

**Regulating Sexually Explicit Content on the Internet
: Towards Reformation of the Thai Regulatory
Approach**

by

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Abstract

This thesis takes as its theme the regulation of Internet pornography in Thailand and the right to freedom of expression.

Humanity has been interested in sexual representations since the ancient times. Our history has shown that newly developed communications and media technologies, such as printing, photography, motion pictures, videos and cable television, have been used to record and disseminate sexual images. The Internet is no exception. The Internet has made pornography more ubiquitous than traditional media. All kinds of pornography, ranging from materials which depict naked bodies and conventional sexual activities to extreme materials which portray sexual violence, bestiality or necrophilia, are available on the Internet. Furthermore, the Internet has made pornography more readily accessible. With Internet-connectable devices (such as computers, mobile phones and tablet PCs) adults, as well as children, can access Internet pornography with ease.

This situation has stirred up a moral panic, and created great concern to governments in many countries. This is also the case for Thailand. The Thai government has taken a restrictive position to control and suppress pornography on the Internet by enforcing the Thai obscenity laws and Internet censorship.

There have been some legal studies on the regulation of Internet pornography in Thailand from the perspectives of criminal law and crime control. However, there has not been any legal study which examines this subject from a liberal standpoint within the conceptual framework of freedom of expression before. This thesis aims to take this approach to assess how far the Thai regulatory framework is compatible with the concept of freedom of expression. Its core argument is that pornography is a form of expression, thus the regulation of pornography should take into account the notion of freedom of expression.

However, this thesis found that the current Thai regulatory framework is hardly in line with the notion of freedom of expression. This thesis, therefore, analytically compares the Thai regulatory approach with the approaches adopted by the Council of Europe and the European Union (which have laid down important policies on Internet content regulation), and the UK (which has an interesting regulatory model for the regulation of Internet pornography), with an intention to propose a 'new' regulatory framework for Thailand which would be more compatible with the concept of freedom of expression.

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List of Abbreviations

ACACP	Association of Sites Advocating Child Protection
AVMSD	Audiovisual Media Services Directive
BBFC	British Board of Film Classification
BDSM	Bondage, Domination, Sadism and Masochism
CDMSI	Steering Committee on Media and Information Society
CFSP	Common Foreign and Security Policy
CJIA	Criminal Justice and Immigration Act
CJIB	Justice and Immigration Bill
CJPO	Criminal Justice and Public Order Act
CoE	Council of Europe
CSG	Culture Surveillance Group
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
Euratom	European Atomic Energy Community
FACT	Freedom Against Censorship Thailand
FNF	Family Network Foundation (Family Media Watch)
FOSI	Family Online Safety Institution
HRA	Human Rights Act
ICAs	Internet Content Analysts
ICAU	Internet Content Assessment Unit
ICCPR	International Covenant on Civil and Political Rights
ICRA	Internet Content Rating Association
IE	Internet Explorer
IFDT	Internet Foundation for the Development of Thailand
ISPA	Internet Service Providers Association
ISPs	Internet Service Providers
ITSO	Information Technology Supervision Office
IWF	Internet Watch Foundation
MSCN	Media Surveillance and Creativity Network
NRCT	National Research Council of Thailand

OPA	Obscene Publication Acts
PICS	Platform for Internet Content Selections
PJCC	Police and Judicial Co-operation in Criminal Matters
P2P	peer-to-peer
PSTDB Bill	Prevention and Suppression of Temptations to Dangerous Behaviours Bill
RDF	Resource Description Framework
REA	The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment
RSAC <i>i</i>	Recreational Software Advisory Council on the Internet
RTA	Restricted to Adults
TCSD	Technology Crime Suppression Division
TISPA	Thai Internet Service Provider Association
TSIC	Thai Safer Internet Centre
TWFD	Television Without Frontier Directive
UDHR	Universal Declaration of Human Rights
WWW	World Wide Web

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Chapter 1: Introduction

1.1 Background of the Study

I disapprove of what you say, but I will defend to the death your right to say it.

*S. G. Tallentyre (Evelyn Beatrice Hall)*¹

Freedom of expression is one of the fundamental liberties which humanity cherishes and endeavours to protect. At international level, this is clearly evident in the freedom of expression guarantee enshrined in several important international human rights documents – notably Art. 19 of the Universal Declaration of Human Rights (UDHR), Art. 19 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 10 of the European Convention on Human Rights (ECHR). At national level, it is invariably protected by the written constitutions and bills of rights in a number of countries² – such as the First Amendment of the United States and Section 45 of the Thai Constitution 2007. In the UK, at present, the right to freedom of expression is protected by the enforcement of the Human Rights Act 1998.

The Internet is '[recognised] as the newest frontier for the exercise of freedom of expression'.³ From the perspective of speakers, the Internet makes it possible for people to express or publish their ideas or opinions with minimal cost.⁴ The only cost that Internet users have to pay is Internet access fees which are inexpensive nowadays.⁵ Websites and weblogs (blogs) can be created with ease,⁶ making it considerably easy for Internet users to disseminate opinions and ideas to the public. Furthermore, thanks to globally connected networks, opinions and ideas can be diffused regardless of geographical borders, allowing speakers to reach an unprecedentedly wide audience not only in the country where the speakers reside, but also around the globe.⁷ From the perspective of the audience, the

¹ Tallentyre, S.G., *The Friends of Voltaire*, (Smith, Elder & Co., London, 1906), p.199

² Barendt, E., *Freedom of Speech* (2nd ed.), (Oxford University Press, Oxford, 2005), p.1; see also Grimm, D., 'Freedom of Speech in a Globalized World' in Hare, I., and Weinstein, J., (eds), *Extreme Speech and Democracy*, (Oxford University Press, Oxford, 2009), pp.11-22, 11-14

³ Godwin, M., *Cyber Rights : Defending Free Speech in the Digital Age*, (The MIT Press, Cambridge Massachusetts, 2003), p.1

⁴ Balkin, J., 'Digital Speech and Democratic Culture : A Theory of Freedom of Expression for the Information Society' (2004) *New York University Law Review*, 79(1), pp.1-55, 6

⁵ In the UK, for example, O2 Broadband offers Internet access at a price of 8.50 GBP per month. In Thailand, for example, TOT ISPs offers high-speed Internet access at a price of 590 Baht (approximately 11.80 GBP) per month, see <http://www.o2.co.uk/broadband>, <http://www.tothispeed.com/th/promotion-customer.php>, visited 4th January 2013.

⁶ Balkin, J., *supra*, p.6

⁷ *Ibid.*, p.7

Internet allows people to access 'all imaginable topics of interest'.⁸ Therefore, it is unsurprising that the Internet is believed to be the communication technology which enables a genuine 'marketplace-of-ideas'.⁹

The Internet has been used as a channel to disseminate pornographic content since the mid 1990s.¹⁰ The proliferation of pornographic materials on the Internet has caused 'moral panic'¹¹ in many countries, notably the US and the UK.¹² Thailand is no exception. The Thai government expressed its great concern over the availability of pornographic materials on the Internet for the first time in Cabinet Resolution 18/10/2548 (2005), emphasising that Internet pornography was a major social problem and the government must take all necessary measures to tackle it. Since then, pornographic materials on the Internet have become the main target of the control and suppression by the Thai authorities.¹³ The implementation of regulatory measures against pornographic websites began on February 1, 2006.¹⁴ The Ministry of Information and Communication Technology (MICT) demanded that all Thai Internet Service Providers (ISPs) 'takedown' and block access to pornographic websites, with a threat of criminal prosecutions under the Thai obscenity law (Section 287

⁸ Kline, R., 'Freedom of Speech on the Electronic Village Green : Applying the First Amendment Lesson of Cable Television to the Internet' (1996) *Cornell Journal of Law and Public Policy*, 23(1), pp.24-60, 27

⁹ Walker, C., Wall, D., and Akedeniz, Y., 'The Internet, Law and Society' in Walker, C., Wall, D., and Akedeniz, Y. (eds), *The Internet, Law and Society*, (Longman, Harlow, 2000) pp.3-24, 3; Newey, A., 'Freedom of Expression : Censorship in Private Hands' in Liberty (ed) *Liberating Cyberspace : Civil Liberties, Human Rights and the Internet*, (Pluto Press, London, 1999), pp.13-43,13; Volokh, E., 'Cheap Speech and What It Will Do' (1995) *Yale Law Journal*, 104(7), pp.1805-1850. For a discussion about market place of idea see Section 3.3.1.

¹⁰ Akedeniz, Y., and Strossen, N., 'Sexually Oriented Expression' in Walker, C., Wall, D., and Akedeniz, Y. (eds), *The Internet, Law and Society*, (Longman, Harlow, 2000), pp.207-230, 207; Lane, F.S., *Obscene Profits : The Entrepreneurs of Pornography in the Cyber Age*, (Routledge, London, 2001), pp.66-70.

¹¹ Stanley Cohen is the first scholar who use the phrase 'moral panic'. See Cohen S., *Folk Devils and Moral Panics: Creation of Mods and Rockers* (30th Anniversary edition), Routledge, London, 2002).

¹² See for example, Elmer-Dewitt, P., 'On the Screen Near You : Cyberporn', *Time Magazine*, 3rd July 1995; Home Affairs Committee, *First Report on Computer Pornography*, (Her Majesty's Stationery Office, London, 1994), p.v; McMurdo, G., 'Cyberporn and Communication Decency' (1997) *Journal of Information Science*, 23(1), pp.81-90; It should be noted that Philip Elmer-Dewitt's article is based mainly on a controversial study of Marty Rimm (Rimm, M., 'Marketing Pornography on the Information Superhighway : A Survey of 917,410 Images, Descriptions, Short Stories and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces and Territories' (1995) *Georgetown Law Journal* 83(5), pp.1839-1934. For a critique of Rimm's findings see Wallace, J., and Mangan, M., *Sex, Law and Cyberspace : Freedom and Censorship on the frontiers of Online Revolution*, (Henry Holt and Company, New York, 1996), pp.125-152); and for a critique of 'moral panic' caused by Internet pornography see Hamilton, A., 'The Net Out of Control - A New Moral Panic : Censorship and Sexuality' in Liberty (ed.), *Liberating Cyberspace : Civil Liberties, Human Rights & the Internet*, (Pluto Press, London, 1999) pp.169-186.

¹³ *Khaosod* (ข่าวสด), 26th October 2005; *Thaipost* (ไทยโพสต์), 31st January 2009, accessed through the online newspaper archive, www.myfirstinfo.com, visited 5th January 2013.

¹⁴ *Thai News Agency*, 30th January 2006, accessed through the online newspaper archive, www.myfirstinfo.com, visited 5th January 2013.

of the Thai Criminal Code) if they failed to comply with the MICT's request.¹⁵ The MICT was criticised for lacking legal power to order the Thai ISPs to block websites, since at that time there was no law permitting the MICT to do so. However, 2,328 URLs were blocked by the MICT's orders; and pornographic websites accounted for the largest group.¹⁶ In 2007, the Computer-Related Crime Act B.E.2550 (2007) was passed by the Thai Parliament, and came into force in the same year to deal specifically with crimes relating to computers. The Computer Crime Act 2007 makes it an offence to disseminate obscene materials via the Internet. More importantly, it empowers the MICT to order the ISPs in Thailand to block pornographic websites. According to the 2011 Report of the Standing Committee on Children, Youth, Women, Elderly and Handicapped of the House of Representatives, as of 2010 (the latest data available to the public), a total of 13,491 websites deemed obscene had been blocked.¹⁷

The regulation of Internet pornography in Thailand raises an interesting research issue. Whilst Thailand has an obligation to guarantee and protect the right to freedom of expression under the commitment to its constitution and to the UDHR and the ICCPR, the current Thai regulatory approach appears to allow very little or no freedom of sexually explicit expression (including pornography). In addition, the power of regulation is almost completely in the hands of the Thai government (especially the MICT), leaving no room for the IT industry and individual Internet users to participate in the Internet pornography regulation.

1.2 Research Questions

Drawing upon the background of the study discussed above, this thesis deals with the issues of 'Internet pornography regulation in Thailand' and 'the right to freedom of expression'. It is important to note that the concept of freedom of expression in this thesis refers mainly to

¹⁵ *Manager Online* (ผู้จัดการออนไลน์), 31st January 2009, <http://www.manager.co.th/Cyberbiz/ViewNews.aspx?NewsID=9490000013317>, visited 5th January 2013.

¹⁶ This figure was taken from the findings of Freedom Against Censorship Thailand (FACT)'s – an NGO which promotes freedom of expression on the Internet in Thailand. See *FACT*, <http://facthai.wordpress.com/2006/12/06/analysis-mict-blocklist-26-may-2006/>, visited 28th December 2012.

¹⁷ The Secretariat of the House of Representatives, *After Action Review of the Standing Committee on Children, Youth, Women, the Elderly and Handicapped of the House of Representatives between 13 May 2009 and 9 May 2011* (สรุปผลการดำเนินงานของคณะกรรมการเด็ก เยาวชน สตรี ผู้สูงอายุและผู้พิการ ตามผู้แทนราษฎร ระหว่างวันที่ 13 พฤษภาคม 2552 ถึง 9 พฤษภาคม 2554), http://web.parliament.go.th/parcy/commission_documents_count.php?doc_id=13980, visited 5th September 2011, p.31.

the 'western concept of freedom of expression',¹⁸ which is universally recognised by the UDHR and a number of countries in the world.

To address these issues, this thesis concentrates on two main research questions. The first research question is to what extent the current Thai regulatory approach to Internet pornography is consistent with the concept of freedom of expression. The second question is how the current Thai regulatory approach can be improved or amended to be more compatible with the concept of freedom of expression. To answer the first question, the current Thai regulation of Internet pornography will be analysed within the conceptual framework of freedom of expression which is developed in Chapter 3. The answer to the second question will be achieved by a comparative study. The regulatory approaches to Internet pornography adopted by the Council of Europe (CoE), the European Union (EU), and the UK government will be examined. However, this thesis is aware that some aspects of the CoE, the EU and the UK's regulatory approaches are different from the conceptual framework developed in Chapter 3. Nonetheless, a selective reference to the CoE, the EU and the UK's policies and practices – especially those compatible with the notion of freedom of expression – can provide an important conceptual basis for Thailand to construct a new regulatory framework.

1.3 Scope of the Study

This thesis examines the regulation of Internet pornography together with the treatment of freedom of expression in Thailand as a main subject, and the regulatory approaches to Internet pornography and the legal framework of the protection of freedom of expression of the CoE, the EU, and the UK as comparative subjects. This is because the CoE and the EU have played an important role in shaping the international legal framework of the protection of freedom of expression, and have developed several important policies on Internet content regulation. The regulatory approach to Internet pornography in the UK is particularly interesting. The UK has a long experience in regulating pornography by law (the Obscene Publication Act 1959/1964). Moreover, it has recently passed the extreme pornography law (Sections 63-67 of the Criminal Justice and Immigration Act 2008) to regulate specific types of pornography. In addition, as far as Internet is concerned, its government encourages

¹⁸ The notion of freedom of expression is believed to be originated in Ancient Greece (6th or 5th Century BC). Therefore, it is the concept of the western world. See Raaflaub, K., Ober, J., and Wallace, R., *Origins of Democracy in Ancient Greece*, (University of California Press, Berkeley, 2007), p.65

'light-handed' regulation, allowing the IT industry and Internet users to play the principal role in regulating Internet pornography.¹⁹

Internet pornography is normally disseminated via the World Wide Web (WWW or websites),²⁰ peer-to-peer file-sharing (P2P)²¹ and USENET Newsgroups.²² Before the mid 1990s, pornographic images were mainly distributed via USENET Newsgroups.²³ However, the advent of WWW in 1994 and the introduction of graphic web-browsers in 1995 caused the significant decline in the popularity of USENET Newsgroups, and the World Wide Web has become the main channel for the distribution and consumption of pornographic materials.²⁴ Since the beginning of the 2000s, P2P, file-sharing, has also become a popular channel for distributing pornographic materials alongside the World Wide Web.²⁵ However, as the regulatory measures and policies of the CoE, the EU and the UK are applicable primarily to pornographic materials available on the World Wide Web, this thesis sets a

¹⁹ For the discussion of the implication of the extreme pornography law on freedom of expression in the UK See Chapter 5.

²⁰ 'The World Wide Web is a large, heterogeneous, distributed collection of documents connected by hypertext links'. It allows Internet users to view 'all the online information available on the Internet ... [by navigating] through an information world partly hand-authored, partly computer-generated from existing databases and information systems'. Mendelzon, A., Mihaila, G., and Milo, T., 'Querying the World Wide Web' (1997) *International Journal on Digital Libraries*, 1(1), pp.54-67, 54; Berners-Lee, T., Cailliau, R., Pellow, N., and Secret A., 'The World-Wide Web Initiative', <http://assets.cs.ncl.ac.uk/seminars/92.pdf>, visited 29th December 2012.

²¹ 'Peer-to-peer (P2P) file-sharing systems combine sophisticated searching techniques with [decentralised] file storage to allow users to download files directly from one another. ... The work of serving files in virtually all current P2P systems is performed for free by the systems' users.' Golle, P., Brown, K., Mironov, I., and Lillibridge, M., 'Incentives for Sharing in Peer-to-Peer Networks' in Fiege, L., Mühl, G., and Wilhelm, U. (eds) *Electronic Commerce : Second International Workshop, WELCOM 2001 Heidelberg Germany, November 16-17, 2001 Proceeding*, (Springer-Verlag, Berlin, 2001), pp.75-87, 75; For an account on the use of peer-to-peer file-sharing to distribute pornography see, for example, Mehta, M.D., Best, D., and Poon, N., 'Peer-to-peer Sharing on the Internet : An Analysis of How Gnutella Networks are used to Distributed Pornographic Materials' (2002) *Canadian Journal of Law and Technology*, 1(1), http://cilt.dal.ca/vol1_no1/articles/01_01_MeBePo_gnutella_fset.html, visited 29th December 2012; Murray, A., *The Regulation of Cyberspace : Control in the Online Environment*, (Routledge-Cavendish, Oxon, 2007), pp.157-163

²² 'USENET is a collection of bulletin boards or "newsgroups" distributed over the various manifestations of the Internet. ... Since USENET was more or less "official", some topics [(e.g. pornography)] were ... prohibited. An alternative network (the altnet) was created [to distribute] pornography ...'. Osborne, L., 'Topic Development in USENET Newsgroups' (1998) *Journal of the American Society for Information Science*, 49(11), pp.1010-1016, 1010; For an account on pornography in USENET see, for example, Mehta, M.D., 'Pornography in Usenet : A Study of 9,800 Randomly Selected Images' (2001) *CyberPsychology & Behavior*, 4(6), pp.695-703.

²³ Lane, F.S., *supra*, pp.66-67.

²⁴ *Ibid.*, pp.34-35

²⁵ See Committee on Government Reform, *Stumble Onto Smut : The Alarming Ease of Access to Pornography on Peer-to-Peer Networks*, Hearing before the Committee on Government Reform House of Representatives, March 13, 2003, (US Government Printing Office, Washington, 2003), <http://www.gpo.gov/fdsys/pkg/CHRG-108hhr87066/pdf/CHRG-108hhr87066.pdf>, visited 29th December 2012, p.2.

limit to examine only pornographic websites (commercial pornographic websites in particular).²⁶

Furthermore, it is important to note that this thesis deals only with visual adult pornography, which refers to still and motion images that portray adults (persons aged eighteen and over) engaging in sexual activities. Child pornography – i.e. images which depict minors being sexually abused and exploited – is outside the scope of this thesis.²⁷

1.4 Objectives and Original Contributions

The first objective of this thesis is to propose a new regulatory framework for Internet pornography for Thailand, which is arguably more in line with the concept of freedom of expression than the current one.

The second objective is to shed new light on the body of existing literature on the regulation of Internet pornography in Thailand. There have been very few studies on this subject thus far. The existing studies examine the regulation of Internet pornography from the perspectives of criminal law and crime control.²⁸ This thesis aims to be the first legal study which examines this subject from a liberal standpoint within the conceptual framework of the right to freedom of expression. Furthermore, it is intended to be a comparative study which examines not only the Thai regulatory approach, but also the regulatory approaches adopted by the CoE, the EU and the UK government. A comparative study on this subject has never been conducted before. Last but not least, this thesis is the first study on the regulation of Internet pornography in Thailand after the Computer-Related Crime Act B.E.2550 (2007) came into force.

²⁶ Commercial pornographic websites refer to pornographic websites which require Internet users to purchase subscriptions. They include a free pornographic websites which earn incomes through advertising on their websites.

²⁷ For interesting accounts on child pornography see, for example, Taylor, M. and Quayle, E., *Child Pornography : An Internet Crime* (Taylor & Francis, London, 2007); Akdeniz, Y., *Internet Child Pornography and the Law : National and International Responses* (Ashgate, Aldershot, 2008); Gillespie, A., *Child Pornography : Law and Policy* (Routledge, London, 2011).

²⁸ According to the database of National Research Council of Thailand, there have been only three legal studies on the regulation of Internet pornography in Thailand thus far., <http://library.nrct.go.th/opac/Index.aspx>, visited 29th December 2012. The three studies are : (1) Nitithamvisarut, T., *Computer Crime: A Case Study of the Commission of Sex Crimes through the Internet for which Thai People are Injured*, Thesis Submitted for a Master of Law Degree, Chulalongkorn University (2001); (2) Pretiprasong, I., *Liability of the Sexuality Media [sic] Entreprisers on the Internet*, Thesis Submitted for a Master of Law Degree, Thammasat University (2003); (3) Suksri, S., *The Duties and Criminal Liability of Internet-Providers: A Special Study on Pornography and Libel on the Internet*, Thesis Submitted for a Master of Law Degree, Thammasat University (2004). It is worth nothing that all existing studies were conducted at Master degree level. Thus, it could be argued that the depth of their examination and analyses may be limited.

1.5 Research Methodology

Documentary research is the principal research method employed in this thesis. It involves the examination and analysis of primary sources relating to the legal framework of the protection of freedom of expression and the regulation of Internet pornography in Thailand, the UK, the CoE and the EU. The primary sources include international human rights documents, legislation, a draft Bill, judgements of national and international courts, consultation papers, policy papers, statistics, news, and so on. In most cases, these documents are publicly available either at libraries or on the Internet. Legal database systems such as Westlaw and Lexis have also been used. However, certain documents are obtained from the UK's Ministry of Justice under the Freedom of Information Act scheme. Furthermore, this thesis also explores and analyses academic works and literature (books and journal articles) relating to freedom of expression and other areas pertinent to the regulation of pornography.

In Chapter 6, the chapter which deals with the regulation of Internet pornography in Thailand, the library-based research is supported by an empirical study. Semi-structured interviews with key organisations from the public and the private sectors involved in the regulation of Internet pornography in Thailand were conducted. The interviews were necessary because some important and relevant information was neither documented nor publicly available. The detail and procedure of how the interviews were conducted will be discussed in Chapter 6.

1.6 Outline of the Thesis

This thesis is composed of seven chapters. Chapter 1 is the introductory chapter of the whole thesis. It explains why the regulation of Internet pornography in Thailand is worth researching. Also, it addresses the research questions, the scope and objectives of the study and the research methodology. Chapter 2 deals with the definition of the term 'pornography' which will be referred to throughout this thesis. It also gives a brief historical account on the relationship between pornography and mass media. Chapter 3 establishes a conceptual framework which will be used to analyse the regulatory approaches to Internet pornography adopted by the CoE and the EU (Chapter 4), in the UK (Chapter 5) and in Thailand (Chapter 6) respectively. In doing so, Chapter 3 examines, first, the general concept of expression and the three main theories that underpin the right to freedom of expression, to see whether pornography can be regarded as a form of expression. Second, it explores and analyses the rationales typically used to justify the regulation (restriction or suppression) of pornography,

and points out which rationales are in line with the concept of freedom of expression. Third, it discusses the modes of regulation of Internet content. Chapter 4 deals with the regulatory approaches to Internet pornography adopted by the CoE and the EU. It examines the jurisprudence of the European Court of Human Rights (ECtHR) and that of the European Court of Justice (ECJ) on the right to freedom of expression in relation to the restriction of sexually explicit expression. It then explores the CoE and the EU's policies on the regulation of Internet pornography. Chapter 5 focuses on the regulatory approach to Internet pornography in the UK. It examines the UK's legal framework of the right to freedom of expression and pornography-related laws (the focus is on English laws). Also, it explores the model of the regulation of Internet pornography in the UK. Chapter 6 examines the current Thai regulatory approach to Internet pornography to know how far it is consistent with the conceptual framework of freedom of expression developed in Chapter 3. The examination concentrates on the legal framework of the right to freedom of expression under the current Constitution (the Constitution of Thailand B.E.2550 (2007)), the Thai pornography-related laws and the regulatory modes that are presently used to control Internet pornography in Thailand. Chapter 7, which is the last chapter, aims to propose a new regulatory framework of Internet pornography for Thailand. In doing so, the good features and caveats of the regulatory measures and policies of the CoE, the EU and the UK will be analysed with the findings from Chapter 6. The proposed regulatory framework in this chapter is expected to bring the regulation of Internet pornography in Thailand to be more compatible with the notion of freedom of expression. Chapter 7 ends with the conclusion of this thesis.

Chapter 2: Overview of Pornography

Introduction

The main aims of this chapter are to find a definition of 'pornography' which can be used for the discussion in this thesis, and also to give a brief historical account of the relationship between pornography and the development of mass media.

2.1 Definition of Pornography

It should be noted that there seems to be no unitary definition of 'pornography'. In fact, the term 'pornography' has been defined in so many different ways in accordance with the ideologies or perceptions on pornographic materials of particular individuals who (or groups which) propose such definitions. Furthermore, the definitions of pornography appear to be culturally specific, meaning that what is classified as 'pornography' depends significantly on the perspective of a particular culture at a particular time.¹ A sexually explicit material may be deemed 'pornographic' in one culture, but may not be considered 'pornographic' in others.

This chapter does not attempt to re-define 'pornography'. However, it tries to select the existing concepts which could reflect the fundamental attributes that most pornographic materials have in common. And such fundamental attributions of pornographic materials will be, in turn, used as a definition of 'pornography' which will be referred to thereafter throughout this thesis.

The word 'pornography' appeared for the first time in the *Oxford English Dictionary* in the mid-19th Century.² According to *The New Oxford Dictionary of English*, the origin of 'pornography' is from the Greek word 'pornographos', which literally translated as 'writing about prostitutes'.³ However, in the contemporary context, it is defined as:

'Printed or visual material containing the explicit depiction or display of sexual organs or activity, intended to stimulate erotic rather than aesthetic or emotional feelings.'⁴

¹ Thauvette, C., 'Defining Early Modern Pornography : The Case of Venus and Adonis' (2012) *Journal for Early Modern Cultural Studies*, 12(1), pp.26-48, 32.

² Hunt, L., *The Invention of Pornography: Obscenity and the Origins of Modernity, 1500-1800*, (Zone Books, New York, 1993), p.13.

³ Pearsall, J. (ed.), *The New Oxford Dictionary of English*, (Oxford University Press, Oxford, 1988), p.1444.

⁴ Ibid.

According to the Royal Institute of Thailand Dictionary B.E.2542 (1999), the term 'pornographic' is translated as *โป๊* (*Po*) in Thai, which literally means 'to be sexually explicit'.⁵ In the context of contemporary Thai society, sexual explicitness refers mainly to the depictions in which (1) women's nipples and/or (2) male or female genitals are clearly seen.⁶

In the UK, the *Report of the Committee on Obscenity and Film Censorship* (the 'Williams Report') proposes that:

'Pornographic representation is one that combines two features: it has a certain function or intention, to arouse its audience sexually, and also has certain content, explicit representations of sexual material (organs, postures, activity, etc.).'⁷

In the US, the *Attorney General's Commission on Pornography Report* (the 'Meese Report') also defines 'pornography' in a similar fashion by emphasising that pornographic material refers to:

'... the material [which] is predominantly sexually explicit and intended primarily for the purpose of sexual arousal.'⁸

According to Dandy Scoccia – an academic in philosophy, pornography can be divided roughly into 4 categories:

- a) 'Pornography which is not sexist or degrading to women; material which those feminists who regard "pornography" as a pejorative term prefer to call "non-sexist erotic".'
- b) Pornography which does not contain an explicit degradation or domination theme, but which is nevertheless sexist (e.g., portraying women as silly, stupid, and eagerly servile to men).
- c) Non-violent pornography which does contain an explicit degradation or domination theme (e.g. a photo of a naked woman being urinated on, or on her hands and knees while wearing a dog collar and leash).
- d) Violent pornography, containing depictions of women being raped, tortured, tied up, and so forth; in some of this material the victim is depicted as both enjoying and consenting to the sexual abuse that she (or occasionally he) suffers, and in some as unwilling and [terrorised].⁹

⁵ The Royal Institute of Thailand, *The Royal Institute of Thailand Dictionary B.E.2542*, <http://rirs3.royin.go.th/new-search/word-search-all-x.asp>, visited 24th January 2013.

⁶ See Section 6.2.1.

⁷ Committee on Obscenity and Film Censorship, *Report of the Committee on Obscenity and Film Censorship*, (Her Majesty's Stationery Office, London, 1980), p.103.

⁸ Attorney General's Commission on Pornography, *Final Report July 1986: Attorney General's Commission on Pornography*, (US Government Printing Office, Washington D.C., 1986), p.229.

⁹ Scoccia, D., 'Can Liberals Support a Ban on Violent Pornography?' (1996) *Ethics*, 106(4), pp.776-799, 778.

Given the definitions mentioned above, for the purpose of this thesis, ‘pornography’ refers to material which has, at least, two basic characteristics: (1) sexual explicitness (women’s breasts and male/female genitals can be clearly seen) and (2) an intention to arouse viewers/readers sexually. The so-called ‘erotic’ material is included within the broader term of ‘pornography’.

The sexually explicit portrayals that are typically published or shown in *Playboy*,¹⁰ *Penthouse*,¹¹ *Hustler*¹² and *Private*¹³ magazines, videos or websites¹⁴ can serve as illustrative examples of ‘pornography’ within the meaning of this thesis.

2.2 Pornography and Mass Media

Humanity has been interested in sexual representations since the ancient times. One of the oldest pieces of evidence is *Venus of Willendorf*, a limestone figure of a naked woman with large breasts, a prominent pubic area and buttocks, which is presumed to be sculpted in 24,000-22,000 BC.¹⁵ For the Greeks and Romans, sexually explicit imagery was commonly found in everyday items such as cups, wine coolers, vases, vessel-handles, bowls and murals.¹⁶ In Thailand, sexually explicit activities were painted on the walls of many Thai temples; some of which were painted as early as the beginning of the 17th Century.¹⁷ In this regard, it could be said that both western and Thai cultures have been familiar with sexually explicit portrayals for centuries.

As history shows, pornography has long been deeply interconnected with the technological development of the media.¹⁸ In the mid-15th century, when printing technology was introduced, pornographic materials – e.g. books, pamphlets, posters and cartoons – became more accessible to people.¹⁹ *Postures* (1524) by Pietro Aretino is an example of

¹⁰ *Playboy*, <http://www.playboy.com>.

¹¹ *Penthouse*, <http://www.penthousemagazine.com>.

¹² *Hustler*, <http://www.hustler.com>.

¹³ *Private*, <http://www.privatemediagroup.com>.

¹⁴ Rea, M.C., ‘What is Pornography?’ (2001) *Noûs*, 35(1), pp.118-145, 119.

¹⁵ Lane, F.S., *Obscene Profits: The Entrepreneurs of Pornography in the Cyber Age*, (Routledge, London, 2001), p.1.

¹⁶ See generally Jones, C. *Sex or Symbol: Erotic Images of Greece and Rome* (University of Texas Press, Austin, 1982); Richlin, A. (ed.), *Pornography and Representation in Greece & Rome*, (Oxford University Press, Oxford, 1992)

¹⁷ Kongpien, N., *Erotic: Sexual Images in the Traditional Paintings and the Sound of Thai Literature* (เชิงสังวราศ: การรูปในภาพเขียนตามประเพณีที่มีเสียงวรรณคดีไทย), (Matichon Publishing, Bangkok, 2008); Gordon, A., ‘Women in Thai Society as Depicted in Mural Paintings’ in Howard, M.C., Wattanapun, W., and Gordon, A. (eds), *Traditional Thai Arts in Contemporary Perspective* (White Lotus Press, Bangkok, 1998), pp.175-192.

¹⁸ Chatterjee, B.B., ‘Last of the Rainmacs: Thinking about Pornography in Cyberspace’ in Wall, D. (ed.), *Crime and the Internet*, (Routledge, London, 2001), pp.74-99, 75.

¹⁹ Yar, M., *Cybercrime and Society*. (SAGE, London, 2006), p.105.

pornographic literature which shows 'a series of engravings of sexual positions'.²⁰ The invention of photographic processes in 1832 made it possible to produce sexually explicit pictures in fine detail, and pornographic pictures became materials for mass media production.²¹ When moving pictures were invented, pornographers quickly utilised this technology to produce their commodities, leading to prosperous underground markets for 'blue movies'.²² Colour pornographic magazines were available on bookshelves in the 1950s, followed by the advent of pornographic videos in the 1980s.²³ The videos allowed people to view pornographic films 'in comfort at their home for the first time'.²⁴ In the 1990s, pornographic films were broadcasted on certain cable television systems, notable *the Playboy Channel, the Spice Channel* and *Adam & Eve*.²⁵

In the middle of the 1990s, people began to use the Internet as an alternative channel to distribute and view pornographic images. By 1996, among the most popular USENET Newsgroups, five were pornographic and one of these (alt.sex.net) had some 500,000 viewers a day.²⁶ Due to the ability to converge different mediums of the World Wide Web, which makes it possible to distribute textual, visual and audio pornographic materials at the same time on a single webpage, pornographers moved to this new Internet platform in 1995.²⁷ Up until the present day, the World Wide Web is still a main channel for the distribution of pornography.²⁸ Although the exact number of pornographic websites remains unknown, according to Amanda Spink, Helen Partridge and Bernard Jansen – Information Technology scholars – pornographic websites accounted for 3.8 per cent of all website searches in 2005.²⁹ Peer-to-peer networks are also used to distribute pornographic materials. Relying on information from the Internet Filter Review, Majid Yar – an IT law scholar –

²⁰ Johnson, P., 'Pornography Drives Technology: Why not to Censor the Internet' (1996) *Federal Communications Law Journal*, 48(1), pp.217-226, 219.

²¹ Attwood, F. (ed) *PORN.COM*, (Peter Lang, New York, 2010), p. 55; Kutchinsky, B., 'Pornography, Sex Crime and Public Policy' in Gerull, S. and Halstead, B. (eds), *Sex Industry and Public Policy*, (Australian Institute of Criminology, Canberra, 1992), http://www.aic.gov.au/media_library/publications/proceedings/14/kutchinsky.pdf, visited 11th January 2012, pp.41-54, 41.

²² Ibid, p.42.

²³ Slayden, D., 'Debbie Does Dallas Again and Again: Pornography, Technology, and the Market Innovation' in Attwood, F. (ed.) *PORN.COM* (Peter Lang, New York, 2010), pp.54-68, 55.

²⁴ Murray, A.D., *Information Technology Law: The Law and Society*, (Oxford University Press, Oxford, 2010) p.354.

²⁵ Lane, F.S., *supra*, p.34.

²⁶ Yar, M., *supra*, p.105.

²⁷ Murray, A.D., *supra*, p.354.

²⁸ Lane, F.S., *supra*, pp.34-35.

²⁹ Jansen, B., Partridge, H., and Spink, A., 'Sexual and Pornographic Web Searching: Trend Analysis' (2006) *First Monday*, 11(9), pp.1-7; see also Paasonen, S., 'Online Pornography : Ubiquitous and Effaced' in Burnett, R., Consalvo, M., and Ess, C. (eds) *The Handbook of Internet Studies* (Blackwell Publishing, London, 2010), pp.424-439, 425. It should be noted that the percentage of pornographic websites mentioned here is a peer-reviewed source of information available at the moment.

notes that, as of 2006, 'some 1.5 million downloads of pornographic material are performed every month using peer-to-peer ...'³⁰

Conclusion

As history shows, sexually explicit representation and pornography – i.e. the sexually explicit materials which are produced to sexually stimulate viewers – have an interrelation with new media technologies. In the 21st Century, people can access pornographic materials with ease, requiring only a PC or another mobile Internet device and an Internet connection.

Internet pornography has brought a novel challenge to governments in many countries, which attempt to restrict or suppress it. Before going on to examine the regulatory approaches to Internet pornography adopted by the CoE and the EU, and in the UK and Thailand, the next chapter will analyse pornography within the conceptual framework of freedom of expression to see whether pornography is an instance of expression which deserves some, little, or no protection.

³⁰ Yar, M., *supra*, p.107; see also *Topten Review*, <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html>, visited 11th January 2012.

Chapter 3: Pornography and Freedom of Expression

Introduction

This chapter analyses pornography from a theoretical perspective with the intention of answering the question of whether pornography can be considered as a form of expression. As the communicative ability is an essential element for an act to be classified as expression,¹ this chapter begins by providing an analysis to determine whether pornography is capable of communicating any opinions/ideas. It then moves on to analyse the three major theories underpinning the right to freedom of expression, namely the argument from truth, the argument from democracy and the argument from self-realisation (individual autonomy and self-fulfilment) in an attempt to understand the extent to which they are applicable to pornography. After that, the chapter examines rationales that are typically used for supporting the regulation of pornography. The aim is to identify what rationales can be considered as strong justifications for controlling pornography within the conceptual framework of freedom of expression. Subsequently, it proposes concepts of legal and illegal types of pornography. The chapter ends with an examination of the modes of Internet pornography regulation. The findings of this chapter will be used later on in this thesis as a conceptual framework for examining the regulatory frameworks of Internet pornography that are currently adopted by the Council of Europe, the European Union, the UK government and the Thai government.

3.1 Overview of the Concept of Expression/Speech

3.1.1 The Meaning of Expression/Speech

The meaning of the term 'expression' can be implied from the texts of the three major international human-rights instruments that guarantee freedom of expression.

Article 19 of the Universal Declaration of Human Rights (UDHR) states:

'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.

Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR) provides:

¹ Schauer, F., *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, Cambridge, 1982), pp.91-95. See also Easton, S., *The Problem of Pornography: Regulation and the Right to Free Speech*, (Routledge, London, 1994), p.86.

‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice’.

Article 10 (1) of the European Convention on Human Rights (ECHR) reads:

‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...’

According to the three provisions detailed above, ‘expression’ can be defined as an act of holding, seeking, receiving and imparting opinions, information or messages by any means and through any media. In other words, it is about the communication of ideas, opinions or messages, irrespective of the medium used.

As clearly stated in Art. 19 (2) of the ICCPR, expression comes in various forms such as spoken words, writing, printing or works of art. According to the European Court of Human Rights (ECtHR), materials that convey opinions or ideas, such as paintings,² caricature images,³ cartoons,⁴ poems⁵ and symbols (such as the red star on a jacket),⁶ are considered within the meaning of Art. 10 of the ECHR as forms of expression.

The First Amendment to the United States Constitution provides:

‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances’.

The First Amendment does not give a clear definition of ‘speech’. This leaves the United States Supreme Court (the US Supreme Court) to consider what constitutes ‘speech’.⁷ The decision of *Texas v. Johnson*, for instance, makes it clear that the burning of a national flag is a form of speech in the sense that it is an act of denouncing public policies (symbolic speech).⁸ In *Tinker v. Des Moines Independent Community School District*, the US Supreme Court held that the act of wearing black armbands to school was symbolic speech conveying a message protesting against Vietnam War.⁹ In *US v. O’Brien*, although the US Supreme Court remarked that not all types of conduct could be considered as ‘speech’ within the meaning of the First Amendment, it was prepared in this case ‘to assume,

² *Müller and Others v. Switzerland* (1988) No. 10737/84, A 133.

³ *Vereinigung Bildender Künstler v. Austria* (2007) No. 68354/01, hudoc.

⁴ *Kuliś and Różycki v. Poland* (2009) No. 27209/03, hudoc.

⁵ *Karataş v. Turkey* (1999) No. 23168/94, 1999-IV.

⁶ *Vajnai v. Hungary* (2008) No. 33629/06, hudoc.

⁷ Cram, I., *A Virtue Less Cloistered*, (Hart Publication, Oxford, 2002), p.44.

⁸ (1989) 497 U.S. 397, 406.

⁹ (1969) 393 US 503, 514.

without deciding, that the communicative element involved in draft-card burning was sufficient to render the conduct “symbolic speech”.¹⁰ Considering these rulings, it can be said that, in most cases, ‘speech’ within the meaning of the First Amendment refers to a conduct that can communicate ideas/opinions.¹¹

To sum up, it could be said that expression/speech, in essence, means an act or a material with the capacity to communicate or convey opinions/ideas or information/messages. However, the term ‘expression’ appears to have a wider scope than ‘speech’. ‘Expression’ intrinsically covers almost all types of communicative act or material that can impart ideas/opinions, whereas what constitutes ‘speech’ depends significantly on the US Supreme Court consideration. For this reason, the ECtHR does not have to consider the question of whether the communicative act or material at issue is ‘expression’, whilst the US Supreme Court has to deal with the question of whether the communicative act in question constitutes ‘speech’ on a case-by-case basis.¹² However, some academics treat the terms ‘expression’ and ‘speech’ as if they are synonyms. Eric Barendt, in his book *Freedom of Speech*, is an example.¹³ This thesis follows the approach of Barendt, making use of the terms ‘expression’ and ‘speech’ interchangeably.

3.1.2 Expression and Elements of Communication

Harold Lasswell – a leading communication theorist – proposes a well-known model of communication.¹⁴ According to his model, an act of communication comprises of the following elements: speakers (‘who?’), information/messages (‘says what?’), medium (‘in which channel?’), audience (‘to whom?’) and the effect of the communication (‘with what effect?’).¹⁵

At one end of the spectrum are the speakers who play the role of information providers. Freedom of expression allows them to communicate their opinions/ideas or messages about a particular issue ‘through words and actions’¹⁶ to a wide audience.¹⁷ Through such means,

¹⁰ (1968) 391 US 367, 376; Barendt, E., *Freedom of Speech* (2nd ed.), (Oxford University Press, Oxford, 2005), p.81.

¹¹ Easton, S., *supra*, p.86.

¹² Cram, I. (2002), *supra*, p.44.

¹³ Barendt, E., *supra*, p.5.

¹⁴ Fiske, J., *Introduction to Communication Studies*, (2nd ed), (Routledge, London, 1990), p.30.

¹⁵ Lasswell, H.D., ‘The Structure and Function of Communication in Society’ in Bryson, L., (ed), *The Communication of Ideas: A Series of Addresses*, (Cooper Square Publishers, Inc., New York, 1964), pp. 37-51, 37.

¹⁶ Feldman, D., *Civil Liberties and Human Rights in England and Wales* (2nd ed.), (Oxford University Press, Oxford, 2002), p.762.

they can increase their reputations, promote a particular way of life, encourage changes in government and society or simply amuse or shock people.¹⁸ At the other end is the audience. Unrestricted expression makes all ideas or complete information regarding a particular matter available to the audience.¹⁹ People can ponder upon such ideas or information to make their own judgements about matters concerning lives, politics and society.

3.2 Pornography and Expression

As stated above, in order for an act or a material to be classified as expression/speech, it must possess the capability to communicate certain ideas/opinions or information/messages.²⁰ Given this, it is important to ask whether pornography communicates any ideas or messages. If it does not, it would not be an aspect of expression and thus falls outside the scope of protection under the principle of freedom of expression; on the other hand, however, if it has a communicative capability, it should be treated as a form of expression, and is therefore entitled to a certain degree of protection. Interestingly, there are two contrasting answers to this fundamental question, provided from two different viewpoints. Certain academics argue that pornography is not a form of expression, as it does not convey any ideas. This line of argument will be examined first. However, in line with the scholars who agree that pornography has a communicative capability, this section contends that pornography does communicate opinions/ideas or messages relevant to sex, sexuality and gender relations. Furthermore, the application of Lasswell's model of communication to the domain of pornography makes the argument that pornography is a communicative activity even more persuasive. For these reasons, it can be said that pornography is a form of expression.

3.2.1 Pornography as a Non-Communicative Activity

The idea that pornography – particularly the type that shows explicit depictions of sexual activities and nothing else – communicates certain ideas/messages is unconvincing in the eyes of Frederick Schauer – a leading free speech theorist. In his view, pornography offers nothing to viewers but sexual stimulation. In other words, it delivers a purely physical experience.²¹ He contends that pornographic material is purposefully designed for sexual

¹⁷ Scanlon, T., 'Freedom of Expression and Categories of Expression', (1979) *University of Pittsburgh Law Review*, 40(4), pp.519-550, 521.

¹⁸ Ibid.

¹⁹ Ibid., p.524.

²⁰ See Section 3.1.1.

²¹ Schauer, F. (1982), *supra*, pp.181-182.

stimulation to assist masturbation,²² hence performing the function of sexual device (such as 'sex toys') or even sex itself.²³ Explicit images and language appearing on a pornographic object are solely used as a means of sexually exciting its audience,²⁴ and thus it may be seen to contain no cognitive or intellectual properties.²⁵ Accordingly, pornography should be treated as a form of sexual activity (or in his words 'visual sex'),²⁶ rather than a communicative activity.²⁷ In order to illustrate his idea further, he draws an analogy between watching sexual acts on a pornographic film and viewing a live sex performance of two prostitutes, stating that the two are virtually identical in terms of their sexually stimulating effects on the viewer.²⁸ He also remarks that there is only a negligible difference between the two: whilst pornography shows sex on film, live-performance presents it in the flesh.²⁹ Therefore, he concludes that because '[p]ornography involves neither a communicator nor an object of the communication'³⁰ and also has no other effect besides one of sexual stimulation,³¹ its regulation is by no means relevant to the principle of free speech.³²

Eric Barendt – a free speech scholar – and Catherine MacKinnon – a feminist academic, also share to some degree the view of Schauer. According to Barendt, although certain pornographic materials can be seen as speech (owing to the fact that they convey the idea that – at best – sex is fun),³³ this does not necessarily mean that all categories of pornography, particularly that of pictorial hardcore pornography – i.e. the type of pornography that depicts detailed sexual intercourse and nothing else – should be deemed as speech. Hardcore pornography is non-cognitive and hardly communicates any ideas; it is produced only to sexually stimulate viewers and to serve as a masturbation aid.³⁴ Likewise, MacKinnon argues that pornography is nothing other than 'masturbation material' or even 'sex' itself.³⁵

²² Schauer, F., 'Speech and "Speech"-Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language' (1979) *The Georgetown Law Journal*, 67(4), pp.899-933, 923. See also MacKinnon, C.A., *Only Words*, (Harvard University Press, Cambridge Massachusetts, 1993), p. 17.

²³ Schauer, F. (1982), *supra*, p.181-182.

²⁴ *Ibid.*, p.181.

²⁵ Schauer, F. (1982), *supra*, p.183.

²⁶ By 'visual sex', Schauer means the activity of experiencing sex through the eyes, as opposed to tactile sex. *Ibid.*, p.183.

²⁷ *Ibid.*, p.181. See also Weinstein, J., 'Democracy, Sex and the First Amendment' (2007) *New York University Review of Law and Social Change*, 31(4), pp.865-898, 868-873.

²⁸ *Ibid.*, pp.181-182.

²⁹ *Ibid.*, p.182.

³⁰ Schauer, F. (1979), *supra*, p.923.

³¹ *Ibid.*, p.182.

³² *Ibid.*, p.183-184.

³³ Barendt, E., *supra*, p.358.

³⁴ *Ibid.*, pp.356, 361.

³⁵ MacKinnon, C.A., *supra*, p.17.

However, there are two main arguments standing in stark contrast with the above views. First, the analogy between pornography and a live sex performance appears to overlook the importance of media. As noted by James Weinstein – a constitutional law expert, in the case of pornography, pornographers use media of mass communication such as magazines, films and the Internet to disseminate sexual content to a wide audience.³⁶ In this regard, pornography is different from a live sex show, which has nothing to do with mass media and may have only one person as a viewer (the person who hires the two prostitutes).

Second, Schauer, Barendt and MacKinnon appear to view sexual arousal and masturbation resulting from viewing pornography as automatic physical reactions (like a knee-jerk reaction). However, as Andrew Koppelman – a law and political science scholar – contends, '[human] sexuality ... is always mediated by thought'.³⁷ In his opinion, pornography helps a viewer to create a sexual fantasy that, in turn, sexually stimulates the viewer.³⁸ Masturbation is a response to sexual arousal.³⁹ Moreover, the findings of a psychological experiment conducted by D. P. J. Przybyla and Donn Byrne suggest that sexual arousal is caused by internal sexual feelings created through the viewers' interpretation of what they see or hear, and this process requires cognitive abilities.⁴⁰ During the course of the experiment, 166 male and 154 female undergraduate students were asked to view a pornographic film depicting a man and a woman having sex and, on a different occasion, to listen to erotic narration of the same pornographic film. During the visual presentation, the subjects were instructed to pair numbers given to them through the headphones. During the auditory presentation, the subjects were asked to do the same task, but this time the numbers were shown on the screen. The tasks were designed to distract the subjects from sexually stimulating presentations. In the case of auditory sexual material, both males and females reported that their sexual arousal decreased as distraction increased. However, in the case of the visual pornographic film, there were gender-related differences: the distraction decreased sexual arousal in female subjects, but did not significantly decrease sexual arousal in male subjects. However, these differences could be explained by the fact that the males had more affective responses to erotic stimuli than females.⁴¹ Nonetheless, the findings from the experiment support that:

³⁶ Weinstein, J., *supra*, p.873.

³⁷ Koppelman, A., 'Is Pornography "Speech"?' (2008) *Legal Theory*, 14(1), pp.71-89, 77.

³⁸ *Ibid.*

³⁹ Posner, R.A., *Sex and Reason*, (Harvard University Press, Cambridge Massachusetts, 1994), p.354.

⁴⁰ Przybyla, D. P. J. and Bryne, D., 'The Mediating Role of Cognitive Processes in Self-Reported Sexual Arousal', (1984) *Journal of Research in Personality*, 18 (1), pp.54-63.

⁴¹ *Ibid.*, p.61.

'there is not an automatic sexual response to verbal or pictorial depictions of erotic scenes. Rather, such material activates cognitions involving erotic images; it is this internal fantasy that leads to arousal.'⁴²

In other words, if sexual arousal is a purely physical reaction, distraction from sexual presentations (an interruption in the cognitive process) should not have an effect in decreasing sexual arousal.

Given what discussed above, it could be said that the cognitive process plays a crucial mediating role between sexual content in pornography and sexual arousal. In this way, viewing pornography is different from the use of a sexual device or 'sex' itself (including masturbation and orgasm): the former involves a cognitive process to create sexual arousal, but the latter are arguably purely physical activities. This could be a counter-argument to the view posited by Schauer, Barendt and MacKinnon.

3.2.2 Pornography as Communication

In contrast to Schauer, Barendt and MacKinnon's view, some academics and judges have an opposing viewpoint, believing that pornography has a communicative capability. Richard Posner – an American judge and legal theorist – argues that 'erotic representation'⁴³ such as pornography does not only play the role of sexual stimulus, but also performs *inter alia* an informational function.⁴⁴ Posner's view is shared by Judge John Sopinka in *R v. Butler*, the Supreme Court of Canada's landmark obscenity case.⁴⁵ In his opinion, the fact that sexual activity is intentionally recorded on a film and particular images are deliberately selected and arranged in subsequent order to create a film emphasises that the film-maker (pornographer) intends to convey some meaning.⁴⁶

As far as the informational function is concerned, it can be said that there are two types of message communicated by pornography to the viewer. The first one is information on sex in its factual and straightforward sense, and the second is attitudinal ideas towards sex and gender relations derived from an interpretation of sex depicted in a pornographic material.

⁴² Ibid., p.54.

⁴³ Richard Posner prefers to use the term 'erotic representation' as it has a broad meaning covering both 'pornography' and 'obscenity'. In his view, 'erotic representation' denotes a representation concerning sexual activity, whilst pornography is regarded as the explicit and rather offensive subset of the former. By 'obscenity', he means the subset of pornography that is illegal and suppressed by laws. See Posner, R.A., *supra*, pp.351-352.

⁴⁴ Ibid., p.352-354.

⁴⁵ (1992) 1 S.C.R. 452.

⁴⁶ Ibid., para.74.

3.2.2.1 Information about Sex

The most prominent element of pornography is the portrayal of sex. Naked bodies, genitals, varied sexual positions and sexual intercourse are depicted in a frank and non-discursive fashion.⁴⁷ According to Judge Sopinka, the depiction of people engaged in sexual activity⁴⁸ is the message that the pornographer intends to communicate to viewers.⁴⁹ Likewise, Linda Williams – an expert in film studies – suggests that pornography is ‘speaking sex’, i.e. sex with an ability to narrate its own story.⁵⁰ In this regard, pornographic material conveys messages to its viewer in a very similar way that storytelling does to its listener. However, instead of telling the story through a storyteller’s narration, a pornographic film communicates its story via means of projecting sex on a screen.⁵¹ Pornography transforms sexual ideas and makes them visible on screen. Therefore, it could be stated that sexual images are *per se* the messages that pornography intends to communicate to its viewers.⁵² In other words, sex is, in essence, the subject of communication of pornography.

In order to provide a clearer picture of how information concerning sex is communicated to viewers, it is helpful to consider the paintings on ancient Greek pottery and Roman murals. A number of explicit sexual practices were elaborately painted on the surface of the antique vases and walls (erotic murals of Pompeii).⁵³ Over the following millennia, such sexual depictions carry with them information about sexual acts in ancient Greek and Roman times, allowing the modern world to see sex and sexual practices through the lens of ancient Greek and Roman sexual cultures.⁵⁴ In this light, people living in today’s world would find nothing new about homosexuality and orgy because the illustrations on Greek vases and Roman erotic murals reveal that these were apparently sexual practices millenniums ago.⁵⁵ In this sense, it can be said that pornographic materials of the present time could be seen as a modern counterpart of Greek pottery or Roman murals, performing the same informational

⁴⁷ Posner, R.A., *supra*, p.353.

⁴⁸ In the opinion of Judge Sopinka, sexual activity *per se* can be regarded as a form of expression. This opinion is in line with the decision of the US Supreme Court in *Barnes v. Glen Theatre, Inc.*, (1991) 501 U.S. 560, which ruled that erotic dancing was a form of expression within the meaning of the First Amendment, as it conveyed a message of eroticism and sexuality.

⁴⁹ (1992) 1 S.C.R. 452, para.74.

⁵⁰ Williams, L., *Hard Core: Power, Pleasure, and the “Frenzy of the Visible”*, (University of California Press, Berkeley, 1999), pp.1-2.

⁵¹ *Ibid.*, p.2.

⁵² *Ibid.*

⁵³ See generally Kilmer, M. F., *Greek Erotica: On Attic Red-Figure Vases*, (Duckworth, London, 1993); Sutton R. F., ‘Pornography and Persuasion on Attic Pottery’, in Richlin, A., (ed.), *Pornography and Representation in Greece & Rome*, Oxford University press, Oxford, 1992), pp.3-52; Jones, C. *Sex or Symbol: Erotic Images of Greece and Rome* (University of Texas Press, Austin, 1982).

⁵⁴ *Ibid.*, p.1.

⁵⁵ *Ibid.*, pp. 11-15, 55-58 and 103-132. See also for homosexuality in ancient Greece, Shapiro, H. A., ‘Eros in Love: Pederasty and Pornography in Greece’, in Richlin, A., *supra*, pp.53-72.

function to communicate messages in relation to sex and sexuality. Furthermore, it would be reasonable to anticipate that today's pornographic materials will go on to provide people of the future, in thousands of years to come, with information concerning sexual ideas and behaviour of people living in the 21st Century.

3.2.2.2 Attitudinal Ideas towards Sex and Gender Relations

By taking a closer look at what pornography depicts, aside from naked bodies and bodily sexual performances, certain attitudinal ideas towards sex and gender relations are implicitly communicated to viewers. This type of message of pornography may differ from viewer to viewer, depending on how he/she interprets the depictions of sex in pornography.

Pornography can present the idea that sex is 'fun and exciting'.⁵⁶ Typically, this type of pornography shows the viewer that pornographic performers are enjoying different types of sexual activity. Occasionally, it may communicate the idea that sexual pleasure and excitement may derive from unusual or, in an extreme case, degrading and violent sexual practices.⁵⁷

Pornography also conveys attitudinal ideas towards sexual morality or gender relations. For example, the depictions of promiscuity, fornication, adultery, orgy or homosexuality in pornography may be interpreted as morally wrong behaviours.⁵⁸ On the contrary, these sexual depictions may be seen as symbols of sexual liberation by liberals who may take the position that sex should not be confined within the frame of sexual mores. In this regard, Thomas Scanlon – an American philosopher – considers the messages indirectly conveyed by pornography in this manner as 'informal political message', aiming to challenge the dominating sexual mores or fundamental cultural values of sex.⁵⁹

⁵⁶ Gourgey, N., 'Pornography and Freedom of Expression', (1997) *Entertainment Law Review*, 8(3), pp.89-93, 90; see also Barendt, E., *supra*, p.358.

⁵⁷ Certain pornographic films (perhaps mistakenly) suggest that women receive sexual pleasure from degradation and sexual violation. See Kappeler, S., 'Pornography: The Representation of Power', in Itzin, C. (ed.), *Pornography: Women, Violence and Civil Liberties*, (Oxford University Press, Oxford, 2001), pp.88-100, 98-99.

⁵⁸ See, for example, Henkin, L., 'Morals and the Constitution: The Sin of Obscenity', (1963) *Columbia Law Review*, 63(3), pp.391-414, 94-395; West, C., 'Pornography and Censorship', *Stanford Encyclopedia of Philosophy*, (2004), <http://plato.stanford.edu/entries/pornography-censorship/>, visited 13 June 2009. See also for discussion Koppelman, A., 'Does Obscenity Cause Moral Harm?', (2005) *Columbia Law Review*, 105(5), pp.1635-1679, 1639-1647; Caton, D. E., *Overcoming the Addict to Pornography*, (Accord Books, Lake Mary Florida, 1990), p.47; See also *R. v. Hicklin* (1868) LR 3 QB 360; *Paris Adult Theatre I v. Slaton* (1973) 413 US 49, 63.

⁵⁹ Scanlon, T. (1979), *supra*, p.545; Weinstein, J., *supra*, pp.880-896; Brigman, W. E., 'Pornography as Political Expression', (1983) *Journal of Popular Culture*, 17(2), pp.129-134.

Regarding gender relations, some types of pornography may communicate an idea of the sexual mistreatment of women,⁶⁰ or the ideology of male supremacy and dominance through depictions of the degradation, subordination and/or objectification of women.⁶¹ Such attitudinal ideas can be regarded as political messages relating to gender inequality, which (anti-pornography) feminists disapprove and seek to challenge. The view that pornography communicates an attitudinal idea towards gender relations is confirmed in the decision of *American Booksellers Association v. Hudnut*.⁶² In this case, Judge Frank Easterbrook of the US Court of Appeals for the Seventh Circuit was of the opinion that the definition of 'pornography', as given by the Anti-pornography Civil Rights Ordinance,⁶³ clearly regarded pornography as a form of speech that conveyed the idea of women's subordination by presenting them enjoying pain, humiliation or rape, or presenting them in positions of servility or submission. However, as the Ordinance targeted a type of speech on the grounds of its content, it was ruled by the US Court of Appeal to be unconstitutional. This ruling was later affirmed by the US Supreme Court.⁶⁴

3.2.3 Pornography and Elements of Communication

As noted previously in Section 3.1.2, Lasswell's model of communication comprises answers to the following five questions: (1) who? (2) say what? (3) in which channel? (4) to whom? and (5) with what effect?

As far as pornography is concerned, it can be said that a pornographer – i.e. a producer of pornographic films or a publisher of pornographic magazines – in the context of this model is 'who?'. With this taken into account, 'say what?' can be referred to as the ideas/messages the pornographer intends to communicate, namely information about sex and sexuality, and attitudinal ideas towards sex and gender relations. 'In which channel?' may be understood as the medium adopted by the pornographer to express his/her ideas – namely, books, magazines, films, videos or the Internet. 'To whom?' may be the audience of pornography – e.g., readers or viewers. Lastly, 'with what effect?' in this context can be understood as the audience having learned ideas about sex, sexuality and gender relations, and established that they are aroused sexually.

⁶⁰ Although Catherine MacKinnon attempts to point out that pornography does not communicate any ideas because it is in fact sexual mistreatment of women, it can be implied from her statement that the issue of sexual abuse is the message conveyed by pornography. See MacKinnon, C. A, *supra*, pp.15, 35-36; Russell, D., *Against Pornography: The Evidence of Harm*, (Russell Publications, Berkeley, 1993), pp.113-114.

⁶¹ See generally Dworkin, A., *Pornography: Men Possessing Women*, (The Women's Press, London, 1981).

⁶² (1985) 771 F.2d 323 (7th Cir.) (1986) 475 U.S. 1001.

⁶³ For information about the Ordinance see Section 3.5.4.2.

⁶⁴ (1986) 475 U.S. 1001.

As the way in which pornography conveys messages to its viewers can be fit into Lasswell's model of communication, it could be argued that pornography is a communicative activity and thus an instance of expression.

3.3 Pornography and the Three Major Theories of Freedom of Expression

The previous section argues that pornography can communicate information about sex and attitudinal ideas with regard to sex and gender relations. For this reason, it concludes that pornography is an instance of expression. To explore this matter further, each of the three central theories underpinning the justification for the protection of freedom of expression is examined in turn. Following this, pornography is analysed within an individual conceptual framework based on each theory. It is generally agreed amongst theorists that freedom of expression is entitled to protection as it is the foundation for three fundamental values: (1) the discovery of truth (2) the maintaining of democracy and (3) the assurance of individual self-realisation (individual autonomy and self-fulfilment).⁶⁵

3.3.1 Pornography and the Argument from Truth

'And though all the winds of doctrine were let loose to play upon the earth, So Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?'⁶⁶

In the search for the justifications of the protection of freedom of expression, the argument from truth is one of the most frequently invoked theories. The idea that expression is crucial for attaining truth⁶⁷ was initially brought to light by John Milton in his classic work *Areopagitica* in 1644.⁶⁸ Milton proposes that the press should be free from licensing – a type of governmental restrictive measure; since this would allow society to attain truth and reject falsehood.⁶⁹ However, it was John Stuart Mill who refined the notion, shaping it into a

⁶⁵ See, for example, Emerson, T., *The System of Freedom of Expression*, (Vintage Books, New York, 1970), pp.6-7, cited in Redish, M. H., 'The Value of Free Speech', (1982) *University of Pennsylvania Law Review*, 130(3), pp.591-645, 591; Barendt, E., *supra*, pp.6-23; Feldman, D., *supra*, pp.762-767; Schauer, F. (1982), *supra*, pp.15-46 and 67-72; Cram, I. (2002), *supra*, pp.6-17; Justice Louis D. Brandeis's concurrence in *Whitney v. California*, (1972) 274 US 357, 375.

⁶⁶ Milton, J., *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England*, (1644), <http://www.gutenberg.org/files/608/608-h/608-h.htm>, visited 24 June 2009.

⁶⁷ See for a discussion about the value of truth, Haworth, A., *Free Speech*, (Routledge, London, 1998), pp.83-117.

⁶⁸ See Schauer, F. (1982), *supra*, p.15.

⁶⁹ *Ibid.*

concept that has had a profound influence on contemporary literature on freedom of expression.⁷⁰

Lying at the heart of Mill's argument is that truth can be discovered through free expression in open discussion.⁷¹ However, it should be noted that the types of expression to which Mill refers appear to be the expressions concerning political, moral and social-related matters.⁷² He maintains that all opinions – regardless of whether they are true or false – should be heard and discussed freely, as it is possible that a suppressed opinion may eventually turn out to be true.⁷³ The state has no complete assurance that the opinion in question it seeks to censor is actually false.⁷⁴ Furthermore, much like individuals, the state is 'fallible and prone[s] to error'.⁷⁵ Its decision to suppress an opinion may result from 'inaccurate information'.⁷⁶ Thus, the silencing of discussion, which can be interpreted as an unwarranted 'assumption of infallibility'⁷⁷ on the part of the state, is undesirable.⁷⁸

In addition, he argues that even an opinion that is generally accepted to be true needs to be questioned or tested by other views.⁷⁹ If the opposing ideas are suppressed, those who hold true beliefs are not forced to defend or find rationales for supporting their viewpoints.⁸⁰ As a result, what they believe would become unchallenged and, subsequently, a dead dogma 'with little comprehension or feeling of its rational grounds'.⁸¹

In short, it can be said that all opinions should be expressed and discussed freely. If the restricted opinion is wrong, people will lose a crucial 'opportunity of exchanging error for truth'.⁸² On the other hand, if that expression is found to be true, they are prevented from 'the clearer perception and livelier impression of truth, produced by its collision with error'.⁸³

⁷⁰ Haworth, *supra*, p.3.

⁷¹ Barendt, E., *supra*, p.7.

⁷² *Ibid.*, p.10.

⁷³ Mill, J. S., *On Liberty*, Bromwich, D. and Kateb, G. (eds.), (Yale University Press, New Haven, 2003), pp.73-175, p.118.

⁷⁴ Cram, I. (2002), *supra*, p.7.

⁷⁵ Schauer, F. (1982), *supra*, p.34.

⁷⁶ Cram, I. (2002), *supra*, p.7.

⁷⁷ Mill, J.S., *supra*, p.88.

⁷⁸ Barendt, E., *supra*, p.8.

⁷⁹ *Ibid.*

⁸⁰ Cram, I. (2002), *supra*, p.8.

⁸¹ Mill, J.S., *supra*, p.118; Barendt, E., *supra*, p.8; Cram, I., *supra*, p.8.

⁸² Mill, J.S., *supra*, p.87.

⁸³ *Ibid.*

However, Mill's argument from truth is not free from criticisms. It can be argued that Mill assigns too much importance to the search for truth.⁸⁴ Although it is undeniable that truth is of importance, it does not mean that truth 'must prevail in any case of conflict with other values'.⁸⁵ In certain circumstances, some interests are more important to be safeguarded at the expense of freedom of expression. For instance, the protection of public health, which allows the state to prohibit advertising of dangerous drugs, may outweigh the value of searching for truth (as some users may claim that it is healthy to use the drugs in question).⁸⁶

Another well-known version of the argument from truth is 'the marketplace of ideas', as advanced by Justice Oliver W. Holmes in his dissenting opinion on *Abrams v. United States*.⁸⁷ He points out that:

[men] may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁸⁸

By analogy with the concept of the free competitive economic market, Justice Holmes believes that opinions should be allowed to compete freely with other different views in the marketplace of ideas, where all views and opinions can be expressed without suppression or intervention.⁸⁹ Within the context of a free market, all opinions may be brought to the process of evaluation and refinement, eventually leading to the emergence of truth.⁹⁰ In this environment, the opinions surviving are likely to be more reliable than 'the appraisal of any one individual or government'.⁹¹ With this taken into account, Martin Redish states that the 'marketplace of ideas' argument regards free expression 'as a catalyst to the discovery of truth'.⁹² On this basis, the truth will pave the way to a more desirable knowledge-based society.⁹³ At a glance, the Millian account and the 'marketplace of ideas' argument appear to be similar owing to the fact that both emphasise the importance of free discussion of ideas and beliefs. Nonetheless, they are different in some aspects: whilst Mill's argument, notably based on utilitarianism, regards the competition of ideas as a tool leading to the objective of truth; the concept presented by Justice Holmes (the 'marketplace of ideas') places

⁸⁴ Schauer, F. (1982), *supra*, p.33.

⁸⁵ *Ibid.*, p.16.

⁸⁶ Barendt, E., *supra*, p.8

⁸⁷ (1919) 250 U.S. 616.

⁸⁸ *Ibid.*, p.630.

⁸⁹ Schauer, F. (1982), *supra*, p.16.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Redish, M.H., *supra*, p.593.

⁹³ Schauer, F. (1982), *supra*, p.17.

importance on customer choices in the selection of truth from competing ideas available in a free market.⁹⁴

However, a major argument can be posed in relation to the concept of the marketplace of ideas. In the real world, the marketplace is not open to every speaker on an equal basis.⁹⁵ Those who can access mass media have a better opportunity to disseminate their opinions more widely; whereas, in contrast, those who are unable to voice through mass communication channels cannot make the public at large hear their viewpoints. As a consequence, only certain views are heard, whilst others hardly appear in the marketplace of ideas.⁹⁶ More importantly, if false ideas are expressed by powerful and influential agencies, falsehood may prevail.⁹⁷ When the marketplace of ideas is distorted in this way, it would no longer be a trustworthy forum for public discussion.⁹⁸

As far as pornography is concerned, the argument from truth seems difficult to apply to pornographic expression, particularly when it is in the form of a picture or a photograph. The Report of the Committee on Obscenity and Film Censorship (the Williams Report) suggests that sexually explicit literature may contain some good ideas that contribute in their own way to the search for truth.⁹⁹ However, it cannot see how pornographic photographs or pictures can serve the same goal.¹⁰⁰ In the Committee's opinion, this may be because sexually explicit images may not necessarily contain any intellectual content, such as that inherent in writings or works of art; therefore, sexually explicit images are unable to provide any valuable contribution to the discussion leading to the discovery of truth.¹⁰¹ Likewise, Ronald Dworkin, an American philosopher, comments that:

'The conventional explanation of why freedom of speech is important is Mill's theory that truth is most likely to emerge from a "marketplace" of ideas freely exchanged and debated. But most pornography makes no contribution at all to political or intellectual debate: it is preposterous to think that we are more likely to reach the truth about anything at all because pornographic videos are available.'¹⁰²

Although it is difficult to place pornography within the framework of a truth-based argument, it does not mean that such a notion is completely impossible. The key concept of the argument from truth is that free discussion will eventually bring a society to truth. As

⁹⁴ Cram, I. (2002), *supra*, p.10.

⁹⁵ Barendt, E., *supra*, p.12.

⁹⁶ *Ibid.*

⁹⁷ Report of the Committee on Obscenity and Film Censorship, (Her Majesty's Stationery Office, London, 1980), para. 5.19, p.55.

⁹⁸ Barendt, E., *supra*, p.12.

⁹⁹ Report of the Committee on Obscenity and Film Censorship, *supra*, para. 5.17, p.54.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, para. 5.24, p.56.

¹⁰² Dworkin, R., 'Women and Pornography', (1993) *New York Review of Books*, 40(17), pp.36-42, 36.

suggested previously, pornography communicates various attitudinal ideas, all of which provide the basis for discussion about sex, sexuality or gender relations. Although some ideas expressed by pornography are deemed objectionable, disapproved or are otherwise believed to be false, they should be permitted to compete with other existing ideas. It could be argued that the ideas/opinions imparted from pornography would lead to discussion which may ultimately bring society to the truest conclusion concerning sex, sexuality or gender relations.¹⁰³ For example, certain types of pornography convey ideas centres on endorsing the ideology of male supremacy and condoning the objectification or subordination of women. Although many people believe that these ideas are incorrect, the state should not interfere or prohibit them; rather, the state should permit them to compete with opposing ideas such as the ideas that women are equal to men, that women should be treated with respect, or even that women are superior to men. The competition between these opposing ideas would eventually lead to the truth about the proper relations between men and women in society. This idea is in line with that which Thomas Emerson suggests. As he argues, as opposed to seeking to proscribe a false idea, the more effective approach of dealing with this would be to encourage more counter-arguments to correct the false idea.¹⁰⁴ 'More speech' will in turn lead to more discussions; and with more discussions, greater knowledge and more understanding will be achieved, leading society to the truth about sex and gender relations.¹⁰⁵

However, there are three main criticisms against the argument from truth as it is applied to pornographic expression. First, as pointed out above, some important public interests may prevail over the value of truth. In the context of pornography, for example, the safety of pornographic performers may outweigh the value of the search for truth and justify the prohibition of pornographic materials that involve the use of real violence. Second, as stated above, unequal access to mass media may distort the mechanism of the marketplace of ideas. For example, pornographic materials that advocate male supremacy may dominate the market, leaving little or no room for pornographers who support sexual equality to express their view through their pornographic products. As a result, the two different ideas (i.e. male supremacy and sexual equality) cannot compete on a fair basis. Lastly, although it is believed that free discussion will lead society to truth, it is questionable when the 'truth' will be found. In the context of pornography, even though ideas communicated by pornography are permitted to compete against other existing ideas with an expectation that the truth about

¹⁰³ Waldron, J., 'Mill and the Value of Moral Distress', (1987) *Political Studies*, 35(3), pp.410-423, 417.

¹⁰⁴ Emerson, T., 'Pornography and the First Amendment: A Reply to Professor MacKinnon', (1984) *Yale Law & Policy Review*, 3(1), pp.130-143, 133.

¹⁰⁵ *Ibid.*, p.142.

sex, sexuality and gender relations will be revealed eventually, we do not know and cannot be sure when such truth will be discovered.

3.3.2 Pornography and the Argument from Democracy

Freedom of expression can be regarded as an indispensable mechanism for a well-functioning democracy. The significance of freedom of expression can be explained by looking at the role it plays in a democratic political system. Therefore, as a prerequisite to understanding its theoretical concept, one must presume that democracy is an ideal system for governing a state.¹⁰⁶

Democracy refers to a form of government of which the ultimate ruling power belongs to the people at large, not to any particular individuals or groups,¹⁰⁷ and of which the operation of the government, in relation to legal and policy-related issues, primarily depends on public decisions made either directly or indirectly by those with equal political rights.¹⁰⁸ In short, democracy centres on self-government, which may be described as a government that has the sovereign people as its supreme ruler.¹⁰⁹

The link between self-government and free speech was initially introduced by Alexander Meiklejohn during his interpretation of the First Amendment of the United States Constitution.¹¹⁰ He asserts that freedom of expression plays several crucial roles in the process of democracy. One is that it makes all essential information relating to political choices accessible to the electorate.¹¹¹ As democracy is a matter of public discussion, it is important for voters to acknowledge pertinent issues and the interests of other members of the community.¹¹² Without access to full information, it would be difficult to expect intelligent voting.¹¹³ Secondly, free speech is utilised by a population as a channel to communicate its demands to its government, which, according to Meiklejohn, is seen as a body whose main duty is to respond to people's wishes.¹¹⁴ Lastly, by allowing freedom of expression, full citizens can openly criticise state officials when their work produces unsatisfactory results.¹¹⁵ As a mechanism of checks and balances to show the flaws of the

¹⁰⁶ Schauer, F. (1982), *supra*, p.35.

¹⁰⁷ Lively, J., *Democracy*, (Basil Blackwell, Oxford, 1975), p.8.

¹⁰⁸ Weale, A., *Democracy* (2nd ed.), (Palgrave Macmillan, New York, 2007), p.18.

¹⁰⁹ Schauer, F. (1982), *supra*, pp.36-37.

¹¹⁰ *Ibid.*, p.37-38 See also Cram, I. (2002), *supra*, p.11 and Redish, M. H., *supra*, pp.592,596-597.

¹¹¹ Schauer, F. (1982), *supra*, p.36-37.

¹¹² Saward, M., 'Democratic Innovation', in Saward, M. (ed.), *Democratic Innovation: Deliberation, Representation and Association*, (Routledge, London, 2000), p.3-13, 5.

¹¹³ Schauer, F. (1982), *supra*, p.38.

¹¹⁴ *Ibid.*, pp.38-39.

¹¹⁵ *Ibid.*, p.39.

majority's chosen policies,¹¹⁶ and to prevent public officials from abusing their power,¹¹⁷ freedom of expression is necessary for all democratic countries.

Taking Meiklejohn's views, the value of freedom of expression seems to be intrinsically attached to the political process of democratic governance.¹¹⁸ Similarly, Robert Bork concludes that only 'explicitly and predominantly political speech' can invoke protection,¹¹⁹ expelling other types of expression irrelevant to politics from the scope of immunity against governmental suppression.

At first glance, it seems difficult to establish a connection between pornography and the argument from democracy. However, the key piece of this jigsaw puzzle can be found in Scanlon's claim of 'informal politics'.¹²⁰ In comparison to Meiklejohn's thesis, Scanlon contends that political speech is not limited only to political matters in the strict sense – i.e. the issues relating to politics and politicians – but, in a broader sense, may also be seen to include any social matters that have the capacity to bring about changes to society through public discourse, by which 'opposing groups attempt to alter or to preserve the social consensus through persuasion and example'.¹²¹ Applying Scanlon's argument to pornography, it follows that pornography imparts ideas/opinions that can be used as 'a potentially important means of changing people's sexual mores',¹²² which may lead to 'changes in ... attitudes towards sex and in ... sexual mores' in society,¹²³ through persuasion and examples (the depictions of sexual activities).¹²⁴ Thus, in this sense, pornography can be seen as a form of informal political speech contributing to public discourse, by which people who have different viewpoints about sex can express their alternative ideas with an intention to challenge or alter the dominating sexual mores. Given this conception, therefore, the state's attempt to suppress pornography on the basis that it

¹¹⁶ Ibid., pp.43,45.

¹¹⁷ Blasi, V., 'The Checking Value in First Amendment Theory', (1977) *American Bar Foundation Research Journal*, 1977(3), pp.521-649, p.527. See also Redish, M. H., supra, pp.611-616.

¹¹⁸ Ibid., p.602. However, Meiklejohn accepts later that the First Amendment also covers non-political speech such as novels, dramas, paintings and poems. This is because these forms of speech allow people to be self-educated. And at some point, people are required to cast their votes. If voters are not educated for self-government, how can the self-governing system be successful? See Meiklejohn, A., 'The First Amendment is an Absolute', (1961) *Supreme Court Review*, 1961(1), pp.245-266, 263.

¹¹⁹ Bork, R. H., 'Neutral Principles and Some First Amendment Problems', (1971) *Indiana Law Journal*, 47 (1), pp.1-35, 26.

¹²⁰ Scanlon, T. (1979), supra, p.545.

¹²¹ Ibid.

¹²² Weinstein, J., supra, p.878.

¹²³ Scanlon, T. (1979), supra, p.543.

¹²⁴ For example, lesbian pornography can be regarded as an attempt to legitimise lesbian sexuality in a male dominant society. See for discussion, Butler, H., 'What Do You Call a Lesbian with Long Fingers? The Development of Lesbian and Dyke Pornography', in Willams, L. (ed.), *Porn Studies*, (Duke University Press, Durham North Carolina, 2004), pp.167-192.

may persuade people to change their opinions about sex and sexuality, or that it challenges the sexual conventions, means – in principle – that the state is depriving the right of pornographers – as speakers – to propose their ‘different sexual vision[s]’¹²⁵ in an attempt to persuade the public to adopt different viewpoints of sex and sexuality. At the same time, it denies the public – as the audience – the right to access ideas and information that may encourage them to reconsider or change their attitudes towards sex and sexuality, and to challenge the conventional sexual practices and values that dominate their society.¹²⁶ In short, the state prevents people from taking part in public discourse and a democratic process in relation to a social issue pertinent to the changing of sexual norms.¹²⁷ Thus, the prohibition of pornographic expression is clearly inconsistent with the principle of democratic participation.¹²⁸

More importantly, as Scanlon argues, although the working of democracy is propelled by the majority opinion, it does not necessarily mean that the majority is justified to silence those who have different viewpoints.¹²⁹ Otherwise stated, the majority does not have legitimacy to use its opinions as a pretext for suppressing or restricting the views of the minority. In this regard, Scanlon’s posit is consistent with the European Court of Human Rights (ECtHR) in *Young, James and Webster v. UK*, which held that:

‘democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ... avoids any abuse of a dominant position’¹³⁰

Given the above concept, sexual mores that dominate society can be considered as the majority’s attitude towards sex; whereas sexual ideas depicted in pornographic material can be seen as the opinions of those who think differently from the majority’s view (the minority). For this reason, it could be argued that the state’s prohibition of pornography on the basis that pornography challenges the prevailing sexual norms can be interpreted as the majority (the state) using its views to suppress the views of the minority (pornographers). This is contrary to the concept of democracy that underpins the right to freedom of expression, which maintains that the majority cannot silence the minority.

¹²⁵ Weinstein, J., supra, p.888.

¹²⁶ Ibid., p.893.

¹²⁷ Ibid., pp.880,893. However, Ronald Dworkin seems to reject the link between pornography and political process. He asserts that ‘[n]o one...is denied an equal voice in the political process, however broadly conceived, when he is forbidden to circulate photographs of genitals to the public at large, or denied his right to listen to argument when he is forbidden to consider these photographs at his leisure.’ See Dworkin, R., ‘Is There A Right to Pornography?’, (1981) *Oxford Journal of Legal Studies*, 1 (2), pp.177-212, at p.177.

¹²⁸ Weinstein, J., supra, p.886; Scanlon, T. (1979), supra, pp.545-546.

¹²⁹ Ibid., p.545.

¹³⁰ (1981) No. 7601/76, 7806/77, A44, para.63.

Nonetheless, it is worth noting that the main argument against the application of the notion of democracy to pornographic expression is that pornography is produced mainly for profits.¹³¹ There may be very few pornographers who have a political mind.¹³² Thus, it is not surprising that, in most cases, judicial bodies such as the ECtHR do not recognise sexually explicit expression (including pornography) as political expression.¹³³ However, insofar as it is difficult for the state to ascertain which pornographers have political intention and which pornographers do not, the suppression of pornographic expression is still inconsistent with the principle of democracy since it would unavoidably silence pornographers who really have political intention.

3.3.3 Pornography and the Argument from Self-Realisation (Individual Autonomy and Self-Fulfillment)

Martin Redish interestingly points out that actually the protection of freedom of expression serves only one true and ultimate value, which is 'individual self-realisation'. Individual self-realisation comprises two significant values, namely individual autonomy and self-fulfilment.¹³⁴

3.3.3.1 Individual Autonomy

Individual autonomy can be defined as the ability of an individual to choose his own destiny through making decisions about his life without being controlled or dictated by external factors.¹³⁵

This notion is not new as it has been explored by Scanlon in one of his notable works *A Theory of Freedom of Expression*.¹³⁶ By drawing upon the Millian Principle, he proposes that an autonomous individual should consider 'himself as sovereign in deciding what to believe and in weighing competing reasons for action.'¹³⁷ In other words, he should solely rely on 'his own canons of rationality'¹³⁸ to reach his own non-influenced judgements for what he should follow. Therefore, freedom of expression is of particular importance as it

¹³¹ See for a general discussion about pornography business and its profits, Nathan, D., *Pornography: A Groundwork Guide*, (House of Anansi Press, Toronto, 2007), Chapter 7, pp.64-74.

¹³² Scanlon, T. (1979), *supra*, p.546; Weinstein, J., *supra*, p.889.

¹³³ See Section 4.2.1.

¹³⁴ Redish, M. H., *supra*, p.593.

¹³⁵ External factors can be a life threat such as at gunpoint, or a psychological influence such as hypnosis. See Crocker, L., *Positive Liberty: An Essay in Normative Political Philosophy*, (Nijhoff, the Hague, 1980), p.114 See also Redish, M. H., *supra*, p.593.

¹³⁶ Schauer, F. (1982), *supra*, p.68.

¹³⁷ Scanlon, T., 'A Theory of Freedom of Expression', in Dworkin, R. (ed.), *The Philosophy of Law*, (Oxford University Press, London, 1977) pp.153-171, 162-163.

¹³⁸ *Ibid.*, p.163.

allows a person to access various ideas and beliefs that may be used to make personal decisions. He goes on to maintain that a state should not restrict information and opinions available for its citizens even if some of the information and opinions are likely to be false, undesirable, harmful *per se*, or which may even lead to harmful conduct.¹³⁹ If expression is inhibited particularly on these grounds, personal autonomy is unavoidably affected. This means that citizens surrender their autonomy because they allow the state to judge for them that the suppressed ideas are false or not worth hearing.¹⁴⁰ Although it can be argued that individuals can still exercise their autonomy by using the remaining information to make decisions, this cannot be regarded as complete autonomy since decision-making is based on incomplete information.¹⁴¹ However, according to his concept of 'justified paternalism', he suggests that the state be permitted to restrict expression only when individuals are under certain circumstances that prevent them from acting rationally (or have diminished rationality).¹⁴² As an example, he points out that it is justified for the state to prohibit a man's expression of falsely shouting 'Fire!' in a crowded theatre, as such expression would make people in the theatre, who 'are under the conditions that diminish their capacity for rational deliberation', perform harmful actions such as stampeding for the exit.¹⁴³

In essence, the argument from personal autonomy emphasises the role of an individual as the centre of decision-making. By applying this notion to the case of pornography, it follows that the prohibition of pornography removes pornographers' opportunities to add further ideas about sex and sexuality to existing ones. As a result, a viewer, as an autonomous person, is compelled to make a decision from a limited range of information, rendering him/her unable to make a choice that truly reflects his/her own sexual preference.

Under the notion of individual autonomy, a person should be free to access the ideas expressed by pornography. Open access to those ideas provides the viewer with information/ideas about sex and sexuality upon which he/she can base when making a decision on his/her sexuality and sexual life. The government should avoid suppressing pornography, despite the fact that it may be harmful or may cause the viewer to conduct a detrimental act (to him/herself). The suppression can be construed as 'a denial of [personal] autonomy by which the government interfere[s] with a person's control over [his/her] own reasoning processes'.¹⁴⁴ Additionally, in accordance with David Strauss's premise, by

¹³⁹ Ibid., p.164.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid., p.166.

¹⁴³ Ibid.

¹⁴⁴ Strauss, D. A., 'Persuasion, Autonomy, and Freedom of Expression', (1991) *Columbia Law Review*, 91 (2), pp.334-371, 354. See for discussion, Koppelman, A., 'Free Speech and Pornography:

preventing people from learning ideas conveyed by pornography, the government not only lies to its people about the existence of varied ideas concerning sex and sexuality, but also manipulates them to accept only the sexual views of which the government approves.¹⁴⁵ This preventive measure violates not only personal autonomy¹⁴⁶ but also bars people from thinking independently¹⁴⁷ about their own sexuality.

Ronald Dworkin also proposes the notion of 'moral independence'¹⁴⁸ to justify the right to consume pornography. It is important to note that his idea draws upon a more general conception of liberty, rather than the notion of the right to freedom of expression.¹⁴⁹ However, to a certain extent, it can be used to foster the argument from individual autonomy. He begins his thesis by claiming that:

'[people] have the right not to suffer ... disadvantage in the liberties permitted to them ... just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ... wrong'¹⁵⁰

Dworkin's thesis suggests that it would be wrong to limit a person's freedom to live his life simply because his chosen way of life is condemned by the state or others as 'ignoble or wrong'.¹⁵¹

From the perspective of individual autonomy, the concept of moral independence advocates that an individual should have the liberty to make decisions about his own life without interference from other people or the government, and to judge what is right or wrong for him/her.

The application of this concept in the case of pornography follows that a person has a right to view pornography and to gather information about the sexuality therein, which can be used when he/she makes his/her choices about sexuality and his/her sexual life, irrespective of how the state or his/her fellow people perceive those choices. In this sense, preventing a person from pornography on the grounds that what he/she chooses to view is distasteful or disapproved of in the eyes of other people or the state, is not only a violation of his/her

A Response to James Weinstein', (2007) *New York University Review of Law and Social Changes*, 31(4), pp.899-910, 905-907.

¹⁴⁵ Strauss, D. A., supra, p.354.

¹⁴⁶ Ibid., p.355.

¹⁴⁷ Koppelman, A.(2007), supra, pp.907.

¹⁴⁸ Dworkin, R. (1981), supra, p.194.

¹⁴⁹ This is because Dworkin does not believe that the right to freedom of expression can efficiently support the right to disseminate and view pornography. See Ibid, p.177.

¹⁵⁰ Ibid., p.194.

¹⁵¹ Ibid.

moral independence, but also an interference in his/her individual autonomy concerning the decision-making about his/her personal sexual life and preference.

3.3.3.2 Self-fulfilment

Self-fulfilment can be seen as the development of one's personality in relation to mental and intellectual abilities to reach full potential.¹⁵² This includes the capability to make the most out of him/herself.¹⁵³

Self-fulfilment and individual autonomy are interrelated. As examined above, the notion of individual autonomy encourages people to access a full-range of ideas (irrespective of whether they are deemed good or bad), and to ponder such ideas so as to make independent decisions about their personal lives or viewpoints on political and social issues. The process of learning, critical thinking and eventually making an independent decision fosters personal and intellectual growth.¹⁵⁴ Furthermore, according to Scanlon, an autonomous person is expected 'to defend his beliefs and decisions in accordance with [his] canons'.¹⁵⁵ As a rational agent,¹⁵⁶ he is thus required to construct ideas and opinions to support his decisions. By this means, his intellectual capacities can grow.¹⁵⁷ In other words, individual autonomy is a means to achieve self-fulfilment.

In *Whitney v. California*,¹⁵⁸ Justice Louis D. Brandeis underscored the importance of self-fulfilment as a fundamental value of human beings by stating that '[t]hose who won our independence believed that the final end of the state was to make men free to develop their faculties'.¹⁵⁹ Emerson states that men are intellectual creatures that can think, reason and 'form [their] own beliefs and opinions'.¹⁶⁰ The right of people to express what they believe and think is therefore an essential part of their lives, allowing them to create new ideas, explore their mental attributes, and affirm the realisation of themselves.¹⁶¹

¹⁵² Redish, M. H., supra, p.593; Bailey, S., and Taylor, N., *Civil Liberties: Cases, Materials and Commentary*, (6th ed), (Oxford University Press, Oxford, 2009), p.613.

¹⁵³ Cram, I., *Contested Words : Legal Restrictions on Freedom of Speech in Liberal Democracies*, (Ashgate, Aldershot, 2006), pp.140-141

¹⁵⁴ Stone, G., 'Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions', (1978) *University of Chicago Law Review*, 46(1), pp.81-115, 104.

¹⁵⁵ Scanlon, T. (1977), supra, p.163.

¹⁵⁶ *Ibid.*, p.162.

¹⁵⁷ Cram, I. (2002), supra, p.15.

¹⁵⁸ (1927) 274 US 357.

¹⁵⁹ *Ibid.*, p.374.

¹⁶⁰ Emerson, T., 'Toward A General Theory of the First Amendment', (1963) *Yale Law Journal*, 72(5), pp.877-956, p.879.

¹⁶¹ *Ibid.* See also Cram, I. (2002), supra, p.15.

In light of the above opinions, it could be said that if the right to freedom of expression is constrained, people cannot gain full access to ideas (other people's thoughts). They are denied opportunities to learn from others; as a consequence, the development of their intellectual and personal capabilities would be obstructed.¹⁶² This notion is also endorsed by Judith Lichtenberg when she makes the following statement:

'A person cannot think freely if he cannot speak; and he cannot think freely if others cannot speak, for it is in hearing the thoughts of others and being able to communicate that we develop our thoughts'.¹⁶³

As far as sexuality is concerned, as Abraham Maslow – an expert in humanistic psychology, suggests, sexual desire is one of the basic physiological needs of all human beings.¹⁶⁴ Information and ideas about sexual matters are an integral part of people's mental and intellectual development, particularly in terms of their sexuality. With a comprehensive range of ideas, some of which are conveyed by pornography, people would be able to develop their attitudes towards sex and accordingly enhance their sexuality. This, in turn, facilitates the flourishing of their sexual personalities. As a result, they would become not only physically but also mentally mature.

According to Ian Cram, pornography has at least a certain degree of connection to 'the intellectual growth and maturity of autonomous individuals'.¹⁶⁵ Pornography provides raw materials of thought concerning sexual matter that assists individuals in their decision-making with regard to their personal sexuality. This allows them to become intellectually mature and emotionally rounded with regard to sexual matters in their lives. If Redish is correct about self-realisation being the ultimate goal of the protection of freedom of expression,¹⁶⁶ pornographic expression arguably serves that aim. The ideas and information communicated by pornography assist individuals in developing their sexual personalities, exploring their sexuality, and helping them to make their own choices of sexual lifestyles and attitudes towards sex. Given this, it could be argued that, amongst the three theories underpinning the right to freedom of expression, the concept of self-realisation (individual autonomy and self-realisation) offers the strongest argument for the protection of pornographic expression.

¹⁶² Ibid.

¹⁶³ Lichtenberg, J., 'Foundation and Limits of Freedom of the Press', in Lichtenberg, J. (ed.) *Democracy and Mass Media: A Collection of Essays*, (Cambridge University Press, Cambridge, 1990), pp.102-135, p. 108.

¹⁶⁴ Maslow, A. H., 'A Theory of Human Motivation', (1943) *Psychological Review*, 50(4), pp.370-396, 372.

¹⁶⁵ Cram, I. (2006), *supra*, pp.140-141.

¹⁶⁶ Redish, M. H., *supra*, p.593.

3.4 Pornography and Content-Based Restriction

Content-based restrictions are used by the state to curtail expression on the basis of the messages or ideas communicated.¹⁶⁷ According to the interpretation of the First Amendment,¹⁶⁸ 'the [US] Supreme Court has been especially wary of government action that restricts speech because of its content'.¹⁶⁹ This is clearly shown in *Erznoznik v. City of Jacksonville*.¹⁷⁰ As stated by Justice Lewis F. Powell:

'when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.'¹⁷¹

In this case, the city ordinance, which prohibited drive-in theatres in Jacksonville from exhibiting films that showed sexually explicit nudity if the movie screen was visible from a public street, was invalidated by the US Supreme Court, because the city ordinance discriminated amongst movies solely on the basis of content.¹⁷²

However, the content-based restriction is permitted only in special circumstances, one of which is when the speech in question is not covered by the First Amendment protection, such as obscene speech.¹⁷³ In the case of protected speech, the state can restrict expression 'in only the most extraordinary circumstances'.¹⁷⁴ In other words, it is necessary that a very strong justification (e.g. clear and present danger) be presented.¹⁷⁵

Under the ECtHR's jurisprudence, expression can be restricted if its content is contrary to the legitimate aims listed in Article 10 (2).¹⁷⁶ In contrast with the US Supreme Court, the ECtHR appears to have adopted more permissive attitude towards content-based regulations, particularly when they are imposed on non-political speech. Moreover, under the notion of

¹⁶⁷ Stone, G. (1978), supra, p.81.

¹⁶⁸ See also, for example, *Police Department of Chicago v. Mosley*, (1972) 408 US 92, 95.

¹⁶⁹ Stone, G. (1978), supra, p.82.

¹⁷⁰ (1975) 422 US 205.

¹⁷¹ Ibid., p.209.

¹⁷² Ibid., p.211.

¹⁷³ See *Roth v. United States*, (1957) 354 US 476.

¹⁷⁴ See, for example, *Nebraska Press Association v. Stuart*, (1976) 427 US 539; *Police Department of Chicago v. Mosley*, (1972) 408 US 92; *Cohen v. California*, (1971) 403 US 15; *Brandenburg v. Ohio*, (1969) 395 US 444.

¹⁷⁵ For example, for clear and present danger see *Schenck v. United States*, (1919) 249 US 47. In this case an anti-war activist was arrested under the Espionage Act because his political speech attempted to persuade draftees and soldiers to resist the draft. The main argument was that the Espionage Act was unconstitutional because it violated the First Amendment. The US Supreme Court held that the restriction on political speech in this case was reasonable, because no person could use free speech to place others in danger. In time of war, the protection of political speech might diminish.

¹⁷⁶ See Section 3.1.1.

margin of appreciation,¹⁷⁷ the ECtHR was of the opinion that the national authorities were in a better position to determine what kind of content should be prohibited or permitted. This stance is clearly shown in *Wingrove v. the UK*,¹⁷⁸ in which the ECtHR stated that:

‘Whereas there is little scope under Article 10 para. 2 of the Convention (art.10-2) for restrictions on political speech or on debate of questions of public interest ..., a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions in the sphere of morals or religion.’¹⁷⁹

In this case, it was held by the ECtHR that the rejection by the British Board of Film Classification (BBFC) to grant a classification certificate to the video work entitled *Visions of Ecstasy* did not violate Article 10 of the ECHR.¹⁸⁰ This illustrates that, in the view of the ECtHR, expression in the form of video work can be limited due to its religiously objectionable content¹⁸¹(the portrayal of erotic acts between St. Teresa and the body of Christ).¹⁸² The same judicial opinion that allows content-based regulations under the principle of margin of appreciation is also reflected in the ruling of *Otto-Preminger-Institut v. Austria*.¹⁸³ In this case, the ECtHR held that the seizure and the forfeiture of the film *Das Liebeskonzil* (Council in Heaven), which portrayed Jesus Christ and the Virgin Mary in an offensive manner,¹⁸⁴ did not constitute a violation of Art. 10 of the ECHR. The ECtHR gave the reason that the prohibition of the film was justified as the content of the film offended people’s religious feelings.

However, it could be argued that content-based restrictions prevent the public from accessing a full range of ideas, leaving them with only an incomplete, and perhaps inaccurate, vision about social and political matters.¹⁸⁵ This contradicts all three fundamental values underpinning the free speech principle. From the perspective of the argument from truth, expression should not be curtailed on the basis of its content because no one, not even the state, can ensure that the ideas or messages communicated by restricted expression may turn out to be true.¹⁸⁶ With respect to the marketplace of ideas, it is assumed that truth would arise from the competition of ideas in free market (discussion).¹⁸⁷ Content-related regulations prevent certain views from entering the competition (public debate), allowing

¹⁷⁷ For an account on the margin of appreciation doctrine see Section 4.2.2.4.

¹⁷⁸ (1996) No.17419/90, 1996-V.

¹⁷⁹ *Ibid.*, para.58.

¹⁸⁰ *Ibid.*, para.65.

¹⁸¹ *Ibid.*, para.47-48.

¹⁸² *Ibid.*, para.9.

¹⁸³ (1994) No.13470/87, A 259 A.

¹⁸⁴ *Ibid.*, para.10, 22, 51, 57.

¹⁸⁵ *Ibid.*, p.101.

¹⁸⁶ Mill, J. S., *supra*, p.118.

¹⁸⁷ *Abrams v. United States*, (1919) 250 US 616, 630.

some ideas to exist without competitors. In this manner, the ordinary mechanism of the marketplace of ideas in the form of public debate is distorted.¹⁸⁸

Regarding the argument from democracy, free expression is essential as it provides people with complete information that they can consider when making decisions about public policies.¹⁸⁹ Thus, content-based restrictions of speech render people unable to have a full perception about political issues, and as a result people may not be able to make intelligent choices.¹⁹⁰ Moreover, content-based restrictions could be interpreted as that certain expressions are prohibited because the ideas that they communicate are disapproved by the state. This obviously stands in contrast to the principle of democracy in relation to freedom of expression. In democratic society, all kinds of expression should be allowed. Thus, the expression should not be prohibited simply because the idea conveyed is different or disapproved by the state or certain groups of people (even though they account for the majority).

Lastly, free speech plays a vital role in self-realisation. It enables individuals to exercise their critical thinking and make decisions about their lives independently (personal autonomy);¹⁹¹ and through such means they can develop their personal and intellectual capacities (self-fulfilment).¹⁹² If the state suppresses expressions on the basis that the ideas communicated are deemed objectionable, people would lose the opportunity to explore a full-range of ideas and their independent decision-making would be hindered.¹⁹³ This would prevent people from personal and intellectual growth; thus they may not be able to achieve their full potential.¹⁹⁴

The restriction of pornography can be regarded as a content-based regulation. This is because pornographic expression is restricted on the basis of sexually explicit content and the sexual ideas it imparts. Like content-based restrictions on other types of expression, the state cannot restrict it because the sexual content is objectionable or disapproved. Within the framework of freedom of expression, to regulate pornographic expression, the state is required to show strong justifications.¹⁹⁵

¹⁸⁸ Stone, G. (1978), *supra*, p.101; Stone, G., 'Content-Neutral Restrictions' (1987) *University of Chicago Law Review*, 54(1), pp.46-117, 55.

¹⁸⁹ Sward, M., *supra*, p.5.

¹⁹⁰ Schauer, F. (1982), *supra*, p.38.

¹⁹¹ Scanlon, T. (1977), *supra*, p.164.

¹⁹² Redish, M. H., *supra*, p.593. See also *Whitney v. California*, (1927) 274 US 357, 374.

¹⁹³ Scanlon, T. (1977), *supra*, p.164.

¹⁹⁴ Lichtenberg, J., *supra*, p.108; Cram, I. (2002), *supra*, p.15.

¹⁹⁵ Gourgey, N., *supra*, p.89.

The next section will explore the rationales on which the state typically relies as justifications for restricting or prohibiting pornography. It will also point out which justifications are strong enough to proscribe pornographic expression or limit its availability, and which justifications are not.

3.5 Rationales for the Regulation of Pornography

Typically, the arguments for the regulation of pornography rely upon the following rationales: (1) pornography is morally wrong, (2) it is offensive, (3) it is harmful to minors,¹⁹⁶ (4) it causes sexual crime (especially rape), (5) it causes physical harms to pornographic performers and (6) it propagates the ideas of male supremacy and female subordination. In this section, these rationales will be examined in turn. It will be argued that, within the conceptual framework of freedom of expression, the protection of minors against harm to their understanding and psychological development of sexuality and gender relations, and physical harm to pornographic performers (especially those who are involved in violent pornography that uses real violence in the production) are two justifications that have enough weight to restrict pornography in the former case, and to prohibit violent pornography in the latter case.

3.5.1 Pornography and Morality

One of the classic arguments against pornography is based on morality. This view claims that all pornographic materials should be banned because they are morally wrong and have a corrupting effect on their viewers or readers.¹⁹⁷

In western cultures (including that of the UK), this conception can be understood by looking at the outlook on sex adopted by Christianity, which considers that sex and sexual desire need to be controlled.¹⁹⁸ First, because Christianity considers that proper monogamous marriage and a stable family life are core values of all good Christians.¹⁹⁹ Sexual chastity is the way to maintain such values.²⁰⁰ Therefore, sex is morally acceptable insofar as it is within a valid heterosexual and monogamous marriage.²⁰¹ Extramarital sex is deemed

¹⁹⁶ DeCew, J. W., 'Violent Pornography: Censorship, Morality and Social Alternatives', (1984), *Journal of Applied Philosophy*, 1(1), pp.79-92, 79.

¹⁹⁷ West, C., *supra*.

¹⁹⁸ Hawkes, G., *Sex & Pleasure in Western Culture*, (Polity Press, Cambridge, 2004), pp.42-61.

¹⁹⁹ Weaver, M. J., 'Pornography and the Religious Imagination', in Gubar, S., and Hoff, J. (eds.), *For Adult Users Only: The Dilemma of Violent Pornography*, (Indiana University Press, Bloomington, 1989), pp.68-82, 72; Hawkes, G., *supra*, pp.54-57.

²⁰⁰ The principle of sexual chastity was laid down by two Christian theologians, namely Clement of Alexander (150-230 AD) and Tertullian of Carthage (155-225 AD). *Ibid.*, p. 50.

²⁰¹ Atkinson, R., *Sexual Morality*, (Hutchinson & Co., London, 1965), p.45.

immoral. Second, according to Christian precepts, the natural and proper function of human sexual organs is only for a procreative purpose.²⁰² Therefore, sexual activities that do not lead to reproduction such as non-genital sex, sodomy, masturbation or homosexuality are all regarded as unnatural²⁰³ and therefore immoral.²⁰⁴ Lastly, according to St. Augustine's precept, lust (sexual desire) is considered as the inner-worldly sinfulness of human, particularly males.²⁰⁵ '[They] are unable to wilfully control their own sexuality, and thus are potential victims of whatever might arouse their sexual desires'.²⁰⁶ Therefore, in order to ensure that sin is circumvented, they should abstain from sexual desire.

In most cases, pornography appears to depict sex for its own sake, hardly showing it in connection with the institution of marriage or a family life. The depictions of promiscuity and fornication give the image of sex as a worldly activity disconnected from religious virtue and marital commitment.²⁰⁷ Furthermore, certain types of films – for example, homosexual or anal sex-oriented pornography – concentrate only on the idea of non-reproductive sex. These sexual-related ideas conveyed by pornography are regarded as a major threat to family stability, the fundamental and crucial value of all good Christians.²⁰⁸ From this religious stance, pornography is therefore deemed morally objectionable. It is argued that pornography could harm its consumers by 'corrupting their character and preventing them from leading a good and worthwhile life in accordance with family and religious values'.²⁰⁹ Lastly, as Christianity views sexual desire as sin, pornography is considered as the principal cause of sexual stimulus, leading humans – particularly men – to sinful thoughts.²¹⁰ Therefore, it should be forbidden.

Based on the concept of legal paternalism, which allows the state to intervene in citizens' liberties so as to protect them from harming or risking harm to themselves,²¹¹ moral conservatives argue that it is legitimate for the state to prohibit pornography to prevent people, including consenting and willing adults, from being morally corrupted by pornography.²¹² When individuals are safe from moral harm, the state can ensure that

²⁰² Ibid, p.50; Posner, R. A., supra, p.225.

²⁰³ Ibid., pp.225-226.

²⁰⁴ Richards, D. A., 'Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment', (1974) *University of Pennsylvania Law Review*, 123(1), pp.45-91, 58.

²⁰⁵ Greek, C. E., and Thompson, W., 'Antipornography Campaigns: Saving the Family in America and England', (1992) *International Journal of Politics, Culture and Society*, 5(4), pp.601-616, 604.

²⁰⁶ Ibid.

²⁰⁷ Richard, D. A., supra, pp.57-58.

²⁰⁸ Weaver, M. J., supra, p.72.

²⁰⁹ West, C., supra.

²¹⁰ Greek, C. E., and Thompson, W., supra, p.604.

²¹¹ Feinberg, J., 'Autonomy, Sovereignty and Privacy: Moral Ideals in the Constitution?', (1983)

Notre Dame Law Review, 58(3), pp.445-492, 456-457.

²¹² West, C., supra.

society as a whole is protected from a decline into licentiousness.²¹³ Taking this view, the state is presumably in the best position to know what is good or bad for its citizens.

The notion of legal paternalism is reflected clearly in the English classic case of *Regina v. Hicklin*²¹⁴ and the American case of *Paris Adult Theatre I v. Slaton*.²¹⁵ In the former case, the criminalisation of materials that may cause moral depravation and corruption²¹⁶ suggests that the state should play a paternalistic role to safeguard individuals' personal morality. And the latter case emphasises the role of the state in maintaining 'the social ... morality'²¹⁷ in general.

In Thai culture, the prudish and repressive attitude towards pornography is not based on a religious doctrine, as it is the case in western cultures. Buddhism, the main religion in Thailand, does not regard sex as sin; rather, it considers sex as a natural part of mundane lives.²¹⁸ Interestingly, the view of contemporary Thai society that considers pornography as immoral derives from the influence of Victorian sexual morality that was introduced to Siam (the former name of Thailand) in the mid 19th Century during the nation's modernisation. This issue will be discussed in detail in Section 6.5.1.

However, from the liberal perspective, the legal paternalistic approach to prevent people, including competent adults, from moral harm allegedly caused by pornography does not seem not to be a good enough reason for permitting state interference with pornographic expression. In his essay *On Liberty*, Mill argues that the protection of moral goodness cannot be a sufficient warrant for the state to compel its people to do what it believes will make them better, wiser or happier.²¹⁹ He adds that neither others nor society should intervene in mentally competent adults' decision-making regarding personal matters.²²⁰ This implies that no one, even the state, knows about one's interests better than oneself.²²¹ Adults with full intellectual competence should be free to do and venture as they wish, even though they may end up harming themselves. Applying Mill's notion to the case of pornography, it follows that adults should not be prevented from viewing and disseminating pornography, although they may be morally damaged by the sexual ideas/opinions imparted from

²¹³ Ibid., See also Barendt, E., supra, p.363.

²¹⁴ (1868) LR 3 QB 360.

²¹⁵ (1973) 413 US 49.

²¹⁶ (1868) LR 3 QB 360, 371.

²¹⁷ *Roth v. United States*, (1957) 354 US 476, 485, quoting *Chaplinsky v. New Hampshire*, (1942) 315 US 568, 572, in (1973) 413 US 49, 61.

²¹⁸ Truong, T., *Sex Money and Morality: Prostitution and Tourism in South-East Asia*, (Zed Books Ltd., London, 1990), pp.133-134.

²¹⁹ Ten, C. L., *Mill on Liberty*, (Clarendon Press, Oxford, 1980), p. 109; Mill, J. S., supra, p.80.

²²⁰ Ibid., p.140.

²²¹ Ten, C. L., supra, p.115.

pornography. As they can judge for themselves what is good or bad, the state has no role in determining what adults should not view or read.

Furthermore, from the issue of harm to morality arises a question of 'what counts as harm?'.²²² If moral harm is taken to mean licentious thoughts, the issue of moral harm is more relevant to the question of 'who would read the stuff?'²²³ than the question of what ideas pornography expresses. Some people may create such 'dirty' thoughts after viewing pornography, but some may not. In addition, another question that should be asked is who has legitimacy to judge the issue of moral harm?²²⁴ Should it be the state, society, judges or individuals who view or read pornography? These questions leave room for disagreement.

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More importantly, morality is highly abstract in nature and there seems to be no instrument to measure this particular sphere in quantitative terms. It is difficult to show that the implementation of certain measures against pornography will help to maintain public morality. Given this, it is questionable how paternalistic governments know (and are certain) that public morality would be preserved if pornography is restricted or suppressed. Therefore, the argument that the restriction or prohibition of pornography will protect public morality is not persuasive.

Lastly, it could be contended that the proscription of pornography on moral grounds is inconsistent with 'democracy' and 'self-realisation' principles that underpin freedom of expression.

As argued above, in a democratic society, the majority has no right and legitimacy to silence the minority. The minority is allowed to express its opinion and persuade people to agree with it. As far as pornographic expression is concerned, sexual morality could be seen as the majority's opinion about sex, whilst sexual ideas imparted from pornography could be seen as the minority's viewpoint. The suppression of pornography on grounds of morality allows the majority to use its opinions about sex (sexual morality) as a pretext to suppress the minority's opinions. Thus, it could be argued that the restriction of pornography to protect so-called 'morality' is contrary to the 'democracy' principle of freedom of expression.

²²² Report of the Committee on Obscenity and Film Censorship, *supra*, para.5.27, p.58.

²²³ Koppelman, A.(2005), *supra*, p.1675.

²²⁴ Report of the Committee on Obscenity and Film Censorship, *supra*, para.5.27, p.58.

²²⁵ *Ibid.*

Furthermore, with regard to the 'self-realisation' principle, the prohibition of pornography on the grounds of morality would force people to learn (and accept) only sexual ideas that are deemed moral. People would lack opportunities to explore sexual ideas that are different from those that are the morally approved. Given the limited sexual ideas available to them, they could not make full autonomous judgements about sexual matters; and as a result could not develop intellectual ability and critical judgements about their sexuality and sexual lives.²²⁶ This would significantly undermine self-realisation, the ultimate aim of freedom of expression.

It can be concluded from what is discussed above that morality does not seem to be an adequate justification for suppressing or restricting pornographic expression.

3.5.2 Pornography and Offensiveness

Another common rationale typically invoked to justify the restriction or suppression of pornography is based on the offence principle. Joel Feinberg defines 'offensive' as disliked mental states: disgusted, shocked, shameful, embarrassed, annoyed, bored, angry or humiliated.²²⁷

As far as pornography is concerned, it is interesting to question why pornography is deemed offensive in the eyes of some people. According to Feinberg, the manner in which sex is presented by pornography violates some people's moral sensibilities.²²⁸ The candid depictions and descriptions of sex may create "impure thoughts" in the minds of the beholders'.²²⁹ These 'dirty' thoughts would make them feel ashamed and perhaps revolted.²³⁰ It is not sex that is deemed immoral; rather, it is the presentation of sex with an intention to persuade the viewer to have impure thoughts that is deemed immoral.²³¹

Another explanation is that pornography significantly reduces psychic distance between the viewer and sexual activities that are commonly deemed to be a private matter.²³² Based on a psychological account proposed by George P. Elliott, Feinberg points out that copulation, in the same way as bathing, defecating and urinating, is a bodily function that needs to be

²²⁶ Feinberg, J., 'Hard Cases for the Harm Principle' in Baird, R. M. and Rosenbaum, S. E., *Morality and the Law*, (Prometheus Books, Buffalo New York, 1988), pp.55-66, 55.

²²⁷ Feinberg, J., *The Moral Limits of the Criminal Law: Volume 2: Offense to Others*, (Oxford University Press, Oxford, 1988), p.5.

²²⁸ *Ibid.*, p.139.

²²⁹ *Ibid.*

²³⁰ *Ibid.*, p.140.

²³¹ *Ibid.*

²³² *Ibid.*, p.141.

performed in private.²³³ In general, most people do not like ‘being spatially or psychologically close to the physiological organs and processes which are deemed “private”’.²³⁴ Given this, it would not be surprising that some people who accidentally see a couple having sex in a public place (such as a park) feel embarrassed, perhaps disgusted, and want to leave that place immediately, because sex that they have witnessed disturbs their sense of what ought to be private.²³⁵ In the case of pornography, explicit portrayals of sexual acts make viewers feel as if sex is performed in their presence. This could elicit disgusting or shocking feelings from unwilling viewers in much the same way as when people feel embarrassed when unintentionally seeing sexual acts in a park. For these two reasons, it could be said that the offence caused by pornography is, in effect, the dislike of sexual presentation that challenges one’s perception of sexual morality or propriety.

The next question is whether the restriction or a complete ban of pornographic expression on the grounds of offensiveness, especially when such offensiveness does not cause any physical harm to anyone, is compatible with the principle of freedom of expression. Several academics comment that offensiveness alone is not a strong justification for a complete ban on pornographic expression. Feinberg argues that ‘the offensiveness of opinion itself is never serious enough to outweigh the heavy public interest in open discussion and free expression of opinion.’²³⁶ Similarly, Cass Sunstein – an American legal scholar – contends that ‘the government should not be allowed to regulate [sexually explicit] speech because people are offended by the ideas that it contains.’²³⁷ This argument is shared by Barendt. He contends that ‘it would clearly be contrary to freedom of speech principles to outlaw the publication or dissemination of pornography on the ground that it is offensive ...’.²³⁸

The restriction of speech on the grounds of offensiveness allows the majority to ‘stifle minority or unpopular viewpoints’.²³⁹ As far as pornographic expression is concerned, the prohibition of pornography on the basis that it is offensive would permit the majority (i.e. those who abide by dominant sexual mores) to use offensiveness as a pretext to suppress

²³³ Ibid., p.140.

²³⁴ Ibid., p.141.

²³⁵ Ibid., p.140.

²³⁶ Feinberg, J., *supra*, pp.35,39. It should be noted that Feinberg does not completely disagree with the restriction of expression on the basis of offensiveness. However, according to his posit, the restriction must be subject to conditions, such as the magnitude of the offence (intensity, duration, and extent) and the standard of reasonable avoidability. Therefore, the state may restrict a sexually explicit billboard that is erected in a public space, such as Times Square, but cannot restrict pornographic materials that are sold in an adult shop.

²³⁷ Sunstein, C., *supra*, pp.155, 158.

²³⁸ Barendt, E., *supra*, p.385.

²³⁹ Cram, I., ‘The Danish Cartoons, Offensive Expression and Democratic Legitimacy’, in Hare, I., and Weinstein, (eds), *Extreme Speech and Democracy*, (Oxford University Press, Oxford, 2009), pp. 311-330, 22.

pornographers' opinions/ideas. The majority would not tolerate sexual ideas that are different from theirs, and might even refuse to acknowledge the variety of sexual ideas. This would make a society lack tolerance and pluralism with regard to ideas of sex and sexuality. Moreover, it is possible that pornographic expression might be prohibited by the standards of the least tolerant (the most prudish) segment of a given society.²⁴⁰ All of these circumstances are obviously contrary to the democratic value of the right to freedom of expression. As Cram notes,

[the prohibition of expression in this regard] would produce the ironic result for liberal democracies that, in trying to accommodate differences out of a commitment to pluralism and the equal worth of alternative conceptions of the good life, the lack of tolerance on the part of certain of the accommodated groups provides the basis for curtailing the freedoms of the rest.²⁴¹

Furthermore, by drawing upon Mill's Harm Principle, Jeremy Waldron – a legal philosopher – argues that offensiveness in the form of 'moral distress' – i.e. 'the fact that someone is distressed on account of what he takes to be the immorality or the depravity of another's behaviour'²⁴² (such as outrage and disturbance) – 'is something to be welcomed, nurtured and encouraged in the free society that Mill is arguing for.'²⁴³ 'Moral distress' is a natural result of 'ethical confrontation', the clash between 'earnestly-held ideals' and contrasting opinions²⁴⁴ that answers the questions about a good life with regard to moral, philosophical, political and religious matters.²⁴⁵ Ethical confrontation has two significant contributions to society and individuals. First, it would bring new and better ideas. According to Waldron's understanding of Mill's thesis, neither the prevailing ideas nor the opposing views express the whole and ultimate truth with regard to a good life; furthermore, 'brand new ideas do not spring up ready-formed in the minds of their proponents'.²⁴⁶ The competition between contrasting ideas in open debate and confrontation would allow existing ideas to synthesise; and, as a result, new ideas with 'greater verisimilitude' may eventually emerge.²⁴⁷ Second, the ideas that have no competitors or cannot be challenged would become a 'dead dogma' with prejudice; this circumstance would make the progress to achieve a better life become empty and the truth about a good life no longer worth pursuing.²⁴⁸ On the contrary, the search for a better life would keep progressing and the pursuit of truth would be meaningful, if opinions about a good life can be discussed and challenged in open debate. The on-going

²⁴⁰ Cram, I. (2006), *supra*, p.143.

²⁴¹ *Ibid.*

²⁴² Waldron, J., 'Mill and the Value of Moral Distress', (1987) *Political Studies*, 35(3), pp.410-423, p.411.

²⁴³ Cram, I. (2006), *supra*, p.143.

²⁴⁴ Waldron, J., *supra*, p.414.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*, p.415.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

competition between opposing ideas allows the meaning and significance of opinions about a good life to be 'reasserted ... and re-examined' continuously.²⁴⁹ For these reasons, it could be said that ethical confrontation encourages a society to progress and stimulates individuals to grow intellectually because they have to prepare to defend the views to which they subscribe. Nonetheless, people may be disturbed or distressed when involved in ethical confrontation (or the clash of ideas). However, moral distress as a result of ethical confrontation can be seen as a positive sign of the progress of moral and intellectual development of society and individuals. In other words, if moral distress does not occur, it would mean that 'the intellectual life and progress of our [civilisation] may be grinding to a halt'.²⁵⁰ In this regard, the prohibition of speech that may cause offensiveness in order to avoid ethical confrontation and moral distress is unsound, as it would hinder the development of society and people. By applying this concept to pornographic expression, it follows that people should be free to view and disseminate pornography. Pornographic expression would create a confrontation about ethics and personal morality, allowing people to debate and challenge ideas/opinions concerning sex, sexuality and gender relations with an ultimate goal of finding truth concerning such sexual-related issues.²⁵¹ Put differently, the state should not interfere with the competition between the prevailing sexual ideas and the opposing sexual ideas imparted from pornography. Although this process would cause offensiveness in the form of moral distress, it is an intrinsic part of the moral and intellectual development of both society and individuals.

The next question concerns whether any kind of restriction of pornographic expression (as opposed to a complete ban) on the grounds of offensiveness is consistent with the principle of freedom of expression. An adult shop may place a sign in front of its entrance and thereby warn unwilling adults and minors not to enter its premises. In the UK, the Indecent Displays (Control) Act 1981 prohibits the display of indecent materials in any place the public can access.²⁵² As a result, sex shops have to cover their sexually explicit products to prevent passers-by from unwitting exposure to such materials. Theoretically speaking, the restriction of pornography on the grounds of offensiveness either by restrictive measures imposed by the owner of a sex shop or by legislation is inconsistent with the notion of freedom of expression.²⁵³ However, it could be argued that the restriction of pornography is much less restrictive than a complete ban on pornography, since at least it allows a certain

²⁴⁹ Ibid.

²⁵⁰ Ibid., p.417.

²⁵¹ For arguments against the application of Mill's argument from truth to pornography, see section 3.3.1.

²⁵² Section 1 (1) and (2). It should be noted that the place that requires visitors to pay admission fees, or which shows an adequate warning notice, are exempted by virtue of Article 1 (3) (a) and (b).

²⁵³ Barendt, E., *supra*, p.386-387.

degree of freedom of pornographic expression (as willing adults can still view and distribute pornographic materials, despite being under a certain degree of limitation). Furthermore, as Barendt notes, for a practical reason, the restriction of pornography in this manner allows consenting adults to access pornographic materials, whilst 'society is able to combine in this way muted moral disapproval of pornography with a measure of tolerance'.²⁵⁴

To sum up, it could be contended that offensiveness is not strong enough to justify the suppression of pornographic expression. It could be used as a justification for restricting the availability of pornographic materials for a practical reason at best.

3.5.3 Pornography and Harm to Minors²⁵⁵

It is interesting to note at the outset that the question of how minors are negatively affected by sexually explicit content has not yet been well researched, due significantly to the ethical limitations of conducting empirical research on persons under the age of 18.²⁵⁶ This presents a difficulty in reaching any conclusive consensus amongst the experts in the field. As a result, there has not yet been experimental evidence garnered thus far to demonstrate how minors are potentially harmed by exposure to sexually explicit material.²⁵⁷ Nevertheless, given the young ages of minors, together with their mental and physical immaturity, it is a widely held view that pornography adversely affects them in different ways.²⁵⁸ Furthermore,

²⁵⁴ Ibid., p.386.

²⁵⁵ Minors refers to both children (twelve years and under) and adolescents (thirteen to eighteen years old). See Etzioni, A., 'On Protecting Children from Speech', (2004) *Chicago-Kent Law Review*, 79(1), pp.3-53, 43.

²⁵⁶ The British Board of Film Classification (BBFC), *BBFC Annual Report 2000*, (2000), www.sbbfc.co.uk/Assets/documents/AnnualReport2000.pdf, visited 20th November 2009, p.6; Helsper, E., *R18 Material: Its Potential Impact on People Under 18: An Overview of the Available Literature*, www.ofcom.org.uk/research/radio/reports/bcr/r18.pdf, visited 20th November 2009, p.4; Byron, T., *Safer Children in a Digital World: The Report of the Byron Review*, (The Department for Children, Schools and Family (DCSF) Publications, Nottingham, 2008), <http://www.dcsf.gov.uk/byronreview/pdfs/Final%20Report%20Bookmarked.pdf>, visited 20th November 2009, p.50. For the issue of ethical restrictions on conducting empirical research on children, see Hargrave, A. M., and Livingstone, S., *Harm and Offence in Media Content: A Review of the Evidence*, (Intellect, Bristol, 2006), pp.44-46.

²⁵⁷ Heins, M., *Identifying What is Harmful or Inappropriate for Minors: White Paper Submitted to the Committee on Tools and Strategies for Protecting Kids From Pornography and Their Applicability to Other Inappropriate Internet Content*, (2001) <http://www.fepproject.org/whitePapers/NRCwhitePapers.html>, visited 20th November 2009.

²⁵⁸ See for example, Ibid.; Barendt, E., *supra*, p.374; Hargrave, A. M., and Livingstone, S., *supra*, p.123; Stock, P., *The Harmful Effects on Children of Exposure to Pornography: A Report from Canadian Institute for Education on the Family*, (2004), <http://www.cief.ca/pdf/harmpornography.pdf>, visited 20th November 2009; Flood, M., 'The Harms of Pornography Exposure Among Children and Young People', (2009) *Child Abuse Review*, 18(6), pp.384-400; <http://mentalhealthlibrary.info/library/porn/pornlds/pornldsauthor/links/victorcline/porneffect.htm>, visited 20th November 2009.

it is commonly accepted that minors are entitled to special protection and care.²⁵⁹ Therefore, it is justifiable for the state to prevent minors from gaining access to pornographic expression, despite the lack of clear evidence of whether pornography actually has the capacity to harm them.²⁶⁰

First, pornography may cause upset, distress and disgust in some children.²⁶¹ According to the survey of UK children's online experiences conducted in 2004,²⁶² Sonia Livingstone and Magdalena Bober found that 20 per cent²⁶³ of youths aged between 9 and 19 years old claimed to have been disgusted by viewing pornography.²⁶⁴ Similarly, the US national survey of young people aged between 10 and 17, carried out in 2000,²⁶⁵ also reveals that '24 [per cent] of youths said they were very or extremely upset' because of viewing pornography.²⁶⁶ Furthermore, the study conducted by Joanne Cantor *et al.* reveals that sexual depictions in X-rated and R-rated films could cause emotional guilt, fear of being caught or embarrassment in young children aged between 5 and 12 years old.²⁶⁷ Normally, children and adolescents are of the age where the proper time for sexual experience has not yet come. In other words, during these periods, children are 'unaware of, inexperienced in, or uninterested in sexual activities'.²⁶⁸ As a consequence, premature or inadvertent exposure to sexually explicit content may result in emotional harm.²⁶⁹

²⁵⁹ This notion is recognised by the UN in the preamble of the Convention on the Rights of the Child. It states that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.

²⁶⁰ Nair, A., 'Real Porn and Pseudo Porn: The Regulatory Road', (2010) *International Review of Law, Computers and Technology*, 24(3), pp.223-232, 230.

²⁶¹ Byron, T., *supra*, p.50.

²⁶² The survey is a part of the UK Children Go Online (UKCGO) project. The information was taken from a national, face-to-face survey of 1,511 young people aged between 9 and 19 years old. See Livingstone, S., and Bober, M., *UK Children Go Online: Surveying the Experience of Young People and Their Parents*, (LSE Research Online, London, 2004), <http://eprints.lse.ac.uk/395/>, visited 21st November 2009, p.31; Livingstone, S., and Bober, M., *UK Children Go Online: Final Report of Key Project Findings*, (LSE Research Online, London, 2005), <http://eprints.lse.ac.uk/399/>, visited 21st November 2009, p.21.

²⁶³ 720 respondents, children who have come in contact with online pornography, account for 100 per cent. However, it should be noted that as the respondents were permitted multiple responses to the question, this percentage does not simply add up to 100 per cent.

²⁶⁴ Livingstone, S., and Bober, M. (2004), *supra*, p.31.

²⁶⁵ The US national survey was conducted by means of telephone interviews with 1,501 young people between the ages of 10 and 17. See Mitchell, K. J., Finhelhor, D., and Wolak, J., 'The Exposure of Youth to Unwanted Sexual Material on the Internet: A National Survey of Risk, Impact, and Prevention', (2003), *Youth & Society*, 3(3), pp.330-358, 336-337.

²⁶⁶ *Ibid.*, p.346.

²⁶⁷ It should be noted that there were no children involved in the study. The samples were 214 undergraduate students of an American university. They were asked to recall their childhood encounters with sexual content in media, and fill in questionnaires. The findings derive primarily from an analysis of the answers in the questionnaires. Cantor, J., Mares, M., and Hyde, J. S., 'Autobiographical Memories of Exposure to Sexual Media Content', (2003) *Media Psychology*, 5(1), pp.1-31, 22.

²⁶⁸ *Ibid.*

²⁶⁹ Flood, M., *supra*, p.388.

Second, as Tanya Byron – an English psychologist – comments, premature exposure to pornography may negatively affect adolescents who are in the early stage of cognitive development of understanding about sexual relationships and sexuality.²⁷⁰ Willard Gaylin – an American psychiatrist – gave his opinion to the US Supreme Court in *Ginsberg v. New York*,²⁷¹ stating that the age of adolescence is a critical period when:

‘patterns of [behaviour] are laid down, when environmental stimuli of all sorts must be integrated into a workable sense of self, when sensuality is being defined and fears elaborated, when pleasure confronts security and impulse encounters control’.²⁷²

During this period, adolescents learn about gender relations and sexuality through observing others’ sexual behaviour and may imitate what they have seen.²⁷³ Therefore, it is possible that adolescents may learn ideas about sex from pornography. Such sexual ideas may lead to sexual behaviour that is deemed improper or deviant (according to contemporary sexual mores) when they grow up. By referring to Thomas Johansson and Nils Hammaren’s study, Michael Flood – an Australian sociologist – comments that young people who see pornography are more likely than those who do not view pornography to have homosexual and/or one-night-stand sex.²⁷⁴ In addition, depictions of sex as an activity without a committed relationship in mainstream pornography may mislead and encourage them to perceive that sex is for its own sake, divorced from marriage and reproduction; or that there is nothing wrong with promiscuity or having sex with strangers.²⁷⁵ Interestingly, the study conducted by Jennings Bryant and Steven Carl Rockwell suggests that heavy exposure to television programmes featuring sexual relationships between unmarried persons has a negative effect on the moral judgements of teenagers, especially those aged between 13 and 14 years old, thus making them more accepting of premarital, extramarital or non-marital sex, and affording less importance to family and marriage values.²⁷⁶ Given the fact that most pornographic materials focus on sex and largely ignore family and marriage values,

²⁷⁰ Byron, T., *supra*, p.50.

²⁷¹ (1968) 390 US 629, fn 10.

²⁷² *Ibid.*

²⁷³ Downs, A. C., and Hillje, L. S., ‘History and Theoretical Perspectives on Adolescent Sexuality: An Overview’ in Gullotta, T., Adams, G. R. and Montemayor, R. (eds), *Adolescent Sexuality*, (Sage Publications, Newbury Park, 1993), pp.1-33, 25.

²⁷⁴ Flood, M., *supra*, p.390-391; see also Johansson, T., and Hammaren, N., ‘Hegemonic Masculinity and Pornography: Young people’s attitudes toward and relations to pornography’, (2007) *Journal of Men’s Studies*, 15(1), pp.57-70.

²⁷⁵ Heins, M., ‘Criminalizing Online Speech to “Protect” the Young: What are the Benefits and the Costs?’, in Wall, D. (ed.), *Crime and the Internet*, (Routledge, London, 2001), pp.100-112, p.105.

²⁷⁶ Bryant, J., and Rockwell, S. C., ‘Effects of Massive Exposure to Sexually Oriented Prime-Time Television Programming on Adolescents’ Moral Judgment’ in Zillmann, D., Bryant, J., and Huston A. C. (eds), *Media, Children and the Family: Social Scientific, Psychodynamic, and Clinical Perspectives*, (Lawrence Erlbaum Associates Publishers, Hillsdale New Jersey, 1994), pp.183-195, 193-195; Greenfield, P. M., ‘Inadvertent Exposure to Pornography on the Internet: Implications of Peer-to-Peer File Sharing Networks for Children Development and Families’, (2004) *Journal of Applied Developmental Psychology*, 25(6), pp.741-750, 744.

exposure to pornography could have a negative effect on adolescents' moral judgements in the same way, or similar ways, as do the sexually-oriented television programmes.

It is also argued that pornography may cause children and adolescents to accept less common or even 'deviant' sexual behaviour such as anal sex, group sex, sadomasochistic activities and bestiality.²⁷⁷ Dolf Zillmann – a communication studies scholar – points out that pre-school children and first to fourth graders would not have sufficient cognitive and emotional maturity to separate propriety from impropriety.²⁷⁸ Thus, premature exposure to sexual practices as shown in pornography, ranging from common to abnormal ones, would unavoidably affect and influence children's development of their understanding about sex and sexuality.²⁷⁹ In addition, it could be argued that pornography accustoms young people to sexual violence. The study of Silvia Bonino *et al.* shows that male adolescents who use pornography are more likely to show 'acceptance of sexually abusive attitudes' and to 'establish relationships with their peers by greater tolerance towards unwanted sexual behaviour [such as violent sexual behaviour]'; whereas female adolescents who view pornographic films are more likely to accept a passive role in sexual violence and become less resistant in such abusive sexual activities.²⁸⁰ The study of Daniel Lee Carter *et al.* found that most subjects in their study – with the sample notably comprising 64 adult rapists of Massachusetts Treatment Centre for Sexually Dangerous Persons – were exposed to pornography during their early developmental years.²⁸¹ The findings suggest that exposure to pornography at a young age may implant a sexually criminal mind in certain young people, and lead to the commission of sexual crime in adulthoods. (The two studies mentioned above should be read with caution as they were conducted on limited sample groups in particular countries. They may not represent situations that happen in other countries. Nonetheless, they serve as evidence to support the hypothesis that pornography attributes, at least partly, to young people's inclination towards sexual violence.)

Theoretically, because pornography can be considered as an instance of expression, it deserves a certain degree of protection under the principle of freedom of expression. However, this would be a different matter when the viewers are minors. As discussed above,

²⁷⁷ Helsper, E., *supra*, p. 17 See also Zillmann, D., 'Influences of Unrestrained Access to Erotica on Adolescents' and Young Adults' Dispositions Towards Sexuality', (2002), *Journal of Adolescent*, 27(2), pp.41-44, 41-42.

²⁷⁸ *Ibid.*, p.43.

²⁷⁹ *Ibid.*

²⁸⁰ Bonino, S., Ciairano, S., Rabaglietti, E. and Cattelino, E., 'Use of Pornography and Self-Reported Engagement in Sexual Violence Among Adolescents', (2006), *European Journal of Developmental Psychology*, 3(3), pp.265-288, 281-283.

²⁸¹ Carter, D. L., Prentky, R. A., Knight, R. A., Vanderveer, P. L. and Boucher, R. J., 'Use of Pornography in the Criminal and Developmental Histories of Sexual Offenders', (1987), *Journal of Interpersonal Violence*, 2(2), pp.196-211, p.205.

pornography is potentially harmful to the young. Since the state has an interest in protecting the well-being of the young,²⁸² restrictions on pornography, especially by making it out of the reach of minors, is arguably justifiable.

In *Ginsberg v. New York*,²⁸³ a leading US Supreme Court case dealing with the concept of harm to minors, it was held that although 'girlie' magazines, that contained pictures of naked women, were not deemed obscene and could be sold to persons aged 17 or older, they might be harmful to younger children because the pictures 'predominantly [appealed] to the prurient, shameful or morbid interest of minors'.²⁸⁴ This case clearly shows that the US Supreme Court recognised that sexually explicit content is harmful to minors.²⁸⁵ Interestingly, because the US Supreme Court admitted that the empirical evidence showing such harm was scarce,²⁸⁶ Justice William Brennan ruled that the Supreme Court did not require scientific proof of harm. Furthermore, the prohibition of the distribution of sexually explicit pictures to minors was rational because the state had an interest in protecting the welfare of minors, and their ethical and moral development.²⁸⁷

Another interesting case is *R. v. Secretary of State for the National Heritage*,²⁸⁸ which involves the UK Secretary of State's order, by virtue of Section 177 of the Broadcasting Act 1990, to proscribe satellite broadcasting of hardcore pornographic programmes by a Dutch company from Denmark to subscribers who had special decoders in the UK.²⁸⁹ The core issue of this case revolves around the European Union (EU) Directive 89/552/EEC. Article 22 of the Directive allows its member states to implement appropriate measures to ensure that broadcasters under their jurisdiction do not broadcast any programmes that might seriously impair the physical, mental or moral development of minors, particularly programmes that depict pornography.²⁹⁰ The Queen's Bench Divisional Court agreed that such programmes might seriously impair the moral development of minors,²⁹¹ and the moral welfare of minors outweighed the applicant's profits.²⁹² Therefore, Judge Leggatt L. J. and Judge McCullough J. denied granting an injunction against the Secretary of State's order.²⁹³

²⁸² *Ginsberg v. New York* (1968) 390 US 629, 640-641.

²⁸³ (1968) 390 US 629.

²⁸⁴ (1968) 390 US 629, 632-635.

²⁸⁵ Heins, M. (2001), *supra*.

²⁸⁶ *Ibid.*

²⁸⁷ (1968) 390 US 629, 641.

²⁸⁸ (1993) 2 C.M.L.R. 333.

²⁸⁹ *Ibid.*, p.335-338.

²⁹⁰ *Ibid.*, p.339.

²⁹¹ *Ibid.*, p.345.

²⁹² *Ibid.*, p.348.

²⁹³ *Ibid.*, pp.348-349 See also *R. v. Secretary of State for National Heritage Exp. Continental Television BV*, (1993) 3 C.M.L.R. 387. The Court of Appeal (Civil Division) ruled that the dispute

Furthermore, Rachel O'Connell suggests that a paedophile may use adult pornography to 'groom' a child, by using adult pornographic images for the purpose of 'normalising sexual behaviour',²⁹⁴ 'inciting a child to create pornographic images, [or] instructing a child to engage in various sex acts either alone, with another child or with an adult.'²⁹⁵

To sum up, it would be reasonable to argue that sexual ideas associated with pornography could have detrimental effects on young people's psychological development and understanding about sex and sexuality. Additionally, adult pornography can be used as a tool to 'groom' children. On these grounds, the state has a legitimate right to interfere with pornographic expression by preventing minors from accessing pornography, as well as outlawing all sexually oriented publications aimed at young people. Nevertheless, this view does not endorse the state's interference with adults' freedom of expression by suppressing pornographic materials altogether. In the case of intellectually competent adults, it would be safe to assume that, because their perceptions about sex and sexuality have already settled, they should have sufficient intellectual ability to distinguish between prevailing sexual mores and conventional sexual practices, and sexual ideas and practices that are deemed unconventional. Sexual ideas imparted from pornography may have little effect on the sexual cognition of competent adults. Therefore, pornography is far less harmful to adults than to children. Furthermore, in the case of adults it could be suggested that receiving sexual ideas (or even deviant or unconventional ones) from pornography and having sexual practices according to such sexual ideas could be regarded as a matter of freedom to choose one's sexual lifestyle (autonomy and self-fulfilment). Thus, the state does not have legitimacy to interfere with adults' independent choice of sexual lifestyle. Therefore, the regulation of Internet pornography should take into account a proper balance between the protection of minors and the guarantee of adults' right to freedom of expression. Thus, a regulatory measure should be designed to keep pornography out of the reach of children, whilst simultaneously allowing consenting adults to enjoy their freedom of pornographic expression.

over the interpretation of the Directive must be determined by the European Court of Justice. In the meantime, the order of the Secretary of State would stand.

²⁹⁴ Gillespie, A., 'Indecent Images, Grooming and the Law' (2006) *Criminal Law Review*, 2006 (May), pp.412-421, 413

²⁹⁵ O'Connell, R., *A Typology of Cyberexploitation and On-line Grooming Practices*, (Cyberspace Research Unit, Preston, 2003), http://www.jisc.ac.uk/uploaded_documents/lis_PaperJPrice.pdf, visited 12th December 2012, p.12.

3.5.4 Pornography as a Cause of Sexual Crimes and Rape

Robin Morgan's oft-quoted epigram '[p]ornography is the theory and rape is the practice'²⁹⁶ underscores the strong belief amongst some anti-pornography activists that there is a causal relationship between pornography and rape. However, this section contends that the 'pornography-causes-rape' hypothesis is highly controversial and inconclusive. Thus, it cannot be a strong justification for prohibiting pornography.

There have been many studies conducted on the relationship between the availability of pornography and reported sexual crimes, especially rape. The study of Berl Kutchinsky – a Danish criminologist – is a notable one. In his analysis of the statistical data on rape and other forms of sexual offences in the United States, Sweden, Denmark and Western Germany (where pornography including materials depicting sexual violence were widely available), during 1964-1984, Kutchinsky argues that there is no persuasive evidence showing that pornography causes higher rates of rape and other sexual crimes in these four countries.²⁹⁷

However, Kutchinsky's study is subject to a criticism that the statistics of reported sexual crimes may not be accurate enough to give a picture of the actual situation of sexual crimes. Victor Cline contends that:

'There is no reduction at all in the numbers reported of violent sex crimes and rapes, both in Copenhagen and in Denmark ...; and the possibility exists that, in actual numbers, they may have increased, but victims are reporting them less than often'.²⁹⁸

Similarly, John Court suggests that 'people were consistently less likely to report sex crimes as pornography became increasingly available.'²⁹⁹

In the US, the Report of the US Presidential Commission on Obscenity and Pornography (the 1970 US Report)³⁰⁰ suggests that the analysis of the relationship between the

²⁹⁶ Morgan, R., *Going to Far: The Personal Chronicle of a Feminist*, (Random House, New York, 1977), p. 169; See also Strossen, N., *supra*, p.204.

²⁹⁷ See generally Kutchinsky, B., 'Pornography and Rape: Theory and Practice? Evidence from Crime Data in Four Countries where Pornography is Easily Available', (1991) *International Journal of Law and Psychiatry*, 14, pp.47-64. See also Strossen, N., *supra*, p.256.

²⁹⁸ Cline, V. B., 'Another View: Pornography Effects, the State of the Art' in Cline, V. B. (ed.) *Where Do You Draw The Line? An Exploration into Media Violence, Pornography and Aggression*, (Brigham Young University Press, Provo Utah, 1974), pp.203-239, 223. See also Howitt, D., and Cumberbatch, G., *Pornography: Impacts and Influences: A Review of the Available Research Evidence on The Effects of Pornography*; (Home Office Research and Planning Unit, London, 1990), p.22.

²⁹⁹ Court, J. H., 'Sex and Violence: A Ripple Effect' in Malamuth, N., and Donnerstein, E.(eds), *Pornography and Sexual Aggression*, (Academic Press, Orlando, Florida, 1984), pp.143-172, 152.

availability of pornography and changes in sex crime rates, including rape, in the US between 1960 and 1969³⁰¹ does not seem to support the alleged causal relationship between an increase in the availability of pornographic material and the commission of sexual offences.³⁰² Nevertheless, it also remarks that the analysis 'neither proves nor disproves the possibility that the availability of erotica leads to crimes [especially rape]'.³⁰³

Most recently, by relying on the data available relating to pornography consumption and rape rates in the US between 1990 and 2009, the 2009 study conducted by Christopher Ferguson and Richard Hartley shows that whilst crime in general and rape in particular has decreased over the last twenty years, the availability of pornographic materials in the US has increased steadily during the same period.³⁰⁴

In the UK, the Williams Report indicates that, despite the alleged wide availability of pornography in two different periods, i.e. firstly after 1964 and secondly since 1970, the overall statistical data on rape and sexual assault in England and Wales from 1946 to 1978 show no significant rise in sexual crimes.³⁰⁵ It concludes by denying that 'pornography acts as a stimulus to the commission of sexual violence'.³⁰⁶

In their 1990 research for the Home Office (the 1990 study), Dennis Howitt and Guy Cumberbatch support the contention that the link between pornography and sexual crimes is weak, stating through their analysis of the available research evidence on the effects of pornography that sexual crime rates are relatively stable and of low frequency in Britain.³⁰⁷ They also contend that '[v]ariations in rates of sexual crime do not indicate any simple casual relationship with the circulation rates of sex magazines'.³⁰⁸ This, however, does not necessarily mean that they agree with the claim that the rise in the availability of pornography leads to the reduction in sex crimes,³⁰⁹ because the low rates of sex crimes could possibly be explained by the fact that rape is likely to be under-reported.³¹⁰ They add that the sexual crime statistics do not provide any helpful detail in understanding the

³⁰⁰ Report of the Commission on Obscenity and Pornography (September 1970), (US Government Printing Office, Washington, 1970).

³⁰¹ This finding was based on empirical studies conducted by the 1970 Commission. See Report of the Commission on Obscenity and Pornography, *supra*, pp.227-229.

³⁰² *Ibid.*, p.229.

³⁰³ *Ibid.*, p.227.

³⁰⁴ Ferguson, C. J., and Hartley, R. D., 'The Pleasure is Momentary ... the Expense Damnable?: The Influence of Pornography on Rape and Sexual Assault', (2009) *Aggression and Violent Behavior*, 14(5), pp.323-329, p.328.

³⁰⁵ Report of the Committee on Obscenity and Film Censorship, *supra*, paras. 6.42-6.43, pp.79-80.

³⁰⁶ *Ibid.*, para.6.43.

³⁰⁷ Howitt, D., and Cumberbatch, G., *supra*, pp.30, 83.

³⁰⁸ *Ibid.*, p.94.

³⁰⁹ *Ibid.*, pp.30-31.

³¹⁰ *Ibid.*, pp.31,83.

changes of sexual offence trends over time, and that there is no available evidence showing patterns for the relationship between hardcore pornography and sexual crimes.³¹¹ In short, they conclude that it seems unlikely for pornography to be the only determinant of sexual crimes.³¹² Equally, it is unconvincing to claim that pornography contributes to the decrease in sexual crimes.³¹³

In addition to the studies concerning pornography and sexual crimes conducted in western countries, the Japanese spotlight on this issue is very interesting. Japan is notorious for the prevalence of pornographic products that show a lot of deviant sexual practices and high levels of sexual violence.³¹⁴ However, according to the findings of Milton Diamond and Ayako Uchiyama, the increase in the number of sexually oriented materials in the country from 1972 to 1995³¹⁵ did not have a significant impact on the rise in sexual crime rates. On the contrary, they found that there was a sharp reduction in sexual crimes during this period. This leads them to conclude that the availability of pornography does not necessarily have a meaningful connection with the increase in sexual offences.³¹⁶ However, they also note that the uniqueness of Japanese society and the educational system play a major role in the reduction of sexual crimes.³¹⁷

As examined above, most studies that are based on the analyses of statistical data of reported sexual crimes support the conclusion that there is no obvious connection between the availability of pornography and the increase in sexual crimes in several countries. However, this conclusion is subject to main criticisms that many sexual crimes are not reported, and that the uniqueness of a particular society keeps sexual crimes low in general. Therefore, it could be suggested that the analyses of statistics of reported sexual crimes may not be able to give a definite conclusion with regard to whether or not pornography sexual crimes and rape.

Apart from the analyses of the statistics of reported sexual crimes, there have been several studies that examine the relationship between pornography and sexual crime and rape from the perspectives of psychology and behavioural science. In the US, the Commission of the 1970 US Report sponsored a number of original empirical studies and experiments on the

³¹¹ Ibid., p.94.

³¹² Ibid., p.95.

³¹³ Ibid.

³¹⁴ Diamond, M., and Uchiyama, A., 'Pornography, Rape and Sex Crimes in Japan', (1991), *International Journal of Law and Psychiatry*, 22(1), pp.1-22, p.14.

³¹⁵ Ibid., p.5.

³¹⁶ Ibid., pp.18-19.

³¹⁷ Ibid., p.18.

psychological effects of pornography (both violent and non-violent types) on viewers' attitudes.³¹⁸ Based on the findings of those studies, the 1970 Report concludes that:

'[r]esearch to date thus provides no substantial basis for the belief that erotic materials constitute a primary or significant cause for the development of character deficits or that they operate as a significant determinative factor in causing crime and delinquency.'³¹⁹

In the UK, in the 1990 study of the Home Office, Howitt and Cumberbatch put forward the view that there is no strong evidence suggesting that pornography (encompassing both violent and non-violent types) is a cause of sexual deviant behaviour in offenders.³²⁰ Actually, very little is known about possible psychological and inhibiting impacts of pornography on offenders because most of the research has not been conducted in a way that can show clear evidence of the effects.³²¹ Likewise, the negative effects on the attitudes of those who committed sexual crimes towards women have not been well researched owing to 'the lack of intensive investigations of representative samples of men and sexual offenders'.³²²

Both the 1970 US report and the 1990 study of the Home Office draw a similar conclusion: the hypothesis that pornography may have negative psychological effects on viewers' attitudes and behaviour remains inconclusive.

In contrast to the above findings, Diana Russell argues that pornography is one of the major influential factors of rape.³²³ Based on David Finkelhor's multi-causal theory of child sexual abuse, she has formulated her own theoretical model to explain the role pornography plays in encouraging men to rape,³²⁴ arguing that, first of all, pornography stimulates desires to rape by eroticising rape. It sexualises male dominance and female submission, and as a consequence creates rape fantasies in certain male viewers' minds.³²⁵ Secondly, it weakens male internal inhibitions against acting out rape desires by persuading men to view women as sexual objects; to misunderstand that women enjoy being raped (rape myth); to condone the use of violence in their interpersonal relationships; to regard rape as a trivial matter; to

³¹⁸ For the list of the studies, see Report of the Commission on Obscenity and Pornography, *supra*, p. 153.

³¹⁹ *Ibid.*, p.243.

³²⁰ Howitt, D., and Cumberbatch, G., *supra*, p.94.

³²¹ *Ibid.*

³²² *Ibid.*, p.95.

³²³ Other main causal factors are biological factors, childhood experience of sexual abuse, male sex-role socialization, exposure to mass media that encourage rape. See Russell, D., *Dangerous Relationships: Pornography, Misogyny and Rape*, (SAGE Publications, Thousand Oaks, 1998), pp. 118, 119-120.

³²⁴ *Ibid.* p.119

³²⁵ *Ibid.*, pp.124-132.

have hostile attitudes towards females; and finally to be desensitised to rape.³²⁶ She adds that viewing pornography may cause potential rapists to feel less afraid of social sanctions and of disapproval by their peers.³²⁷ She backs up her argument with a number of psycho-sociological experiment reports, one of which is Neil Malamuth's experimental study on the likelihood of males to create sexual rape fantasies after viewing rape depictions.³²⁸ His study shows that those who are exposed to rape material create more violent sexual fantasies than those who watch the material showing mutually consenting sex, 'irrespective of whether they had been classified as force-oriented or non-forced oriented'.³²⁹

In the US, the final report of the Attorney General's Commission on Pornography 1986 (the Meese Report) seems to support Russell's claim, and apparently contradicts the conclusion of the 1970 Report. The Meese Report concludes that exposure to violent pornography has played a role in the likelihood of sexual aggression against women; and this appears to be the case for non-violent pornography that depicts degradation, domination-subordination or humiliation, despite less extensive effect than the former.³³⁰ However, non-violent and non-degrading pornography appears to bear no causal relationship to sexual violence in viewers.³³¹ It should be noted that, as the Meese Commission did not fund any original empirical study like the Commission of the 1970 Report, its conclusion derives mainly from a review of the existing studies on the relationship between exposure to pornography and viewers' sexual attitudes and behaviour.³³² However, the Meese Report's conclusion on this issue is subject to certain criticisms. First, many of the experimental studies from which the Meese Commission³³³ drew its conclusion used R-rated 'slasher' films,³³⁴ not X-rated pornographic films, as sexual stimuli.³³⁵ Second, its conclusions are based on overgeneralisations from psychological studies that were mainly laboratory-based. In other

³²⁶ Ibid., pp.132-140.

³²⁷ Ibid., pp.140-142.

³²⁸ Malamuth, N., 'Rape Fantasies as a Function of Exposure to Violent Sexual Stimuli' (1981) *Archives of Sexual Behavior*, 10, pp.33-47, 33.

³²⁹ Ibid.; see also Russell, D., supra, p.124.

³³⁰ US Department of Justice, *The Final Report of the Attorney General's Commission on Pornography*, (US Government Printing Office, Washington D.C., 1986), pp.232-235.

³³¹ Ibid., pp.235-247.

³³² Wilcox, B. L., 'Pornography, Social Science and Politics: When Research and Ideology Collide', (1987) *American Psychologist*, 42(10), pp.941-943, 941.

³³³ The majority of the commissioners were either anti-pornography campaigners or those who had negative attitudes towards pornography. This may have a negative effect on the impartiality of the findings. See Baron, L., 'Pornography and Its Discontents: Immoral, Inviolable or Inconclusive?' (1987) *Society*, 24(5), pp.6-12, 6-7.

³³⁴ Slasher movie is a genre of horror film that typically shows victims murdered in an explicit violent manner by psychopathic killers. See generally Weaver, J.B., 'Are "Slasher" Horror Films Sexually Violent? A Content Analysis', (1991) *Journal of Broadcasting and Electronic Media*, 35(3), pp.385-392.

³³⁵ Linz, D., Donnerstein, E., and Penrod, S., 'The Findings and Recommendations of the Attorney General's Commission on Pornography: Do the Psychological "Facts" Fit the Political Fury?', (1987) *American Psychologist*, 42(10), pp.946-953, 950.

words, it failed to exercise sufficient caution that findings from experiments in a laboratory (under a controlled environment) may not be able to explain sexual violence outside the laboratory.³³⁶

In the UK, in 2007, the UK government commissioned three academics, Catherine Itzin, Ann Taket and Liz Kelly, to conduct a study entitled *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment* (REA) to support its proposal to criminalise the possession of so-called 'extreme pornography'.³³⁷ Itzin *et al.* did not conduct any new empirical study, but merely reviewed the findings of existing studies concerning the relationship between pornography and its detrimental effects. Based on their review, they contend that pornography (violent types in particular) has several adversely psychological, attitudinal and behavioural effects on male consumers.³³⁸ Pornography encourages men to 'believe that women enjoy or desire rape; and [to have a] lack of empathy with rape victims.'³³⁹ In terms of attitudinal effects, those who access pornography may accept the rape myth; have pro-rape attitudes; and are prone to use force or rape.³⁴⁰ Regarding behavioural effects, the study indicates that pornography viewers become more sexually aggressive (according to the results from the experiments in the laboratory) and may commit rape or sexual violent offences in their real lives.³⁴¹ However, they also note that 'men who are predisposed to aggression ... are more susceptible to the influence of extreme pornographic material'.³⁴² Nonetheless, the REA is subject to criticisms. First, as the authors of the REA are well-known for their anti-pornography attitudes, the impartiality of the REA is sceptical.³⁴³ Second, since Itzin *et al.* depend mainly on reviewing the findings of existing experimental studies, it could be argued that their studies provide no new substantial evidence to prove the causal connection between pornography and sexual aggression and sexual crime. Furthermore, as laboratory-based experiments are conducted in artificial surroundings and under controlled conditions,³⁴⁴ it could be contended that the results deriving from the laboratory environments may not reflect an accurate picture of how pornography consumers behave in

³³⁶ Ibid.

³³⁷ Itzin, C., Taket, A., and Kelly, L., *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment (REA)*, (Minister of Justice, Department of Health, 2007), p.11, <http://www.justice.gov.uk/publications/research280907.htm>, visited 12 October 2009, for the methodology of the review see pp.1-7. For a discussion about the extreme pornography law, see Section 5.2.4.

³³⁸ Ibid., p.26.

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² Ibid., p.iii.

³⁴³ Attwood, F., and Smith, C., 'Extreme Concern: Regulating "Dangerous Pictures" in the United Kingdom', (2010) *Journal of Law and Society*, 37(1), pp.171-188, 174-175.

³⁴⁴ Rodgeron, G., and Wilson, E. (eds), *supra*, p.50.

the real world.³⁴⁵ Another point is that, despite being able to explain how pornography urges the commission of rape, the advocates of the 'pornography-causes-rape' hypothesis seem to be silent when facing with the question of why most male pornography viewers do not act out their rape fantasies.³⁴⁶

As discussed above, there are mixed viewpoints about whether pornography has a direct link to rape. Both advocates and opponents of the 'pornography-causes-rape' hypothesis have attempted to use statistical data and the findings from psychological experiments to back up their views. Generally, researchers appear to come to conclusions that most closely conform to hypotheses already held in their minds. Nonetheless, all of them have some flaws and are subject to criticisms in one way or another. Considering this, it could be contended that the premise that viewing pornography can lead to sexually aggressive behaviour and eventually the commission of rape remains highly controversial and inconclusive. Although the most recent study in this area may suggest that pornography does not cause someone to rape or commit other sexual offences, it is always possible that future studies may derive with new evidence to rebut this conclusion. Therefore, it could be argued at this point that, as the claim that pornography causes sexual crimes and rape is still inconclusive, it is not strong enough to justify the restriction or prohibition of pornographic expression.

3.5.5 Pornography and Harm to Women

In the ongoing debate over whether pornography should be restricted or prohibited, it is undisputable that the argument from anti-pornography feminism plays a crucial role in developing an alternative approach to explaining the damaging effects of pornography. Unlike the notions of moral corruption and offensiveness that regard pornography as detrimental to everyone and society as a whole, the anti-pornography feminist position principally bases its argument on harm to a specific affected group, namely women. 'Harm' in this sense means: (1) physical harm to individuals who participate in the production of pornography (pornographic performers); and (2) harm to women's position in society (the ideas of male supremacy and female subordination).

3.5.5.1 Direct Bodily Harm to Pornographic Performers

One of the frequently cited arguments against pornography is proposed by Catherine MacKinnon – a well-known anti-pornography activist. She claims that pornography is a production of sexual violence and abuse against women by which pornographic performers,

³⁴⁵ Ibid. See also Howitt, D., and Cumberbatch, G., supra, pp.84, 94.

³⁴⁶ Rodgeron, G., and Wilson, E. supra, p.50.

actresses in particular, 'are gang raped ... hurt, penetrated, tied and gagged, undressed and genitally spread' and even killed merely for satisfying men when they masturbate.³⁴⁷ It can be said that MacKinnon's argument against pornography in this regard is principally based on direct bodily harm to pornographic performers.³⁴⁸

MacKinnon's harm-based argument accords with the UK government's opinion. In a document entitled *Consultation: On Possession of Extreme Pornographic Material* (the *Consultation Paper*), based on the observations of the UK police, the UK government states that it believes that female performers are exploited, mistreated and physically harmed in the production of pornography, especially the extreme types that show sexual violence.³⁴⁹ The examples given in the *Consultation Paper* include images of women being tied to various equipment; being stabbed with knives and hooks; and hanging on meat hooks with their heads covered by plastic bags.³⁵⁰ Nonetheless, no first-hand evidence, such as the testimonies of pornographic performers who were actually injured as a result of dangerous activities during the filming of pornography, is mentioned in the *Consultation Paper*.

Although it is very difficult to ascertain in each case whether individual pornographic actresses are actually injured during production, some evidence suggests that the abuse of pornographic performers does occur in the pornography industry. For instance, the documentary entitled *Hard Core* tells a story of Felicity, a British woman who travelled to Los Angeles to pursue a career as a pornographic performer.³⁵¹ The documentary reveals that, during the filming of an oral sex scene, the pornographic actor (who was also the director of the pornographic film) deliberately choked her by forcing his penis down her throat without notifying her in advance. This incident made her terrified and she ran off the set. The pornographic actor attempted to persuade her to continue by showing his sympathy at first, and then verbally abusing and threatening her. However, upon the involvement of the documentary crew, she eventually managed to leave the studio. Another interesting piece of evidence is the testimony of Shelley Lubben – a former pornographic actress – given to California State Assembly.³⁵² She claimed that some pornographic actresses were

³⁴⁷ MacKinnon, C. A., *supra*, p.15-17.

³⁴⁸ MacKinnon also argues against pornography on the grounds that pornography damages and degrades the images of women in general. This issue is discussed in Section 3.5.5.2.

³⁴⁹ See Home Office and Scottish Executive, *Consultation: On the Possession of Extreme Pornographic Material*, <http://www.scotland.gov.uk/Resource/Doc/57346/0017059.pdf>, visited 3rd march 2012., para.5, 5.

³⁵⁰ *Ibid.*, para.27, 9.

³⁵¹ Walker, S. (director) and Spector J. (researcher), *Hard Core*, Channel 4 (UK), 7th April 2001.

³⁵² Lubben, S., *Ex Porn Star Shelly Testifies at California State Capitol*, <http://www.shelleylubben.com/shelleys-videos/ex-porn-star-shelley-testifies-california-state-capitol/>; See also Lubben, S., *Shocking Footage of Women Abused on the Porn Set*,

compelled to perform sexual acts to which they had not agreed in the contracts; and in certain cases were beaten or slapped during the filming. In addition, *Mail Online (Daily Mail)* reported on June 22, 2011 that some pornographic performers were seriously injured by hot wax during the filming of sadomasochistic pornography.³⁵³ Due to a lack of academic research on first-person experiences of pornographic performers who participate in pornography that involves actual violent sexual acts, it is difficult to make a general claim that real sexual violence is a common or pervasive practice in the pornography industry, and that most pornographic performers are at risk of receiving serious physical injuries as a result of sexual violence employed during the production. However, given the anecdotal evidence mentioned above,³⁵⁴ it could be argued that there can be some pornographic performers have to perform hazardous sexual practices (sometimes against their will), and receive serious physical injury as a consequence.³⁵⁵

Another relevant issue concerns the consent of pornographic performers to engage in violent sexual practices. Without doubt, it is unlawful to coerce anyone into the production of pornography;³⁵⁶ and the state has a role to play in preventing women from being victims of coercion.³⁵⁷ However, if sexual acts are consensual, the question to be asked is whether performers can consent to sexual acts that may cause serious bodily injury or even death – e.g. sexual activities involving sharp objects, heat (hot wax or fire) or electricity; the infliction of bleeding wounds; or erotic asphyxiation. The House of Lords's ruling in *R v. Brown, Laskey and Jaggard*³⁵⁸ makes it clear that a person cannot give consent to an act that causes 'grievous bodily harm',³⁵⁹ which refers to 'really serious bodily harm and wounding that involves the breaking of the whole skin'; or 'actual bodily harm',³⁶⁰ which means 'any hurt or injury that is calculated to interfere with, or does interfere with, the health or comfort of the subject'.³⁶¹ Some examples include the insertion of a fish hook through the penis,

<http://www.shelleylubben.com/shelleys-videos/shocking-footage-women-abused-porn-set>, visited 20th March 2012

³⁵³ *Mail Online*, 22nd June 2011, <http://www.dailymail.co.uk/news/article-2006840/Porn-producers-face-years-jail-making-S-M-films-violent-actors-begged-stop.html>, visited 20th March 2012

³⁵⁴ Further academic investigation (which is beyond the scope of this thesis) is still required as to provide further evidence to strengthen this argument.

³⁵⁵ See also Boyle, K., *Submission to the Equal Opportunities Committee of the Scottish Parliament on the Impact of Pornography* (2007), [http://ics-
www.leeds.ac.uk/papers/vp01.cfm?outfit=ks&requesttimeout=500&folder=42&paper=119](http://ics-www.leeds.ac.uk/papers/vp01.cfm?outfit=ks&requesttimeout=500&folder=42&paper=119), visited 7th April 2012

³⁵⁶ Strossen, N., *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights*, (New York University Press, New York, 2000), p.179

³⁵⁷ Sunstein, C., *Democracy and the Problem of Free Speech*, (The Free Press, New York, 1995), p.216

³⁵⁸ (1994) 1 A.C. 212

³⁵⁹ Section 20 of the Offences Against the Person Act 1861

³⁶⁰ Section 47 of the Offences Against the Person Act 1861

³⁶¹ (1994) 1 A.C. 212, 276.

burning the penis with hot wax or burning a mark on the skin (branding).³⁶² Although pornographic performers consent to be involved in certain sexual activities that may cause serious bodily injury, such consent is deemed invalid. Such harmful sexual acts relate to public health; therefore, the state can interfere with such sexual acts to ensure the safety and well-being of people.³⁶³

As already pointed out in Section 3.2.2.2, all types of pornography are a form of expression that can convey attitudinal ideas with regard to sex, sexuality and gender relations. This could be the case even for violent pornography as it communicates the idea that sexual excitement may derive from pain, torture and violence. However, violent pornography may be produced at the expense of pornographic performers' health, safety and – in an extreme case – their lives. Pornographic performers may suffer from, for example, burns or bleeding wounds as a result of sharp or hot objects used in their sexual activities. Erotic asphyxiation (i.e. strangulation by a rope, a plastic bag or other materials), erotic electrocution (the use of electricity to both sexually stimulate and inflict pain to a sexual partner), or chocking by forcing a phallus down a person's throat³⁶⁴ could be life-threatening and even kill, especially when there are not sufficient safety measures in place to prevent accidents that may occur from such risky acts.

The 'harm principle' justifies the state to prohibit 'real' violent pornography. Mill argues that '... the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'³⁶⁵ Feinberg calls this notion 'the harm principle', and explains further that 'the need to prevent harm ... to parties other than the actor is always an appropriate reason for ... legitimate invasion of liberty'.³⁶⁶ As far as pornography is concerned, it could be argued that any pornography that involves the use of real violence in the production could cause serious harm to pornographic performers' physical health and bodily integrity.³⁶⁷ According to Feinberg, the term 'harm' has different meanings. First, in the broadest sense, 'harm' refers to damage to any kind of tangible thing; and in the second meaning, it refers to 'one conduct violates the other's right'.³⁶⁸ 'Bodily harm' falls into both categories, as it can be seen as damage done to the body (i.e. a tangible thing) and a consequence of the violations of the right to bodily

³⁶² Ibid., pp.236, 238, 246.

³⁶³ See also *Laskey, Jaggard and Brown v. UK* (1997), No.21627/93; 21826/93; 21974/93, 1997-I

³⁶⁴ See generally Cooke, C.T., Cadden, G.A., and Margolius, K.A., 'Autoerotic Deaths : Four Cases' (1994) *Pathology : The Journal of Royal College of Pathologists of Australia* , 26(3), pp.276-280.

³⁶⁵ Mill, J. S., supra, p.80.

³⁶⁶ Feinberg, J., *The Moral Limits of the Criminal Law: Volume I: Harm to Others*, (Oxford University Press, Oxford, 1984), p.11.

³⁶⁷ Ibid., p.106.

³⁶⁸ Ibid., pp.32,34

integrity and the right to be free from torture and cruel treatment.³⁶⁹ Therefore, under ‘the harm principle’, although violent pornography can be regarded as expression, the state has the legitimacy to forbid this type of expression.³⁷⁰

Furthermore, no one can reasonably argue against the fact that human life is of paramount importance. Bearing this in mind, it could be contended that the value of human life (health and well-being) outweighs the right to freedom of expression. Thus, pornographic materials that cause serious physical harm to pornography performers as scripts require, deserve no protection under the freedom of expression principle.³⁷¹

These views are in line with the recommendation of the Williams Report that suggests the law forbid pictorial pornography that involves the infliction of serious physical harm on the participants.³⁷²

However, the above argument does not mean to support the complete prohibition of all BDSM (Bondage, Domination, Sadism and Masochism) pornographic materials. People who practice BDSM are arguably entitled to the right to freedom of expression, even though their BDSM activities may involve certain forms and degrees of violence (because violence is an inherent element of BDSM sexual activities).³⁷³ However, as suggested above, the BDSM activities shown in pornographic materials should not go beyond ‘grievous bodily harm’ or ‘actual bodily harm’, to which – according to the English law – participants cannot consent.³⁷⁴ Furthermore, such BDSM activities portrayed in pornographic materials must be consensual and carried out with special care and safety.³⁷⁵ Given this, pornography that depicts BDSM activities that meet these requirements and which do not lead to serious physical harm or a life-threat should be allowed. This notion is in line with the Crown

³⁶⁹ See Art. 5 of the UDHR, Art. 7 of the ICCPR and Art. 3 of the ECHR

³⁷⁰ See also Hornle, J., ‘Countering the Dangers of Online Pornography : Shrewd Regulating of Lewd Content, (2011) European Journal of Law and Technology, 2(1), <http://ejlt.org//article/view/55>, visited 24th January 2013, pp.1-26, 9

³⁷¹ Easton, S., ‘Criminalising the Possession of Extreme Pornography: Swords or Shield?’, (2011), *Journal of Criminal Law*, 75(5), pp.391-413, 398; Nair, A., ‘Real Porn and Pseudo Porn: The Regulatory Road’, (2010), *International Review of Law, Computers and Technology*, 24(3), pp.223-232, 229.

³⁷² Report of the Committee on Obscenity and Film Censorship, *supra*, para.13.4, p.161; The extreme pornography law (Sections 63-67 of the Criminal Justice and Immigration Act 2008) also aims to protect the safety and health of pornographic performers. For discussion see Section 5.2.4.4.

³⁷³ Bamforth, M., ‘Sado-Masochism and Consent’, (1994), *Criminal Law Review*, 1994(Sep), pp.661-664, 663; see also Langdrige, D., and Baker, M. (eds), *Safe, Sane and Consensual : Contemporary Perspectives Sadomasochism*, (Palgrave Macmillan, Basingstoke, 2007).

³⁷⁴ According to guidance from the Crown Prosecution Service (CPS), in the UK pornography that depicts mind bondage (without the use of gag tools), and sadomasochism activities that do not go beyond trifling and transient infliction of injury are allowed. See Section 5.2.2.

³⁷⁵ Hanna, C., ‘Sex is not a Sport: Consent and Violence in Criminal Law’, (2001), *Boston College Law Review*, 42(2), pp.239-290, 288.

Prosecution Service (CPS)'s guidance on prosecution under the Obscene Publications Act 1959/1964, which permits mild forms of BDSM activity such as mild bondage or BDSM acts that do not cause serious bodily harm.³⁷⁶

Another point to note here centres on MacKinnon's claim that certain women were murdered in front of cameras for the sake of producing pornography.³⁷⁷ The films featuring extremely violent scenes of women being tortured to actual death (to which MacKinnon refers) are normally known as 'snuff movies'.³⁷⁸ However, this type of pornography is believed to be an urban legend without any credible evidence of its existence.³⁷⁹ According to *Dark Side of Porn: Does Snuff Exist?*, a documentary from Channel 4, it is far from clear whether the pornography industry has gone as far as having its performers killed on camera merely for the sake of filming.³⁸⁰ However, the documentary interestingly notes that, given the availability of cheap video recorders and the Internet (as a distribution channel), the existence of real snuff films is not entirely impossible, although this kind of film has not yet been discovered by authorities and there have not been reports about it in the media thus far.³⁸¹ If snuff films do exist, it is perfectly reasonable to prohibit them on the grounds of physical harm because the participants in the production are tortured and killed. Furthermore, because the production of 'real' snuff films constitutes murder, all people involved in it (the producer, the director and film crew) would be subject to prosecution for murder.³⁸²

Bestial pornography may cause physical harm to pornographic performers. Sexual intercourse with real animals (especially mammals) exposes pornographic performers to the risk of infection from animal-to-human diseases. Brucellosis,³⁸³ rabies³⁸⁴ or toxocariasis (roundworm parasites)³⁸⁵ are some examples of the diseases that can be transmitted from animals to pornographic performers through direct physical contact with animals' semen, vaginal fluids, urine, saliva or faeces. Furthermore, male sexual organs of larger animals (e.g. horses and boars) may cause injuries to human vaginas and rectums. On 19th October

³⁷⁶ See Section 5.2.2.

³⁷⁷ MacKinnon, C. A., *supra*, p.15-17.

³⁷⁸ Rodgeron, G., and Wilson, E., *Pornography and Feminism: The Case Against Censorship*, (Lawrence & Wischart, London, 1991), p. 55.

³⁷⁹ *Ibid.*

³⁸⁰ Barry, E. (director) and Donnelly, A. (researcher), *Dark Side of Porn: Does Snuff Exist?*, Channel 4 (UK), 18th April 2006.

³⁸¹ *Ibid.*

³⁸² Rodgeron, G., and Wilson, E., *supra*, p.55.

³⁸³ Corbel, M. J., *Brucellosis in Human and Animals*, (World Health Organisation Press, Geneva, 2006), p. 15.

³⁸⁴ See generally *World Health Organisation*, <http://www.who.int/mediacentre/factsheets/fs099/en/>, visited 18th May 2012.

³⁸⁵ See generally *National Health Service*, <http://www.nhs.uk/Pages/HomePage.aspx>, visited 18th May 2012.

2005, *The Seattle Times* reported that a Seattle man died of 'acute peritonitis due to perforation of the colon' as a result of anal penetration by a horse.³⁸⁶ Another case is reported in a medical journal *INJURY* (2002). In this case, a 62-year-old farmer in Bulgaria suffered from a torn rectum as a result of being anally penetrated by a male pig.³⁸⁷ Lastly, animal behaviour is unpredictable. Even professional animal trainers may sometimes be attacked by their trained animals.³⁸⁸ At a pornographic film set, animal behaviour is even more difficult to predict. Animals may be nervous or under stress due to being exposed to an unfamiliar environment and approached by unfamiliar persons – i.e. pornographic performers and film crews. This could trigger a defensive instinct within the animals, making them bite or kick pornographic performers during bestiality intercourse.

3.5.5.2 Pornography as the Propaganda of Male Supremacy and Female Subordination (Harm to Women's Position in Society)

Another main feminist argument against pornography can be seen in the 1983 *Model Anti-Pornography Law*, drafted by two leading anti-pornography feminists, Catherine MacKinnon and Andrea Dworkin. It proposes that pornography violates women's civil rights, and the women who fall victim to such violations should be entitled to seek damages in civil courts. This model ordinance was enacted by Indianapolis as the Anti-pornography Civil Rights Ordinance in the following year.³⁸⁹ In this document, pornography is defined as 'the graphic sexually explicit subordination of women through pictures and/or words'.³⁹⁰ Pornography aligns women with a prostitute-like image, lewdness, promiscuity, humiliation and sexual violence. Not surprisingly, scenes of women obsessing about immoral sex; enjoying sexual intercourse with multiple partners or group sex; being undressed in public, treated as pets are typically featured as main themes of some pornographic products. This type of depiction arguably leads anti-pornography campaigners, such as Dworkin, to contend that pornography degrades all women by making them look like 'low class whores' whose existence is to serve men sexually.³⁹¹ Furthermore, they go on to argue that the value

³⁸⁶ *The Seattle Times*, 19th October 2005,

http://seattletimes.nwsourc.com/html/localnews/2002569751_horsesex19m.html, visited 18th May 2012.

³⁸⁷ Kirov, G. K., Losanoff, J. E., and Kjossev, K. T., 'Zoophilia: A Rare Cause of Traumatic Injury to the Rectum', (2002) *INJURY International Journal of the Care of the Injured*, 33(4), pp.367-368.

³⁸⁸ D. Wayne Lukas, a professional horse trainer, was struck by his trained horse and received injuries to his head. See *Bloomberg*, 6th June 2012, <http://www.bloomberg.com/news/2012-06-06/hall-of-fame-horse-trainer-lukas-kicked-in-head-needs-stitches.html>, visited 25th August 2012

³⁸⁹ See Title 17, Chapter 139 of the Minneapolis Code of Ordinances relating to Civil Rights. See generally Strossen, N., *supra*, p.73-79.

³⁹⁰ Dworkin, A., 'Against the Male Flood: Censorship, Pornography and Equality', (1985) *Harvard Women's Law Journal (Harvard Journal of Law and Gender)*, 8, pp.1-29, p.25. See also Strossen, N., *supra*, p.19.

³⁹¹ Dworkin, A., *supra*, p.200.

of women is reduced to mere sexual objects,³⁹² vaginas,³⁹³ or even sex itself.³⁹⁴ The degradation and subordination of women portrayed in pornography may encourage men to treat women in the same way that they see in pornography. In this way, the depictions of women in a degrading manner in pornography is claimed to harm the position of women in society.

MacKinnon and Dworkin published testimonies of women who claimed that pornography was the central cause of the negative change in attitudes of their boyfriends, husbands or male friends towards them, making them become sexual objects to these men.³⁹⁵ In one case, a woman testified that, after viewing pornography, her boyfriend came to visit her merely for sex. After having sex, he left her and rushed to a party. She complained that she was used as a 'sex doll', and blamed pornography as a cause of her boyfriend's cold and heartless behaviour.³⁹⁶ In another case, a young woman claimed that her ex-boyfriend forced her to have sex. He attempted to convince her that what he had done to her was normal because it was shown in pornography.³⁹⁷

All of these claims boil down to one conclusion: pornography is allegedly the representation of the male supremacist ideology and women are simply objects for male sexual gratification. In other words, it is a reflection of gender inequality in society in which men assert their 'male power'³⁹⁸ over women through the debasement, subordination and objectification of women.³⁹⁹

³⁹² Leidholdt, D., 'When Women Defend Pornography', in Leidholdt, D. and Raymond J. (eds), *The Sexual Liberals and the Attack on Feminism*, (Pegamon, New York, 1990), pp.125-131, 131. For more discussion about the sexual objectification of women by pornography see Shibata, T., 'Pornography, Sexual Objectification and Sexual Violence in Japan and in the World', Working Paper No.27, Center of East and South East Asian Studies, Lund University, (2008), http://www.ace.lu.se/images/Syd_och_sydstastienstudier/working_papers/shibata_final.pdf, visited 25th July 2012.

³⁹³ Dworkin, A., *supra*, p.201.

³⁹⁴ Kappeler, S., *supra*, p.93.

³⁹⁵ MacKinnon C., and Dworkin, A., (eds), *In Harm's Way: The Pornography Civil Rights Hearings*, (Harvard University Press, Cambridge Massachusetts, 1997).

³⁹⁶ *Ibid.*, pp.106-107.

³⁹⁷ *Ibid.*, pp.107-108.

³⁹⁸ See generally Dworkin, A., *supra*, pp.13-24.

³⁹⁹ See, for example, Dworkin, A., *supra*; Kappeler, S., *supra*, pp.88-100; Leidholdt, D., *supra*, pp. 125-131; MacKinnon, C. A., 'Not a Moral Issue', (1984), *Yale Law & Policy Review*, 2(2), pp.321-345; Russo, A., 'Feminists Confront Pornography Subordinating Practices: Politic and Strategies for Change', in Dines, G., Jensen, R., and Russo, A. (eds), *Pornography: The Production and Consumption of Inequality*, (Routledge, New York, 1998), pp.9-35; Stoltenberg, J., 'Pornography, Homophobia and Male Supremacy', in Itzin, C. (ed.), *supra*, pp.145-165, 145-154; LaBelle, B. 'The Propaganda of Misogyny' in Lederer, L. (ed.), *Take Back the Night : Women on Pornography*, (William Morrow and Company, New York, 1980), pp.174-178.

Interestingly, although anti-pornography feminist campaigners have relentlessly refused to treat pornography as expression, their argument against pornography on the grounds that it degrades women suggests that they implicitly concede that pornography conveys some messages, i.e. the ideas of male domination⁴⁰⁰ and female subordination.⁴⁰¹ The call from some anti-pornography feminists to prohibit pornography on this basis could be interpreted as some anti-pornography feminists attempting to use their objection to the idea of male supremacy as a pretext for suppressing the opinion of pornographers who advocate male supremacy. In the broader sense of political expression, male supremacy and women's subordination can be arguably regarded as 'informal political expression' since they are ideas/opinions relating to a social issue of gender relations. It would be true to suggest that some people find male supremacy and female subordination objectionable and have strong feelings against them. However, under the principle of freedom of expression, all expressions – regardless of whether they are deemed good or bad, true or false, acceptable or objectionable – are allowed to be expressed and discussed freely. Thus, people (including anti-pornography feminists) and even the state do not have the legitimacy to suppress the ideas/opinions merely on the grounds that they oppose such ideas/opinions. Therefore, it could be argued that the attempt to prohibit pornography on the grounds of pornography propagating male supremacy and women's subordination (which may ultimately threaten the position of women in society) is inconsistent with the democratic principle of freedom of expression.⁴⁰² In the 1985 case of *American Booksellers Association v. Hudnut*,⁴⁰³ the US Court of Appeals for the Seventh Circuit ruled that even though pornography portrayed women in a demeaning manner that endorsed male domination, it '[demonstrated] the power of pornography as speech'.⁴⁰⁴ Under the Ordinance, only speech that expresses the idea of women's subordination is prohibited, whilst speech that imparted the idea of women enjoying gender equality is lawful.⁴⁰⁵ In the regard, the Ordinance allows only people with approved views of women's gender equality to propagate their ideas, but, in effect, prohibits people who have opposing opinions from speaking out.⁴⁰⁶ The US Court of Appeals, went further holding that, as the Ordinance attempted to limit speech on the basis of its ideas or messages (content-based restriction),⁴⁰⁷ it was unconstitutional because the First Amendment did not permit the government to restrict speech because of the ideas or

⁴⁰⁰ Gourgey, N., supra, p.92.

⁴⁰¹ Strossen, N., supra, p.60.

⁴⁰² Strossen, N., supra, p.60. See also Section 3.3.2.

⁴⁰³ (1985) 771 F.2d 323 (7th Cir.) affirmed in (1986) 475 US 1001.

⁴⁰⁴ Ibid.,329.

⁴⁰⁵ Ibid.,328.

⁴⁰⁶ Sunstein, C., supra, p.222.

⁴⁰⁷ See Section 3.4.

messages it conveyed.⁴⁰⁸ The ruling in *Hudnut* underlines an important principle that the protection of free speech under the First Amendment covers all types of expression, regardless of whether the expression in question communicates approving or disapproving ideas.

Furthermore, it could be argued that not all pornography shows women in passive and submissive roles in sexual relationships.⁴⁰⁹ There are many pornographic materials that depict the equality in sexual relationships between men and women. Moreover, certain types of pornography portray women in active or even dominating roles.⁴¹⁰ 'The female dominatrix and male slave are familiar characters in sexually explicit materials'.⁴¹¹ Therefore, as pornography is not always about female subordination, the argument that pornography threatens women's position seems to be a weak justification for the ban of pornography.

Lastly, the censorship of sexually explicit materials depicting women in a degrading manner does not mean that the sexual oppression of women will come to an end.⁴¹² To achieve this goal, as Mary Joe Frug argues, it is more important to change the way people think, talk and act about sex and gender relations.⁴¹³ Promoting the idea of gender equality could be a reasonable way of dealing with this problem, which could be achieved by persuading people (particularly men) to treat women with dignity. Furthermore, it is also important to make men understand that women in general do not enjoy ill-treatment and degrading sexual acts as shown in some pornographic materials.

To sum up, it could be said that the prohibition of pornography on the basis that pornography threatens the women's position in society through the depictions of women as sexual objects for men does not seem to comply with the regulation of pornography under the principle of freedom of expression.

3.5.5.3 Pro-Pornography Feminist Perspective

As discussed above, anti-pornography feminists – such as MacKinnon, Dworkin and Russell – regard pornography as harmful to women. However, some feminists have positive views

⁴⁰⁸ (1985) 771 F.2d 323 (7th Cir.), 328, quoting *Police Department of Chicago v. Mosley* (1972), 408 US 92.

⁴⁰⁹ Frug, M. J., 'The Politics of Postmodern Feminism' in Cornell, D. (ed.), *Feminist and Pornography*, (Oxford University Press, Oxford, 2000), pp.245-263, 261.

⁴¹⁰ *Ibid.*, p.262.

⁴¹¹ Strossen, N., *supra*, p.162.

⁴¹² Frug, M.J., *supra*, p.261.

⁴¹³ *Ibid.*

on pornography. Nadine Strossen is one of those who believe that pornography has beneficial effects. She claims that pornography serves several positive functions, one of which is to offer people a safe alternative to release their sexual desire.⁴¹⁴ The use of pornography may prevent some people from entering 'psychologically or physically risky sexual relations' leading to unwanted pregnancies or HIV contraction.⁴¹⁵ Secondly, because pornography communicates sexual ideas,⁴¹⁶ it can provide information concerning sexuality to many people, including those who lack the opportunity to have sexual contact with others (such as those who are very shy, unattractive, have mental or physical disabilities, or have emotional problems).⁴¹⁷ Furthermore, it may be the only source of sex-related information for gay men or lesbians who have few places to learn about their sexual orientation or who otherwise are afraid to reveal or express their sexual orientation.⁴¹⁸ Thirdly, for women, pornography, especially pornography that focuses on women's sexuality, 'enhances [their] ability to attain sexual pleasure on their own, as well as with men'.⁴¹⁹ It teaches women to gain autonomous sexual pleasure through masturbation.⁴²⁰ Furthermore, through the depictions of various sexual positions, they can learn what positions are most enjoyable or uncomfortable.⁴²¹ Moreover, it can be used to instruct their partners to sexually please them.⁴²² Finally, it improves relationships between husbands and wives by making their sexual and marital lives more exciting and interesting.⁴²³ The final point to be made is that some pornography producers such as Candida Royale⁴²⁴ or Anna Aerosmith (Anna Span)⁴²⁵ make pornography especially for women, a type of pornography that aims to satisfy female viewers.⁴²⁶ If all types of pornography are banned, women (pornographers) would lose the opportunity to express ideas/opinions regarding their sexuality (which may be different from men's sexuality). Additionally, female viewers would not be able to consume sexually-oriented materials that are produced in the way that they want to see and enjoy.

⁴¹⁴ Strossen, N., supra, p.164.

⁴¹⁵ Ibid.

⁴¹⁶ See Section 3.2.2

⁴¹⁷ Strossen, N., supra, p.164.

⁴¹⁸ Ibid, pp.167-170. See also Hollibaugh, A., 'Seducing Women into "a Lifestyle of Vaginal Fisting": Lesbian Sex Gets Virtually Dangerous' in Cornell, D. (ed.), *Feminist and Pornography*, (Oxford University Press, Oxford, 2000), pp.445-459, 449.

⁴¹⁹ Strossen, N., supra, p.166.

⁴²⁰ Palac, L., 'How Dirty Pictures Changed My Life', *Playboy* (May 1994), pp.80,88, referred in Strossen, N., supra, p.166 fn 14.

⁴²¹ Gardiner, J. K., 'What I Didn't Get to Say About Pornography, Masculinity, and Repression', in (1993), *New York Law School Review*, 38, pp.319-333, 331. See also Strossen, N., supra, p.165.

⁴²² Ibid.

⁴²³ Ibid., p.164.

⁴²⁴ *Femme Production*, <http://www.candidaroyalle.com/>, visited 15 October 2009.

⁴²⁵ *Anna Span's Diary*, <http://www.annaspansdiary.com/>; *The Guardian*, 22nd March 2011, <http://www.guardian.co.uk/lifeandstyle/2011/mar/22/porn-women>, visited 15 October 2011.

⁴²⁶ See generally Royale, C., 'Pornography in the USA', in Cornell, D. (ed.), *Feminist and Pornography*, (Oxford University Press, Oxford, 2000), pp.540-550.

3.6 The Concept of Legal and Illegal Types of Pornography

It is discussed in the previous section that there are six rationales for the restriction or proscription of pornographic expression, namely, the protection of public morality, the prevention of offensiveness, the protection of minors, pornography as a cause of rape, bodily harm to pornographic performers, and harm to women's position in society. However, it is argued that the protection of minors can be regarded as an important justification for restricting the availability and accessibility of pornography, keeping it out of the reach of minors; and that physical harm to those participating in the production of pornography can be seen as a strong justification for the prohibition of pornographic materials involving the use of real violence. In contrast, the restriction and prohibition of pornography on the grounds of public morality, offensiveness, and female subordination appears to be contradictory to the fundamental concept of freedom of expression. Furthermore, the pornography-causes-rape hypothesis is still inconclusive and highly controversial. Therefore, the latter four rationales do not seem to be strong justifications for the regulation of pornography within the conceptual framework of freedom of expression.

Given the above argument, this thesis proposes that pornographic expression be divided into two categories. The first category is 'legal' pornography, mainly referring to most types of sexually explicit material that do not cause bodily harm to pornographic performers. The legal type of pornography may have negative effects on minors, but not on adults. This type of pornography is referred to as 'harmful content' in this thesis. The second category is 'illegal' pornography which, in principle, refers to violent pornography involving the use of real violence that may cause serious bodily harm to pornographic performers (this includes bestial pornography). These two categories of pornography require different treatments. For legal pornography, the state should strike a proper balance between the protection of minors and the adults' right to freedom of expression. Therefore, the restrictive measures should be able to prevent minors from accessing pornography, whilst allowing adults to exercise the right to freedom of expression. For the illegal category of pornography, it is contended above that this type of pornography is not entitled to protection under the principle of freedom of expression. Thus, the complete prohibition of this type of pornography is arguably justifiable.

3.7 Modes of Internet Content Regulation

There are three main modes of Internet content regulation, namely legal or state regulation,

self-regulation and co-regulation.⁴²⁷ State regulation refers to the mode of regulation that the state uses by directly applying national regulations and law to Internet-related activities. The state authorities play a leading role in enforcing such laws to regulate content on the Internet.⁴²⁸ This mode of regulation is based on the concept that Internet-related activities 'should be subjected to regulation on the same basis and for the same reasons that other human activities are regulated'.⁴²⁹

Self-regulation and co-regulation can be classified under the non-state regulatory mode. These two modes of regulation give the Internet industry and individual Internet users a certain degree of control over access to content on the Internet on a voluntary basis, with no or very little involvement from the government.⁴³⁰

Self-regulation can be implemented at IT industry and individual Internet user levels. In the strict sense, IT industry self-regulation could refer to a voluntary private body established by the IT industry, which operates independently from the government with the objective to regulate Internet content through the implementation of codes of conduct.⁴³¹ However, as Monroe Price and Stefaan Verhulst – communication studies scholars – argue, industry self-regulation in this strict sense rarely exists because in reality industry always has a relationship with the state, at least to some extent.⁴³² Therefore, given the argument posed by Price and Verhulst, it could be suggested that, in most cases, industry self-regulation exists in the form of co-regulation, of which industry plays a leading role in the regulation in co-operation with the governmental agencies, rather than acting as the sole regulator. Self-regulation at Internet user level refers mainly to the use of a technological solution such as a filtering system⁴³³ by individual Internet users – especially parents – to control their children's access content on the Internet.⁴³⁴ (This issue is discussed in more detail in 5.4.2 with special reference to the UK.)

⁴²⁷ Kleinstaub, H. J., 'The Internet Between Regulation and Governance' in OSCE, *Self-Regulation, Co-Regulation, State Regulation*, <http://www.osce.org/fom/13844>, visited 25th November 2012.

⁴²⁸ Solum, L. B., 'Models of Internet Governance' in Bygrave, L. A., and Bing, J., (eds), *Internet Governance: Infrastructure and Institutions*, (Oxford University Press, Oxford, 2009), pp.48-91, 68.

⁴²⁹ Ibid.

⁴³⁰ See generally, Machill, M., and Waltermann, J., *Self-Regulation of Internet Content*, (ReproZentrum Rosengerger GmbH & Co., Bielefeld, 1999),

<https://www.cdt.org/speech/BertelsmannProposal.pdf>, visited 25th November 2012, pp.21-25.

⁴³¹ Price, M. E., and Verhulst, S. G., *Self-Regulation and the Internet*, (Kluwer Law International, the Hague, 2005), pp.14, 19; Bonnici, J. P. M., *Self-Regulation in Cyberspace*, (T. M. C. Asser Press, the Hague, 2008), pp.30.

⁴³² Price, M. E., and Verhulst, S. G., *supra*, p.3.

⁴³³ There are two types of filtering technologies. The first one is a filtering system that operates in conjunction with a labelling scheme set up by a third party labelling organisation, and the second one is a filtering system that operates independently without reference to a third party labelling scheme.

⁴³⁴ Price, M. E., and Verhulst, S. G., *supra*, pp.76,97-132.

As stated above, co-regulation refers to a hybrid mode of regulation whereby the state and the IT industry co-operate in regulating content on the Internet.⁴³⁵ The operation of the Internet Watch Foundation (IWF), a private regulatory body established by the IT industry in the UK and working in partnership with the UK police, in regulating content on the Internet is a prime example of the co-regulatory regime.⁴³⁶ (The operation of the IWF is discussed in more detail in Section 5.4.1.)

Under the concept of freedom of expression, people should have the freedom to hold, impart and receive ideas/opinions as much as possible, whereas the state should interfere with people's freedom of expression as little as possible (and only in circumstances in which state interference is necessary in a democratic society).⁴³⁷ Legal or state regulation relies mainly on state authorities enforcing relevant legislation to control content on the Internet. Because the state is the principal and perhaps autocratic regulator, this mode of regulation appears to be contrary to the key concept of freedom of expression. Thus, it does not appear to be a desirable regulatory approach, if the objective is to regulate Internet pornography under the concept of freedom of expression.

Co-regulation seems to be a plausible mode of regulation in terms of dealing with illegal types of pornography on the Internet. Within the co-regulatory framework, it is the private sector, the IT industry (particularly ISPs), that take a leading role in the regulation. State authorities play a supportive role. It should be noted that illegal content has to be dealt with by law enforcement authorities because a private organisation does not have the power to enforce laws. The private regulatory body acts as a centre to receive reports of allegedly illegal content from the public, and may investigate the reported websites in the first place. It may request ISPs to remove or block access to such websites, and liaise with law enforcement agencies (the police in particular) to take legal action against publishers of illegal content (provided that the wrongdoers are within the law's jurisdiction). In this regard, it could be said that co-regulation is compatible with the notion of freedom of expression in the way in which it limits the state's interference with expression on the Internet to a certain extent, especially when compared with legal or state regulation. However, because the private regulatory body performs a censoring function, it may also pose a threat to freedom of expression, particularly if its operation lacks transparency and

⁴³⁵ Bonnici, J. P. M., *supra*, p.15; Kleinstauber, H. J., *supra*, p.63; Marsden, C., *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace*, (Cambridge University Press, Cambridge, 2011), p.46.

⁴³⁶ <http://www.iwf.org.uk/>, visited 25th November 2012.

⁴³⁷ Art. 19 of the UDHR, Art. 19 of the ICCPR, Art. 10 of the ECHR. For the issue about necessity in a democratic society, see Section 4.2.2.4.

accountability to the public.⁴³⁸ Moreover, because it is a private organisation that has to determine the legality of the reported websites, its legitimacy to exercise such 'judicial power' (which is normally exercised by courts) is subject to challenge.⁴³⁹ (These issues are discussed in detail with reference to the IWF in Section 5.4.1.) Therefore, in order to avoid excessively or arbitrarily curtailing freedom of expression, the whole co-regulatory process, particularly that of the private regulatory body, must be transparent, publicly accountable and legitimate. (This issue is discussed in Chapter 7).

Self-regulation at Internet user level is arguably a feasible approach to regulate the legal category of pornography (harmful content) on the Internet. J.P. Mifsud Bonnici and C.N.J. De Vey Mestdagh – IT law academics – interestingly note that:

'The choice of what content is considered harmful is a personal choice of (adult) users based on personal beliefs and values not a criteria imposed by the state (as in the case of illegal content). This essential feature marks the task of regulation. The role of regulation of harmful content is to create the necessary conditions within which the user can freely exercise his or her right to decide what content to receive.'⁴⁴⁰

Furthermore, under this mode of regulation, the power to regulate accessible content on the Internet is in the hands of individual Internet users, allowing people to have freedom to pornographic expression without interference from the state or a third party private regulatory body. Willing Internet users can view legal pornographic materials on the Internet freely; and pornographers also have liberty to express their sexual views (especially content providers who comply with a content rating scheme).⁴⁴¹ Therefore, it could be argued that self-regulation at Internet user level is in line with the notion of freedom of expression to a great extent. Importantly, it can be seen as a regulatory tool for parents and teachers to prevent children from accessing pornography, whilst not imposing an excessive limitation on consenting adults' freedom of expression. Nonetheless, self-regulation at Internet user level is not free from criticisms in terms of its implications for freedom of expression. The reliability of the third party rating body is one of the major concerns. Furthermore, the current filtering technology appears to have a problem of over-blocking.⁴⁴²

⁴³⁸ Edwards, L., 'Pornography, Censorship and the Internet' in Edwards, L., and Waelde, C. (eds.), *Law and the Internet* (3rd ed.), (Hart Publishing, Oxford, 2009), pp.623-669, 655.

⁴³⁹ Akdeniz, Y., 'Internet Content Regulation: UK Government and the Control of Internet Content', (2001), *Computer Law & Security Report*, 17 (5), pp.303-317, 307.

⁴⁴⁰ Bonnici, J. P. M., and de Vey Mestdagh, C. N. J., 'Right Vision, Wrong Expectations: The European Union and Self-Regulation of Harmful Content', (2005), *Information & Communications Technology Law*, 14(2), pp.133-149, 146.

⁴⁴¹ Some filtering systems may filter out websites that do not have rating labels attached. See Section 5.4.2.

⁴⁴² Akdeniz, Y., 'To Block or Not to Block: European Approaches to Content Regulation, and Implications for Freedom of Expression', (2010), *Computer Law & Security Review*, 26, pp.260-272, 270; Richardson, C. R., Resnick, P. J., Hansen, D. L., Derry, H. A., and Rideout, V. J., 'Does Pornography-Blocking Software Block Access to Health Information on the Internet?', (2002),

Some standalone filtering products, i.e. filtering software that operates independently and does not refer to a rating scheme set by a third party rating body, is subject to criticism in terms of the transparency and neutrality of the criteria to block Internet content. In addition, content filtering would be meaningless if filtering software is not installed on a computer or if it is circumvented by young Internet users. Therefore, the role of parents and teachers in supervising and guiding young Internet users remains important and necessary. (This matter is discussed in more detail in Section 5.4.2.)

Lastly, given the decentralised and borderless nature of the Internet and the current filtering technology, we should concede that there is no solution that can completely suppress illegal types of pornography and perfectly prevent minors from accessing harmful content (legal pornography) on the Internet. Lawrence Lessig – an American IT law scholar – interestingly notes that:

‘The regulation is not perfect – any child who really wants the stuff can get it – but regulation is not needed to be perfect to be effective. It is enough that ... regulations make [pornography] generally unavailable.’⁴⁴³

‘[we] should not design for the most efficient system of censoring ... Nor should we opt for perfect filtering so long as the tendency worldwide is to overfilter speech. If there is speech the government has an interest in controlling then let that control be obvious to the users.’⁴⁴⁴

By applying Lessig’s opinions to the regulation of Internet pornography, it would follow that, although it is important to censor illegal pornography, it is more important for the government to implement restrictive measures against illegal pornographic materials on the Internet with transparency, allowing the public (especially Internet users) to know the implementation of such measures, and how far they affect people’s right to freedom of expression. Furthermore, the regulatory approach does not need to completely prevent young Internet users from accessing harmful content (legal pornography) because certain young people may still access pornography. It is more significant to ensure that the chosen regulatory approach makes pornography unavailable to minors in general.

Conclusion

This chapter argues that pornography can be regarded as an instance of expression because it communicates opinions/ideas or messages with regard to sex, sexuality and gender relations. The opinions/ideas that pornography conveys can be classified into two categories,

Journal of the American Medical Association, 288 (22), pp.2887-2894; Heins, M., Cho, C., and Feldman, A., *Internet Filters: A Public Policy Report*, (2nd ed.), <http://www.fepproject.org/policyreports/filters2.pdf>, visited 27th June 2010.

⁴⁴³ Lessig, L., *Code: Version 2*, (Basic Books, New York, 2006), p.247.

⁴⁴⁴ *Ibid.*, p.260.

namely direct information about sex, and attitudinal ideas towards sex, sexuality and gender relations. It is suggested that the three main theories underpinning the right to freedom of expression – i.e. the argument from truth; the argument from democracy and the argument from self-realisation – can explain why pornography deserves a certain degree of protection. Amongst these three theories, self-realisation appears to relate most closely to the protection of freedom of pornographic expression. To a certain extent, the democratic value of freedom of expression can also be used to support the protection of pornographic expression, in the sense that the majority does not have the legitimacy to silence the minority. However, the argument from truth does not seem to give a good explanation for the right to freedom of pornographic expression.

This chapter also points out that the regulation of pornography is content-based restriction, meaning that the state cannot restrict pornography merely because of its sexually oriented and explicit content but is required to show strong justifications and genuine necessity for its restriction. It is contended that serious physical harm to pornographic performers may be viewed as a strong justifications for the state to suppress pornographic materials involving the use of real violence (and bestial pornography). Also, the protection of minors has enough weight to allow the restriction of the availability/accessibility of pornography (as opposed to a complete ban) to keep pornography out of the reach of children. However, the selected regulatory approach should not excessively interfere with the right to freedom of expression of consenting adults.

Furthermore, this chapter proposes that pornography be divided into two categories, namely legal pornography and illegal pornography. Self-regulation at Internet user level appears to be a feasible regulatory mode to deal with legal pornography, whereas co-regulation seems to be a reasonable approach to regulate illegal pornography. Lastly, it is suggested that there may not be the need for the regulations that can censor all illegal pornography on the Internet, and that can completely prevent children from accessing harmful content (legal pornography). Actually, what is needed is a regulatory approach that is transparent and accountable to the public, and which makes pornography generally unavailable to children.

The discussion in this chapter will be used as a conceptual framework to analyse the regulatory approaches to Internet pornography of the CoE, the EU, the UK and Thailand in the following chapters.

Chapter 4: Freedom of Expression and the Regulatory Approaches to Internet Pornography of the Council of Europe and the European Union

Introduction

The Council of Europe (CoE) and the European Union (EU) have played a significant role in shaping the international legal framework protecting freedom of expression. The legal norms that emerge at international and supra-national levels are also relevant in the domestic context. In the UK, under Section 2 (1) of the Human Rights Act (HRA) 1998, the jurisprudence of the European Court of Human Rights (ECtHR) with regard to Art. 10 of the European Convention on Human Rights (ECHR) has become the baseline (or floor) which the UK courts have to take into account when deciding the extent to which the right to freedom of expression should be protected at domestic level.¹ Under EU law, by virtue of Section 2 (1) of the European Communities Act 1972, the UK courts are required to 'recognise, make available in law and enforce, allow or follow all rights, powers, liabilities, obligations, restriction, remedies and procedures arising under the EU law'² (i.e. Treaties, Regulations, Directives and Decisions). This means that the UK courts have an obligation to protect and enforce the rights conferred by the EU law on individuals at domestic level.³

This thesis contended in the previous chapter that pornography is a form of expression, thus deserving a certain level of protection under the principle of freedom of expression. However, it also argued that the protection of minors justifies the state in restricting the availability and accessibility of pornographic materials; and that serious bodily harm to pornographic actors is a strong justification for the prohibition of pornographic materials that involve the use of real violence in the production. Lastly, it suggested that co-regulation and self-regulation at Internet-user level⁴ are regulatory approaches that are consistent with the concept of freedom of expression.

This chapter will examine the CoE and the EU's legal frameworks of the protection of freedom of expression in relation to pornographic expression. It will also explore the CoE and the EU's policies on the regulation of Internet pornography. The principle aim of this

¹ For more detail see Section 5.1.2.

² O'Neill, A., *EU Law for UK Lawyers*, (Hart Publishing, Oxford, 2011), p.55

³ This is normally known as the doctrine of direct effects. For more information see generally Steiner, J., and Woods, L., *EU Law* (10th ed), (Oxford University Press, Oxford, 2009), pp.105-124; Weatherill, S., *Case & Materials on EU Law* (9th ed), (Oxford University Press, Oxford, 2010), pp.125-143

⁴ For the definitions of co-regulation and self-regulation see Section 3.7.

chapter is to determine the extent to which the CoE and the EU's treatment of pornographic expression on the Internet are in line with the conceptual framework proposed in Chapter 3.

4.1 Brief Introduction to the Council of Europe and the Convention on Human Rights

The CoE⁵ is an international organisation that seeks, as a primary goal, integrity and unity among European member states in the areas of human rights protection, democracy and the rule of law.⁶ It was established by the Treaty of London – which was signed by ten founding members⁷ – in 1949.⁸ At present, it has 47 member states, including the UK.⁹

The ECHR was introduced at the CoE's First Session of the Consultative Assembly in 1949, in response to the serious violations of human rights in Europe during the Second World War.¹⁰ It was signed in 1950 and came into effect in 1953.¹¹ It has two important functions. First, it elaborates the obligations of the contracting states ('High Contracting Parties'), listing what rights and freedoms the contracting states are required to guarantee and protect. Second, it sets up enforcement mechanisms '[t]o ensure the observance of the engagements undertaken by the High Contracting Parties [with regard to the protection of rights and freedoms enumerated in the ECHR]'.¹²

At the heart of the ECHR's enforcement mechanisms is the ECtHR which has jurisdiction over all contracting states.¹³ It has power to receive complaints (or 'applications') from the contracting states – i.e. the legal entity under international law¹⁴ – claiming that there is a breach of provisions of the ECHR by another contracting state (this is known as an inter-

⁵ *The CoE*, www.coe.int, visited 5th August 2012.

⁶ Palmer, M., Lambert, J. and *et al.*, *European Unity: A Survey of the European Organisations*, (George Allen & Unwin Ltd., London, 1968), pp. 111-112; *The CoE*, <http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en>, visited 5th August 2012.

⁷ The ten founding members are Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and UK.

⁸ Robertson, A.H., *European Institutions: Co-Operation, Integration, Unification* (3rd ed), (Stevens & Sons Limited, London, 1973), p.16.

⁹ *The CoE*, <http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en>, visited 5th August 2012; For historical account on the CoE and its institutional structure see generally Robertson, A.H., 'The Council of Europe 1949-1953: Part I and Part II' (1954) *International Law and Comparative Law Quarterly*, 3(2), pp.235-255; 3(3), pp.404-420; Royer, A., *The Council of Europe* (Council of Europe Publishing, Strasbourg, 2010).

¹⁰ Rehman, J., *International Human Rights Law* (2nd ed), (Longman, Harlow, 2010), p.184; Steiner, H., Alston, P., and Goodman, R., *International Human Rights in Context: Law, Politics and Morals* (3rd ed.) (Oxford University Press, Oxford, 2008), p.933.

¹¹ Robertson, A.H., *supra*, p.50.

¹² Art. 19 of the ECHR.

¹³ Art. 32 of the ECHR.

¹⁴ See generally for the subjects of international law Shaw, M.N., *International Law* (6th ed), (Cambridge University Press, Cambridge, 2008), pp.195-264.

state application);¹⁵ and from persons – i.e. natural and juristic persons such as non-governmental organisations or groups of individuals, regardless of nationality – claiming that an authority of a particular contracting state has violated his/her/its rights and freedoms guaranteed by the ECHR (this is known as an individual application).¹⁶

Under the original system, all inter-state and individual applications had to be submitted to the European Commission on Human Rights (the European Commission) in the first place to consider whether they were admissible. If an application was deemed admissible and the European Commission could not find a friendly settlement, it would make a report on the facts of the case and a non-binding opinion on the merits of the case. The European Commission (in the case of an individual application) or the contracting state (in the case of an inter-state application) would refer the case to the ECtHR, which sat part-time in Strasbourg.¹⁷ In other words, it can be said that the ECtHR had a role to play only when a case was referred to it. However, Protocol No.11 (which came into force in 1998) has brought a significant change to the power of the ECtHR and the complaint-filing procedure.¹⁸ The European Commission was abolished. The ECtHR has power to receive applications directly to consider the admissibility of the applications, and to adjudicate allegations of human-rights violations.¹⁹ Under Art. 26 of the ECHR, ‘the [ECtHR] shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and a Grand Chamber of seventeen judges’. A single judge has power to declare inadmissible or strike out of the Court’s list of cases an individual application.²⁰ A Committee has power to consider the admissibility of an individual application and to judge on its merits if the case concerns the interpretation or the application of the ECHR which is ‘already the subject of well-established case-law of the [ECtHR]’.²¹ A Chamber has power to decide the admissibility and the merits of an individual application.²² Under Art. 43, after a Chamber has given judgement, a party to the case can request that the case be referred to the Grand

¹⁵ Art. 33 of the ECHR.

¹⁶ Art. 34 of the ECHR.

¹⁷ The Public Relations Unit of the European Court of Human Rights, *50 Years of Activities : The European Court of Human Rights - Some Facts and Figures* (The Public Relations Unit of the European Court of Human Rights, Strasbourg, 2010), http://www.echr.coe.int/NR/ronlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFigures_EN.pdf, visited 6th August 2012, p.3; Royer, A., *supra*, p.22

¹⁸ See Protocol No.11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, <http://conventions.coe.int/treaty/en/Treaties/Html/155.htm>, visited 5th February 2010.

¹⁹ Preamble and Art. 2 (3) of the Protocol No.11.

²⁰ Art. 27 of the ECHR

²¹ Art. 28 of the ECHR

²² Art. 29 of the ECHR

Chamber. The Grand Chamber here acts as the 'Court of Appeal', and its judgement is final.²³

The ECtHR's judgement is legally binding on the relevant contracting states.²⁴ The judgement is initially transmitted to the Committee of Ministers. As the judgement does not give an instruction regarding the execution of the judgement, the Committee of Ministers will discuss with the respondent state and its relevant department how the judgement can be executed in the respondent state and how to prevent a similar violation in the future.²⁵ The respondent state has freedom to choose the way in which the judgement is executed, depending on its legal system. The execution of the judgement can take the forms of an amendment to the legislation at issue, the implementation of individual measures and remedies or damages to the applicants.²⁶ The execution of the judgment is supervised by the Committee of Ministers.²⁷ If the respondent state refuses to execute the judgement, the Committee of Ministers has two coercive methods. The first is the adoption of an interim resolution 'to provide information on the state of progress of the execution, or ... to express concern and/or to make relevant suggestions with respect to the execution'.²⁸ The Committee of Ministers can adopt interim resolutions to urge the respondent state to comply with the judgement.²⁹ The second method is the enforcement of Art. 8 of the Statute of the CoE against the respondent state. Under Art. 8, if a member state persists in denying execution of judgement, it is deemed to have seriously violated its obligations to the principles of rule of law, and to the enjoyment ... of human rights and fundamental freedoms' enshrined in Art. 3 of the Statute of the CoE.³⁰ Its rights of representation may be suspended and it may be requested by the Committee of Ministers to withdraw from

²³ Art. 43 and Art. 44 of the ECHR; See generally White, R., and Ovey, C., *Jacobs, White and Ovey : The European Convention on Human Rights* (5th ed), (Oxford University Press, Oxford, 2010), pp.22-23.

²⁴ The Public Relations Unit of the European Court of Human Rights, *The European Court of Human Rights : The ECHR in 50 Questions*, The Public Relations Unit of the European Court of Human Rights, Strasbourg, 2009), http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf, visited 6th August 2012, p.9.

²⁵ *Ibid*, p.10.

²⁶ *Ibid*. See also Section 5.1.1.

²⁷ Article 46 of the ECHR as amended by Article 1 of the Protocol No.11; Steiner, H., Alston, P., and Goodman, R., *supra*, p.940.

²⁸ Rule 7 of Rules Adopted by the Committee of Ministers for the Application of Article 46, Paragraph 2, of the ECHR.

²⁹ Lambert-Abdelgawad, E., *The Execution of Judgments of the European Court of Human Rights*, (Council of Europe Publishing, Strasbourg, 2002),

<http://www.echr.coe.int/NR/rdonlyres/5BDDF858-F85B-4523-BD58-27243CB2F03C/0/DG2ENHRFILES192002.pdf>, visited 11th November 2012, pp.36-37

³⁰ The Committee of Ministers has officially threatened to enforce Art. 8 against Turkey for failing to execute the judgement of *Loizidou v. Turkey*, (1996) No.15318/89, 1996-VI; See Lambert-Abdelgawad, E., *supra*, p.38

membership of the CoE.³¹ It may also have to pay a fine.³² From a political viewpoint, failure to execute the judgement may also mean embarrassment in the international arena.³³

4.2 Pornography and Freedom of Expression under Art.10 of the European Convention on Human Rights (ECHR)

This section examines Art. 10 of the ECHR and its relevant jurisprudence in relation to pornography. To begin with, the first two sub-sections will examine Art.10 in detail to give an overall picture of the Art. 10 jurisprudence. Pornographic expression will also be examined in these two sub-sections where it is relevant. The last sub-section will analyse the extent to which Art. 10 jurisprudence on sexually explicit expression is compatible with the conceptual framework suggested in Chapter 3.

4.2.1 The Scope of Art. 10 (1) and Pornography

Art. 10 (1) reads:

'[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...'

Art. 10 (1) guarantees that all individuals are free to express and receive ideas and information without state interference. In this regard, state interference may come in the form of censorship (i.e. pre-publication censorship, e.g. an executive order prohibiting publication³⁴ and post-publication censorship, e.g. the confiscation of publication),³⁵ formalities; conditions, restrictions or penalties³⁶ (e.g. criminal sanctions in the forms of fines or imprisonment).³⁷

The protection of 'freedom of expression'³⁸ in Art.10 (1) is generally construed to safeguard both two elements of expression: (1) the methods in which such ideas/opinions are

³¹ Art. 7 of the Statute of the CoE

³² Lambert-Abdelgawad, E., *supra*, pp.45-48

³³ *The International*, 28th October 2012, <http://www.theinternational.org/articles/283-prisoner-disenfranchisement-as-a-sovereig>, visited 11th November 2012

³⁴ See, for example, *The Observer and Guardian Newspaper Ltd v. the United Kingdom* (1991) No.13585/88, A216; *Sunday Times v. the United Kingdom (No.2)*, (1991) No.13166/87, A217.

³⁵ See, for example, *Vereniging Weekblad Bluf! v. the Netherlands*, (1995) No.16616/90, A306-A; *Öztürk v. Turkey* (1999) No.22479/93, 1999-VI.

³⁶ Art. 10 (2) of the ECHR.

³⁷ See, for example, *Gerger v. Turkey* (1999), No.24919/94, hudoc; *Stoll v. Switzerland*, (2007), No.69698, hudoc.

³⁸ The term 'expression' appears to have a wider meaning and more inclusive than 'speech'. The ECtHR does not have to deal with the question as whether the communicative act at issue is

expressed, conveyed and received (the means of expression) and (2) the substance or the content of ideas/opinions and information (the messages).³⁹ Regarding the means of expression, the ECtHR in *Oberschlick v. Austria (no.1)* held that all types of forms and means in which the messages conveyed were protected by Art.10 (1).⁴⁰ This would mean that expression in any forms – such as words (written⁴¹ or spoken),⁴² paintings,⁴³ motion pictures,⁴⁴ photographs,⁴⁵ or cartoons⁴⁶ – all come under the wide umbrella of Art.10 (1). Traditional media – such as publications,⁴⁷ radio,⁴⁸ films or video-recordings⁴⁹ – and the Internet⁵⁰ are covered by Art. 10 (1).

As far as the content of expression (the message) is concerned, the text of Art. 10 (1) does not specify what types of expression or content are within the scope of protection. Nevertheless, the ECtHR has developed significant jurisprudential principles through the interpretation of Art. 10 (1). The first one can be found in the landmark case of *Handyside v. UK*.⁵¹ In this case, the ECtHR had to consider whether the seizure and confiscation of copies of *The Little Red Schoolbook* (the *Schoolbook*) – an anti-authoritarian sex education pamphlet that contained liberal ideas towards sexual matters⁵² – and a criminal prosecution

‘expression’. By contrast, the US Supreme Court has to deal with the question of whether the communicative act in question constitutes ‘speech’ or not. See Section 3.1.1.

³⁹ Macovei, M., *Human Rights Handbook No.2 : A Guide to the Implementation of Article 10 of the European Convention on Human Rights*, 2nd ed (2004), http://www.coe.int/T/E/Human_rights/hrhb2.pdf, visited 1 April 2010, p.15; see, for example, *Oberschlick v. Austria (no.1)* (1999) No.11662/85, A 204, para.57; *Sokolowski v. Poland* (2005) No. 75955/01, hudoc, para.44.

⁴⁰ (1991) No.11662/85, A313, paras.10-33, para.57; The case concerned defamation proceedings against an Austrian journalist who published an article criticising an Austrian politician and his allegedly discriminated policy-campaign in a magazine ‘Forum’.

⁴¹ See, for example, *Karataş v. Turkey* (1999).

⁴² See, for example, *Zana v. Turkey* (1997) No.18954/91, 1997-VII.

⁴³ See, for example, *Müller and Others v. Switzerland* (1988); and *Vereinigung Bildender Künstler v. Austria* (2007) No.68354/01, hudoc.

⁴⁴ See, for example, *Otto Preminger Institut v. Austria* (1994) No.13470/87, A295-A; and *Wingrove v. UK* (1996) No.17419/90, 1996-V.

⁴⁵ See, for example, *Hachette Filipacchi Associés v. France* (2007) No.71111/01, hudoc; and *Egeland and Hanseid v. Norway* (2009) No.34438/04, hudoc.

⁴⁶ See, for example, *Cumpănă and Mazăre v. Romania* (2004); and *Kuliś and Różycki v. Poland* (2009) No.27209/03, hudoc.

⁴⁷ See, for example, *Handyside v. UK* (1976); *Sunday Times v. UK (no.1)* (1979).

⁴⁸ See, for example, *Groppera Radio AG and Others v. Switzerland* (1990) No.10890/84, A173.

⁴⁹ See, for example, *Otto Preminger Institut v. Austria* (1994); *Wingrove v. UK* (1996); and *S v. Switzerland* (1993) No.17116/90, the Decision of the European Commission on Human Rights.

⁵⁰ *Yildirim v. Turkey* (2012) No.3111/10, Hudoc. In this case, the Turkish government attempted to block an entire online platform (Google Sites) on the ground that a website on Google Sites insulted the memory of Atatürk. The ECtHR ruled that the blocking order by a Turkish court violate the right to freedom of expression (Art. 10), since the relevant Turkish law did not allow such a sweeping blocking. Therefore, the sweeping blocking did not meet the ‘prescribe by law’ condition, especially the ‘foreseeability’ requirement.

⁵¹ (1976) No.5493/72, A024.

⁵² Bailey, S.H., Harris, D.J., and Ormerod, D.C., *Civil Liberties : Cases and Materials* (5th ed), (Butterworths LexisNexis, London, 2001), p.691; For the the scanned version of the Red Little Schoolbook see <http://www.nla.gov.au/apps/cdview?pi=nla.aus-vn4512714>, visited 17th August 2010.

against its publisher constituted a violation of Art. 10 of the ECHR. The ECtHR laid down a general principle that:

‘Subject to paragraph 2 of Article 10 (art. 10-2), [Art.10] is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.’⁵³

The second principle is found in the ruling in *Müller and Others v. Switzerland*.⁵⁴ In this case, the ECtHR had to determine whether the confiscation of the sexually explicit paintings exhibited in a gallery and criminal prosecutions against the painter and the organisers of the exhibition breached Art. 10. The ECtHR stated that:

‘Admittedly, Article 10 ... does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression. As those appearing before the [ECtHR] all acknowledged, it includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.’⁵⁵

Given the above principles, it can be said that expression – regardless of whether it may cause offence, shocking or disturbing feelings to ‘the state or any sector of the population’ – should be free from state interference (except the state acting in accordance with conditions set out in Art. 10 (2)).⁵⁶ Furthermore, all kinds of content which can lead to public exchange of ideas or information come within the ambit of Art. 10 (1). This would mean that, apart from artistic expression (the issue before the court in *Müller*),⁵⁷ expressions in other areas, e.g. politics,⁵⁸ the economy (commercial advertisements),⁵⁹ and general public interest (civil expression),⁶⁰ fall within the scope of Art.10 (1) protection. In short, as a general principle, the scope of Art. 10 (1) covers almost all kinds of expression.

In *Handyside*, the ECtHR explained the significance of freedom of expression. It stated that freedom of expression was a crucial element of ‘the development of every man’ (self-

⁵³ (1976) No.5493/72, A024, para.49.

⁵⁴ (1988) No.10737/84, A133.

⁵⁵ *Ibid.*, para.27.

⁵⁶ Harris, D.J., O’Boyle, M., and Warbrick, *Law of the European Convention on Human Rights*, (2nd ed), (Oxford University Press, Oxford, 2009), p.445.

⁵⁷ See, for example, *Karatas v. Turkey* (1999) No.23168/94, 1999-IV; and *Lindon, Otchakovsky-Laurens and July v. France* (2007) No.21279/02 and 36448/02, hudoc.

⁵⁸ See, for example, *Lingens v. Austria* (1986) No.9815/82, A103; and *Lombardo and other v. Malta* (2007) No.7333/06, hudoc.

⁵⁹ See, for example, *Markt intern Verlag GmbH and Klaus Beermann v. Germany* (1989). No.10572/83, A165; *Casado Coca v. Spain* (1994) No.15450/89, A285-A; See generally Munro, C.R., ‘The Value of Commercial Speech’ (2003) *Cambridge Law Journal*, 62(1), pp.134-138.

⁶⁰ See, for example, *Steel and Morris v. the United Kingdom* (2005) No. 68416/01, 2005-II.

fulfilment and individual autonomy) and an essential foundation for a democratic society.⁶¹ In *Young, James and Webster v. UK*,⁶² the ECtHR explained further that a democratic society required pluralism, tolerance and broadmindedness. In addition, democracy did not mean that the opinions of the majority must always prevail. Thus, it was necessary to allow minorities to voice their opinions.⁶³ Put differently, a democratic society gives some room for minority's views to co-exist with the majority's views. Thus, the majority does not have legitimacy to silence the minority, although the minority's views are different from those of the majority.

Considering the ECtHR's principles stated above, it could be said that, as a matter of principle, pornography is an instance of expression within the meaning of Art. 10 (1),⁶⁴ since the scope of protection under Art. 10 (1) is very broad and covers all types of expression,⁶⁵ which convey messages and cause an exchange of ideas. As already discussed

⁶¹ (1976) No.5493/72, A024, para.49; See also Sections 3.3.2 and 3.3.3 of this thesis

⁶² (1981) No.7601/76, 7806/77, A44.

⁶³ *Ibid.*, para.63.

⁶⁴ See also Liu, H.Y., "'Pornography as Protected Speech?': The Margins of Constitutional Protection' in Annichino, P (ed) *UCL Human Rights Review* (2nd ed), (The Institute for Human Rights University College London, London, 2009), pp.233-239.

⁶⁵ However, it is important to note that certain types of expression may intrinsically be excluded from the scope of protection under Art. 10. These types of expression are examined in brief here as they are not relevant to the main body of discussion of this chapter. However, it is important to acknowledge the reader. One of the prime examples is child pornography – i.e. real or artificially generated images that depict children involved in sexual activity. Within the meaning of 'expression' of Art. 10 (1), child pornography can be seen as a form of expression, in the way that it conveys an idea of sexual relationship between minors and adults. However, it can be argued that child pornography is a production which derives from sexual abuse and exploitation of a child; dissemination would make the records of sexual abuse on a child circulate widely on the Internet and consumption increases demand for child pornography and, as a result, more children would be lured into child pornography production. Pseudo or computer-generated child pornography, despite the fact that no real children are sexually abused or harmed, may be used by a paedophile to 'groom' (to lure and lower inhibitions of) a child victim for sexual abuse. Although the ECtHR has not yet stated its position on the applicability of Art.10 to child pornography thus far, it is safe to assume that the prohibition of child pornography can be easily justified on the basis of the protection of the rights of others (in this case, children) under Art. 10 (2). See generally Gillespie, A., 'Indecent Images, Grooming and the Law', (2006) *Criminal Law Review*, 2006(May), pp.412-421; Taylor, M. and Quayle, E., *Child Pornography : An Internet Crime* (Taylor & Francis, London, 2007), pp.23,25; Akdeniz, Y., *Internet Child Pornography and the Law : National and International Responses*, (Ashgate, Aldershot, 2008), p.11; See also the US Supreme Court's ruling in *New York v. Ferber* (1982) 485 US 747, 758-759; Cram, I., *Contested Words* (Ashgate, Aldershot, 2006), p.168. Another example of expression which may fall outside the realm of protected expression under Art.10 (1) is 'extreme speech'. Speech that incites violence (*Süreç v. Turkey* (no. 3), (1999) No.24735/94, hudoc), promotes Nazi ideology (*Kühnen v. The Federal Republic of Germany* (1988) No.12194/86, Vol.56) or denies Holocaust (*D.I. v. Germany* (1996) No. 26551/95, European Commission of Human Rights) are generally categorised within this group of speech. In practice, the ECtHR bases its decision on Art.17 of the ECHR, which prohibits the use of freedoms in the way that amounts to an objective attempt to destroy the rights or freedoms enumerated in the ECHR. See generally Hare, I., 'Extreme Speech Under International and Regional Human Rights Standards' in Hare, I., and Weinstein, J. (eds), *Extreme Speech and Democracy* (Oxford University Press, Oxford, 2009), pp.62-80; Clements, L., *European Human Rights : Taking A Case Under the Convention* (Sweet & Maxwell, London, 1994), p.179; White, R., and Ovey, C., *Jacobs, White and Ovey : The European Convention on Human Rights* (5th ed), (Oxford University Press, Oxford, 2010), pp.430. However, there is a rare

in Chapter 3, pornography communicates ideas about sex and sexuality. On the one hand, pornographers (speakers) impart sexual ideas to viewers (audience) through depictions of stories and sexual activities shown in pornographic material; on the other hand, it would also be possible for viewers/readers to play the role of speaker by writing to the pornographers, telling them the ideas/fantasies which pornographers could use to create pornographic films. This pornographer-audience communication could be seen as an exchange of ideas. Furthermore, viewers/readers of pornography may also exchange their sexual ideas among each other by, for example, writing their sexual fantasy (a sex story) to be published in pornographic magazines,⁶⁶ or making their own pornographic footage and posting on pornographic video-sharing websites.⁶⁷

There have been decisions in which ECHR judicial organs (i.e. the European Commission on Human Rights and the ECtHR) have confirmed that pornography is expression. In *S. v. Switzerland*,⁶⁸ the case which concerned the prosecution of Mr. Scherer – an owner of a sex shop in Zurich – on a charge under the Swiss obscenity law of showing a pornographic film to his customers, the European Commission⁶⁹ recognised that the showing of pornographic films was an exercise of the right to freedom of expression.⁷⁰ The case was later brought to the ECtHR in *Scherer v. Switzerland*, but was eventually struck out of the list due to the death of Mr. Scherer, the applicant.⁷¹ *Scherer* is not the only case in which the ECHR organs have accepted that pornography is expression; *Hoare v. UK*⁷² and *Perrin v. UK*⁷³ are another two cases in which the ECHR organs recognised pornography as a form of expression within the scope of Art.10 (1). In the former case, the UK authority prosecuted Mr. Hoare under the Obscene Publications Act 1959, on the grounds that he had sold hard-core pornographic video tapes⁷⁴ by post. The European Commission decided that the conviction

exception. If the extreme speech is part of a discussion relating to the issue of public interest, such extreme speech is protected by Art.10. For example, in *Jersild v. Denmark* (1994) No.15890/89, A298, the racist comments expressed by the individual interviewees (the members of an extremist group) were taken outside the protection under Art.10 (1), whereas the whole report in a journal which published such racism speech was protected.

⁶⁶ For example, *Mayfair* (a British pornographic magazine) has columns entitled 'Mayfair Male' and 'Quest'; *Men's Only* has a column entitled 'Letter'. *Mens World* has a column entitled 'Filth'. These columns allow readers to send their sex stories to be published in the magazines.

⁶⁷ For example, www.xhamster.com, www.tube8.com, and www.youporn.com

⁶⁸ (1992) No.17116/90, the Decision of the European Commission on Human Rights.

⁶⁹ This case was filed to the European Commission on Human Rights, before Protocol No.11 came into force.

⁷⁰ *S v. Switzerland* (1992) No.17116/90, the Decision of the European Commission on Human Rights; see also *Scherer v. Switzerland* (1994) No.17116/90, A287, para.26.

⁷¹ *Ibid.*, paras.28-32.

⁷² (1997) No.31211/96, the Decision of the European Commission on Human Rights; See also Case Comment 'Sale of Video – Conviction for Obscenity' (1997) *European Human Rights Law Review*, 1997 (6), pp.678-680.

⁷³ (2005) No.5446/03, 2005-XI.

⁷⁴ Hard-core video tapes at issue depicted explicit sexual acts, such as masturbation, oral sex, virginal fisting, urophilia (urine play), anal-intercourse buggery, and semen play.

against Mr. Hoare and the seizure of his pornographic video tapes constituted an interference with his right to freedom of expression under Art. 10 (1), implicitly suggesting that the European Commission saw hard-core pornography as a form of expression. In the latter case, the ECtHR was the body which considered the admissibility of the application, which was submitted after Protocol No. 11 came into effect. In this case, Mr. Perrin was prosecuted under the Obscene Publication Act 1959 for disseminating pornographic materials (the preview page⁷⁵ of his pornographic website) via the Internet (the website was hosted on an overseas server, but accessible from a computer located in the UK). The ECtHR accepted that the enforcement of English obscenity law against Mr. Perrin was an interference with the right to freedom of expression guaranteed by Art. 10 (1), implicitly recognising that pornographic images on the preview page were a form of expression.⁷⁶ In short, it could be said that Art. 10 (1) and the ECtHR's jurisprudence accept and treat pornography as an instance of expression. Nonetheless, it should be noted that in both *Hoare* and *Perrin* the European Commission and the ECtHR eventually held that the interferences in both cases did not constitute a violation of Art. 10, since the interference met the requirements of Art. 10 (2).

It is important to note that, within Art.10 jurisprudence, not all categories of expression enjoy an equal level of protection. The levels of protection (weak or strong) affordable to a particular expression depend primarily on what type of expression is. Political expression – i.e. the type of expression which directly relates to political matters or issues of public concern⁷⁷ – is on the top and entitled to a strong protection; whereas non-political expression is at the bottom and received a weaker protection. This is known as the 'hierarchy of expression'.⁷⁸ The ECtHR attaches more importance to political expression because, in the eyes of the ECtHR, political expression is 'the bedrock of any democratic system'.⁷⁹ To ensure a healthy democratic society, it is essential to ensure that the state and politicians can be criticised; and that the public and mass media can impart, receive and exchange political ideas/information.⁸⁰ Therefore, the ECtHR has to adopt a stringent proportionality review, leaving little room for national authorities to exercise their discretionary power (a narrow

⁷⁵ The preview page showed pornographic images, such as coprophilia (faeces play) and fellatio.

⁷⁶ In *R v. Perrin* (2002) EWCA Crim 747, the English court also admitted that pornographic images on the preview page on Mr. Perrin's pornographic website were a form of expression under Art.10 (1) of the ECHR. See Section 5.3.1

⁷⁷ For expression relating to political matters see, for example, *Lingens v. Austria* (1986) No.9815/82, A-103, *Lombardo and Others v. Malta* (2007) No.7333/06, hudoc; for expression relating to issues of public concern see, for example, *The Sunday Times v. UK (no.1)* (1979) No.6538/74, A30, *Jersild v. Denmark*, (1994) No.15890/89, A298

⁷⁸ Harris, D.J. *et al.*, *supra*, pp.458, 461.

⁷⁹ Harris, D.J. *et al.*, *supra*, p.455; *Handyside v. UK*, (1976) No.5493/72, A024, para.49; See also Section 3.3.2.

⁸⁰ See, for example, *Sunday Times (No.1) v. UK* (1979) No.6538/74, A30, para.65; *Lingens v. Austria* (1986) No.9815/82, A103, para.41; and *Jersild v. Denmark* (1994) No.15890/89, A298, para.31.

margin of appreciation) when considering the restriction imposed on political expression.⁸¹ By contrast, the ECtHR typically gives lesser significance to non-political expression – i.e. the type of expression which, in the eyes of the ECtHR, neither relates to political matters nor contributes to discussion of public interest – by applying a more relaxed proportionality test when considering the restriction of non-political expression. It leaves more leeway for national authorities to determine the level of protection afforded to non-political expression (a wide margin of appreciation).⁸² (The doctrine of margin of appreciation will be examined in more detail below.)⁸³ Some examples of expression that the ECtHR has considered to be non-political include *the Schoolbook* in the *Handyside* case – a book which had chapters pertinent to sexual matters (such as lovers of children or ‘dirty old men’, pornography, impotence, homosexuality, venereal diseases, and abortion), and aimed at school children aged 12 years and above as prime target readership;⁸⁴ and the paintings which depicted sexually explicit acts (e.g. sodomy, fellatio, bestiality, erect penises and masturbation) in the *Müller* case.⁸⁵

It is notable that *Vereinigung Bildender Künstler v. Austria*⁸⁶ is the only exceptional case in which the ECtHR applied a strict review to sexually explicit expression. In this case, the Vienna Court of Appeal issued an injunction against the applicant, an association of artists called *Vereinigung Bildender Künstler*,⁸⁷ prohibiting it from continuing to display a painting entitled *Apocalypse*⁸⁸ which portrayed naked bodies of several public figures – one of whom was Mr. Meischberger (a well-known Austrian politician) – involving explicit sexual activities.⁸⁹ Interestingly, unlike other sexually explicit expression-related cases, the ECtHR applied a strict review to consider the Austrian court’s injunction to find that the injunction constituted a violation of Art. 10. The ECtHR held that the right to freedom of artistic expression outweighed Mr. Meischberger’s personal interest (the protection of his reputation

⁸¹ See, for example, *Sener v. Turkey* (2000) No.26680/95, para.40; *Lombardo and Others v. Malta* (2007) No.7333/06, hudoc, paras.53-56.

⁸² Harris, D.J. *et al.*, *supra*, pp.458, 461.

⁸³ See Section 4.2.2.4.

⁸⁴ (1976) No.5493/72, A024, paras.20-21.

⁸⁵ (1988) No.10737/84, A133, para.18; One of the three paintings can be seen at <http://www.jfmueller.ch/cms/index.php/sitemap/7-jfm/11-3-naechte-3-bilder>, visited 24th August 2012.

⁸⁶ (2007) No.68354/01, hudoc.

⁸⁷ *Ibid.*, para.7.

⁸⁸ The painting can be seen at http://www.ippt.eu/files/2007/IPPT20070125_ECHR_Vereinigung_Bildender_Kunstler_v_Austria.pdf, visited 24th August 2012.

⁸⁹ Mr. Meischberger is a former general secretary of the Austrian Freedom Party (FPÖ). The painting ‘Apocalypse’ portrayed him as ‘gripping the ejaculating penis of Mr. Haider – the former head of the FPÖ – whilst at the same time being touched by two other FPÖ politicians and ejaculating on Mother Teresa’. (2007) No. 68354/01, hudoc, paras.8,16.

against damage caused by the exhibition of *Apocalypse*).⁹⁰ Does this ruling mean that the ECtHR's position regarding sexually explicit expression has become more liberal, and that it is willing to give stronger protection to sexually explicit expression? Steve Foster – a European Human Rights law scholar – doubts that this is the case. The ECtHR does not here take a more liberal on sexually explicit expression; rather, it regarded *Apocalypse* as political expression.⁹¹ This might be because the ECtHR judges found a political message in the depiction of Mr. Meischberger's being involved in sexual activities – which could be read as 'some sort of counter-attack against the Austrian Freedom Party which always criticised the painter's work'.⁹² Hence, as Foster argues, *Vereinigung Bildender Künstler* 're-affirm[s] the value of political speech and the right to oppose and attack political figures'.⁹³

Niether the European Commission in *Scherer*⁹⁴ and *Hoare*⁹⁵ nor the ECtHR in *Perrin*⁹⁶ stated clearly whether pornography is non-political form of expression. However, given the line of rulings in *Handyside* and *Müller* and *Vereinigung Bildender Künstler*, which underscores that – in most cases – sexually explicit expression is a kind of expression that does not directly relate to politics or politicians. It is likely for pornography to be considered by the ECtHR as non-political expression, which is afforded lower protection than political expression.⁹⁷

It can be argued that, however, the *Schoolbook*, Mr. Müller's sexually explicit paintings and pornography could be considered to be 'political expression'. As Helen Fenwick and Gavin Phillipson – both European Human Rights scholars – persuasively note, the chapters relating to 'dirty old man', sexual intercourse, masturbation, pornography, homosexuality, and abortion, all impart attitudinal ideas towards sex and sexuality from a liberal point of view.⁹⁸ Mr. Müller's paintings and pornography⁹⁹ arguably communicate the idea of sexual liberty. The idea of sexual liberty can be seen as an attempt to challenge the dominating sexual

⁹⁰ (2007) No.68354/01, hudoc, paras.26,38.

⁹¹ Foster, S., 'Case Comment : Artistic Expression, Public Morality and the European Convention of Human Right 1950 Art.10' (2007) *Coventry Law Journal*, 12(1),pp.56-62, 59-61.

⁹² (2007) No.68354/01, hudoc, para.34.

⁹³ Foster, S., supra, p.62.

⁹⁴ *S v. Switzerland* (1992) No.17116/90, the Decision of the European Commission on Human Rights.

⁹⁵ (1997) No.31211/96, the Decision of the European Commission on Human Rights; See also 'Case Comment : Sale of Video – Conviction for Obscenity' (1997) *European Human Rights Law Review*, 1997 (6), pp.678-680.

⁹⁶ (2005) No.5446/03, 2005-XI.

⁹⁷ In *Belfast City Council v. Miss Behavin' Ltd* (2007) UKHL 19, the House of Lords implicitly recognised that pornography was a form of expression, despite it being a low value type of expression. See Section 5.1.3.

⁹⁸ Fenwick, H., and Phillipson, G., *Media Freedom under Human Rights Act* (Oxford University Press, Oxford, 2006), p.412.

⁹⁹ See also Section 3.2.2.2.

mores. It is an opinion on sex and sexuality in society, which is an issue of public discussion. Therefore, the *Schoolbook*, Müller's paintings and pornography could be considered as political expression in this sense.¹⁰⁰ Nonetheless, as can be seen in the decisions of *Handyside*, *Müller* and *Perrin*, the ECtHR appeared to overlook the political element of the *Schoolbook*, Müller's paintings and pornography, and granted a wide margin of appreciation to national authorities.

4.2.2 The Conditions for Restricting Expression in Art. 10 (2)

Art. 10 (2) can be seen as providing an exception to the general principle of protection of freedom of expression laid down in Art. 10 (1). Art. 10 (2) sets out requirements which a contracting state (and its law enforcement agencies) has to meet before being able to implement a restrictive measure against an expression. In other words, if the state can satisfy the ECtHR that it has fulfilled all conditions stipulated in Art. 10 (2), the ECtHR will typically rule that the restriction in question does not breach Art. 10. Art.10 (2) reads:

'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

4.2.2.1 Duties and Responsibilities

Art. 10 (2) begins with the notion that the right to free expression comes with duties and responsibilities. This could be interpreted as 'an individual may exercise [the right to free expression] ... in the light of [his/her] duties and responsibilities'.¹⁰¹ In other words, 'duties and responsibilities' serve as initial limitation of the right to freedom of expression. David Harris *et al.* note that different bearers of the right to freedom of expression are subject to different 'duties and responsibilities', depending mainly on their professions,¹⁰² e.g. 'politicians, civil servants, lawyers,¹⁰³ the press, journalists, editors¹⁰⁴, authors and publishers¹⁰⁵ and even artists such as novelists'.¹⁰⁶

¹⁰⁰ For discussion about 'informal political expression' see Section 3.3.3.

¹⁰¹ Gomien, D., *Short Guide to the European Convention on Human Rights* (Council of Europe, Strasbourg, 1991), p.82.

¹⁰² Harris, D.J. *et al.*, *supra*, p.494

¹⁰³ *Steur v. Netherlands* (2003) No.39657/98, 2003-XI, paras.37-38

¹⁰⁴ *Sürek v. Turkey (No.1)* (1999) No.26682/95, 1999-IV, para.63; *Leempoel v. S.A. ED. Ciné Revue c. Belgique* (2006) No.64772/01, hudoc, para.66

¹⁰⁵ *Édition Plon v. France* (2004) No.58148/00, 2004-IV, para.50

¹⁰⁶ *Lindon, Otchakovsky-Laurens and July v. France* (2007) No. 21279/02, 36448/02, hudoc, para.51

Regarding authors and publishers, Alastair Mowbray – a European Human Rights and Public Law scholar – comments that ‘the subject matter of a piece of “expression” falling within [Art. 10 (1)] will have a direct effect upon the nature of the author/publishers’ duties and responsibilities under [Art. 10 (2)]’.¹⁰⁷ *Otto Preminger Institut v. Austria*¹⁰⁸ – the case which involved the seizure and forfeiture of a religiously offensive film *Das Liebeskonzil* – serves as a prime example. In this case, the ECtHR stated that the ‘duties and responsibilities’ in the context of religious opinions and beliefs included ‘an obligation to avoid as far as possible expressions that [were] gratuitously offensive to others.’¹⁰⁹ Given this jurisprudence, in *Handyside*, although the ECtHR did not identify what the duty and responsibility were, it could be inferred from the facts surrounding the case that the duty and responsibility meant the author’s obligation to avoid depraving and corrupting the *Schoolbook*’s readership (school children).¹¹⁰ Similarly, in *Müller*, it could be inferred from the ECtHR’s rulings that Mr. Müller, the painter, and the organisers of the exhibition had duty and responsibility to prevent children from entering the gallery, and inform adult visitors of sexually explicit nature of the paintings.¹¹¹ In these three cases, it appears that the applicants failed to comply with their duties and responsibilities.

4.2.2.2 Prescribed by Law

Art. 10 (2) sets out three primary requirements (or tests) which the state must fulfil to justify its interference with the right to free expression protected by Art. 10.

The first requirement, ‘prescribed by law’, is generally understood to mean that the restrictive measures imposed on freedom of expression must have a basis on the national law.¹¹² Thus, the contracting states are required to prove the existence of the national law that empowers their authorities to curb the right to freedom of expression of individuals.¹¹³ According to the ECtHR, the term ‘law’ is not limited merely to statutory/written laws, but

¹⁰⁷ Mowbray, A., *Cases and Materials on the European Convention of Human Rights*, (Oxford University Press, Oxford, 2007), p.687

¹⁰⁸ (1994) No.13470/87, A295-A

¹⁰⁹ *Ibid.*, para.49

¹¹⁰ van Rijn, A., ‘Freedom of Expression (Article 10)’, in van Dijk, P., van Hoof, F., van Rijn, A., and Zwaak, L. (eds.), *Theory and Practice of the European Convention on Human Rights* (4th ed), (Intersentia, Antwerpen, 2006), pp.773-816, 807; (1976) No.5493/72, A024, para.49

¹¹¹ (1988) No.10737/84, A133, para.36; In comparison, in *Otto Preminger Institut v. Austria* (1994) No.13470/87, A295-A, the audience was warned beforehand of the offensiveness which might be caused by the film, and the cinema also charged the entrance fee. However, despite the warning, the ECtHR ruled that the Austrian authorities’ actions against the film and the organisation that showed the film did not violate Art. 10.

¹¹² Macovei, M., *supra*, p.30.

¹¹³ Harris, D.J. *et al.*, *supra*, p.444.

also covers the unwritten forms of law (common-law rules)¹¹⁴ and domestic application of international law principles.¹¹⁵

The law must meet the 'quality of law' requirements.¹¹⁶ In *The Sunday Times (No.1)*, the ECtHR stipulated two criteria to determine whether the law in question can be considered 'law' within the meaning of Art.10 (2). The first is 'accessibility', which means that 'the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case'; the second is 'foreseeability', which can be construed as meaning that the rule or norm in question must be 'formulated with sufficient precision to enable the citizen ... to foresee ... the consequences which a given action may entail.'¹¹⁷ Put differently, the law must have a certain degree of clarity and precision, allowing people to know what expression is subject to legal prohibition or restriction.

It can be seen from *Handyside, Hoare, Perrin, Müller* and *Scherer* that, in most cases, sexually explicit expression is subject to the obscenity laws of the respondent states – namely the Obscene Publication Acts 1959/1964¹¹⁸ (OPA) and Section 204 of the Swiss Penal Code.¹¹⁹ (The only exception is *Vereinigung Bildender Künstler*, in which the provision at issue was not the Austrian obscenity law, but copyright law).¹²⁰ It can be argued that an obscenity standard can be vague and highly subjective, depending significantly on an individual who judges obscenity, his/her attitude to sexual matters and the sexual mores that dominate a given society at a given time.¹²¹ Reasonable people may have different conclusions regarding whether the material in question is obscene or not. Furthermore, at courts, an expression may be deemed non-obscene by a judge or a jury in one case, but may be considered to be obscene by a different judge or a different jury in another case. It could be said that the concept of obscenity makes it difficult for people to know or predict – with a certain degree of clarity and precision – what constitutes obscenity. Given this, it is questionable whether the obscenity law meets the 'foreseeability' standard of the 'prescribed by law' requirement of Art. 10 (2).

¹¹⁴ See an example case *Sunday Times v. United Kingdom (no.1)*¹¹⁴ (1979) No.6538/74, A30, para.47.

¹¹⁵ See example cases *Groppera Radio AG and Others v. Switzerland* (1990) No.10890/84, A173, para.68; and *Autronic AG v. Switzerland* (1990) No.12726/80, A187, para.57.

¹¹⁶ White, R., and Ovey, C., p.312.

¹¹⁷ (1979) No.6538/74, A30, para.49.

¹¹⁸ (1976) No.5493/72, A024, paras.24-25; (1997) No.31211/96, the Decision of the European Commission on Human Rights, Section B; (2005) No.5446/03, 2005-XI, Section B.

¹¹⁹ (1988) No.10737/84, A133, para.20; (1993) No.17116/90, A 287, para.21.

¹²⁰ Section 78 of the Austrian Copyright Act prohibits the public display of images of persons that caused injury to the legitimate interests of the portrayed persons. See (2007) No.68354/01, hudoc, para.19.

¹²¹ For discussion about the vagueness and subjectivity of obscenity law with reference to the Obscene Publication Act see Section 5.2.3.

4.2.2.3 Legitimate Aims

The second paragraph of Art.10 enumerates nine legitimate aims, which constitute the second requirement. These are: (1) the protection of national security; (2) the protection of territorial integrity; (3) the protection of public safety; (4) the prevention of disorder or crime; (5) the protection of health; (6) the protection of morals; (7) the protection of the reputation or rights of others; (8) the prevention of the disclosure of information received in confidence; and (9) the maintenance of the authority and impartiality of the judiciary.¹²² To satisfy the second requirement, domestic enforcement of any laws which constitutes interference with the right to freedom of expression must be based on at least one of the nine interests. Typically, it is the duty of national courts to identify a particular interest in question and to ensure that it is on the list provided in Art.10 (2).¹²³

Of the nine legitimate aims, the protection of morals and the rights of others are most relevant to the restriction of sexually explicit expression. In the well-known *Handyside* case, the ECtHR found that the enforcement of Obscene Publications Acts (OPA) 1959/1964 against the *Schoolbook* '[was] linked far more closely to the protection of morals than to any of the further purposes permitted by [Art.10 (2)].'¹²⁴ Similarly, in *Hoare*, the European Commission was of the opinion that the OPA concerned the protection of morals.¹²⁵ In *Müller*, the ECtHR was of the opinion that the enforcement of the Swiss obscenity law (Section 204 of the Swiss Penal Code) aimed to protect not only morals (sexual propriety), but also the rights of others (the rights of adults who are offended by sexually explicit paintings at issue), explaining that these two legitimate aims were naturally linked.¹²⁶ The ECtHR in *Perrin* was of the opinion that the enforcement of the OPA against the owner of obscene websites was to pursue the legitimate aims of protecting public morality and/or rights of others (in this case, the ECtHR mentioned the rights of vulnerable people, which appeared to refer to the right to well-being of young people).¹²⁷ However, in the *Scherer* case, the question of legitimate aim was not thoroughly examined, as the case was struck out of the list due to the death of the applicant.¹²⁸

Interestingly, in *Vereinigung Bildender Künstler*, the expression at issue was also sexually explicit material, namely a painting entitled *Apocalypse*. The law that the Austrian

¹²² Harris, D.J. *et al.*, *supra*, p.474.

¹²³ Macovei, M., *supra*, p.34.

¹²⁴ (1976) No.5493/72, A024, para.46.

¹²⁵ (1997) No.31211/96, the Decision of the European Commission on Human Rights, The Law para.1.

¹²⁶ (1988) No.10737/84, A133, paras.14, and 30.

¹²⁷ (2005) No.5446/03, 2005-XI, Section C.

¹²⁸ (1993) No.17116/90, A287, para.32.

authorities relied on to impose restriction on *Apocalypse* was not an obscenity law, but a law to protect a person's reputation.¹²⁹ The ECtHR stated that the legitimate aim that the law pursued in this case was the protection of the rights of others (the reputation and the rights of Mr. Meischberger, whose image was painted in sexually explicit manner).¹³⁰ Although the Austrian government also attempted to argue that the restriction on *Apocalypse* was also based on the protection of public morality, the ECtHR rejected this claim.¹³¹

It is noteworthy that 'the rights of others' in Art. 10 (2), as well as in the second paragraphs of Art. 8, 9, and 11, could be construed to mean, in effect, the rights expressly enumerated in the ECHR – such as the right to a private life under Art. 8¹³² or the right to freedom of religion (or perhaps, more accurately, the right not to be offended in religious feelings) under Art. 9.¹³³ Nonetheless, the ECtHR's case-law regarding this issue shows that 'the rights of others' can be broadly construed, perhaps even open-ended.¹³⁴ An interesting example is *Chappell v. United Kingdom*.¹³⁵ This case shows that copyright fell within the scope of the legitimate aim of 'the protection of the rights of others'.¹³⁶ The custody of, and access to children, women's right to abortion without the father's consent, and compulsory blood tests to establish paternity, are also included in the legitimate aim of the protection of the rights of others.¹³⁷

It is interesting to question whether 'the right not to be offended' (or the protection of people against offensiveness) can be deemed as a legitimate aim within the meaning of Art. 10 (2). In *Handyside*, the ECtHR confirmed that offensive expression was entitled to protection.¹³⁸ Likewise, in *Vajnai v. Hungary*, the ECtHR was of the opinion that the protection of offensiveness was not considered as a pressing social interest which could justify the restriction of freedom of expression. It stated that:

¹²⁹ Section 78 of the Austrian Copy Right Act reads 'Images of persons shall neither be exhibited publicly, nor in any way made accessible to the public, where injury would be caused to the legitimate interests of the portrayed persons or, in the event that they have died without having authorised or ordered publication, those of a close relative'.

¹³⁰ (2007) No.68354/01, hudoc, para.19.

¹³¹ *Ibid.*, paras.30-31.

¹³² See, for example, *Tammer v. Estonia*, (2001) No. 41205/98, 2001-I; *Hachette Filipacchi Associés v. France* (2007).

¹³³ See, for example, *Otto Preminger Institut v. Austria* (1994); *Wingrove v. the United Kingdom* (1996).

¹³⁴ Cram, I., 'The Danish Cartoons, Offensive Expression and Democratic Legitimacy', in Hare, I., and Weinstein, (eds), *Extreme Speech and Democracy*, (Oxford University Press, Oxford, 2009), pp.311-330, 322; White, R., and Ovey, C., p.323.

¹³⁵ (1989) No.10461/83, A217.

¹³⁶ (1989) No.10461/83, A217, para.51.

¹³⁷ For more examples see Greer, S., *The Exception to Article 8 to 11 of the European Convention on Human Rights* (Council of Europe Publishing, Strasbourg, 1997), p.36.

¹³⁸ (1976) No.5493/72, A024, para.49.

'restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society...'¹³⁹

However, in *Otto Preminger*¹⁴⁰ and *Müller*,¹⁴¹ the ECtHR appeared to accept that the right not to be offended could be regarded as a pressing social need justifying the restriction of freedom of expression. In the former case, the ECtHR held that the seizure of the film met the legitimate aim of protecting the right to respect one's religious feelings,¹⁴² and in the latter case, the seizure of the paintings and criminal punishment on the painter met the legitimate aim of protecting the sense of sexual propriety.¹⁴³

Whilst the ECtHR's position in *Handyside* and *Vajnai* made it clear that offensive expression was protected, its position in *Otto Preminger* and *Müller* allowed expression to be restricted on the basis of preventing people from offence. It could be contended that the ECtHR's jurisprudence on 'the right not to be offended' is a contradiction in itself and does not seem to be coherent.

Nonetheless, as already argued in Chapter 3, the mere offensiveness cannot be a strong justification for restricting freedom of expression.¹⁴⁴

4.2.2.4 Necessity in a Democratic Society and the Margin of Appreciation Doctrine

The phrase 'necessary in a democratic society' connotes the idea that the contracting state's interference with freedom of expression must be 'relevant', 'sufficient', 'necessary' (in other words, there is a pressing social interest, i.e. the nine legitimate aims enumerated in Art. 10 (2))¹⁴⁵ and 'proportional' to a legitimate aim that the state pursues.¹⁴⁶ The principle of proportionality appears to be most important for the 'necessary in the democracy' condition. Without this principle, 'the formulation of [the ECHR] provisions would be open to restrictions depriving the rights and freedoms of all content so long as they were prescribed by law and for a legitimate purpose.'¹⁴⁷ In other words, without the requirement of proportionality, the state signatory to the ECHR can restrict freedom of expression

¹³⁹ (2008) No.33629/06, Hudoc, para.57

¹⁴⁰ (1994) No.13470/87, A295-A

¹⁴¹ (1988) No.10737/84, A133.

¹⁴² (1994) No.13470/87, A295-A, para.46

¹⁴³ (1988) No.10737/84, A133, para.36

¹⁴⁴ See Section 3.5.2.

¹⁴⁵ *Lingens v. Austria* (1986) No.9815/82, A103, para.39.

¹⁴⁶ Arai-Takahashi, Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerpen, 2001), pp.11-12.

¹⁴⁷ McBride, J., 'Proportionality and the European Convention of Human Rights', in Ellis, E. (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999), pp.23-35, 24.

without being concerned about whether the restrictive measure in question excessively burdens individuals' rights to freedom of expression; or to consider whether there is any less restrictive alternative, so long as they can claim that the implementation of such restriction is allowed by a law and has a legitimate aim. For this reason, the principle of proportionality serves as a buffer between the state's implementation of restrictive measure to achieve or secure public interest and individuals' rights and freedoms, by requiring the state to strike a fair balance and not to make 'the intensity of restriction ... excessive in relation to the legitimate needs and interests, which the specific restriction aims to redress'.¹⁴⁸ Therefore, the state authorities should be selective in choosing a restrictive measure which is 'the least burdensome on individual person's rights, but equally capable of achieving the same legitimate objective'.¹⁴⁹

Another significant element that is relevant to the 'necessary in a democratic society' requirement is the margin of appreciation doctrine. The doctrine is not prescribed anywhere in Art. 10 or in the ECHR, but has been developed by the ECHR judicial bodies themselves – i.e. the European Commission and the ECtHR.¹⁵⁰ The margin of appreciation can be explained – in general terms – as a doctrine according to which signatory state governments are granted a certain degree of latitude with regard to the evaluation of factual situations and to the implementation of legislative, administrative or judicial measures in the area of the ECHR's protected rights.¹⁵¹ This latitude refers principally to the discretionary power, in accordance with their national laws, which the authorities of the contracting state have in taking actions as necessary to satisfy particular pressing societal needs (the nine legitimate aims).¹⁵² Consequently, although such actions may amount to interference with the right guaranteed by Art. 10,¹⁵³ the ECtHR would typically find that there is no breach of Art. 10.¹⁵⁴

In practice, the ECtHR applies the doctrine of margin of appreciation by deferring its reasoning, to a greater or lesser extent, to the relevant domestic authorities' decisions in

¹⁴⁸ Tsakyrakis, S., 'Proportionality : An Assault on Human Rights?' (2009) *International Journal of Constitutional Law*, 7(3), pp.468-493, 476.

¹⁴⁹ Arai-Takahashi, Y., *supra*, p.15.

¹⁵⁰ Letsas, G., 'Two Concepts of the Margin of Appreciation' (2006) *Oxford Journal of Legal Studies*, 26(4), pp.705-732, 705-706.

¹⁵¹ Harris, D.J. *et al.*, *supra*, p.11; For a comprehensive analysis of the margin of appreciation doctrine in the context of the ECtHR's case-law, see Brems, E., 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) *Heidelberg Journal of International Law*, 56, http://www.zaoerv.de/56_1996/vol56.cfm, visited 12th December 2010, pp.240-314.

¹⁵² Feldman, D., *supra*, p.756.

¹⁵³ It should be noted that, apart from the right to free expression (Art.10), the margin of appreciation doctrine is also applicable to other rights (e.g. the right to privacy (Art.8), the right to conscience and religion (Art.9) and the right of association (Art.11)).

¹⁵⁴ Letsas, G., *supra*, p.710.

relation to the necessity of restriction on a particular freedom/right in question and the selection of means to accomplish a specific legitimate goal.¹⁵⁵ This can be called 'judicial deference'.¹⁵⁶ In this regard, the application of the doctrine could be seen as a justification for the ECtHR's refraining from replacing the national (local) authorities' discretion and evaluation with its opinions, which is normally based on international perspectives.¹⁵⁷ As a result, the ECtHR can avoid the risk of '[making] an unqualified substantive [*emphasis added*] judgement as to whether a right has been violated'.¹⁵⁸ However, this does not mean that the domestic authorities have unlimited power of discretion.¹⁵⁹ The ECtHR still maintains a supervisory role to ensure (review) that the exercise of national authorities' discretionary power complies with the ECHR's legal framework.¹⁶⁰

One of the main rationales for the application of margin of appreciation is the notion of 'subsidiarity'.¹⁶¹ Subsidiarity may be understood to mean that '[an] action to accomplish a legitimate government objective should be, in principle, taken at the lowest level of government capable of effectively addressing the problem'.¹⁶² This is consistent with Art. 1 of the ECHR which requires the contracting state to take the principal role in protecting the rights and freedoms enumerated in the ECHR. However, subsidiarity also means that national authorities can exercise discretionary power with regard to the selection of appropriate means, in accordance with their domestic legal system, to regulate freedoms and rights as necessary, if there is a pressing social interest requiring a restriction. On the other hand, the main task of ECtHR – as an international judicial body – is not to substitute itself for national authorities in exercising such discretionary power, but rather to play the role of supervisor, monitoring and reviewing the chosen regulatory measures to ensure that they are consistent with the ECHR's standards.¹⁶³ The ECtHR's position in *Handyside* clearly shows this notion. The ECtHR states that:

¹⁵⁵ Fenwick, H., and Phillipson, G., *supra*, p.49.

¹⁵⁶ Shany, Y., 'Toward a General Margin of Appreciation Doctrine in International Law' (2006) *The European Journal of International Law*, 16(5), pp.907-939, 909.

¹⁵⁷ *Ibid.*, *supra*, p.910.

¹⁵⁸ Letsas, G., *supra*, p.721.

¹⁵⁹ *Handyside v. UK* (1976) No.5493/72, A024, para.49.

¹⁶⁰ *Ibid.*,

¹⁶¹ Petzold, H., 'The Convention and the Principle of Subsidiarity' in Macdonald, R. St. J., Matscher, J., and Petzold, H. (eds.), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, Dordrecht, 1993), pp.41-62, 55-59; Bakircioglu, O., 'The Application of Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases', (2007) *The German Law Journal*, 8(7), pp.711-733, 717-718. For discussion about the relationship between the principle of subsidiarity and human rights in general see Corozza, P.G., 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) *American Journal of International Law*, 97(1), pp.38-79.

¹⁶² Bermann, G.A., 'Subsidiarity and the European Community' (1993) *Hastings International and Comparative Law Review*, 17(1), pp.97-112, 97.

¹⁶³ Petzold, H., p.49; McBride, J., *supra*, p.28.

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.¹⁶⁴

The second rationale behind the margin of appreciation concerns cultural diversity. The ECHR can be seen as providing a common standard with regard to the protection of Human Rights for the community, which is comprised of European countries that have ‘inexhaustible cultural and ideological variety’; thus, in interpreting the ECHR, the ECtHR should take into account such cultural and ideological differences of member states, and should not undermine such diversity by attempting to create and apply a rigidly uniform norm – especially those relating to moral values – to all member states.¹⁶⁵ In *Handyside*, it is clear that the ECtHR took into account the diversity of culture and ideology, particularly with regard to morality. It stated that:

‘it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place ...’¹⁶⁶

The lack of consensus of moral standards among European countries appears to be the main reason why the ECtHR rejected the applicant’s argument that, as the *Schoolbook* was freely available in other European countries, it should be freely available in the UK.¹⁶⁷ In *Müller*, the ECtHR was of the opinion that, even in the same country, the moral values and the standards of obscenity might differ from one region to another. Upon this view, the ECtHR rejected the applicant’s argument that Mr. Müller’s sexually explicit paintings should not be deemed obscene in Fribourg (the place where Mr. Müller and the organisers of the exhibition were prosecuted under the Swiss obscenity law), since the paintings had been exhibited in another Swiss city (Basle) before and they did not have a problem regarding obscenity there.¹⁶⁸

The granting of a wide margin of appreciation to national authorities in effect allows each member state to assert its own moral and cultural norms to restrict sexually explicit expression. In consequence, the levels of protection afforded to a particular sexually explicit expression would differ greatly between different ECHR countries; and, even within the

¹⁶⁴ *Handyside v. UK* (1976) No.5493/72, A024, para.48.

¹⁶⁵ Mahoney, P., ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’ (1998) *Human Rights Law Journal*, 19(1), pp.1-6, 3.

¹⁶⁶ *Handyside v. UK* (1976) No.5493/72, A024, para.48.

¹⁶⁷ The countries where the *Schoolbook* was available included Denmark, Belgium, Finland, France, Germany, Greece, Iceland, Italy, the Netherlands, Norway, Sweden and Switzerland. See *Ibid*, para.11.

¹⁶⁸ (1988) No.10737/84, A133, para.17.

same country, would vary from place to place. In other words, the right to freedom of sexual expression of people in *Country A* or *City A* would be considerably different from that of people in *Country B* or *City B*. As Eyal Benvenisti – a human rights law scholar – argues, such difference is obviously inconsistent with, and would ultimately undermine the universality of Art. 10 of the ECHR which emphasises that ‘[everyone] has the right to freedom of expression’.¹⁶⁹ He argues further that the wide margin of appreciation:

‘may lead national institutions to resist external review altogether, claiming that they are better judges of their particular domestic constraints and hence the final arbiters of their appropriate margin.’¹⁷⁰

This situation would downplay the authority of international human rights organisations, and the development of universal standards of the right to freedom of expression ‘in the long run also may be compromised.’¹⁷¹

The principle of proportionality – which prevents the state from excessive restriction of individual rights and freedoms – and the doctrine of margin of appreciation – which allows the state to exercise discretionary power to restrict individuals’ rights and freedoms in accordance with the local moral values – have an inverse relationship. The relation between the proportionality principle and the margin of appreciation doctrine also correlates with the type of expression and the legitimate aims that the state pursues. The ECtHR’s formula appears to be as follows. At the first stage, the ECtHR asks what type of expression is at issue and what the legitimate aims are that the state is pursuing. If the expression is political and the legitimate aim is not related to the protection of morality, the ECtHR would tend to give a narrow margin of appreciation to national authorities. This means that the ECtHR would apply a rigorous standard to consider whether the restriction of expression and the legitimate aim that the state pursues is proportionate. Interestingly, Yukata Arai-Takahashi – a researcher in the margin of appreciation doctrine – observes that, in some cases, the ECtHR did not apply the margin of appreciation doctrine at all.¹⁷² For example, in *Lingens v. Austria*, the ECtHR attached great importance to political expression and the press, which had a duty to impart opinion on the political matters. It then adopted a strict proportionality test to consider whether the restriction imposed on the political expression at issue (i.e. articles published in the magazine *Profil* that criticised an Austrian politician in strong language) was proportionate to ‘necessary in a democratic society to protect the rights of others’. It found that the restriction was not proportionate, and thus constituted a violation of

¹⁶⁹ Benvenisti, E., ‘Margin of Appreciation, Consensus and Universal Standards’ (1999) *New York University Journal of International Law and Politics*, 31(4), pp.843-854, 844

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Arai-Takahashi, Y., *supra*, p.2.

Art. 10.¹⁷³ In this case, the ECtHR did not even mention the margin of appreciation doctrine at all.¹⁷⁴ *The Sunday Times (No.1)* is another case that involves political expression (an issue of public interest). The core issue of this case is news coverage of litigation involving compensation claims by families of the victims who suffered from effects of drugs which contained thalidomide against *Distillers Company* – the manufacturer of the drugs. The Attorney General filed a contempt of court action, seeking to stop newspaper reporting on this matter, because the negotiation between parties was still before the court.¹⁷⁵ The ECtHR considered the doctrine of margin of appreciation and ruled that the legitimate aim of the maintenance of the authority and impartiality of the judiciary was more objective in nature than public morality (which might differ from place to place and from time to time). Thus a narrow margin of appreciation was granted to the national authorities. As a result, the ECtHR applied a strict standard of scrutiny to the restriction (the injunction against publication), and ruled that the restriction was not proportionate to the legitimate aim, i.e. the protection of ‘authority of the judiciary’.¹⁷⁶

By contrast, if the type of expression at issue is not relevant to political matters (in the strict sense) and the legitimate aim is the protection of morality, the ECtHR would typically grant a wide margin of appreciation to national authorities, and applies a more relaxed standard of proportionality; and, in some cases, the proportionality test is not considered at all.¹⁷⁷ In *Handyside*, the ECtHR did not regard the *Schoolbook* as political expression,¹⁷⁸ and was satisfied that the law at issue, namely the Obscene Publication Act 1959/1964, aimed to protect morality.¹⁷⁹ Given these two factors, the ECtHR readily granted a wide margin of appreciation to the national authorities. Regarding the principle of proportionality in this case, the ECtHR did not even attempt to consider whether the seizure and the destruction of several hundreds of copies of the *Schoolbook* and the criminal sanction against the publisher was proportionate to the legitimate aim of protecting morality.¹⁸⁰ Similarly, in *Müller*, the ECtHR was of the opinion that the paintings in question were of non-political expression (as they were artistic expression). Regarding the legitimate aim, it considered that the Swiss

¹⁷³ (1986) No.9815/82, A103, paras.40,42,47; The case involved a defamation prosecution against the editor of a magazine *Profil*, which published two articles criticising an Austrian politician. The Austrian courts found that the editor was guilty, sentenced him with a fine, and ordered to confiscate copies of magazines which had the articles in question. Then, the editor brought his case to the ECtHR, alleging that the restriction imposed on him by the Austrian authorities constituted a violation of Art. 10.

¹⁷⁴ Prebenseb, S.C., ‘The Margin of Appreciation and Articles 9, 10 and 11 of the Convention’ (1998) *Human Rights Law Journal*, 19(1), pp.13-17, 14.

¹⁷⁵ (1979) No.6538/74, A30, paras.8-17

¹⁷⁶ *Ibid.*, paras.58-59,62,67-68.

¹⁷⁷ Arai-Takahashi, Y., *supra*, p.2.

¹⁷⁸ It is argued that the *Schoolbook* communicates political ideas, thus it should be treated as political expression. See 4.2.1.

¹⁷⁹ (1976) No.5493/72, A024, paras.45-47.

¹⁸⁰ Arai-Takahashi, Y., *supra*, p.103.

obscenity law had a legitimate aim to protect morality which, in this case, had a link to another legitimate aim, namely the protection of the rights of others (against offence).¹⁸¹ As a result, the ECtHR granted a wide margin of appreciation to the Swiss authorities. Interestingly, unlike in *Handyside*, the ECtHR in *Müller* did consider the proportionality between restrictions imposed on the expression (criminal conviction against the painter and the organisers of the exhibition, and the confiscation of the paintings) and the legitimate aim (the protection of morality and the rights of others) in some detail. However, as a wide margin of appreciation had already been granted, the ECtHR was ready to apply a more relaxed standard of proportionality to the restrictions at issue.¹⁸² Given this, it is unsurprising that the ECtHR agreed with the Swiss courts in imposing a criminal penalty on the applicants.¹⁸³ Regarding the confiscation of the paintings, the ECtHR considered that, having regard to the Swiss authorities' margin of appreciation, the confiscation (as an alternative to the destruction of the paintings) and the fact that Mr. Müller could apply to the Swiss courts to have the paintings returned earlier, met the 'necessary in a democratic society' requirement.¹⁸⁴

However, it could be argued that the granting of a wide margin of appreciation to national authorities to restrict sexually explicit expression seems to be inconsistent with the democratic principle of freedom of expression. Under the principle of democracy, the majority (those who adhere to the prevailing sexual norms), despite being offended, shocked or disturbed, do not have legitimacy to silence the sexual ideas expressed by the *Schoolbook*, Müller's paintings and pornography. However, granting a wide margin means that the ECtHR permits the national authorities, who presumably represent the majority views on sexual matters to suppress sexual ideas that are different from those of the majority. This is clearly contradictory to the notions of pluralism, tolerance and broadmindedness which allow different (or even opposing) ideas/opinions to co-exist in a democratic society. Furthermore, a wide margin of appreciation does not appear to be consistent with the notion of self-realisation (individual autonomy and self-fulfilment). As examined in Chapter 3, one should be permitted to access a wide range of ideas – irrespective of whether the ideas are deemed good or bad, consistent or inconsistent with the dominating views; and bases upon such ideas to make an independent decision about one's life and to develop one's personality and intellect.¹⁸⁵ Interestingly, in *Handyside*, although the ECtHR mentioned the importance of freedom of expression to self-development, it did not take it into account when granting a wide margin of appreciation to national authorities. It can be argued that the

¹⁸¹ (1988) No.10737/84, A133, para.27,30.

¹⁸² *Ibid.*, paras.31-37,40-44.

¹⁸³ (1988) No.10737/84, A133, para.36

¹⁸⁴ *Ibid.*, para.43

¹⁸⁵ See Section 3.3.4.

wide margin of appreciation, which allowed the English authorities to seize and destroy hundreds copies of the *Schoolbook*, inevitably limited opportunities of adults to explore sexual ideas from the *Schoolbook*. Likewise, in *Müller*, given the granting of wide margin of appreciation to the Swiss authorities, the seizure and the keeping of the paintings in a special room in The Art and History Museum of Fribourg (allowing only a few serious art specialists to view upon request),¹⁸⁶ in effect, prevents consenting adults from accessing sexual ideas imparted by the paintings. For the same reason, the restriction of pornographic expression without strong justifications (i.e. the protection of children and serious bodily harm to pornographic performers) may deprive consenting adults of chances to learn sexual ideas communicated by pornography, and to make independent decisions on their sexuality and sexual life-styles. In this sense, it could be argued that a wide margin of appreciation allows national authorities to interfere with adults' individual autonomy and self-fulfilment.

4.2.3 The ECtHR's jurisprudence on Freedom of Expression in Relation to Pornography

It was argued in Chapter 3 that pornography is a form of expression. As examined above, the European Commission and the ECtHR in *Scherer, Hoare and Perrin* recognised that pornography – materials which depict sexual activities in an explicit and provocative manner – was an instance expression within the meaning of Art. 10 (1).¹⁸⁷ The ECtHR's jurisprudence in this regard is consistent with the argument of Chapter 3. However, as examined above, it is likely for the ECtHR to classify pornography as non-political expression – i.e. the expression which does not relate to politics (in the strict sense) or issues of public concern. Thus, it could be said that pornography is afforded relatively weak protection against interference from the state.

Regarding the justification for restricting sexually explicit expression, it can be seen from the decisions in several cases that the European Commission and the ECtHR did mention about the importance of the protection of children against sexually explicit expression. In *Handyside*, the ECtHR expressed its concern that the *Schoolbook* might have harmful effects on young people (school children aged between 12 and 18) by encouraging them to 'indulge in precocious activities harmful for them or even to commit certain criminal offences [e.g. sexual intercourse between a boy not yet 14 and a girl not yet 16]'.¹⁸⁸ In *Müller*, the ECtHR expressed a similar view, noting that, as the exhibition did not have an age restriction, a minor who visited the exhibition was shocked and reacted violently after

¹⁸⁶ (1988) No.10737/84, A133, paras. 14, 21

¹⁸⁷ See Section 4.2.1.

¹⁸⁸ (1976) No.5493/72, A024, paras.32,52.

unintentionally seeing Mr. Müller's sexually explicit paintings.¹⁸⁹ Likewise, in *Hoare* the European Commission was of the opinion that, given the nature of video cassettes which could be copied, lent, rented, sold and viewed at home (out of control), it was difficult to ascertain that the pornographic videos in question would not fall in the hands of minors.¹⁹⁰ And in *Perrin*, the ECtHR stated that the pornographic websites in question could be freely accessible, and it was young Internet users – a group of people whom the state was attempting to protect – who sought out such kind of websites.¹⁹¹ The European Commission and the ECtHR's position on the protection of children against sexually explicit expression is consistent with conceptual framework in Chapter 3, which suggests that children should receive special protection, since pornographic expression may have detrimental effects on children's mental health and proper development of sexuality.¹⁹²

Although the European Commission and the ECtHR did address the necessity to protect children, they focused mainly on the legitimate aim of the protection of public morals when considering whether a wide margin of appreciation should be granted. This might be because the restrictions imposed on the expressions at issue in these cases were all based on obscenity laws. In *Handyside*, *Hoare* and *Perrin*, although the restrictive measures imposed on the sexually explicit expressions at issue (the *Schoolbook*, pornographic videos and a pornographic website respectively) were partly implemented to protect children, such restrictions were based on the English obscenity law (the OPA 1959/1964), which was designed to safeguard public morality in general. Likewise, in *Müller*, although the restrictions imposed on Mr. Müller's sexually explicit paintings were partly aimed to prevent young visitors from viewing the crude sexual depictions, such restriction was implemented under the Swiss obscenity law (Section 204 of the Swiss Penal Code) – the law that aimed to protect public morals. Since the legitimate aim of the protection of morality is afforded the widest margin of appreciation,¹⁹³ it appears that the European Commission and the ECtHR readily agreed to grant a great degree of discretionary power to the national authorities to determine what sexual expression should be permitted or forbidden, and what restrictive measures should be employed to constrain such forbidden sexual expression.

It could be argued that, in these cases, if the European Commission and the ECtHR had given more importance to the protection of children than the safeguard of public morality in

¹⁸⁹ (1988) No.10737/84, A133, paras.12,36.

¹⁹⁰ (1997) No.31211/96, the Decision of the European Commission on Human Rights.

¹⁹¹ (2005) No.5446/03, 2005-XI.

¹⁹² See Section 3.5.3.

¹⁹³ Koering-Joulin, R., 'Public Morals' in Delmas-Marty, M. (ed), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Martimus Nijhoff Publisher, Dordrecht, 1992), pp.83-98, 84.

general, they might have adopted a stricter scrutiny standard (in other words, a narrower margin of appreciation) to ponder whether the restriction imposed upon sexually explicit expression is 'necessary in a democratic society'. This would mean that, instead of promptly giving a great discretionary power to the state authorities, the ECtHR would have asked the state authorities whether there were any less restrictive alternative measures available at that time which could equally achieve the aim of protecting children. Applying this concept to *Handyside*, it would follow that the regulatory measure that seemed less restrictive would be the prohibition of the sales of *Schoolbook* to young children, and the requirement to make clear indication on the cover that the book that it had sexually explicit content. Admittedly, this would undermine the intention of the publisher who wishes to communicate sexual ideas to children. However, it would prevent the harmful effect caused by the book on children, whilst not completely prohibiting the *Schoolbook*. The book would have still been available for adults. Given this, it could be said that the seizure and the destruction of hundreds of copies of the *Schoolbook* and the conviction of the publisher would be deemed excessive, and did not meet the 'necessity in a democratic society' requirement. Likewise, in *Müller and Perrin*, there were less restrictive measures available. In *Müller*, the Swiss authorities could have ordered the organiser (as well as Mr. Müller) to impose some measures – such as an age limit, admission charges and the posing of a sign at the entrance to the exhibition warning visitors of the offensive nature of the paintings – to filter out minors (as well as adults who could be offended by sexually explicit paintings). Similarly, in *Perrin*, the English authorities could have ordered Mr. Perrin to remove pornographic images from the preview webpage, and pose a warning of sexually explicit content on the front page of his website. (Mr. Perrin's pornographic website requires a subscription and fee; this measure, to a certain extent, prevents young children from viewing the website as, in most cases, they do not have credit cards of their own). Thus, the confiscation of the paintings and the criminal sanction imposed on Mr. Müller, and the criminal sanction imposed on Mr. Perrin, appear to be excessive restrictions and arguably do not meet 'the necessity in a democratic society' condition.

The decision of the European Commission in *S. v. Switzerland*¹⁹⁴ can be seen as an interesting example of the regulation of pornographic expression which gives more importance to the protection of minors (as well as adults who do not want to view pornography), than to the protection of morality in general. In this case, Mr. Scherer – the applicant – ran a sex shop in Zurich. At the back of his shop was a video room, in which he showed homosexual pornographic films to his customers. The customer who wanted to view

¹⁹⁴ (1990) No.17116/90 the Decision of the European Commission on Human Rights; This case was brought to the ECtHR in *Scherer v. Switzerland* (1994) No.17116/90, A287.

such a film had to pay an entrance fee of 15 SFr, or alternatively bought sex magazines costing over 50 SFr and showed a membership card. The showing of pornographic films at his shop was known to his customers by 'word of mouth'. Mr. Scherer was arrested, prosecuted under the Swiss obscenity law (Section 204 of the Swiss Penal Code) and ordered to pay a fine. The European Commission concluded that the conviction of Mr. Scherer for showing pornographic films in a video room at his sex shop constituted an interference with his right to freedom of expression.¹⁹⁵ Mr. Scherer argued that the Swiss obscenity law '[was] not sufficiently precise to serve as a legal basis for [his] conviction'.¹⁹⁶ Furthermore, he had imposed a measure to ensure that those who entered the video room were consenting adults who wished to watch the pornographic videos and young persons were not allowed in; thus, there was no compelling reason to justify the restriction of his freedom to expression.¹⁹⁷ The European Commission was of the opinion that Mr. Scherer's arguments 'raised serious issues of fact and law which required an examination of the merits'.¹⁹⁸ Thus, it declared the application admissible (on the basis that it was not manifestly ill-founded). Furthermore, it noteworthy that, the European Commission's stance in this case implicitly denies the protection of public morality as a strong justification for restricting pornographic expression, especially in the case where there was no risk to children.¹⁹⁹ The approach that the European Commission took in this case may be regarded as a paradigm of the proportional regulation of pornographic expression, and is consistent with the conceptual framework of Chapter 3 – which argues that the regulatory measure should prevent children from accessing pornography, whilst not curtailing the right to freedom of expression of consenting adults. Due to the death of Mr. Scherer, the ECtHR did not have a chance to consider this case. Had it done so, it might have given more protection to the pornographic expression, in the circumstance that the defendant did take significant steps to prevent children from accessing pornography.

Nonetheless, it is clear from *Perrin* – the most recent sexually explicit expression case brought before the ECtHR – that, despite mentioning the protection of children, the ECtHR still based its view on the rationale of the protection of public morality to declare that the application was inadmissible. Considering the position of the ECtHR in *Perrin*, it could be said that there would be no significant change to the ECtHR's jurisprudence on sexually explicit expression. The ECtHR would carry on granting a wide margin of appreciation,

¹⁹⁵ *S v. Switzerland* (1992) No.17116/90, the Decision of the European Commission on Human Rights; see also *Scherer v. Switzerland* (1994) No.17116/90, A287, para.26.

¹⁹⁶ *S v. Switzerland* (1992) No.17116/90, the Decision of the European Commission on Human Rights.

¹⁹⁷ Fenwick, H., and Phillipson, G., *supra*, p.414.

¹⁹⁸ *S v. Switzerland* (1992) No.17116/90, the Decision of the European Commission on Human Rights.

¹⁹⁹ Fenwick, H., and Phillipson, G., *supra*, p.414.

leaving the level of protection afforded to sexually explicit expression to be determined by national authorities.²⁰⁰

4.3 The Council of Europe's Policies on Freedom of Expression on the Internet and the Regulation of Internet Pornography

This section looks at the CoE's policy initiatives in relation to freedom of expression on the Internet and the regulation of Internet pornography. It analyses the CoE's policies within the conceptual framework proposed in Chapter 3, with the intention of assessing the extent to which the policy initiatives are in line with the conceptual framework.

It is important to note at the outset that the CoE's policies come in the forms of the Recommendation, the Resolution and the Declaration. The Recommendation sets a common policy on a particular matter at which the member states of the CoE should aim. It may be introduced by the Committee of Ministers²⁰¹ or Parliamentary Assembly.²⁰² The Resolution is an administrative decision taken by the Committee of Ministers or introduced by the Parliamentary Assembly.²⁰³ The Declaration is a statement concerning a particular issue adopted by the Committee of Ministers.²⁰⁴ The Recommendation, the Resolution and the Declaration of the CoE are regarded as important standard-setting documents loosely binding on the member states in the manner of political commitment, to which the member states should attach importance when making or implementing relevant policies at state-level. However, as these documents are advisory in nature and do not have a legally binding effect, the implementation of policies set out in the documents depends mainly on the member states' willingness to comply.²⁰⁵

The CoE's policies on freedom of expression on the Internet and the regulation of Internet pornography can be roughly divided into four areas, namely (1) the general policy on freedom of expression on the Internet; (2) the regulation of Internet content; (3) the protection of children from harmful content on the Internet; and (4) the regulation of violent and extreme pornography.

²⁰⁰ See Section 5.1.3.

²⁰¹ Art. 15 (b) of the Statute of CoE.

²⁰² Art. 22 of the Statute of CoE; In 1994, the Committee of Ministers decided to use the denomination 'Parliamentary Assembly' instead of 'Consultative Assembly'. Recommendation of the Parliament Assembly is normally passed on to the Committee of Ministers for consideration.

²⁰³ Art. 29 of the Statute of CoE; *The CoE*, http://www.coe.int/t/cm/adoptedTexts_en.asp#P46_2532, visited 17th September 2012.

²⁰⁴ *Ibid.*

²⁰⁵ *The CoE*,

http://www.coe.int/t/dg4/education/historyteaching/Results%5CAcceptedTexts%5CAcceptedTextsIntro_en.asp, visited 17th September 2012; Akdeniz, Y.(2008), *supra*, p.206.

4.3.1 The CoE's policy on Freedom of Expression on the Internet

In *Recommendation Rec(2001)8 on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services)*, and the *Committee of Ministers' Declaration on Freedom of Communication on the Internet (Declaration 2003)*,²⁰⁶ their preambles state that:

'Recalling the commitment of the member states to the fundamental right to freedom of expression and information as guaranteed by Article 10 of the [ECHR] ...',²⁰⁷

The preambles of *Recommendation Rec(2006)12 on empowering children in the new information and communications environment*, *Recommendation CM/Rec(2007)11 on Promoting Freedom of Expression and Information in the New Information and Communication Environment* and *Recommendation CM/Rec(2008)6 on Measures to Promote the Respect for Expression and Information with regard to Internet Filters* state that:

'Reaffirming the commitment of member states to the fundamental right to freedom of expression and to receive and impart information and ideas without interference by public authorities and regardless of frontiers, as guaranteed by Article 10 of the [ECHR]',²⁰⁸

The above statements show that, in general, the CoE considers freedom of expression – which is enshrined in Art. 10 of the ECHR – as one of the crucial elements of its policies on the regulation of Internet content. Thus, it encourages member states to make and implement policies on the Internet at domestic level accordingly by avoiding imposing prior control on Internet content.²⁰⁹ In general, it could be said that the CoE's policies which urge member states to take into account the right of freedom of expression when regulating Internet content is consistent with the conceptual framework developed in Chapter 3, which suggests that the regulation of Internet content should consider the right to freedom of expression.

²⁰⁶ *Declaration 2003* was adopted by the Committee of Ministers on May 28, 2003 at the 840th meeting of the Ministers' Deputies.

²⁰⁷ *Recommendation Rec(2001)8 on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services)* <https://wcd.coe.int/ViewDoc.jsp?id=220387&Site=CM>; the *Committee of Ministers' Declaration on Freedom of Communication on the Internet 2003* https://wcd.coe.int/ViewDoc.jsp?id=220387&Site=CM;http://www.coe.int/t/information/society/documents/Freedom%20of%20communication%20on%20the%20Internet_en.pdf, visited 19th September 2012.

²⁰⁸ *Recommendation Rec(2006)12 on empowering children in the new information and communications environment*, <https://wcd.coe.int/ViewDoc.jsp?id=1188541>; *CM/Rec(2007)11 on Promoting Freedom of Expression and Information in the New Information and Communication Environment*, <https://wcd.coe.int/ViewDoc.jsp?id=1188541>; *Recommendation CM/Rec(2008)6 on Measures to Promote the Respect for Expression and Information with regard to Internet Filters*, <https://wcd.coe.int/ViewDoc.jsp?id=1266285>, visited 19th September 2012.

²⁰⁹ *Ibid*, p.8.

Nonetheless, as stated clearly in the explanatory note of *Declaration 2003*, freedom of expression on the Internet is subject to Art. 10 (2) of the ECHR. According to Principle 3, member states still have power to impose restrictions on illegal content on the Internet (by removing the illegal content from the Internet or blocking access to it), if they fulfil all requirements set out in Art. 10 (2).²¹⁰ According to the ECtHR's jurisprudence on sexually explicit expression examined in the previous section, by giving wide margin of appreciation to national authorities, the ECtHR gives leeway to member states to determine what types of pornographic expression should be criminalised or allowed, and what restrictive measures should be implemented to regulate pornography. Accordingly, despite the CoE's policies on the Internet affirming the right to freedom of expression on the Internet, the level of protection affordable to Internet pornography still depends primarily on national pornography-related laws and the discretionary power of national authorities of individual member-states.²¹¹

4.3.2 The CoE's policy on the Regulation of Internet Content

The CoE's policies on Internet content distinguish harmful content (i.e. the content that carries a risk of harm to physical, mental and moral development of children which *inter alia* includes online pornography)²¹² from illegal content (i.e. the content which is deemed unlawful according to national criminal law).²¹³ This is consistent with the concept proposed in Chapter 3 in that, whilst it is necessary to control pornographic expression on the Internet, the regulation of Internet pornography should make a clear distinction between two types of pornography. The first is pornography that may be regarded as harmful to minors, but not to adults (legal pornography); the second is pornography that is deemed illegal under the national pornography-related law (illegal pornography).²¹⁴ These two distinct categories of pornography require different regulatory approaches. The former needs restrictive measures

²¹⁰ *Explanatory Note of the Declaration on Freedom of Communication on the Internet 2003*, http://www.coe.int/t/information/society/documents/Freedom%20of%20communication%20on%20the%20Internet_en.pdf, visited 19th September, 2012, p.9.

²¹¹ See Section 5.1.3 and for an example case see *Perrin v. UK* (2005) No.5446/03, 2005-XI.

²¹² *Recommendation CM/Rec(2009)5 on Measures to Protect Children Against Harmful Content and Behaviour and to Promote their Active Participation in the New Information and Communication Environment*, <https://wcd.coe.int/ViewDoc.jsp?id=1470045&Site=CM>, visited 24th September 2012, para.2.

²¹³ *Recommendation Rec(2001)8*, supra, preamble, para.9.

²¹⁴ However, it should be noted that the conceptual framework in Chapter 3 suggests that only pornographic materials that involve the use of real violence and cause serious bodily harm to participants should be treated as illegal pornography. By contrast, 'illegal pornography according to national laws' stated in *Recommendation Rec(2001)8* may cover a broader category of pornography such as, under the Obscene Publication Act, obscene pornography which may not involve the use of real violence, but have morally corrupting effects on viewers.

to prevent children – but not consenting adults – from accessing it; whilst the latter demands legal enforcement to suppress its availability as it should not be accessible to anyone.²¹⁵

Regarding the regulatory modes of Internet content, the CoE advocates co-regulatory and self-regulatory approaches,²¹⁶ rather than the purely state regulation.²¹⁷ *Recommendation Rec(2001)8* urges member states to encourage the establishment of an organisation which has representatives from ISPs, content providers and users to regulate content on the Internet through the enforcement of a regulatory mechanism and codes of conduct.²¹⁸ It also recommends that member states set up a content complaint system (e.g. hotline) to allow the public to report possible illegal online content; and that the complaint system works in co-operation with the relevant public authorities.²¹⁹ The Internet Watch Foundation (IWF) of the UK can serve as an example of the co-regulatory approach. The IWF is a private regulatory organisation established by the Internet industry (it is sometimes referred to as an industry self-regulatory body)²²⁰ which provides a hotline to receive reports of unlawful content, and works in co-operation with ISPs and state agencies – such as the Home Office and police – to remove or suppress illegal content on the Internet (i.e. child pornography, obscene and extreme pornographic content). Although the IWF may be seen as an institutional model of the Internet content regulatory body which the *Recommendation Rec(2001)8* envisages, it is subject to certain criticisms, particularly its lack of accountability to the public and legitimacy to judge the illegality of content. (This issue will be discussed in more detail in Section 5.4.1.)

Apart from the establishment of a private regulatory body, *Recommendation Rec(2001)8* urges the member states to encourage the Internet industry, by working in co-operation with the aforesaid organisation, to establish a set of content descriptors in order to provide neutral labelling of the content system (or rating system). The labelling system could help content providers to identify whether their websites have pornographic content.²²¹ In addition, member states should encourage a wide range of search tools and filtering profiles, enabling Internet users to select content in accordance with content descriptors.²²² This would allow Internet users to choose for themselves and their children what types of content they/their

²¹⁵ See Section 3.6.

²¹⁶ For the definitions of co-regulation and self-regulation see Section 3.7.

²¹⁷ Principle 2 of the *Declaration 2003*.

²¹⁸ *Explanatory Note of the Declaration 2003*, supra, p.8; *Recommendation Rec(2001)8*, paras.1-5.

²¹⁹ *Ibid.*, paras.12,14.

²²⁰ However, it is interesting to note that the IWF does not have a representative from Internet users. This is different from what *Recommendation Rec(2001)8* suggests.

²²¹ Apart from pornography, the content descriptor may identify violent content, the use of tobacco or alcohol, gambling and content which allows unsupervised contact and anonymous contact between adults and minors. *Recommendation Rec(2001)8*, para.7.

²²² *Ibid.*, para.9.

children want or can view or should avoid.²²³ However, most importantly, filtering should be applied by users on a voluntary basis.²²⁴ This policy is consistent with Principle 3 of *Declaration 2003*, which proposes that public authorities should not employ 'general blocking or filtering measures' to deny access to content on the Internet.²²⁵

Recommendation CM/Rec(2008)6 on Measures to Promote the Respect for Freedom of Expression and Information with regard to Internet Filters also provides interesting policies on filtering systems. It comments that Internet users' awareness, understanding of and ability to effectively use Internet filters are of great importance, as these factors would allow them to exercise the full right to freedom of expression.²²⁶ Thus, it recommends that users be informed when the filtering system is active and, where appropriate, be able to activate or de-activate such filter.²²⁷ It suggests that public authorities refrain from operating Internet content filtering and from imposing nationwide general blocking, unless the operation of a filter meets all requirements enumerated in Art. 10 (2) of the ECHR.²²⁸

Internet users should have a channel through which to challenge the blocking of content and to seek clarification and remedies.²²⁹ Furthermore, it is important for the filtering scheme to be transparent; thus member states, in co-operation with the private sector and the civil society, should develop and promote a minimum level of information, informing Internet users of the techniques the filter in question uses (e.g. inclusive filtering (a white list),²³⁰ exclusive filtering (a black list),²³¹ keyword blocking,²³² content rating-based filtering²³³ or combination thereof), and provide information to explain the grounds on which specific

²²³ Ibid., paras.6-8.

²²⁴ Ibid., para.10

²²⁵ Principle 3, *Declaration on Freedom of Communication on the Internet 2003*; However, this recommendation does not prevent public authorities from installing filtering software on computers at school or libraries in order to protect children against harmful content.

²²⁶ *Recommendation CM/Rec (2008)6*, supra, para.1.

²²⁷ Ibid.

²²⁸ Ibid., para.3.1.

²²⁹ *Recommendation CM/Rec (2008)6*, supra, para.1; the IWF has a channel for an Internet user or a content provider to challenge the blocking or removal of content. See Section 5.4.1.

²³⁰ The 'white-list blocking' means that the Internet users are allowed to access only websites on the lists. Other websites are blocked. See Deibert, J.R., and Villeneuve, N., 'Firewalls and Power: An Overview of Global State Censorship of the Internet', in Klang, M., and Murray, A.D. (eds.), *Human Rights in the Digital Age* (Glasshouse, London, 2005), pp.111-124, 112.

²³¹ The 'black-list blocking' is a filtering technique which allows Internet users to access most websites except websites on the black list. See *ibid.*

²³² The keyword blocking' blocks access to a website or a webpage if such website or webpage contains a forbidden keyword. See *ibid.*

²³³ The filtering software operates in conjunction with a particular content rating scheme. This means that a content provider has to rate or label his/her website or webpage. For example, a website is labelled inappropriate for children due to sexually explicit content. When children try to access this website, the filtering software will check the label of the website in question. When the software finds that website has a label indicating that it contains sexually explicit content, it will automatically block access to such website. For more information see Section 5.4.2.

online content is filtered out.²³⁴ This policy is in line with *Recommendation CM/Rec(2007)11 on Promoting Freedom of Expression and Information in the New Information and Communication Environment*, which suggests that the governments of the member states, the private sector and the civil society should develop common standards and strategies to promote transparency, and to give guidance and assistance to individual Internet users on the blocking and filtering of content.²³⁵ It is also important for the governments of the member states to raise public awareness of how Internet filters may limit freedom of expression.²³⁶

As can be seen from *Recommendation Rec(2001)8*, the CoE recommends that the power to control access to Internet content – which is not illegal – should be mainly in the hands of end users.²³⁷ Rating and filtering systems should be developed, with the support of the governments of member states, private sector and civil society, to meet this demand. This policy appears to be consistent with the concept of freedom of expression, as Internet users should be free to select whatever online content they wish to view, and the state should abstain from interference with such selection. The Internet Content Rating Association (ICRA) might provide an example of such a labelling system. However, the problem with the ICRA is that not many content providers use it; and, at present, the Family Online Safety Institution (FOSI) – the organisation which operated the ICRA – has stopped providing the ICRA label without giving a clear reason. Commercial Internet filtering software may have a problem of over-blocking, thus preventing Internet users from accessing useful information. (This issue will be discussed in more detail in Section 5.4.2.)

4.3.3 The CoE's policy on the Protection of Young Internet Users

It was argued in Chapter 3 that the protection of minors against pornography, which may have detrimental effects on their moral development understanding of sex and sexuality, is an important justification for the restriction of pornography.²³⁸ However, it is equally important that the measures adopted to safeguard minors should not excessively interfere with consenting adults' freedom to pornographic expression. The CoE seems to have policies which are consistent with this principle. *Recommendation Rec(2001)8* urges member states to encourage content providers and ISPs to use conditional access tools, such as age-verification systems, personal identification codes, passwords, encryption and decoding systems or access via cards with an electronic code.

²³⁴ *Recommendation CM/Rec (2008)6*, supra, paras.1.1, 1.2.

²³⁵ *Recommendation CM/Rec (2007)11*, supra, para.1.6.

²³⁶ *Recommendation CM/Rec (2008)6*, supra, paras.1.5,1.11.

²³⁷ *Recommendation Rec(2001)8*, para.10.

²³⁸ See Section 3.5.3.

Recommendation CM/Rec (2009)5 on Measures to Protect Children against Harmful Content and Behaviour and to Promote Their Active Participation in the New Information and Communication Environment encourages member states, as well as the private sector and the civil society, to provide safe and secure space (walled garden) for children; for instance, age-appropriate websites and online portals (*Yahoo! Kids*,²³⁹ *CBBC*²⁴⁰ and *Through the Wild Web Woods*²⁴¹ are examples of age-appropriate portal and website).²⁴²

It recommends that member states promote a pan-European labelling system which works with the filter system to screen out harmful content (the ICRA can be an example), helping to create a safe and secure space for young Internet users; also that they develop the pan-European trustmark so as to ensure the labelling system is trustworthy.²⁴³

In *Declaration 2003*, the CoE allows schools and libraries to install filtering software on computers accessible to children in order to prevent children from accessing harmful content (including pornography).²⁴⁴

In addition, as the CoE recognises that it is almost impossible to eliminate every harmful site, *Recommendation CM/Rec (2009)5* urges that member states – in association with the private sector, media and civil society – promote Internet skills and literacy in children, parents and teachers. Parents and educators should be aware of the risk of children's freely using the Internet; moreover, children should learn how to best use the Internet and be prepared for possible encounters with harmful content.²⁴⁵ This policy is in line with *Recommendation Rec(2006)12*, which enjoins member states to teach school children familiarity with the Internet, and promote sufficient understanding of detrimental effects of harmful content (such as pornography) and how to deal with it.²⁴⁶ *Childnet International*²⁴⁷ and *Kidsmart*²⁴⁸ are examples of websites which give information and advice to children, parents and teachers on how to use the Internet safely.

²³⁹ *Yahoo! Kids*, <http://kids.yahoo.com/>, visited 27th September 2012.

²⁴⁰ *CBBC*, <http://www.bbc.co.uk/cbbc/>, visited 27th September 2012.

²⁴¹ *Through the Wild Web Woods*, <http://www.wildwebwoods.org/popup.php?lang=en>, visited 27th September 2012.

²⁴² *Recommendation CM/Rec (2009)5*, <https://wcd.coe.int/ViewDoc.jsp?id=1470045&Site=CM>, visited 27th September 2012, para.9.

²⁴³ *Ibid.*, paras.11-12.

²⁴⁴ Principle 3 of the Declaration 2003.

²⁴⁵ *Ibid.*, paras.16.

²⁴⁶ *Recommendation Rec(2006)12*, supra, paras.1, 3.

²⁴⁷ *Childnet International*, <http://www.childnet.com/default.aspx>, visited 27th September 2012.

²⁴⁸ *Kidsmart*, <http://www.kidsmart.org.uk/>, visited 27th September 2012.

As can be seen from the CoE's policies on children and the Internet above, the CoE recommends member states, in co-operation with the private sector and civil society, to use a combination of approaches to keep pornographic expression out of the reach of children. These approaches include the application of technological solutions (e.g. conditional access, labelling and filtering systems), the promotion to create more child-appropriate portals or websites and, perhaps most importantly, initiatives to raise awareness about harmful content on the Internet among children, parents and teachers. This would be an ideal approach. It should be accepted that the technological solutions can partially protect children from online pornographic materials. The most key factor for the success of this scheme is young Internet users themselves. They should learn, with the support and guidance from parents and teachers, how to use the Internet wisely and to prevent themselves from being harmed by online pornography.

4.3.4 The CoE's policy on Violent and Extreme Pornography

The CoE has an initiative to restrict violent and extreme pornography. The motion for a recommendation on *Violent Pornography: A Threat to Women's Dignity and Rights* was introduced to the Parliament Assembly in 2010.²⁴⁹ In the following year, the Parliamentary Assembly adopted *Resolution 1835(2011) on Violent and Extreme Pornography*, showing its deep concern at increased accessibility to 'violent and extreme pornography' on the Internet. 'Violent and extreme pornography' is defined as pornography that depicts scenes of degradation, sexual violence, torture, murder, necrophilia or bestiality.²⁵⁰ It proposes that, among other things, member states introduce specific legislation to criminalise the production, distribution and possession (even in the case of personal use) of violent and extreme pornographic material,²⁵¹ and set up or support the setting up of hotlines for the public to report violent and extreme pornography.²⁵² In addition, it encourages member states to conduct 'scientific research about the impact of violent and extreme pornography

²⁴⁹ The motion for recommendation was introduced by José Mendes Bota, an Assembly member from Portugal, and others,

<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=12755&Language=EN>, visited 29th September 2012.

²⁵⁰ *Parliamentary Assembly Resolution 1835(2011)*,

<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1835.htm>, visited 29th September 2012, para.2.

²⁵¹ *Ibid.*, paras.9.1.5.1, 9.1.5.2; England already has specific legislation to regulate extreme pornography law in place (Section 63 of the Criminal Justice and Immigration Act 2008). See Section 5.2.4, 5.3.2.

²⁵² *Ibid.*, para. 9.1.7; In the UK, the Internet Watch Foundation (IWF) provides a hotline for the public to report illegal pornographic content, including extreme pornography. See Section 5.4.1.

on viewers to examine the possible link between habitual consumption of violent and extreme pornography and the increase of inclination to violent sexual behaviour'.²⁵³

In September 2011, the Committee on Equal Opportunities for Women and Men of the Parliamentary Assembly of the Council of Europe produced *Report on Violent and Extreme Pornography*.²⁵⁴ The *Report* states that:

'The images contained in violent and extreme pornography ... are degrading and harmful to women's dignity and their status in society. ...

[It is expected that] this report can contribute to raising awareness of its implication and give a push forward in the following three main areas:

-as regards research, there is a need for in-depth scientific studies to be conducted on the accessibility of violent and extreme pornographic material, in particular on the Internet; on its impact on the viewer; ...

-as regards the law, given the different cultural traditions of member states and, to a certain extent, their different approach to freedom of expression, youth protection and sexual freedom, it would be unfeasible for [this report] to propose a harmonisation of criminal law on pornography and obscenity. However, there is wide scope for improving the enforcement of existing national laws and regulations and strengthening co-ordination amongst member states. In particular, they could assess the impact of their existing law and regulations applying to violent and extreme pornography and revise it to bring them closer at European level;

-as regards classification, there is scope for setting up a system of classification and content descriptors for violent and extreme pornographic material, applicable in all member states.²⁵⁵

It is interesting to note that the degree of restriction of pornography in member states of the CoE differs from one to another. At one end of the spectrum, a small number of member states, e.g. Bulgaria, Iceland, Lithuania, Ukraine, ban all forms of pornography. Some countries, such as Germany, Norway, Belgium, prohibit only certain kinds of pornography (such as violent, bestial or necrophilia pornography). At the other end of the spectrum, Sweden – which stands out as a very liberal country in this regard – allows most types of pornography.²⁵⁶

In *Resolution 1981(2011)*, adopted in October 2011, the Parliamentary Assembly recommends the Committee of Ministers ask an appropriate body of the CoE to conduct a comparative study of the law and regulations applying to violent and extreme pornography

²⁵³ Ibid., para. 9.3.1.

²⁵⁴ Ibid.

²⁵⁵ Ibid., paras.108, 111.

²⁵⁶ The Committee on Equal Opportunities for Women and Men, *Report on Violent and Extreme Pornography*, Doc.12719, 19th September 2011, <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=13173&Language=EN>, visited 29th September 2012, paras.55, 57, 67-69.

in member states to consider whether there is scope for a more harmonised approach, especially with regard to responses to the distribution of violent and extreme pornography on the Internet.²⁵⁷ In April 2012, the Committee of Ministers expressed its position on this matter. It shared its concern with the Parliamentary Assembly at increased accessibility of violent and extreme pornographic materials available on the Internet.²⁵⁸ Accordingly, the Committee instructed the Steering Committee on Media and Information Society (CDMSI) to discuss the possibility of conducting a comparative study.²⁵⁹ In October 2012, the CDMSI held a meeting to discuss *inter alia* issues of violent and extreme pornography.²⁶⁰ At the meeting, however, the CDMSI concluded that:

‘ ... [the CDMSI] takes the view that a comparative analysis of the laws and regulations applying to forms of violent and extreme pornography in member states would require a strong multidisciplinary approach, involving not only the CDMSI but also other pertinent committees and expertise of the [CoE]. Furthermore, given the current work programme of the CDMSI and its limited resources available, it would not be feasible for the CDMSI to carry out such a task at this moment.’²⁶¹

As the comparative study on the legal regulation of violent and extreme pornography at the CoE level has not yet been conducted, it could be said that the CoE’s position on this matter remains uncertain.

As argued in Chapter 3, pornography that involves in the use of real violence should be criminalised.²⁶² The CoE’s initiative on the regulation of violent and extreme pornography examined above appears to be in line with what was proposed in Chapter 3 in that it attempts to outlaw violent and extreme pornography. Nonetheless, it is important to note that the CoE’s initiative and the proposal in Chapter 3 are different in terms of the rationales for the prohibition of violent pornography.

The argument for the prohibition of violent pornography proposed in Chapter 3 is harm-based. Violent pornographic material which involves the use of real, as opposed to simulated violence, may cause serious bodily harm (e.g. wounds from the use of sharp objects or burns caused by the use of hot substances) or could even be life-threatening (e.g.

²⁵⁷ *Recommendation 1981(2011)*,

<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/EREC1981.htm>, visited 29th September 2012.

²⁵⁸ CM/AS(2012) Rec1981 Final, <https://wcd.coe.int/ViewDoc.jsp?id=1932645&Site=CM>, visited 30th September 2012, para.2.

²⁵⁹ *Ibid.*, para.5

²⁶⁰ *The CoE*, http://www.coe.int/t/dghl/standardsetting/media/cdmsi-bu/CDMSI-BU%282012%29OJ2_en.asp, visited 29 September 2012.

²⁶¹ *The CoE*, [http://www.coe.int/t/dghl/standardsetting/media/cdmsi/CDMSI\(2012\)010Rev_en%20Sec%20report%20on%20violent%20and%20extreme%20pornography.asp](http://www.coe.int/t/dghl/standardsetting/media/cdmsi/CDMSI(2012)010Rev_en%20Sec%20report%20on%20violent%20and%20extreme%20pornography.asp), visited 16th December 2012.

²⁶² See Section 3.5.5.1.

erotic asphyxiation) to pornographic performers. Although it is difficult to deny that this genre of pornography is a form of expression as it imparts the idea that sexual pleasure can derive from bodily pain and violence, or women are subordinate to men sexually, it is nonetheless produced at the cost of participants' being exposed to the risk of serious injury and death. Thus, as argued in Chapter 3, it does not deserve protection within the legal framework of freedom of expression. The conceptual framework proposed in Chapter 3 focuses upon the criminalisation of violent pornography only in which real violence is used. It does not cover pornography which apparently depicts simulated or computer-generated sexual violence (where no real physical harm occurs).

Conversely, the initiative of the CoE to regulate violent pornography is based on the notion that violent pornography threatens women's dignity, as this type of pornography conveys and endorses the ideas of women's objectification and subordination for men's sexual gratification.²⁶³ Interestingly, the CoE's position on violent pornography in this respect is, closely similar to the argument of anti-pornography feminism that pornography propagates the idea of male supremacy or women's subordination.²⁶⁴ Admittedly, the ideas of male supremacy/women subordination may be deemed objectionable by certain groups of people, especially women. Nonetheless, they are a type of idea relating to sexuality and gender relations. It was contended in Chapter 3, according to the concept of freedom of expression, all kinds of ideas/opinions should be freely expressed irrespective of whether they are disturbing, shocking or offensive; therefore an attempt to suppress violent pornography on the ground that it communicates an idea which allegedly threatens women's dignity seems to be incompatible with the conception of freedom of expression.²⁶⁵ More importantly, it is doubtful whether the prohibition of violent pornography will be able to protect the dignity of women, as the CoE seems to claim. As already suggested in Chapter 3, a more reasonable way to protect women's dignity would be the promotion of the idea of gender equality, persuading people (especially men) to treat women with respect.²⁶⁶

Apart of the issue of women's dignity, the *Report on Violent and Extreme Pornography* suggests that violent pornography may contribute to undesirable perceptions of women or

²⁶³ See the motion for a recommendation on 'Violent Pornography : A Threat to Women's Dignity and Rights', supra, para.3; *Resolution 1835(2011)*, supra, para.7; The The Committee on Equal Opportunities for Women and Men, *Report on Violent and Extreme Pornography*, Doc.12719, 19th September 2011, supra, paras.8-9.

²⁶⁴ See Section 3.5.5.2.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

aggressive sexual behaviour in men, leading men to abuse women sexually.²⁶⁷ In other words, violent pornography put women at risk of real-life sexual violence at the hands of men. However, *Resolution 1835(2011)* appears to accept that this claim is inconclusive; as it states that more scientific research in this area is still required.²⁶⁸ Given the insufficient scientific research to support the claim that violent pornography leads to sexual violence, this rationale of the CoE does not appear to be strong enough to justify the prohibition of violent pornography, especially in comparison with harm-based justification proposed in Chapter 3.²⁶⁹

As the CoE's initiative regarding violent pornography is still at an early stage, it remains to be seen whether the regulation will cover simulated and computer-generated violent pornography.

In sum, it could be said that the CoE's initiative to suppress the availability of violent pornography is welcome and in line with what proposed in Chapter 3 to some extent. Nonetheless, its justification, which is based mainly on the protection of women's dignity, appears to be inconsistent with the freedom of expression principle. Moreover, its claim that violent pornography causes men to have aggressive and violent sexual behavior remains controversial and lacks sufficient scientific proof, and thus may not be able to provide a persuasive justification for prohibiting violent pornography.

4.4 Brief Introduction to the European Union

'The [EU] is an economic and political partnership between 27 European states that together cover much of the continent.'²⁷⁰ It originated in 1950, when six European countries, i.e. France, Germany, Italy, Belgium, the Netherlands and Luxembourg, agreed on the establishment of a supranational body to control their steel and coal production,²⁷¹ to develop a common market in coal and steel, and to implement Community legislation.²⁷² This resulted in the signing of the Treaty Instituting the European Coal and Steel

²⁶⁷ The Committee on Equal Opportunities for Women and Men, *Report on Violent and Extreme Pornography*, Doc.12719, 19th September 2011, supra, para.9; For the feminism's account of this issue see also Section 3.5.5.2

²⁶⁸ *Resolution 1835(2011)*, supra, para. 9.3.1.

²⁶⁹ See Section 3.5.5.2.

²⁷⁰ *The EU*, http://europa.eu/about-eu/basic-information/index_en.htm, visited 8th October 2012.

²⁷¹ Dedman, M.J., *The Origins and Development of the European Union 1945-2008: A History of European Integration*, (2nd ed.), (Routledge, London, 2010), p.51.

²⁷² Dinan, D., *Ever Closer Union: An Introduction to European Integration*, (Palgrave MacMillan, Basingstoke, 2005), p.27.

Community (ECSC) (or the Paris Treaty) in 1951.²⁷³ In 1957, the Treaties of Rome were signed to establish two more Communities, the European Atomic Energy Community (Euratom), which had its principal objective to deal with atomic energy and nuclear materials; and the European Economic Community (EEC), which aimed to create economic and commercial integrity by fusing the member-states' economies into one single economic system.²⁷⁴ In 1965, the Merger Treaty merged the executive bodies of the three communities (the ECSC,²⁷⁵ the Euratom²⁷⁶ and the EEC) under a single executive structure.²⁷⁷ In 1992, the Treaty of Maastricht was signed, creating the European Union (EU). The EEC was renamed the European Community (EC)²⁷⁸ and became one of the three pillars of the EU. The other two were Common Foreign and Security Policy (CFSP) and the Police and Judicial Co-operation in Criminal Matters (PJCC).²⁷⁹ However, the Treaty of Lisbon, which was signed in 2007 and came into effect in 2009, has brought a significant change to the structure of the EU. The three-pillar system was abolished and replaced by the EU as a single consolidated legal entity.²⁸⁰

The EU has a number of institutions and bodies. The European Parliament serves as a forum in which member states debate and pass EU law.²⁸¹ The Council of the EU is the place where national ministers from each EU member state meet to co-ordinate EU policy and pass EU laws (with the European Parliament).²⁸² The European Commission (in the past, Commission of the European Communities) is the executive body of the EU with its main responsibility to oversee and implement EU policies by *inter alia* purposing a new law and enforcing the existing EU law.²⁸³ The European Court of Justice (ECJ), interprets EU law and settles disputes between the member states and EU institutions; it also tries the cases

²⁷³ Robertson, A.H., *European Institutes: Co-operation, Integration, Unification*, (3rd ed.), (Steven and Sons Limited, London, 1973), p.18.

²⁷⁴ Dedman, *supra*, p.86,88; Fairhurst, J. and Vincenzi, C., *Law of the European Community*, (4th ed.), (Pearson/Longman, Harlow, 2003), p.6.

²⁷⁵ The ECSC expired on July 23, 2002. See

http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm, visited 1st October 2012.

²⁷⁶ It should be noted that the Euratom does not merge with the EU; therefore, it is a legal entity separate from the EU. See

http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_euratom_en.htm, visited 1st October 2012.

²⁷⁷ *Ibid.*, p.7.

²⁷⁸ Title 2 Art. G of Treaty on European Union.

²⁷⁹ Titles 1, 5, 6 of Treaty on European Union.

²⁸⁰ *The EU*,

http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm, visited 1st October 2012.

²⁸¹ *The European Parliament*, <http://www.europarl.europa.eu/portal/en>, visited 9th October 2012.

²⁸² *The Council of the EU*, <http://www.consilium.europa.eu/homepage.aspx?lang=en>, visited 9th October 2012.

²⁸³ *The European Commission*, http://ec.europa.eu/index_en.htm, visited 9th October 2012.

brought by individuals, companies or organisations concerning infringement of their rights by an EU institution.²⁸⁴

4.5 Pornography and Freedom of Expression within the EU's Legal Framework

Originally, the EC was established to be an international co-operative organisation with the primary purpose of regulating economic development (the focus was on creating a common market).²⁸⁵ Thus, none of its founding treaties²⁸⁶ mentions human (or fundamental) rights protection. It was believed that activities within the scope of the EC were mainly economy-oriented²⁸⁷ and they would not constitute violations of human rights.²⁸⁸ Secondly, it was thought human rights protection already fell within the purview of the member-states²⁸⁹ and that of the CoE, which at the time was already in operation to safeguard human rights.²⁹⁰

In its early judgements (in the mid-1960s), the ECJ explicitly denied its role as a human rights protector; it emphasised that there was no room for human rights within the EC legal order.²⁹¹ However, the position of the ECJ with regard to the protection of human rights changed radically in the 1970s when the ECJ held in the landmark case of *Stauder v. City of Ulm* that it recognised, albeit tentatively, fundamental rights.²⁹² Following *Stauder*, the ECJ in *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* confirmed that respect for human rights, as inspired by the constitutional traditions common to the member-states, formed an integral part of the general principles of Community law.²⁹³ In *Nold v Commission*, the ECJ went further, holding that international treaties for the protection of human rights could supply guidelines for human rights

²⁸⁴ *The European Court of Justice*, http://curia.europa.eu/jcms/jcms/j_6/, visited 9th October 2012.

²⁸⁵ Craig, P., and de Búrca, G., *EU Law: Text, Cases and Materials*, (5th ed.), (Oxford University Press, Oxford, 2011), p.364; for a useful discussion about the development of the human rights in the EU see Alston, P., Bustelo, M., and Heenan, J., (eds.), *the EU and Human Rights*, (Oxford University Press, Oxford, 1999); Williams, A., *EU Human Right Policies: A Study in Irony*, (Oxford University Press, Oxford, 2004).

²⁸⁶ The Treaty of Paris (1951) to establish the ECSC and the Treaties of Rome (1957) to establish the EEC and the Euratom.

²⁸⁷ It should be noted that, of the three organisations of the EC, the Euratom was the only one which did not deal with economic activity. It was initially established 'to coordinate the Member States' research programmes for the peaceful use of nuclear energy'. See generally *The EU*, http://ec.europa.eu/energy/nuclear/euratom/euratom_en.htm

²⁸⁸ Betten, L., and Greif, N., *EU Law and Human Rights*, (Longman, New York, 1998), p.53.

²⁸⁹ Isiksel, N. T., 'Fundamental Rights in the EU after *Kadi* and *Al Barakaat*', (2010) *European Law Journal*, 16(5), pp.551-557, 553.

²⁹⁰ Betten, L., and Greif, N., p.53.

²⁹¹ Chalmers, D., Davies, G., and Monti, G., *European Union Law*, (2nd), (Cambridge University Press, Cambridge, 2010), pp. 232-233; for example cases see *Stork v. High Authority*, Case 1/58 (1959) ECR; Joined Cases 36/59-38/59 and 40/59 (1960) *Geitling v. High Authority*; *Sgarlata v Commission* (1965) Case 40/64.

²⁹² Case C-29/69 (1969) ECR 419, para.7.

²⁹³ Case C-11/70 (1970) ECR 1125, para.4.

jurisprudence, which the ECJ should follow within the framework of Community law.²⁹⁴ This was the first time that the ECJ mentioned the international human rights instrument as a legal source of human rights protection. In the following case, *Rutili v Ministre de l'intérieur*, the ECJ made it clear that the international human rights instrument referred mainly to the ECHR.²⁹⁵ Since then it has continued to cite the ECHR and the case-law of the ECtHR.²⁹⁶ It may thus be said that the ECJ's ruling in *Rutili* was an important landmark in the EU legal system of protection of human rights, giving a clear status to the ECHR as a main source of legal reference within the legal order of the EU. In *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, the ECJ underlined the importance of human rights protection, ruling that the Community could not accept measures which were incompatible with human rights that were guaranteed *inter alia* by the ECHR.²⁹⁷ The position of the ECJ in *Rutili* and *Wachauf* appears to confirm that the ECJ considers the ECHR as a principal source of legal reference. The ECJ was ready to exercise its judicial power to ensure the protection of rights enumerated in the ECHR. However, it is important to note that despite the ECJ treating the ECHR as a main source of legal reference, it has never ruled that the ECtHR's case-law has a formal legally binding effect upon the ECJ or that the ECHR's provisions have been formally incorporated into EU law.²⁹⁸ As a result, the ECJ retains leeway to give protected rights that the ECHR does not guarantee, such as the right to lawyer, refugee rights and data protection. In addition, since the ECJ considers the level of protection of human rights given by the ECHR as a 'floor' rather than the ceiling, the ECJ can grant a more extensive protection to human rights beyond the level given by the ECHR and the ECtHR.²⁹⁹

In parallel with the development of the ECJ's case law, there is also development in EU legislation on the protection of human rights. The Treaty on European Union (TEU) provides that the EU shall respect fundamental rights, as guaranteed by the ECHR, as a general principle of Community law.³⁰⁰ This was the first time that the EU formally addressed the status of the ECHR in its treaties. The consolidated version of the TEU still maintains the principle that the EU shall recognise the ECHR as providing the general

²⁹⁴ Case C-4/73 (1974) ECR p.491, para.13.

²⁹⁵ Case C-36/75 (1975) ECR 1219, para.32; It should be noted that the ECHR is not the only international human rights instrument the ECJ refers to. The ECJ also looks at other international human rights instruments for legal reference, e.g. the ICCPR (*Orkem v. Commission*, Case 374/87 (1989) ECR 3283), the UN Convention on the Rights of Children (*Parliament v. Council (family reunification)*, Case C-540/03 (2006) ECR I-5769), the Community Charter of Fundamental Rights of Workers, and the European Social Charter (*Blaizot v. Belgium*, Case 24/86 (1988) ECR 379, *Defrenne v. Sabena*, Case 149/77 (1987) ECR 1365) see Chalmers, D., Davies, G., and Monti, G., *supra*, p.235.

²⁹⁶ Douglas-Scott, S., 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*' (2006) *Common Market Law Review*, 43(3), pp.629-665, 633 and 644-652.

²⁹⁷ Case C-5/88 (1989) ECR 2609, para.17.

²⁹⁸ Craig, P., and de Búrca, G., *supra*, p.367.

²⁹⁹ *Ibid.* See Section 52 (3) of the EU Charter of Fundamental Rights.

³⁰⁰ Art. F (2) of the TEU (the original version).

principles of EU law.³⁰¹ Furthermore, it empowers the EU to accede to the ECHR, meaning that when the accession completes the EU will be legally bound by the ECHR.³⁰²

Concerning the right to freedom of expression, the ECJ has referred to Art. 10 of the ECHR in its case-law on several occasions. In *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and other*, the ECJ drew upon the ECHR, as providing a general principle of law, to hold that if the national law in question fell within the scope of Community policies, 'it must be appraised in the light of general principle of freedom of expression' embodied in Art. 10 of the ECHR.³⁰³ In *Society for the Protection of Unborn Children Ireland v. Grogan*, the ECJ similarly held that when the national legislation fell within the scope of Community law, the national law should be assessed whether or not it was compatible with the right to freedom of expression, laid down in the ECHR.³⁰⁴ These two early cases marked the initial step of the ECJ's addressing the right to freedom of expression. However, the ECJ did not discuss Art. 10 and held that national laws at issue were outside the scope of Community law. In *TV10 SA v Commissariaat voor de Media*,³⁰⁵ the ECJ made a general statement about the existence and importance of freedom of expression that was guaranteed by Art. 10 of the ECHR, but did not examine the relevant jurisprudence in detail.³⁰⁶ However, in *Connolly v. Commission*³⁰⁷ significant jurisprudence with regard to freedom of expression was laid down by the ECJ. In this case the ECJ made it clear that it followed the ECtHR's jurisprudence with regard to the protection of the right to freedom of expression (Art. 10 of the ECHR). The ECJ began with defining the scope of freedom of expression, holding that both inoffensive and offensive, disturbing and shocking expressions were within the protection of the ECHR under Art. 10 (1).³⁰⁸ It referred to well-known cases of ECHR, such as *Handyside* and *Müller*. However, it went on to remark that the right to freedom of expression was not absolute and could be restricted in accordance with conditions set out in the second paragraph of Art. 10 to protect, for example, morals and rights of others.³⁰⁹ Lastly, it pointed out that the limit on expression must be interpreted restrictively and must be necessary in a democratic society (which could be understood as

³⁰¹ Art. 6 (3) of the TEU (the consolidated version).

³⁰² Art. 6 (2) of the TEU (the consolidated version); see generally Jacque, J.P., 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) *Common Market Law Review*, 48(4), pp.995-1023.

³⁰³ Case C-260/89 (1991) ECR 2925, para.45.

³⁰⁴ Case 159/90 (1991) ECR I-4685, para.31.

³⁰⁵ Case C-23/93 (1994) ECR I-14795.

³⁰⁶ Woods, L., 'Freedom of Expression in the European Union' (2006), *European Public Law*, 12(3), pp.371-401, 390.

³⁰⁷ Case C-274/99P (2001) ECR I-1611.

³⁰⁸ *Ibid.*, para.39.

³⁰⁹ *Ibid.*, para.40.

that there was 'a pressing social need').³¹⁰ In addition, although the contracting states were allowed a certain degree of margin of discretion in assessing whether such a pressing social need exists, the interference with the right to freedom of expression must be proportionate to legitimate the aim pursued and the reasons adduced by national authorities to justify it must be relevant and sufficient.³¹¹ The ECJ in *Germany v. Parliament and Council*³¹² confirmed its position that it depended mainly on the ECtHR's jurisprudence in considering cases involving freedom of expression. It held that :

'whilst the principle of freedom of expression is expressly recognised by Article 10 of the ECHR and constitutes one of the fundamental pillars of democratic society, it nevertheless follows from Article 10 (2) that freedom of expression may be subject to certain limitation justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of legitimate aims under the provision and necessary in democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.'³¹³

In *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*, the ECJ added that where the expression at issue did not contribute to a discussion of public interest (which in this case was an advertisement), member states had wide discretion to consider the reasonableness and proportionality of the limitation imposed on the expression (a wide margin of discretion).³¹⁴

As examined above, the ECJ's jurisprudence on the right to freedom of expression appears to follow the jurisprudence of the ECtHR. This means, in principle, that the ECJ recognises the right to freedom of expression in general. Nevertheless, it admits that the right to freedom of expression can be limited if the limitation meets the requirements set out in Art. 10 (2) of the ECHR, namely that there is legislation which permits restriction, the implementation of restrictive measures aims to serve the nine public interests enumerated on Art. 10 (2) and the implementation is necessary in a democratic society (or there is a pressing social need). Importantly, in *Herbert Karner*, the ECJ was of the opinion that when the expression neither relates to political matters nor contributes to the discussion of public interests (non-political expression), the state might have a greater degree of discretion to ponder whether the implemented restrictive measure is proportional to the right to freedom of expression. The ECJ's principle 'discretion' apparently follows the ECtHR's application of the margin of appreciation doctrine.

³¹⁰ Ibid.

³¹¹ Ibid., para.41.

³¹² Case C-380/03 (2006) ECR I-11573.

³¹³ Ibid., para.154.

³¹⁴ Case C-71/02 (2004) ECR I-3054, paras. 51.

Thus far, the ECJ has not yet had an opportunity to consider a case involving freedom of expression in relation to pornography. Nonetheless, in *R. v Henn and Darby*,³¹⁵ the ECJ considered an issue relating to pornographic material within the context of free movement of goods. The jurisprudence in this case would be useful in analysing the possible position of the ECJ on pornographic expression. In this case, pornographic films and magazines were imported to the UK in a lorry departing from Rotterdam, Maurice Henn collected the boxes containing pornographic materials from the lorry and was about to delivery pornographic materials to Frederick Darby in London. However, Henn and Darby were arrested and the boxes containing pornographic materials were seized by Customs officers on the ground that the importation was prohibited under the Customs Consolidation Act 1876. One of the key issues brought by the House of Lords to the ECJ in this case was that the ban on the importation of pornographic materials was contrary to Art. 30 of the ECC Treaty (now Art. 28 of the Treaty on EU), which prohibited the quantitative restriction on imports between EU member states. The ECJ ruled that the UK's ban on the importation of pornographic materials in this case constituted a quantitative restriction on imports, which was in breach of Art. 30.³¹⁶ Nevertheless, such restriction was justified by Art. 36 of the ECC Treaty (now Art. 30 of the Treaty on EU), which permitted restrictions on imports on the ground *inter alia* of public morality.³¹⁷ It went further, ruling that each member state was free to determine, in accordance with its own moral values, what should be forbidden on grounds of public morality.³¹⁸ The ECJ in *Conegate Ltd. v. Commissioners of Customs and Excise*, confirmed this notion, ruling that 'it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory'³¹⁹ These rulings confirm that the protection of public morality is an important justification, permitting a state to restrict pornographic materials. Given this ruling and the ECJ's jurisprudence on the right to freedom of expression examined above, if the ECJ has to consider an issue of pornography within the context of freedom of expression, it is likely the ECJ will hold that pornographic expression, despite being protected by Art. 10 of the ECHR, could be restricted by domestic law protecting public morality.

It was contended in Chapter 3 that the protection of public morality cannot be a strong justification for restricting pornographic expression. This is because, firstly, relying on the

³¹⁵ Case C-34/79 (1979) ECR 3795.

³¹⁶ *Ibid.*, paras.12-13.

³¹⁷ *Ibid.*, para.15.

³¹⁸ *Ibid.*

³¹⁹ Case 121/85 (1986) ECR 1007, para.14; However, it should be noted that in this case the UK's argument to justify the prohibition of the importation of sex dolls from Germany on the ground of public morality failed. This was because, as the ECJ pointed out, there was no ban on the manufacture and sale of sex dolls in the UK (unlike pornographic materials which were subject to obscenity law and there was no lawful trade in pornography in the UK). Thus, the prohibition of the importation constituted a breach of Art. 30 of the ECC and could not be justified by Art. 36.

protection of public morality to suppress pornographic expression could be interpreted as that the state exerts its power in the name of protection of prevailing sexual mores to silence the different views. This is obviously contrary to the notion of freedom of expression, which argues that there should always be room for all kinds of ideas/opinions, irrespective of whether they are deemed good or bad, morally acceptable or objectionable, true or false.³²⁰ Therefore, it could be said that the likelihood that the ECJ would allow the restriction on pornographic expression on the ground of public morality is not in line with the conceptual framework proposed in Chapter 3.³²¹

Within the EU legal framework, the protection of minors is another important justification for restricting freedom of expression. It is generally accepted by the EU that in the jurisprudence of Art. 10 of the ECHR, even shocking or offensive expression deserves protection; however, the protection of freedom of expression must be balanced against the public interest of protecting minors, a vulnerable group which needs a greater level of protection since their physical and mental developments could be easily impaired by harmful expression.³²² In 1989, the EU adopted Television Without Frontier Directive (TWFD).³²³ It should be noted that in 2007, the TWFD was amended and renamed to Audiovisual Media Services Directive (AVMSD) to cover not only television but all audiovisual media services.³²⁴ Art. 22 of the TWFD, as amended by Directive 97/36/EC (or Art. 27 of the AVMSD), makes it clear that pornography is considered to be content that might seriously impair the physical, mental and moral development of minors.³²⁵ Member states shall take appropriate measures to ensure that television programmes which have pornographic content should be 'prohibited, unless they are broadcast at a time when they will not normally be seen by minors or protective technical measures are in place'.³²⁶ In addition, when such television programmes are broadcast in encoded form, member states

³²⁰ See Section 3.5.1.

³²¹ Lorna Woods argues that the scope the ECJ gives to member states to prohibit imports on the ground of public morality is too wide and might lead member states to abuse their discretionary power to prohibit goods from other member states. The approach taken by the ECJ in *R v. Henn and Darby* on this point is not good law with regard to free movement of goods. See Woods, L., *Free Movement of Goods and Services within the European Community*, (Ashgate, Aldershot, 2004), pp.115-116

³²² Harrison, J., and Woods, L., *European Broadcasting Law and Policy*, (Cambridge University Press, Cambridge, 2007) pp. 220, 221.

³²³ 89/552/EEC.

³²⁴ 2007/65/EC, http://ec.europa.eu/avpolicy/reg/history/historytwf/index_en.htm, visited 8th November 2012. It is codified in 2010. See 2010/13/EU, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>, visited 8th November 2012.

³²⁵ Apart from pornographic content, gratuitous violence is considered to be content that might seriously impair the physical, mental and moral development of minors within the meaning of Art. 22 (1) of the TWFD.

³²⁶ Art. 22 (2) of the TWFD (or Art. 27 (2) of the AVMSD), http://europa.eu/legislation_summaries/audiovisual_and_media/l24101_en.htm, visited 17th December 2012.

must ensure that 'they are preceded by acoustic warning or are identified by the presence of a visual symbol throughout their duration'.³²⁷ In short, Art. 22 of the TWFD requires that programmes which have pornographic content must not be shown to minors.³²⁸

It was argued in Chapter 3 that the protection of minors is a particularly important justification for restricting freedom of pornographic expression. However, the restriction should not excessively interfere with the right to freedom of expression of consenting adults.³²⁹ As examined above, undoubtedly the legal measures under Art. 22 of the TWFD aim to prevent children from accessing pornographic expression, whilst not imposing a complete ban on pornographic programmes. As a result, consenting adults can still access pornographic programmes. Therefore, it could be said that the TWFD's restriction of pornographic expression on the ground of safeguarding minors is in line with what was suggested in Chapter 3.

To sum up, when dealing with a case involving freedom of expression, the ECJ typically relies on Art. 10 of the ECHR and its relevant jurisprudence laid down by the ECtHR as the main source of legal reference. Thus far, the ECJ has not yet had a chance to try a case relating to pornography in the context of freedom of expression. However, the ruling in *R v. Henn and Darby*, that involved the regulation of pornographic materials in the context of free movement of goods, clearly shows that within the EU legal framework of the protection of public morality is seen as an important justification for restricting pornography. Given this, it could be inferred that the ECJ is likely to rely on the protection of public morality to be a justification for limiting pornographic expression, when it has an opportunity to consider a case involving pornography in the context of freedom of expression. Furthermore, the TWFD added an important aspect to the EU legal framework by confirming that the protection of minors is another important justification for restricting (as opposed to a complete ban) the broadcasting of pornography. As examined above, whilst limitation of pornographic expression on the ground of protecting children is consistent with the conceptual framework in Chapter 3, the limitation of pornographic expression on the ground of public morality is not.

4.6 The EU's Policies on the Regulation of Internet Pornography

The EU first formally considered Internet content regulation in 1996. At the meeting of the Telecommunications Ministers, and the Culture and the Audio-Visual Ministers in Bologna

³²⁷ Art. 22 (3) of the TWFD (or Art. 27 (3) of the AVMSD)

³²⁸ Harrison, J., and Woods, L., *supra*, p.225

³²⁹ See Section 3.5.3.

on April the 24th 1996, the Commission of the European Communities (the European Commission) was requested to produce a summary of benefits offered by the Internet and assess how the European Community could take action to keep pace with the challenge posted by illegal and harmful content on the Internet.³³⁰ On October 16th 1996, the European Commission produced a document entitled *Communication from the Commission to Council and the European Parliament, the Economic and Social Committee and the Committee of the Regions on Illegal and Harmful Content on the Internet (Communication 1996)*.³³¹ *Communication 1996* summarised how Internet technology contributes to society, its economic and educational sectors. It also addressed the problem of illegal and harmful content on the Internet, as well as providing policy options with regard to the immediate action which the member states can take to deal with the problem.³³² As a follow-up to *Communication 1996*, the European Commission adopted an *Action Plan on Promoting Safe use of the Internet in 1997 (Action Plan)*.³³³ *Action Plan 1997* focused on available short-term measures to regulate illegal and harmful Internet content, and the relevant projects that needed financial supports from the EU.³³⁴ Initially, the implementation of *Action Plan* was intended to begin in 1998 and run for three years until 2001.³³⁵ However, *Action Plan* actually started in 1999 and ran until 2002.³³⁶ It was subsequently extended to 2004.³³⁷ *Action Plan* was succeeded by *Safer Internet Plus Programme* which ran from 2005 to 2008.³³⁸ The current *Safer Internet Programme* runs from 2009 to 2013.³³⁹

Alongside *Communication 1996*, the European Commission published *Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services (Green Paper 1996)*.³⁴⁰ *Green Paper 1996* was consultative, aiming to stimulate discussion on how to protect children and human dignity in the audiovisual and information services (TV and

³³⁰ Campbell, C., and Machet, E., 'European Policy on Regulation of Content on the Internet' in Liberty (ed.), *Liberating Cyberspace: Civil Liberties, Human Rights and the Internet*, (Pluto Press, London, 1999), pp.140-158, 147.

³³¹ COM (96) 487 Final, 16th October 1996.

³³² Akdeniz, Y.(2008), supra, p.167.

³³³ COM (97) 582, 26th November 1997.

³³⁴ Campbell, C., and Machet, E., supra, p.152; Akdeniz, Y., and Strossen, N., 'Sexually Oriented Expression', in Walker, C., Wall, D. and Akdeniz, Y. (eds.), *The Internet, Law and Society*, (Longman, Harlow, 2000), pp.207-230, 222.

³³⁵ Ibid.

³³⁶ Article 1.1 and 1.2 of the Decision No. 276/1999/EC of European Parliament and of the Council, 25th January 1999.

³³⁷ Article 1.2 of the Decision No. 1151/2003/EC of European Parliament and of the Council, 16th June 2003.

³³⁸ Article 1.1 of the Decision No. 254/2005/EC of European Parliament and of the Council, 11th May 2005.

³³⁹ Article 6.1 of the Decision No. 1351/2008/EC of European Parliament and of the Council, 16th December 2008.

³⁴⁰ COM (96) 483 Final, 16th October 1996.

the Internet) on a medium to long-term basis.³⁴¹ Following *Green Paper 1996* was *Council Recommendation on the Competitiveness of the European Audiovisual and Information Service Industry by Promoting National Frameworks aimed at Achieving a Comparable and the Effective Level of Protection of Minors and Human Dignity (Recommendation 1998)*.³⁴² This document was the first legal instrument at EU level concerning the content of audiovisual and information services, including Internet content.³⁴³ In 2004, the European Commission introduced *Proposal for a Recommendation of the European Parliament and of the Council on the Protection of Minors and Human Dignity and the Right of Reply in relation to the Competitiveness of the European Audiovisual and Information Service Industry*.³⁴⁴ The European Parliament and the Council of EU adopted *Recommendation of the European Parliament and of the Council on the Protection of Minors and Human Dignity and the Right of Reply in relation to the Competitiveness of the European Audiovisual and On-line Information Service Industry* on December 20 2006 (*Recommendation 2006*). *Recommendation 2006* was the supplementary policy to *Recommendation 1998*, taking into account 'recent technological developments and the changing media landscape'.³⁴⁵

As noted, by virtue of the Treaty of Lisbon; the Institutions of the EU can adopt five types of legal act, namely the Regulation, the Directive, the Decision, the Recommendation and the Opinion.³⁴⁶ The first three are legally binding, the latter two are not.³⁴⁷

4.6.1 The EU's Policy on Freedom of Expression on the Internet

Green Paper 1996 states clearly that the measures on the protection of human dignity and minors in audio-visual and information services must be subject to the principle of freedom of expression.³⁴⁸ The principle of freedom of expression mentioned in *Green Paper 1996* referred to the principle of freedom of expression laid down in Art. 10 of the ECHR. Likewise, *Communication 1996* states that measures at international level aiming to control harmful content should respect and ensure freedom of expression in accordance with Art.10

³⁴¹ See introduction of *Green Paper*, COM (96) 483 Final.

³⁴² 98/560/EC, 16th October 1996.

³⁴³ Lievens, E., Dumortier, J., and Ryan, P.S., 'The Co-Protection of Minors in New Media: A European Approach to Co-Regulation', (2006) *UC Davis Journal of Juvenile Law & Policy*, 10(1), pp.97-150, 117.

³⁴⁴ COM (2004) 341 Final, 30th April 2004.

³⁴⁵ *The EU*, http://europa.eu/legislation_summaries/audiovisual_and_media/124030a_en.htm, visited 12th October 2012.

³⁴⁶ *The EU*,

http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0032_en.htm, visited 9th October 2012.

³⁴⁷ Art. 288 of the Treaty on the Functioning of the EU.

³⁴⁸ COM (96) 483 Final, 16th October 1996, p.12.

of the ECHR.³⁴⁹ *Recommendation 2006* states *inter alia* that measures taken at EU level to encourage self-regulation to protect minors and human dignity should be based on the principle of freedom of expression.³⁵⁰ These show that respect for freedom of expression on the Internet is an important element of EU policy on the regulation of Internet content. Thus, the EU's policy is in line with the conceptual framework in Chapter 3 which suggests that the regulation of Internet pornography should take into account the principle of freedom of expression.

However, *Green Paper 1996* notes that freedom of expression is not an absolute right. It may be restricted by domestic law provided that such restriction is necessary within a democratic society, and the restrictive measures must meet the social needs and be effective without being disproportional.³⁵¹ This concept is in line with the principle in Art. 10 (2) of the ECHR, which permits states to limit freedom of expression if the implementation of restrictive measures is necessary within a democratic society and proportional to legitimate aim which the state pursues.³⁵² This would mean that although the EU's policy in general is in favour of freedom of expression, it would allow pornographic expression to be restricted if there is a pressing social need such as the protection of children against harmful content.

4.6.2 The EU's Policy on the Regulation of Internet Content

4.6.2.1 The Distinction between Illegal and Harmful Content

Concerning the regulation of content on the Internet EU policy goes in the same direction as that of the CoE. *Green Paper 1996* suggests that the EU policy should make a clear distinction between illegal content, which should be completely banned to all, and harmful content which is considered to have a negative impact on minors, but which should be lawfully available to adults.³⁵³ Similarly, *Communication 1996* emphasises that it is crucial to distinguish between illegal and harmful content, as these two categories of content 'call for very different legal and technological responses'.³⁵⁴ As far as pornography is concerned, both documents make it clear that illegal content refers mainly to child pornography (which is beyond the scope of this thesis).³⁵⁵ However, *Green Paper 1996* suggests that obscene materials, violent and zoophilia pornography are threats to human dignity and should also be

³⁴⁹ COM (96) 487 Final, 16th October 1996, p.11.

³⁵⁰ 2006/925/EC, 20th December 2006, paras. 5, 12, 18.

³⁵¹ COM (96) 483 Final, 16th October 1996, p.12.

³⁵² See Section 4.2.2.

³⁵³ COM (96) 483 Final, 16th October 1996, p.6.

³⁵⁴ COM (96) 487 Final, 16th October 1996, p.10.

³⁵⁵ COM (96) 483 Final, 16th October 1996, p.3; COM (96) 487 Final, 16th October 1996, p.10.

prohibited.³⁵⁶ In both documents, content that is regarded as harmful to minors refers to adult pornography.³⁵⁷

As far as adult pornography is concerned, the proposal of *Green Paper 1996* attempts to draw a distinction between illegal pornography (i.e. the types of pornography which should be completely prohibited, e.g. violent and bestial pornography) from legal pornography (i.e. the type that may be harmful to minors in terms of physical and mental development, but not to adults). The concept of harmful content sets an important initiative, suggesting that member states, in co-operation with the IT industry and civil society, should develop a system that protects minors from access to online pornographic material, whilst not excessively curtailing freedom of pornographic expression of consenting adults.³⁵⁸ The EU's policy in this regard accords with the conceptual framework in Chapter 3, which proposes that pornography should be divided into two types, namely illegal pornography, (pornography which causes bodily harm to pornographic performers e.g. pornography which uses real violence or real animals)³⁵⁹ and legal pornography. The former should be entirely forbidden, whilst the latter should be kept out of reach of children, but legally available to consenting adults.³⁶⁰ However, the only problematic one is 'obscene materials'. *Green Paper 1996* regards obscene materials as content which is detrimental to human dignity. Nonetheless, it does not explain how and in what sense obscene material threatens human dignity. If the mentioned threat means the threat to morality, this initiative is not consistent with the principle of freedom of expression and the conceptual framework of Chapter 3. This is because, as already argued in Chapter 3, the restriction of pornography on the ground of morality protection is inconsistent with the principle of freedom of expression³⁶¹. Another major problem is that EU member states adopt different approaches to the regulation of pornography and some jurisdictions do not have a concept of obscenity. For example, England has obscenity law,³⁶² whereas, for example, France does not adopt a concept of obscenity. French criminal law does not prohibit pornography on the ground of its content, but forbids the dissemination of pornographic content to minors.³⁶³ The English obscenity law prohibits pornographic material on the ground of its morally corrupting effect on the viewers/readers.³⁶⁴ German criminal law prohibits only pornography that depicts acts of

³⁵⁶ COM (96) 483 Final, 16th October 1996, p.3.

³⁵⁷ COM (96) 483 Final, 16th October 1996, p.3; COM (96) 487 Final, 16th October 1996, p.10.

³⁵⁸ COM (96) 483 Final, 16th October 1996, p.15.

³⁵⁹ See Section 3.5.5.1.

³⁶⁰ See Section 3.5.3.

³⁶¹ See Section 3.5.1.

³⁶² The Obscene Publication Act 1959/1964.

³⁶³ Art.227-24 of the French Criminal Code,

www.legifrance.gouv.fr/content/download/1957/.../4/.../Code_33.pdf, visited 18th October 2012.

³⁶⁴ See Section 5.2.1.

violence and bestiality,³⁶⁵ but does not forbid pornography which shows, for example, urination or excretion on the body – which are deemed morally corrupting under the English obscenity standard. Given the diversity of approaches to the regulation of pornography, it is quite difficult to set a standard of obscenity common to member states of the EU and make all of them agree on prohibiting obscene content as illicit expression. In addition, it is notable that whilst *Green Paper 1996* and *Communication 1996* identically state that illegal material on the Internet refers mainly to child pornography, only *Green Paper 1996* mentions obscene content (*Communication 1996* does not mention obscene content at all). It is questionable why these two documents are not consistent in the treatment of obscene content. As a result, the position of the EU on whether obscene content should be treated as illegal is still vague, unlike its position on child pornography, where there is a high degree of consensus among member states of the EU.³⁶⁶

4.6.2.2 Modes of Regulation

The EU expressed its clear position at the beginning; that is, it advocates IT industry self-regulation, co-regulation (the co-operation between private sector and the relevant public authorities) and technological solution – i.e. filtering and rating systems (self-regulation at Internet-user level) as main approaches to control content on the Internet.³⁶⁷ This is consistent with the conceptual framework proposed in Chapter 3.³⁶⁸

As far as illegal content on the Internet is concerned, *Communication 1996*, *Action Plan 1997* and *Recommendation 1998* similarly recommend that member states encourage the online services industry in their countries to set up a national framework of industry self-regulation and establish an industry self-regulatory body to direct, through a code of conduct, ISPs and host providers to remove illegal content from the servers or block access to such illegal content, where it is hosted on overseas servers.³⁶⁹ Furthermore, *Recommendation 1998*, urges member states to encourage the establishment of a hotline system to handle complaints from the public with regard to alleged illicit content on the Internet and liaison with law enforcement agencies to take legal action against content providers.³⁷⁰ As suggested by *Action Plan 1997*, illegal content must be dealt with at source by law enforcement agencies with assistance offered by the IT industry.³⁷¹ It should be noted that

³⁶⁵ Section 184a of the German Criminal Code.

³⁶⁶ COM (96) 487 Final, 16th October 1996, p.11.

³⁶⁷ Edwards, L., 'Pornography, Censorship and the Internet' in Edwards, L., and Waelde, C. (eds.), *Law and the Internet*, (3rd ed.), (Hart Publishing, Oxford, 2009), pp.623-669, 647-648.

³⁶⁸ See Section 3.7.

³⁶⁹ COM (96) 487 Final, 16th October 1996, pp.13-14; COM (97) 582 Final, 26th November 1997, p.4; 98/560/EC, 24th September 1998, para. I (1).

³⁷⁰ 98/560/EC, 24th September 1998, para. I (3).

³⁷¹ COM (97) 582 Final, 26th November 1997, p.3.

although the EU's initiatives on the regulation of illegal content on the Internet focus mainly on child pornography, the regulatory framework can be a model to be applied to regulate illegal types of adult pornography, such as violent and bestial pornography. The IWF can serve as an example of the IT industry self-regulatory and co-regulatory model, mentioned in the EU documents. It acts as a co-ordinator between the public, ISPs and public authorities (mainly the police) in receiving complaints from the public about alleged illegal types of pornography (such as, obscene and extreme pornography) and requesting the relevant ISP to remove such illegal pornography from the server (if the content is hosted on a UK server); at the same time, requesting the police to enforce pornography-related law against the content provider (if the content provider is in the UK). However, as stated earlier, the IWF is criticised, especially for its lack of accountability to the public and legitimacy to judge the illegality of content.³⁷²

In dealing with harmful content (or legal pornography), the EU advocates technological solutions i.e. filtering and rating (content labelling) systems, leaving the power of control in the hands of parents (and teachers) rather than the government.³⁷³ It encourages research on and the development of filtering and rating systems to ensure that the filtering devices are effective, accessible and cost-efficient; and that the rating system takes into account the cultural and linguistic diversity of Europe.³⁷⁴ Under *Safer Internet Action Plan*, the EU has funded a number of research projects to develop filtering and rating systems, such as SIP-Bench,³⁷⁵ 3W3S,³⁷⁶ Internet Content Rating Association (ICRA),³⁷⁷ NETPROTECT and NECTPROTECT II,³⁷⁸ and QUATRO and QUATRO Plus.³⁷⁹ At present, the EU is funding

³⁷² These issues will be examined in more detail in Section 5.4.1.

³⁷³ COM (96) 487 Final, 16th October 1996, p.20.

³⁷⁴ COM (97) 582 Final, 26th November 1997, p.4.

³⁷⁵ 'The SIP-Bench study is an expert, vendor/supplier-independent, objective assessment of the filtering software and services currently available. The study was carried out through an annual benchmarking exercise of approximately 30 parental control products or services repeated over 3 years. ... The focus of the benchmarking was on effectiveness, performance, usability, configurability, transparency and suitability for the European cultural context.' See http://ec.europa.eu/information_society/activities/sip/projects/completed/filtering_content_labelling/filtering/sip_bench/index_en.htm, visited 21st October 2012.

³⁷⁶ 'The 3W3S project intends to create a software programme compatible with the main browsers that will allow the persons responsible to choose the level of pornography, violence or bad words that the other users may see in the web pages.' See http://ec.europa.eu/information_society/activities/sip/projects/completed/filtering_content_labelling/filtering/3w3s/index_en.htm, visited 21st October 2012.

³⁷⁷ 'The ICRA safe project will create a system to allow responsible adults ("care-givers") to restrict children's access to Internet content that may harm them or is otherwise considered undesirable by the care-giver.' However, the ICRA is no longer active. See http://ec.europa.eu/information_society/activities/sip/projects/completed/filtering_content_labelling/filtering/icrasafe/index_en.htm, visited 21st October 2012; See also Section 5.4.2.

³⁷⁸ 'The objective of the NetProtect proposal is to build a European prototype of an Internet access filtering tool for parents and teachers which addresses the problems of current existing filtering solutions: inappropriate blocking/filtering techniques which sometimes blocks legitimate Web sites and occasionally allow questionable Web sites, inability to filter non-English Web sites and therefore

SIP-Bench II project with 443,960 euros. The project assesses the filtering products available on the markets and ranks the effectiveness of each filtering product with a main objective of helping parents to choose the most appropriate filtering products.³⁸⁰

According to the latest assessment (the 4th cycle result), some filtering products – e.g. F-Secure Internet Security 2012, K9 Web Protection, Trend Micro Online Guardian for Family and Window Live Family Safety – perform satisfactorily in screening out sexually explicit content.³⁸¹ Nonetheless, the efficiency of filtering appears to come with the problem of a high rate of over-blocking.³⁸² However, the document recommends that parents should not leave all responsibility for protecting minors from harmful content to filtering software alone. Filtering tools should be treated as a partial solution and parental control and communication with children are still requisite.³⁸³

As stated in *Communication 1996*, one of the main reasons for the EU's promotion of filtering and rating systems to regulate Internet pornography (harmful content) is that it is unwilling to interfere with the right to freedom of expression of adults.³⁸⁴ As argued in Chapter 3, although it is important to protect children against online pornographic content, the selected regulatory approach should not unconditionally and completely prohibit pornographic materials, which consenting adults can access and distribute as part of their right to freedom of expression. Filtering and rating solutions can meet this aim by screening out pornographic content when children surf the Internet (when the filtering software is

most Web European sites, lack of transparency disabling the user the right to know why some sites can be accessed and not others.' 'The [NetProtect II] carry on the work initiated in the NetProtect project. ... This follow-up action will focus on industrialising the prototype in order to have a commercially available product by the end of this project.' See http://ec.europa.eu/information_society/activities/sip/projects/completed/filtering_content_labelling/filtering/netprotect/index_en.htm;

http://ec.europa.eu/information_society/activities/sip/projects/completed/filtering_content_labelling/filtering/netprotect2/index_en.htm, visited 21st October 2012.

³⁷⁹ 'QUATRO will provide a common platform for quality labels making it possible for the many existing labelling schemes to be brought together through a single, coherent approach without affecting an individual scheme's assessment criteria or independence.' 'QUATRO Plus aims to build a universal machine-readable labelling platform to be used by labelling authorities among other actors on the trust marks Internet market.' See

http://ec.europa.eu/information_society/activities/sip/projects/completed/filtering_content_labelling/content_labelling/quatro/index_en.htm;

http://ec.europa.eu/information_society/apps/projects/factsheet/index.cfm?project_ref=SIP-2006-UE-211001, visited 21st October 2012.

³⁸⁰ See

http://ec.europa.eu/information_society/activities/sip/projects/filter_label/sip_bench2/index_en.htm, visited 21st October 2012.

³⁸¹ The full report of SIP-Bench II (Assessment Results and Methodology 4th Cycle),

http://ec.europa.eu/information_society/activities/sip/docs/sip_bench2_results/20120709%20SIP%20BENCH%20II%204th%20cycle%20report.pdf, visited 21st October 2012, p.31

³⁸² http://ec.europa.eu/information_society/activities/sip/projects/filter_label/sip_bench2/index_en.htm, visited 21st October 2012.

³⁸³ Ibid., p.15.

³⁸⁴ Ibid., p.18.

activated by parents) at the same time allowing adults access to such content (when the filtering software is turned off). Therefore, it could be said that the policy of the EU to promote the use of filtering and rating systems is consistent with the conceptual framework of Chapter 3.

4.6.3 The Liability of ISPs

The Electronic Commerce Directive 2000/31/EC laid down several important principles with regard to the limitations of liability of ISPs. Under Art. 12 of the Directive member states should treat ISPs as ‘conduits’ of information; thus, they are not liable for (illegal) information that is transmitted through their services. However, it is important to note that immunity under Art. 12 is given to ISPs on conditions that the ISPs do not initiate the transmission of such information, do not select the receiver of the transmission nor are involved in selecting or editing information that is transmitted through their services. Art. 13 grants immunity to the ISPs from liability caused by ‘cache’, i.e. automatic, intermediate and temporary storage of that information stored on the ISPs’ system. With regard to hosting services, Art. 14 provides that the ISPs are not liable for (illegal) content hosted on their systems, on the conditions that the ISPs lack knowledge of such content and promptly remove it when they are informed or are made aware of the existence of such content on their systems (notice and takedown measure). This means that the Electronic Commerce Directive does not give absolute immunity to ISPs; they are still liable for illegal content if they know the presence of illegal content and do not take any action to remove or disable access to such illegal content.³⁸⁵ If ISPs fail to take any action, by virtue of Art. 14 (3), national courts or administrative authority still have the power to order the ISPs to remove or disable access to the illegal content. Lastly, under Art. 15, ISPs are not under a general obligation to oversee information transmitted through or stored on their systems, nor actively to seek facts or circumstances indicating illegal activities.

Overall, the Electronic Commerce Directive provides the ISPs an option to choose immunity, allowing them not to act as censors (seeking and removing alleged illegal content on the Internet).³⁸⁶ As a result, freedom of expression on the Internet is not transgressed by ISPs. However, once the ISPs are informed of alleged illegal content, they become a censoring body in removing such ‘illegal’ content. Therefore, it is very important to ensure that the

³⁸⁵ Akdeniz, Y., ‘To Block or Not to Block: European Approaches to Content Regulation and Implication for Freedom of Expression’, (2010) *Computer Law & Security Review*, 26, pp.260-272, 266.

³⁸⁶ Birnhack, M.D., and Rowbottom, J.H., ‘Shielding Children: the European Way’ (2004) *Chicago-Kent Law Review*, 79(1), pp.175-227, 210.

'notice and takedown' measure is implemented in a transparent manner. Moreover, the enforcement bodies – i.e. public authorities or industry self-regulatory body – should be accountable to the public, especially by means of legal proceedings. Put differently, people whose right to freedom of expression is curtailed by the action of enforcement agencies should be entitled to seek judicial review of 'notice and takedown' orders. This would prevent the abuse of censoring power and not improperly restrict freedom of expression on the Internet.

4.6.4 The EU's policy on the Protection of Young Internet Users: Awareness-Raising

Apart from the promotion of filtering and rating mechanisms to safeguard children from harmful content (as discussed above), awareness-raising also plays an important role in the EU's policy on protecting young Internet users. *Recommendation 1998* and *Recommendation 2006* urged that member states to take action to improve the level of awareness among parents, educators and teachers of the potential of the online information services, and of means whereby they may be made safe for minors, and to educate minors to make responsible use of the new media services through media literacy programme at school.³⁸⁷ Similarly, in *Action Plan 1997*, the EU set out a plan to fund awareness initiatives to promote the safe use of the Internet, giving young Internet users, parents and teachers sufficient knowledge of drawbacks of the Internet and the way to protect children from harmful content.³⁸⁸ INSAFE³⁸⁹ was founded in 2004 under *Safer Internet Programme*.³⁹⁰ It is a co-operation network of national awareness centres in 27 EU countries. These provide young Internet users, parents and teachers with the necessary information and materials the safer use of the Internet, and campaign to improve knowledge of how to keep young Internet users safe online (e.g. Safer Internet Day).³⁹¹ In the UK the awareness centre, which is a member of INSAFE, is the UK Internet Safer Centre.³⁹²

As can be seen within the EU policy framework, the protection of minors against pornographic content on the Internet depends on the combination of the use of filtering and rating systems, and raising awareness of how to deal with such harmful content. However, this policy should be supported by programmes to teach people, especially children, parents and teachers about the measures to keep children safe online and how to use filtering software effectively.

³⁸⁷ 98/560/EC, 24th September 1998, para. I (4); 2006/952/EC, 20th December 2006, para. I (2) (a).

³⁸⁸ COM (97) 582 Final, 26th November 1997, pp.4, 7, 28-29.

³⁸⁹ INSAFE, <http://www.saferinternet.org/web/guest/home>, visited 22nd October 2012.

³⁹⁰ <http://www.saferinternetday.org/web/guest/about>, visited 22nd October 2012.

³⁹¹ <http://www.saferinternetday.org/web/guest>, visited 22nd October 2012.

³⁹² <http://www.saferinternet.org.uk/>, visited 22nd October 2012.

Conclusion

Examination of the CoE and the EU's approach to the regulation of Internet pornography in this chapter gives several important considerations.

It is clear that the ECtHR case-law recognises sexually explicit expression, including pornography, as a form of expression. This confirms what the conceptual framework suggests in Chapter 3, that pornography is expression. However, the rulings in *Handyside*, *Müller*, and *Perrin* show that, where the expression in question is non-political, the ECtHR focuses mainly on the protection of morality and grants a wide margin of appreciation. As a result, the level of protection given to sexually explicit expression, including pornography, is considerably limited and is to be determined by domestic authorities. It could be said that the giving of a wide margin of appreciation which is based on the protection of morality is inconsistent with the conceptual framework in Chapter 3, which argues that morality cannot be a strong justification for regulating pornographic expression.

Regarding the policies on the regulation of Internet pornography, The CoE makes it clear that the regulation should comply with Art. 10 of the ECHR. Furthermore, it is necessary to distinguish between harmful and illegal content. This policy is, to a great extent, consistent with the conceptual framework of Chapter 3 which proposes that pornographic expression should be divided into two categories, pornography which is deemed harmful and that which should be treated as illegal. With regard to modes of regulation, the CoE advocates co-regulation and self-regulation at Internet users' level. The CoE attaches special importance to the protection of minors, encouraging parents, school and the IT industry to take necessary measures, in the form of technological solutions, parental supervision, and IT literacy, to protect young Internet users from harmful content (including pornography). This policy underlines what is suggested in Chapter 3, that the protection of children is an important justification for restricting pornographic expression; however, the chosen measures should not excessively limit consenting adults' freedom of pornographic expression. Lastly, the CoE's most recent initiative with regard to violent and extreme pornography is consistent with the conceptual framework in Chapter 3 in that both of them propose to suppress violent pornography. However, the CoE's initiative bases on the idea that violent pornography threatens dignity of women in general. Furthermore, the CoE's initiative claims that violent pornography could lead men to have aggressive sexual behaviours. These two rationales are different from the rationale proposed in Chapter 3 which argues that violent pornography should be prohibited as it may cause serious bodily harm to participants.

Even though the ECJ has not yet had an opportunity to consider a case on pornography in the context of freedom of expression, as can be seen from *R v. Henn and Darby*, the ECJ tends to regard the protection of public morality as an important justification to regulate pornography. This is inconsistent with the conceptual framework in Chapter 3 which argues that the protection of public morality cannot be a strong justification for regulating pornographic expression. Furthermore, the TWFD adds a significant legal principle to the EU legal framework, allowing pornographic expression to be restricted on grounds of safeguarding minors. This notion is in line with the conceptual framework constructed in Chapter 3.

In its policies on the regulation of Internet content, the EU takes a closely similar approach to that of the CoE, emphasising that the measures to control content on the Internet should take into account the right to freedom of expression. Like that of the CoE, the EU policy suggests that harmful content should be distinguished from illegal content. The EU encourages co-regulation to deal with illegal content; and a combination of technological solution and education to deal with harmful content (including pornography). This approach is consistent with the conceptual framework in Chapter 3.

The analysis of CoE and the EU's approaches to the regulation of Internet pornography in this chapter will be revisited with an aim of proposing a new regulatory framework of Internet pornography in Thailand, in Chapter 7. In the next chapter, the UK's approach to the regulation of Internet pornography will be examined.

Chapter 5: Freedom of Expression and the Regulation of Internet Pornography in the UK

Introduction

In line with the analysis outlined in Chapter 3, this thesis argues that pornography could be considered as an instance of expression. However, it is also contended in Chapter 3 that physical harm which may occur to pornographic performers as a result of dangerous sexual acts during the production is a strong justification for removing protection under the principle of freedom of expression from pornographic materials that involve the use of real violence, allowing the state to suppress this particular type of pornography. Furthermore, the prevention of minors of being exposed to pornography is arguably an important public interest, which could justify the restriction of the availability and accessibility of pornography. However, the regulatory approach to meeting these aims should be designed not to excessively limit the right to freedom of expression of adults.

The main focus of this chapter is the question of how far the UK's regulatory model of Internet pornography is consistent with the aforementioned conceptual framework. It is important to note at the outset that this chapter will examine the legal framework of the protection of freedom of expression (Section 5.1) and the non-state regulation of Internet pornography (Section 5.4) in the UK as a whole. This is because these two matters are applicable throughout the UK. However, with regard to legal regulation of Internet pornography (Section 5.2 and Section 5.3), it will cover only pornography-related laws that are currently enforced in England and Wales. The laws in Scotland and Northern Ireland, which may be different from those of England and Wales, are not included.

5.1 The Protection of Freedom of Expression in the UK

This section argues that, in the UK, the protection of the right to free speech can be available at both national (the Human Rights Act 1998 or 'HRA') and supra-national (the European Convention on Human Rights or 'ECHR') levels.¹ However, pornography, as a form of expression, does not seem to benefit much from the HRA and the ECHR. The level of its protection is subject to the national pornography-related laws which, in England and Wales, are the Obscene Publication Acts 1959/1964 and the extreme pornography law (Sections 63-67 of the Criminal Justice and Immigration Act 2008).

¹ In comparison with England, Thailand does not have a channel for an individual to seek such protection beyond national level. The Thai Constitutional Court is the final court where the protection is available. See Section 6.1.

5.1.1 International Obligation

The UK has committed itself to safeguarding the right to freedom of expression at international level under the three main international human rights instruments, namely the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the European Convention of Human Rights (ECHR). However, only the ECHR has jurisdiction over, and machinery to enforce against, the UK.

The UK was one of the drafting committee members,² and also one of the 48 nations that voted for the UDHR.³ It readily recognises the right to freedom of expression that is guaranteed by Art. 19 of the UDHR. Nonetheless, because the UDHR was intended to be merely a normative framework with regard to human rights protection⁴ and not a treaty,⁵ it does not have an official, legally binding effect on the UK.⁶ The UK became a party to the ICCPR in 1976.⁷ The ICCPR is a treaty that has a legally binding effect on the countries that ratified it. The UK is legally obliged to guarantee the right to freedom of expression enshrined in Art. 19.⁸ Under Art. 40 (1), the UK has a compulsory duty to submit regular reports⁹ to the UN Human Rights Committee¹⁰ on the measures that it has taken to give effect to the ICCPR rights (including the right to freedom of expression). After studying the report, the Committee will produce a 'concluding observation' that includes *inter alia* the assessment of the UK's compliance with the ICCPR and recommendations for improvement

² The members of the drafting committee comprised the delegations of Australia, Chile, Republic of China, France, Lebanon, the UK, the USA, and USSR. For the drafting process, see generally Morsink, J., *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia Pennsylvania, 1999), pp.1-35.

³ For the list of 48 nations that voted for the UDHR, see <http://www.udhr.org/history/yearbook.htm>, visited 12th January 2012.

⁴ Lauterpacht, H., 'The Universal Declaration of Human Rights' (1948) *British Year Book of International Law*, 25, p.354-381, 356-365.

⁵ Art. 2 (1) (a) of the Vienna Convention on the Law of Treaties: "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

⁶ However, certain UDHR provisions may become part of customary international law. See generally Hannum, H., 'The Status of Universal Declaration of Human Rights in National and International Law' (1995-1996) *Georgia Journal of International and Comparative Law*, 25 (1 & 2), pp.287-397; Rehman, J., *International Human Rights Law* (2nd ed), (Pearson, Harlow, 2010), pp.80-82.

⁷ The UN, <http://www2.ohchr.org/english/law/ccpr-ratify.htm>, visited 15th April 2011.

⁸ However, Art. 19 (3) permitting State parties to limit the right to freedom of expression if: (1) the restriction has a legal basis, and (2) its implementation is necessary so as to respect the rights and reputation of others and/or to protect national security, public order, public health and morals.

⁹ The initial report must be submitted within one year after acceding to the ICCPR. At present, the subsequent (periodic) reports are due at a time that is individually specified by the UN Human Rights Committee for each State party (in other words, on a case-by-case basis).

¹⁰ For a critical analysis of the effectiveness of the UN Human Rights Commission in relation to the enforcement of human rights, see Mutua, M.W., 'Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement' (1998) *Buffalo Human Rights Law Review*, 4, pp.211-260.

in the identified areas.¹¹ The Committee can monitor the UK through the reporting scheme and its concluding observation should be regarded as its authoritative pronouncement.¹² However, it has no means of enforcing its recommendations. The decision to follow the recommendations depends primarily on the UK government's willingness.¹³ Moreover, as the UK has not yet signed the First Optional Protocol to the ICCPR,¹⁴ the Committee does not have power to receive and consider petitions ('communications') made by individuals – who are subject to the UK jurisdiction – with regard to the alleged breach of ICCPR rights.¹⁵ Therefore, it could be said that the authority of the ICCPR over the UK is considerably limited.

The ECHR requires the UK to protect the right to freedom of expression. Art. 10 (1) of the ECHR guarantees that all individuals can enjoy the right to freedom of expression without the UK government's interference (except when the interference meets all conditions set out in Art. 10 (2));¹⁶ and, under Art. 1, it is the primary responsibility of the UK government to ensure the protection of the right to freedom of expression. Unlike the first two human rights instruments, the ECHR has a mechanism to enforce the UK to fulfill its obligation under Art. 10 (1) of the ECHR. Once all domestic remedies have been exhausted,¹⁷ a natural or legal person, irrespective of nationality, whose right to freedom of expression is violated by the UK authorities within the UK jurisdiction, may file a complaint (known as 'individual application') to the European Court of Human Rights (ECtHR).¹⁸ The ECtHR¹⁹ will adjudicate individual applications. In other words, after the case has been decided by the

¹¹ See generally *Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15 (Rev. 1)*, <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>, visited 15th April 2011, pp.15-21.

¹² Buergenthal, T., 'The U.N. Human Rights Committee' in Frowein J.A. and Wolfrum, R. (eds.), *Max Planck Yearbook of United Nations Law (Vol. 5)*, (Kluwer Law International, the Hague, 2001), pp.341-398, 346-364, http://www.mpil.de/shared/data/pdf/pdfmpunyb/buergenthal_5.pdf, visited 23rd January 2012.

¹³ *The United Nation Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies (Fact Sheet No. 30)*, available at <http://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf>, visited 26th January 2012, p.32.

¹⁴ For the Optional Protocol, see <http://www2.ohchr.org/english/law/ccpr-one.htm>, visited 15th April 2011, and for the list of the countries which have signed or ratified the First Optional Protocol, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en, visited 15th April 2011.

¹⁵ For the judicial power of the UN Human Rights Committee, see generally Steiner, H., 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in Alston, P. and Crawford, J. (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, Cambridge, 2000), pp.15-53; Buergenthal, T., supra, pp.367-385.

¹⁶ For the discussion about the ECtHR's jurisprudence with regard to Art. 10, see Chapter 4.

¹⁷ Art. 35 of the ECHR.

¹⁸ Registry of the Court, *European Court of Human Rights: Questions and Answers*, available at http://www.echr.coe.int/NR/rdonlyres/BB10719C-D747-4862-AE44-8A54D9B316D5/0/ENG_Questions_and_Answers.pdf, visited 28th January 2012, p.4.

¹⁹ Art. 34 of the ECHR.

highest judicial body (the Supreme Court of the UK),²⁰ and if the complainant is not satisfied with the outcome, he/she may file an application to the ECtHR. If the UK is found to be in breach of Art. 10, the ECtHR has the power to deliver a judgement that the UK has to implement accordingly.²¹ It is interesting to note that normally the ECtHR's judgement does not give an instruction about what and how remedial measures should be taken; thus, the UK government can choose the methods to give effect to the judgement in accordance with the rules of its national legal system – which can be an amendment to the legislation in question, the implementation of individual measures, and/or compensation under Art. 41.²² Approximately 30 cases involving alleged violations of Art. 10 by the UK authorities have been brought to the ECtHR thus far.²³ The fact that the ECtHR did rule against the UK in several cases (e.g. *Sunday Times (No.1)*,²⁴ *Observer and Guardian*²⁵ and *Goodwin*²⁶) is evidence that the ECHR plays an important role in the protection of freedom of expression in the UK.

5.1.2 The Protection of Freedom of Expression at National Level

The treatment of the right to freedom of expression in the UK can be divided into two eras: before and after the advent of the Human Rights Act (HRA), which was enacted in 1998 and came into effect in 2000. Originally, as a country without a written constitution, the concept

²⁰ On October 1, 2009, the judicial authority of the House of Lords was transferred to the Supreme Court of the UK. As a result, the Supreme Court of the UK is now the final court of appeal for all civil cases throughout the UK. However, for criminal cases, it hears only appeals from England, Wales and Northern Ireland because the High Court of Justiciary remains the final court for criminal cases in Scotland. See <http://www.supremecourt.gov.uk/index.html>; <http://www.scotcourts.gov.uk/justiciary/index.asp>, visited 3rd May 2012.

²¹ Art. 46 of the ECHR. Interestingly, there can be a case where the State party refuses to comply with the ECtHR's judgement. In this case, Art. 46 (4) empowers the Committee of Ministers to refer to the ECtHR the question of whether the defendant State has failed to fulfil its obligation under Art. 46 (1). See, for example, *Brogan and Others v. UK* (1989) Nos. 11209/84, 11234/84, 11266/84, 11386/85, 11 E.H.R.R. 117, cited in Rehman, J., *International Human Rights Law* (2nd ed), (Pearson, Harlow, 2010), p. 228.

²² Rehman, J., *Ibid*, p.227; Fenwick, H., *Civil Liberties and Human Rights* (4th ed), (Routledge-Cavendish, Oxon, 2007), p.33; The Public Relations Unit of the European Court of Human Rights, *The European Court of Human Rights: The ECHR in 50 Questions*, The Public Relations Unit of the European Court of Human Rights, Strasbourg, 2009), p.11, at http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf, visited 27th January 2012. For guidance for Departments responding to the court judgements on human rights, see <http://www.parliament.uk/documents/joint-committees/human-rights/Annex%20-%20Guidance%20for%20Departments.pdf>, visited 3rd February 2012.

²³ The number of cases derives from the Hudoc database, available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/>, visited 29th January 2012. *Handyside v. UK* ((1976) No. 5493/72, A24) is the first case involving violations of Art. 10 by the UK authorities brought before the ECtHR; and *MGN Limited v. UK* (2011), No.39401/04, Hudoc) is the most recent case.

²⁴ (1979) No. 6538/74, A30.

²⁵ (1991) No. 13585/88, A216.

²⁶ (1996) No. 17488/90, Reports1996-II.

of right to freedom of expression in the UK does not appear in the form of a constitutional provision; rather, it is in the form of residual freedom existing in gaps of the laws relating to obscenity, libel, and contempt of court.²⁷ Put differently, individuals are free to express and receive any ideas/information so far as the aforementioned laws do not prohibit such expressions.

However, the HRA has brought several significant changes to this area of human rights.²⁸ First, Section 1 (1) (a) of the HRA gives the right to freedom of expression (Art. 10 of Schedule 1) a defined legal status in the UK law.²⁹ As a result, the right to freedom of expression is no longer treated as residual liberty subject to piecemeal legal regulations (as it was in the pre-HRA period), but as a statutory right ('Convention right').

Second, under Section 2 (1), courts (or tribunals) in the UK are required to 'take into account' the relevant case law of the ECtHR when determining a question that has arisen in connection with the Convention right to freedom of expression. This could be understood as meaning that the UK courts should 'consider' the jurisprudence of the ECtHR regarding Art. 10 as a baseline or 'a floor' for the protection afforded to the right to freedom of expression at domestic level.³⁰ However, it is important to note that the term 'take into account' does not mean that the UK courts are legally bound by the ECtHR's jurisprudence. The UK courts retain a leeway in choosing an interpretation that may be different from the ECtHR's approach if there are good reasons to do so.³¹ The UK courts may interpret the HRA to give a greater protection to the right to freedom of expression than the protection affordable under the ECtHR jurisprudence. The UK judges may take a more liberal stance than that of the ECtHR in interpreting what is within the meaning of expression (Schedule 1 of the HRA, Art. 10 (1)), or adopt a more rigorous standard than that of the ECtHR in scrutinising justifications for governmental interference with freedom of expression (Schedule 1 of the HRA, Art. 10 (2)).³² On the other hand, it is also possible that UK judges may interpret the HRA to give lesser protection to the right to freedom of expression than that given by

²⁷ Barendt, E., 'Freedom of Expression in the United Kingdom Under the Human Rights Act 1998', (2009) *Indiana Law Journal*, 89(3), pp.851-866, 852-853; Dicey, A.V., *An Introduction to the Study of the Law of the Constitution* (10th ed), (Macmillan, London, 1959), pp.239-240.

²⁸ This sub-section gives a brief overview of only certain provisions that are applicable to the right to freedom of expression, not a complete account of the HRA.

²⁹ Ewing, K.D., 'The Human Rights Act and Parliamentary Democracy' (1999) *Modern Law Review*, 62(1), pp.79-99, 84.

³⁰ Grosz, S., Beatson, J., and Duffy, P., *Human Rights: The 1998 Act and the European Convention*, (Sweet & Maxwell, London, 2000), pp.20-21; Parliamentary Debates on the Human Rights Bill: House of Lords, 18th November 1997, vol. 583, col. 510.

³¹ Hoffman, D. and Rowe, J., *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (2nd ed), (Pearson Longman, Harlow, 2006), p.56.

³² Feldman, D., *Civil Liberties and Human Rights in England and Wales* (2nd ed), (Oxford University Press, Oxford, 2002), p.83.

ECtHR.³³ In the latter case, as Roger Masterman – a European Human Rights scholar – contends, such interpretation could constitute a violation of Section 6 (1) of the HRA (which requires public authorities to act in a way that is compatible with a Convention right).³⁴ Furthermore, the argument that the protection granted by the UK courts is less than that normally given by the ECtHR can be seen as a strong challenge against the UK, when an application is filed to the ECtHR.³⁵

Third, by virtue of Section 3 (1) and (2) (a), the UK courts³⁶ have a duty to read all primary³⁷ and subordinate legislation,³⁸ whether enacted in the past or in the future, compatible with the Convention right to freedom of expression, so far as it is possible.³⁹ Nonetheless, in the case that it is impossible to construe the statute (or a provision prescribed therein) to be ECHR-compatible, the implications could be as follows. If the statute is subordinate legislation, every court should treat it as unenforceable; if the statute is primary legislation or subordinate legislation that is subject to Section 3 (2) (c),⁴⁰ then all courts still have to enforce it despite its incompatibility.⁴¹ In the latter circumstance, higher courts, e.g. the Supreme Court of the UK, the Privy Council, and the Courts-Martial Appeal Court and (in England and Wales) the Court of Appeal and the High Court,⁴² are empowered by Section 4 to grant a declaration of incompatibility. The declaration of incompatibility is not equivalent to a power to invalidate (strike down) the statute at issue,⁴³ and has no effect on the case before the courts.⁴⁴ In other words, the courts are still obliged to enforce the incompatible statute and the parties are still subject to it. However, the declaration serves as a notification to the UK government that the legislation at issue is considered to be in breach

³³ Grosz, S., Beatson, J. and Duffy, P., *supra*, pp.22-23.

³⁴ Masterman, R., 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the "Convention Rights" in Domestic Law' in Fenwick, H., Phillipson, G. and Masterman, R. (eds), *Judicial Reasoning Under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2007), pp.57-86, 66; see also *R. (on the Application of Ullah) v. Special Adjudicator; Do v. Immigration Appeal Tribunal* (2004) UKHL 26, para.23 *per* Lord Bingham. For the discussion of Section 6 (1), see below in this sub-section.

³⁵ Bailey, S. H., and Taylor, N., *Civil Liberties: Cases, Materials and Commentary* (6th ed), (Oxford University Press, Oxford, 2009), p.35.

³⁶ All English courts have the interpretative duty under Section 3 (1). Ewing, K.D., *supra*, p.88.

³⁷ Primary legislation means Acts that are passed by the UK Parliament.

³⁸ Subordinate legislation means laws that are made by the UK government under powers granted by primary legislation.

³⁹ For the techniques of interpretation, see, for example, Hoffman, D. and Rowe, J., *supra*, pp.60-63; Fenwick, H., *supra*, pp.174-183.

⁴⁰ This means subordinate legislation that has become incompatible because of the requirement of primary legislation. The primary legislation under which it is made does not allow it to be removed despite its incompatibility.

⁴¹ Stone, R., *Textbook on Civil Liberties and Human Rights* (8th ed), (Oxford University Press, Oxford, 2010), p.60.

⁴² Section 4 (5) of the HRA.

⁴³ Section 3(2)(b) of the HRA.

⁴⁴ Stone, R., *supra*, p.60.

of the ECHR.⁴⁵ This, in turn, opens up the possibility for a ‘fast-track’ remedial action⁴⁶ – an order made by the relevant Minister to amend the legislation – to remove the incompatibility (Section 10 and Schedule 2).⁴⁷ However, as stated in Section 10 (2) of the HRA, the decision on whether or not the remedial order should be given depends principally on the Minister.⁴⁸ If the Minister does not take any remedial action, a person whose right to free speech is affected by the legislation may file an application to the ECtHR.⁴⁹

Fourth, by virtue of Section 6 (1), it is unlawful for a public authority, which includes courts and tribunals, to act in a way that is incompatible with the Convention right to freedom of expression. In the circumstances where the law at issue is common law (e.g. libel or breach of confidence), or where the courts are allowed to exercise discretionary power, the courts have to interpret the law so as to give protection to the Convention right to freedom of expression.⁵⁰ Nonetheless, when the law in question is a statute, this obligation is subject to an exception stated in Section 6 (2). When primary legislation prevents the authority from acting differently, or the secondary legislation cannot be read to be compatible with the Convention right to freedom of expression, the authority still has to act in accordance with what the primary legislation requires, or to enforce the secondary legislation. In this case, higher courts may grant the declaration of incompatibility in accordance with Art. 4.

5.1.3 Pornography and the Protection of Freedom of Expression in the UK

In Chapter 4, it was seen that the ECtHR has ruled that the scope of Art. 10 (1) of the ECHR covered all types of expression, irrespective of their offensiveness or disturbing characteristics.⁵¹ The position of the European Commission of Human Rights in *Scherer v. Switzerland*⁵² and that of the ECtHR in *Hoare v. UK*⁵³ and *Perrin v. UK*⁵⁴ have made it clear that pornography is ‘expression’ within the meaning of Art. 10 (1). However, in *Handyside v. UK*⁵⁵ and *Müller and Others v. Switzerland*,⁵⁶ the ECtHR was of the opinion that, in most

⁴⁵ Bailey, S. H., and Taylor, N., supra, p.37.

⁴⁶ In the normal process of legislation amendment, the government may have to introduce a Bill to Parliament.

⁴⁷ Hoffman, D. and Rowe, J., supra, p.65.

⁴⁸ It is argued that the declaration of incompatibility and ‘fast-track’ procedure have created a degree of political pressure on the UK government, as well as the UK Parliament, to reform the ECHR-incompatible legislation. See Cram, I., ‘Judging Rights in the United Kingdom: The Human Rights Act and the New Relationship Between Parliament and the Courts’ (2006) *Review of Constitutional Studies*, 12 (1), pp.53-82; Ewing, K.D., supra, pp.79-99.

⁴⁹ Feldman, D., supra, p.91.

⁵⁰ Robertson, G. and Nicol, A., *Media Law* (5th ed), (Penguin Books, London, 2008), p.76.

⁵¹ *Handyside v. UK* (1976) No.5493/72, A024, para.48.

⁵² (1993) No.17116/90, A287.

⁵³ (1997) No.31211/96, Hudoc.

⁵⁴ (2005) No.5446/03, Hudoc.

⁵⁵ (1976) No.5493/72, A024.

cases, sexually explicit expression has no political value⁵⁷ and is morally sensitive in nature; thus, it is subject to a wide margin of appreciation. As a result, domestic authorities are allowed a great deal of discretion to consider, in the light of a domestic standard of morality, which categories of sexually explicit expression should be forbidden and what restrictive measures might be implemented to deal with the prohibited types of sexually explicit expression in their countries. It would follow that, although a pornographer in the UK can bring a case to the ECtHR alleging that his/her right to pornographic expression is curtailed by domestic pornography-related law, e.g. the Obscene Publication Acts 1959/1964 (the OPA), it is unlikely that the ECtHR will rule in favour of the pornographer by finding that the enforcement of the OPA against the pornographer constitutes a violation of Art. 10. This is clearly shown in *Perrin v. UK*,⁵⁸ in which the ECtHR relied on *inter alia* a wide margin of appreciation as grounds to hold that the application is inadmissible (Art. 35 (3) and (4) of the ECHR). The ECtHR held that, as the online materials in question were deemed obscene according to the English standard and accessible via computers located within England, the prohibition of such materials and the applicant's conviction under the OPA 1959/1964 were consistent with a margin of appreciation and thus Convention-compliant.⁵⁹

At a domestic level, the UK courts take the same position as the ECtHR in recognising pornography as a form of expression. In *R v. Perrin*, the Court of Appeal (Criminal Division) took into account the ECtHR's jurisprudence regarding Art. 10 and conceded that pornography was expression.⁶⁰ In *Belfast City Council v. Miss Behavin' Ltd*,⁶¹ the House of Lords⁶² implicitly accepted that pornography (its distribution) constituted expression within the meaning of Art. 10 (1) of the ECHR.⁶³ As noted above, under the current ECtHR

⁵⁶ (1998) No.10737/84, A133.

⁵⁷ However, *Vereinigung Bildender Künstler v. Austria* (2007) No.68354/01, Hudoc, appears to be an exception. The ECtHR, based on the grounds that the sexually explicit painting in question was artistic expression, held that the restriction imposed by Austrian courts constituted a violation of Art. 10. However, because the ECtHR implied that the painting carried a political message because it was created to attack certain Austrian politicians, it could be argued that, in fact, the ECtHR considered the painting to be political expression, a type of expression that deserved the strongest protection.

⁵⁸ (2005) No.5446/03. This case concerns the issue of whether the enforcement of the Obscene Publication Act 1959 against the publisher of a pornographic website, which depicted coprophagia and could be accessible from a computer located in the UK, constituted a violation of Art. 10 of the ECHR. See Section 4.2.1

⁵⁹ (2005) No.5446/03, para.D.1.

⁶⁰ (2002) EWCA Crim 747, paras.32-52. Later, this case was brought to the ECtHR in *Perrin v. UK* mentioned above.

⁶¹ (2007) UKHL 19. This case concerns an allegation that, when Belfast City Council exercised its power under the Local Government Order 1985 No.1208 (NI 15) to refuse to grant a license to open a sex shop in a certain location in Belfast, this constituted a violation of the right to freedom of expression guaranteed by the ECHR and the HRA.

⁶² This case was considered prior to the establishment of the Supreme Court of the UK.

⁶³ (2007) UKHL 19, paras.19,83. Interestingly, Paul Wragg, a free speech academic, comments that what the House of Lords focused in this case was the right to sell pornography, not the status of pornography under Art. 10. In other words, the main consideration was whether the distribution of

jurisprudence, sexually explicit expression is normally subject to a wide margin of appreciation, making the level of protection afforded to sexually explicit expression to be decided by domestic authorities. It follows that, although Section 2 (1) of the HRA requires the UK courts to take account of the ECtHR's case law, the ECtHR's case law in this area is not very helpful. It provides no meaningful guidance with regard to the baseline of the right to freedom of sexually explicit expression for the UK courts to 'take into account'. Furthermore, a wide margin of appreciation means that the UK courts are entitled to set their own standards in applying the HRA to pornographic expression.⁶⁴ Therefore, the ECtHR jurisprudence and the HRA do not bring any significant change to the way in which pornographic expression is protected in domestic courts. The degree of the protection against the interference of the UK government remains a matter for the UK courts to decide. The House of Lords in *Miss Behavin' Ltd* was of the opinion that pornography was a low-valued expression and its distribution is not an important right of free expression, thus the protection available to it was low.⁶⁵ In both *Perrin* and *Miss Behavin' Ltd*, the Court of Appeal and the House of Lords similarly pointed out that the UK authorities' restrictions imposed on pornographic expression, in accordance with Section 2 (1) of the OPA 1959 (in the former case) and Article 4 of the Local Government Order 1985 No.1208 (NI 15) (in the latter case), met all requirements set out in Art. 10 (2) of the ECHR. Furthermore, the UK authorities' implementation of such restrictive measures perfectly complied with the ECtHR's margin of appreciation doctrine. Based on these reasons, the two courts ruled in favour of the UK authorities' restrictions, finding that there were no violations of the right to freedom of expression.⁶⁶ The outcomes of these cases show that it is unlikely the UK courts will apply the HRA 'to interfere with or challenge [such statutory restrictions] approved by Parliament'.⁶⁷ As Helen Fenwick interestingly notes, if there would be a radical change in this area (more freedom to pornographic expression), it would be the UK Parliament, rather than UK courts, which will bring such a change.⁶⁸

In summary, it could be concluded that, although both the ECtHR and the UK Courts recognise pornography as expression, the level of protection still depends largely on the

pornography, not pornography itself, constituted an act of expression. He argues that the status of pornography under Art. 10 within the legal framework of the UK remains largely unclear. See Wragg, P., *Critiquing the UK Judiciary's Response to Article 10 Post-HRA: Undervaluing the Right to Freedom of Expression?*, Thesis Submitted for the Doctor of Philosophy, Durham University (2009), pp.290-291

⁶⁴ Fenwick, H., *Civil Liberties and Human Rights* (4th ed), (Routledge-Cavendish, Oxon, 2007), p.475; Stone, R., *supra*, p.402.

⁶⁵ (2007) UKHL 19, paras.16, 38.

⁶⁶ (2002) EWCA Crim 747, para.52; (2007) UKHL 19, paras.16,28,91.

⁶⁷ Stone, R., *supra*, p.402.

⁶⁸ Fenwick, H., *supra*, p.463.

extent to which domestic pornography-related laws allow. Put differently, pornographic expression is protected insofar as it is not in breach of the UK's pornography-related laws.

5.2 The English Obscenity Standard and the Extreme Pornography Test

It is argued in the previous section that, in the UK, pornography is protected as a form of expression insofar as it is not illegal under the pornography-related laws. This Section will show how far pornographic expression is allowed by examining the boundary between legal and illegal categories of pornographic expression. The two criteria that are applicable to Internet pornography, namely the obscenity standard under the OPA 1959, and the extreme pornography test under Section 63 of the Criminal Justice and Immigration Act 2008, will be examined.⁶⁹

5.2.1 The English Obscenity Standard

The English obscenity standard is prescribed in Section 1 (1) of the Obscene Publication Act (OPA) 1959. It reads:

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 effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

It should be noted that, in a criminal trial at the Crown Court, it is a matter for the jury to determine questions of fact.⁷⁰ The role of a judge is to direct the jury on questions of law, determine questions of admissibility of evidence, and to decide on the sentence (if the defendant is found guilty).⁷¹ This also applies to an obscenity trial. It is the duty of the jury to consider whether the material in question meets each criterion of the obscenity standard and to determine whether it is obscene. At a magistrates' court, a magistrate is responsible for deciding whether the material is obscene.⁷²

⁶⁹ As already stated in the introduction, this chapter covers only pornography-related laws that are enforced in England and Wales. The laws that are enforced in Scotland and Northern Ireland are not included.

⁷⁰ For the role of jury and the judge in a criminal trial, see Doran, S., 'Trial by Jury' *Ibid.*, pp.379-401, 390-393.

⁷¹ Davies, M., Croall, H., and Tyrer, J., *Criminal Justice: An Introduction to Criminal Justice System in England and Wales* (3rd ed), (Pearson, Harlow, 2005), p.244.

⁷² For a general account on magistrates, see Darbyshire, P., 'Magistrates' in McConville, M. and Wilson, G. (eds), *The Handbook of Criminal Justice Process* (Oxford University Press, Oxford, 2002), pp.285-309.

5.2.1.1 Tendency to Deprave and Corrupt

The 'tendency to deprave and corrupt' test was first laid down in the landmark 19th century obscenity case of *R. v. Hicklin*.⁷³ In this case, the trial judge had to interpret the term 'obscene' of the OPA 1857. Chief Justice Alexander Cockburn ruled that, under the OPA 1857, the publication was deemed obscene if it had a 'tendency ... to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall'.⁷⁴ The 'tendency to deprave and corrupt' test was later prescribed in Section 1 (1) of the OPA 1959 as the crucial factor for the jury to determine the obscenity of the article⁷⁵ in question.

The court in *R v. Penguin Books Ltd*⁷⁶ (the *Lady Chatterley* case) ruled, by referring to the *Oxford English Dictionary*, that deprave meant 'to make morally bad, to pervert, to debase or corrupt morally'; and corrupt meant 'to render morally unsound or rotten, or destroy the moral purity or chastity of, to pervert or ruin a good quality, to debase, to defile'. The court also suggested that merely shocking or disgusting feelings were insufficient to constitute obscenity.⁷⁷ The Law Lords in *Knulier v. DPP*⁷⁸ held that, given 'depravation and corruption', which were strong terms, the effect of the publication must go much further than mere suggestion for immoral ideas. It must also seduce the readers/viewers to be self-indulgent in immorality, which could create a destructive impact on the 'fabric of society'.⁷⁹ Moreover, the ruling of *DPP v. Whyte and Others* adds that people, whose minds are already corrupted, can be re-corrupted by obscene materials.⁸⁰ For example, bestial pornography⁸¹ addicts (who presumably have corrupted minds already) could be corrupted further by viewing bestial pornography, because such material not only feeds their corrupted minds but also increases their addiction.⁸² Given this, bestial pornography is still considered

⁷³ (1868) L.R. 3 Q.B. 360, 371.

⁷⁴ The material at issue was *The Confession Unmarked*, a pamphlet which was deemed as anti-Popish propaganda that revealed techniques employed by priests to extract erotic confessions from female penitents. See Robertson, G., *Obscenity: An Account of Censorship Laws and Their Enforcement in England and Wales* (Weidenfeld and Nicolson, London, 1979), p.29.

⁷⁵ Section 1 (2) of the OPA 1959 states 'In this Act "article" means any description of article containing or embodying matter to be read or looked at or both, and any sound record and any film or other record of a picture or pictures.'

⁷⁶ (1961) Crim. L.R. 176.

⁷⁷ Rolph, C.H. (ed.) *The Trial of Lady Chatterley: Regina v. Penguin Books Limited: The Transcript of the Trial* (Penguin Books, London, 1961), p.229.

⁷⁸ (1973) AC 435.

⁷⁹ (1973) AC 435, 491, 456-457.

⁸⁰ (1972) 3 All E.R. 12, 24-25.

⁸¹ At present, the possession of bestial pornography is unlawful under extreme pornography law (Section 63 of the Criminal Justice and Immigration Act 2008).

⁸² Grace, S., *Testing Obscenity: An International Comparison of Laws and Controls Relating to Obscene Materials* (Home Office, London, 1996), p.8.

to be obscene, although it is judged by its effect on bestial pornography addicts. (It is worth noting that bestial pornography is illegal under the extreme pornography law.)

On the other hand, if the effect of the material appears to discourage the readers/viewers from indulgence in immorality, the defendant can argue that the material does not have a corrupting effect and thus is not obscene. This argument is known as 'aversion defence'. In *R v. Calder & Boyars Ltd*, the Court of Appeal ruled that the trial judge's failure to explain to the jury about the aversive defence – that the horrific portrayal of homosexuality, drug-taking and violence in the book entitled *Last Exit to Brooklyn* discouraged the readers from partaking in such activities – was the major ground for upsetting the obscenity conviction.⁸³ Similarly, in *R v. Anderson*, the Court of Appeal granted an appeal on the grounds that the trial judge did not put the aversion argument – that cartoon illustrations in *Oz Magazine*⁸⁴ were shocking and repulsive, and far from seducing children (the target readers) to take part in the immoral acts depicted therein – before the jury.⁸⁵

Furthermore, the ruling of *Whyte* suggests that obscenity is decided by whether the material corrupts readers'/viewers' minds alone; thus the question as to whether the effect of the material results in any physical or overt sexual activities is immaterial.⁸⁶ This is consistent with the ruling of *Shaw v. DDP*, which stated that the question as to what people might do after reading the material is irrelevant in determining the obscenity of the material in question.⁸⁷

Lastly, obscenity of the material has to be judged from the perception of the jury without recourse to an expert witness.⁸⁸ This means that the jury has to decide whether the article in question has a corrupting or depraving effect from their personal perspectives. The Law Lords in *Kneller* and *Calder & Boyars Ltd* held that the jury can take into account the current standards of ordinary decent people with regard to what is acceptable in society,⁸⁹ e.g. the degree of sexual explicitness of films shown in cinemas, of books sold in normal bookshops or of pornographic materials available in adult shops, when considering the obscenity of the article at issue.

⁸³ (1969) 1 Q.B. 151, 169-170.

⁸⁴ For the illustrations, see <http://www.ozit.co.uk/oz-magazine/issue-28/>, visited 25th February 2012.

⁸⁵ (1971) 3 All E.R. 1152, 1160.

⁸⁶ (1972) 3 All E.R. 12, 23; See also Williams, B., *Obscenity and Film Censorship: An Abridgement of the Williams Report* (Cambridge University Press, Cambridge, 1981), p.10.

⁸⁷ (1962) A.C. 220, 227. See also Stone, R., *supra*, p.405.

⁸⁸ Williams, B., *supra*, p.11.

⁸⁹ (1973) A.C. 435, 457; (1969) 1 Q.B. 151, 172.

5.2.1.2 Target Audience

The 'tendency to deprave and corrupt' must be considered in the light of the question 'Who is likely to read, see or hear the article?' In other words, an article is obscene if it tends to corrupt/deprave the target audience, namely people who would be likely to seek and purchase it, or those who are interested in borrowing or viewing it.⁹⁰ An illustrative example is the following situation. Presuming that children are the group who are likely to buy and read comic books, the obscenity of the comic book is thus to be determined by its corrupting/depraving impact on children (not adult readers). Likewise, the obscenity of a pornographic magazine sold in a sex shop is to be judged by its effect on adult customers of that particular sex shop (the target readers), not general adult readers.⁹¹ Furthermore, it is also important to take into account all relevant circumstances, which include the locations of the shops, the kind of customers who frequent such shops in terms of age, sex and social class, the selling prices of the materials, the prominence of display, and the covers or containers.⁹² A portrayal of an orgy may not be judged obscene if it is published in pornographic books available in a sex shop that is located in a red-light district and where only willing adult customers are allowed. In contrast, the same picture could be judged obscene if it is published in comic books or books for children sold in a bookstore where young people can visit.

In the case of Internet pornography, the court in *Perrin* has made it clear that, if a website makes the sexually explicit images viewable without a proper mechanism to filter out minors (in the case, sample obscene images were displayed at the front page of the website), such a website is accessible to minors.⁹³ Therefore, its obscenity should be judged by whether it has a corrupting effect on minors or not.

The term 'persons' (plural form), stated in Section 1 (1) of the OPA 1959, clearly indicates that the effect of an obscene article must corrupt/deprave more than one person. The question is how many 'persons' does Section 1 (1) require to satisfy this test? The rulings of *Calder & Boyars Ltd* and *Whyte* give an answer to this question, stating that the term 'persons' does not mean all persons, the great majority of persons or the average reader. Instead, it means a significant proportion of persons that are not numerically negligible, but may be much less than half. Furthermore, the number should be left to the jury to decide.⁹⁴

⁹⁰ Robertson, G., and Nicol, A., *supra*, p.201.

⁹¹ *Ibid.*

⁹² Robertson, G., *supra*, p.54.

⁹³ (2002) EWCA Crim 747, paras.26,51.

⁹⁴ (1973) AC 435, at 456-457; (1972) 3 All E.R. 12, 24-25.

5.2.1.3 The 'Taken as a Whole' Test

Under the 'taken as a whole' test, the obscenity of the material must be determined from its overall impact on the readers/viewers. In other words, a single passage in a book or a single scene of a film, despite having a corrupting or depraving effect, cannot make the whole book or film obscene. This was not the case before the promulgation of the OPA 1959, when a single passage, if found to have a corrupting effect, could render the whole book obscene. Such a passage was known as a 'purple passage'.⁹⁵ In *R v. Penguin Books Ltd*,⁹⁶ the trial judge instructed the jury to read the whole of *Lady Chatterley's Lover* from the front to the back covers before evaluating its overall impact.⁹⁷ However, this test is not applicable to a magazine, which has different articles that are independent from each other, or a film, which is composed of separate segments that have different themes and may be directed by different directors. The articles of the magazine⁹⁸ or the segments of the film⁹⁹ are judged individually on an item-by-item basis. For example, a publisher of a magazine may be prosecuted under the OPA 1959 if a single article contained therein appears to have a corrupting effect (despite the rest of the magazine not having a corrupting effect).

5.2.2 The Crown Prosecution Service Guidance

As examined above, the English statutory obscenity standard is somewhat abstract. The obscenity of a material relies heavily on the opinion of the jury of a particular case. As a result, it is very difficult to know in advance what types of pornographic materials may fall within the scope of Section 1 (1) of the OPA 1959. Nonetheless, the Crown Prosecution Service (CPS) has drawn a clearer distinction between the categories of pornography that are likely to be deemed obscene and those that are permitted by the OPA 1959.

According to CPS guidance,¹⁰⁰ the materials that depict the following sexual activities are normally subject to prosecution:

1. Sexual act with an animal (bestiality).
2. Realistic portrayals of rape.
3. Sadoomasochistic material that goes beyond trifling and transient infliction of injury.
4. Torture with instruments.

⁹⁵ Robertson, G., *supra*, p.61.

⁹⁶ (1961) Crim. L.R. 176.

⁹⁷ Rolph, C.H., *supra*, p.39.

⁹⁸ *R v. Anderson* (1971) 3 All E.R. 1152, 1158.

⁹⁹ 'Obscenity: Whether Film's Obscene 'Taken as a Whole', Case Comment on *R. v. Goring* (Jonathan) (1999) *Criminal Law Review*, August, pp.670-672.

¹⁰⁰ *The Crown Prosecution Service*, http://www.cps.gov.uk/legal/1_to_o/obscene_publications/#a06, visited 26th February 2012.

5. Bondage (especially where gags are used with no apparent means of withdrawing consent).
6. Dismemberment or graphic mutilation.
7. Activities involving perversion or degradation (such as drinking urine, urination or vomiting on to the body, or excretion or use of excreta).
8. Fisting.
9. Non-consensual buggery.

The guidance also makes it clear that the materials that portray the following consensual sexual acts are safe from obscenity prosecution:

1. Actual consensual vaginal or anal intercourse, including double penetration – a situation when a woman has her vagina and anus penetrated simultaneously by two men.
2. Oral sex.
3. Masturbation.
4. Mild bondage.
5. Simulated intercourse or buggery.
6. Fetishes that do not encourage physical abuse.

However, since the CPS guidance is merely a guideline for the police and prosecutors, it is not legally binding on the jury. It cannot guarantee that a material that depicts a sexual act on the list will always be found obscene. Ultimately, the obscenity is to be judged by the jury in an individual case.

5.2.3 The English Obscenity Standard and Implications for Freedom of Expression

It can be argued that the English obscenity standard gives a certain degree of freedom of pornographic expression, in the way that it allows pornography to depict naked bodies and sexually explicit activities as long as such depictions do not morally deprave or corrupt the viewers.¹⁰¹ The focus on a corrupting/depraving effect implies that the central considerations of the English obscenity standard are the ideas/messages communicated by pornographic materials, not the sexually explicit depictions. Therefore, materials that show sexual activities and naked bodies in sexually explicit, provocative, shocking or disgusting situations are not prohibited, provided that such ideas/messages do not have a tendency to corrupt/deprave the viewers. Furthermore, the CPS guidance makes it clear that, apart from the nine categories of sexual acts, the depictions of nipples, genitals and consensual sexual acts are allowed, underscoring the freedom of pornographic expression in general.

In this sense, the English obscenity test appears to reject the notion of inherent or *per se* obscenity, under which the obscenity of the material is judged from what it depicts. This means that pornographic materials are not prejudged to be obscene. However, one may

¹⁰¹ This is different from the Thai obscenity law, which deems all materials that depict sex in an explicit and sexually provocative manner as obscene materials. See Section 6.2

argue that the CPS guidance seems to recognise the idea of *per se* obscenity because it states clearly the nine categories of pornographic materials that are likely to be subject to prosecution. Nonetheless, it should be borne in mind that the outcome depends mainly on the opinion of the jury in an individual case. It is always possible that the defence counsel will manage to persuade the jury that the materials, which depict the sexual acts on the list of the CPS, are not obscene on the grounds of the aversive effect.¹⁰² The 2012 case of *R v. Peacock*¹⁰³ serves as an example. The jury in this case was of the opinion that gay pornographic DVDs that depicted anal fisting, urine play, whipping, needle play and staged rape did not have a tendency to deprave and corrupt the willing viewers, and thus were not obscene. Furthermore, as noted by the defendant's lawyer, the jurors, despite expressing shock, found that the materials were rather boring and were far from persuading viewers to engage in the depicted sexual activities. In this sense, pornographers and adult viewers are allowed to enjoy their freedom of pornographic expression, at least until the pornographic expression in question is found to be obscene.

Second, it can be said that the 'target audience' test draws a boundary between willing adult customers whose right to freedom of pornographic expression should be respected, and minors who need a certain degree of protection against pornography. In this sense, the 'target audience' test, on the one hand, acts as a measure to protect vulnerable people from pornography by warning sex shop owners and pornographers that they should keep their pornographic materials out of the reach of young people and people who are unwilling to see them. If not, their materials would be judged by their corrupting effect on such groups of people, who may be far more morally sensitive or vulnerable than willing adult customers. On the other hand, the 'target audience' test apparently guarantees that pornographers and adults alike are entitled to the enjoyment of their freedom of pornographic expression because pornographic materials are not completely banned and still available in sex shops. This approach is apparently consistent with the conceptual framework discussed in Chapter 3, which argues that the protection of youngsters against pornography is reasonable in order to restrict pornographic expression, by keeping such materials out of the reach of children. But it should not limit freedom of pornographic expression of consenting adults.

¹⁰² Edwards, S., 'The Failure of British Obscenity Law in the Regulation of Pornography' (2000) *Journal of Sexual Aggression*, 6(1/2), pp.111-127, 111.

¹⁰³ The citation of the case has not been available yet. For the details of the case see, for example, *Law, Justice and Journalism*, 13th January 2012, <http://lawjusticejournalism.org/2012/01/13/r-v-peacock-landmark-trial-redefines-obscenity-law/>; *BBC*, 6th January 2012, <http://www.bbc.co.uk/news/uk-16443697>; *The Guardian*, 6th January 2012, <http://www.guardian.co.uk/commentisfree/libertycentral/2012/jan/06/michael-peacock-obscenity-trial>, visited 2nd March 2012.

However, the English obscenity standard is still not fully consistent with the conceptual framework developed in Chapter 3. First, the use of ‘tendency to deprave and corrupt’ as a decisive factor for determining obscenity connotes an attempt to uphold the prevailing sexual morality by means of prohibition of all sexual ideas that are deemed perverted or deviant from such moral standards.¹⁰⁴ Put differently, the English obscenity standard is, in essence, constructed around the morality-based and paternalistic justification to bar people from sexual ideas that are deemed inappropriate. As argued in Chapter 3, the restriction of pornographic expression on the grounds of morality permits the state – under the name of sexual morality – to silence opinions that are different from the prevailing sexual mores. It is contradictory to the democratic value of freedom of expression, which protects all kinds of expression irrespective of whether they are deemed good or bad, morally acceptable or veil.¹⁰⁵ Furthermore, such restriction rejects the notion of self-realisation – another argument for freedom of expression. It limits people to know only sexual ideas that are deemed moral. As a result, people cannot access a full range of sexual ideas, and use those ideas to make an independent decision about their own sexuality (autonomy) to develop their intellectual potentials and personality (self-fulfilment).¹⁰⁶

Moreover, the English obscenity test ‘focuses only on prurience and lewdness giving no consideration to harm of pornography’,¹⁰⁷ especially physical harm that may occur to pornographic actors/actresses. This, as contended in Chapter 3, could be seen as a strong justification for prohibiting violent pornography. Whilst it is true that the CPS guidance indicates that the materials that depict violent sexual activities that could create real injury are subject to prosecution, such guidance is still morality-based (the corrupting/depraving effect) not harm-based (direct bodily harm inflicted on pornographic performers). More importantly, as argued above, it is always possible that such violent pornography is found to be non-obscene because of the aversive defence. Therefore, it is reasonable to say that violent pornography may survive the obscenity test.

Lastly, as noted above, the decision of whether the material is obscene depends principally on the question of whether the material at issue has morally corrupting effects on viewers/readers. The answers to this question can be various, depending on the perception towards sexual morality of the jury in an individual case. Different juries may have different opinions. In short, there is no common criterion with regard to what kinds of pornography are morally corrupting. A pornographer may produce a pornographic film which, according

¹⁰⁴ Stone, R., *supra*, p.406.

¹⁰⁵ See Section 3.3.3

¹⁰⁶ See Section 3.3.4

¹⁰⁷ Edwards, S., *supra*, p.123.

to the current case law, he/she is certain that the film is not obscene. However, nothing can guarantee that the jury will follow the pornographer's view and decide that the film in question is not obscene. Also, it is always possible that the pornographic film in question is considered to be non-obscene by one jury, but found to be obscene by a different jury. One may contend that the CPS guidance may help to clarify the scope of obscene materials because it enumerates the categories of pornography that are commonly prosecuted under the OPA. This does not mean that the pornographic materials on the list are always deemed obscene or non-obscene. As noted above, the CPS is merely giving a practical guide for the police and public prosecutors. The guidance has no legally binding effect, and the jury is not bound to follow it when determining obscenity. Again, although a type of pornography is found to be obscene by one particular jury, it is possible that the identical type may be found to be non-obscene by a different jury. In this sense, it could be said that the indefinite nature of the obscenity standard makes the extent to which people can enjoy the freedom to sexually explicit expression largely erratic.

5.2.4 The Concept of Extreme Pornography

5.2.4.1 Background to the Extreme Pornography Law

In 2003, Jane Longhurst was strangled to death by her sexual partner Graham Coutts during sexual intercourse.¹⁰⁸ Coutts was alleged to have an obsession with sexually violent images, some of which portrayed simulated necrophilia and erotic asphyxiation.¹⁰⁹ The murder prompted Liz Longhurst (Jane's mother) to lead a campaign against violent pornography in the UK.¹¹⁰ The campaign achieved support from 50,000 people and David Blunkett, Home Secretary at that time.¹¹¹ As a consequence, in 2005, the Home Office and the Scottish Executive jointly conducted a survey of public opinion about the criminalisation of the possession of so-called 'extreme pornography'.¹¹² In 2007, draft provisions to outlaw the possession of extreme pornographic material (clauses 64 and 65 of the Criminal Justice and

¹⁰⁸ Graham Coutts was found guilty of murder by Lewes Crown Court in 2004. In 2006, on appeal, House of Lords overturned the murder conviction on the grounds that the jury was not offered a manslaughter alternative at the trial. As a result, the original conviction was quashed and a retrial was ordered (*R v. Coutts* HL (2006) W.L.R. 2154). However, at his retrial at the Old Bailey in 2007, Coutts was found guilty and sentenced to a life term with a minimum of 26 years. See *BBC*, 4th February 2004, http://news.bbc.co.uk/1/hi/england/southern_counties/3455327.stm; 5th July 2007, <http://news.bbc.co.uk/1/hi/england/sussex/6272330.stm>; *Murder UK*, http://www.murderuk.com/one_off_graham_coutts.html, visited 3rd March 2012.

¹⁰⁹ See *R v. Coutts* (2005) 1 WLR 1605, para.41. *BBC*, 4th February 2004, http://news.bbc.co.uk/1/hi/england/southern_counties/3342313.stm, visited 3rd March 2012.

¹¹⁰ See *Jane Longhurst Trust*, <http://www.jltrust.org.uk/>, visited 3rd March 2012.

¹¹¹ *BBC*, 30th August 2006, <http://news.bbc.co.uk/1/hi/england/berkshire/5297600.stm>, visited 3rd March 2012.

¹¹² Home Office and Scottish Executive, *Consultation: On the Possession of Extreme Pornographic Material*, <http://www.scotland.gov.uk/Resource/Doc/57346/0017059.pdf>, visited 3rd March 2012, para.10, p.6.

Immigration Bill 2007 (CJIB2007)) were introduced by the UK government. After the first reading of the Bill, the UK government produced a study entitled *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment (REA)* to back up its proposal to criminalise the possession of extreme pornography. This study claims that exposure to violent pornography leads to sexual aggression in certain viewers, especially those who are predisposed to aggression.¹¹³ The draft provisions were considered by the House of Commons and the House of Lords.¹¹⁴ They underwent major amendments¹¹⁵ before becoming Sections 63-68 of the Criminal Justice and Immigration Act (CJIA) 2008, and came into force on January 26, 2009.¹¹⁶

5.2.4.2 The Extreme Pornography Test

Section 63 (2) - (7) of the CJIA 2008 lays down criteria for determining extreme pornography. It reads:

(2) An “extreme pornographic image” is an image which is both –

- (a) pornographic, and
- (b) an extreme image.

(3) An image is “pornographic” if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.

(4) Where (as found in the person’s possession) an image forms part of a series of images, the question whether the image is of such a nature as is mentioned in subsection (3) is to be determined by reference to –

- (a) the image itself, and
- (b) (if the series of images is such as to be capable of providing a context for the image) the context in which it occurs in the series of images.

(5) So, for example, where –

- (a) an image forms an integral part of a narrative constituted by a series of images, and
- (b) having regard to those images as a whole, they are not of such a nature that they must reasonably be assumed to have been produced solely or

¹¹³ However, the REA is subject to criticisms. See sections 3.5.4.3 and 5.2.4.2.

¹¹⁴ For information concerning all stages of the passage of the Criminal Justice and Immigration Bill and relevant parliamentary debates see <http://services.parliament.uk/bills/2007-08/criminaljusticeandimmigration/stages.html>, visited 3rd March 2012. For the summary see *Criminal Justice and Immigration Bill: Committee Stage Report Bill 1 of 2007-08*, <http://www.parliament.uk/documents/commons/lib/research/rp2007/rp07-093.pdf>, visited 3rd March 2012, pp.24-26.

¹¹⁵ For the details concerning the amendments, see Murray, A.D., ‘The Reclassification of Extreme Pornographic Images’ (2009) *The Modern Law Review*, 72(1), pp.73-90, 80-86.

¹¹⁶ *Crown Prosecution Service*, http://www.cps.gov.uk/legal/d_to_g/extreme_pornography/, visited 8th March 2012.

principally for the purpose of sexual arousal, the image may, by virtue of being part of that narrative, be found not to be pornographic, even though it might have been found to be pornographic if taken by itself.

(6) An “extreme image” is an image which –

- (a) falls within subsection (7), and
- (b) is grossly offensive, disgusting or otherwise of an obscene character.

(7) An image falls within this subsection if it portrays, in an explicit and realistic way, any of the following –

- (a) an act which threatens a person’s life,
- (b) an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals,
- (c) an act which involves sexual interference with a human corpse, or
- (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive), and a reasonable person looking at the image would think that any such person or animal was real.

In brief, a material (a moving or still image, including those in the form of digital data)¹¹⁷ that is deemed as ‘extreme pornography’ must have all of the three main elements, as follows: (1) it must be pornographic; (2) it must depict one or more of the prohibited sexual acts enumerated in Section 63 (7) in an explicit and realistic manner; and (3) the images must be grossly offensive, disgusting or obscene. All of these elements are to be judged by a jury.¹¹⁸

The first element of extreme pornography is that the material in question must be deemed ‘pornographic’. According to Section 63 (3), ‘pornographic’ character is to be determined by considering whether a reasonable assumption can be made that the image is produced solely or principally for the purpose of sexual arousal.

Additionally, Section 63 (4) stipulates that the jury has to judge the ‘pornographic’ character of the image by looking at the image itself, without taking into account the intention of the producer of the image, and the question as to whether or not the image sexually arouses the defendant.¹¹⁹ Furthermore, if the image in question is a part of a larger series of images, the jury has to determine the image’s pornographic character by considering it in the overall context in which it appears.¹²⁰ Section 63 (5) gives an example of the principle in the fourth paragraph, as follows. An image of sexual intercourse may be deemed ‘pornographic’

¹¹⁷ Section 63 (8) of CJIA 2008.

¹¹⁸ Ministry of Justice, *Possession of Extreme Pornography Images and Increase in the Maximum Sentence Offender Under the Obscene Publication Act 1959: Implementation of Section 63-67 and Section 71 of the Criminal Justice and Immigration Act 2008*, Circular No. 2009/01, 19th January 2009, para.8; Easton, S., ‘Criminalising the Possession of Extreme Pornography: Swords or Shield?’ (2011) *Journal of Criminal Law*, 75(5), pp.391-413, 393.

¹¹⁹ Ministry of Justice, *supra*, para.8.

¹²⁰ *Ibid.*, para.10.

within the meaning of Section 63 (3) *per se* when it is considered in isolation. However, it appears to the jury that the image in question is, in fact, an image extracted from, say, a scene of a documentary film about human fertility, which is produced for an educational purpose. The image of sexual intercourse in question is an integral part of the documentary film, which is not produced solely or principally for sexual purpose. Therefore, the image is not 'pornographic' for the purpose of Section 63 (3).¹²¹ It is important to note that the documentary film in this case refers to material that is not classified by the British Board of Film Classification (BBFC), such as foreign films that are on video-sharing websites. The certified films and the images extracted from them are subject to Section 64 (which is discussed below).

If the image in question meets the 'pornographic' requirement, the next question to be considered is whether it portrays the 'prohibited sexual acts' enumerated in Section 63 (7) in an 'explicit and realistic' manner. According to the UK government, the 'explicit' element focuses only on the pictures in which a prohibited sexual act 'can be clearly seen, and is not hidden, disguised or implied'.¹²² For example, an image portraying an obscure shadow of a couple engaging in erotic asphyxiation would not fall within the scope of Section 63 because the prohibited sexual acts are not clearly seen. The 'realistic' element targets only images that may be the recordings of actual prohibited sexual acts, or images that 'appear to be real and are convincing, but which may be acted'.¹²³ Therefore, the 'realistic' test excludes cartoons, textual materials, paintings and drawings. A prime example of the application of the 'realistic' test is the 2010 case of Andrew Holland. In this case, he was prosecuted under Section 63 for possessing a bestial pornographic video clip showing a woman having sex with a tiger. However, it emerged that the animal in the clip was, in fact, computer-generated and intended to parody the cartoon character 'Tony', the Frosties Tiger. Holland's prosecution was withdrawn by the prosecutor and his charge dismissed by the Crown Court.¹²⁴ Another example is the 2011 case of Kevin Webster who downloaded a number of pornographic images showing sexual violence and death from the Internet. At the trial, the jury was of the opinion that the images at issue were obviously staged, and

¹²¹ *Explanation Note of the CJIA 2008*, para.456.

¹²² Home Office and Scottish Executive, para.38, at p.11.

¹²³ *Ibid.*

¹²⁴ See *The Register*, 6th January 2010, http://www.theregister.co.uk/2010/01/06/tiger_police/, 22nd March 2001, http://www.theregister.co.uk/2010/03/22/six_second_clip/; *The Telegraph*, 31st December 2009, <http://www.telegraph.co.uk/news/uknews/6918001/Man-cleared-of-porn-charge-after-tiger-sex-image-found-to-be-joke.html>, visited 10th March 2012.

acquitted him.¹²⁵ (The ‘realistic-looking’ criterion is subject to certain criticisms, which will be discussed below).

One last requirement is that the image must be ‘grossly offensive, disgusting or otherwise of an obscene character’. This requirement was added in the final stage of the parliamentary process with an intention to bring Section 63 in line with the OPA.¹²⁶ According to the House of Lords, this would ensure that only materials that are already illegal under the OPA would be caught by Section 63.¹²⁷ This shows that the UK government intends to make extreme pornography a subset of a group of obscene materials under the OPA. However, as will be discussed below, the inclusion of gross offensiveness and disgustingness as factors to determine extreme pornography appears to extend the scope of extreme pornography law beyond that of the OPA.

As far as mainstream movies are concerned, extreme pornography law provides a safeguard for the classified films that have certain scenes that may fall within the meaning of extreme pornography.¹²⁸ Section 64 states:

- (1) Section 63 does not apply to excluded images.
- (2) An “excluded image” is an image which forms part of a series of images contained in a recording of the whole or part of a classified work.
- (3) But such an image is not an “excluded image” if –
 - (a) it is contained in a recording of an extract from a classified work, and
 - (b) it is of such a nature that it must reasonably be assumed to have been extracted (whether with or without other images) solely or principally for the purpose of sexual arousal.

Under Section 64 (1) and (2), Section 63 is not applicable to an image that is extracted from classified work, e.g. videos and DVDs to which the BBFC has already granted rating certificates,¹²⁹ including their digital data stored on computers or other electronic devices.¹³⁰

¹²⁵ *Backlash*, http://www.backlash-uk.org.uk/wp/?page_id=866; *This is Staffordshire*, 7th January 2011, <http://www.thisisstaffordshire.co.uk/Jury-acquits-landmark-porn-prosecution/story-12524952-detail/story.html>, visited 24th March 2012.

¹²⁶ Ministry of Justice, *supra*, para.13; McGlynn, C. and Rackley, E., ‘Criminalising Extreme Pornography: A Lost Opportunity’ (2009) *Criminal Law Review*, 2009(4), pp.245-260, 252.

¹²⁷ Lord Hunt of Kings Health, *House of Lords Hansard*, Volume 699, Column 894, 3rd March 2008, <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80303-0005.htm#0803034000479>, visited 10th March 2012.

¹²⁸ Ministry of Justice, *supra*, para.19.

¹²⁹ Section 64 (7); The BBFC is an authority under the Video Recordings Act 1984, see <http://www.bbfc.co.uk/about/>, visited 12th March 2012.

¹³⁰ *Explanation Note of the CJIA 2008*, para. 463.

For instance, the classified film *The Realm of Senses*,¹³¹ which contains several scenes of erotic asphyxiation, is exempted from an offence under Section 63. However, according to Section 64 (3), the exemption set out in Section 64 (1) and (2) is lost when it is reasonable to assume that such images have been extracted solely or principally for a sexually arousing purpose.¹³² For example, a person extracts an image from the erotic asphyxiation scene of *The Realm of Senses* and subsequently stores it, together with other pornographic images, in a folder on a computer. Or a person extracts such an image for a masturbatory purpose.¹³³ These examples could suggest that the image is extracted principally for a sexually arousing purpose. However, the onus of proof is on the prosecutor to convince the jury that the plaintiff extracted a scene from a classified film for sexual purposes.

The main criticism of Section 64 is that two identical images from a classified film are treated differently simply because one is still a part of the overall film and the other has been extracted from the film for sexual purposes. 'No real explanation of this provision has been given by the [UK] government justifying its inclusion...'¹³⁴

5.2.4.3 The Extreme Pornography Test and Implications for Freedom of Expression

One of the main features of the extreme pornography test is that it seeks to clarify the boundary between illegal and legal categories of pornography. As examined above, under the OPA, there is no common standard about what genres of pornography are obscene. Obscenity is to be judged by a jury on a case-by-case basis. These situations would render the level of protection given to the freedom of pornographic expression relatively irregular. In contrast, Section 63 (7) of the CJIA 2008 makes it clear that three particular categories, i.e. pornography that shows serious sexual violence,¹³⁵ bestiality, and necrophilia are prohibited. Moreover, as Section 63 (7) is a statute, it has a legally binding effect on the jury and the court. Therefore, if the material in question is found to be on the list of Section 63 (7), it will certainly be illegal; on the other hand, if the material is not on the list of Section

¹³¹ *The Realm of Senses* (愛のコーター) is directed by Nagisa Oshima. It was given an '18 certificate' by the BBFC after the scene portraying a woman pulling a boy's genitals was censored. See BBFC,

<http://www.sbbfc.co.uk/CaseStudies/LEmpire des Sens In The Realm Of The Senses>, visited 11th March 2012.

¹³² Ministry of Justice, *supra*, para.20-21; *Explanation Note of the CJIA 2008*, *supra*, para.465.

¹³³ However, it would be difficult to prove whether the person who extracts the image has actually used it for masturbation. He/she may argue that the image is not sexually arousing for him/her and it is kept for other purposes.

¹³⁴ McGlynn, C. and Rackley, E. (2009), *supra*, p.254.

¹³⁵ Under Section 63 (7), sexually violent pornography refers only to the type of pornography that portrays sexually violent acts that are deemed life-threatening or can cause serious physical harm to the anus, breasts or genitals.

63 (7), it will surely be legal. Because the boundary between legal and illegal types of pornographic expression is clearly defined by extreme pornography law, it is unlikely that a certain type of pornography which is deemed legal under the extreme pornography law in one case will be judged illegal in another. Therefore, it could be said that the distinction between illegal and legal types of pornography drawn by the extreme pornography law makes the law in this area clearer; as a result, it also makes the level of protection affordable to freedom of pornographic expression more predictable and certain.

Moreover, because the extreme pornography law deals only with pictorial materials that have explicit and realistic depictions of prohibited sexual acts (under Section 63 (7)), textual materials such as novels, and materials that do not have realistic depictions, such as comic books, drawings and paintings, are not covered by the legislation. As will be discussed below, however, the 'realistic-looking' test may have a problem when dealing with simulated or computer-generated materials that appear real. Most importantly, the extreme pornography law criminalises only pornographic materials, e.g. the materials that are reasonable to assume have been produced solely or principally for a sexually arousing purpose. Therefore, the extreme pornography law does not interfere with materials that are not produced for a sexually arousing purpose, such as the *Little Red Schoolbook*¹³⁶ or novels like *Lady Chatterley's Lover*¹³⁷ or *Last Exit to Brooklyn*.¹³⁸ These three books are not pornographic materials, but were prosecuted under the OPA – legislation that has a broad scope to cover all kinds of material, including non-pornographic. Given the narrow scope of the extreme pornography law, there would be very few materials subject to restriction, whilst most types of pornography are permitted. In this sense, it could be said that the extreme pornography law allows a considerable extent of freedom for pornographic expression.¹³⁹

In addition, under the extreme pornography law, all extreme pornographic materials are criminalised. As a matter of principle, this would make the extreme pornographic materials unavailable to all people – including children and adults alike. In this way, it can be said that the extreme pornography law protects minors,¹⁴⁰ thus it is consistent with the argument in Chapter 3 that the regulation of Internet pornography should take into account the protection of minors. However, one may contend that the extreme pornography law curtails the

¹³⁶ *Handyside v. UK* (1976), No. 5493/72, A24.

¹³⁷ *R v. Penguin Books Ltd.* (1961) Crim. L.R. 176.

¹³⁸ *R v. Calder & Boyars Ltd.* (1969), 1 Q.B., 151.

¹³⁹ The obscenity test under the OPA also gives a certain degree of freedom for pornographic expression, but in a different way. See Section 5.2.3.

¹⁴⁰ In comparison, the OPA protects children by implicitly imposing a duty on the publisher to implement measures to prevent children from (intentionally or unintentionally) accessing pornographic materials. See Section 5.2.3

freedom of adults who want to view extreme materials. As will be discussed below, pornographic materials which cause real serious bodily harm to those participating in the production deserve no protection under the concept of freedom of expression.¹⁴¹

Despite what is argued above, certain elements of the extreme pornography test seem to make the extreme pornography law excessively restrictive in some aspects. The first is the 'realistic-looking' criterion. As pointed out above, the 'realistic-looking' test may exempt materials that are not 'real', such as comic books, paintings and drawings. However, the 'realistic looking' element is subject to a criticism that it may criminalise simulated or computer-generated materials. With special techniques, images can be created to convey a realistic impression to viewers. 'Fake' blood, wounds and organs, or the acting of performers, can be employed to create realistic-looking images of sexual violence listed on Section 63 (7) (a) and (b). An animal mannequin or a living person acting as a dead body can be used to produce realistic-looking pictures of bestiality and necrophilia (Section 63 (7) (c) and (d)). Furthermore, the current technology of computer graphics makes it possible to create pseudo or virtual extreme pornographic images¹⁴² that look very realistic.¹⁴³ It is considerably difficult for ordinary people (and the jury) who do not possess special knowledge in the fields of computer graphics or special effects to distinguish whether such images are, in fact, simulated or computer-generated. Section 63 (7) states clearly that the term 'realistic-looking' is sufficient to make the image illegal. In this sense, the extreme pornography law appears to be overly restrictive because it prohibits simulated or computer-generated pornographic images, the production of which does not involve real sexual violence, real animals or corpses, and causes no actual physical harm to participants ('direct harm'). One may contend that even simulated or computer-generated extreme pornography should be restricted, as it could encourage people to have violent or aberrant sexual behaviour that could harm society at large ('indirect harm'). However, as will be discussed in Section 5.2.4.4 (B) below, there has not been any compelling evidence to date that shows extreme pornography leads to such undesirable effects. Therefore, at present, the indirect harm argument does not seem strong enough to justify the prohibition of simulated/computer-generated extreme pornography.

¹⁴¹ See Section 5.2.4.4.

¹⁴² Pseudo pornography means a pornographic image that is created by digitally altering or modifying pictures of real persons. Virtual pornography means a pornographic image that is entirely generated by computer software without using images of real people.

¹⁴³ Nair, A., 'Real Porn and Pseudo Porn: The Regulatory Road' (2010), *International Review of Law, Computers and Technology*, 24(3), pp.223-232, 224 and 229. See also responses of the BBFC, the BBC and the LINX (London Internet Exchange) to the *Consultation Paper*, Home Office, *Consultation on the Possession of Extreme Pornographic Material: Summary of the Responses and Next Steps*, (2006), <http://www.spannertrust.org/documents/Gvt-response-extreme-porn.pdf>, visited 8th June 2012, para.53, p.16.

The 'grossly offensive/disgusting/obscene' criterion is another problem that makes the extreme pornography law ambiguous and unnecessarily overly restrictive. In an extreme pornography trial, it is the jury that decides the question of fact as to whether the material at issue is grossly offensive, disgusting or obscene.¹⁴⁴ However, offensiveness, disgustingness or obscenity is subjective in nature. An image may offend or make some people feel disgusted, but may not have such effects on others. Similarly, an image may be deemed obscene by some people, but may not be by others.¹⁴⁵ In other words, the answer to this criterion depends significantly on how a particular person feels about the image. At a trial, it is always possible that some jurors may decide that the image in question is offensive or disgusting, whilst the others may have a contrary opinion. Moreover, although a jury may unanimously find that a particular image is grossly offensive or has a disgusting character in one case, a different jury may reach a different conclusion in another case, despite considering an identical image. Also, juries in London or other cities might be more relaxed about materials that would cause a jury with a different demographic to be less indulgent. Therefore, it could be contended that the 'grossly offensive/disgusting/obscene' criterion would make the extreme pornography test needlessly vague, in a similar fashion to the way in which the 'tendency to deprave and corrupt' criterion could make the obscenity standard ambiguous. This problem not only undermines a key feature of the extreme pornography test – an attempt to clarify the boundary between illegal and legal types of pornography – but also makes it very difficult for people to know how far they can enjoy freedom of pornographic expression, since the 'grossly offensive/disgusting/obscene' criterion makes the extreme pornography become vague and subjective.

Furthermore, as already noted, the inclusion of the 'grossly offensive/disgusting/obscene' criterion reflects the UK government's intention to make extreme pornography a subset of a larger group of obscene materials. In other words, the extreme pornography law should criminalise only the materials that are already illegal under the OPA, and should not criminalise materials that are not illegal under the OPA. The inclusion of 'obscene character' as a factor to determine extreme pornography is understandable, because it could ensure that extreme pornography law is in line with the OPA. However, the inclusion of gross offensiveness and disgustingness appears to be inconsistent with this idea. As pointed out above, the obscenity test of the OPA gives no attention to the offensiveness or disgustingness of the material, but concentrates only on the corrupting and depraving effect of the material.¹⁴⁶ The inclusion of the terms 'grossly offensive' and 'disgusting' would expand the scope of Section 63 to cover grossly offensive/disgusting materials that are not

¹⁴⁴ See Section 5.2.1.

¹⁴⁵ See Section 5.2.3.

¹⁴⁶ See Section 5.2.1.1.

illegal under the OPA. For example, a grossly offensive or disgusting pornographic image that does not corrupt/deprive anyone is not deemed obscene under the OPA's standard. However, due to its gross offensive or disgusting character, it may fall within the scope of extreme pornography. Therefore, it could be argued that, because the extreme pornography law fails to keep the scope of extreme pornography law narrow as it was intended to do, it appears to be more restrictive in terms of freedom of expression than the OPA. It is recommended that the 'grossly offensive/disgusting' criterion should be taken out, and Section 63 (6) should state clearly that only material that is already illegal under the OPA can be criminalised under the extreme pornography law. This may make a jury consider the obscenity of the material first, and then move on to consider it under the extreme pornography law.

5.2.4.4 Extreme Pornography and the Harm-Based Justification

The extreme pornography test can be seen as an important step to shift the justification for restricting pornographic expression from morality-based (the 'tendency to deprave and corrupt' test of the OPA) to harm-based justification. According to the Home Office and the Scottish Executive's *Consultation: On the Possession of Extreme Pornography Material* (the *Consultation Paper*) published in 2005, there are two main justifications for the proposal of extreme pornography law. The first is to protect pornographic actors against direct physical harm that may happen to them during a production as a result of harmful sexual acts required by the scripts. This type of harm is known as 'direct harm to pornographic performers'.¹⁴⁷ The second justification is to prevent undesirable effects on society at large or on people who are not directly connected with the production of extreme pornographic materials. Such undesirable effects include people becoming increasingly interested in 'aberrant sexual acts', or certain viewers imitating 'violent sexual acts' and inflicting physical harm on themselves or partners. This kind of harm is called 'indirect harm to society'.¹⁴⁸

A) Direct Harm to Pornographic Performers

Regarding direct harm, the *Consultation Paper* gives examples of some pornographic materials that the UK government believes may cause real physical harm to individuals appearing therein. The examples include pornographic materials that portray women being tied to apparatus, restrained in other ways, and stabbed with knives, hooks and other implements. The most horrific example is a material that depicts women hanging by their

¹⁴⁷ Home Office and Scottish Executive, *supra*, para.34, at p.11; See also Nair, A., *supra*, p.229.

¹⁴⁸ Home Office and Scottish Executive, *Ibid*.

necks from meat hooks, some with plastic bags covering their heads.¹⁴⁹ Originally, in the *Consultation Paper*, the UK government proposed to criminalise materials that depicted ‘serious violence in a sexual context’¹⁵⁰ and ‘serious sexual violence’.¹⁵¹ However, the ambiguity of these two wordings is criticised by the House of Lords and the House of Commons Joint Committee on Human Rights. The Joint Committee states that:

‘Our concerns about the vagueness of the definition of the offence, which we expressed in correspondence with the Minister, remain. It is in our view questionable whether the definition of the new offence in clause 113 [formerly clause 94] is sufficiently precise and foreseeable to meet the Convention test of “prescribed by law”. The offence requires the pornographic image in the individual’s possession to be “extreme”. An assessment of whether an image is or is not “extreme” is inherently subjective and may not, in every case, be, as the Government suggests, “recognisable” or “easily recognisable”. This means that individuals seeking to regulate their conduct in accordance with the criminal law cannot be certain that they will not be committing a criminal offence by having certain images in their possession.’¹⁵²

In the document entitled *Consultation on the Possession of Extreme Pornographic Material: Summary Responses and the Next Steps (Summary 2006)*, which was published following the *Consultation Paper*, the UK government recognised that the terms ‘serious violence in a sexual context’ and ‘serious sexual violence’ were too vague and too broad, and might cover too many materials.¹⁵³ Accordingly, it amended its proposal in order to criminalise only a single category of ‘serious violence’, which was defined as ‘acts that appear to be life threatening or are likely to result in serious, disabling injury.’¹⁵⁴ Interestingly, *Backlash*¹⁵⁵ – a pressure group campaigning against extreme pornography law that was established in 2005 by several NGOs, i.e. Libertarian Alliance (a pro-freedom of expression NGO),¹⁵⁶ the Spanner Trust (an NGO that campaigns for the rights of people who practise BDSM (Bondage, Domination, Sadism and Masochism),¹⁵⁷ Sexual Freedom Coalition (an NGO

¹⁴⁹ Ibid., paras.5,27, at pp.5 and 9.

¹⁵⁰ “[S]erious violence” means ‘violence in respect of which a prosecution of grievous bodily harm could be brought in England and Wales, or in Scotland, assault to severe injury.’ It ‘will involve or will appear to involve serious bodily harm in a context or setting which is sexual – for example, images of suffocation or hanging with sexual references in the way the scenes are presented.’ See Ibid., fn 1, at p.2 and para.40, at p.12.

¹⁵¹ “[S]erious sexual violence will involve or will appear to involve serious bodily harm where the violence is sexual’, Ibid.

¹⁵² Joint Committee on Human Rights, *Legislative Scrutiny: Criminal Justice and Immigration Bill, Fifth Report of the Session 2007-08*, <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/37/37.pdf>, visited 3rd March 2012, p. 16.

¹⁵³ Home Office, *Consultation on the Possession of Extreme Pornographic Material: Summary Responses and the Next Steps*, para.4, p.5.

¹⁵⁴ Home Office, Ibid., paras.13,16, pp.6-7.

¹⁵⁵ Backlash was created in 2005 and consists of several NGOs, i.e., Libertarian Alliance, the Spanner Trust, Sexual Freedom Coalition, Feminists against Censorship, Ofwatch and Unfettered. See <http://www.backlash-uk.org.uk/index.html/>, visited 24th March 2012.

¹⁵⁶ <http://www.libertarian.co.uk/>, visited 18th June 2012.

¹⁵⁷ <http://www.spannertrust.org/>, visited 18th June 2012.

that promotes sexual freedom in the UK),¹⁵⁸ Feminists against Censorship,¹⁵⁹ Ofwatch (a telecommunication organisation that joins *Backlash* as the representative of the viewers of adult entertainment)¹⁶⁰ and Unfettered (a BDSM education and entertainment organisation)¹⁶¹ – argued that the wording ‘serious violence’ was still problematic. It was too vague for people to know what could constitute ‘serious violence’.¹⁶² It went on to criticise the definition of extreme pornography, i.e. the pornography that depicts serious violence in a realistic way,¹⁶³ as overly broad. The definition would affect people who practise BDSM, which was non-abusive sexual activity conducted by consenting adults (despite involving certain degrees of violence), and also prevent the efforts of the BDSM community to educate people about safe, sane and consensual BDSM practices.¹⁶⁴ (It will be discussed below that consent to sexual violence has limitations; and certain kinds of harm inflicted on people who practise BDSM are deemed illegal under the UK law.)

The wording regarding direct harm to pornographic actors was amended once more to that prescribed in Section 63 (7): (a) an act that threatens a person’s life, and (b) an act that results, or is likely to result, in serious injury to a person’s anus, breasts or genitals. *The Explanation Note of the CJIA 2008* provides further information, stating that hanging, suffocation or sexual assault involving a threat with a weapon are examples of life-threatening acts; and insertion of sharp objects into the anus or genitals, and the mutilation of breasts or genitals, are examples of acts that cause serious harm to the anus/breasts/genitals.¹⁶⁵

As already discussed in Chapter 3, physical harm can be regarded as a strong justification to prohibit pornography which involves real violence and causes serious physical harm to pornographic performers.¹⁶⁶ However, it is difficult to ascertain whether pornography performers appearing in individual violent pornographic materials are actually harmed. Nonetheless, anecdotal evidence suggests that certain forms of violence are used and some pornographic performers are abused during filming.¹⁶⁷ Therefore, it could be contended that there is a possibility that, given the high competition in the pornography industry, some

¹⁵⁸ <http://www.sfc.org.uk/>, visited 18th June 2012.

¹⁵⁹ <http://www.fiawol.demon.co.uk/FAC/facfaq.htm>, visited 18th June 2012.

¹⁶⁰ <http://ofwatch.org.uk/>, visited 18th June 2012.

¹⁶¹ <http://www.unfettered.co.uk/index.html>, visited 18th June 2012.

¹⁶² Backlash, ‘Extreme Pornography Proposal: Ill-conceived and Wrong’ in McGlynn, Rackley, E., and Westmarland, N., (eds), *Positions on the Politics of Porn: A Debate on Government Plans to Criminalise the Possession of Extreme Pornography* (Durham University, Durham, 2007), pp.9-14, 11.

¹⁶³ Home Office, *supra*, paras.15-16, pp.6-7.

¹⁶⁴ Backlash, *supra*, p.9.

¹⁶⁵ *Explanation Note of the CJIA 2008*, para.457.

¹⁶⁶ See Section 3.5.5.1

¹⁶⁷ See Section 3.5.5.1

pornographic actors/actresses are forced to perform extreme and harmful sexual practices (such as the use of hot substances, sharp objects, electricity play or erotic strangulation) and may be physically injured as a result.¹⁶⁸

As far as consent is concerned, pornographic actors/actresses cannot consent to certain kinds of sexual acts, particularly those causing physical injuries. Section 66 (3) (a) states that:

For the purposes of this section harm inflicted on a person is “non-consensual” harm if –

- (a) the harm is of such a nature that the person cannot, in law, consent to it being inflicted on himself or herself

It is explained in the Ministry of Justice’s *Circular No.2009/01* that ‘consent to the intentional infliction of actual bodily harm or grievous bodily harm is normally deemed invalid’.¹⁶⁹ The examples of the harmful acts within the meaning of Section 66 (3) (a) can be found in *R v. Brown, Laskey and Jaggard*, such as ‘genital torture and violence to the buttocks, anus, penis, testicles and nipples’,¹⁷⁰ and infliction of bleeding wounds that cause scarring by using ‘hot wax, sandpaper, fish hooks and needles’.¹⁷¹ This case was later brought to the ECtHR – *Laskey, Jaggard and Brown v. UK* – on the grounds that the enforcement of the Offences Against the Person Act 1861 against the applicants violated their rights to private life protected by Art. 8 of the ECHR. However, the ECtHR was of the opinion that the degree of physical harm that the law allows between consenting adults was related to public health, and thus was a matter for the state to determine. Furthermore, ‘the UK authorities acted within their margin of appreciation in order to reach that legitimate aim’ (the protection of its citizens from real risk of serious physical harm or injury).¹⁷² Therefore, there was no violation of Art. 8. Given the rulings of the House of Lords and the ECtHR, the pornographic performers’ consent does not legitimise the infliction of physical harm on them during filming.

Clare McGlynn and Erika Rackley – academics in gender and law – interestingly remarks that the extreme pornography appears to be illogical in that it outlaws only pornographic materials that depict acts which can cause serious injury to the anus/breasts/genitals, but allows pornographic materials that show acts which cause serious injury to other parts of the

¹⁶⁸ However, it is important to note that, due to a lack of academic research on experiences of pornographic performers who participate in pornography that involves actual violent activities, this argument is primarily based on anecdotal evidence. Further academic investigation (which is beyond the scope of this thesis) is still required to provide further evidence to strengthen this argument.

¹⁶⁹ Ministry of Justice, *supra*, para.29.

¹⁷⁰ (1994) 1 A.C. 212, 236.

¹⁷¹ *Laskey, Jaggard and Brown v. UK* (1997) No. 21627/93; 21826/93; 21974/93, 1997-I, para.8.

¹⁷² *Ibid.*, paras.41,44.

body (e.g. buttock).¹⁷³ This view is shared by Julia Hornle – an IT law scholar. She notes that ‘in some ways the [extreme pornography law] is also under-inclusive, as a depiction of violence in asexual context causing [grievous bodily harm] to parts of the body [other than the anus/breasts/genitals are not prohibited by the law]’¹⁷⁴ It could be argued that the serious injury to other parts of the body is equally harmful to a person as the serious injury to the anus/breasts/genitals. It is doubtful why the scope of the extreme pornography law does not cover pornographic materials that portray an act which causes serious injury to other parts of the body, making the extreme pornography law illogical in this respect. However, McGlynn and Rackley note that this odd circumstance may derive from the fact that, before the passage of the extreme pornography law, the UK government was under the pressure from liberals’ demanding to narrow the scope of materials which may be illegal under the extreme pornography law.¹⁷⁵

The prohibition of violent pornography that could cause physical harm to participants can be seen as a welcome stance in the area of the regulation of pornography. As Susan Easton persuasively points out, the pornographic materials that are produced at the expense of physical harm to pornographic performers deserve no protection under the notion of the right to freedom of expression.¹⁷⁶ Given this, it could be said that the justification of direct bodily harm to pornographic performers of the extreme pornography law seems reasonable and consistent with the conceptual framework developed in Chapter 3.¹⁷⁷ It is also in line with the recommendation of the Williams Report, which suggests that the law should prohibit only pictorial pornography that involves sexual exploitation and serious physical injury of the participants.¹⁷⁸

¹⁷³ ; McGlynn, C. and Rackley, E., supra, p.249.

¹⁷⁴ Hornle, J., ‘Countering the Dangers of Online Pornography : Shrewd Regulating of Lewd Content, (2011) *European Journal of Law and Technology*, 2(1), <http://ejlt.org/article/view/55>, visited 24th January 2013, pp.1-26, 7.

¹⁷⁵ Originally, in the *Consultation Paper*, the UK government proposed to criminalise depictions of ‘serious sexual violence’ and ‘serious violence in a sexual context’ which might cover depictions of acts which could result in serious injury to of any part of the body. However, the pressure from criticisms regarding the vagueness of the phrases ‘serious sexual violence’ and ‘serious violence in a sexual context’ (as examined above) has made the UK government ‘[succumb] to the arguments of arch-liberals that the only form of harm to justify criminal action is that which, ... is concerned with “specifying a particular injury, typically inflicted upon the body, which can be identified independently of both the context in which it takes place and the understanding of the experience from the point of view of the people involved.”’ See McGlynn, C. and Rackley, E. (2009), supra, p.258; Munro, V., ‘Dev’l in Disguise? Harm, Privacy and Sexual Offence Act 2003’, in Munro, V., and Stychin, C.(eds), *Sexuality and the Law : Feminist Engagements*, (Routledge-Cavendish, London, 2007), pp.12-13.

¹⁷⁶ Easton, S., supra, p.398; Nair, A., supra, p.229

¹⁷⁷ See Section 3.5.5.1

¹⁷⁸ Report of the Committee on Obscenity and Film Censorship (Her Majesty’s Stationery Office, London, 1980), para.13.4, p.161.

The 'direct harm' rationale can be used to justify the prohibition of pornography that could cause real and serious physical harm to participants, but cannot justify the prohibition of pornography that involves simulated sexual violence or computer-generated pornography because these types of material do not cause harm to participants. Furthermore, it could be argued that direct harm cannot justify the exemption set out in Section 64 (3), which extends the scope of extreme pornography law to cover images that are extracted from classified films for a sexually arousing purpose. It is not doubted that physical injuries and even death shown in classified movies are simulated. Thus, it is unlikely that actors are actually harmed during the production. Because no one is harmed, it would be illogical for extreme pornography law to forbid such extracted images on the grounds of the protection of those who participate in the production of the classified films. As stated above, the UK government has not yet provided a clear explanation for the inclusion of Section 64 (3).

An interesting issue is whether pornography that depicts rape should be included within the meaning of extreme pornography or not. This question was raised at the House of Commons Debate by Conservative MP David Burrowes.¹⁷⁹ According to the comment of Edward Garnier – another Conservative MP – the depiction of rape itself is not deemed as extreme pornography within the meaning of Section 63. Only rape pornography which depicts life-threatening acts (using a knife or gun) or acts that may cause serious harm to the anus, breasts or genitals (Section 63 (7) (a) and (b)) could constitute extreme pornography.¹⁸⁰ However, McGlynn and Rackley and Andrew Murray – an IT law scholar – contend that pornography that shows rape, despite not portraying violent life-threatening acts, should have been brought within the definition of extreme pornography. McGlynn and Rackley argue that the depiction of rape itself normalises and glorifies rape (pro-rape); and most rape pornographic websites, despite showing staged rape, often advertise that their materials are real.¹⁸¹ Murray argues that 'realistic' rape imagery should be also treated as extreme pornography because, first, rape pornography may be a product of the use of coercion against pornographic performers and, second, young viewers could misinterpret the images of rape they see on rape pornographic websites as real.¹⁸² It could be said that McGlynn and Rackley's argument in this regard seems to be based on the anti-pornography feminists'

¹⁷⁹ David Burrowes, *House of Commons Public Bill Committee, Criminal and Justice and Immigration Bill*, 18th October 2007, col 125, <http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/071018/pm/71018s01.htm>, visited 3rd March 2012

¹⁸⁰ Edward Garnier, *House of Commons Public Bill Committee, Criminal and Justice and Immigration Bill*, 18th October 2007, col 125, <http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/071018/pm/71018s01.htm>, visited 3rd March 2012

¹⁸¹ McGlynn, C. and Rackley, E. (2009), *supra*, p.249

¹⁸² Murray, A., *supra*, p.88

'pornography-causes-rape' claim.¹⁸³ However, apart from rape pornography that shows rape scenes, many mainstream films, e.g. *Last House on the Left* (1972)¹⁸⁴ and *I Spit on Your Grave* (1978),¹⁸⁵ also depict 'realistic' rape scenes. In this regard, 'realistic' rape scenes can be seen as a message that a film intends to express to the viewer. Although such a message is offensive or distasteful, it is a form of expression which deserves a certain degree of protection. Moreover, as already discussed in Chapter 3, since there has not been any conclusive evidence to support the view that pornography (including rape pornography) encourages men to rape,¹⁸⁶ the claim that rape pornography glorifies rape is not strong enough to prohibit rape pornography – especially that which does not involve the use of real violence.

Regarding Murray's argument, although it is possible that certain unfortunate pornographic performers are forced to play rape scenes, he recognises that, in most cases, people playing in rape pornography are professional performers;¹⁸⁷ and 'rape', in a legal sense, does not actually happen as the pornographic performers consent to participate in the rape scene. In other words, rape which we see in rape pornography is, in fact, a consensual sexual act which pretends to be a rape (or a simulated rape). As long as no real violent sexual acts (such as penetration by sharp objects or strangulation) and real coercion are involved in the production, there is no point in covering rape pornography within the scope of extreme pornography law.

Lastly, as Murray contends, young people cannot distinguish between staged rape and real rape on screen. This would be true. However, the important point is that not only rape pornography, but almost all types of pornography, have negative effects on minors' development in terms of personality and sexuality.¹⁸⁸ Therefore, it is more important to keep all kinds of pornography, including rape pornography, out of the reach of minors, rather than proscribing rape pornography which is merely a representation of a sexual fantasy. Prohibiting pornographic rape materials, especially those that do not show violent or life-threatening acts, would excessively interfere with adults who have a rape fetish. Again, as long as there is no concrete evidence to show that rape pornography directly leads rape fetishists to rape, it is immature to use this claim to include rape pornography within the scope of extreme pornography. Therefore, it could be contended that the inclusion of rape

¹⁸³ See Section 3.5.4

¹⁸⁴ *Last House on the Left* is directed by Wes Craven. It was given an '18 certificate' by the BBFC.

¹⁸⁵ *I Split on Your Grave* is directed by Meir Zarchi. It was given an '18 certificate' by the BBFC.

¹⁸⁶ See Section 3.5.4.

¹⁸⁷ Murray, A., *supra*, pp.75-76.

¹⁸⁸ See Section 3.5.3.

pornography, which falls short of serious sexual violence in the scope of extreme pornography law, is unnecessary at the moment.¹⁸⁹

As regards bestial and necrophilia pornography, it could be argued that these two types of pornography may harm pornographic performers physically in some ways. As far as bestial pornography is concerned, as already argued in Chapter 3,¹⁹⁰ sexual intercourse with real animals (especially mammals) may cause pornographic performers to be infected with animal-to-human diseases. Moreover, as animal behaviour is unpredictable, pornography performers may be injured in animal attacks, such as biting or a hoof kick. Lastly, the size of the animals' genitals, especially horses or boars, may be too large to be inserted in a human's genitals or anus. Being penetrated by an animal's genitals may injure a pornographic performer's genitals or anus. Regarding necrophilia pornography, the direct harm justification may be reasonable only when a pornographic actor engages in a sexual act with a real corpse because this could expose him/her to infectious diseases from the dead body.¹⁹¹ Nevertheless, it can be contended that direct harm cannot sustain the prohibition of simulated necrophilia pornography, which employs a living person to play a corpse role or uses a mannequin as a corpse. This is because no one is exposed to the risk of infection. Therefore, it can be said that the prohibition of necrophilia pornography seems necessary only so far as it aims to protect actors who must have sex with real dead bodies as scripts require.

It is interesting to note that the UK government did not give a clear explanation why bestial and necrophilia pornography was included in the scope of extreme pornography when the CJIB 2007 was proposed to Parliament. More surprisingly, this issue was not raised at any point during the legislative process of extreme pornography law. As remarked by McGlynn and Rackley:

'[w]hile debate has largely focused on life-threatening and seriously harmful acts, the bestiality and necrophilia provisions attracted little critical attention and slipped into the [Criminal Justice and Immigration Act 2008] largely unnoticed.'¹⁹²

Without a clear explanation from the UK government and the parliamentary discussion, it is difficult to indicate the reasons behind the inclusion of bestial and necrophilia pornography. Nonetheless, as argued above, bestial and necrophilia pornographic materials which use real

¹⁸⁹ It should be noted that Section 42 (2) (6) (c) of the Criminal Justice and Licensing (Scotland) Act 2010 prohibit rape pornography.

¹⁹⁰ See Section 3.5.5.1

¹⁹¹ For an account on infection from dead bodies see, for example, Morgan, O., 'Infectious Disease Risks from Dead Bodies Following Natural Disaster' (2004) *Pan American Journal of Public Health (Rev Panam Salud Publica)*, 15 (5), pp.307-312.

¹⁹² McGlynn, C. and Rackley, E. (2009), *supra*, p.250.

animals and corpses may cause physical harm to pornographic performers. The prohibition of these two types of pornography by extreme pornography law could, therefore, be justified on the grounds of direct (physical) harm. However, the direct harm cannot be used to justify the prohibition of pornographic materials that use 'fake' animals or corpses but have realistic depictions, because no one is physically harmed.

B) Indirect Harm to Society

As clearly stated in the *Consultation Paper*, the UK government claims that extreme pornography 'may encourage or reinforce interest in violent or aberrant sexual activity to the detriment of society as a whole'.¹⁹³ In other words, the UK government has concerns that extreme pornography may indirectly harm society by leading people to have aggressive or aberrant sexual behaviour, and this in turn could have undesirable effects on people in general (those who are not directly involved in the production of extreme pornography) and on society at large.¹⁹⁴ However, the UK government accepts that, to date, there has not been any definite evidence to prove the indirect harm caused by extreme pornography. It is stated in the *Consultation Paper* that:

'we are unable, at present, to draw any definite conclusions based on research as to the likely long term impact of [extreme pornography] on individuals generally, or on those who may already be predisposed to violent or aberrant sexual behaviour.'¹⁹⁵

Despite its initial acceptance after the first reading of the CJIB 2007, the UK government attempted to seek new evidence to support its 'indirect harm to society' claim. It commissioned a group of academics, i.e. Catherine Itzin, Ann Taket and Liz Kelly, to look for evidence. As a result, a paper entitled *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment (REA)*¹⁹⁶ was produced. It is important to note that Itzin *et al.* did not conduct any new empirical research, but merely reviewed the findings of the existing laboratory psychological studies.¹⁹⁷ Based on their review, they conclude that viewing extreme pornography, especially violent and bestial pornography, increases the risk of developing sexually aggressive attitudes, beliefs

¹⁹³ Home Office and Scottish Executive, *supra*, para.27, at p.9.

¹⁹⁴ Nair, A., *supra*, p.229.

¹⁹⁵ Home Office and Scottish Executive, *supra*, para.31 at p.10.

¹⁹⁶ Itzin, C., Taket, A. and Kelly, L., *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment (REA)*, (Ministry of Justice, Department of Health, 2007), <http://www.justice.gov.uk/publications/research280907.htm>, visited 12 October 2009.

¹⁹⁷ For the methodology of the REA, see Itzin, C., Taket, A. and Kelly, L., *supra*, pp.1-7.

and behaviour, especially in men who are predisposed to aggression or who have a history of sexual aggression.¹⁹⁸

Nonetheless, the REA is subject to criticisms. For example, in a letter to Parliament, Martin Baker and Clarissa Smith – film and television studies scholars – comment that:

‘The evidence presented in the [REA] is extremely poor, based on contested findings and accumulated results. It is one-sided and simply ignores the considerable research tradition into “extreme” (be they violent or sexually explicit) materials within the UK’s Humanities and Social Sciences.

The proposers of the Bill have made no effort to seek out research which investigates how viewers of pornographic materials understand their practices – the effects of the “extreme” pornography are assumed and ascribed to “problem individuals” – further research is required which does not presume effects of a singularly harmful kind.’¹⁹⁹

In addition, at the House of Commons Committee discussion, a Labour MP, Harry Cohen criticised the REA for not offering any definite evidence to show the causal relationship between exposure to violent pornography and sexual aggression in general, and was silent on the question of how extreme pornography affects people participating in its production.²⁰⁰ Furthermore, as Easton notes, the REA found no evidence of the effects of necrophilia pornography on viewers.²⁰¹

As already argued in Chapter 3, because of the lack of clear evidence, the hypothesis that pornography of both violent and non-violent types leads to violent and aberrant sexual behaviour, especially at the level that can make someone commit sexual crime or violence, remains inconclusive.²⁰² This seems to be the case for extreme pornography. There is no definite evidence to show the causal link between viewing extreme pornography and viewers’ violent and aberrant sexual behaviour. The REA that the UK government relied on to support the alleged causal link is controversial and, most importantly, fails to provide the proof that extreme pornography necessarily leads to aberrant or violent sexual behaviour in the viewers (indirect harm to society). Thus, it could be argued that the ‘indirect harm to society’ claim is unsound to justify the criminalisation of the possession of extreme pornography, due significantly to the lack of clear and conclusive evidence regarding the causal connection between viewing extreme pornography and violent and aberrant sexual

¹⁹⁸ Itzin, C., Taket, A. and Kelly, L., *supra*, pp.iii,26.

¹⁹⁹ The letter is available at <http://www.melonfarmers.co.uk/gch07.htm>, visited 9th June 2012.

²⁰⁰ See Harry Cohen, *House of Commons Public Bill Committee, Criminal and Justice and Immigration Bill*, 16th October 2007, col. 31, <http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/071016/am/71016s01.htm>, visited 3rd March 2012.

²⁰¹ Easton, S., *supra*, p.409.

²⁰² See Section 3.5.4 See also Murray, A.D, *supra*, pp.77-79.

behaviour.²⁰³ This is consistent with the 1990 Report conducted for the Home Office by Dennis Howitt and Guy Cumberbatch, which concludes that there is no strong evidence suggesting that pornography (both violent and non-violent genres) is a cause of sexually aberrant behaviour in offenders.²⁰⁴

Nonetheless, during the House of Commons Committee consideration of the CJIB 2007, the UK government insisted on using the claim that extreme pornography was detrimental to society, and used the REA to back up its proposal to make extreme pornography illegal.²⁰⁵ The UK's attempt was successful eventually, when the extreme pornography law was passed in 2008 and came into effect in 2009.

C) The Extreme Pornography Law and the Morality-Based Justification

The last point to be noted is that, although the *Consultation Paper* attempts to persuade the public that extreme pornography law is based mainly on (both direct and indirect) harm justification, it remains the case that morality and paternalism still have a major role in underpinning the new law. Thus, it could be contended that the extreme pornography law is not purely harm-based. The *Consultation Paper* states that:

‘[Extreme pornography] depicts suffering, pain, torture and degradation of a kind which we believe most people would find abhorrent ... [and] this material should have no place in our society’²⁰⁶

The above message could be interpreted to suggest that one of the main justifications offered by the UK government for the legislation ‘relied on moral assertions about the “deeply offensive” nature of this “vile material”’.²⁰⁷ Therefore, it is hardly surprising that gross offensiveness, disgustingness or obscenity is one of the main factors to make the material illegal under the extreme pornography law (Section 63 (6) (b)). As examined above, the concept of obscenity in English law is based on an attempt to protect the morality of the readers/viewers against the depraving and corrupting effects of the material. Because the

²⁰³ It is interesting to note that in *Stanley v. Georgia*, (1969) 394 US 557, the US Supreme Court dismissed Georgia's claim that possession of pornography caused aberrant and violent sexual behaviour and sexual crime, pointing out that there was no strong empirical evidence to support the claim.

²⁰⁴ Howitt, D. and Cumberbatch, G., *Pornography: Impacts and Influences: A Review of the Available Research Evidence on The Effects of Pornography* (Home Office Research and Planning Unit, London, 1990), p.94. See also Section 3.5.4.

²⁰⁵ See Maria Eagle, *House of Commons Public Bill Committee, Criminal and Justice and Immigration Bill*, 16th October 2007, col. 31, <http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/071016/am/71016s01.htm>, visited 21st March 2012.

²⁰⁶ Home Office and Scottish Executive, *supra*, para.11, at p.6.

²⁰⁷ Johnson, P., ‘Law, Morality and Disgust: The Regulation of ‘Extreme Pornography’ in England and Wales’, (2010) *Social & Legal Studies*, 19(2), pp.147-163, 150.

notion of obscenity is included in the extreme pornography test as one of the criterion to determine whether the material is extreme pornography, in this respect it could be argued that the extreme pornography law is morality-based. However, as discussed above, using obscenity as a parameter to judge the illegality of expression is incompatible with democratic values and self-realisation – two pillars supporting the right to freedom of expression.²⁰⁸

The inclusion of gross offensiveness or disgustingness in the extreme pornography test mirrors the paternalistic stance of the UK government to ensure that people cannot have access to expression that the government finds distasteful or abhorrent. This is some distance away from the concept of (direct and indirect) harm on which the UK government relies to justify the extreme pornography law. It could be argued that the depictions of certain sexual acts may be deemed offensive or disgusting, but may cause no physical harm to the pornographic performers. For instance, vaginal or anal fisting may be offensive or disgusting, but it does not necessarily create physical harm to the performers. More importantly, it could be contended that the ‘grossly offensive and disgusting’ element of the extreme pornography law is inconsistent with the jurisprudence of Art. 10 of the ECHR. In *Handyside v. UK*, the ECtHR has made it clear that Art. 10 (1) protects even expressions that ‘offend, shock or disturb the State or any sector of the population’.²⁰⁹ In addition, Art. 10 (2) does not allow the state to restrict expression on the ground of offensiveness or disgustingness.

5.3 Legal Regulation of Internet Pornography in England

The previous section deals with the pornographic content which is allowed (legal pornography) and prohibited (illegal pornography) in England through the examination of the obscenity standard (Section 1 (1) of the OPA 1959) and the extreme pornography test (Section 63 of the CJIA 2008). This section examines the legal regulatory approach of illegal types of pornography in England, i.e. the offences under the OPA 1959/1964 and the possession offence under the extreme pornography law. It shows that, at present, the law enforcement authorities appear to use the extreme pornography law, rather than the obscenity law, as a main tool to regulate Internet pornography. Also, it argues that the possession offence under the extreme pornography law, which makes simply viewing extreme pornographic materials subject to up to three years imprisonment, may not be proportional. The focus of the extreme pornography law should be the producers and distributors.

²⁰⁸ See Section 5.2.3.

²⁰⁹ (1976) No.5493/72, A024, para.49.

5.3.1 Offences under the English Obscenity Law

At present, there are two offences under the English obscenity law. The first is the 'publication' offence under Section 2 of the OPA 1959, the second being the offence of 'possession with an intention to publish for gain' under Section 1 of the OPA 1964.

Section 2 of the OPA 1959 makes it an offence for a person to publish an obscene article, whether for gain or not.²¹⁰ The 'publication' offence is a strict liability.²¹¹ The intention of the offender (*mens rea*) and the question as to whether the offender wants to make money from the publication are irrelevant. An act of publication of an obscene article (*actus reus*) is sufficient to constitute a 'publication' offence.

According to Section 1 (2) and (3) (b) of the OPA 1959, 'article' referred not only to tangible media, e.g. books, magazines, photographs, video cassettes, DVDs, or computer hard disks,²¹² but also digital pornographic materials which can be stored or transmitted electronically. *R v. Waddon*,²¹³ *R v. Perrin*²¹⁴ and *R v. McKinnon*²¹⁵ are prime examples which show that an obscene 'article' within the meaning of the OPA covers digital images and video clips, especially those available on pornographic websites. Given the court's interpretation of 'article' to mean digital materials, obscene materials attached to emails²¹⁶ and those available on peer-to-peer networks are also within the scope of 'article'.

As regards the term 'publication', Section 1 (3) of the OPA 1959 (as amended by the Criminal Justice and Public Order Act (CJPO) 1994)²¹⁷ defines the act of 'publication' to include the electronic transmission of data. In *R v. Waddon*, the court held that uploading obscene materials by a website owner to a website constituted 'publication', and downloading such materials by an Internet user from the website to a computer, constituted

²¹⁰ Under Section 2 of the OPA 1959, 'the offender shall be liable – (a) on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months; (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding three years or both.'

²¹¹ Robertson, G., *supra*, p.65.

²¹² Manchester, C., 'Computer Pornography' (1995) *Criminal Law Review*, 1995(July), pp.546-555, 548-549.

²¹³ (2000) WL 491456.

²¹⁴ (2002) EWCA Crim 747, para.18.

²¹⁵ (2004) 2 Cr App R (s) 46.

²¹⁶ Akdeniz, Y., 'Governance of Pornography and Child Pornography on the Internet: The UK Approach' (2001) *University of West Los Angeles Law Review*, Cyber-Rights, Protection and Markets: A Symposium, pp.247-275.

²¹⁷ Section 1 (3) of the OPA 1959 reads '... a person publishes an article who – (a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire; or (b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it, or, where the matter is data stored electronically, transmits that data.'

further 'publication'.²¹⁸ Furthermore, in *R v. Perrin*, the court ruled that, although obscene materials were hosted on and distributed via a server based outside England, downloading such materials to a computer located in England was regarded as 'publication' within England.²¹⁹ In other words, the physical location where the obscene data were hosted was immaterial. In the case of peer-to-peer networks, the person who uses peer-to-peer software is acting as the downloader and uploader simultaneously.²²⁰

The following scenario raises an interesting point about the notion of 'publication' in the borderless environment of cyberspace. A person uploads obscene images to an overseas server and intentionally makes such images inaccessible from computers located in England.²²¹ It is interesting to question how Section 2 of the OPA 1959 will be applied to this case. Furthermore, although it could be argued that the person's act of uploading constitutes 'publication', the question is whether it is necessary to enforce Section 2 against him since it could be presumed that no Internet user in England could access or view his uploaded images and would therefore not be morally corrupted by such images.²²² Additionally, if the English authority charges him with the 'publication' offence, a further question would be whether the enforcement of Section 2 excessively interferes with his freedom of expression. This is because he intends to express his sexual ideas to people in countries other than England, where he realises that his sexual ideas could be deemed obscene by the English obscenity standard, and he has already taken action to prevent Internet users in England accessing his uploaded images. This issue was raised by the defendant in *R v. Waddon*; however, the court did not express its position on this matter.²²³

Interestingly, ISPs, despite being intermediaries, can also be prosecuted as 'publishers' under Section 2 of the OPA 1959.²²⁴ In 1996, the Metropolitan Police sent a letter to the

²¹⁸ (2000) WL 491456, para.12.

²¹⁹ (2002) EWCA Crim 747, para.18.

²²⁰ Rowbottom, J., 'Obscenity Laws and the Internet: Targeting the Supply and Demand' (2006) *Criminal Law Review*, 2006 (Feb), pp.97-109, 105; Lloyd, I.J., *Information Technology Law* (6th ed.), (Oxford University Press, Oxford, 2011), p.104.

²²¹ Current Internet technology allows a website owner to prevent Internet users of a certain geographic location from accessing a certain website. For example, Youtube utilises IP Address identification technology to restrict video clips to be viewed only in a certain geographic region. This means that, if an Internet user outside the allowed geographic region attempts to access a restricted video clip, he/she will be diverted to a message 'This video is not available in your country'. However, this restrictive measure can be circumvented. See generally Agarwal, A., *Youtube Video Not Available in Your Country? You Can Still Watch It!* <http://www.labnol.org/internet/video/youtube-blocked-video-not-available-in-your-country/2680/>, visited 7th April 2012.

²²² It is possible for an enthusiastic Internet user to circumvent the blocking measure set by the website owner and access the website. Therefore, this argument is based on the presumption that the blocking measure can perfectly filter out Internet users in England.

²²³ (2000) WL 491456, para.11.

²²⁴ Lloyd, I., *supra*, p.252.

Internet Service Providers Association (ISPA) asking for co-operation from its ISP members to block certain pornographic newsgroups. The Metropolitan Police also warned that failure to give the requested co-operation could trigger the enforcement of Section 2 of the OPA 1959 against them.²²⁵ Technically speaking, the Metropolitan Police's demand makes the ISPs responsible for regulating and monitor illegal content posted by a third party. This is clearly inconsistent with the Electronic Commerce Directive 2000/31/EC, which safeguards ISPs from responsibility to monitor unlawful content posted by a third party and civil or criminal action in respect of unlawful activity of which they have no knowledge.²²⁶ However, the ISPA did not argue against the demand on the grounds of incompatibility with Electronic Commerce Directive, and chose to give its full co-operation to the Metropolitan Police. As a result of the discussion between the UK Internet industry (i.e. major ISPs, the Safety Net Foundation, ISPA, and the London Internet Exchange) and the relevant governmental agencies (i.e. the former Department of Trade and Industry, the Home Office and the Metropolitan Police), a non-governmental Internet regulatory body named the Internet Watch Foundation (IWF) was established in the same year.²²⁷ One of the main tasks of the IWF is to notify ISPs of potentially criminally obscene content, allowing them to remove such content before the police take action.²²⁸ This could prevent ISPs from being prosecuted under the OPA 1959.²²⁹ This effort may be considered successful because no ISP has been prosecuted under the OPA 1959 thus far.²³⁰ (The IWF's regulatory approach will be discussed in the next section.)

Section 4 of the OPA 1959 provides a defence to Section 2 prosecution. A person shall not be convicted of a Section 2 offence if the publication of an obscene article 'is justified as being for the public good on the grounds that it is in the interests of science, literature, art or learning, or of other objects of general concern'. In other words, although the material is

²²⁵ Grabosky, P. and Smith, R.G., *Crime in the Digital Age: Controlling Telecommunications and Cyberspace Illegalities* (Transaction Publishers, New Brunswick New Jersey, 1998), p.131; Akdeniz, Y., 'The Regulation of Pornography and Child Pornography on the Internet' (1997) *Journal of Information, Law & Technology*, 1997(1), http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1997_1/akdeniz1, visited 4th April 2012, para.5.2. For the letter from the Metropolitan Police see *Computer Underground Digest*, 25th August 1996, <http://cu-digest.org/CUDS8/cud862>, visited 4th April 2012.

²²⁶ See Section 4.6.3.

²²⁷ *The IWF*, <http://www.iwf.org.uk/about-iwf/iwf-history>, visited 4th April 2012; Laidlaw, E.B., 'The Responsibilities of Free Speech Regulators: An Analysis of the Internet Watch Foundation' (2012), *International Journal of Law and Information Technology*, 20(4), pp.312-345,316-317.

²²⁸ *The IWF*, <http://www.iwf.org.uk/services/removal>, visited 4th April 2012. It should be noted that, however, the IWF cannot compel overseas ISPs to take down obscene materials.

²²⁹ It is interesting to note that, before the establishment of the IWF, a UK ISP had been prosecuted under defamatory law. See *Godfrey v. Demon Internet Ltd* (2001) QB 201 QBD. See also Akdeniz, Y., 'Case Analysis: Laurence Godfrey v. Demon Internet Limited' (1999) *Journal of Civil Liberties*, 4(2), pp.260-267.

²³⁰ Lloyd, I., supra, p.252; Edwards, L., 'Pornography, Censorship and the Internet' in Edwards, L. and Waelde, C. (eds.), *Law and the Internet* (3rd ed.), (Hart Publishing, Oxford, 2009), pp.623-669, 651.

found to be obscene, the defendant can be acquitted if he/she successfully persuades the jury that the obscene material has merits that can outweigh the depraving or corrupting effect of the work.²³¹ The onus to prove the merits of the material is on the defendant, and the jury can refer to expert evidence to decide whether the material has some merits.²³² Geoffrey Robertson and Andrew Nicol comment that 'public good' within the meaning of Section 4 refers specifically to the benefits that could lead to 'the advancement of cultural and intellectual values'.²³³ It is shown in *R v. Penguin Books Ltd*²³⁴ that literary merit of the material is considered to be for the public good. In this case, the defendant, the publisher of *Lady Chatterley's Lover*, called in experts in literature (e.g. a novelist and a literary scholar) to testify that the book had literary merits. The expert evidence led the jury to decide that the defendant was not guilty according to the 'public good' defence. However, not all kinds of benefits of obscene material are recognised as public good. In *DDP v. Jordan*,²³⁵ the defendant called in sexologists and psychiatrists to argue that pornography²³⁶ had a 'psychotherapeutic' benefit because it allowed viewers to relieve sexual tension through masturbation, thus diverting them from anti-social behaviour. The defendant said that such benefit could be deemed as 'public good' in relation to the 'interest of other objects of general concern' within the meaning of Section 4. However, the House of Lords ruled that the public good with regard to 'other objects of general concern' meant the intrinsic merit of the material, not the effect that the material may have on anyone or anything, and rejected the argument that the psychotherapeutic effect of pornography could be counted as 'public good'.²³⁷ In other words, the House of Lords held that pornography did not have intrinsic merit could be deemed beneficial for general concern, thus the publisher of pornography could not use the 'public good' defence.

Regarding the second offence, Section 1 (2) of the OPA 1964 criminalises the possession of obscene articles with a view to gain (in other words, for a commercial purpose). Unlike Section 2 of the OPA 1959 (the 'publication' offence), the offence under the OPA 1964 does not need evidence that the offender actually publishes obscene materials; merely having obscene articles in possession, ownership or control is sufficient.²³⁸ However, as this offence requires *mens rea*, the prosecutor has to prove that the defendant has an intention to

²³¹ Robertson, G., *supra*, p.160.

²³² *R. v. Calder & Boyars* (1969) 1 QB 151, 153; *R. v. Anderson* (1972) 1 QB 304, 312.

²³³ Robertson, G., and Nicol, A., *supra*, p.209.

²³⁴ (1961) Crim. L.R. 176.

²³⁵ (1977) A.C. 699.

²³⁶ The pornographic materials at issue were films, books and magazines that explicitly and graphically depicted and described a variety of sexual activities, including group sex and sexual violence.

²³⁷ (1977) A.C. 699, 719-723.

²³⁸ Robertson, G., *supra*, p.71. For the issue of 'possession' in the context of the Internet, see Section 5.3.2.

publish obscene materials for gain. The term 'gain' means the profit that goes to the offender or other person, and includes not only cash but also advantages of any kinds.²³⁹ Amended by the CJPO 1994, the scope of Section 1 (2) of the OPA 1964 covers the case where a person operates a website that offers obscene materials for download by purchasing a password (subscribing).²⁴⁰ It is important to note that possession of obscene materials for private use only is not unlawful, except where the material in question is deemed extreme pornography according to Section 63 of the CJIA 2008.

Section 1 (3) of the OPA 1964 provides a defence. It states that a person shall not be convicted under Section 1 (2) of the OPA 1964 provided that he/she can prove that he/she has not examined the offending material, and there is no reasonable cause to suspect that he/she acknowledges that possessing such material with an intention to publish for gain would be an offence. The burden of proof is on the defendant to satisfy the jury that he/she has a defence under this provision.

5.3.2 The Possession of Extreme Pornography Offence

According to the UK government's claim, one of the important rationales for the criminalisation of the possession of extreme pornography (Section 63 of the CJIA 2008) is that the borderless nature of the Internet makes it more difficult and less effective for the English authorities to control extreme pornographic images at source, because this type of pornography can be created and distributed from overseas.²⁴¹ Moreover, accessing extreme pornographic websites – especially those that charge for subscription fees – keeps the demand and supply cycle going.²⁴² Therefore, it is necessary to shift the target of law enforcement from the publishers (who may operate the websites abroad and are thus not subject to English jurisdiction) to the possessors of extreme pornography (who access such material from computers located in England and are thus subject to English jurisdiction). As the government claims, this legal measure would not only break the demand/supply cycle (as the demand of extreme pornography would reduce), but also discourage people from being interested in violent and aberrant sexual activities.²⁴³

²³⁹ Robertson, G., *Ibid.*

²⁴⁰ Akdeniz, Y. (2001) *supra*, p. 4. See also *R v. Perrin* (2002) EWCA Crim 747; *R v. McKinnon* (2004) 2 Cr App R (s) 46.

²⁴¹ Rowbottom, J., *supra*, p.97; Home Office and Scottish Executive, *supra*, paras.4,23,32 at pp.5,8 and 10

²⁴² *Ibid.*, para.23 at p.9.

²⁴³ *Ibid.*, p.1.

Section 63 of the CJIA 2008 makes it an offence to possess an extreme pornographic image,²⁴⁴ creating the first 'possession of adult pornography for private use' offence in Europe.²⁴⁵ This offence requires only *actus reus* – that is, mere 'possession' is sufficient to constitute the commission of this offence.²⁴⁶ There are some important issues with regard to the act of 'possession' in the context of Internet pornography. In *R v Porter*, the court held that the custody or control of illegal images (in this case were indecent photographs of children) was the key to consider whether a person possessed such illegal images. If he/she no longer had custody or control of the images, for example because he/she had deleted them from the computer hard disk and had no ability to retrieve or gain access to them (because of a lack of technical knowledge or proper software to do so), he/she no longer had such images in possession.²⁴⁷ Furthermore, the court in *Atkins v. DDP* ruled that knowledge is an essential element in the offence of possession.²⁴⁸ In other words, a person cannot be convicted of possessing illegal images (in this case indecent photographs of children), unless he/she knows that such images are stored on his/her computer hard disk. By applying the principles laid down in *R v Porter* and *Atkins v. DDP* to the 'possession of extreme pornography' offence, it could be said that the person who can be convicted of this offence must be computer literate, having knowledge about cache and sufficient skills to manipulate computer files. On the contrary, people who do not know about the existence of cache or cannot retrieve extreme pornographic files may use the defence that they do not have extreme pornographic materials in possession (when the materials have been deleted).

Interestingly, whilst the 'possession' offence may play a role in educating Internet users about using the Internet responsibly and informing them of the consequences if they access extreme pornographic websites,²⁴⁹ it remains to be seen how effective it is in reducing the demand of extreme pornographic materials in the country.

²⁴⁴ Section 67(2) and (3) of the CJIA 2008 reads '(2) Except where subsection (3) applies to the offence, the offender is liable – (a) on summary conviction, to imprisonment for a term not exceeding the relevant period or a fine not exceeding the statutory maximum or both; (b) on conviction on indictment, to imprisonment for a term not exceeding 3 years or a fine or both. (3) If the offence relates to an image that does not portray any act within Section 63 (7)(a) or (b), the offender is liable – (a) on summary conviction, to imprisonment for a term not exceeding the relevant period or a fine not exceeding the statutory maximum or both; (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both'.

²⁴⁵ McGlynn, C. and Rackley, E., 'Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography' (2007) *Criminal Law Review*, 2007(Sep), pp.677-690, 677.

²⁴⁶ Easton, S, *supra*, p.393.

²⁴⁷ (2006) 1 W.L.R. 2633, 2639-2640.

²⁴⁸ *Atkins v. DDP and Goodland v. DDP* (2000) 1 W.L.R. 1427, 1440. In this case, a cache of indecent photographs of children was automatically created and stored on the hard disk, whilst the defendant was viewing child pornography on websites. However, as he did not have knowledge about the existence of the cache, the court ruled that he should not be convicted of possessing indecent photographs of children.

²⁴⁹ Rowbottom, J., *supra*, p.109.

The *Consultation Paper* implies that the target of extreme pornography law is those who intentionally access extreme pornography on the Internet for sexual gratification.²⁵⁰ Therefore, Section 65 (2) of the CJIA 2008 sets out certain statutory defences.²⁵¹ The burden of proof under this provision is on the defendant. Section 65 (2) (a) protects people who have a legitimate reason for possessing extreme pornography. These people include law enforcement officers (the police and public prosecutors) who may have to view and possess such materials during the investigation and prosecution process; and possibly the IWF, which has to access and examine the alleged extreme pornographic websites when receiving reports from the public.²⁵² As far as the possession of extreme pornography for academic research is concerned, to date the English courts have not had a chance to consider this issue, leaving it unclear whether the defence under Section 65 (2) (a) is also available to academics and students who do research in this area. However, the jurisprudence of the defence under child pornography law, namely Section 160 (2) (a) of the Criminal Justice Act 1998 (CJA), may give a helpful guideline that could be applicable to the case of the defence under the extreme pornography law (Section 65 (2) (a)). The court in *Atkins v DDP* ruled that the question of whether the possession of indecent photographs of children for academic research constitutes a 'legitimate reason for possession' defence is a question of fact that must be decided by the jury (or the magistrate) in each case. The jury has to consider whether such possession was for a genuine research purpose that leaves the researcher no other alternative but to have such unpleasant material in his/her possession, or for the satisfaction of the researcher's sexual gratification.²⁵³ Nonetheless, the court is entitled to instruct the jury to bear in mind the scepticism of the defendant's claim of research purposes when considering this enquiry, and should not too readily conclude that 'the possession of extreme pornography for academic purpose' defence has been made out.²⁵⁴ Given this principle, an academic who has extreme pornography in possession for an academic purpose may raise the defence under Section 65 (2) (a), but it is necessary for him/her to clear the jury's doubt that the possession is for a genuine research purpose, and not for sexual gratification.

²⁵⁰ Home Office and Scottish Executive, *supra*, p.2.

²⁵¹ Section 65 of the CJIA 2008 reads: '(1) Where a person is charged with an offence under Section 63, it is a defence for the person to prove any of the matters mentioned in subsection (2). (2) The matters are – (a) that the person had a legitimate reason for being in possession of the image concerned; (b) that the person had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image; (c) that the person – (i) was sent the image concerned without any prior request having been made by or on behalf of the person, and (ii) did not keep it for an unreasonable time'.

²⁵² McGlynn, C. and Rackley, E. (2009), *supra*, p.255.

²⁵³ *Atkins v. DDP and Goodland v. DDP* (2000) 1 W.L.R. 1427, 1435.

²⁵⁴ *Ibid.*

Section 65 (2) (b) safeguards a person who has an extreme pornographic image in his/her possession, but has not yet seen the image and does not know – or has cause to suspect – that the image is extreme pornography. Section 65 (2) (c) protects a person who becomes a possessor of extreme pornographic images by accident because such materials are sent to him/her without any request, on the condition that he/she does not keep the image for an unreasonable time. The question concerning ‘reasonableness of unsolicited material’ defence is to be decided by the jury or magistrate.²⁵⁵

Section 66 (3) of the CJIA 2008 safeguards the defendant of the possession of extreme pornography offence when he/she directly takes part in a sexual act shown in an image, provided that the act does not inflict ‘non-consensual harm’ on any person.²⁵⁶ This defence makes it clear that people who engage in consensual sadomasochistic activities that do not go beyond trifling and transient infliction of injury – such as mild whipping, spanking or bondage – will not be caught by the extreme pornography law. The inclusion of this defence appears to result from a concern expressed by members of the BDSM community that the extreme pornography law would criminalise even the images of consensual BDSM activities, making them become the prime target of law enforcement.²⁵⁷ Interestingly, this defence appears to be in line with the CPS Guidance with regard to the prosecution practice under the OPA, which exempts mild bondage and BDSM activities that do not encourage physical harm.²⁵⁸

In the case of necrophilia pornography, the defendant also benefits from the defence in Section 66, if he/she can satisfy the jury that the corpse depicted in the image is not real. However, the defender who possesses bestial pornographic images (those involving real animals) is excluded from the protection of Section 66.

Apart from the possessors of extreme pornography for private use, the publishers and the distributors of extreme pornography – especially those located within the UK – would also be prosecutable under the extreme pornography law (Section 63 of the CJIA 2008) because they necessarily have extreme pornographic materials in their possession.²⁵⁹ Therefore, the

²⁵⁵ Ibid.

²⁵⁶ For ‘non-consensual harm’ see Section 5.2.4.2.

²⁵⁷ See for example, Murry, A.D., supra, p. 89; *Backlash*, <http://www.backlash-uk.org.uk/unintend.html>, visited 9th April 2012. See also Adams, H.K., *England’s Extreme Pornography and BDSM: How Will It Affect the UK’s BDSM Community?* <http://voices.yahoo.com/englands-extreme-pornography-act-bdsm-2555425.html>, visited 9th April 2012.

²⁵⁸ See Section 5.2.2.

²⁵⁹ Home Office and Scottish Executive, supra, para.49, at p.13. It should be noted that *Option Three* in the *Consultation Paper*, which proposes a free-standing offence to deal with the possession of extreme pornography, has become Section 63 of the CJIA 2008.

content providers of extreme pornographic websites, or Internet users who upload such materials to the Internet, are certainly caught by the extreme pornography law. As far as the ISPs are concerned, the UK government states its clear policy that they are not a target of the extreme pornography law, because it recognises that the ISPs are only intermediaries 'which should not be responsible for the data itself as they are unaware of what is being transmitted' through their servers.²⁶⁰ Interestingly, in contrast with the UK government's initial position on the ISP's liability for third party illegal content,²⁶¹ the UK government appears to accept, at present, that the ISPs as intermediaries, which do not have a duty to monitor illegal content posted by a third party and should not be forced to be responsible for such illegal content if they do not know. This position is more in line with Electronic Commerce Directive, which gives immunity to the ISPs against criminal prosecution caused by illegal content that is posted by Internet users. Despite the UK government's relaxed position on the ISPs, on the request of the Home Office, the Internet Watch Foundation (IWF) agreed to include extreme pornographic materials hosted on UK servers within its 'notice and take down' operation.²⁶²

As noted above, the UK government claims that, because of the Internet, it is difficult to control extreme pornographic materials at source because most producers and distributors of the materials are outside the UK's jurisdiction; thus, it is more practical to enforce the extreme pornography law against the possessors of such materials who reside in the UK. However, an important question to be raised is whether the imposition of criminal liability with a potential penalty of up to three years imprisonment on viewers (Internet users in particular), who have nothing to do with extreme pornography except accessing and viewing it, is proportional, especially within the legal framework of Art. 10 (2) of the ECHR.²⁶³

As Rabinder Singh QC comments, a criminal prosecution (or the threat of a criminal prosecution) with a severe punishment for looking at adult pornography in private is regarded as a serious interference with an individual's right to freedom of expression under Art. 10 of the ECHR. Under the concept of proportionality of Art. 10 (2), it requires a justification that must be far stronger than that required in the case of regulating the publication and distribution of extreme pornographic materials by commercial operators.²⁶⁴

²⁶⁰ Ibid., p.23.

²⁶¹ The Metropolitan Police demanded the ISPs to block obscene websites. If the ISPs fail to do so, they are at risk of being prosecuted as publishers of obscene articles under Section 2 of the OPA 1959. See Section 5.3.1.

²⁶² *The IWF*, <http://www.iwf.org.uk/hotline/the-laws/criminally-obscene-adult-content/criminal-justice-and-immigration-act-2008>, visited 19th June 2012.

²⁶³ For the concept of proportionality under Art. 10 (2) of the ECHR see Chapter 4.

²⁶⁴ Singh, R., *In the Matter of Consultation Paper on The Possession of Extreme Pornographic Material*, http://www.backlash-uk.org.uk/wp/?page_id=148, visited 20th June 2012, para.29.

As noted by Abhilash Nair, a criminologist, shifting criminal liability on to the viewers merely because it allows a more practical solution for the authorities to enforce the law by making it more possible to bring the wrongdoers before courts is unacceptable in a democratic society, and appears to be unconvincing in terms of proportionality.²⁶⁵ Furthermore, the UK government also attempts to justify the criminalisation of extreme pornography on the grounds that such a legal measure is necessary so as to break the demand/supply cycle. However, as Singh argues, the UK government accepts that most extreme pornographic materials are produced in other countries.²⁶⁶ Apart from the UK, there seem to be no other countries that have or propose to adopt a possession offence. 'That being the case, a legal measure in the UK would be very unlikely to have any effect on supply.'²⁶⁷ Furthermore, the government alleges that extreme pornography law is designed to protect people participating in the production of extreme pornography.²⁶⁸ However, as most extreme pornographic materials are produced abroad, it is doubtful how the possession offence would help to protect those people.²⁶⁹ Lastly, it is claimed that extreme pornography is necessary to prevent people from developing violent or aberrant sexual behaviour.²⁷⁰ Nonetheless, the government concedes that there is no study that can offer definite evidence that viewing extreme pornography will necessarily lead to such undesirable sexual behaviour.²⁷¹ It can be contended that these claims do not seem to have enough weight to justify the necessity of criminalisation of having extreme pornography in possession under the concept of proportionality.

Admittedly, the criminalisation of extreme pornography could be justifiable on the basis that it outlaws the types of pornography which deserve no protection under the principle of freedom of expression. However, it could be argued that the restrictive measures should be implemented at source, meaning that the criminal liability should rest primarily on the producers/distributors, who take greater responsibility for the physical harm inflicted on pornographic performers, not the viewers. When the producers/distributors are outside the UK, the implementation of the blocking measure by the ISPs may be a plausible alternative.²⁷² Although the blocking measure curtails the right to freedom of expression of the viewers to a certain extent, it is a far less serious measure than the imposition of criminal liability on the viewer. Therefore, it could be argued that blocking access to extreme

²⁶⁵ Nair, A., *supra*, pp.230-231.

²⁶⁶ Home Office and Scottish Executive, *supra*, para.22, at p.8.

²⁶⁷ Singh, R., *supra*, para.24.

²⁶⁸ Home Office and Scottish Executive, *supra*, para.27, at p.9.

²⁶⁹ Singh, R., *supra*, para. 25.

²⁷⁰ Home Office and Scottish Executive, *supra*, para.27, at p.9.

²⁷¹ *Ibid.*, para.31, at p.10.

²⁷² Nair, A., *supra*, p.231.

pornography would be sufficient to deal with this type of pornography, and the possession offence appears to be too harsh.

5.3.3 The Enforcement of the Obscenity Law and the Extreme Pornography Law

Offences	Outcome	2009	2010	2011
Publish an obscene article – Section 2 of the OPA 1959/ Having an obscene article for publication for gain – Section 1 of the OPA 1964	Proceeded against	14	7	2
	Found guilty	19	7	3
	Sentenced	21	6	4
Possession of an extreme pornographic image portraying an act which threatened life – Section 63(7) (a) of the CJIA 2008	Proceeded against	-	2	2
	Found guilty	-	-	3
	Sentenced	-	1	3
Possession of an extreme pornographic image portraying an act which likely to result in serious injury to a person's anus/breasts/genital – Section 63(7) (b) of the CJIA 2008	Proceeded against	7	13	11
	Found guilty	4	9	11
	Sentenced	1	11	10
Possession of an extreme pornographic image portraying an act which involves sexual interference with a corpse – Section 63(7) (a) of the CJIA 2008	No data available			
Possession of an extreme pornographic image portraying an act of intercourse/oral sex with a dead or alive animal– Section 63(7) (d) of the CJIA 2008	Proceeded against	19	65	59
	Found guilty	12	48	67
	Sentenced	12	50	77

Table 1 - Statistics of defendants proceeded against at Magistrates' court, and found guilty and sentenced at all courts for offences relating to publication of obscene articles under the OPAs 1959/1964 and possession of extreme pornographic images under Section 63 of the CJIA 2008 in England and Wales between 2009 and 2011²⁷³

In 2009, there were 21 people who were convicted of offences under the OPAs 1959/1964. However, the figures decreased significantly to six in 2010 and to only four in 2011. In comparison, in 2009, which was the first year that the CJIA 2008 came into force, the number of people who were sentenced under the extreme pornography law (all types of extreme pornography) was 13. The first person to be convicted of having extreme pornography in possession was a 20-year-old man in St. Helen who was found to have bestial pornography on his computer. He was sentenced by St. Helen Magistrates' court to an 18-month supervision order, 24 hours at an attendance centre and a fine of 65 GBP.²⁷⁴ However, the number of those who were sentenced under the extreme pornography law sharply increased to 62 in 2010 and 90 in 2011.

The decrease in the number of people who were convicted of the offences under the obscenity law (the OPAs 1959/1964) and the increase in number of those who were convicted of the offence under the extreme pornography law (Section 63 of the CJIA

²⁷³ The information is provided by the Ministry of Justice upon the author's request under the Freedom of Information Act 2000, 28th May 2012.

²⁷⁴ *St. Helens Star*, 18th June 2009,

http://www.sthelensstar.co.uk/news/4445020.Man_had_grossly_offensive_and_disgusting_porn_images_on_computer/, visited 8th April 2012.

2008)²⁷⁵ appear to suggest that, since the extreme pornography law came into effect in 2009, the English authorities tend to rely more on extreme pornography law rather than obscenity law (which is still in force) as the main legal measure to regulate pornography. Given this trend, it could be said that pornographers and adult viewers have a clearly defined boundary for exercising their right to freedom of pornographic expression, since the extreme pornography law has drawn a clearer line between legal and illegal pornography. Moreover, they are given a great deal of freedom of pornographic expression, as they are allowed to produce and access most types of pornographic materials, except only a few categories that fall within the scope of Section 63 of the CJIA 2008. (In comparison, as argued above, the freedom of pornographic expression under the OPA is erratic and unpredictable, since it depends on the jury in each individual case to determine whether the material in question is obscene or not.)

The last point to be noted is that, as can be seen from the table, the number of persons who were convicted of possessing bestial pornography outnumbers the number of those who were convicted of having pornography depicting life-threatening and serious violent sexual acts (the data of those who are convicted of possessing necrophilia pornography is not available). The *Consultation Paper* clearly states that the main aim of extreme pornography law is to deal with violent pornography, whilst the prohibition of bestial and necrophilia pornography is seen as an additional element of the law. However, at present, it appears that the ongoing enforcement of extreme pornography law is focusing on bestial pornography, not serious violent pornography, which is the major objective of the extreme pornography law. It remains to be seen whether this trend will change and whether the law enforcement will change its focus to serious violent pornography or not.

5.4 Non-State Regulation of Internet Pornography in the UK

Interestingly, the UK government regards non-state regulation²⁷⁶ as a preferred method of regulating illegal sexual content on the Internet in addition to the enforcement of obscenity and extreme pornography laws, and does not have a plan to introduce specific legislation to regulate Internet content.²⁷⁷ Ian Taylor, the then Science and Technology Minister, stated at a Home Office meeting held on 19 January 1996 that:

²⁷⁵ The increase in number of the prosecutions under the extreme pornography may be because the scope of the enforcement include not only pornographers or distributors, but also Internet users. By contrast, the enforcement of the OPA catches only pornographers and distributors.

²⁷⁶ For the definitions of co-regulation and self-regulation see Section 3.7

²⁷⁷ Akdeniz, Y., 'Internet Content Regulation: UK Government and the Control of Internet Content', (2001), *Computer Law & Security Report*, 17(5), pp.303-317, 306.

'The Government considers that the risk of children being exposed to harmful material is sufficiently serious to justify careful consideration of the options.

Our present position is that we would want to encourage the industry to develop a system of self-regulation, which might address these areas of concern, rather than considering statutory options.²⁷⁸

In the House of Commons, he stated that the plans to establish an industry self-regulatory body and to develop rating and filtering systems to deal with illegal and harmful content were in line with EU policies, and were especially welcomed by the EU Telecommunications Council.²⁷⁹

This section examines co-regulation (or industry self-regulation with supports from governmental authorities) and self-regulation at Internet-users level (rating and filtering systems) of Internet pornography in the UK.²⁸⁰ The main focus is on the function of the IWF and filtering/rating solutions. However, it will also show that the effectiveness of these two non-state regulatory approaches has some drawbacks. Furthermore, in some aspects, the implementation of these two non-state regulations may threaten freedom of expression (privatised censorship). Nonetheless, despite these negative implications, non-state regulations can be seen as interesting regulatory approaches that give the Internet industry and Internet users some control over access to the content on the Internet, with less interference from the government and law enforcement authorities. Therefore, it could be argued that the UK's regulatory approach is in line with the conceptual framework of Chapter 3 to a great extent.

5.4.1 Co-Regulation: The Internet Watch Foundation (IWF)

The IWF is a form of co-regulation. This private regulatory organisation is a non-governmental organisation (a self-regulatory body of the IT industry in the UK) that '[works] in partnership with the online industry [i.e. ISPs, mobile operators, content providers, hosting providers, filtering companies and search providers] ... and the public' to regulate illegal sexual content on the Internet.²⁸¹ Furthermore, the IWF's operation is

²⁷⁸ Home Office Meeting of 19th January 1996, <http://web.archive.org/web/19970402234747/http://www.gold.net/users/cdwf/homeoffice/>, cited in Akdeniz, Y., 'The Regulation of Pornography and Child Pornography on the Internet', (1997) *The Journal of Information, Law and Technology (JILT)*, 1, http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1997_1/akdeniz1, visited 26th June 2012.

²⁷⁹ Ian Taylor, *House of Commons Hansard*, Column 421, 29th November 1996, <http://www.publications.parliament.uk/pa/cm/199697/cmhansrd/vo961129/text/61129w05.htm>, visited 24th June 2012.

²⁸⁰ For the definitions of co-regulation and self-regulation see Section 3.7

²⁸¹ IWF, <http://www.iwf.org.uk/accountability/iwf-status>, visited 10th April 2012.

supported by the relevant governmental agencies, e.g. the Home Office and the police.²⁸² It was established by the UK Internet industry in 1996 with the aim to co-operate with the Metropolitan Police to combat illegal sexual content on the Internet, especially images of child sexual abuse (normally known as 'child pornography').²⁸³ As already noted, it also deals with illegal adult pornography, i.e. obscene and extreme pornographic materials, so as to prevent its ISP members from potential prosecutions.

The IWF has two main functions. On the one hand, it provides a central 'hotline'²⁸⁴ to receive reports of potentially illegal sexual content on the Internet from the public; on the other, it notifies the relevant ISPs (the domestic ISPs that are the members of the IWF) of the reported content, and also passes information to the police for further legal action.²⁸⁵ At present, two types of illegal sexual content are within the remit of the IWF. They are (1) images of child sexual abuse, normally known as 'child pornography'²⁸⁶ (which is outside the scope of this research), and (2) adult pornography considered to be criminally obscene (under the OPA 1959) or extreme pornography (under Section 63 of the CJIA 2008). Extreme pornography was brought into the purview of the IWF in January 2009.²⁸⁷

The IWF's operation is aimed at minimising the availability of illegal pornographic content (obscene and extreme pornographic materials) on the Internet.²⁸⁸ However, as far as the protection of minors against pornography is concerned, the IWF does not aim to prevent minors from accessing legal pornographic content (harmful materials). It does not have any tool to prevent young Internet users accessing to (legal) pornographic websites.

The regulatory process begins when the IWF receives a report of potentially obscene and extreme pornographic content from an Internet user through www.iwf.org.uk.²⁸⁹ The

²⁸² Home Office, *Home Office Annual Report 1997* (The Stationary Office, London, 1997).

²⁸³ 'Following discussions between the former Department of Trade and Industry (DTI), the Home Office, the Metropolitan Police, some ISPs and the Safety Net Foundation (formed by the Dawe Charitable Trust) an R3 Safety Net Agreement regarding rating, reporting and responsibility was created by ISPA, the London Internet Exchange (LINX) and the Safety Net Foundation. A key outcome of the Agreement was the formation of the Internet Watch Foundation (IWF).' *IWF*, <http://www.iwf.org.uk/about-iwf/iwf-history>, visited 10th April 2012.

²⁸⁴ It is interesting to note that in Thailand there are a number of Internet hotlines. Some of them are operated by governmental agencies and some are run by NGOs. These hotlines are independent from each other, and appear to lack a coherent and unitary standard to judge the obscenity of the Internet content in question. See Section 6.4.3.

²⁸⁵ Murray, A.D., *Information Technology Law: The Law and Society*, (Oxford University Press, Oxford, 2010), p.383.

²⁸⁶ The IWF does not accept the term 'child pornography' because, as it argues, the images depicting children involved in sexual acts are not pornography, but permanent records of children being sexually abused. See *The IWF*, <http://www.iwf.org.uk/services/keywords>, visited 12th April 2012.

²⁸⁷ *The IWF*, <http://www.iwf.org.uk/about-iwf/iwf-history/iwf-highlights>, visited 12th April 2012.

²⁸⁸ *The IWF*, <http://www.iwf.org.uk/about-iwf/remit-vision-and-mission>, visited 12th April 2012.

²⁸⁹ See generally *the IWF*, <http://www.iwf.org.uk/hotline/report-process>, visited 13th April 2012.

reported website is then assessed by Internet Content Analysts (ICAs) – i.e. the officers of the IWF ‘who have comprehensive, up-to-date, and in-depth training on relevant UK legislation and image assessment with the appropriate UK police personnel’.²⁹⁰ In this regard, the criteria that the IWF uses for content assessment are in line with those of the police. If the ICAs conclude that the reported content is legal, the IWF will take no further action. In contrast, if the content is found to be in breach of the OPA 1959 or the extreme pornography legislation, it traces the source server that hosts the illegal content. When the server in question has a physical existence in the UK, the IWF notifies the relevant ISPs to remove the illegal pornographic content from the server. This action is normally known as a ‘notice and take down’ measure. Also, the IWF informs the police to take legal action against the content providers. According to the IWF’s Code of Practice, the ISP members are obliged to ‘act expeditiously to remove ... the notified content’. The members who fail to comply with this obligation face prosecutions at their own risk.²⁹¹ At the final stage of the process, the IWF monitors the ISP’s removal task until it is satisfied that the illegal pornographic content is removed. The reporter is informed about the process upon request.

The *Annual and Charity Reports* of the IWF provide interesting statistics. In 2010, there were 2,732 reports regarding criminally obscene/extreme pornographic websites, 12 of which were found to be illegal. Eight notices were issued.²⁹² (It is to be noted that the 2010 report does not explain why only eight notices were issued, whilst 12 URLs were found to be illegal.) In 2011, 2,779 websites were reported, only two of which were found to be contrary to obscenity and extreme pornography laws. One notice was issued for the removal of the illegal pornographic content, whilst the other website had been removed by the content provider before the notice was issued.²⁹³ Interestingly, both the 2010 and 2011 reports do not give information about what happened in those cases after the notices were issued. However, according to the ‘notice and take down’ mechanism, the ISPs are required to remove such illegal pornographic websites.

The IWF has no power to request foreign ISPs to remove pornographic websites that are deemed illegal according to UK laws but are hosted on servers outside the UK, and does not

²⁹⁰ *The IWF*, <http://www.iwf.org.uk/services/blocking/blocking-faqs>, visited 13th April 2012.

²⁹¹ *The IWF*, <http://www.iwf.org.uk/members/funding-council/code-of-practice#4IWFNoticeandTakedownService>, visited 13th April 2012.

²⁹² *The IWF, Annual and Charity Report 2010*, <http://www.iwf.org.uk/accountability/annual-reports/2010-annual-report>, visited 13th April 2012, pp.4,9. Interestingly, in 2010, 13,491 websites alleged to violate the Thai obscenity law were blocked by the Ministry of Information and Communication Technology (MICT) of Thailand. See Section 6.4.2.

²⁹³ *The IWF, Annual and Charity Report 2011*, <http://www.iwf.org.uk/accountability/annual-reports/2011-annual-report>, visited 13th April 2012, p.15.

have a policy to request domestic ISPs to block access to such websites.²⁹⁴ The IWF only 'informs the relevant authorities to add the websites to its database of addresses hosting illegal [pornographic] content'.²⁹⁵ This means that Internet users in the UK can still access such websites.

An important feature of the IWF's regulatory framework is its appeal system.²⁹⁶ Individuals who are affected by the IWF's decision with regard to the content assessment are entitled to lodge an appeal to the IWF Director. The appellants can be one of the followings: (1) a party with a legitimate association with the content, or a potential victim or the victim's representative; (2) a hosting company; (3) a publisher; and (4) an Internet user who is being barred from accessing a website that he/she believes is legal.²⁹⁷ The content in question is re-assessed by a different IWF Manager who was not involved in the original assessment. If the original decision is reversed, notice to takedown is repealed. Consequently, the website at issue is brought back to the Internet. However, if there is no reversal of the decision at this stage, the appellant can appeal further. The website in question is referred to the relevant police agency for assessment and a final decision. If the original decision is reversed, notice to takedown is repealed.²⁹⁸

As examined above, it could be argued that the IWF's regulatory approach to Internet pornography allows a certain degree of freedom for pornographic expression. First, it is a report-based surveillance. The key strategy of the IWF's regulatory model is that it does not search for potentially unlawful pornographic websites by itself, but takes action to take down illegal pornographic websites only when it receives reports from the public (presumably there are Internet users who would like to be active reporters).²⁹⁹ Likewise, this model does not require the ISPs to monitor pornographic materials circulated on their

²⁹⁴ *The IWF*, <http://www.iwf.org.uk/services/removal>, visited 13th April 2012. In comparison with adult pornography, the IWF can deal with child pornography hosted outside the UK through its international network – such as INHOPE. *The IWF*, <http://www.iwf.org.uk/about-iwf/blog/post/313-iwf-comment-on-criminally-obscene-adult-content-online>. For information about INHOPE, see <http://www.inhope.org/gns/home.aspx>, visited 13th April 2012.

²⁹⁵ See House of Commons Committee on Culture, Media and Sport, Harmful Content on the Internet and in Video Games, 10th Report of Session 2007-2008, Vol.1, <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcmds/353/353.pdf>, visited 13th April 2012, para.72.

²⁹⁶ See generally *The IWF*, <http://www.iwf.org.uk/accountability/complaints/content-assessment-appeal-process>, visited 13th April 2012. As will be shown in Chapter 6, the regulatory framework of Internet content in Thailand does not have an appeal mechanism. As a result, when a certain URL is blocked, there is no channel to ask the MICT to unblock it. See Section 6.3.2.3.

²⁹⁷ *The IWF*, <http://www.iwf.org.uk/accountability/complaints/content-assessment-appeal-process>, visited 13th April 2012.

²⁹⁸ *Ibid.*

²⁹⁹ The MICT and Technology Crime Suppression Division (Royal Thai Police) search for potentially obscene websites by themselves. If the website in question is deemed obscene in accordance with the obscenity standards of these two agencies, it will be censored by blocking. See Section 6.4.2.

systems. They take action only after being notified by the IWF. In this regard, it can be said that pornographic websites are not subject to pre-censorship.

Pornographers are free to upload pornographic materials and Internet users are free to access pornographic websites, at least until the website is reported to the IWF.

Furthermore, even though the reported website is found to be illegal, the IWF's appeal mechanism allows the website to be re-assessed. Insofar as the final decision has not been made, the right to freedom of expression is not completely restricted. Individuals whose right to freedom of expression has been deprived previously by the original decision (i.e. website owners, pornographers or Internet users) still have a chance to gain it back at appeal, because it is always possible for the original decision to be reversed.

Moreover, the 'notice and take down' system is applicable only to obscene or extreme pornographic websites hosted on servers located in the UK. Therefore, Internet users in the UK still have freedom to access pornographic websites in general. They are allowed to access obscene websites hosted on overseas servers, because the possession of, or access to, online obscene materials for private use is not prohibited by the English obscenity law.³⁰⁰ However, they cannot legally access websites that have extreme pornographic images, because Section 63 of the CJIA 2008 prohibits the possession of, or access to, extreme pornographic images even for private use.³⁰¹

Lastly, the IWF's regulatory model has a prominent advantage in terms of implementation. The IWF is the only hotline to receive reports from the public. Furthermore, it adopts a standard for assessing the pornographic content that is in line with that of the police. Such a unitary hotline system that has the same content assessment standard as the law enforcement authority can avoid the irregularity of implementation that can happen in other jurisdictions, where hotline centres lack a common standard of content assessment, such as the hotline system in Thailand.³⁰²

A major criticism of the IWF's regulatory regime is about its transparency, legitimacy to judge the content and accountability to the public. Although *de jure* the status of the IWF is a private organisation, it exercises *de facto* public power to censor illegal content on the Internet through its implementation of the 'notice and take down' measure. Therefore, as David Wall notes, the IWF should be considered as a quasi-governmental Internet censoring

³⁰⁰ See Section 5.3.1.

³⁰¹ See Section 5.3.2.

³⁰² See Section 6.5.1.

body, not a pure private organisation.³⁰³ As Yaman Akdeniz notes, like governmental organisations, the IWF as a quasi-governmental body should be subject to the concept of transparency and accountability under the framework of the Principles of Good Regulation³⁰⁴ (proposed by the Better Regulation Task Force of the Cabinet Office).³⁰⁵ According to the Principles of Good Regulation, '[r]egulators/policy officials must be able to justify the decisions they make and should expect to be open to public scrutiny'.³⁰⁶

The implementation of its regulatory measures should be transparent, meaning that it should be open to the public and allow Internet users to know when/where the censorship takes place and the on what grounds the content in question is censored. This principle is of great importance in order to ensure that the IWF will not abuse or arbitrarily exercise its censoring power. However, as the official status of the IWF is still a private organisation,³⁰⁷ it has no legal obligations of public reporting or auditing.³⁰⁸ This means that the IWF is not required by law to reveal information concerning its operational activities with regard to the regulation of Internet content – especially the consideration, decision-making and implementation of the 'notice and takedown' measures – to the public. In practice, the lists of URLs (which are subject to 'takedown' measures) are sent to the ISPs in the UK in an encrypted format, thus the lists are kept as secret; moreover, websites owners are not informed by the IWF when their sites have been added to the 'notice and takedown' lists.³⁰⁹

Furthermore, the IWF is not under any legal obligation to be inspected by any public authorities or independent inspectors. Although, at present, the IWF publishes annual reports to inform the public about its regulatory activities, and allows independent inspectors

³⁰³ Wall, D.S., 'Policing and the Regulation of the Internet' in Walker, C. (ed.), *The Criminal Law Review Special Edition: Crime, Criminal Justice and the Internet*, (Sweet & Maxwell, London, 1998), pp.79-91, 85.

³⁰⁴ Cyber-Rights & Cyber-Liberties (UK) Report, *Who Watches the Watchmen Part II: Accountability & Effective Self-Regulation in the Information Age*, <http://www.cyber-rights.org/watchmen-ii.htm>, visited 12th April 2012.

³⁰⁵ The Better Regulation Task Force was an independent advisory group established in 1997 with an aim to advise the UK government with regard to the improvement of government regulation. It was replaced by the Better Regulation Commission (BRC) in 2005. In 2008, the BRC was superseded by the Risk and Regulation Advisory Council (RRAC). However, the RRAC was also disbanded and replaced by the Public Risk Commission (PRC). See <http://www.reduceuse.co.uk/?p=769>; www.bis.gov.uk/files/file54045.pdf, visited 23rd June 2012.

³⁰⁶ The National Archive, webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/bre/consultation%20guidance/page44482.html, visited 12th April 2012.

³⁰⁷ Akdeniz, Y. (2001), *supra*, p.307.

³⁰⁸ Edwards, L. (2009), *supra*, p.655. However, it should be noted that the IWF voluntarily publishes reports of its operations annually and allows independent inspectors, such as experts with backgrounds in law, law enforcement and social services and police to inspect its operation relating to child pornography in particular. See <http://www.iwf.org.uk/assets/media/annual-reports/annual%20med%20res.pdf>, visited 4th December 2012, p.20

³⁰⁹ Laidlaw, E.B., *supra*, p.331.

to examine its operation, its attempt to be transparent is purely voluntary and does not relate to any legal obligations.

Another criticism is that the IWF lacks judicial power and legitimacy to judge the illegality of the pornographic websites. The power to determine whether a website is criminally obscene or extremely pornographic should be exercised by a judicial body, i.e. courts and their juries, not by a private regulator like the IWF. Furthermore, the IWF does not have legal power to order ISPs to block access to allegedly illegal content, thus the ISPs do not need to comply with the IWF's order. Surprisingly, however, it appears that British ISPs choose to comply with the IWF's order with no challenge.³¹⁰ For example, in 2008, the IWF blocked several pages of Wikipedia due to the fact that a webpage of Wikipedia had a picture of a naked pre-pubescent girl (the cover artwork of the rock band Scorpion's album *Virgin Killer*), which was deemed illegal (child pornography).³¹¹ The IWF requested the ISPs in the UK to block access to Wikipedia's webpages, and the ISPs promptly complied with the IWF's request without challenging the fact that the IWF's order did not have a legal basis.³¹²

Regarding the appeal system of the IWF, the bodies which do the re-assessment are the IWF (an officer of the IWF who is not involved in the first assessment) and then the police. These bodies are not a court which has judicial power and legitimacy to judge whether the website or its content in question is legal or illegal. As contended by Akdeniz, by assessing the content and requesting ISPs to remove content from servers, the IWF acts as a 'self-appointed [judge]' with an 'encouragement for vigilantism'.³¹³ Therefore, it can be argued, as Lilian Edwards does, that the IWF action is wrong in principle and should not be accepted in democratic societies. The court should be the authority to decide whether the content is illegal or not.³¹⁴

Moreover, although the IWF has a channel for appeal, the appeal seems to lack fair procedure. The appeal is considered by the IWF (and the police) without representative of the appellant. In the 2008 incident, Wikipedia appealed to the IWF.³¹⁵ However, as

³¹⁰ Akdeniz, Y., 'To Block or Not to Block : European Approaches to Content Regulation, and Implication for Freedom of Expression', (2010) *Computer Law & Security Review*, 26(3), pp.260-272, 266

³¹¹ Sithigh, D.M., 'Datafin to Virgin Killer: Self-Regulation and Public Law' (2009) *Norwich Law School Working Paper Series*, <http://lawwp.webapp2.uea.ac.uk/wp/index.php/workingpapers/article/viewFile/9/9>, visited 16th April 2012, pp.19-21; Laidlaw, E.B., *supra*, p.313.

³¹² Akdeniz, Y. (2010) *supra*, p.266.

³¹³ Akdeniz, Y. (2001), *supra*, p.307.

³¹⁴ Edwards, L. (2009), *supra*, p.663.

³¹⁵ Sithigh, D.M., *supra*, pp.19-21.

Wikipedia revealed, the IWF conducted an appeal on its own without the representative from the Wikipedia, and later informed Wikipedia that it lost the appeal.³¹⁶ In addition, the IWF's appeal system does not provide a channel for judicial review by judicial bodies (such as a court).³¹⁷ As examined above, it is the IWF manager who considers the appeal, and it is the police – an external authority – that make the final decision whether the website or its content is legal or illegal. If the police find that the website or the content is illegal, the website or the content has to be removed. Since the IWF is *de jure* private organisation, and not a public body which is accountable to the public (or to the parliament), and its activities are not subject to a national court, an individual who is not satisfied with the IWF's decision may not be able to bring the IWF's final decision further to national courts or the ECtHR for judicial review. However, Akdeniz interestingly argues that the IWF should be regarded as a public body within the meaning of Section 6 (3) (b) of the HRA,³¹⁸ because it performs public functions relating to Internet content regulation.³¹⁹ In addition, the IWF board asserted that the IWF recognised the ECHR.³²⁰ However, it remains uncertain whether national courts and the ECtHR will agree with Akdeniz's argument and the IWF board's statement, because this issue has not been tested in a court yet.³²¹

As shown above, the public cannot know whether and when the IWF abuses its censoring power or arbitrarily uses it against certain pornographic websites. Although the public know that the IWF is abusing its censoring power, they cannot seek protection of their right from national and supranational courts. Therefore, it could be contended that the censoring power in the hands of a private organisation that is not accountable to the public through a judicial or parliamentary channels can be seen as a threat to freedom of expression. The UK government may solve this problem by making it clear that the IWF is an organisation designated by the government (the Home Office) to regulate sexually explicit content on the Internet, and is a 'public authority' within the meaning of Section 6 (3) (b) of the HRA. It could make the IWF accountable to the public, and also open a channel for an individual whose right to freedom of expression is violated by the IWF to seek protection from a court.

³¹⁶ McIntyre, T.J., 'Child Abuse Images and Cleanfeeds: Assessing Internet Blocking Systems' in Brown, I. (ed), *Research Handbook on Governance of the Internet* (Edward Elgar, Cheltenham, 2012), pp.1-29, 16.

³¹⁷ *Ibid.*, at p.7; Edwards, L., 'Content Filtering and New Censorship', *A Paper for Fourth International Conference on Digital Society* (2010), <http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=05432419>, visited 24th June 2012, pp.317-322, 318,

³¹⁸ Section 6 (3) (b) of the HRA reads '..."public authority" includes – (b) any person certain of whose functions are functions of a public nature'.

³¹⁹ Akdeniz, Y., *Internet Child Pornography and The Law : National and International Responses*, (Ashgate, Aldershot, 2008), p.264; see also Laidlaw, E.B., *supra*, p.324.

³²⁰ Minutes of Internet Watch Foundation Board Meeting, 25 April 2001, cited in Akdeniz, Y. (2008) *Ibid.*

³²¹ Sithigh, D.M., *supra*, p.20.

Moreover, it could ensure that it is a duty of judicial authority (the courts), not a private organisation, to determine the legality of a website.

5.4.2 Self-Regulation by Content Providers and Internet Users: Rating and Filtering Systems

Rating and filtering systems are a mode of self-regulation that is based on a technological solution, making it possible for Internet content to be controlled at the level of individual Internet users. This regulatory approach aims to prevent young Internet users from accessing legal pornographic materials on the Internet (materials that are harmful to minors). A rating system allows content providers³²² to label websites, on a voluntary basis, in accordance with criteria set up by Internet content labelling (rating) standards.³²³ A filtering system is software that enables individual Internet users to control, by blocking or allowing, access to certain types of Internet content or certain websites according to their configurations (client-based filtering).³²⁴ It should be noted that content filtering could be implemented at ISP or at International Internet gateway levels.³²⁵ However, in the UK, the filtering by ISP (known as Cleanfeed) is used to regulate child pornography, not adult pornography.³²⁶

The UK government supports rating and filtering systems. In a document published by the Department of Trade and Industry, the UK government makes a clear statement that:

The UK Government is encouraging parents to use the filtering tools available in the latest Internet browsers, which already include the software to filter rated material and exclude unrated material. ... The UK Government also supports the deployment of the Platform for Internet Content Selection (PICS), and the development of ratings systems. The UK's Internet Watch Foundation has published a consultation document proposing requirements for an international ratings system. It has also helped to form European (INCORE) and international (Internet Content Rating Alliance (ICRA)) groups which aim to develop an internationally acceptable rating standard.³²⁷

³²² In principle, apart from content providers, a third party, such as an ISP and a third party vetting body, can also use a rating scheme to label websites. However, normally, an ISP does not do it, and there is not a third party Internet rating body in the UK yet.

³²³ Akdeniz, Y. (2001) *supra*, pp.308-309.

³²⁴ Edwards, L., 'Pornography and the Internet' in Edwards, L. and Waelde, C. (eds), *Law and the Internet: A Framework for Electronic Commerce* (2nd ed.), (Hart Publishing, Oxford, 2000), pp.245-308, 297.

³²⁵ For an account on different levels of filtering, see generally Deibert, J.R. and Villeneuve, N., 'Firewalls and Power: An Overview of Global State Censorship of the Internet', in Klang, M. and Murray, A.D. (eds.), *Human Rights in the Digital Age* (Glasshouse, London, 2005), pp.111-124.

³²⁶ For Cleanfeed, see generally McIntyre, T.J., *supra*, pp.1-29; Marsden, C., *supra*, pp.183-186; Edwards, L. (2009), *supra*, pp.652-658.

³²⁷ Department of Trade and Industry Document, *Net Benefit: The Electronic Commerce Agenda for the UK, October 1998*, http://www.cyber-rights.org/documents/dti_net_benefit.htm, visited 24th June. 2012. It should be noted that the original online document is no longer available. However, a copy is available on cyber-rights website.

The IWF is one of the founding members,³²⁸ and a supporter of, the Internet Content Rating Association (ICRA).³²⁹ The EU also provided funding of 650,000 Euros to assist the establishment of ICRA.³³⁰ ICRA is an international and non-profit organisation with the aim of setting up a globally accepted, neutral and objective website labelling standard that, on the one hand, makes it easier for content providers to label their contents on a voluntary basis (self-rating) and, on the other, helps parents block their children's access to certain harmful Internet content by using filtering software.³³¹ In 2007, ICRA became part of the Family Online Safety Institution (FOSI), an international organisation that works for the development of a safer Internet.³³²

The labelling standard that ICRA uses is that of the Recreational Software Advisory Council on the Internet (RSACi), which enables online content to be labelled according to the following criteria: nudity, sexual content, the depiction of violence, the language used, the presence or absence of user-generated content and whether this is moderated, and the depiction of other potentially harmful content such as gambling, drugs and alcohol.³³³ Content providers can fill out a digital 'questionnaire' to indicate what elements are present or absent from their websites. Then, a labelling file (electronic tag) is automatically created and embedded to the online content.³³⁴ Originally, the electronic labels were created by using Platform for Internet Content Selections (PICS) specification.³³⁵ However, from July 2005, ICRA no longer issued PICS labels, and began to issue labels in a new format called Resource Description Framework (RDF).³³⁶ Some examples of pornographic websites that

³²⁸ The organisations that played a key role in the establishment of ICRA are the IWF, AOL Europe, Bertelsmann Foundation, BT, Cable & Wireless, Demon Internet (UK), EuroISPA, IBM, Microsoft, Software & Information Industry Association and T-Online Germany. See PR Newswire, <http://www.prnewswire.co.uk/news-releases/internet-content-rating-association-formed-to-provide-global-system-for-protecting-children-and-free-speech-on-the-internet-156631705.html>; *The IWF*, <http://www.iwf.org.uk/about-iwf/iwf-history/iwf-highlights>, visited 24th June 2012.

³²⁹ The founding organisations of ICRA are the IWF, AOL Europe, Bertelsmann Foundation, BT, Cable & Wireless, Demon Internet (UK), EuroISPA, IBM, Microsoft, Software & Information Industry Association and T-Online Germany. See PR Newswire, <http://www.prnewswire.co.uk/news-releases/internet-content-rating-association-formed-to-provide-global-system-for-protecting-children-and-free-speech-on-the-internet-156631705.html>; *The IWF*, <http://www.iwf.org.uk/about-iwf/iwf-history/iwf-highlights>, visited 24th June 2012.

³³⁰ The EU, http://ec.europa.eu/information_society/activities/sip/projects/completed/filtering_content_labelling/filtering/icasafe/index_en.htm, visited 25th June 2012.

³³¹ Archer, P., *ICRAfail: A Lesson For the Future*, <http://philarcher.org/icra/ICRAfail.pdf>, p.5.

³³² Marsden, C., supra, p.8; *FOSI*, <http://www.fosi.org/about-fosi.html>, visited 17th April 2012.

³³³ *FOSI*, <http://www.fosi.org/icra/#glance>, visited 17th April 2012. For a complete list of ICRA criteria, see <http://256.com/gray/docs/pics/icra.html>, visited 17th April 2012.

³³⁴ Elser, B.W., 'Filtering, Blocking and Rating Chaperones or Censorship?' in Klang, M. and Murray, A.D. (eds.), *Human Rights in the Digital Age* (Glasshouse, London, 2005), pp.99-110, 102.

³³⁵ PICS is an Internet specification developed by the World Wide Web Consortium (W3C), an international organisation that aims to develop standards for World Wide Web technology. See <http://www.w3.org/PICS/>; <http://www.w3.org/>, visited 26th June 2012.

³³⁶ Archer, P., supra, p. 13-15; <http://www.w3.org/RDF/>, visited 24th June 2012.

have ICRA tags include: www.hustler.com, <http://www.wunbuck.com>, www.youngleafs.com. The ICRA rating scheme operates in conjunction with Internet Explorer (IE), which has a built-in filtering function called Content Advisor, a browser-based filter.³³⁷ When a person attempts to access a certain website, the Content Advisor checks a label attached to the website and determines whether to permit access according to the information declared on the label.³³⁸ With proper settings, willing adult Internet users can still access pornographic websites, whilst young Internet users cannot. Given this, the rating and filtering system can be seen as a plausible solution to protect minors from pornographic websites without interference of adults' freedom of expression from the government.

However, the ICRA rating system has several major problems. First, Phil Archer – a chief technology officer of ICRA/FOSI – notes that there have been very few content providers who actually put ICRA labels on their websites; and, worse, many of them have removed the labels within a short period afterwards.³³⁹ This is because the labelling is voluntary, and the content providers see no compelling reasons to label their websites. Since there are a very small number of labelled websites, if Content Advisor is set to blocking mode, all unlabelled websites would be, in effect, filtered out (as Content Advisor allows access only to labelled websites). On the other hand, if Content Advisor is turned off, minors can freely access websites that parents want to block. The second problem concerns the possible inaccuracy of labelling. It is the content providers who use the ICRA labelling tool to create the labels and attach them to their websites. However, it is always possible for the content providers to mislabel their websites (whether deliberately or unintentionally). A website with sexually explicit materials may be labelled as non-sexually explicit. Although there are very few mislabelled websites, this problem could reduce parents' trust in the ICRA rating scheme.³⁴⁰ Furthermore, the usefulness of the ICRA rating scheme is limited. The Content Advisor of IE is compatible only with PICS labels.³⁴¹ Thus, it cannot filter websites that have RDF labels. ICRA has attempted to launch a stand-alone filtering tool called *ICRAplus*.³⁴² However, due to several technical and financial difficulties, *ICRAplus* was

³³⁷ *Window Internet Explorer*, <http://technet.microsoft.com/library/Dd361897>; PR Newswire, <http://www.prnewswire.co.uk/news-releases/internet-content-rating-association-formed-to-provide-global-system-for-protecting-children-and-free-speech-on-the-internet-156631705.html>, visited 24th June 2012. It is to be noted that Netscape Navigator also has filtering function. However, at present, this web browser is no longer developed and not popular among Internet users; therefore, this thesis will not examine the filtering system of this web browser.

³³⁸ *FOSI*, <http://www.fosi.org/icra/#glance>, visited 17th April 2012.

³³⁹ Archer, P., *supra*, pp.8-9.

³⁴⁰ *Ibid.*, p. 12.

³⁴¹ *Window Internet Explorer*, <http://technet.microsoft.com/library/Dd361897>; visited 24th June 2012.

³⁴² Bonnici, J.P.M., *Self-Regulation in Cyberspace* (T.M.C. Asser Press, the Hague, 2008), p.47.

eventually removed from the public domain in 2005.³⁴³ Moreover, the ICRA labels are compatible only with IE. Thus, users of other web browsers, such as Firefox, Opera and Chrome, cannot benefit from the ICRA Rating Scheme. The last point to be noted is that the ICRA labelling engine is currently defunct; as a result, the ICRA label generator, tools and Webmaster support, are no longer available.³⁴⁴ This means that, although all websites that already have the ICRA labels will continue to work with filtering software, there will be no more new ICRA labels issued. The FOSI has not made an official statement about the reason behind the termination of the ICRA labelling service. However, this thesis will recommend another labelling system called 'Restricted To Adults' (RTA).³⁴⁵

Apart from Content Advisor of IE, which is a filtering system based on the ICRA rating scheme, there are other filtering systems that are not ICRA-based. The majority of commercial filtering products available on the market, including the UK market, are developed by American software companies, e.g. Net Nanny, AOL Parental Control, CYBERSitter, PureSight PC and Cyber Patrol.³⁴⁶

Each filtering manufacturer has its own rating criteria and filtering approaches. These use content or keyword analysis, or a URL blacklist,³⁴⁷ which may differ between various filtering products.³⁴⁸ Filtering software companies tend to treat their block-lists, rating criteria and blocking techniques as trade secrets, and are unwilling to reveal such information to the public.³⁴⁹ Therefore, it is impossible for users and the public to be sure that the criteria used by commercial filtering products are not biased, on whatever grounds. Furthermore, the use of commercial filtering products means that the power of rating and filtering is in the hands of private corporations that are not accountable to the public. This would leave no space for content providers, whose websites are blocked by filtering software, to argue against the software companies on the grounds that the filtering products

³⁴³ Archer, P., *supra*, p.11.

³⁴⁴ FOST, <http://www.icra.org/>, visited 17th April 2012.

³⁴⁵ See Section 7.2.3.

³⁴⁶ For more products see,

[http://kids.getnetwise.org/tools/tool_result.php3?display_start=1&functionality_id_array\[\]=931452496.23087](http://kids.getnetwise.org/tools/tool_result.php3?display_start=1&functionality_id_array[]=931452496.23087), visited 24th June 2012.

³⁴⁷ Deibert, J.R. and Villeneuve, N., *supra*, p.114.

³⁴⁸ <http://kids.getnetwise.org/tools/blocksex>, visited 24th June 2012.

³⁴⁹ Samuelson, P., 'Principles for Resolving Conflicts Between Trade Secrets and the First Amendment' (2006-2007) *Hastings Law Review*, 58(4), pp.777-848, 790-791. See also *Edelman v. N2H2 Inc.*, Civil Action No.02-CV-11503-RGS. In this case, Benjamin Edelman, a software technician, wanted to test the efficiency of N2H2's filtering software, which was widely used in schools and public libraries in the US. The test would reveal the URL block list embedded in the filtering software. Edelman sought a declaratory judgement to approve his intention to test the software. However, N2H2 filed a motion, seeking to dismiss Edelman's request on the grounds that the block list embedded in its product was a trade secret. Eventually, the District Court of Massachusetts allowed N2H2's motion. As a result, Edelman had to give up his intention, otherwise he may have had to face a substantial civil liability action.

infringe their right to freedom of expression. And, since this is purely a private matter without the direct involvement of the government, content providers cannot seek help from the courts.³⁵⁰

Moreover, the current filtering technologies are still imperfect and tend to over-block socially useful or educational information concerning sex.³⁵¹ A test on seven popular filtering products,³⁵² conducted by Michigan University Medical School in 2002, reveals that, at the least restrictive settings of these products, the blocking of websites that contain information about sexual health and homosexuality was around 10%. This suggests that the filters are not sophisticated enough to precisely distinguish between websites that have educational information concerning sex which may be useful and suitable for minors and pornographic websites. At more restrictive configurations, the blocking of useful sexual information websites substantially increases, whilst the blocking of pornographic websites is more or less the same.³⁵³ The 2006 comprehensive review conducted by the Brennen Center for Justice (NYU School of Law) also shows that all filtering products have over-blocking flaws. A number of websites, e.g. websites that contain information about safe sex or sexual transmitted disease, are filtered out because of the phrase 'sexual content'.³⁵⁴

Lastly, it could be argued that the filtering software is meaningless if it is not installed or activated on computers that are accessible to minors, such as computers at home or in schools. Furthermore, filtering technology can be circumvented by children who have IT skills.³⁵⁵ Therefore, it is still a responsibility of parents and teachers to install such filtering software and supervise minors when using the Internet.

Recently, the UK government has a plan to mandate all ISPs in the UK to block access to all pornographic websites by default³⁵⁶ (network level censorship or server-based filtering).³⁵⁷ Adults who want to view pornographic content have to fill in a digital age-verification form

³⁵⁰ Akdeniz, Y. (2001) *supra*, p.309.

³⁵¹ Akdeniz, Y. (2010) *supra*, p.270.

³⁵² The tested products include SmartFilter v3.0.1, 8e6 v4.5, CyberPatrol (SuperScout v4.1.0.8), Symantec Web Security v2.0, N2H2 v2.1.4 and AOL Parental Controls.

³⁵³ Richardson, C.R., Resnick, P.J., Hansen, D.L., Derry, H.A. and Rideout, V.J., 'Does Pornography-Blocking Software Block Access to Health Information on the Internet?' (2002) *Journal of the American Medical Association*, 288(22), pp.2887-2894.

³⁵⁴ Heins, M., Cho, C. and Feldman, A., *Internet Filters: A Public Policy Report*, (2nd ed.),

<http://www.fepproject.org/policyreports/filters2.pdf>, visited 27th June 2010.

³⁵⁵ Lievens, E., 'Harmful New Media Content : The Latest Regulatory Trends' (2006),

Communications Law, 11(4), pp.113-123, 118; Akdeniz, Y. (2010) *supra*, p.346.

³⁵⁶ *The Guardian*, 14th May 2012, <http://www.guardian.co.uk/technology/2012/may/04/pornography-online-ferguson-opt-in-plan>, visited 19th July 2012.

³⁵⁷ Deibert, J.R., and Villeneuve, N., *supra*, p.114.

on a website ('opt-in').³⁵⁸ Ed Vaizey – the Culture Minister – believes that this measure would make the ISPs more responsible for protecting young Internet users against improper sexually explicit materials on the Internet.³⁵⁹ However, this measure is subject to criticisms by many ISPs. Trefor Davies – a Chief Technology Officer at ISP Timico – comments that, given the current technology, it is impossible to block the sheer volume of online pornography.³⁶⁰ Nicholas Lansman – secretary general of ISPA – states that, although the ISPA welcomes a discussion about this matter with the UK government, the focus should be on developing other measures to protect minors from pornography rather than default filtering at the server level.³⁶¹ Blocking legal pornography at ISP level undoubtedly constitutes censorship on legal types of pornography which adults have a right to view. This can be considered as an excessive interference with the right to freedom of adults, although it is done in the name of protecting minors.³⁶² The question is why adults have to undergo a complicated process (filling in a form and giving personal information) in order to view legal materials. Minors may also use their parents' information to get access to such pornographic websites. More importantly, it is unclear which organisation or individual ISPs will be responsible for making the block lists, and what criterion they are to use to decide what legal pornographic websites should be blocked by default. These arguments signify that the default filtering may not be able to prevent minors from accessing pornographic websites as the UK government had anticipated. Worse, it imposes more and unnecessary restriction on adults who have a right to view legal pornographic websites. By saying this, it does not mean that there should be no measure to prevent minors from accessing pornographic websites. Parents and schools should take a leading role in monitoring, educating and informing them of the negative effects derived from immature exposure to pornography. As of December 2012, there has been no further development on this matter.

³⁵⁸ This idea was proposed by Conservative MP Claire Perry. Prime Minister David Cameron appeared to support this idea. See *BBC*, 23rd November, 2010, <http://www.bbc.co.uk/news/uk-politics-11822874> ; *Computer Active*, 4th May 2012, <http://www.computeractive.co.uk/ca/news/2172714/cameron-consider-automatic-porn-filters-isps>; see also *Independent Parliamentary Inquiries Into Online Child Protection*, <http://www.claireperry.org.uk/downloads/independent-parliamentary-inquiry-into-online-child-protection.pdf>, visited 18th July 2012.

³⁵⁹ *The Telegraph*, 19th December 2010, <http://www.telegraph.co.uk/technology/internet/8212646/Internet-pornography-curb-by-the-Government.html>, visited 18th July 2012.

³⁶⁰ *BBC*, 20th December 2010, <http://www.bbc.co.uk/news/technology-12041063>, visited 18th July 2012.

³⁶¹ *The Guardian*, 14th May 2012, <http://www.guardian.co.uk/technology/2012/may/04/pornography-online-cameron-opt-in-plan>, visited 19th July 2012.

³⁶² See in comparison with *Ashcroft v. American Civil Liberties Union*, (2002) 535 US 564. This case involves the constitutionality of the Child Online Protection Act (COPA), which aims to restrict young Internet users from accessing pornographic websites by criminalising the distribution of pornographic materials to minors via the Internet. However, the US Supreme Court struck down the COPA by upholding the injunction of the COPA enforcement, stating that the COPA was not the least restrictive means of accomplishing a compelling of governmental purpose (the protection of minors) and was substantially overbroad.

Conclusion

In brief, this chapter concludes that the regulation of Internet pornography in the UK is consistent with the conceptual framework of freedom of expression developed in Chapter 3 to some extent.

First, English courts appear to recognise pornography as a form of expression.³⁶³ However, the protection given to pornographic expression is not strong and is subject to obscenity and extreme pornography laws.

Second, the introduction of the concept of extreme pornography has brought a significant development to the regulation of pornography from the freedom of expression perspective. Importantly, the extreme pornography law appears to shift the justification for restricting pornographic expression from the morality-based rationale under the OPA³⁶⁴ to a harm-based alternative under the extreme pornography law. In addition, the extreme pornography law attempts to narrow down the scope of law enforcement, as well as to make it clear that only a few categories of pornography (violent, bestial and necrophilia pornography) are illegal. As discussed in this chapter, it appears that, nowadays, English authorities tend to use extreme pornography law, rather than obscenity law, to regulate Internet pornography. This means consenting adult Internet users and pornographers are allowed freedom to express and access most types of pornography, except those that fall within the scope of extreme pornography. This change is arguably a welcome approach with regard to the regulation of pornography from the perspective of freedom of expression suggested in Chapter 3. Nonetheless, extreme pornography law has some aspects which may negatively affect freedom of expression. As already pointed out, the 'realistic looking' and the 'grossly offensive, disgusting, and obscene' criteria make the extreme pornography test unnecessarily vague and overly wide.

Third, the UK's non-state regulatory model of Internet pornography is an interesting one. Moreover, it is in line with the conceptual framework of Chapter 3 to a great extent, since it limits the governmental interference with Internet content regulation, and focuses on the private sector (the IT industry and Internet users) to play a leading role of regulator. The IWF can be seen as an interesting self-regulatory model. However, the main criticisms of IWF's regulatory model is that the IWF lacks transparency, legitimacy to judge legality of any websites, and is not accountable to the public.

³⁶³ *Belfast City Council v. Miss Behavin' Ltd* (2007) UKHL 19.

³⁶⁴ It is interesting to note that the criterion 'morally corruption' of the OPA has noticeably become more relaxed. This can be seen in the *Peacock* case examined above.

As far as the rating and filtering system in the UK is concerned, it can be said that the system is consistent with the conceptual framework suggested in Chapter 3 in the sense that it allows adult Internet users to access pornographic websites, whilst preventing young Internet users from gaining access. However, rating and filtering systems have certain drawbacks. There are not many pornographic websites that have ICRA labels. Furthermore, as the ICRA rating scheme is compatible only with Content Advisor of IE, the users of other browsers do not benefit from it. Most importantly, the ICRA labelling generator is now defunct. In addition, the only commercial filtering software available at present, such as Net Nanny, CYBERSitter, and Cyber Patrol, is imperfect and could lead to over-blocking. Lastly, if filtering software is not installed on individual computers, the aim of protecting minors from harmful content cannot be achieved.

In Chapter 7, the above analysis will be revisited together with the discussions in Chapter 4 and Chapter 6, with the intention of constructing a coherent regulatory framework that might be considered for adoption in Thailand.

Chapter 6: Freedom of Expression and the Regulation of Internet Pornography in Thailand

Introduction

This thesis argued in Chapter 3 that the regulatory framework for Internet pornography within the conceptual framework of freedom of expression should give importance to the following issues. First, pornography should be treated as a form of expression. Second, there are two public interests that have enough weight to justify the regulation of pornographic expression. Physical harm to pornographic performers could justify the prohibition of pornography which involves the use of actual violence in the production. The protection of minors could be grounds for restricting the availability and accessibility of Internet pornography. Lastly, the regulatory measures should take into account a proper balance between the aforementioned public interests and the right to freedom of expression for consenting adults.

This chapter examines the current Thai regulatory approach to Internet pornography – one of the core issues of this thesis – within the conceptual framework stated above. It aims to evaluate how far the Thai regulatory approach is in line with the conceptual framework.

Importantly, it should be noted that so far there has not been any study on the regulation of pornography from the perspective of freedom of expression in Thailand. Furthermore, some significant information, e.g. the opinions of the relevant authorities and the information pertinent to the mechanism of Internet censorship in Thailand, is not publicly available or documented. To obtain such important information, therefore, the author of this thesis had conducted semi-structured interviews with public and private organisations involved in the regulation of Internet pornography in Thailand.¹ The empirical findings from the interviews are used to support the documentary research of this chapter. The empirical research of this chapter is a part of the originality of this thesis.

The chapter is structured as follows: Section 6.1 examines Thailand's commitment to guaranteeing the right to freedom of expression under international human rights documents and the present constitution (the Thai Constitution 2007). Section 6.2 discusses the Thai obscenity standard. Section 6.3 explores Thai obscenity laws. Section 6.4 investigates the Internet censorship in Thailand. Section 6.5 examines hotline and filtering systems in Thailand. Section 6.6 provides a critical analysis of the rationales on which the Thai

¹ See Section 6.7.

government relies for restricting and suppressing pornographic expression on the Internet. Lastly, Section 6.7 discusses the findings concerning the perspectives of the relevant law enforcement agencies and NGOs on the regulation of pornography and freedom of expression. It should be noted that the official designations of the individuals have been removed to ensure the anonymity of the respondents. The respondents are as follows:

Respondents	Departments	Positions	Categories
1. Court 1	Central Criminal Court	Judge 1	Public Sector
2. Court 2	Burirum Provincial Court	Judge 2	Public Sector
3. Court 3	Northern Bangkok District Court	Judge 3	Public Sector
4. Public Prosecution Service	Criminal Division 3, Office of Attorney General	Public Prosecutor	Public Sector
5. Royal Thai Police	Technology Crime Suppression Division (TCSO)	Officer	Public Sector
6. Ministry of Information and Communication Technology (MICT) 1	Information Technology Supervision Office (ITSO)	Officer 1	Public Sector
7. MICT 2	ITSO	Officer 2	Public Sector
8. MICT 3	ITSO	Officer 3	Public Sector
9. Minister of Culture	Culture Surveillance Group (CSG)	Officer	Public Sector
10. TOT (ISP)	International Gateway Centre	Representative	Private Sector (ISP)
11. Family Network Foundation (FNF)	Media Surveillance and Creativity Network (MSCN)	Representative	Private Sector - NGO (Internet Hotline)
12. The Mirror Foundation	IT Watch (Hotline)	Representative	Private Sector - NGO (Internet Hotline)
13. Internet Foundation for the Development of Thailand (IFDT)	Thai Hotline	Representative	Private Sector - NGO (Internet Hotline)
14. Thai Netizen	Thai Netizen	Representative	Private Sector (Pro- Freedom of Expression NGO)
15. Freedom Against Censorship Thailand (FACT)	FACT	Representative	Private Sector (Pro- Freedom of Expression NGO)

Table 2 - Profiles of Interview Respondents

The empirical findings from the interviews will be discussed in Section 6.7. However, information from the interviews is also used in other sections where it is relevant to the discussion.

6.1 The Protection of Freedom of Expression in Thailand

This section highlights that Thailand has a commitment to the protection of the right to freedom of expression in accordance with two principal international human rights instruments, namely the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). However, these two international human rights instruments do not have judicial mechanisms to receive and consider the complaints concerning the violation of freedom of expression occurring in Thailand. At national level, the Thai Constitutional Court has judicial power to try freedom of expression cases, and its decisions legally bind those Thai authorities that allegedly breach the right to freedom of expression. Nonetheless, as will be discussed later, the Thai Constitutional Court has not yet expressed its position on pornography. As a result, at present, the extent to which pornographic expression is entitled to constitutional protection remains uncertain.

6.1.1 International Obligation

When the UDHR was adopted by the UN General Assembly in 1948, Thailand (Siam) was among the first 48 countries to endorse this landmark international human rights document.² This means that Thailand acknowledges, and thus is presumably obliged to, the principles of the human rights protection set forth therein – including the right to freedom of expression, which is enshrined in Art.19. However, as the legal status of the UDHR is merely a set of international standards on human rights,³ it has no official legally binding effect on Thailand.⁴

Thailand ratified the ICCPR in 1996.⁵ Art. 19 of the ICCPR requires Thailand – as a contracting state – to protect the right to freedom of expression.⁶ By virtue of Art. 40 of the ICCPR, Thailand – like the UK – has a legal obligation to submit reports with regard to the

²*Ministry of Foreign Affairs (Thailand)*

http://www.mfa.go.th/humanrights/index.php?option=com_content&view=article&id=52%3Ashort-eng-version&catid=25%3Athe-project&Itemid=64, visited 15th April 2011.

³ Lauterpacht, H., 'The Universal Declaration of Human Rights' (1948) *British Year Book of International Law*, pp.354-381, 356-365.

⁴ For a general discussion about the status of the UDHR see Hannum, H., 'The Status of Universal Declaration of Human Rights in National and International Law' (1995-1996) *Georgia Journal of International and Comparative Law*, 25(1&2), pp.287-397.

⁵ *Office of the High Commission for Human Rights*, <http://www2.ohchr.org/english/law/ccpr-ratify.htm>, visited 15th April 2011.

⁶ However, the right to freedom of expression under Art.19 of the ICCPR is not absolute. Art.19 (3) permits contracting states to restrict this right provided that (1) the restriction has a legal basis and (2) its implementation is necessary as to respect the rights and reputation of others, and/or protect national security, public order, public health and morals.

measures that Thailand has taken to give effect to the ICCPR's guaranteed rights to the UN Human Rights Committee⁷ on a regular basis.⁸ However, like the UK, Thailand has not yet signed the First Optional Protocol of the ICCPR.⁹ As a result, although the Committee can monitor how Thailand protects the guaranteed rights through consideration of the reports, it does not have judicial power to receive and examine individuals' complaints with regard to the alleged violations of rights guaranteed by the ICCPR, including the right to freedom of expression.¹⁰ At present, Thailand does not recognise the jurisdiction of any international human rights judicial bodies. Therefore, individuals whose right to freedom of expression is violated by a Thai authority cannot file their complaints beyond national level.¹¹

6.1.2 The Protection of Freedom of Expression at National Level

Part III (Sections 32-69) of the Thai Constitution 2007¹² serves as the Bill of Rights, guaranteeing the human rights and liberties of people in Thailand. The right to freedom of expression is guaranteed by Section 45 of the 2007 Constitution. It states:

A person shall enjoy the liberty to express his or her opinion, make speeches, write, print, [publicise], and make expression by other means.

The restriction on liberty under paragraph one shall not be imposed except by virtue of the law specially enacted for the purpose of maintaining the security of State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other persons, maintaining public order or good morals or preventing or halting deterioration of the mind or health of the public.¹³

The first paragraph of Section 45 sets forth how the right to freedom of expression is protected within the framework of the 2007 Constitution. In essence, it states that all

⁷ Office of the High Commission for Human Rights, <http://www2.ohchr.org/english/bodies/hrc/>, visited 15th April 2011.

⁸ For more information on the obligation to submit reports under Art.40 of the ICCPR, see Section 5.1.1.

⁹ Article 19, *Freedom of Expression and the Media in Thailand* (2005), www.article19.org/pdfs/publications/thailand-baseline-study.pdf, visited 15th April 2011, p.25, fn.28.

¹⁰ Art.1 of the First Optional Protocol to the ICCPR.

¹¹ By contrast, the European Convention on Human Rights requires the UK to recognise the jurisdiction of the European Court of Human Rights (ECtHR). Therefore, the ECtHR has judicial power to receive and consider a complaint alleging a violation of the right to freedom of expression brought by an individual in the UK. See Arts. 34 and 46 of the ECHR.

¹² For an account of the Thai Constitution 2007, see for example Traimas, C., and Hoerth, J., 'Thailand : Another New Constitution as a Way Out of the Vicious Cycle' in Hill, C., and Menzel, J. (eds), *Constitutionalism in Southeast Asia: Volume 2 Reports on National Constitutions* (Konrad-Adenauer-Stiftung, Singapore, 2008), http://www.kas.de/wf/doc/kas_21147-1522-2-30.pdf?101118104305, visited 10th October 2011, pp.314-325; Muntarbhorn, V., 'Deconstructing Thailand's (New) Eighteenth Constitution' (2009) *Thailand Journal of Law and Policy*, 12(1), <http://www.thailawforum.com/articles/Thailand-Eighteenth-Constitution.html>, visited 10th October 2011.

¹³ Official translation is available at http://english.constitutionalcourt.or.th/index.php?option=com_docman&task=doc_download&gid=200&Itemid, visited 18th April 2011.

individuals are entitled to the right to freedom of expression. According to this Section, the conventional forms of expression, i.e. speech, writing, printing and publication, are within the scope of constitutional protection. Regarding 'the expression made by other means' the drafters of the 2007 Constitution have expressed their opinions regarding these matters in an important document entitled *The Intents of the Constitution of the Kingdom of Thailand B.E. 2550*. It should be noted that this document does not have a legally binding effect, but has strong influence on the judges of the Thai Constitutional Courts.¹⁴ According to the drafters, the communicative ability is the essence of expression; hence, whatever is capable of communicating a message, and also making the recipient understand the message contained therein, should be considered as an expression.¹⁵ As exemplified by the drafters; films, pictures, photographs and electronic media (e.g. the Internet, websites or electronic bulletin boards) are within the meaning of 'expression made by other means'.¹⁶ In the most recent landmark case regarding freedom of expression, *Judgement No.30/2555 (2012)*, the Thai Constitutional Court has made it clear that all materials and activities which are capable of conveying information, ideas/opinions are considered to be 'forms of expression' within the meaning of Section 45 of the Thai Constitution 2007.¹⁷ Regarding the content, as the drafters suggest, all types of content are within the scope of Section 45, provided that they are not contrary to the public interests listed in the second paragraph of Section 45, or violate the rights and freedom of others.¹⁸ The Thai Constitutional Court has confirmed this notion in *Judgement No.30/2555*, holding that Section 45 allows all kinds of issues to be expressed, provided that such issue was not prohibited by the second paragraph of Section 45.¹⁹

The protection of the right to free speech under the 2007 Constitution is not absolute. The second paragraph of Section 45 permits the Thai government to restrain freedom of expression on two conditions. The first one is that the limitation is based on a particular law; the second is that the law is specifically enacted to serve one of the following public interests: (1) the maintenance of state security; (2) the protection of rights, freedoms, dignity,

¹⁴ *The Intents of the Constitutional of the Kingdom of Thailand B.E. 2550* is a very important document which shows the official perspectives of the 2007 Constitution drafters on how provisions in the 2550 Constitution could possibly be interpreted. Although it does not have a direct legally binding effect, the judges of the Thai Constitutional Court have to take into account this document when interpreting constitutional provisions or considering constitution-related cases.

¹⁵ Working Committee, p.38.

¹⁶ Working Committee, p.38.

¹⁷ *The Thai Constitutional Court Judgement No.30/2555*, p.5. For more information about the case see Section 6.1.4.

¹⁸ Section 28 of the 2007 Constitution prohibits the exercising of rights in violation of the rights of others.

¹⁹ *The Thai Constitutional Court Judgement No.30/2555*, p.6.

reputation, family or privacy rights of others; (3) the maintenance of public order or morals; and (4) the deterrence of degeneration of the mind or health of the public.

Nevertheless, the restriction imposed on speech must be consistent with the ‘proportionality’ condition as stipulated in Section 29 of the 2007 Constitution. It reads:

The restriction of such rights and liberties as recognised by the Constitution shall not be imposed on a person except by virtue of provisions of the law specifically enacted for the purpose determined by this Constitution and to the extent of necessity and provided that it shall not affect the essential substances of such rights and liberties.

According to the drafters of the 2007 Constitution, Section 29 aims to prevent the Thai authorities from excessively limiting constitutional rights, which may result in the complete deprivation of such rights.²⁰ As far as the right to freedom of expression is concerned, the Thai authorities are allowed to restrict the right to freedom of expression only if it is necessary to achieve the legitimate goals stated in the second paragraph of Section 45. More importantly, the restriction should be proportional to such goals, and should not eventually cause the stifling effect on lawful expression (‘chilling effect’).

6.1.3 The Thai Constitutional Court as the Protector of Constitutional Rights

Under the current constitutional framework, the Thai Constitutional Court is the highest judicial authority that can adjudicate cases concerning alleged violations of the constitutional rights. The first paragraph of Section 212 of the 2007 Constitution introduces the right to individual petition, allowing – for the first time – a (natural or legal) person, whose constitutional right is violated by a particular piece of legislation, to file a petition directly to the Thai Constitutional Court. Nonetheless, the right to individual petition is subject to the second paragraph of Section 212. This requires the person to bring his/her case to a court,²¹ the Ombudsman,²² and the National Human Rights Commission²³ in the first instance.

In the case that all of these three authorities do not refer the case to the Thai Constitutional Court on the grounds that, in their opinions, the case does not involve constitutional rights, then the person will be entitled to lodge a petition directly with the Thai Constitutional

²⁰ Working Committee, p.21.

²¹ Section 211 of the 2007 Constitution empowers the court to refer the case to the Thai Constitutional Court, if it is of the opinion that, or a party to the case raises an objection that, the case has an issue concerning constitutionality of the law.

²² Section 245(1) of the 2007 Constitution.

²³ Section 257(2) of the 2007 Constitution.

Court.²⁴ When the Thai Constitutional Court finds that the law in question is unconstitutional, by virtue of Section 6 of the 2007 Constitution, it will rule that the law is no longer enforceable.²⁵ Its ruling is absolute, and legally binds all administrative, legislative and judicial agencies,²⁶ including the Thai Constitutional Court itself.²⁷

6.1.4 Pornography and Freedom of Expression in Thailand

Regarding the international human rights instruments, as pointed out before, the UDHR does not have a legally binding effect in Thailand and the UN Human Rights Committee (ICCPR)²⁸ does not have judicial power to hear cases involving the violation of freedom of expression by the Thai authorities. Considering this, although pornography could be considered as a form of expression within the meaning of the UDHR and the ICCPR, these two instruments seem unable to compel the Thai authorities to guarantee pornographic expression.

As regards to constitutional protection of the right to freedom of expression, before October, 2012, the legal status of sexually explicit expression within the constitutional framework was unclear. This is mainly because only two cases relating to freedom of expression had been brought before the Thai Constitutional Court, and the Thai Constitutional Court did not use these opportunities to lay down any useful principles that could be applied to expression in general and sexually explicit expression in particular.²⁹ In the recent *Judgement*

²⁴ *The Thai Constitutional Court Judgement No.29/2551.*

²⁵ There have been only two cases in which the Thai Constitutional Court held that the laws in question violated constitutional rights. See *The Thai Constitutional Court Judgements No.21/2546* (right to equality) and *No.12/2552* (freedom of occupation). It should be noted that the first case was brought before the Thai Constitutional Court by the Ombudsman and the second case by Saraburi Provincial Court.

²⁶ Section 27 of the 2007 Constitution.

²⁷ Section 216 of the 2007 Constitution.

²⁸ It is important to note that, in the case of morally sensitive expression, the Committee may grant a 'margin of discretion' to the local authorities. See *Hertzberg and Others v. Finland*, Communication No.61/1979.

²⁹ In the first case, *Judgement No.16-17/2549*, the focus was on the allegation that Section 48 of the Printing Act B.E.2484 (1941) – which held an editor liable for the content written by a pseudonymous author – limited the right of the editor of a newspaper to freedom of expression. The Constitutional Court concluded that, because the editor was in charge of considering and permitting content to be published, he/she had to be responsible for the content (which might cause damage to other persons). Therefore, the provision in question was necessary since it protected the rights of others, and thus did not violate the right to freedom of expression. In the second case, *Judgement No.4-5/2552*, the main issue was whether Section 254 of the Civil Procedure Code, which empowers a Civil Court to issue an injunction against libellous speech, was in breach of the right to freedom of expression. The Constitutional Court ruled that the provision at issue was necessary to prevent a party from causing further damage to the other party during the trial. Thus, because it aimed to safeguard the rights of others, it did not breach the constitutional right to freedom of expression. The judgements of these two cases concentrate on the particular facts of each case, without elaborating on the legal principle on the scope of Section 45 of the Thai Constitution 2007, which can be applied to expression in general.

No.30/2555 handed down on October 24, 2012, the Thai Constitutional Court laid down general principles which can be applicable to sexually explicit expression. In this landmark case the plaintiff is a director of a film *Insect in the Backyard*. In 2010, the Rating Committee,³⁰ by virtue of Sections 26 (7) and 29 of the Films and Videos Act B.E.2551 (2008), banned the film on the grounds that *inter alia* it contained sexually explicit scenes (explicit depictions of genitals and sexual intercourse).³¹ As a result, the director of the film filed his case to the Thai Constitutional Court in 2011, claiming that the two provisions of the Films and Videos Act violated his right to freedom of expression which was protected by Section 45 of the Thai Constitution.³² This is the first case ever that has the right to freedom of sexually explicit expression as the core issue. The Thai Constitutional Court held that the film (which had sexually explicit scenes) at issue was a form of expression as it imparted opinions of the director; and the production of the film was the way in which the director exercised his right to freedom of expression guaranteed by Section 45 of the Thai Constitution 2007.³³

The ruling of the Thai Constitutional Court in this case appears to suggest that the sexually explicit scenes are considered to be a form of expression. However, this does not necessarily mean that this jurisprudence will also be applicable to pornography. It could be argued that pornography is different from the sexually explicit scenes in the film. Pornography is produced principally and purposefully to arouse viewers sexually; in contrast, the sexually explicit scenes in questions were not produced for sexual arousal. They formed an integral part of the narration of the film. As the Thai Constitutional Court regarded the whole film as a form of expression, it is not surprising that the sexually explicit scenes therein were also considered to be expression.

Moreover, even though the Thai Constitutional Court implicitly recognised sexually explicit scenes as expression, it held that sexually explicit scenes could be restricted on the ground of the protection of public morality. The Thai Constitutional Court pointed out that Sections

³⁰ *The Nation*, 23rd December 2010, <http://www.nationmultimedia.com/2010/12/23/national/Film-board-bans-Insects-in-the-Backyard-30145028.html>, visited 13th June 2011.

³¹ *Bangkok Post*, 26th November 2012, <http://www.bangkokpost.com/arts-and-culture/film/208221/insect-in-the-backyard>, visited 13th June 2011; *Mail Online*, 24 December 2010, <http://www.dailymail.co.uk/news/article-1341458/Thailand-bans-film-transgender-father-entitled-Insects-Backyard.html>, visited 14th January 2013. Apart from scenes which show genitals and sexual intercourse, there are other morally controversial scenes in this film – such as a scene of a son attempting to stab his father with a knife, and a scene of young prostitutes in student uniforms. For the order to ban the showing of *Insect in the Backyard* see The Rating Committee Resolution No.11/2553; Ministry of Culture Order No. ๓ 0204.1/3680.

³² *The Nation*, 13th May 2011, <http://www.nationmultimedia.com/home/Insects-in-the-Backyard-director-plans-to-go-to-Co-30155362.html>, visited 13th June 2011; *Prachatai*, 14th February 2011, <http://www.prachatai.com/journal/2011/02/33109>, visited 13th June 2011.

³³ *The Thai Constitutional Court Judgement No.30/2555*, p.5.

26 (7) and 29 of the Films and Videos Act were enacted to ensure that the exercise of the right to freedom of expression would not go beyond the proper boundary, which could undermine public morality.³⁴ By this reason, the two provisions of the Films and Videos Act were constitutional, as they aimed to protect public morality of Thai society. Furthermore, these two provisions did not forbid the director from producing other films, hence they were not contrary to Section 29 of the Thai Constitution which prohibited the government from imposing restrictions which could affect the essential substance of the right to freedom of expression.³⁵

Regarding pornography, the Thai Constitutional Court has not yet had a chance to consider a case involving pornography (i.e. the material which is produced principally for provoking viewers sexually). Thus, it could be said that, unlike sexually explicit scenes in a film, the status of pornography under the 2007 Constitution remains largely unclear. Moreover, given the position of the Thai Constitutional Court in *Judgement No.30/2555*, it is likely that the Thai Constitutional Court will hold that pornography can be legitimately restricted by the Thai authority on the grounds of safeguarding public morality. These issues remain to be seen.

6.2 The Obscenity Standard of the Deka Court (the Supreme Court of Thailand)

In Thailand, obscenity is not defined in any laws. It is the Thai Deka Court (or the Thai Supreme Court) that laid down the standard to determine obscenity.³⁶ Although the authorities that are involved in the regulation of Internet pornography have their own obscenity standards, those standards are based primarily on, and in line with, the Deka Court's obscenity test. Therefore, it is important to explore the Deka Court's obscenity standard first. The obscenity standards of other regulatory authorities will be examined later in Section 6.7.

The Deka Court's obscenity standard was established in *Deka Judgement No.978/2492 (1949)* – the first ever obscenity case brought before the Deka Court.³⁷ This obscenity standard has become a significant yardstick by which the Thai courts have determined

³⁴ Ibid., p.6.

³⁵ Ibid.,

³⁶ It should be noted that the Thai Constitutional Court has not had an opportunity to trial a case relating to pornographic expression yet. It has not laid down its own obscenity test.

³⁷ The defendant of this case was prosecuted under Section 240 of the Criminal Code of Siam R.S.127 (1908) and Section 3 of the Suppression of Obscene Material Distribution and Trading Act B.E.2471 (1928). The former is replaced by Section 287 of the current Criminal Code and the latter was revoked in 2003.

subsequent obscenity cases for over six decades. Moreover, according to information from the judges who gave interviews for this thesis, there has not been an attempt by any court to establish a new obscenity standard thus far.³⁸

The Deka Court's obscenity test comprises of three main criteria: (1) whether the material has a sexually explicit depiction; (2) whether the sexually explicit depiction is sexually provocative and repulsive; and (3) whether the material lacks artistic/aesthetic or educational values.³⁹ If the answers to all three questions are in the affirmative, the material will be found obscene.

Importantly, as emphasised by the Deka Court in *Deka Judgement No.978/2492(1949)*, the three criteria must be considered from the perspective of a 'reasonable person' who is not strictly conservative, but can accept changes in contemporary (Thai) society – in which the wearing of shorts, sleeveless shirts or swimming suits on a beach, the depictions of hugs and kisses in movies, and the wearing of a swimming suit in a beauty pageant are regarded as common practices.⁴⁰ Narong Jaiharn – a criminal law academic – comments that the Deka Court laid down this principle because the Deka Court wants obscenity to be judged by a 'lay person', not by an expert in any field, e.g. an artist or a doctor, who may have different perceptions towards obscenity.⁴¹ However, as Thailand does not have a jury system, in practice, the person who decides whether the material is obscene (a question of fact) is a trial judge.⁴² This means that Deka Court's obscenity standard requiring the judge to decide obscenity as if he/she is a lay person. However, this requirement does not appear to be meaningful; because, ultimately, the obscenity of material is to be determined from the perspective of a judge, not that of a lay person. Although there is no official evidence that the Thai judges in general are prudish, a judge of a Central Criminal Court – who was interviewed by the author – commented that, normally, a judge would take a relatively restrictive position when dealing with an obscenity case; as a result, a sexually explicit picture, which most Thai people nowadays do not regard as obscene, may be deemed obscene by the judge.⁴³

³⁸ Interviews, the Central Criminal Court on 12th April 2011, Burirum Provincial Court on 14th April 2011, and the Northern Bangkok District Court on 26th April 2011.

³⁹ The Deka Court did not take into account the right to freedom of expression (which was guaranteed by Section 35 of the 1949 Constitution) to formulate its obscenity standard.

⁴⁰ *Deka Judgement No.978/2492*, p.676.

⁴¹ Jaiharn, N., 'The Definition of "Obscenity" in Law' ('ความหมายของ "สิ่งลามก" ในกฎหมาย'), (1988) *Nitisat Journal* (วารสารนิติศาสตร์), 16(2), pp.125-131, 129.

⁴² In England and Wales, the jury is responsible for deciding whether the material is obscene or not. See Section 5.2.1.

⁴³ Interview, the Central Criminal Court on 12th April 2011.

6.2.1 Sexually Explicit Depictions

The first question which a trial judge has to consider in an obscenity case is whether the material at issue has a sexually explicit depiction. The Deka Court ruled in *Deka Judgements Nos.978/2492 (1949)* and *1223/2508 (1965)* that pictures in which women's nipples could be seen, despite the genitals not patently being shown, were sexually explicit. In *Deka Judgements Nos. 3213/2528 (1985), 642/2529 (1986), 3705/2530 (1987), 2136/2531 (1988), 2641/2531 (1988), 3510/2531 (1988), 2128/2533 (1990), 6301/2533 (1990), 7416/2537 (1994), 4578/2539 (1996), 1744/2544 (2001), 1552/2546 (2003) and 2540/2551 (2008)*, the Deka Court found that the photographs and films at issue were sexually explicit because they depicted penises and vaginas. Given to the Deka Court's rulings, it could be concluded that if an image portrays (1) women's nipples and/or (2) male or female genitals, it is deemed sexually explicit.

6.2.2 Sexually Provocative and Repulsive Characteristics

The Deka Court in *Deka Judgement No.978/2492 (1949)* laid down a significant principle that, if the material in question shows naked bodies (of both men and women), or sexual acts in a sexually provocative manner, such material is deemed repulsive and thus obscene. As commented by Jaiharn, the Deka Court's concept of obscenity connects with the idea that sexually explicit depictions that can arouse the viewers sexually are revolting and also against sexual propriety of contemporary Thai society.⁴⁴ The Deka Court in *Deka Judgement No.3510/2531 (1988)* ruled that images which showed naked women touching and fondling their nipples or crotches were deemed sexually provocative and repulsive. In *Deka Judgement Nos.6301/2533 (1990)*, the Deka Court was of the opinion that images in which women with bare breasts spread their legs wide to expose their genitals were considered to be sexually arousing and revolting. Thus, these are obscene. Furthermore, in *Deka Judgements Nos.3213/2528 (1985), 642/2529 (1986), 2136/2531 (1988), 2128/2533 (1990), 7416/2537 (1994), 4578/2539 (1996), 1744/2544 (2001), 1552/2546 (2003) and 2540/2551 (2008)*, the Deka Court held that materials which depicted sexual intercourse in an explicit manner were sexually arousing, repulsive and hence obscene. In addition, in *Deka Judgement No.2641/2531 (1988)*, even the depiction of sexual foreplay (without sexual intercourse) was sexually provocative and therefore obscene. In contrast, if images do not present naked bodies or sexual activities in a sexually arousing manner, they are considered to be non-obscene. For example, in *Deka Judgements Nos.978/2492 (1949)* and *1223/2508 (1965)*, the pictures at issue showed naked women simply standing and lying

⁴⁴ Jaiharn, N., *supra*, p.128. The attitude that sexually explicit and provocative materials are immoral has a historical reason. For further discussion see Section 6.5.1.

down on the floor without touching or fondling their nipples or genital areas or posing in a sexually provocative way; therefore, the Deka Court held that the pictures were not repulsive, and not obscene. The 'sexually arousing and repulsive characteristics' criterion appears to be the crucial factor for judging obscenity; and, as will be shown below, correlates with the evaluation of artistic/aesthetic value of the image.

6.2.3 Artistic/Aesthetic Value

Artistic/aesthetic value is directly related to the 'sexually arousing or repulsive characteristics' criterion. If the material is deemed sexually arousing and repugnant, the Deka Court would typically rule that the material in question lacks artistic/aesthetic value. In the majority of obscenity cases, the Deka Court relied on this reasoning as an additional element to confirm that an obscene image has no value; thus can be prohibited by the obscenity law.⁴⁵ On the contrary, if the Deka Court satisfies that the image is not sexually provocative, it would usually hold that such image has artistic/aesthetic value. To date, there have been only two cases in which the images were deemed to have artistic/aesthetic values. In the first case, *Deka Judgement No.978/2492 (1949)*, the Deka Court was of the opinion that the image of a naked woman lying down on a beach showed the beauty of a healthy body, and did not depict the naked body in a sexually arousing or repulsive manner. Thus, it had an aesthetic value. The Deka Court in *Deka Judgement No.1223/2508 (1965)* similarly held that the pictures of a naked woman standing showed the curvy body shape in an artistic manner, not in a sexually provocative way. Therefore, the pictures had artistic value and were not obscene.

6.2.4 The Deka Court's Obscenity Standard and Implication for Freedom of Expression

As discussed above, the Deka Court's obscenity standard regards the visual impact of the material, i.e. sexual explicitness and arousal, as the decisive factor when determining obscenity, and gives almost no consideration to the ideas about sexuality and gender relations (or the messages)⁴⁶ that the pornographic materials may communicate to viewers.⁴⁷ In this regard, it can be said that the Deka Court's obscenity test adopts the concept of

⁴⁵ *Deka Judgements Nos.3213/2528 (1985), 642/2529 (1986), 3705/2530 (1987), 2136/2531 (1988), 2641/2531 (1988), 3510/2531 (1988), 2128/2533 (1990), 6301/2533 (1990), 7416/2537 (1994), 4578/2539 (1996), 1744/2544 (2001), 1552/2546 (2003) and 2540/2551 (2008).*

⁴⁶ See Section 3.2.2.

⁴⁷ In comparison, the English obscenity test gives primary importance to the message that pornographic material communicates to the viewers. Therefore, the decisive factor to judge obscenity is not sexual depiction (as is the case with the Thai obscenity test), but the effects of the ideas/messages which pornography conveys to the viewers. See Section 5.2.1.

inherent, or *per se*, obscenity. In other words, the obscenity of the material is to be decided by what it depicts alone without considering the message which it intends to communicate. This approach has significant implications for freedom of pornographic expression.

First, it ignores the attitudinal ideas conveyed by pornography. As already argued in Chapter 3, pornography can be seen as a form of expression which communicates two types of messages/ideas.⁴⁸ The first type is information pertinent to sex and sexuality, e.g. naked bodies, breasts, genitals, various forms of sexual positions, or sexual activities. The second type is attitudinal ideas towards sex and gender relations; for example, the idea that sex is amusing and exciting; that sex – especially that portrayed in dominance and submission pornography – is about gender domination (men dominate women or *vice versa*); that sexual pleasure may derive from pain (sadoomasochism pornography); or people deserve sexual liberty and sex should not be confined within the sexual mores or the frame of sexual mores (pornography that shows orgies, swinging or one-night stand sex).⁴⁹ By focusing only on the visual impact of sexual explicitness, the trial judge would limit himself/herself to only looking at the first type of message i.e. sexually explicit images, but would not see the second type of message, i.e. the attitudinal ideas of sex and gender relations, which may be hidden beneath the superficial layer of sexually explicit depictions. Given this, it can be argued that the communicative value of pornography is downplayed, as the ideas about sexuality and gender relations that pornographic images impart to the viewers are largely overlooked.

Second, ‘the sexual arousing effect’ criterion of the Deka Court’s obscenity standard is subjective in nature. Sexual arousal caused by a sexually explicit material varies from person to person. A sexually explicit image may sexually arouse some viewers, but may not have the same effect on others. Given this, a sexually explicit image, which is deemed sexually arousing by a judge in one case, may not be considered as a sexually provocative material by a different judge in another case. This means that an identical sexually explicit image can be judged to be either obscene or non-obscene, depending mainly on the opinion of the trial judge. This subjective criteria of the Deka Court’s obscenity standard makes the Thai obscenity laws lack clarity and precision. This, in turn, renders the level of freedom to sexually explicit expression which Thai people can enjoy uncertain.

Third, the Thai obscenity standard appears to overlook the fact that pornography may have different effects on different groups of viewers. Whilst it is understandable that pornography

⁴⁸ See Section 3.2.2.

⁴⁹ This type of message can be seen as a political message which challenges the dominating sexual norms in a particular society. See Section 3.3.3.

may have negative impacts on young people who are in the early stages of developing cognition about sexuality and sexual morality, it may not have detrimental effects on competent adults whose understanding of sexuality and sexual morality have arguably been settled (and their choices to view pornography are a part of their sexual self-fulfilment).⁵⁰ Under the Deka Court's obscenity standard, almost all pornographic materials are prohibited. This 'blanket restriction' has a disproportionate impact on adults as it rejects adults' legitimate access to pornographic expression. Thus, it could be argued that the Thai obscenity laws, which rely on Deka Court's obscenity test, limit adults to read or view only materials that are suitable for young children.⁵¹ In this regard, the Thai obscenity laws are blunt and clumsy to protect children, and strike at adults' ability to exercise their right to freedom of pornographic expression.

Moreover, the Deka Court's obscenity standard is considerably broad. All pornographic materials – which are defined as sexually explicit materials that are produced with an intention to arouse viewers sexually⁵² – are, in effect, deemed obscene, and thus illegal. In other words, the Thai obscenity standard does not draw a line between legal and illegal types of pornography.⁵³ The distinction between legal and illegal types of pornography is important, as it does not entirely prohibit adults from exercising the right to freedom of sexually explicit expression. Adults can still publish and view legal type of pornography.

Furthermore, the Thai obscenity standard does not recognise that pornography has many different sub-categories, ranging from materials with non-violent/consensual sexual activities to those which portray sexual violence or coercive sexual acts.⁵⁴ It can be argued that different types of pornography may need different levels of restriction. Non-violent pornography may need only a regulatory mechanism that can keep it out of the reach and sight of minors, whilst adults who want to view it should be permitted to enjoy their

⁵⁰ See Section 3.3.4.2.

⁵¹ See in comparison with the English obscenity test, Section 5.2.3 below, which – in effect – draws a line, allowing adults to view sexually explicit materials whilst preventing children from accessing such material; and *ACLU v. Reno II* (1997) US 844, the US Supreme court case in which the Child Online Protection Act (COPA) was struck down as it violated the First Amendment on the grounds that it restricted the right to free speech of adult viewers (despite the name being about protecting children).

⁵² See Chapter 2.

⁵³ In comparison, under the English laws relating to pornography, pornography is divided into two types. The first one is legal pornography; the second type is illegal pornography, which is criminalised according to obscenity and extreme pornography laws. See Section 5.2.

⁵⁴ In the UK, most types of pornography are allowed. At present, the prosecutions under obscenity laws are reduced. The authorities tend to rely on the extreme pornography law (Section 63 of the Criminal Justice and Immigration Act 2008) to restrict only very few types of pornography which have realistic and explicit depictions of serious violence, bestiality and necrophilia. This would mean that the UK authorities are trying to narrow down the scope of illegal pornography and to prohibit only a few categories of pornography. See Section 5.3.3.

freedom of pornographic expression. Pornography that involves the use of real sexual violence should be made illegal and may need the strictest regulation, as it is produced at a cost of serious physical harm to pornographic performers.⁵⁵ However, the Deka Court's obscenity standard treats all sub-categories of pornography as the same. (However, it should be noted that the Thai government is now proposing to the Thai Parliament the 'Prevention and Suppression of Temptations to Dangerous Behaviour Bill' ('PSTDB Bill'). This Bill aims to suppress specific types of pornography. This issue will be discussed in Section 6.3.2.)

Lastly, the Deka Court's obscenity standard does not take into account freedom of expression. Of all cases relating to pornography that the Thai Deka Court has considered (as mentioned in Sections 6.2.1-6.2.3), there was not a single case in which the Deka Court considered or even mentioned freedom of expression. It can be said that the Deka Court has not yet recognised pornography as a form of expression.

6.3 Legal Regulation of Internet Pornography in Thailand

There are two methods of legal regulation of Internet pornography in Thailand. The first one is the enforcement of the obscenity laws by law enforcement authorities (the police, state prosecutors and courts); the second is the implementation of Internet censorship by the Ministry of Information and Communication Technology (the MICT).

6.3.1 The Enforcement of Obscenity Laws

At present, obscene materials on the Internet (in this context, 'obscene material' means pornographic materials that are deemed obscene by the Deka Court's standard) are primarily regulated by Section 287 of the Criminal Code B.E.2499 (1956) and Sections 14 (4) and (5), 15 and 20 of the Computer-Related Crime Act B.E.2550 (2007) (Computer Crime Act 2007). It is noteworthy that the PSTDB Bill, which proposes to criminalise specific types of pornography such as violent, bestial, or necrophilia pornography, is now awaiting a parliamentary consideration. In the future, if it is passed, it will become an additional law in the regulation of pornography. The PSTDB Bill will be examined after the examination of Section 287 of the Criminal Code and the Computer Crime Act 2007.

⁵⁵ See Section 3.5.4.1.

6.3.1.1 Section 287 of the Criminal Code

Section 287 of the Criminal Code is a provision which is generally applicable to obscene materials in any medium. It states:

Whoever:

(1) for the purpose of trade or by trade, for public distribution or exhibition, makes, produces, possesses, brings or causes to be brought into the Kingdom, sends or causes to be taken away, or circulates by any means whatever, any document, drawing, print, painting, printed matter, picture, poster, symbol, photograph, cinematograph film, noise tape, picture tape or any other thing which is obscene;

(2) carries on trade, or takes part or participates in trade concerning the aforesaid obscene material or thing, or distributes or exhibits to the public, or hires out such material or thing;

(3) in order to assist in the circulation or trading of the aforesaid obscene material or thing, propagates or spreads the news by any means whatever that there is a person committing the act which is an offence according to this Section, or propagates or spreads the news that the aforesaid obscene material or thing may be obtained from any person or by any means, shall be punished with imprisonment not exceeding three years or a fine not exceeding six thousand Baht, or both.⁵⁶

In essence, Section 287 criminalises the making, production, possession, importation, exportation and circulation of obscene materials. Importantly, the *actus reus* of this provision must be carried out with the following *mens rea*: (1) for the purpose of trade, meaning that an offender has an intention to make profits from such activities (e.g. production of obscene videos for sale); (2) for public distribution, meaning that the offender intends to give out obscene materials to others; (3) for public exhibition, meaning that the offender intends to show obscene materials to others; or (4) by trade, meaning that the offender intends to use obscene materials as a part of his/her business (e.g. production of an obscene calendar as a promotional item to be given away to customers).⁵⁷ Section 287 (2) prohibits the trading, public distribution and exhibition (whether for gain or not), or rental of obscene materials, whilst simply participating in the aforesaid activities is also punishable. Section 287 (3) also makes it an offence to advertise or spread news with regard to the availability of obscene materials.

Overall, it can be said that Section 287 targets individuals who produce or distribute obscene materials for a commercial purpose, rather than people who produce or possess obscene

⁵⁶ There is no official translation of the Thai Criminal Code available. However, an unofficial translation by [www.thailaws.com](http://thailaws.com) is available at http://thailaws.com/law/t_laws/tlaw50001.pdf, visited 5th August 2011.

⁵⁷ Na Nakorn, K., *Criminal Law: Offences (กฎหมายอาญา: ภาคความผิด)*, (10th ed), (Winyuchon Publication House, Bangkok, 2010), p.466.

materials for private use.⁵⁸ In this regard, Section 287 limits mainly the right to freedom of expression of pornographers (producers and distributors of obscene materials), but not that of viewers of pornography.

6.3.1.2 Computer Crime Act 2007

On 19th July 2007, the Computer Crime Act 2007 came into force to combat criminal acts committed on computer networks or by using computers as a tool – including the dissemination of obscene materials on the Internet.⁵⁹ The Computer Crime Act 2007 has three provisions concerning the regulation of obscene materials on the Internet, namely Sections 14 (4) and (5), 15 and 20.⁶⁰

The main provision which criminalises the dissemination of obscene materials via the Internet is Section 14 (4) and (5). It reads:

Whoever commits the following acts shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding one hundred thousand Baht or both: ...

(4) inputting into a computer system obscene computer data that is accessible to the public;

(5) publishing or forwarding any computer data with the full knowledge that such computer data is under paragraph ... (4)⁶¹

The Computer Crime Act 2007 does not give a definition for the term ‘input’. However, Paiboon Amonpinyokeat – one of the drafters of the Computer Crime Act 2007 – suggests that ‘input’ means an act – by any means – that makes it possible for the illegal computer data to be viewed, read or acknowledged by others.⁶² In the context of Internet pornography, ‘input’ appears to denote uploading obscene materials to the Internet. ‘Computer system’

⁵⁸ The offences under Section 287 of the Thai Criminal Code are similar to the offences of Section 2 of the OPA 1959 and Section 1 (2) of the OPA 1964 of England, which aims to criminalise the production and distribution of obscene materials; however, it does not prohibit individuals who produce or have obscene material for private use. See Section 5.3.1.

⁵⁹ For a historical account of the Computer-Related Crime Act 2007, see generally *National Electronics and Computer Technology Centre*, http://www.nectec.or.th/index.php?option=com_content&view=article&id=79:-2550&catid=40:technology-news&Itemid=165; <http://wiki.nectec.or.th/nectecpedia2/index.php/เว็บไซต์>, visited 5th August 2011.

⁶⁰ Unlike Thailand, England does not have separate legislation to control pornographic materials on the Internet, as the Obscene Publication Act 1959 is applicable to online pornographic materials. See Section 5.3.1.

⁶¹ The official translation of the Computer Crime Act 2007 has not been available yet. An unofficial translation by the Secretariat Office of the Electronic Transactions Commission is available at http://www.dpu.ac.th/upload/compcentre/page/file/crimeact/cc_act_en_unofficial.pdf, visited 5th August 2011.

⁶² Amornpinyokeat, P., *The Explanation for Computer-Related Crime Act 2007* (คำอธิบาย พ.ร.บ. คอมพิวเตอร์ พ.ศ. 2550), (Provision, Bangkok, 2010), p.64.

means 'any device or a group of interconnected or related devices, one or more of which are pursuant to a [programme] or instruction or anything else, which performs the automatic processing of data.'⁶³ In this regard, 'computer system' means not only a stand-alone PC (with operation system software installed), but also computers which are connected to a network or networks, i.e. the Internet or Intranet.⁶⁴ 'Computer data' means 'information, messages and concepts or instruction, a [programme] or anything else in a form suitable for processing in a computer system ...'⁶⁵ In this sense, obscene computer data could mean, for example, video, audio, text, multi-media files or programmes (such as computer games) which are deemed obscene by the Deka Court's standard.⁶⁶

With regard to the *mens rea* of this offence, Section 14 (4) only requires the prosecutor to satisfy the court that the offender acknowledges that the uploaded materials are accessible to the public. It does not require proof that the offender uploads the materials for commercial purposes, as it is the case for Section 287 of the Criminal Code. Thus, it would follow that, once a person uploads obscene materials to the Internet, he/she would be immediately liable for punishment under this offence.

Section 14 (5) prohibits the forwarding of obscene computer data. According to Amonpinyokeat, this would include the forwarding of obscene material through an e-mail between two persons.⁶⁷

The principal aim of Section 14 (4) and (5) is to prevent people from exploiting the Internet as a channel to distribute obscene materials.⁶⁸ In this regard, this provision restricts mainly the right to freedom of expression of pornographers who post or upload obscene materials to the Internet. Internet users can still have access to pornographic websites (especially those hosted on overseas servers), provided that such websites have not been blocked by the MICT.

Under Section 15 of the Computer Crime Act 2007, ISPs are also subject to a criminal offence relating to the distribution of obscene materials. Section 15 provides:

⁶³ Section 3 of the Computer Crime Act 2007.

⁶⁴ Wichichonchai, P., *Explanation for Computer-Related Crime Act 2007* (คำอธิบาย พ.ร.บ. คอมพิวเตอร์ พ.ศ. 2550), http://www.mict.go.th/download/law/38_.pdf, visited 7th August 2011, p.3.

⁶⁵ Section 3 of the Computer Crime Act 2007.

⁶⁶ Wichichonchai, P., p.23.

⁶⁷ Amornpinyokeat, P., p.69.

⁶⁸ The Secretariat Department of the Electronic Transactions Commission, *The Plan for Computer Crime Law* (แนวทางในการจัดทำกฎหมายอาชญากรรมคอมพิวเตอร์), (National Electronics and Computer Centre, Bangkok, 2003), p.33.

Any service provider, who intentionally supports or gives consent to the commission of an offence under Section 14, using a computer system in its control, shall be liable to the same penalty as provided in Section 14.

This provision aims to hold ISPs liable for the third party's dissemination of obscene materials. The *mens rea* of this offence is that the ISP in question must 'intentionally support or [give] consent to the commission of an offence under [Section 14 (4)]'. In reality, to prove the intention of the ISP (offender) in this context is not an easy task for the law enforcement authorities. As there are millions of obscene materials circulated on the Internet, the ISP may contend that it is unaware of the particular obscene material at issue. However, according to Pornpetch Wichitchonchai – the Presiding Justice of the Deka Court and an IT law scholar – the *mens rea* of this offence could be interpreted as follows: that, if the ISP has been informed about the obscene material being circulated in its network and fails to block access to or take down such illegal materials in due time, the ISP could be presumed to have an 'intention' within the meaning of Section 15.⁶⁹ Interestingly, no ISP has been prosecuted under Section 15 thus far. This is because, as a common practice, ISPs are prompt in adhering to the MICT's demand for blocking forbidden websites.

Regarding the power to censor obscene content on the Internet, Section 20 empowers the MICT officials, with the MICT Minister's approval and a competent court order, to block websites which are considered to be obscene. Section 20 reads:

In the case where an offence committed under this Act involves disseminating computer data that could undermine national security as prescribed in the Criminal Code, or is against the public peace or good morals, the competent official, with the Minister's approval, may submit a request with evidence to the competent court for an order to suspend/block the dissemination of such computer data.

The legislative power to Internet censorship under Section 20 is an important issue, as it has the most restrictive effect on the right to freedom of expression of Internet users. This will be discussed in more detail in Section 6.4 below.

As regards jurisdiction, Wichitchonchai comments that Section 5 of the Criminal Code⁷⁰ – which allows a Thai court to exert its jurisdiction over an offence committed outside Thailand, if its effect occurs within Thailand – is also applicable to the Computer Crime Act

⁶⁹ Wichichonchai, P., pp.24-25.

⁷⁰ Section 5 of the Criminal Code: 'Whenever any offence is even partially within the Kingdom, or the consequence of the commission of which, as intended by the offender, occurs within the Kingdom or by the nature of the commission of which the consequence resulting therefrom should occur within the Kingdom, or it could be foreseen that the consequence would occur within the Kingdom, it shall be deemed that the offence is committed within the Kingdom.'

2007, since the Act imposes criminal punishment.⁷¹ This would mean that, although the inputting of the obscene computer data (according to the Thai obscenity standard) is carried out outside Thailand, the inputting of obscene computer data is automatically subject to an offence under Section 14 (4) since such obscene computer data can be accessible from a computer located within Thailand. Therefore, it could be argued that, in principle, Section 14 (4) interferes not only with the right to freedom of expression of people residing within Thailand, but also that of people of foreign countries – who have no connection with Thailand except the fact that what they upload to the Internet can be viewed from a computer in Thailand. However, according to the officer of the Technology Crime Suppression Division (TCSD) of the Royal Thai Police, in practice, the police do not enforce this provision against pornographers who are outside Thailand.⁷² Website-blocking under Section 20 is usually implemented to deal with pornographic websites hosted on overseas servers.⁷³

6.3.1.3 The Enforcement of Section 287 of the Criminal Code and the Pornography-Related Provisions of the Computer Act 2007

Section 287 of the Criminal Code and Section 14 (4) and (5) of the Computer Crime Act 2007 are typically enforced in cases where the wrongdoers are in Thailand.⁷⁴ These provisions aim to deal mainly with the producers and distributors of obscene materials. In other words, they restrict freedom of expression of pornographers. The audience of pornography continues to have freedom of expression to some extent, as they can still access pornographic materials which have not yet been blocked.

Prior to the promulgation of the Computer Crime Act 2007, criminal prosecution for the dissemination of obscene materials on the Internet was carried out under Section 287 of the Criminal Code. In the *Red Case*⁷⁵ No. 797/2545 (2002), the first Internet pornography case, the offender was arrested by the police on a charge of uploading a series of morphed pictures of Thai actresses engaging in sexual activity on a WebBoard called 'Thai Sexy'.⁷⁶

⁷¹ Wichichonchai, P., p.28.

⁷² Interview, the TCSD on 19th April 2011. The TCSD is a department of the Royal Thai Police, which is primarily responsible for enforcing criminal law, including obscenity law, on the Internet and computer networks. See generally http://www.tcsd.in.th/about_us.php, visited 11th June 2011.

⁷³ See Section 6.4.

⁷⁴ Interview, the TCSD on 19th April 2011.

⁷⁵ In the Thai judicial system, a judgement which is handed down by a trial court is called a 'Red Case'.

⁷⁶ *Manager Online* (ผู้จัดการออนไลน์), 3th January 2000, accessed through the online newspaper archive, www.myfirstinfo.com, visited 2nd September 2011.

He was prosecuted under Section 287 for publicly exhibiting obscene materials.⁷⁷ He was sentenced by the trial court to 12 months imprisonment and a fine of 23,000 Baht (approximately 460 GBP); however, he was granted a suspended sentence of two years. After the Computer Act came into force in 2007, Section 287 of the Criminal Code and Section 14 (4) (or Section 15 in the case that the offender is a webmaster) of the Computer Crime Act 2007 have been enforced in parallel. In practice, the Thai police and state prosecutors charge the offenders under both provisions; and typically, the courts hold that the offenders are guilty on both charges.⁷⁸ Regarding the punishment, according to Section 90 of the Criminal Code, in the case that an act violates several provisions, the offender shall be punished under the provision that has the severest punishment. As an act of uploading obscene materials violates both Section 287 of the Criminal Code and Section 14 (4) (or Section 15) of the Computer Crime Act 2007, normally the courts punish the defendants under Section 14 (4) (or Section 15) – whichever has the severest punishment.⁷⁹

According to information from the officer of the TCSD,⁸⁰ the enforcement process begins with a complaint alleging the dissemination of obscene materials on the Internet. The complaint can be filed by any individuals or state agencies. After receiving the complaint, the TCSD will identify the IP address of the wrongdoer's computer. Then it will co-ordinate with the ISP – to which the IP address connects – to find the identity of the user (i.e. the user's telephone number, address and name that are registered with the ISP). The relevant information will be passed on to either local police or the Children, Juveniles and Women Division (CJWD)⁸¹ to request an arrest warrant from a competent court. Then the offender is prosecuted by a public prosecutor.

In 2010, iLaw – an NGO which aims to raise public awareness and knowledge of legal issues in the area of IT law⁸² – set up a *Research Team on 'The Effect of the Computer Crime Act 2007 and State Policy on the Right to Freedom of Expression'*⁸³ (the Research Team) to conduct research on how the Computer Crime Act 2007 affects the right to

⁷⁷ The offender was also prosecuted for defamation under Section 328 of the Criminal Code, as the morphed naked images damaged the reputation of the actresses.

⁷⁸ This information is concluded from the twelve cases involving the violations of Sections 14 (4) and 15 mentioned below.

⁷⁹ The punishment provided by Section 287 of the Criminal Code is imprisonment for a term not exceeding three years or a fine not exceeding 6,000 Baht, or both. The punishment provided by Section 14(4) of the Computer Crime Act 2007 is imprisonment for a term not exceeding five years or a fine not exceeding 100,000 Baht, or both. The offence under Section 15 is subject to the same punishment provided by Section 14(4).

⁸⁰ Interview, the TCSD on 19th April 2011.

⁸¹ The CJWD has the power to deal with obscenity cases across the country.

⁸² See <http://ilaw.or.th/>

⁸³ The Research Team comprised of two legal academics (Sawatree Suksri and Siriphon Kusonsinwut) and five free speech activists (Orapin Yingyongpathana, Danuch Wallikul, Yingcheep Atchanont, Thanakrit Piammongkol and Tewson Seeoun).

freedom of expression in Thailand. The main researchers of the Research Team are a police officer (Police Lieutenant Colonel Siriphon Kusonsinwut), a legal academic from Thammasat University (Sawatree Suksri), and a freedom of expression activist and manager of iLaw (Orapin Yingyongpattana).⁸⁴ The Research Team published *Situational Report on Control and Censorship of Online Media, through the Use of Laws and the Imposition of Thai State Policies* to provide the public with information regarding censorship on the Internet and statistics on criminal prosecution under the Computer Act 2007.⁸⁵ According to this document, between July 2007 and July 2010 there have been twelve cases relating to the dissemination of obscene materials on the Internet that have been decided by the Thai courts.⁸⁶ They are as follows: the *Red Cases No. 5024/2550 (2007), 4025/2551 (2008) 4966/2551 (2008), 1252/2552 (2009), 2353/2552 (2009), 1100/2553 (2010), 1418/2553 (2010), 1467/2553 (2010), 1728/2553 (2010), 2081/2553 (2010), 2726/2553 (2010) and 3743/2553 (2010)*.⁸⁷

In all cases, the materials at issue (digital images or video clips) were deemed obscene according to the Deka Court's obscenity standard as they depicted sexual intercourse and women's nipples and genitals were clearly seen. In most cases, the offenders were the persons who committed offences under Section 14 (4) of the Computer Crime Act 2007 by sending obscene materials via emails or posting such materials on webboards. However, in the *Red Cases No. 2353/2552 (2009), 1728/2553 (2010), 2776/2553 (2010) and 3743/2533 (2010)*, the webmasters were prosecuted under Section 15 of the Computer Crime Act 2007 for deliberately allowing obscene materials to be posted on the webboards under their control.

6.3.2 The Prevention and Suppression of Temptations to Dangerous Behaviour Bill (PSTDB Bill)

In a similar way to England which has passed the extreme pornography law to control specific categories of pornography,⁸⁸ Thailand is attempting to pass a law to deal

⁸⁴ The Research Team also has another four research assistants, namely Danuch Wallikul, Yingcheep Atchanont, Thanakrit Piammongkol and Tewson Seeoun.

⁸⁵ The Research Team on 'the Effects of the Computer Crime Act 2007 and State Policy on the Right to Freedom of Expression', *Situational Report on Control and Censorship of Online Media, through the Use of Laws and the Imposition of Thai State Policies*, at http://www.boell-southeastasia.org/downloads/ilaw_report_EN.pdf, visited 2nd September 2011.

⁸⁶ As noted by the Research Team, the figures in the cases shown in the report represent a minimum number of cases. There may have been more cases during this period of time, but the relevant information was not available to the Research Team due to limited access to the sources. For methodology and remarks regarding the Research Report see The Research Team, fn5, p.7.

⁸⁷ The reference numbers of the cases were made available courtesy of the Research Team. The details of the cases can be found on the Central Criminal Court Database, <http://aryasearch.coj.go.th/aryaweb/main.php>, visited 3rd September 2011.

⁸⁸ See Section 5.2.4.

specifically with certain types of pornography. In 2006, *the Sub-Committee on Children's Law Reform, in accordance with the Constitutional Standards and the Convention on the Rights of the Child*,⁸⁹ proposed the Prevention and Suppression of Temptations to Dangerous Behaviour Bill (PSTDB Bill) to the Thaksin Cabinet.⁹⁰ According to the document of the Office of Welfare, Promotion, Protection and Empowerment of Vulnerable Groups, it received an approval from the Abhisit Cabinet on 22 June 2010.⁹¹ As of November 2012, the Yingluck's government was preparing to propose the Bill to the Thai Parliament.⁹² Therefore, at the moment, the Bill is awaiting a parliamentary consideration.

It is stated in the preamble of the Bill that the enforcement of the existing obscenity law (Section 287 of the Criminal Code)⁹³ is not sufficiently effective to combat specific types of obscene materials which present the so-called 'sexually perverted activities'. This idea was supported by *the Sub-Committee on the Solutions for the Problem of Obscene Media which affects Children, Juveniles and Women*.⁹⁴ It commented that the lacuna in the Thai obscenity law was that the standard to judge obscenity concentrates only on the sexual explicitness and sexually arousing quality of the material, hence giving inadequate attention to the content contained therein. Sexual materials that present 'perverted sex' – namely, sex with animals or corpses, sexual violence, sadistic sexual acts, and rape – had more serious negative effects on minors than the materials that were merely sexually explicit. Pornography that shows 'sexually perverted activities' not only distorted young people's proper understanding about sexuality, but also encouraged them to imitate the sexual acts that they saw on screens; therefore, Thailand needed a new law, which was specifically designed to tackle this particular category of sexual materials.⁹⁵

The PSTDB Bill aims to criminalise *inter alia* pornographic materials which portray sexual violence, group sex, bestiality and necrophilia. Section 3 of the PSTDB Bill defines

⁸⁹ คณะอนุกรรมการปรับปรุงกฎหมายเกี่ยวกับเด็กตามมาตรฐานรัฐธรรมนูญและอนุสัญญาว่าด้วยสิทธิเด็ก

⁹⁰ For the PSTDB Bill in Thai see <http://dl.parliament.go.th/handle/lirt/299819>; see generally ⁹⁰ Chamsanit, V., *The Thai Government Concept about Sexuality* (วิถึคิดเรื่องเพศวิถีของประเทศไทย), (Woman's Health Advocacy Foundation, Bangkok, 2008), pp.44-46.

⁹¹ *Office of Welfare Promotion, Protection and Empowerment of Vulnerable Groups*, <http://www.opp.go.th/2new5-30-6-53.doc>, visited 6th August 2011.

⁹² *Thairath Online* (ไทยรัฐออนไลน์), 22nd November 2012, <http://www.thairath.co.th/content/pol/307587>, visited 22nd November 2012

⁹³ At the time (2006), the Computer Crime Act had not come into effect yet.

⁹⁴ คณะอนุกรรมการการศึกษานโยบายในการแก้ไขปัญหาสื่อลามกที่มีผลกระทบต่อเด็ก เยาวชน สตรี สถาบันบัญญัติแห่งชาติ

⁹⁵ The Sub-Committee on the Solutions for the Problem of Obscene Media which affects Children, Juveniles and Women, 'Information on Coping with Obscenity Media in Thai Society' ('ข้อความรู้เกี่ยวกับ การจัดการปัญหาสื่อลามกในสังคมไทย') in *The Paper for the 7th National Academic Conference: the Suppression of Temptations to Dangerous Behaviour* (เอกสารประกอบการประชุมวิชาการระดับชาติครั้งที่ 7 เรื่อง การปราบปรามวัตถุอันตราย พฤติกรรมอันตราย), *Office of Justice Affairs*, <http://www.oja.go.th/doc/Lists/doc1/DispForm.aspx?ID=404>, visited 20th August 2011, pp.21-34, 23-24.

'temptations to dangerous behaviour' as a document, picture, publication, figure, symbol, photograph, film, sound, words, message, data or any other materials which are likely to incite, encourage, or instigate – among other things – 'sexually perverted acts'.⁹⁶ The second paragraph of Section 3 provides a list of sexual acts or relationships which are deemed 'sexually perverted acts'; they include: (1) the use of violence to a degree which is likely to cause bodily harm, or the use of tools or equipment which may cause bodily harm or endanger life; (3) sexual acts which involve threat or coercion (rape); (4) a consensual sexual act which involves three persons and over, including group sex; and (5) intercourse with an animal or a human corpse.⁹⁷

If the PSTDB Bill becomes law, it will bring a significant change to the regulation of pornography in Thailand, particularly in terms of the pornographic content which is deemed illegal. The list of prohibited types of pornography in the second paragraph of Section 3 shows that the PSTDB Bill is trying to prohibit pornography on the grounds of the ideas communicated by the materials (such as the ideas of sexual violence, bestiality, necrophilia and group sex) in addition to the visual presentation of the materials (sexually explicit and provocative depictions), which is already subject to Thai obscenity laws.

Secondly, like the English extreme pornography law, the PSTDB Bill is attempting to be more specific about the categories of pornography that should be prohibited, making the scope for illegal pornography narrower than that of the Thai obscenity laws. Furthermore, the PSTDB Bill criminalises pornographic materials that show sexual violence which may cause bodily harm or a threat to life, bestiality or necrophilia. This is also similar to the English extreme pornography law. However, the PSTDB Bill appears to have a wider scope than that of the extreme pornography law as it includes rape and group sex pornography within the ambit (whilst the extreme pornography law does not proscribe such types of pornography).

On the one hand, the PSTDB Bill can be seen as a welcome stance in the regulation of Internet pornography. Because its scope is narrower and more specific; it would not restrict much freedom of pornographic expression. Only a few categories of pornography would be prohibited, whilst most types of pornography would be allowed. This would mean that Thai people would have more freedom of pornographic expression. In this regard, the PSTDB Bill is in line with the conceptual framework of Chapter 3, which argues that the scope of

⁹⁶ Section 3 of the PSTDB Bill aims to forbid materials which depict child pornography, torture to children, suicidal instigation (individual or group suicide), encouragement to use drugs and the encouragement to perform acts relating to terrorism, theft, robbery, homicide, cruel assault or torture.

⁹⁷ As there is no English translation of the PSTDB Bill available, Section 3 is translated by the author.

pornography-related law should be narrow and specific. However, it should be noted that this scenario will happen on the assumption that the Thai authorities tend to enforce only the PSTDB Bill rather than the Thai obscenity laws, as it is the case in England where the English authorities are now relying on the extreme pornography law, rather than obscenity laws, to control Internet pornography); or that the Thai obscenity laws are abolished.

On the other hand, however, the PSTDB Bill is subject to certain criticisms.⁹⁸ First, PSTDB Bill is moral-based. Although the Bill will, in effect, proscribe pornography that depicts sexual violence that may cause physical harm or is life threatening, it is originally designed to prohibit violent pornography on the grounds of such type of pornography is deemed morally objectionable.⁹⁹ As already contended in Chapter 3, the moral-based justification for restricting pornographic expression (especially from a paternalistic perspective) is not consistent with the concept of freedom of expression, since it is contrary to democratic value and self-realisation – the two values which underpin freedom of expression. As argued in Chapter 3, violent pornography should be banned on the basis that its production may cause serious bodily harm to pornographic actors (harm-based justification).

Second, it could be argued that, although the PSTDB Bill attempts to narrow down the scope of illegal pornography, its scope is still vague and overly wide in some aspects. The second paragraph of Section 3 states that the PSTDB Bill deals not only with visual material, but also textual materials. In comparison, the English extreme pornography law deals only visual materials. Moreover, the PSTDB Bill will outlaw visual materials, irrespective of whether they are realistic-looking. This means that cartoons, drawings or paintings would fall within the scope of the PSTDB Bill. By contrast, the English extreme pornography law limits its scope to criminalise only visual materials that are realistic-looking;¹⁰⁰ thus, cartoons, drawings or paintings are excluded. It could be argued that pornographic images which portray sexual violence in an explicit and realistic manner may involve the use of real violence on pornographic performers,¹⁰¹ whilst it is unlikely for pornographic performers to receive physical harm from the production of textual materials, cartoons, drawings or paintings. For this reason, it could be said that the PSTDB appears to be overly restrictive on freedom of pornographic expression as it prohibits even materials that cause no harm to anyone during production.

⁹⁸ It should be noted that there is no further information about the PSTDSB Bill from the relevant governmental agencies and academic articles about the Bill available thus far. The criticisms in this section belong originally to the author.

⁹⁹ The Sub-Committee on the Solutions for the Problem of Obscene Media which affects Children, *Juveniles and Women*, supra, p.22

¹⁰⁰ However, 'realistic looking' criteria is also subject to criticism. See Section 5.2.4.3.

¹⁰¹ See Section 5.2.4.4; however, this does not include images that show simulated violent acts or computer-generated images.

Furthermore, as the language of Section 3 is not clear, the list of 'perverted sexual acts' in the second paragraph could be interpreted to include the materials depicting staged rape, fake necrophilia or bestiality (for example, having sexual intercourse with a performer pretending to be a corpse, or with an animal mannequin), and cartoons, computer-generated images or a pseudo-photograph of such 'perverted sexual activities'. This would make the PSTDB Bill considerably wide and may unduly interfere with the right to freedom of pornographic expression. However, at this moment, the PSTDB Bill has not yet been passed. It remains to be seen how the Thai courts will deal with this issue.

Lastly, the PSTDB Bill is, to a great extent, morality-based. It includes sexual activities which may not cause harm to anyone, but may be deemed morally objectionable – namely group sex. It has already been argued in Chapter 3 that morality protection is not a strong justification for restricting pornographic expression. It is inconsistent with the democratic value of freedom of expression, silencing people whose sexual ideas and attitudes are different from the majority. Moreover, it denies people's individual autonomy and self-realisation, preventing people from exploring the full range of ideas about sex and sexuality, by which they can find a sexual lifestyle which suits them the most. In this regard, as it is a morality-based restrictive measure, the PSTDB Bill is not in line with the conceptual framework of freedom of expression as suggested in Chapter 3.

Section 18 of the PSTDB Bill reads:

Whoever makes, produces or possesses temptations to dangerous behaviour for public distribution, exhibition or dissemination shall be punished with imprisonment of the term between one and five years, or a fine between one and five hundred thousand Bath, or both. ...

If the commission of the offence as mentioned either in the first ... paragraphs is for the purpose of trade or by trade, the offender shall be punished with heavier punishment than that as provided for that offence by one-half.

If any act as prescribed in this Section is committed for educational, medical or scientific research purposes, including an action carried out as necessary for the interests of the government service, such commission is not an offence prescribed by this Act.¹⁰²

Section 18 makes it a criminal offence to make, produce or possess 'sexually perverted materials' with an intention to distribute, exhibit or disseminate them to the public. Therefore, the production or possession of 'sexually perverted' materials for private use is not within the scope of this provision. (Unlike the PSTDB Bill, the English extreme pornography law criminalises possession of 'extreme pornographic images' even in the case

¹⁰² There is no official translation of the PSTDB Bill available. This is translated by the author of this thesis.

where an individual has extreme pornography for private use, without a commercial purpose or an intention of dissemination.)¹⁰³ However, under the fourth paragraph of Section 18 (the defence clause), it is not an offence if the activities enumerated in the first paragraph are carried out for 'educational, medical or scientific research purposes, and for actions carried out in the interests of government service'.

Section 19 provides:

Whoever distributes, exhibits or disseminate temptations to dangerous behaviour shall be liable for the punishment as that of the offender of the first or second paragraphs of Section 18, as the case may be.

If the offence as mentioned in the first paragraph is committed for the purpose of trade, the offender shall be liable for the punishment as that of the offender of the third paragraph of Section 18.

If the offence as mentioned in the first paragraph is committed by inputting data into a computer system that is accessible to the public, the offender shall be punished with heavier punishment than that as provided for that offence by one-half.

The first paragraph of Section 19 prohibits the distribution, exhibition or dissemination of 'sexually perverted materials'. The offender under this section is subject to the punishment as provided for the offence under Section 18. Under the second paragraph of Section 19, the offender shall be punished as stipulated in the third paragraph of Section 18, if he/she distributes, exhibits or disseminates 'sexually perverted materials' for commercial purposes.

With regard to the Internet, the PSTDB Bill appears to give a special attention to online materials. According to the third paragraph of Section 19, a person who inputs 'sexually perverted materials' to a computer system, which is accessible to the public, shall be given a punishment one-half heavier than that provided for the offence under the first or the second paragraph of Section 19. The heavier punishment for the offender who makes the materials available on the Internet seems to show the drafters' viewpoint, in that the Internet makes the materials more widespread and more accessible to young people.

6.4 Internet Censorship in Thailand

Internet censorship is another regulatory method that the Thai government utilises to control Internet pornography; this is particularly so in the case where the person who disseminates obscene materials is outside Thailand or the materials are hosted on a server overseas.¹⁰⁴

¹⁰³ See Section 5.3.2.

¹⁰⁴ Interview, the ITSO (the MICT) on 3rd May 2011.

The diagram below shows the process of Internet censorship by the MICT.

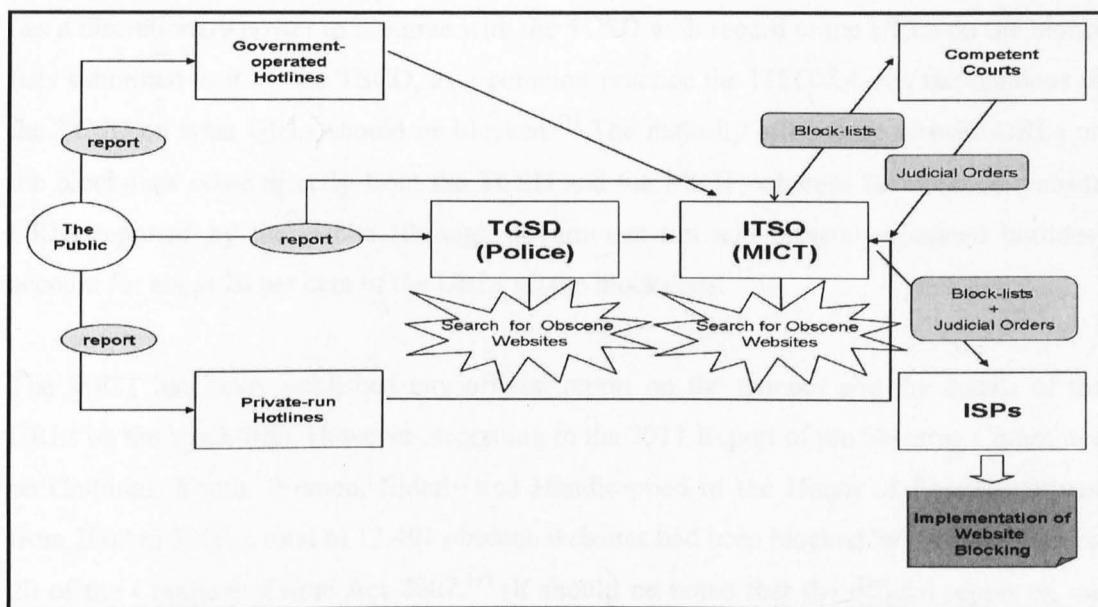


Diagram 1 - The Process of Website-Blocking by the MICT¹⁰⁵

6.4.1 The Process of Website-Blocking by the MICT

By virtue of Section 20 of the Computer Crime Act 2007, the MICT is the principal agency that implements Internet censorship.

According to the information from the interviews with officers of the Information Technology Supervision Office (ITSO) of the MICT¹⁰⁶ and the representative of TOT (ISP),¹⁰⁷ the process of Internet censorship begins with the MICT making a block-list.¹⁰⁸

The MICT and the TCS have special departments whose main duty is to search for obscene websites (as well as other websites which are deemed illegal according to Thai laws – such as gambling or lèse majesté websites). The search is implemented by software, which is specially developed for this purpose and for governmental use only.¹⁰⁹ Both the MICT and the TCS have their own obscenity standards which, to a great extent, are in line with the Deka Court's obscenity standard.¹¹⁰ The URLs of the obscene websites from the special

¹⁰⁵ The diagram is developed by the author, based on the information deriving from interviews with the ITSO (MICT) officers (3rd May 2011) and TOT (ISP) representative (27th April 2011).

¹⁰⁶ It should be noted that this department of the MICT has been renamed the Office of Prevention and Suppression of Internet-Related Crime. However, at the time of interviewing, the department's name was still the ITSO.

¹⁰⁷ Interviews, the ITSO (MICT) on 3rd May 2011 and TOT (ISP) on 27th April 2011.

¹⁰⁸ See Section 6.4.2.2.

¹⁰⁹ The interviewees did not reveal the technology and how the searching software works.

¹¹⁰ The obscenity test of the ITSO (MICT) and that of the TCDS will be examined in Section 6.7.

searching departments of the MICT and the TCSD are passed on to the ITSO (the MICT) to make a final decision about what URLs should be blocked. Although the ITSO (the MICT) has a discretionary power to disagree with the TCSD with regard to the URLs on the block-lists submitted to it by the TSCD, as a common practice the ITSO follows the opinions of the TCSD on what URLs should be blocked.¹¹¹ The majority of obscene website URLs on the block-lists come directly from the TCSD and the MICT, whereas the obscene website URLs reported by the public (through government-run and privately-operated hotlines) account for about 20 per cent of the URLs on the block-lists.¹¹²

The MICT has never published any official report on the number and the details of the URLs on the block-lists. However, according to the 2011 Report of the Standing Committee on Children, Youth, Women, Elderly and Handicapped of the House of Representatives, from 2008 to 2010, a total of 13,491 obscene websites had been blocked by virtue of Section 20 of the Computer Crime Act 2007.¹¹³ (It should be noted that the official report on the number of obscene websites that have been blocked after 2010 has not been published yet.) The MICT will submit the block-list, together with a request for a judicial order (which is approved by the MICT Minister), to a competent court. When the court issues a judicial order permitting Internet censorship, the judicial order and the block-list will be passed on to all ISPs in Thailand by the MICT. Subsequently, the ISPs implement website-blocking by inputting the URLs on the block-list onto special software (server-based filtering). As a result, when users attempt to access a particular blocked website, they will be diverted to a screenshot stating that the website has been blocked by the MICT.



¹¹¹ Interview, the ITSO (MICT) on 3rd May 2011.

¹¹² Ibid.

¹¹³ The Secretariat of the House of Representatives, *After Action Review of the Standing Committee on Children, Youth, Women, the Elderly and Handicapped of the House of Representatives between 13 May 2009 and 9 May 2011* (สรุปผลการดำเนินงานของคณะกรรมการเด็ก เยาวชน สตรี ผู้สูงอายุและผู้พิการ สภาผู้แทนราษฎร ระหว่างวันที่ 13 พฤษภาคม 2552 ถึง 9 พฤษภาคม 2554),

http://web.parliament.go.th/parcy/commission_documents_count.php?doc_id=13980, visited 5th September 2011, p.31.

Pictures 1 (previous page) - Samples of Screenshots informing that the Websites are Blocked by the MICT (on the right) and by an ISP (on the left)¹¹⁴

6.4.2 The MICT's Website-Blocking and Freedom of Expression

The implementation of Internet censorship by the MICT is subject to certain criticisms. First, it is without doubt that state censorship is a restriction of the right to freedom of expression. As discussed earlier, the current Thai obscenity standard (which concentrates on sexual explicitness and the sexually arousing effects of the material) seems to be broad. It covers virtually all categories of pornographic materials, not only those depicting sexual violence, bestiality and necrophilia,¹¹⁵ but also those depicting non-violent sexual activities or simply naked bodies in sexually provocative poses. Implementing Internet censorship under this obscenity standard would significantly curtail the freedom of pornographic expression by adults.

Second, given the sheer number of sexually explicit materials on the Internet, which fall within the scope of the obscenity standard of the Deka Court, it is impossible for the MICT to censor all of them. In practice, the MICT authorities selectively block only some pornographic websites.¹¹⁶ This means that only certain specific pornographic websites are blocked whilst a number of pornographic websites, which may have the same or similar content, are still on the Internet. This raises questions as to what criteria the authorities use to select those pornographic websites, and whether they have bias against, or in favour of, certain websites.

Third, Section 20 requires the MICT to request a judicial order from a competent court before implementing Internet censorship. This means that, ultimately, it is a court – being a judicial body, rather than the MICT, which is a non-judicial body – that decides whether the website or content in question is illegal and should be censored. This can be considered as a merit of the Thai regulatory system. In comparison, the IWF's 'notice and takedown' measure is implemented without a court's involvement at any stage of the process. The main criticism is that the IWF lacks judicial power to judge the legality of the online content, thus acting as a vigilante to censor content on the Internet.¹¹⁷ It could be said that the role of

¹¹⁴ <http://www.web-censorship.org/tag/thailand/>;
<http://advocacy.globalvoicesonline.org/2008/05/17/censoring-free-speech-in-thailand/>, visited 10th May 2011.

¹¹⁵ The UK government is attempting to restrict only a few types of pornography – i.e. pornography which depicts sexually violent acts which could lead to serious bodily harm or life-threat, bestiality and necrophilia in an explicit and realistic manner. See Section 5.2.4

¹¹⁶ Interview, the ITSO (the MICT) on 3rd May 2011.

¹¹⁷ See Section 5.4.1.

courts in Internet censorship is important, as it makes the MICT's orders to block websites to be considered by judicial authorities.

However, the main criticism of the role of the Thai courts under the current Thai regulatory framework is that the courts may not spend sufficient time to consider the legality of URLs on the block-lists. The Research Team¹¹⁸ remarks that, in most cases, 'the courts take an extremely short period of time (within a day) to look at the URLs [on the block-lists]'.¹¹⁹ Given that there are hundreds of URLs on the block-lists, it is doubtful whether the courts have scrutinised those URLs thoroughly before granting an order authorising the blocking or whether they act merely as 'a rubber stamp' for the MICT.

Fourth, the URLs on the block-lists are derived mainly from the MICT and the TCSD's searches; more significantly, the block-lists are not made available to the public. This could raise an issue of transparency. It is very difficult for the Internet users in Thailand to know what websites are blocked (unless they try to access a particular website), and on what grounds they are blocked. Given this, it could be contended that the Internet users would never be entitled to the full right to freedom of sexual expression, as their right is being secretly curtailed by the MICT.

Fifth, once the URLs on the block-list are rendered inaccessible, Internet users and the website owners cannot appeal against the judicial order, since Section 20 of the Computer Crime Act 2007 does not provide an opportunity to do so. This is different from the IWF. The IWF provides an appeal channel for individuals whose right to freedom of expression is affected by the IWF's implementation of 'notice and takedown' measure. This allows the IWF to reconsider the content which is subject to its 'notice and takedown' measure. Thus, it is always possible that censorship may be revoked.¹²⁰ However, under the current Thai regulatory framework, the only way to challenge the judicial order is to bring the case to the Thai Constitutional Court, alleging that Section 20 violates the constitutional right to freedom of expression. This act is possible because the MICT is a governmental body, which is accountable to the public. Nevertheless, there has not been an attempt by anyone to file the case to the Thai Constitutional Court until now.

Lastly, as discretionary power is in the hands of the MICT, there is no room for the ISPs, webmasters, content providers and Internet users to develop and implement their own self-regulation of sexual content on the Internet.

¹¹⁸ For information about the Research Team, see footnote 80 above.

¹¹⁹ The Research Team, p.17.

¹²⁰ See Ibid.

6.5 Hotline and the Filtering Systems in Thailand

6.5.1 The Internet Hotline System in Thailand

Like the UK, Thailand has a hotline system. Internet hotlines provide a channel for the public to report obscene content on the Internet. There are two groups of hotlines. The first group is operated by government agencies, whilst the second is run by the NGOs which support the regulation of Internet content.

According to Cabinet Resolution 27/12/2548, the MICT set up the first government-operated hotline www.cyberclean.org and requested ISPs and 30 webmasters to attach it (as a hyperlink) to their websites. However, this Internet hotline is now defunct and superseded by hotlines which are operated by different governmental agencies. The MICT's hotline,¹²¹ the Ministry of Culture's hotline 1765,¹²² the TCSD's hotline¹²³ and the Royal Thai Police's E-Cyber Crime Hotline¹²⁴ are some prime examples of Internet hotlines in the first group.

Some NGOs which promote the control of pornographic materials on the Internet also run their own hotlines. Family Media Watch (operated by Family Network Foundation (FNF)),¹²⁵ the Thai Hotline (operated by the Internet Foundation for the Development of Thailand (IFDT))¹²⁶ and the IT Watch Hotline (run by the Mirror Foundation)¹²⁷ are three main examples of hotlines in the second group (NGO-operated hotlines).

As examined above, there are a number of Internet hotlines in Thailand. However, these hotlines operate independently from each other and lack a unified framework. The most obvious problem is the lack of a common obscenity standard. Each of them has their own obscenity standard, which is, to some extent, different from the obscenity standard of the MICT.¹²⁸ The difference in obscenity standards between those of the hotlines and that of the MICT could raise a problem. For example, an Internet user reports a sexually explicit website to the Thai Hotline. As the Thai Hotline considers that the website in question is obscene (under its obscenity standard), it passes this report to the MICT. However, due to a different obscenity standard that the MICT adopts, the MICT may regard it as a non-obscene

¹²¹ A report on an illegal or an inappropriate website can be made online (<http://www.mict.go.th/main.php?filename=complaint>) or by telephone (1212), visited 7th September 2011.

¹²² *Ministry of Culture Hotline*, http://www.m-culture.go.th/multilateral/detail_page.php?sub_id=2, visited 7th September 2011.

¹²³ *TCSD Hotline*, <http://www.tcsd.in.th/petition.php>, visited 7th September 2011.

¹²⁴ *Royal Thai Police Hotline*, <http://ecybercrime.police.go.th/#>, visited 7th September 2011.

¹²⁵ *Family Media Watch*, <http://www.familymediawatch.org/>, visited 7th September 2011.

¹²⁶ *Thai Hotline*, <http://report.thaihotline.org/>, visited 7th September 2011.

¹²⁷ *IT Watch Hotline*, <http://www.thaiitwatch.org/>, visited 7th September 2011.

¹²⁸ For the obscenity standards of each organisation see Section 6.7.3.

website and take no action. This problem makes it difficult for the public to know exactly what kinds of pornographic websites should be reported. Furthermore, it could discourage Internet users – especially those who are enthusiastic about reporting illegal content on the Internet – to participate in Internet regulation, since they may feel that their reports are meaningless as the reported websites are still accessible. Furthermore, as there are too many hotlines, Internet users may be confused which hotline they should report to.

6.5.2 Internet Filtering Software

The MICT encourages Internet users to install a filtering programme on their computers to prevent young people from accessing improper content on the Internet, including pornographic materials. For this purpose, it introduced a filtering programme called *ICT Housekeeper* in 2008.¹²⁹ The *ICT Housekeeper* was developed by King Mongkut's Institute of Technology Ladkrabang.¹³⁰ The software is free to download.¹³¹

The key criticism of the *ICT Housekeeper* is its lack of transparency. The officers of the ITSO who gave interviews to the author of this thesis declined to answer questions regarding how the software operates, i.e. whether the software operates by blocking a list or by content analysis, and what criteria the programme uses to determine what URLs should be blocked. The answers to these questions are very important for the right to freedom of expression. As the operation of *ICT Housekeeper* is a secret, it is impossible for Internet users to know what websites have been filtered out. It is doubtful whether *ICT Housekeeper* has a problem of over-blocking (i.e. a situation in which not only pornographic websites, but also educational or socially useful websites about sex and sexuality are filtered out) or under-blocking (i.e. a situation in which the software cannot screen out all pornographic content, leaving some or most pornographic content still accessible).¹³² With regard to the rating system, the representative of TOT (ISP) and the officers of the ITSO (the MICT) stated that, at present, Thailand did not have a rating system of its own.¹³³ Therefore, it is questionable what standard *ICT Housekeeper* uses to filter out pornographic materials, and whether such a standard is neutral or has a problem of bias against certain types of content. Although the MICT alleges that a number of people – especially parents and schools – are

¹²⁹ *ICT Housekeeper*, <http://hk.mict.go.th/>, visited 4th May 2011.

¹³⁰ *Ibid.*

¹³¹ *ICT Housekeeper*, <http://hk.mict.go.th/>, visited 4th May 2011.

¹³² For issues about over-blocking and under-blocking, see generally Deibert, J.R., and Villeneuve, N., 'Firewalls and Power: An Overview of Global State Censorship of the Internet', in Klang, M., and Murray, A.D. (eds.), *Human Rights in the Digital Age*, (Glasshouse, London, 2005), pp.111-124, pp.112-113.

¹³³ Interviews, TOT (ISP) on 27th April 2011 and the ITSO (MICT) on 3rd May 2011.

interested in *ICT Housekeeper*,¹³⁴ there is no official report to show how many families and schools have actually installed the *ICT Housekeeper* and how effective the software is in preventing minors from pornography on the Internet. Another important question is whether *ICT Housekeeper* has any protection system against circumvention. The officers of the ITSO reserved their right to answer these questions.

Nonetheless, the *ICT Housekeeper* can be seen as a less restrictive and more preferable method to regulate Internet pornography than the MICT's implementation of Internet censorship. This is because, in essence, it allows adults to control what type of content they want their children to see or avoid. Parents can set the software to filter out pornographic content when their children use the Internet, whereas adult Internet users can still have the freedom to access pornography websites by turning the filtering function off. However, It is argued that the MICT should inform the public of how *ICT Housekeeper* works, what rating system it is based on, whether it has a problem of over or under-blocking, whether it has a loophole which may allow circumvention, and whether it has any other defects. All of these issues are very important, as they would assure parents and teachers that the MICT's *ICT Housekeeper* is reliable to protect their children.

6.6 Justifications for the Restriction of Pornography in Thailand

In Chapter 3, this thesis discussed the rationales which the state and anti-pornography groups (such as anti-pornography feminists) typically use to justify the regulation of pornographic expression.¹³⁵ The rationales are (1) the protection of public morality; (2) the prevention of offensiveness caused by pornography; (3) the protection of minors; (4) the 'pornography-causes-rape' claim; (5) physical harm inflicted on pornographic performers; and (6) the propaganda of women subordination ideology. This section will revisit these rationales, but specifically within the context of Thailand.

Chapter 3 concluded that bodily harm to pornographic performers is an important rationale and has enough weight to justify the prohibition of pornographic materials that involve the use of real violence. The protection of minors from pornography is a strong justification for the restriction of the availability/accessibility of Internet pornography. The protection of public morality, the prevention of offences, the prevention of rape and the prohibition of women subordination ideology image of women are not strong enough to justify the prohibition and restriction of pornographic expression. This section will start with

¹³⁴ *ICT Housekeeper*, <http://hk.mict.go.th/> , visited 4th May 2011.

¹³⁵ See Section 3.5.

examining the rationales that are arguably justifiable for the regulation of pornography, and then discussing the rationales that are deemed weak and inconsistent with the notion of freedom of expression.

It should be noted that some of the information necessary for the discussion in this section, i.e. the opinions of the authorities involved in the regulation of Internet pornography in Thailand on the justifications for the regulation of Internet pornography is not publicly available. Thus, the information gathered from interviews with the authorities will also be used where it is relevant to the discussion.

6.6.1 Physical Harm to Pornographic Performers in the Context of Thailand

In Chapter 3, this thesis contended that bodily harm to pornographic performers during the production of pornography – especially the type which involves the use of real violence (e.g. the use of sharp objects, electricity, whipping, or wax that causes wounds or burns, and asphyxiation) – could be seen as a rationale for proscribing this type of pornography.¹³⁶ The well-being and safety of individuals participating in the production of pornography are of most significance, and may outweigh the right to freedom of expression. In other words, pornography which is produced at the cost of a person's safety and life does not deserve protection under the notion of freedom of expression.

According to information from the interviews, only the representative of Thai Netizen¹³⁷ and the representative of Freedom Against Censorship Thailand (FACT)¹³⁸ agreed with this argument.

In contrast, the officer of the Culture Surveillance Group (CSG) (the Ministry of Culture) and the officers of the ITSO commented that, in their eyes, harm to pornographic actors was not an important justification for regulating Internet pornography. However, they did not give an explanation why physical harm to pornographic performers was not regarded as a strong justification for the restriction of pornography.

In England, an attempt to criminalise the possession of violent pornography led to the passage of the extreme pornography law.¹³⁹ In Thailand, the PSTDB Bill can be seen as an

¹³⁶ See Section 3.5.5.1.

¹³⁷ Interview, Thai Netizen on 22nd April 2011. Thai Netizen is an NGO which campaigns for the rights of Internet users, including the right to free speech on the Internet. <https://thainetizen.org/>, visited 23rd April 2011.

¹³⁸ Interview, FACT on 18th May 2011. FACT is an NGO which campaigns against Internet censorship in Thailand. <http://facthai.wordpress.com/>, visited 18th May 2011.

¹³⁹ See Section 5.2.4.

important starting point for Thailand to have a specific law to prohibit violent pornography.¹⁴⁰

6.6.2 Pornography as Harmful to Minors in the Thai Context

The Thai government relies on the claim that pornography has negative effects on Thai youngsters in order to justify the prohibition of all pornographic materials. In Cabinet Resolution 18/10/2548 (2005), the Cabinet stated that the wide availability of pornographic materials was one of the major social problems threatening the well-being of young people in Thailand; and the co-operative actions between the Ministry of Education, the MICT, the Ministry of Culture, and the Royal Thai Police to oversee and suppress such harmful materials were urgently required. In 2006, Thaksin Shinawatra (the Prime Minister at that time) addressed this issue on Children's Day, stating that pornography needed to be eliminated from Thai society in order to protect Thai young people.¹⁴¹ Likewise, in 2011, Abhisit Vejjajiva (the Prime Minister at that time) expressed his concern about minors' access to pornography online, and assigned the MICT to take action to prevent young people from such harmful online materials.¹⁴²

In the context of Thailand, pornography is allegedly harmful to minors in two different ways. The first is that it encourages young people to have under-age sex. The second rationale is that pornography has a negative impact on minors' development and understanding of sex and sexuality. The Public Prosecutor of Criminal Division 3, the officers of the ITSO (the MICT), and the representative of the Family Media Watch (FNF)¹⁴³ were of the opinion that underage sex among Thai youngsters was the most significant justification for the prohibition of pornography. The judge of the Burirum Provincial Court and the representative of IT Watch Hotline (The Mirror Foundation)¹⁴⁴ took the second rationale (pornography could distort the development of sexuality in minors) as the most important

¹⁴⁰ It should be noted that the PSTDB Bill prohibits violent pornography not on the grounds of harm to pornographic performers, but on the grounds of preventing Thai people – especially children – from sexually deviant ideas. See Section 6.3.2.

¹⁴¹ *40 Speeches of the Prime Minister Thaksin Shinawatra from 2005-2006 (40 ประมวลสุนทรพจน์ของ นายกรัฐมนตรี พ.ศ.ท. ทักษิณ ชินวัตร ตั้งแต่ปีพ.ศ. 2548-2549).*

¹⁴² *Thairath Online (ไทยรัฐออนไลน์)*, 23rd February 2011, <http://www.thairath.co.th/content/tech/151146>, visited 27th June 2011.

¹⁴³ Interview, the Family Media Watch on 10th May 2011. The Family Media Watch is part of the Family Network Foundation – an NGO which *inter alia* encourages parents to participate in the educational process for children, and educates parents to protect children from social harm. It runs a hotline to report obscene materials. <http://www.familymediawatch.org/>; <http://familynetwork.or.th/works>, visited 25th May 2011.

¹⁴⁴ Interview, IT Watch Hotline on 9th April 2011. The Mirror Foundation is an NGO working in the areas of human rights. It is trying to use the Internet as a tool to improve the quality of the lives of the Thai people. It also has a hotline channel to receive reports about obscene materials on the Internet. <http://www.mirror.or.th/index.php>, visited 9th April 2011.

justification for regulating pornography. This section contends that the first rationale is not strong enough to justify the regulation of pornography, as there are many factors involved in under-age sex. However, the second rationale is an important justification for the restriction of the availability/accessibility of pornography.

According to Varaporn Chamsanit – a gender studies academic – in the eyes of the Thai State, pornography exposes minors to sex and, in turn, entices them to engage in sexual activities prior to the age of majority¹⁴⁵ (under-age sex).¹⁴⁶ This viewpoint is shown in a number of news articles exemplified in her study. For example, Tipawadee Mekswan – the Permanent Secretary of Ministry of Culture at that time – alleged that pornographic media accounted for pre-mature sexuality, and that restrictive measures against such harmful media were required.¹⁴⁷ Navin Chidchob – the Minister for the Office of the Prime Minister at that time – blamed pornography for causing pre-mature sex among young people in Thailand, and went further by saying that the problem of pre-mature sex led to other social problems – e.g. unplanned pregnancy, illegal abortion and an increase in HIV infection among youngsters.¹⁴⁸

However, apart from pornography, there appears to be other factors involved in pre-mature sex. As noted by some nursing science academia, such as Sathja Thato and Suriyaporn Kritcharoen *et al.*, one of the principal factors that lead young people to pre-mature sex is the dominating perception in contemporary Thai society that sexuality is an inappropriate matter for Thai youngsters; and that they will naturally learn about it when they become adults through their marriage.¹⁴⁹ Interestingly, this viewpoint is consistent with the Thai government perspective in that young people are regarded as innocent and asexual, hence they should maintain their images as such by abstaining from involvement in all forms of sexual activity, including viewing/reading sexually provocative materials.¹⁵⁰ However, Thato argues that the more young people are prevented from learning about sexuality, the more they want to experiment with their sexuality, which – in some cases – means pre-

¹⁴⁵ According to Section 19 of the Thai Civil and Commercial Code, the age of majority is 20.

¹⁴⁶ Chamsanit, *supra*, pp.27-28.

¹⁴⁷ *Khom Chad Luek* (นม ชัด ลึก), 17th August 2006, accessed through the online newspaper archive, www.myfirstinfo.com, visited 9th April 2011.

¹⁴⁸ *Neawna* (เนอหน้า), 14th January 2006, cited in Chamsanit, V., *supra*, p.27; See also *Thairath Online* (ไทยรัฐออนไลน์), 23rd February 2011, <http://www.thairath.co.th/content/tech/151146>, visited 27th June 2011.

¹⁴⁹ Thato, S., 'Premarital Sexual Behaviour Among Thai Adolescents' ('การมีเพศสัมพันธ์ก่อนเวลาอันควรของวัยรุ่นไทย'), (2007) *Journal of Nursing Science, Naresuan University*, 1(2), pp.19-30, 20 ; Kritcharoen, S., Phol-in, K., Ingkathawornwong, T., and Srithaweewat, J., 'Teaching Sexual Education through Parents and the Learning Needs of Children' ('การสอนเรื่องเพศของพ่อแม่และความต้องการการเรียนรู้เรื่องเพศของลูก'), (2008) *Songklanagarind Medical Journal*, 26(1), http://medinfo.psu.ac.th/smj2/26_1/pdf26_1/07.pdf, visited 28th July 2011, pp.61-70, 67.

¹⁵⁰ Chamsanit, V., *supra*, pp.17, 41.

mature sex.¹⁵¹ Other relevant factors – such as peer pressure (some teenagers have sex in order to gain acceptance from their peers), opportunities to have sex (whilst dating or staying alone with boy/girlfriends), inadequate sexual education and information about safe sex, and the use of drugs and alcohol – are all relevant to young people’s pre-mature sexuality.¹⁵²

Given what discussed above, it could be contended that the problem of pre-mature sexuality in Thailand involves several factors rather than pornography alone. It is doubtful whether the suppression of pornography would be able to solve this complicated problem. Thus, the prevention of pre-mature sexuality may not be a strong justification for the prohibition of pornographic expression, especially at the cost of the right to freedom of expression.

Another major rationale that the Thai government typically relies on to support the prohibition of pornography is that pornography may convey so-called ‘deviant sexual ideas’ to young viewers.¹⁵³ The sexual acts deemed deviant were first addressed in Cabinet Resolution 05/10/2547 (2004). Later, they were enumerated in the PSTDB Bill.¹⁵⁴ They include (1) sexual practices which involve sexual violence or the use of objects or devices that would cause physical harm or be life threatening; (2) sexual activities which involve at least three or more participants and group sex; and (3) necrophilia and bestiality.¹⁵⁵

At present, there is no psychological study available in Thailand on the effects of pornography on minors’ mental health.¹⁵⁶ However, as commented by Yongyuth Wongpiromsarn – an expert in child and adolescent psychology and an advisor to the Department of Mental Health (Ministry of Public Health), early exposure to pornography would inculcate deviant sexual ideas in youngsters (especially those aged between 11 and 13), making them mistakenly recognise uncommon sexual behaviour and practices (such as

¹⁵¹ Thato, S., supra, p.24

¹⁵² Bureau of Young Promotion and Protection, *Report on the Situation of Thai Children 2005-2006* (รายงานสถานการณ์เด็ก พ.ศ. 2548-2549), pp.86-87, <http://info.thaihealth.or.th/system/files/documents/%20%E0%B8%9E.%E0%B8%A8.2548-2549-1.pdf>; Thato, S., pp.23-25.

¹⁵³ Chamsanit, supra, p.41.

¹⁵⁴ The Bill was first proposed to the Thaksin’s Cabinet by the Ministry of Social Development and Human Security in 2007.

¹⁵⁵ Section 3, second paragraph (2) (4) and (5) of the Prevention and Suppression of Temptations to Dangerous Behaviour Bill.

¹⁵⁶ According to the research database of National Research Council of Thailand, there has been no research on psychological effects of pornography on minor’s behaviour in Thailand thus far. See <http://library.nrct.go.th/opac/Index.aspx>, visited 29th December 2012

promiscuity, violent sex and sodomy) as being normal.¹⁵⁷ Furthermore, Amornwich Nakornthap – an expert in education and the Director of the Ramjitti Institution,¹⁵⁸ stated that 30% of Thai children viewed pornographic content regularly. This would distort their attitude towards the proper perception of sexuality and gender relations.¹⁵⁹ Therefore, it could be said that viewing pornography would negatively affect the development of youngsters' sexuality and attitudes towards sex in the long term. These comments are consistent with what discussed in Chapter 3, in that the studies conducted in the UK and in the US suggest that adolescents are in the early stages of cognitive development and learn about their sexuality through observing the sexual behaviour of others. Therefore, exposure to deviant sexual ideas may distort their understanding about sexuality and develop an appetite for more uncommon types of sexuality.¹⁶⁰ By these reasons, the restriction of pornography by keeping it out of the reach of children is justifiable.

However, it is important to note that the protection of children against pornography does not mean that the Thai government should ban all pornographic materials, because the complete ban would excessively interfere with the right to freedom of expression of adults who want to view pornography. Given this, it could be argued that the Thai government should develop a regulatory mechanism to prevent only Thai youngsters from accessing pornography, whilst allowing consenting adults to enjoy their right to pornographic expression.

6.6.3 Pornography as a Threat to Public Morality

The Thai authorities have claimed that pornography has been harmful to the morality of Thai society on several occasions. For example, in *the Deka Judgements Nos.2875/2531 (1988)*,¹⁶¹ *7416/2537 (1994)*¹⁶² and *2787/2541 (1998)*,¹⁶³ the Deka Court stated that obscene materials were contrary to the public morality of the Thai people. Teera Slukpetch – the Minister of Culture at that time – commented that pornographic websites were contrary to the good morals of Thai society; for this reason, the Ministry of Culture, the Royal Thai

¹⁵⁷ *The Nation*, 26th March 2004, accessed through the online newspaper archive, www.myfirstinfo.com, visited 28th July 2011; *Matichon (มติชน)*, 27th April 2008, accessed through the online newspaper archive, www.myfirstinfo.com, visited 29th July 2011.

¹⁵⁸ The Ramjitti Institution is an organisation funded by the Thailand Research Fund and the Thai Health Promotion Foundation, and its main activity is to conduct research on subjects relating to the welfare and health of Thai children. See <http://www.ramajitti.com/about.php>, visited 28th July 2011.

¹⁵⁹ *Thaipost (ไทยโพสต์)*, 11th January 2007, accessed through the online newspaper archive, www.myfirstinfo.com, visited 29th July 2011.

¹⁶⁰ See Section 3.5.3.

¹⁶¹ The offender of this case was charged with showing pornographic films to customers who paid to view the films.

¹⁶² In this case, the offender was prosecuted for running a pornographic video rental business.

¹⁶³ In this case, the offenders committed the offence of producing pornographic films.

Police and the MICT all agreed that the implementation of blocking measures against those websites was urgently required.¹⁶⁴ Likewise, Second Lieutenant Ranongruk Suwanchawee – the Minister of the MICT at that time – stated that pornographic content disseminated on the Internet had malign effects on public morality; therefore, it was a direct responsibility of the MICT to closely watch, block and close down pornographic websites.¹⁶⁵

According to the findings from the interviews, the judge of the Central Criminal Court,¹⁶⁶ the judge of the Northern Bangkok District Court,¹⁶⁷ the officer of the TCSD,¹⁶⁸ the officer of the CSG (the Ministry of Culture),¹⁶⁹ and the representative of the Thai Hotline (Internet Foundation for the Development of Thailand or IFDT)¹⁷⁰ regarded the protection of morality as the most important justification for prohibiting pornography.

Given the above claim that pornography is harmful to public morality, two questions arise. First, what is meant by ‘morality’ in this context? Second, how does pornography harm morality? Some Thai scholars have answered these questions. As regards the first question, based on her observation of state policies on the Thai people’s sexual behaviour from 2002 (the year in which the Ministry of Culture was established) to 2007, Chalidaporn Songsampan – a Thai sociologist – suggests that ‘morality’ – to which the Thai authorities typically refer – appears to be a set of norms as follows: (1) sex should be held within the institution of monogamous marriage; (2) it should be limited within the private sphere; and (3) it should not be presented in a sexually arousing and explicit manner.¹⁷¹ Similarly, by analysing discourses concerning sexuality in Thai society over the past seventy years (1938-2008), Kritaya Archavanitkul and Prissara Sae-Kuay – both gender studies scholars – noted that, for several decades, the Thai authorities have clung to the notion that sexual morality of the contemporary Thai society only accepts sex in a monogamous marriage which occurs

¹⁶⁴ He addressed this issue in the First Official Meeting of the Safe and Creative Media Operation Centre on 30th April 2009. See *Thairath Online* (ไทยรัฐออนไลน์), 30th April 2009, <http://www.thairath.co.th/content/edu/2969>, visited 25th May 2011.

¹⁶⁵ She addressed this issue in the Seminar ‘The Integration of the Monitoring and Blocking of Inappropriate and Illegal Websites’ on 3rd September 2009. See *Thairath Online* (ไทยรัฐออนไลน์), 3rd September 2009, <http://www.thairath.co.th/content/tech/30651>, visited 25th May 2011.

¹⁶⁶ Interview, the Central Criminal Court on 12th April 2011.

¹⁶⁷ Interview, the Northern Bangkok District Court on 26th April 2011.

¹⁶⁸ Interview, the TCSD on 19th April 2011.

¹⁶⁹ Interview, the CSG on 11th May 2011.

¹⁷⁰ Interview, Thai Hotline on 19th May 2011. The IFDT is a private non-profit organisation which aims to promote the development of Internet technology and the safe use of the Internet in Thailand. <http://www.inetfoundation.or.th/>, visited 19th May 2011.

¹⁷¹ Songsampan, C., *History of Sexuality: History of Sex/Sex in Thai History* (ประวัติศาสตร์ของเพศวิ:

ประวัติศาสตร์เรื่องเพศ/เรื่องเพศในประวัติศาสตร์ไทย), (Women’s Health Advocacy Foundation, Bangkok, 2008), pp.7-8.

behind closed doors, and prohibits all forms of sexually explicit and arousing presentations to the public.¹⁷²

With regard to the second question, Songsampan points out that, from the Thai authorities' stance, pornography is seen as a moral threat because it is contrary to the contemporary Thai sexual norms in many ways. First, pornography introduces Thai people to ideas about extra-marital or group sex, partner-swapping, promiscuity and fornication – all of which are inconsistent with the ideology of monogamous marriage. Second, it causes sex to be viewed by the public, rejecting the norm which deems sex as a private matter. Lastly, pornographic depictions challenge the norm that sex should not be presented in a sexually explicit and provocative manner.¹⁷³ Likewise, by drawing upon the analysis of the news relating to the Thai State's perspectives on sexuality between 2001 and 2007, Chamsanit remarks that the Thai State sees pornography as a medium that encourages sexual behaviour to deviate from how the State expects its people to behave, thus undermining public morality.¹⁷⁴

However, there can be two arguments against the Thai government using the so-called 'morality' as a rationale for restricting pornographic expression. First, as already pointed out in Chapter 3, the argument from the freedom of expression perspective is that the restriction of pornography to preserve morality appears to be incompatible with 'democracy' and 'self-realisation' notions.¹⁷⁵ Second, it could be argued from the socio-historical viewpoint, that the prohibition of pornography on the basis that it presents sex in a sexually explicit manner, does not appear to be consistent with the permissive attitude towards sexual presentation of traditional Thai culture.

The 'democracy' notion of freedom of expression, on the one hand, safeguards the right of the minority to express its opinions and persuade people to agree with it; on the other hand, it prevents the majority from using its viewpoints as a pretext to silence the minority. In the context of pornographic expression, the suppression of pornography on morality grounds could be seen as an effort by the Thai authorities to use the majority's opinion in the name of sexual morality (which only approves of sex in a monogamous marriage, and forbids sexually explicit and arousing presentations in the public sphere) to justify its prohibition

¹⁷² Archavanitkul, K. and Sae-Kuay, P., 'Is the Mainstream Sexual Norm in Thai Society being Weakened?' ('ดู ปฏิบัติการของสังคมไทยในกระแสเสรีคิดเรื่องเพศจะอ่อนกำลังลง?') in Pachuen, T., and Bunmongkol, B. (eds.) *The Report of the 1st Annual Conference of Sexuality Studies in Thai Society* (รายงานการประชุมประจำปี เพศวิถีศึกษาในสังคมไทย ครั้งที่ 1), (Chareon Dee Publishing, Bangkok, 2008), pp.57-72, 59-63.

¹⁷³ Songsampan, C., *Low-end Market Pornographic Publications: Knowledge, Myths and Sexual Imagination* (หนังสือโป๊ตลาดล่าง: ความรู้ มายาคติ และจินตนาการในเรื่องเพศ), (Woman's Health Advocacy Foundation, Bangkok, 2008), pp.1-5.

¹⁷⁴ Chamsanit, V., *supra*, p.41-43.

¹⁷⁵ See Section 3.5.1.

against the minority's different opinion (which accepts sexuality outside the normative frame of sexual propriety, i.e. orgy, extra or pre-marital sex, or 'swinging sex', and allows sex to be presented in a sexually explicit or arousing manner to the public). Therefore, the morality-based prohibition of pornography seems to be inconsistent with the 'democracy' principle of freedom of expression. The 'self-realisation' principle encourages an individual to access a full range of thoughts and opinions – irrespective of whether they are deemed good or bad, morally approved or objectionable. Accessing a full range of ideas enables them to (1) make an independent decision about their lives (autonomy); and (2) achieve intellectual growth and personal development (self-fulfilment). Based on this conception, Thai people – particularly adults – should be permitted to explore both morally approved and objectionable sexual ideas, using them as a foundation to develop their own perceptions of sex and to autonomously choose the sexual lifestyles that suit them the most. Given this, the morality based restriction of pornography could be interpreted as the Thai government's attempt to not only limit the choices available to Thai people concerning sexuality, but also to dictate them to think and behave within the normative frame that the Thai government regards as sexual propriety. In other words, the prohibition of pornographic expression on the grounds of morality constitutes a denial of 'self-realisation' of individual Thai citizens.

From the historical perspective, Nithi Aeusrivongse – a Thai historian – argues that the repressive attitude towards sex and its representation of the contemporary Thai society is, in fact, influenced by Victorian sexual mores, which were introduced to Thai society in the mid 19th Century during the reigns of King Rama V (1868-1910) and King Rama VI (1910-1925).¹⁷⁶ As explained by Peter Jackson, like other Southeast Asian countries, Siam (the former name of Thailand) was under the threat of European colonialism – especially from France and England. To protect Siam's sovereignty against the western powers, King Rama V was aware that his Kingdom needed to remove the image of a barbaric and backward land (the pretext which the European countries typically used as a justification for colonialism) by undergoing a 'self-civilisation' programme.¹⁷⁷ As part of the programme, the Victorian

¹⁷⁶ Aeusrivongse, N., 'Obscenity, the Thai Way: About Pornography and Nakedness' ('เรื่องโป๊ๆเปลือยๆ'), (1990) *Art and Culture Magazine*, 11(5), pp. 94-105 cited in Jackson, P.A., 'Offending Images: Gender and Sexual Minorities, and State Control of the Media in Thailand' in Heng, R. (ed), *Media Fortunes, Changing Times: Asian States in Transition* (Institute of Southeast Asian Studies, Singapore, 2002), pp.201-230, 207; Aeusrivongse, N., *Cultures of the Poor* (วัฒนธรรมทวารวดี), (Praw Publishing, Bangkok, 2008), p.16; Tharawan, K., 'Thai State and Queer Relationships' ('รัฐไทยกับชีวิตคู่แบบเพศวิถีนอกขนบ') (2012) *A Paper for the Institution for Population and Social Research Annual Conference 2012: Marginalised People and Social Justice in Thai Society*, http://www2.ipsr.mahidol.ac.th/ConferenceVIII/Download/Article_Files/7-Queer-Kanokwan.pdf, visited 28th January 2013, pp.145-164, 149-150 and 152

¹⁷⁷ Jackson, P., 'Performative Genders, Perverse Desires: A Bio-History of Thailand's Same-Sex and Transgender Cultures' (2003), *Intersections: Gender, History and Culture in the Asian Context*, 9, <http://intersections.anu.edu.au/issue9/jackson.html>, visited 5th December 2011, paras.20-37.

sexual mores were introduced and disseminated initially among the upper and middle classes, and subsequently to lower and other groups of the Siamese society via the education system.¹⁷⁸ An orthodox interpretation of Victorian sexual morality¹⁷⁹ typically describes it as norms which have a prudish and repressive outlook on sexuality.¹⁸⁰ Some of its familiar precepts include: sexual activity should be confined within the institution of heterosexual marriage (and even sex within marriage should be moderate), sexual impulse is dangerous and needs to be controlled¹⁸¹ and sexuality is a matter that people should attempt to hide, evade, repress or deny.¹⁸² Pornographic novels were available only on the black market.¹⁸³ Visual expression which presented sex and nudity in a sexually arousing manner (leading to 'lewdness') is deemed inappropriate to be exhibited or circulated in the public sphere.¹⁸⁴ Certain sexually explicit paintings – such as those of William Etty¹⁸⁵ – are deemed morally objectionable.¹⁸⁶

However, traditionally, Thai people do not appear to have a repressive attitude towards sex, instead allowing it to be explicitly presented to the public. This seems especially evident in sexually explicit murals, which can be found in a number of Buddhist temples. Niwat Kongpien – a notable Thai art critic – interestingly discusses the sexually explicit murals of eighteen different temples across the country¹⁸⁷ in his work *Erotic: Sexual Images in the*

¹⁷⁸ Thammarongwit, S., 'Silence and Speech: The Dissimulations Concerning Sex in Thai Society' ('ความเงียบกับการพูด: ความดัดจริตเรื่องเพศในสังคมไทย') in Esanachatang, D. (ed.), *Jan Dara: Erotic Drama on the Silver Screen* (จินดารดา: เรื่องราวชกกรรมบนจอเงิน), (Rangwat Banthat Publishing, Bangkok, 2001), pp.120-127, p. 123, 125, cited in Jackson, P., paras. 47-48.

¹⁷⁹ For the origins and development of Victorian sexual attitudes see generally Trudgill, E., *Madonnas and Maagdalens: The Origins and Development of Victorian Sexual Attitudes* (Heinemann, London, 1976), Mason, M., *The Making of Victorian Sexuality* (Oxford University Press, Oxford, 1994).

¹⁸⁰ Myrone, M., 'Prudery, Pornography and the Victorian Nude' in Smith, A. (ed.), *Exposed: The Victorian Nude* (Tate Publishing, London, 2001), pp.23-35, 23; for the arguments that Victorian society might not be prudish and sexually repressive as is normally understood see Foucault, M., *History of Sexuality Volume 1: The Will to Know*, translated by Hurley, R. (Penguin, Harmondsworth, 1998), Sweet, M., *Inventing the Victorians* (Faber, London, 2001).

¹⁸¹ Stearns, P.N., *Sexuality in World History*, (Routledge, Oxon, 2009), pp.90,93

¹⁸² Miller, A.H., and Adams, J.E., 'Introduction' in Miller, A.H., and Adams, J.E. (eds), *Sexualities in Victorian Britain*, (Indiana University Press, Bloomington Indiana, 1996), pp.1-16, 1

¹⁸³ For an account on underground pornographic literature during the Victorian era see Marcus, S., *The Other Victorians: A Study of Sexuality and Pornography in Mid-Nineteenth Century England*, (Transaction Publishers, New Brunswick, New Jersey, 2009); Pearsall, R., *The Worm in the Bud: The World of Victorian Sexuality*, (Penguin Book, Harmondsworth, 1971), pp.447-507

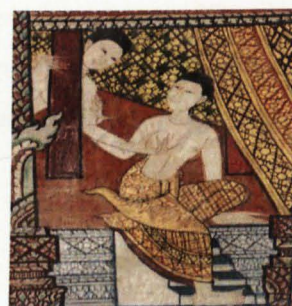
¹⁸⁴ Myrone, M., supra, p.23; However, in the Victorian era, nudity which was presented in an artistic way was acceptable. For a discussion about sexually explicit paintings in the Victorian period see Smith, A., *Victorian Nude: Sexuality, Morality and Art*, (Manchester University Press, Manchester, 1996).

¹⁸⁵ See generally Burnage, S., Hallett, M., and Turner, L., *William Etty: Art and Controversy*, (Philip Wilson Publisher, London, 2011)

¹⁸⁶ Myrone, M., supra, p.25.

¹⁸⁷ *Thung SriMuang* Temple (Ubonrajtahn Province); *Na Prathat* Temple (Nakornrajsrima Province); *Matchimawas* Temple (Songkla Province); *Phumin* Temple (Nan Province); *Pra Singh* Temple (Chiang Mai Province); *Nhong Yaw* and *Nhong Noh Nue* Temples (Saraburi Province); *Kong*

Traditional Paintings and the Sound of Thai Literature.¹⁸⁸ He comments that, in traditional Thai culture, sex is seen as part of human nature and presented in that sense in traditional art – especially in the form of murals (most of which date back to the early 17th Century).¹⁸⁹ This view is shared by Alec Gordon – a Thai traditional art critic. He similarly remarks that sex is portrayed as part of the everyday life of ordinary people, and sometimes in a humorous fashion.¹⁹⁰ Regarding sexual explicitness, naked bodies, women's breasts, buttocks, genitals of both sexes and sexual intercourse are typically seen in the murals (see some examples below). This could imply that traditional Thai culture hardly regards sexual explicitness (the degree to which the Dekka Court would find obscene) as obscene or offensive.



A mural at A Bang Yi Khan Temple

A mural at Wat Nah Pra Tat Temple

A mural at Khong Kha Ram Temple

Pictures 2 - Samples of Sexually Explicit Depictions on Thai Temple Murals¹⁹¹

Therefore, it could be said that the negative attitude towards sexually explicit presentation does not originally belong to Thailand; thus, it could not be a strong justification for prohibiting pornography.

One might argue, however, that Victorian sexual mores have dominated Thai society for over a century and, therefore, the attitudes towards sexual presentation of Thai people could have become more repressive. Thus, the prohibition of pornography by the Thai government

Kha Ram Temple (Rajburi Province); Bang Namphung Temple (Samutprakarn Province); Bang Yikhan, Suwanwararam, Chong Nonsi, Dusitharam, Suthat, Thong Thammachad, Pradu, Si Taram Temples (Bangkok).

¹⁸⁸ Kongpien, N., *Erotic: Sexual Images in the Traditional Paintings and the Sound of Thai Literature* (เชิงสังวาท: ภาพรูปในภาพเขียนตามประเพณีที่มีเสียงวรรณคดีไทย), (Matichon Publishing, Bangkok, 2008). It should be noted that there have been very few studies on Thai sexually explicit murals. At present, this book is the only document which directly and comprehensively examines this matter.

¹⁸⁹ Kongpien, N., p.9.

¹⁹⁰ Gordon, A., 'Women in Thai Society as Depicted in Mural Paintings' in Howard, M.C., Wattanapun, W., and Gordon, A. (eds), *Traditional Thai Arts in Contemporary Perspective* (White Lotus Press, Bangkok, 1998), pp.175-192, 185.

¹⁹¹ A mural at Bang Yi Khan Temple available at <http://thanakharn.multiply.com/photos/album/26/26#photo=5>; a mural at Wat Nah Pra Tat Temple available at http://www.era.su.ac.th/Mural/erotic/erotic2_pic.html; a mural at Khong Kha Ram Temple available at <http://thanakharn.multiply.com/photos/album/26/26#photo=1>, visited 26th May 2011.

nowadays would be justifiable. However, according to the survey conducted by the National Research Council of Thailand (NRCT) in 2009,¹⁹² 53.6 per cent of the respondents¹⁹³ had a permissive attitude towards pornography, and agreed with the legalisation of pornography.¹⁹⁴ The same survey shows that 39.2 per cent of those who supported the legalisation of pornography were of the opinion that sexually explicit and arousing materials should be allowed, as sex is a natural part of being human and viewing and producing it is not morally wrong.¹⁹⁵ Similarly, the survey of public opinion on Internet censorship carried out by the 'My Computer Law' Project (the co-operation between Thai Netizen, Amnesty International (Thailand) and iLaw)¹⁹⁶ in 2011 reveals that 69.93 per cent of the respondents¹⁹⁷ had permissive attitudes towards Internet pornography, and opposed the censorship of Internet pornography.¹⁹⁸ (However, 49.87 per cent of the respondents commented that, although Internet pornography should be free from censorship, there should be a regulatory mechanism to prevent young Internet users from accessing pornographic websites.) The surveys mentioned above suggest that a substantial number of

¹⁹² Pohsa-ard, S., Polnikornkij, V., Kamollimsakul, S., and Pakdeenarong, P., *Pornographic Market: Pornography Consumer Behaviour and Attitudes towards Pornographic Control in Thailand* (National Research Council of Thailand, Bangkok, 2009). It should be noted that this survey is the only survey on pornography that has ever been done on a national scale. In this survey, 'pornography' is defined as sexually explicit materials which are produced to sexually arouse viewers/readers.

¹⁹³ The respondents comprise of 1,155 males and 1,243 females, aged between 15 and 50 years, from 18 different major provinces in 6 main regions across the country – namely Chiangmai, Nan, Mae Hongson (Northern Region); Nakhon Rajsima, Sakon Nakhon, Mukdahan (North-eastern Region); Bangkok, Lopburi, Samut Songkarm (Central Region); Chonburi, Sa Kaeo, Trad (Eastern Region); Kanchanaburi, Tak, Phetchaburi (Western Region); and Nakhon Si Thammarat, Phattalung, Ranong (Southern Region).

¹⁹⁴ Pohsa-ard, S., and *et al.*, pp.116, 126.

¹⁹⁵ Other reasons against the prohibition of pornography are as follows: (1) it is impossible for the Thai government to eliminate all pornographic materials, thus pornography should be legalised (26%); (2) the ban on pornography intervenes with the right to privacy (18.9%); (3) viewing pornography is a common phenomenon (8.2%); and (4) pornography is widely consumed (7.7%). See Pohsa-ard, S., and *et al.*, pp.116, 126.

¹⁹⁶ Thai Netizen is an NGO which works to promote freedom of expression and civil rights on the Internet in Thailand (<https://thainetizen.org/>); Amnesty International, Thailand is the Thai branch of Amnesty International – an international human rights NGO which has the main objective of conducting research on the abuse of human rights (<http://www.amnesty.or.th/>); and iLaw is an NGO which aims to raise public awareness and knowledge of legal issues in the area of IT law (<http://ilaw.or.th/>).

¹⁹⁷ This survey has 1,500 respondents in total, comprising 806 males, 670 females and 24 of non-specified gender. 750 respondents were asked to complete online questionnaires via the 'My Computer Law' website. Another 750 respondents were asked to complete the questionnaires on the spot (the face-to-face surveys were carried out in Chiangmai, Chonburi and Ubonrajthani Provinces). The average age of the respondents was 22.

¹⁹⁸ 'My Computer Law' Project, *The Survey of Public Attitudes towards the Thai Government's Policies on the Regulation of the Internet* (ผลสำรวจทัศนคติของประชาชนต่อแผนนโยบายอินเทอร์เน็ตของประเทศไทย), <http://mycomputerlaw.in.th/wp-content/uploads/2011/12/mycomputerlaw-net-policy-survey-2011.pdf>, visited 16th December 2011.

Thai people in the present day have permissive attitudes towards sexual presentation, and are ready for the legalisation of pornography.¹⁹⁹

6.6.4 Pornography and Offensiveness in the Thai Context

In the contemporary Thai society, sex is considered to be a private matter and can be talked about only in a 'private sphere';²⁰⁰ therefore, the presentation of sex in an explicit manner – especially in the 'public sphere' – is deemed shameful and inappropriate.²⁰¹ As a result, it is understandable and unsurprising that some Thai people may find pornography offensive, particularly when they are exposed to such sexually explicit material unintentionally.²⁰²

However, as contended in Chapter 3 that, under the principle of freedom of expression, offensiveness is not a strong justification to suppress or restrict pornographic expression.²⁰³ According to the interviews with the Thai authorities involved in the regulation of Internet pornography, none of them gave importance to the regulation of Internet pornography on the grounds of preventing offence.

6.6.5 Pornography as a Cause of Rape in the Context of Thailand

One of the claims that the Thai authorities use as a justification for restricting pornographic expression is that pornography is a cause of rape. (It should be noted that the Thai authorities did not refer specifically to any particular types of pornography as a cause of rape.) This claim can be seen in several instances. For example, in the *Deka Judgements Nos.2875/2531 (1988)* and *2787/2541 (1998)*, the Deka Court expressed that obscene materials could urge viewers to rape and commit other sexual crimes. *Thai Health 2005*, a document published by the Ministry of Public Health, states that:

In 2004, Thailand experienced a worrying increase in the number of sexual crimes. At the same time, pornography became more common ... it is hard to deny that the uncontrolled proliferation of [pornographic] images is related in some way to the rise of sexual crimes. ...

¹⁹⁹ However, it is important to note that the surveys should be read with caution; there may be a certain degree of sample bias as these two surveys do not comprehensively explain the sample representativeness.

²⁰⁰ 'Private sphere' means the circles of family members, husband and wives or close friends.

²⁰¹ Songsamphan, C., *History of Sexuality: History of Sex/Sex in Thai History* (ประวัติศาสตร์ของเพศวิถี : ประวัติศาสตร์เรื่องเพศ/เรื่องเพศในประวัติศาสตร์ไทย), (Women's Health Advocacy Foundation, Bangkok, 2008), pp.7-8.

²⁰² Asawasriporgtorn, K., *The Educating Process of Sexuality in Thai Society* (กระบวนการให้ความรู้เรื่องทางเพศในสังคมไทย), (Thai Population Association, Nakorn Pathom, 2009), p.175.

²⁰³ See Section 3.5.2.

People accused of rape claim that the desire to commit rape was prompted by watching pornographic movies.²⁰⁴

In his speech regarding the suppression of harmful media given in 2006, Thaksin Shinawatra – the Prime Minister at that time – claimed that the rape and murder of a British tourist on Samui Island carried out earlier that year was primarily caused by the two defendants watching pornography.²⁰⁵ In 2007, Paiboon Wattanasiritham – the Deputy Prime Minister at the time – gave a similar opinion, stating that ‘inappropriate Internet content could lead to sexual violence and crime’.²⁰⁶

However, it is interesting to note that, among the state officers who gave interviews for this research, only the public prosecutor of Criminal Division 3 (Office of Attorney General) and the officer of the CSG (the Ministry of Culture) mentioned a possible causal connection between the viewing of pornography and rape (despite not being the most significant justification for restricting pornography).²⁰⁷ On the contrary, the officer of the TCSD (Police), the judges (who gave interviews for this research), and the officers of the ITSO (the MICT) did not give opinions on whether a causal connection between pornography and rape exists.

In Thailand, like in the western countries, ‘pornography-causes-rape’ claim remains inconclusive, since there has not been any hard evidence to support the direct relationship between viewing pornography and the commission of rape. Therefore, the prohibition of pornography on the grounds that it causes rape and sexual crimes seems to be unsound.

In the Thai context, rape is a complicated social phenomenon which cannot simply be explained by a claim that pornography urges viewers to commit rape. There appear to be

²⁰⁴ Kanchanachitra, C., Podhisita, C., Archacanitkul, K., and Im-em, W., *Thai Health 2005*, (The Institution of Population and Social Research, Mahidol University, Nakhon Patom, 2005), p.63, http://www.hiso.or.th/hiso/HealthReport/report_download.php?download1=10&lesson1=20&lesson_id=223&zone=3&manu=1&page=, visited 27th May 2011, pp.62-63.

²⁰⁵ *40 Speeches of the Prime Minister Thaksin Shinawatra from 2005-2006 (40 ประมวลสุนทรพจน์ของ นายกรัฐมนตรี พ.ศ.ท. ทักษิณ ชินวัตร ตั้งแต่ปีพ.ศ. 2548-2549)*,

<http://www.thaigov.go.th/mobile/submore.asp?pageid=467&directory=2216&contents=4704&pageno=7&no=40>, visited 27th May 2011; for the news see *The Guardian*, 12th January 2006,

<http://www.guardian.co.uk/uk/2006/jan/12/ukcrime.thailand>, visited 27th May 2011; *Manager Online* (ผู้จัดการออนไลน์), 9th January 2006,

<http://www.manager.co.th/Crime/ViewNews.aspx?NewsID=9490000002834>, visited 27th May 2011.

²⁰⁶ *The Nation*, 29th March 2007,

http://www.nationmultimedia.com/2007/03/29/national/national_30030550.php, visited 27th May 2011.

²⁰⁷ Although the public prosecutor and the officer of the CSG mentioned the possibility that pornography could lead to rape, they did not regard this rationale as the most important justification for restricting pornography. The former stated that the protection of children was the most important justification for prohibiting pornography; whilst the latter considered the protection of public morality to be the most significant rationale.

several factors involved in a rape case; and pornography is merely one of them at best. In other words, it would be the combination of several factors – rather than pornography alone – that causes someone to rape. In his 2002 criminological study on the correlation between pornography and sexual crimes (focusing on rape) in Thailand,²⁰⁸ Tanachai Padungthiti suggests that pornography is merely one of the several factors that makes adult offenders (over 18 years old) to commit rape. In most rape cases, other relevant factors also have a great influence on the offenders' decisions to rape. They are as follows: poor education; low incomes; opportunities to rape (e.g. the victim being alone); and alcohol consumption (which could reduce a person's inhibitions).²⁰⁹ Likewise, this seems to be the case for rapes committed by young offenders (under 18 years old). According to the 2006 study on juvenile crimes by Suree Kanchanawong *et al.*,²¹⁰ although pornography is a factor that causes young offenders to commit rapes, alcohol and the influence of their peers (the imitation of their delinquent peers' behaviour and peer pressure – in the sense that juveniles have to participate in a sexual crime to gain acceptance from their peers) also play important roles in their crimes.²¹¹ (However, this does not suggest that minors should be allowed access to pornography, as pornography may have negative effects on young people's sexual development.)²¹²

The public prosecutor of Criminal Division 3 and the officer of the CSG (the Ministry of Culture) gave opinions which accord with the above findings. They commented that pornography might tempt certain viewers to rape. However, as they remarked, it might not be the sole factor that caused someone to rape. There might be other factors involved, such

²⁰⁸ In this study, 270 sex crime offenders in Bangkwang Central Prison (Nonthaburi) and Bangkok Remand Prison were asked to complete questionnaires. According to the respondent demographics, 41.1% of the inmates were relatively young, aged between 19 and 30; 48.5% had education at elementary levels and 7.4% had never entered school; 66.2% were working class with low monthly incomes (less than 6,800 Baht or around 136 GBP); 38.1% came from broken families; 49% were unmarried.

²⁰⁹ Padungthiti, T., *Pornography and Sexual Offenders* (สื่อลามกกับผู้กระทำความผิดทางเพศ), Thesis Submitted for a Master of Arts Degree (Criminal Justice), Thammasat University (2002), pp.69, 78-80. It is important to note that this Master's thesis is cited as a reliable source of information in the National Research Council of Thailand (NRCT)'s study on pornography (for full reference of the NRCT research see Section 6.5.1 above).

²¹⁰ Kanchanawong, S., Kor-Suriyamanee, C., Kallayajit, S., Sinloyma, P., and Sanitphon, P., *A Study on the Causes of Juvenile Crimes* (การศึกษาปัญหาที่เป็นสาเหตุการกระทำความผิดของเด็กและเยาวชน), www.ajarnpat.com/research/research_child.pdf, visited 2nd July 2011. This study was conducted for the Central Juvenile and Family Court. In the study, 200 young offenders from four main juvenile detention centres – i.e. Baan Pranee, Baan Metta, Baan Ubekka and Baan Karuna – were asked to complete questionnaires.

²¹¹ Kanchanawong, S., and *et al.*, pp.74-45. However, the surveys should be read with caution as the findings were derived from a limited number of respondents selected by the persons who conducted the surveys.

²¹² See Section 6.5.3 below.

as the individual's proneness to sexual violence and rape²¹³ or the opportunity to commit sexual crimes, e.g. a victim was walking alone along an isolated and dimly lit street.²¹⁴

As there could be a number of factors involved in rape, it seems doubtful whether the complete ban of pornography could in itself prevent all instances of rape in Thai society.

The table and graphs below show the numbers of rape cases reported to the police and arrests under Section 287 of the Criminal Code (the production and/or distribution of obscene materials) across Thailand between 2001 and 2010.

Year	Rape Cases Reported to Police	Arrests of Producers & Distributors of Obscene Materials
B.E. 2544 (2001)	3831	2404
2545 (2002)	4369	2736
2546 (2003)	4811	3123
2547 (2004)	5028	3372
2548 (2005)	5090	3245
2549 (2006)	5223	2514
2550 (2007)	5152	2247
2551 (2008)	4644	2170
2552 (2009)	4570	1253
2553 (2010)	4255	1025

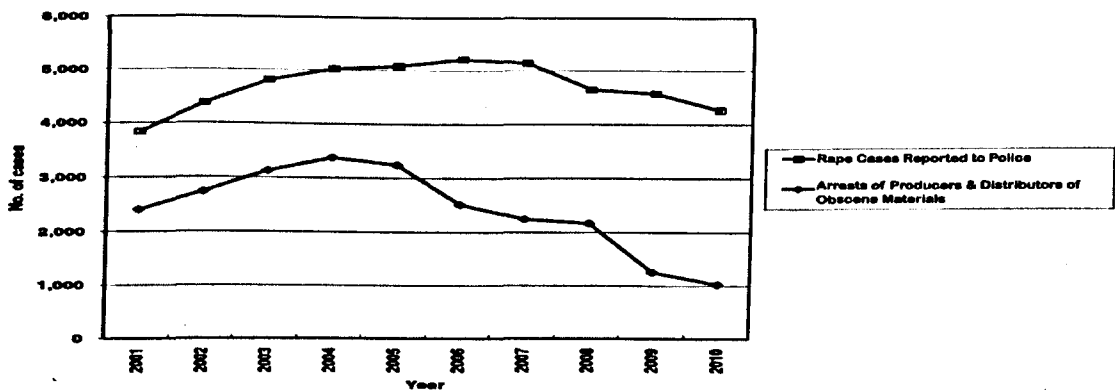


Table 3 - Statistics of Rape Cases Reported to the Police and Arrests of Producers and Distributors of Obscene Materials Nationwide between 2001 and 2010²¹⁵

Taking them at face value, it could be argued that the figures do not seem to support the claim that pornography leads to rape. If the claim had been true, the graphs should have shown a negative correlation – meaning that, whilst the number of arrests of producers and distributors of obscene materials increases, the number of rape cases reported to the police should decrease. On the contrary, the statistics suggest that, over the ten-year period, the suppression of obscene materials did not have a significant impact on the number of rape cases. Between 2001 and 2004, despite the rigorous enforcement²¹³ of the obscenity laws, rape

²¹³ Interview, Criminal Division 3 (Office of Attorney General) on 6th May 2011.

²¹⁴ Interview, the CSG (the Ministry of Culture) on 11th May 2011.

²¹⁵ Royal Thai Police, http://statistic.police.go.th/dn_main.htm, visited 28th May 2011.

cases continued to rise gradually. From 2005 to 2006, although the number of arrests under Section 287 decreased sharply, rape cases still rose continuously, albeit slightly. The noticeable point was in 2007 when the number of rape cases started to decrease, as well as the number of the arrests under Section 287.

As one may argue, the statistics of rape cases and the arrests of producers and distributors of obscene materials may not show the connection between pornography and rape in real-world situations, as there may be variables which could affect the accuracy of the numbers. The unwillingness of rape victims to report to the police could make the number of rape cases look smaller than the number of rapes that actually occur. The lax enforcement of Section 287 during a particular period of time and the pornographers' ability to evade the police's detection could result in a smaller number of arrests. Given these variables, the statistics do not seem to be accurate enough to refute the 'pornography-causes-rape' claim. However, it could be counter-argued that, as the actual number of rapes and the volume of obscene materials that exist in Thai society remain unknown due to the variables, it is equally difficult to prove and ensure that the 'pornography-causes-rape' claim is true.

Regarding psychological studies on the effects of pornography on the viewers, there has not been any study on this subject in Thailand thus far.²¹⁶ As discussed in Chapter 3, the psychological studies in this area in other countries, notably the US and the UK, are too controversial to be used as conclusive evidence to justify the prohibition of pornography.²¹⁷

Furthermore, as argued in Chapter 3, the 'pornography-causes-rape' hypothesis cannot explain why most viewers do not act out what they see in pornography or commit rape.²¹⁸ Considering this, it could be argued that the claim that pornography attributes to rape can only be seen as an exception at best, not a general rule. In this sense, therefore, the use of an exception as a justification to proscribe freedom of pornographic expression of most viewers of pornography does not seem to be persuasive. More importantly, as long as the 'pornography-causes-rape' hypothesis remains highly debatable and inconclusive, it could not serve as a strong justification for the suppression of pornographic expression.

6.6.6 Pornography Tending to Undermine the Image of 'Good' Thai Women

²¹⁶ According to the research database of National Research Council of Thailand, there has been no research on psychological effects of pornography on sexual behaviour in Thailand thus far. See <http://library.nrct.go.th/opac/Index.aspx>, visited 29th December 2012

²¹⁷ See Section 3.5.4.3.

²¹⁸ See *Ibid.*

As pointed out in Chapter 3, in western culture, anti-pornography feminists have claimed that pornography propagates the idea of male supremacy and female subordination.²¹⁹

In the Thai context, the way in which pornography has a negative effect on women is significantly different from that in western society. The officer of the CSG (the Ministry of Culture) remarked that pornography shows sexual behaviour which is contrary to how a good Thai woman should behave; this is especially the case in the pornographic materials in which Thai women are portrayed.²²⁰ In January 2012, *Thairath* newspaper reported that a Japanese pornographic company came to Thailand and hired a Thai woman to play in its pornographic film, which is now available not only in Japan but also on the Internet.²²¹ Piya Utayo – the spokesman for the Royal Thai Police – commented that smuggling productions of pornography in Thailand and the use of Thai women as pornographic performers by foreign pornography companies had happened several times in the past. He said that such pornographic materials distorted the image of Thai women as a whole, making foreign countries misunderstood that Thai women were ‘easy’ and always ready for sex.²²²

In Thai contemporary society, Thai women are framed within the discourse of ideology as a ‘good woman’. For a ‘good woman’, sex is confined within the institution of monogamous heterosexual marriage (a couple will be allowed to have sexual intercourse after marriage), and is for a procreative purpose, not for sexual pleasure.²²³ More importantly, within Thai sexual morality, ‘good’ Thai women should control their sexual desire, and should not express it or sexually arouse men.²²⁴ Moreover, exposure of naked bodies (breasts, buttocks and genitals) is deemed socially unacceptable for a good woman.²²⁵ As noted above, the ideology of ‘good women’ in Thai society is – to some extent – influenced by the sexual

²¹⁹ See Section 3.5.5.2.

²²⁰ Interview, the CSG (the Ministry of Culture) on 11th May 2011.

²²¹ *Thairath Online* (ไทยรัฐออนไลน์), 12th January 2012, <http://demo.thairath.co.th/content/life/229776>, visited 25th July 2012.

²²² Ibid.

²²³ Harrison, R., ‘The Madonna and the Whore: Self/“Other” Tensions in the Characterization of the Prostitute by Thai Female Authors’ in Jackson P.A., and Cook, N.M. (eds), *Genders & Sexualities in Modern Thailand* (Silkworm Book, Bangkok, 1999), pp.168-189, 168-169; Archavanitkul, A. ‘Sexual Transition in Thai Society’ (‘เพศวิถีที่กำลังเปลี่ยนแปลงไปในสังคมไทย’), (2011) *A Paper for the Institution for Population and Social Research Annual Conference 2011: Thailand's Population in Transition: A Turning Point for Thai Society*, <http://www2.ipss.mahidol.ac.th/ConferenceVII/Download-Articles.php>, visited 25th July 2012, pp.43-66, 58.

²²⁴ Harrison, R., supra, p.169; Ounjit, W., ‘Pre-marital Sex and Pregnancy : The High Price of Forgiveness’ (2011) *International Journal of Social Science and Humanity*, 1(2), pp.111-120, 115.

²²⁵ Taweessit, S., ‘The Fluidity of the Gender and Sexuality of Thai women’ (‘การเลื่อนไหลของเพศภาวะและเพศวิถีของผู้หญิงไทย’), in Pongsapitch, A., (ed), *Genders and Sexualities in Thai Society* (เพศสถานะและเพศวิถีในสังคมไทย), Chulalongkorn University Press, Bangkok, 2005), pp.209-268, 225.

mores of women in the Victorian era.²²⁶ By contrast, in traditional Thai culture, an unmarried Thai woman can surreptitiously have sexual intercourse with an unmarried man before marriage; (in fact, it is fornication that leads to marriage which will occur after the couple make a formal apology to the woman's parents or guardians).²²⁷ Regarding the level of bodily exposure in Siam (the era before the modernisation of the country in the mid 19th Century), women with bare breasts were deemed common.²²⁸ (However, it is unclear whether Thai women in the pre-modern period were allowed to express their sexual desire freely or not.)

Pornography, which portrays sex outside marriage, promiscuity, group sex and women's sexual enjoyment, therefore, is clearly contrary to the normative ideal of a 'good woman'.²²⁹ This issue is closely related to the notion of Thai sexual morality which is discussed above. However, it is slightly different in that the focus is on the proper sexual behaviour of women, whilst sexual morality refers to the sexual behaviour of both men and women. However, the claim that pornography damages the images of a 'good' Thai woman does not appear to have sufficient weight to justify the prohibition of pornography. The ideology of 'a good Thai woman' can be seen as an idea of how Thai women should behave sexually. In contrast, pornography expresses an idea which challenges the idea of proper sexual behaviour of Thai women. As pointed out in Chapter 3, in a democratic society, all kinds of ideas/opinions should be freely expressed.²³⁰ The state does not have legitimacy to silence ideas/opinions on the ground that those ideas/opinions are different from or contrary to the those which the state holds. Therefore, in a democratic society like Thailand, it would be wrong in principle to use the ideology of 'a good Thai woman' to suppress pornography. Furthermore, as argued in Chapter 3, under the concept of self-realisation, people should be allowed to explore ideas which are deemed good and bad; by doing so, they can learn to develop their intellectual ability (self-fulfilment) and make an independent decision as to what sexual lifestyles they want to pursue (autonomy). Thai women should not be intellectually confined

²²⁶ Aeusrivongse, N., *Culture of the Poor?* (วัฒนธรรมคนจน?), (Praew Publishing, Bangkok, 1998), p.16; See also Section 6.6.4.

²²⁷ Ibid.; Loos, T., *Subject Siam : Family, Law and Colonial Modernity in Thailand*, (Cornell University Press, Ithaca, 2006), pp.137-138.

²²⁸ In 1829, Bruguière Bartholomeu – a French Bishop – described the way in which Siamese people dress as follows: 'The costume of the Siamese is very simple; they go bare-foot and bare-headed and the only covering is a piece of coloured cloth attached at the waist; they fix it at the back, which gives the garment the appearance of trousers (I shall call it langouti); this is a costume that men and women have in common ...' See Bartholomeu, B. 'Lettre de. Mgr Bruguière, évêque de Capse, à M. Bousquet, vicaire-général d'Aire' *Annales de l'Association de la Propagation de la Foi*, (1831), p.151, cited in Terwiel, B.J., 'The Body and Sexuality in Siam : First Exploration in Early Sources' (2007) *MANUSYA : Journal of Humanities*, 14 (Special Issue), http://www.manusya.journals.chula.ac.th/files/essay/Terwiel_42-55.pdf, visited 29th January 2013, pp.42-55, 46.

²²⁹ Songsamphan, C., *supra*, pp.7-8.

²³⁰ See Section 3.3.3.

within the normative frame of 'a good Thai woman', but should be allowed to explore a full range of ideas, including the idea of being so-called 'a bad Thai woman', from which they can learn and make an autonomous decision regarding which sexual lifestyles are most suitable for them.

6.7 Empirical Findings from Interviews with Authorities and Private Organisations involved in the Regulation of Internet Pornography in Thailand

This section presents the findings derived from 15 semi-structured interviews (9 from the public sector and 6 from the private sector) concerning their organisations' perspectives on Internet pornography and the regulatory approach currently adopted in Thailand within the context of freedom of expression. The collected primary data are based on five themes, as follows: (1) whether the relevant law enforcement authorities and the civil society view pornography as a form of expression; (2) how the interviewee's organisations define 'obscenity'; (3) the most significant justification for regulating pornography; (4) whether the current regulatory methods (legal enforcement and Internet censorship) are plausible to regulate Internet pornography within the context of freedom of expression and (5) how far adults should be allowed to access Internet pornography. The empirical findings in the section will be revisited in Chapter 7, a chapter which aims to propose a 'new' regulatory framework for Thailand.

This section starts with the methodology, and then illustrates the key findings according to the order of the themes.

6.7.1 Methodology

This study adopts qualitative research, namely 'semi-structured interviews', to gain an insight into the Thai regulatory approach to Internet pornography to supplement and reinforce the findings drawn from library-based research. This type of interview allows the author of this thesis to gain essential information from the relevant personnel through their answers, and also to elicit their additional remarks on the issues.²³¹

In this study, 10 structured questions according to the five themes mentioned above were used for the interviewees.²³² In addition, the questions relating to the implementation of

²³¹ See generally Bryman, A., *Social Research Methods*, (Oxford University Press, Oxford, 2004), pp.318-335.

²³² See Appendix

regulatory measures for Internet pornography, i.e. enforcement of obscenity laws and the implementation of Internet censorship, were specifically constructed for the officer of the TCSD (Police), the officers of the ITSO (the MICT), and the representative of TOT (ISP). The author of this thesis informed them that they might give further comments regarding the regulation of Internet pornography, which may not be on the list of prepared questions. It is important to note that the information gathered from the interviews is not publicly available or documented.

To obtain samples, this study employs a non-probability sampling technique, namely 'purposive sampling'. 'Purposive samples' are subjects who can represent the characteristics of the phenomena well or seem to fit the research purpose.²³³ For purposive sampling, only organisations (from both public and private sectors) directly involved in the implementation of the regulative measures against Internet pornography, and in the promotion of freedom of expression on the Internet, were selected. Individual interviewees were, in turn, selected by individual organisations on the basis that their positions could represent the organisations as a whole, and they were directly responsible for the regulation of Internet pornography and the promotion of freedom of expression on the Internet.

The author of this thesis initiated contact with the interviewees, and all interviews were held in Bangkok, Thailand between 12th April and 19th May 2011. Fourteen interviews out of 15 were face-to-face interviews, taking place at the interviewees' workplaces. Only one interview, with the judge of Buriram Provincial Court, was conducted over the telephone. All interviews were conducted only once and each interview lasted between 40 to 60 minutes on average. Most of the interviews were recorded using a digital recording device (an MP3 recorder). However, two interviews; the interview with the representative of TOT (ISP) and the interview with the public prosecutor of Criminal Division 3, were recorded by note-taking due to the interviewee's unwillingness and a technical problem, respectively.

As far as the confidentiality and ethical issues are concerned, the author of this thesis informed the interviewees about their rights to anonymity, and assured them that the information would be treated with strict confidentiality. Also, the interviewees were informed about their rights to withdraw from the interview at any time. It should be noted that the representative of TOT (ISP) declined to answer all the questions, and only gave information about the process of Internet censorship. Therefore, there were only 14 respondents who answered the questions in the interviews.

²³³ See generally, Baker, T.L., *Doing Social Research*, (McGraw-Hill, Inc., New York, 1994), pp.160-167.

6.7.2 Is Pornography A Form of Expression?

All respondents were asked whether pornography communicates any ideas, and whether it should be treated as a form of expression. The responses can be roughly divided into three groups.

All of the respondents in the first group (9 respondents out of 14) agreed that pornography could communicate ideas and thus should be regarded as a form of expression. This group comprised of (1) the judge of Northern Bangkok District Court; (2) the judge of Buriram Provincial Court; (3) the officer of the TCSD (Police); (4) the officer of the CSG (the Ministry of Culture); (5) the representative of the Family Media Watch (FNF); (6) the representative of the IT Watch Hotline (Mirror Foundation); (7) The representative of the Thai Hotline (IFDT); (8) the representative of Thai Netizen; and (9) the representative of Freedom Against Censorship Thailand (FACT).

In the second group, the judge of the Central Criminal Court pointed out that, as pornography does not seem to show anything but depictions of naked bodies and sexual activities, it is not a form of expression and deserves no protection.

In the third group, the public prosecutor of Criminal Cases Division 3 and the officers of the ITSO (the MICT) declined to answer this question.

The findings above suggest that the majority of interviewees agree that pornography is a form of expression as it can communicate ideas about sex. However, it is important to note that, as the judges, the public prosecutor and the officer of the TCSD remarked, they would not take the right to freedom of expression into account, when dealing with obscenity cases.²³⁴

6.7.3 Definitions of ‘Obscenity’

This section explores the obscenity standards of individual organisations involved in the regulation of Internet pornography.

²³⁴ Interviews, the Central Criminal Court on 12th April 2011, Buriram Provincial Court on 14th April 2011, the Northern Bangkok District Court on 26th April 2011; Criminal Division 3 (Office of Attorney General) on 6th May 2011 and the TCSD (Police) on 19th April 2011.

6.7.3.1 The Judges and the Public Prosecutor

The judges noted that they would certainly apply the Deka Court's criteria when obscenity cases came before them.²³⁵ Similarly, the Public Prosecutor stated that, typically, public prosecutors adopted the Deka Court's obscenity test as the principal guideline when considering whether the material at issue was obscene.²³⁶

6.7.3.2 The TCSD

The officer of the TCSD stated that the primary focus of the TCSD's enforcement on the Internet was materials which depicted sexual activities in an explicit manner, regardless of whether they have potential for sexual arousal or not. However, materials that only showed naked bodies, falling short of sexual acts, were not the prime target of the TCSD.²³⁷

6.7.3.3 The MICT

According to the information from the officers of the ITSO (the MICT), the MICT's obscenity standard focuses on the question of whether the material in question shows sexual activities in an explicit manner. If it does, it is considered to be obscene. However, the MICT's obscenity standard gives importance to the educational values of the materials. Sexually explicit materials which are for educational purposes are not deemed obscene.²³⁸

6.7.3.4 The Ministry of Culture

The comment of the officer of the CSG (the Ministry of Culture) was consistent with those of other relevant law enforcement agencies. She commented that materials which exhibited intercourse in an explicit way were typically considered to be obscene under the CSG's criteria. However, as she stressed, the scope of the obscenity criteria of the CSG is broad and includes the depictions of activities which are sexually provocative and could lead to sexual intercourse, e.g. sexual foreplay, even though they are not sexually explicit.²³⁹

²³⁵ Interviews, the Central Criminal Court on 12th April 2011, Buriram Provincial Court on 14th April 2011, and the Northern Bangkok District Court on 26th April 2011.

²³⁶ Interview, Criminal Division 3 (Office of Attorney General) on 6th May 2011.

²³⁷ Interview, the TCSD on 19th April 2011.

²³⁸ Interview, the ITSO (the MICT) on 3rd May 2011.

²³⁹ Interview, the CSG (Ministry of Culture) on 11th May 2011.

6.7.3.5 Privately-Operated Hotlines

Both the IT Watch²⁴⁰ and the Thai Hotline²⁴¹ have similar criteria to determine obscene materials. According to their criteria, online materials are deemed obscene if they depict naked bodies and sexual acts in an explicit and sexually arousing manner.²⁴² The representative of the Family Media Watch commented that obscene material could be defined as material showing naked bodies and sexual activities in a sexually provocative manner, irrespective of whether genitals were obviously displayed or not.²⁴³

6.7.3.6 The Pro-Freedom of Expression NGOs

The representative of Thai Netizen – a pro-Internet freedom of expression group – pointed out that a sexually-arousing characteristic is the key consideration for determining whether the material in question is obscene.²⁴⁴ The representative of FACT was of the opinion that obscenity is a matter for individuals' judgement values. It was somewhat subjective and difficult to find a consensus. Thus, he could not give a definition of obscenity.²⁴⁵

6.7.4 The Most Important Justification for Regulating Pornography

Section 6.6 examined, in part, the rationales which each interviewee's organisation regards as the most important justification for regulating pornography. The findings from the interviews reveal that the protection of public sexual morality²⁴⁶ and the prevention of minors from accessing pornography²⁴⁷ are regarded as the two significant justifications for the regulation of pornographic expression. Physical harm to pornographic performers²⁴⁸ appears to be less important than the two justifications mentioned above. Pornography as a cause of rape, and pornography that damages the images of 'good Thai women' were mentioned by two interviewees – the public prosecutor and the officer of the CSG; however, in their opinions, they are not important justifications for the regulation of Internet pornography.

²⁴⁰ <http://www.thaiitwatch.org/>, visited 13th June 2011.

²⁴¹ <http://report.thaihotline.org/>, visited 13th June 2011.

²⁴² Interviews, the IT Watch (Hotline) on 9th May 2011, and Thai Hotline on 19th May 2011.

²⁴³ Interview, the Family Media Watch on 10th May 2011.

²⁴⁴ Interview, Thai Netizen on 22nd April 2011.

²⁴⁵ Interview, FACT on 18th May 2011.

²⁴⁶ The judge of the Central Criminal Court, the judge of the Northern Bangkok District Court, the officer of the TCSD (Police), the officer of the CSG (the Ministry of Culture) and the representative of Thai Hotline (IFDT).

²⁴⁷ The public prosecutor of Criminal Division 3, the officers of ITSO (MICT), the representative of Family Media Watch, and the judge of Buriram Provincial Court.

²⁴⁸ Only the representative of Thai Netizen and the representative of FACT argue that harm to pornographic actors can be seen as a justification for prohibiting violent pornography.

6.7.5 Opinions on the Current Regulatory Measures for Internet Pornography

According to the respondents, 7 interviewees did not agree with Internet censorship as an effective mode for restricting sexually explicit materials on the Internet, whilst another 7 interviewees agreed with it.

Those who were in favour of censorship were as follows: (1) the judge of the Central Criminal Court; (2) the judge of Buriram Provincial Court; (3) the officer of the TCSD; (4) the officers of the ITSO (the MICT); and (5) the representative of the Family Media Watch. Interestingly, the ITSO officers commented that censorship was still necessary because it acted as a public warning that obscene materials were illegal.²⁴⁹ The representative of the Family Media Watch mentioned that censorship was effective in two ways. First, it was more effective in preventing minors from accessing obscene materials. Second, the act of imposing criminal sanctions by enforcing the law normally took a long time, and it was difficult to bring the wrongdoers before the courts; hence, Internet censorship was a more effective regulatory method as it could instantly cope with Internet pornography.²⁵⁰

The respondents who opposed censorship were the judge of the Northern Bangkok District Court, the public prosecutor of Criminal Division 3 (Office of Attorney General), the officer of the CSG, the representative of the IT Watch, the representative of the Thai Hotline, the representative of Thai Netizen, and the representative of FACT. The judge of the Northern Bangkok District Court and the representative of the Thai Hotline commented that there was a large number of pornographic websites. It was almost impossible to censor them all. Whilst some pornographic websites might be blocked, a number of such websites were still accessible. The representative of the IT Watch noted that censorship was ineffective as it could be easily circumvented by Internet-users. Furthermore, the webmasters could promptly move to new URLs when their current URLs were blocked.²⁵¹ In addition, as stated by the representative of FACT, Internet censorship was contrary to the right to freedom of expression.²⁵²

The question of alternative measures to restrict obscene materials, apart from censorship and criminal sanctions, resulted in various valuable responses. These included education, technical solutions (e.g. filtering software to prevent minors from accessing Internet pornography), self-regulation by the Internet industry (ISPs and webmasters) and by

²⁴⁹ Interview, the ITSO (the MICT) on 3rd May 2011.

²⁵⁰ Interview, Family Media Watch on 10th May 2011.

²⁵¹ Interview, IT Watch on 9th May 2011.

²⁵² Interview, FACT on 18th May 2011.

individual Internet user, the introduction of a rating system, and the co-operation between the private sector (NGOs, parents and schools) and the relevant governmental agencies (e.g. the Ministry of Culture and the MICT) to raise awareness of the harmful effects of obscene materials on minors. Among these alternative non-state regulatory modes, the majority of respondents²⁵³ agreed that education about the safe use of the Internet both at home and school was crucial. Children should be taught about harmful effects which pornography might have on them and how to avoid pornographic websites. Moreover, parents should take an active role in monitoring their children's use of the Internet. In doing so, they should learn IT skills to keep pace with their children.

Four respondents, namely the officers of the ITSO (the MICT), the representative of the Thai Hotline, the representative of Thai Netizen and the representative of FACT, preferred technical solutions – such as rating and filtering systems.

6.7.6 Should Adults be allowed to Access Internet Pornography?

As examined above, it is justifiable that minors should be barred from accessing Internet pornography, as pornography has negative effects on minors' development and understanding of sex and sexuality.²⁵⁴ The question is whether adults should be permitted to access Internet pornography? This question was designed to examine to what extent the public Thai authorities and the NGOs involved in the regulation of Internet pornography agree with one of the hypotheses of this thesis, which suggests that consenting adults should be permitted to access pornography as a part of their freedom of expression. The results are divided into two groups.

The representative of Thai Netizen and the representative of FACT were of the opinion that competent adults should be entitled to access most pornographic materials on the Internet, except certain materials, e.g. violent pornography.²⁵⁵ The officer of the TCSD (Police) commented that nude pictures without explicit depictions of sexual acts should be allowed for adults.²⁵⁶

In the second group, the public prosecutor of Criminal Division 3, the judge of the Central Criminal Court, the judge of the Northern Bangkok District Court, the judge of Burirum Provincial Court, the officer of the CSG, the officers of the ITSO, the representative of the

²⁵³ The majority of respondents refer to all respondents, except the officers of the ITSO (MICT), the representative of the Thai Hotline, the representative of Thai Netizen and the representative of FACT.

²⁵⁴ See Section 6.6.3.

²⁵⁵ Interviews, Thai Netizen on 22nd April 2011, and FACT on 18th May 2011.

²⁵⁶ Interview, the TCSD on 19th April 2011.

Family Media Watch, the representative of the Thai Hotline and the representative of the IT Watch, commented that pornography should still be subject to a complete ban in Thailand. Adults should not be permitted to access pornographic materials on the Internet.

Conclusion

The current regulatory approach to Internet pornography adopted in Thailand is hardly consistent with the conceptual framework developed in Chapter 3. The Thai Constitutional Court has not yet had a chance to consider a case relating to pornography. Thus, under the current jurisprudence, it is still uncertain whether pornography is regarded as a form of expression by the Thai Constitutional Court. Moreover, the Deka Court has never mentioned the concept of freedom of expression in its decisions relating to pornography thus far. In addition, the law enforcement officers who gave an interview for this research stated that they would not take the notion of freedom of expression into account when enforcing obscenity laws. Therefore, at present, it could be said that pornography still has no place within the Thai legal framework.

Second, it is argued that the Deka Court's obscenity standard is excessively broad, making almost all categories of pornography illegal. As a result, there is no distinction between of legal and illegal pornography. The PSTDB Bill can be seen as a welcome stance, as it attempts to specifically restrict only certain genres of pornography – especially pornography that depicts violence, which may cause physical harm or a life-threat to the performers, bestiality and necrophilia. This legal framework is similar to the English extreme pornography. However, the concept proposed by the PSTDB Bill still needs some amendments. Certain types of prohibited pornography, i.e. staged rape and group sex, should be removed from the list to make the PSTDB Bill become harm-based legislation, rather than morality-based as it is at present.

Regarding the mode of Internet content regulation, it can be said that Thailand focuses mainly on state regulation (enforcement of pornography related laws and the implementation of Internet censorship by the MICT). The major criticism of the current censoring measure from the MICT is its lack of transparency. The public cannot know what URLs are blocked, and on what grounds. Furthermore, under the present censoring system, there is no appeal channel for individuals whose right to freedom of expression is affected by the implementation of censoring.²⁵⁷ Internet censorship by the MICT can be seen as the

²⁵⁷ As examined above, Section 20 of the Computer Crime Act does not provide an appeal channel. At present, what an individual (whose right to freedom of expression is restricted by the MICT's

most serious threat to freedom of expression. Furthermore, it leaves no room for the development of self-regulation by the Thai internet industry and by Internet users.

The hotline system in Thailand needs improvement. At present, it has several problems such as the lack of a unified framework and the common obscenity standards, the insufficiency of co-operation between publicly run and privately run hotlines, and between the hotlines and the TCSD and the MICT (governmental bodies which have power to censor Internet content). In this regard, Thailand can learn from the model of the IWF.

With regard to the justifications for regulating pornography, in the eyes of the Thai authorities, public morality and the protection of children appear to be the two main rationales for the regulation of Internet pornography in Thailand. However, under the concept of freedom of expression, only the protection of minors can justify the restriction of pornography; whereas the protection of public morality cannot sustain the regulation of pornography. Furthermore, it was argued in Chapter 3 that serious bodily harm of pornographic performers can be a strong justification for the prohibition of pornography which involves the use of real violence. However, none of the respondents from the public authorities gave importance to this justification.

Lastly, the majority of the public authorities who gave interviews for this thesis take a paternalistic position in that pornography should still be subject to criminal laws and censorship. As a result, consenting adults are prohibited from accessing pornography altogether. It will be contended in the next chapter that, within the conceptual framework of freedom of expression, such a paternalistic position should be avoided. In line with the above arguments, consenting adults should be entitled to freedom of pornographic expression (for legal types of pornography); whilst there should be proper regulatory measures in place to prevent minors from being exposed to pornography on the Internet.

All of these issues will be analysed with the regulatory approaches of the CoE, the EU and the UK to build up a new regulatory framework of Internet pornography for Thailand in the next chapter.

Chapter 7: A Proposal for a New Regulatory Framework of Internet Pornography in Thailand and Conclusion

Introduction

In the previous chapter, this thesis argued that the current Thai regulatory approach to Internet pornography barely conforms to the notion of freedom of expression. As a result, at present, freedom of pornographic expression in Thailand is heavily constrained.

Drawing upon the analyses of Council of Europe (CoE) and the European Union (EU)'s approaches to the regulation of Internet pornography (Chapter 4), and the UK's experience in controlling Internet pornography (Chapter 5), this chapter develops the argument by proposing a 'new' regulatory framework of Internet pornography for Thailand with the intention to bring it towards a more western concept of freedom of expression as examined in Chapter 3.

This chapter is in two parts. The first deals with content regulation, and attempts to answer the question concerning the extent to which sexually explicit expression should be allowed in Thailand. The second part proposes a new regulatory framework for Internet pornography, concentrating on the composition of the new regulatory model, and who should take the role of regulators.

7.1 Content Regulation

7.1.1 Treating Pornography as Expression

It has been argued throughout the thesis that pornography is a form of expression that can communicate ideas/opinions and information about sexuality and gender relations.¹ The examination of decisions of the European Commission on Human Rights and the case-law of the ECtHR in Chapter 4 confirms that pornography is 'expression' within the meaning of Art. 10 (1) of the European Convention on Human Rights (ECHR).² In the UK, as examined in Chapter 5, the House of Lords in *Belfast City Council v. Miss Behavin' Ltd.*,³ ruled that the sale of pornographic materials constituted an exercise of the right to freedom of expression, implicitly accepting that pornography was an instance of expression.⁴

¹ See Section 3.2.2.

² *Scherer v. Switzerland* (1994) No.17116/90, A287; *Hoare v. UK* (1997) No.31211/96 the Decision of the European Commission on Human Rights; *Perrin v. UK* (2005) No.5446/03, 2005-XI; See Section 4.2.1.

³ (2007) UKHL 19.

⁴ See Section 5.1.3.

In the case of Thailand, as examined in Chapter 6, although the Thai Constitutional Court implicitly recognised a film that had sexually explicit scenes was expression,⁵ it has not yet had the opportunity to consider pornography, i.e. sexually explicit material which is produced principally and purposefully for sexually arousing viewers. Therefore, it could be argued that, at present, it remains unclear whether pornography can be considered as an instance of expression within the meaning of the Thai Constitution.

However, this thesis recommends that it is important for the Thai Constitutional Court to give a clear status to pornography, when it has an opportunity to do so in the future. The Thai Constitutional Court should base on the principle laid down in *Judgement No.30/2555*⁶ (and also argued in Chapter3)⁷ – which stated that a material which conveys ideas, opinions and messages on a particular issue was regarded as a form of expression – to hold that pornography is a form of expression as it communicates ideas/opinions concerning sex, sexuality and gender relations. Furthermore, the authorities and organisations involving the regulation of Internet pornography should treat pornography as a form of expression.

7.1.2 Shifting from a Morality-based to a Direct Harm-based Justification

In *Judgement No.30/2555*, the Thai Constitutional Court held that sexually explicit expression could be prohibited by state authorities on the grounds that it was deemed detrimental to public morality.⁸ This clearly shows that the Thai Constitutional Court regards the protection of public morality as an important justification for restricting (prohibiting) sexually explicit expression. The Thai Constitutional Court's position on sexually explicit expression appears to be in line with that of the ECtHR,⁹ the ECJ¹⁰ and the UK courts,¹¹ all of which consider public morality to be a significant justification for the limitation of sexually explicit expression.

However, it was argued that a morality-based justification is not compatible with the concept of freedom of expression outlined in Chapter 3.¹² The prohibition of pornography on the grounds of morality does not permit the sexual ideas/opinions that are different from prevailing sexual morals to be expressed. Thus, it is contrary to the democratic principle of

⁵ *The Thai Constitutional Court Judgement No.30/2555*.

⁶ *Ibid.*, p.5.

⁷ See Section 3.2.

⁸ The Rating Committee Resolution No.11/2553; Ministry of Culture Order No. 28 0204.1/3680.

⁹ See *Handyside v. UK* (1976) No.5493/72, A024; *Müller v. Switzerland* (1988) No.10737/84, A133.

¹⁰ According to the ECJ, the importation of pornographic materials can be restricted on morality grounds. See *R. v. Henn and Darby* Case C-34/79 (1979) ECR 3795.

¹¹ See, for example, *Shaw v. DDP* (1962) A.C. 220; *DPP v. Whyte and Others* (1972) 3 All E.R.

¹² For the discussion in detail, see Section 3.5.1.

freedom of expression which maintains that all kinds of ideas/opinions (regardless of whether they are deemed good or bad, approved or objectionable) should be expressed freely in a democratic society; and that the majority does not have legitimacy to silence minority simply on the grounds that the majority disapprove or offend the ideas held by the minority.¹³ Considering the democratic principle in the context of pornography, it could be stated that although most people in a given society hold that only sex occurring within homogeneous heterosexual marriage is morally acceptable,¹⁴ they cannot use the sexual viewpoint that they hold as a pretext for suppressing the sexual ideas outside the sexual mores that pornography imparts – namely, promiscuity, fornication, or homosexuality. In other words, although the majority does not agree with or is offended by sexual ideas communicated by pornography, it must allow such sexual ideas to co-exist with the sexual idea that it holds.

Furthermore, the moral-based restriction of expression obstructs people from accessing the full range of sexual ideas/opinions upon which they can ponder to make independent decisions about their lives (individual autonomy). Moreover, it prevents them from learning these sexual ideas/opinions, which are a part of personal and intellectual development in terms of sex and sexuality (self-fulfilment).¹⁵

The ECtHR has ruled on several occasions that the state could limit sexually explicit expression¹⁶ and pornography¹⁷ to protect public morality. The ECJ has not yet had the opportunity to try a case of pornography in relation to the right to freedom of expression. However, given the ECJ's position on the restriction of the importation of pornography in *R. v. Henn and Darby*¹⁸ and its reference to the ECtHR's jurisprudence regarding the right to freedom of expression in *Connolly v. Commission*,¹⁹ it is likely that the ECJ will take the same position as that of the ECtHR to allow the restriction of pornographic expression on the basis of the protection of public morality.²⁰ Given this, one may argue that even at international and supranational levels, judicial bodies allow member states to limit sexually

¹³ See Section 3.3.2.

¹⁴ See Section 3.5.1.

¹⁵ See Section 3.3.3.

¹⁶ See *Handyside v. UK* (1976) No.5493/72, A024; *Müller v. Switzerland* (1988) No.10737/84, A133.

¹⁷ See *Hoare v. UK* (1997) No.31211/96, the Decision of the European Commission on Human Rights; *Perrin v. UK* (2005) No.5446/03, 2005-XI; *R. v. Henn and Darby* Case C-34/79 (1979) ECR 3795.

¹⁸ Case C-34/79 (1979) ECR 3795.

¹⁹ Case C-274/99P (2001) ECR I-1611.

²⁰ The ECJ has not yet had an opportunity to try a case of pornography in relation to the right to freedom of expression. However, given the ECJ's position on the restriction of the importation of pornography (see *R. v. Henn and Darby* Case C-34/79 (1979) ECR 3795) and its reference to the ECtHR's jurisprudence regarding the right to freedom of expression (see *Connolly v. Commission* Case C-274/99P (2001) ECR I-1611), the ECJ is likely to allow the restriction of pornographic expression on the basis of the protection of public morality. For a discussion see Section 4.5.

explicit and pornographic expression to protect public morality. Thus the contention that the protection of public morality is inconsistent with the right to freedom of expression seems unpersuasive. It is true to suggest that the ECtHR states clearly that public morality can justify the restriction of expression; and it is likely the ECJ would follow the ECtHR. Nonetheless, one should bear in mind that both the ECtHR and the ECJ are international judicial bodies, and because of cultural variety and different moral standards amongst member states, they are unwilling to determine morally sensitive matters (such as sexually explicit expression) for a particular member state.²¹ Accordingly, a margin of appreciation doctrine is adopted to give a wide degree of discretionary power to national authorities – who are culturally and geographically close to the community in which the freedom of expression dispute originates and know the prevailing sexual moral standards of that community – to deal with the extent to which freedom of sexual expression should be permitted at a local level.²² Nonetheless, as discussed in Chapter 4, the margin of appreciation doctrine has negative implications for the protection of the right to freedom of expression because it undermines the universality of the right to freedom of expression and downplays the authority of the ECtHR in particular in terms of maintaining an equal standard of freedom of expression protection throughout Europe.²³

In England, the restriction of sexually explicit expression on the grounds of public morality protection is not free from criticism. As examined in Chapter 5, under the English obscenity standard, the morally corrupting and depraving effects of the material is the decisive criterion on which to judge obscenity. And these morally corrupting effects of sexually explicit material are to be judged by a jury (or magistrates) on a case-by-case basis.²⁴ As a result, it is always possible that sexually explicit or pornographic expression is judged not to be obscene by a jury in one case, but is deemed obscene by a different jury in another case. For example, in *Hoare v. UK*, pornographic material that depicted *inter alia* urophilia (a man urinating into a woman's mouth) and virginal fisting were found by the jury to be obscene.²⁵ However, in *R v. Peacock*, the most recent obscenity case, pornographic DVDs that showed urophilia and fisting were determined by the jury not to be obscene.²⁶ The subjectivity and vagueness of the moral standard to determine obscenity appears to render

²¹ See Section 4.2.2.4.

²² The ECtHR has a margin of appreciation doctrine, and the ECJ has adopted a very similar concept called margin of discretion; see Section 4.5.

²³ See Section 4.2.2.4.

²⁴ See Section 5.2.

²⁵ An unreported case in the UK, but this case was later filed to the ECtHR (1997) No.31211/96.

²⁶ The citation of the case is not yet available. For the details of the case see, for example, <http://lawjusticejournalism.org/2012/01/13/r-v-peacock-landmark-trial-redefines-obscenity-law/>; <http://www.bbc.co.uk/news/uk-16443697>; <http://www.guardian.co.uk/commentisfree/libertycentral/2012/jan/06/michael-peacock-obscenity-trial>, visited 2nd March 2012.

the scope of protection of sexually explicit expression in England unforeseeable and irregular.²⁷

In Thailand, as examined in chapter 6, the decisive criterion for judging obscenity is the question of whether the sexually explicit material is sexually provocative and repulsive. As stated by the Deka Court in several judgements, this criterion is based on the protection of sexual morality in Thai society.²⁸ However, it can be contended that this criterion of the Thai obscenity standard is also vague and subjective.²⁹ As a result, the scope of freedom of sexually explicit expression in Thailand is largely unpredictable. Furthermore, given that pornographic material is typically produced with an intention of arousing viewers sexually, it could be argued that the Thai obscenity laws (which regards sexually provocative characteristic of the material as one of the decisive criteria) in effect outlaw almost all pornographic material. Put differently, there is hardly any freedom of pornographic expression in Thailand, despite the Constitutional Court accepting that sexually explicit material is expression. By contrast, whilst the English obscenity standard is also vague because of its 'morally corrupting effects' criterion, it leaves some room for legal pornography – i.e., pornographic material that has sexually explicit and provocative portrayals but which falls short of morally corrupting effects.

In summary, the vagueness and subjectivity of the morality-based justification arguably poses problems to freedom of sexually explicit expression. First, it makes it difficult for people to know or predict a clear and defined boundary of freedom of sexually explicit expression to which they are entitled. Second, in Thai obscenity laws in particular, it renders the scope of prohibited sexually explicit expression unduly wide (until there is almost no freedom of sexually explicit expression).

This thesis proposes that the legal regulation of sexually explicit expression shift its justification from a morality-based rationale to a harm-based rationale. Also, it recommends that the judicial bodies – i.e. the Thai Constitutional Court and the Thai courts – adopt the harm-based justification when trying a case relating to pornography. 'Harm' in this context refers specifically to physical harm inflicted on people participating in the production of pornography (pornographic performers). It is argued in chapter 3 that bodily harm is a strong justification for the restriction of sexually explicit and pornographic expression.³⁰ According to the harm principle, expression can be legitimately limited if it causes harm

²⁷ See also Section 4.2.2.2.

²⁸ See *the Deka Judgements No. 2875/2531 (1988), 7416/2537 (1994), 2787/2541 (1998)*.

²⁹ See Section 6.2.4.

³⁰ See Section 3.5.5.1.

(particularly bodily harm) to others.³¹ More importantly, well-being and the life of a person are of paramount importance, and could arguably outweigh the value of freedom of expression. Put differently, sexually explicit and pornographic material produced at the cost of physical harm or the life of a person is not entitled to protection under the principle of freedom of expression.³² Therefore, pornography that involves the use of real violence in its production should be outlawed (illegal pornography).

One may question at this point whether the argument from ‘indirect harm to society’ – i.e. the argument that pornography encourages people (especially men) to be interested in violent or aberrant sex and to accordingly develop degrading attitudes towards women, leading them to have undesirable sexual behaviour that could harm society at large³³ – can justify the prohibition of pornography in Thailand. Regarding ‘indirect harm to society’, the UK government, at first, accepted that there was no hard scientific evidence to show that pornography causes changes in the sexual behaviour of viewers (men in particular).³⁴ However, it commissioned a group of academics (notably anti-pornography feminists) to produce a document entitled *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment (REA)*.³⁵ The REA contended that pornography plays a significant role in changes to sexual behaviour. The UK government took the findings from the REA to persuade the UK Parliament to criminalise the possession of extreme pornography. (It should be noted that the REA is subject to criticisms).³⁶

However, the claim that pornography causes negative changes in viewers’ sexual behaviour and causes them to hold degrading attitudes towards women is inconclusive and highly controversial. In 1970, the US government funded several experiments on the psychological effects of pornography on viewers. None of these experiments provided substantial evidence to support the claim that pornography leads to the development of delinquent sexual

³¹ See Section 3.5.5.1.

³² Easton, S., ‘Criminalising the Possession of Extreme Pornography: Swords or Shield?’, (2011), *Journal of Criminal Law*, 75(5), pp.391-413, 398; Nair, A., ‘Real Porn and Pseudo Porn: The Regulatory Road’, (2010), *International Review of Law, Computers and Technology*, 24(3), pp.223-232, 229.

³³ See Section 5.2.4.4 (B).

Home Office and Scottish Executive, *Consultation: On the Possession of Extreme Pornographic Material Consultation Paper*, <http://www.scotland.gov.uk/Resource/Doc/57346/0017059.pdf>, para.31, at p.10.

³⁵ Itzin, C., Taket, A. and Kelly, L., *The Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment (REA)*, (Ministry of Justice, Department of Health, 2007), <http://www.justice.gov.uk/publications/research280907.htm>, visited 12 October 2009.

³⁶ See Section 5.2.4.4 (B).

behaviour in viewers.³⁷ In the UK, the study on this subject by Howitt and Cumberbatch for the Home Office in 1990 concluded that the causal link between pornography and deviant and aggressive sexual behaviour is largely unclear.³⁸ In Thailand, according to the research database of the National Research Council of Thailand (NRCT), thus far, there has not been any scientific or psychological study of the effects of pornography on changes to sexual behaviour.³⁹ Given the lack of studies in this area in the context of Thailand, together with the fact that the studies on this matter in foreign countries, notably the UK and the US, remain debatable, Thailand should not rush to utilise the inconclusive argument from 'indirect harm to society' in an attempt to justify the limitation or prohibition of sexually explicit and pornographic expression.

Regarding the 'physical harm to pornographic performers' justification, the question arises with regard to the level of bodily harm deemed serious enough to call for the law to interfere with freedom of sexually explicit expression. This is an important question. A certain degree of violence and the infliction of a certain degree of pain are typical parts of BDSM practices; and more importantly, in most cases, BDSM activities are consensual.⁴⁰ If the criteria to judge bodily harm are too restrictive – even very minor injuries or temporary discomfort such as a small scratch without bleeding, a minor rope burn, or an unserious spanking mark (as opposed to a bruise), it would mean that pornography depicting mild BDSM acts that do not cause serious bodily injury would be outlawed.⁴¹ This would unavoidably limit the right to free speech of the BDSM community that practices safe, sane and consensual BDSM activities. In contrast, unduly lax criteria would expose pornographic actors to the risk of serious physical harm. In the UK, the House of Lords in the landmark case of *R v. Brown, Laskey and Jaggard*⁴² set standards of bodily injuries to which consent cannot be given. It held that acts causing 'grievous bodily harm' (i.e. 'really serious bodily harm and wounding that involves the breaking of the whole skin')⁴³ or 'actual bodily harm' (i.e. 'any hurt or injury that is calculated to interfere with, or does interfere with, the health

³⁷ Report of the Commission on Obscenity and Pornography (September 1970), (US Government Printing Office, Washington, 1970), p.243; see also Section 3.5.4.

³⁸ Howitt, D., and Cumberbatch, G., *Pornography: Impacts and Influences: A Review of the Available Research Evidence on The Effects of Pornography*, (Home Office Research and Planning Unit, London, 1990), p.94.

³⁹ <http://library.nrct.go.th/opac/Index.aspx>, visited 29th December 2012.

⁴⁰ Bamforth, M., 'Sado-Masochism and Consent', (1994), *Criminal Law Review*, 1994(Sep), pp.661-664, 663; see also Langdrige, D., and Baker, M. (eds), *Safe, Sane and Consensual : Contemporary Perspectives Sadomasochism*, (Palgrave Macmillan, Basingstoke, 2007).

⁴¹ See Sections 3.5.5.1 and 5.2.4.4 (A).

⁴² (1994) 1 A.C. 212. This case was later brought to the ECtHR in *Laskey, Jaggard and Brown v. UK* (1997) No. 21627/93; 21826/93; 21974/93, 1997-I. The ECtHR granted a wide margin of appreciation to the UK authorities and held that there was no violation of Art. 8 of the ECHR.

⁴³ Section 20 of the Offences Against the Person Act 1861.

or comfort of the subject'),⁴⁴ could not be carried out legally despite the consent of a victim.⁴⁵ Examples of grievous or actual bodily harm included, in this case, the insertion of a fish hook through a penis, burning a penis with hot wax or burning a mark on the skin (branding).⁴⁶ In Thailand, the Deka Court has also laid down similar jurisprudence regarding consent and levels of bodily harm. In *Deka Judgement No. 628/2474 (1931)*, the Deka Court held that a person could not consent to another person inflicting bodily harm on him/herself.⁴⁷ In terms of the levels of bodily harm, the Deka Court ruled in *Deka Judgement No. 703/2506 (1963)* that the seriousness of an injury or a wound must be taken into account when determining whether the injury in question constitutes bodily harm under Section 295 of the Thai Criminal Code. Section 295 provides the following:

'Whoever causes injury to the other person in body or mind is said to commit bodily harm, and shall be punished with imprisonment not exceeding two years or given a fine not exceeding four thousand Baht, or both.'⁴⁸

It can be concluded from the Deka Court's judgements that bleeding,⁴⁹ breaking of a tooth,⁵⁰ breaking of ribs,⁵¹ causing a serious bruise that lasts over 5 days,⁵² cuts from a sharp object,⁵³ a burn as a result of a hot metallic object,⁵⁴ and a wound caused by electrocution⁵⁵ are considered to be physical harm within the meaning of Section 295.

This thesis proposes that the new legal regulation of pornographic expression should establish a link with the 'bodily harm' element of Section 295, meaning that the new pornography-related legislation should be designed to criminalise only pornography that depicts violent sexual acts that can cause, or are likely to cause, 'bodily harm' within the meaning of Section 295. The scope of the proposed legislation may be broader than that of the English extreme pornography law (Section 63 of the Criminal Justice and Immigration Act (CJIA) 2008), which outlaws only pornography that depicts violent acts that cause

⁴⁴ Section 47 of the Offences Against the Person Act 1861.

⁴⁵ (1994) 1 A.C. 212, 276.

⁴⁶ *Ibid.*, pp.236, 238, 246.

⁴⁷ In this case, the injured person had a superstitious belief that his skin was penetration-proof. He consented to the defendant stabbing him with a knife to prove his belief. However, the knife penetrated his chest. Before the court, the defendant raised the consent of the injured person as a defence.

⁴⁸ There is no official translation of the Thai Criminal Code available. However, an unofficial translation by [www.thailaws.com](http://thailaws.com) is available at http://thailaws.com/law/t_laws/tlaw50001.pdf, visited 15th January 2013.

⁴⁹ *Deka Judgement No. 437/2515 (1972)*.

⁵⁰ *Deka Judgements Nos. 235/2513 (1970); 193/2519 (1976)*.

⁵¹ *Deka Judgement No. 3862/2528 (1985)*.

⁵² *Deka Judgements Nos. 1875/2522 (1979); 2075/2527 (1984); 2745/2535 (1992); 2895/2543(2000)*.

⁵³ *Deka Judgement No. 2822/2531 (1988)*.

⁵⁴ *Deka Judgement No. 1752/2540 (1997)*.

⁵⁵ *Deka Judgement No. 513/2543 (2000)*.

injuries to the anus, breasts or genitals.⁵⁶ However, as remarked by McGlynn and Rackley, the narrow scope of extreme pornography which focuses only on serious injury to the anus/breasts/genitals would render the extreme pornography law illogical.⁵⁷ For example, whilst a pornographic image that portrays the anus/breasts/genitals being cut by a sharp object would be considered illegal under the extreme pornography law, a pornographic image of a person's buttocks being cut by a sharp object – which are arguably deemed equally detrimental to a person – is lawful.⁵⁸ Learning from the UK's experience, in an attempt to avoid such illogical outcomes, this thesis insists that the proposed legislation to control pornography should criminalise pornographic material that depicts violent acts that can cause 'bodily harm' within the meaning of Section 295 of the Thai Criminal Code.

Based on the bodily harm justification, pornographic material that shows life-threatening acts – including erotic asphyxiation, especially by suffocation or strangulation; erotic electrocution; forcing a phallus into a person's throat with an intention to choke,⁵⁹ for example – should also be prohibited. Furthermore, as argued in Chapter 3 and Chapter 5, performing sexual acts with real animals or corpses exposes pornographic actors to serious bodily injury and diseases caused by animals and dead bodies. Therefore, bestial and necrophiliac types of pornography, which involve the use of real animals and corpses in the production, should also be criminalised.⁶⁰

According to the interviews with Thai authorities and private organisations involved in the regulation of Internet pornography, the judge of the Central Criminal Court, the judge of Northern Bangkok District Court, the officer of the Technology Crime Suppression Division (TCSD) of the Royal Thai Police, the officer of the Cultural Surveillance Group (CSG) of the Ministry of Culture, and the representative of the Thai Hotline all regard the protection of public morality as the most important justification for restricting pornographic expression.⁶¹ However, in order to afford freedom of sexually explicit expression to Thai people, this thesis argues that it is necessary for those who have influence over the regulation of Internet pornography to adjust, perhaps gradually, their attitudes to be more in line with harm-based justification.

⁵⁶ Section 63 (7) (b) of the Criminal Justice and Immigration Act 2008; See also Section 5.2.4.2 of this thesis.

⁵⁷ McGlynn, C. and Rackley, E., 'Criminalising Extreme Pornography: A Lost Opportunity', (2009) *Criminal Law Review*, 2009(4), pp.245-260, 249

⁵⁸ *Ibid.*

⁵⁹ See generally Cooke, C.T., Cadden, G.A., and Margolius, K.A., 'Autoerotic Deaths: Four Cases' (1994) *Pathology: The Journal of Royal College of Pathologists of Australia*, 26(3), pp.276-280.

⁶⁰ See Sections 3.5.5.1 and 5.2.4.4 (A).

⁶¹ See Sections 6.6.3 and 6.7.4.

7.2 Proposed Regulatory Framework

7.2.1 Abolishing the Current Thai Obscenity Laws and Introducing a New Law to Control Pornography

This section begins with a proposal for a 'new' legal framework of Internet pornography regulation for Thailand. As examined above, the current Thai obscenity standard is vague, subjective and unduly restrictive, leaving almost no room for freedom of sexually explicit expression. This thesis recommends that the current Thai obscenity laws be abolished. This is considered necessary if the aim is to establish a reasonable degree of freedom of sexually explicit expression, including pornography, within Thai society. Nonetheless, the abolition of obscenity laws does not mean that Thailand no longer needs any form of regulation in the domain of sexually explicit expression; rather there is still the requirement of a certain degree of control, and legal norms to control it remains essential. Nonetheless, as suggested above, the legal regulation should be harm-based, rather than morality-based (as is the case at present).

The proposed new legal framework will take the form of an amendment to Section 287 of the Criminal Code, the current principal obscenity provision. The English extreme pornography law⁶² serves as a useful source of reference. However, as examined in Chapter 5, certain elements of the English extreme pornography are arguably incompatible with the concept of freedom of expression.⁶³ The construction of the 'new' Section 287 will be selective, taking only those elements that are essential to the regulation of pornography, and more importantly, consistent with the notion of freedom of expression.

Because the extreme pornography law (Section 63 (1) of the CJIA) makes it an offence to possess an extreme pornographic image, the first question raised is as follows: 'Does Thailand need a possession offence?' As already discussed in Chapter 5, the criminalisation of possession (as opposed to production or distribution) appears to be an unduly severe treatment of Internet users who only access pornography portraying sexual violence/bestiality/necrophilia or who otherwise have only these types of pornography in their possession for private use, because they are not directly involved in the infliction of harm on pornographic performers.⁶⁴ However, the UK government has claimed that most violent pornographic material is produced outside the UK but is accessible via the Internet; thus, the possession offence is deemed necessary to reduce the demand of such material in

⁶² See Section 5.2.4.2.

⁶³ For discussions, see Sections 5.2.4.2 and 6.3.2.

⁶⁴ Singh, R., *In the Matter of Consultation Paper on The Possession of Extreme Pornographic Material*, http://www.backlash-uk.org.uk/wp/?page_id=148, visited 20th June 2012, para.29.

the country. As the demand reduces, the supply should decrease. However, it could be argued that the UK government's claim is based purely on a the simple assumption that the criminalisation of possession of extreme pornography will certainly lead to the decrease of the demand and the supply of such material. The UK is the only country in Europe that prohibits the possession of violent pornography. However, as the UK government accepts, this type of pornography is produced mainly outside the UK. Although the UK government may be able to control the consumption of violent pornography in the country, this does not necessarily mean a decrease in the production of violent pornography in other countries, with such violent pornography continuing to be circulated on the Internet. More importantly, since the extreme pornography came into effect in 2009, thus far, there has not been any study carried out or statistical evidence garnered to support that the possession offence actually reduces the demand of extreme pornography in the UK. Given the lack of statistical proof at the present time, it is still too early to conclude whether the possession offence effectively decreases the demand of violent pornography, and thus is necessary.

Furthermore, the imposition of criminal liability with imprisonment for a practical reason of the enforcement of the law appears to be unsound.⁶⁵ It is the producers of violent pornography who are involved in the use of real violence, inflicting harm on the pornographic performers; whilst the distributors are those responsible for circulating permanent records of a person being sexually abused and exploited on the Internet. The imposition of criminal sanctions on the producers and distributors is arguably justifiable. However, the viewers of violent pornography simply view the materials, but are not directly involved in the use of violence being inflicted on pornographic performers. Thus, it is questionable whether punishing the viewers with criminal penalties is proportionate. Therefore, the proposed Section 287 should criminalise only the production and distribution of violent, bestial and necrophiliac types of pornography.

This thesis suggests that Internet censorship can be an alternative approach that is deemed sufficient to control violent pornography. Internet censorship could prevent people from accessing to violent pornographic websites, making such type of pornography unavailable in general. This would help to reduce the availability of violent pornography in the country. Despite restricting the right to freedom of expression, it can be seen as a less harsh regulatory method than criminal liability. (The issue of Internet censorship will be discussed below.)

⁶⁵ Nair, A., 'Real Porn and Pseudo Porn: The Regulatory Road' (2010), *International Review of Law, Computers and Technology*, 24(3), pp.223-232, 230-231.

Based on the 'bodily harm' justification, the text of the proposed Section 287 would be as follows:

(1) It is an offence for a person to produce, distribute (whether for commercial purposes or not), or display in a public place a 'criminalised pornographic image'.

(2) A 'criminalised pornographic image' is an image that is both –

- (a) pornographic, and
- (b) depicts acts enumerated in subsection (6)

(3) An image is 'pornographic' if it is of such a nature that it has been produced solely or principally for the purpose of sexual arousal. This is to be determined by a trial judge.

(4) Where an image forms part of a series of images, the question of whether the image is of such a nature mentioned in subsection (3) is to be determined by reference to the context in which it occurs in the series of images.

(5) An image in question is not considered to be 'pornographic' within the meaning of subsection (2) (a) if, given the overall context in which it exists, it is justified as being for the public good on the ground that it is in the interests of science, literature, art or education.

(6) An image falls within this subsection if it portrays any of the following acts in an explicit manner, and can be identified beyond a reasonable doubt that an act portrayed therein is real –

- (a) an act that threatens a person's life
- (b) an act that results, or is likely to result, in bodily harm within the meaning of Section 295
- (c) sexual intercourse or oral sex with a real animal or a real corpse

(7) In this section 'image' is taken to mean: –

- (a) a moving or still photographic image; or
- (b) data (stored by any means) that is capable of conversion into an image within the meaning of paragraph (a)

As with other criminal offences, an accused found guilty of this offence is punishable by a fine and/or imprisonment. However, the severity of the penalty (the maximum fine or imprisonment) is an issue of criminology and penology and is beyond the scope of this thesis.

The proposed Section 287 focuses only on pornography. This thesis suggests that this criterion should be determined by a trial judge. (Thailand lacks a jury system.) 'Pornographic' character must be determined by considering whether the image is produced solely or principally for the purpose of sexual arousal. Like the English extreme pornography law (Section 63 (4) and (5) of the CJIA 2008), if the image in question is part of a large series of images, the proposed Section 287 requires the judge to consider it by taking into account the overall context in which it exists. Moreover, if the image in question, given the overall context in which it exists, has scientific, artistic, literary or educational merits, it will not be considered as 'pornography' within the meaning of Section 287. For

example, an image of a couple engaging in sexual intercourse can be deemed pornographic, if it is considered in isolation. However, if the court is satisfied that it is actually an image extracted from a documentary film produced for an educational purpose or from a mainstream movie not produced mainly for the purpose sexually arousing viewers or has an artistic value, such an image will not be considered to be 'pornography'.⁶⁶ This criterion would prevent the proposed Section 287 from being excessively broad and prohibiting artwork, educational materials (such as illustrations on an educational website) or documentaries.

Importantly, the trial judge may call for the opinions of experts in the relevant fields (such as art, science, education or film and media studies) to help him/her determine whether the material in question has scientific, artistic, literary or educational merits. Section 243 of the Thai Criminal Procedure Code B.E. 2477 (1934)⁶⁷ allows a trial judge to call upon an expert in any field whose opinion is valuable for the adjudication of the case.⁶⁸ Experts' opinions provide the court with information that is outside the experience and knowledge of the judge,⁶⁹ helping him/her to be more certain about the real purpose of the production of the material in question.

Another main feature of the proposed Section 287 is that it deals only with pornographic images that depict acts enumerated in subsection (6) in an explicit manner, and it can be identified beyond a reasonable doubt that the act portrayed therein is real. This criterion is of particular importance. First, it would limit the proposed Section 287 to specifically prohibiting an explicit photographic image of an actual act enumerated in subsection (6); and as such, its scope would be narrow and does not cover non-photographic materials – e.g., cartoons, drawings, paintings, audio and textual material. Second, it would not criminalise the material that is obviously 'fake' – i.e. pornographic material that employs special effects to depict simulated violence, 'fake' wounds and blood, and that involving the use of an animal mannequin or a living person acting as a dead body.

⁶⁶ See Section 5.2.4.2.

⁶⁷ Section 243 of the Thai Criminal Procedure Code B.E.2477 (1934) reads: 'Any person having, by profession or otherwise, expertise on any subject such as science, art, professional skills, commerce, medicine or foreign law, and whose opinion may be valuable for the adjudication of a case may, in the course of inquiry, preliminary examination or trial, be a witness in matters such as the examination of the body or mind of the injured person, alleged offender or accused, or of handwriting, or carrying out experiments or other works ...'; There is no official translation of the Thai Criminal Procedure Code available. However, an unofficial translation is available at <http://www.humanrights.asia/countries/thailand/laws/Criminal%20Procedure%20Code%20I.pdf>, visited 17th January 2013.

⁶⁸ Office of Criminal Litigation of Office of Attorney General, *The Handbook for Attorney on Criminal Procedure Law*, <http://www.crim.ago.go.th/information01.html>, visited 17th January 2013, p.145

⁶⁹ May, R., *Criminal Evidence* (4th ed), Sweet & Maxwell, London, 1999), p.180.

However, given the current technologies of special effects and computer graphics, pictures can be very realistic-looking, and so is extremely difficult for a lay person (or even a judge) to tell whether what is depicted therein is 'real', 'simulated' or 'computer-generated'. Thus, this thesis proposes that the judge call experts in the relevant fields, – such as special effects, films or computer graphics – to give an opinion to assist the judge to determine whether the image in question is a record of real prohibited acts listed on subsection (6). One may contend that the expert's opinions may not fully guarantee that an image of real sexual violence, bestiality or necrophilia will always be detected, and the image of 'fake' prohibited acts will always be free from prohibition, since even an expert's decision can be mistaken. This may be true. However, the expert's opinion is of great assistance in making the court certain beyond a reasonable doubt that sexual violence or sexual activities with an animal or a corpse are 'real'. This would elevate the threshold of the court's scrutiny standard, and would accordingly help a judge to determine the legality of the pornographic material with a greater degree of accuracy.

The proposed Section 287 (6) is designed to deal specifically with pornographic materials that can cause serious bodily harm to pornographic performers in the production. It could be said that the main feature of the proposed provision is that it attempts to depart from the concept of obscenity and adopts the concept of bodily harm as a justification for restricting sexually explicit expression. It narrows down the scope of illegal pornography to only pornographic materials that depict violence to a degree that could constitute 'bodily harm' (under Section 295), and sexual acts with a real animal or a real corpse. This, in effect, would not only legalise most types of pornography, but would also draw a clearer line between legal and illegal categories of pornography than that achieved by the present Thai obscenity laws. In other words, the proposed Section 287 will divide pornography into two categories: the first is legal pornography, which refers to most pornographic materials; and the second category is illegal pornography, which refers mainly to pornographic materials prohibited by the proposed Section 287. This makes the scope of the legal regulation of pornography more certain and predictable, and also allows people to know the scope of freedom to sexually explicit expression with a great degree of certainty. One may raise a question with regard to whether Thai people are ready for the legalisation of pornography. As already pointed out in Chapter 6, according to a study on the attitudes of Thai people towards the legalisation of pornography conducted by NRCT in 2009, 53.6 per cent of respondents have permissive attitudes towards pornography and agree with its legalisation.⁷⁰

⁷⁰ Pohsa-ard, S., Polnikornkij, V., Kamollimsakul, S., and Pakdeenarong, P., *Pornographic Market: Pornography Consumer Behaviours and Attitudes towards Pornographic Control in Thailand* (National Research Council of Thailand, Bangkok, 2009). The respondents comprise of 1,155 males

A more recent survey on Internet users' attitudes towards Internet pornography conducted by the 'My Computer Law Project' in 2011 reveals that 69.93 per cent of respondents are of the opinion that Internet pornography should be permitted.⁷¹ These surveys serve as an indicator that a substantial number of people in contemporary Thai society accept the legalisation of pornography.

Interestingly, one may ask whether the proposed Section 287 will be compatible with the Thai government's policy. As already examined in Chapter 6, the Thai government has a plan to propose the Suppression of Temptations to Dangerous Behaviours Bill (PSTDB Bill)⁷² to the Thai Parliament with an aim to outlaw particular types of pornography – i.e. pornographic material that portrays sexual violence that can cause bodily harm or threaten life, and bestiality and necrophilia that involves the use of a real animal or a real corpse. Therefore, it could be said that the 'new' Section 287 will be consistent with the Thai government's policy on the regulation of pornography. However, there is a noticeable difference between the 'new' Section 287 and the PSTDB Bill. As discussed in Chapter 6, the PSTDB Bill is morality-based and attempts to prohibit the depiction of certain sexual acts that are deemed morally objectionable, notably consensual group sex. From the perspective of the 'new' Section 287, which is harm-based, these sexual activities do not appear to cause bodily harm to the pornographic actors; and therefore should be permitted.⁷³

Regarding 'rape' pornography, the proposed Section 287 takes the same approach as the English extreme pornography law.⁷⁴ The proposed Section 287 will not criminalise pornographic materials that depict rape and fall short of acts listed in subsection (6). This is because, as already discussed in Chapter 5, 'rape' in most commercial pornographic material is staged; in other words, it is a consensual sexual activity. Pornographic actors are paid to play the role of rape victims. Legally speaking, therefore, no 'rape' (non-consensual

and 1,243 females, aged between 15 and 50 years, from 18 different major provinces in 6 main regions across the country. See Section 6.6.3.

⁷¹ 'My Computer Law' Project, *The Survey of Public Attitudes towards the Thai Government's Policies on the Regulation of the Internet* (ผลสำรวจทัศนคติของประชาชนต่อแผนงาน โยนายอินเตอร์เน็ตของประเทศไทย), <http://mycomputerlaw.in.th/wp-content/uploads/2011/12/mycomputerlaw-net-policy-survey-2011.pdf>, visited 16th December 2011. This survey has 1,500 respondents in total, comprising 806 males, 670 females and 24 of non-specified gender. 750 respondents were asked to complete online questionnaires via the 'My Computer Law' website. Another 750 respondents were asked to complete the questionnaires on the spot (the face-to-face surveys were carried out in Chiangmai, Chonburi and Ubonrajthani Provinces). The average age of the respondents was 22. See Section 6.6.3.

⁷² See Section 6.3.2.

⁷³ It should be noted that this thesis does not support the passage of the PSTDB Bill because its provision relating to the regulation of pornography is considerably vague, and its scope of enforcement is excessively broad. Its passage may restrict freedom of sexual expression to a significant extent. For a discussion, see Section 6.3.2.

⁷⁴ See Section 5.2.4.4 (A).

sex) actually occurs.⁷⁵ Furthermore, the depiction of staged rape (as opposed to real rape which is a crime)⁷⁶ is arguably a form of expression communicating viewpoints on the sexual abuse of women or inequality in gender relations. Although such viewpoints are objectionable or offensive to most people, they are entitled to a certain degree of protection under the principle of freedom of expression, as long as rape pornography does not involve the use of real violence or acts that threaten a person's life in its production.

Regarding the constitutionality of the proposed Section 287, the second paragraph of Section 45 of the Thai Constitution 2007 states:

'Restriction [freedom of expression] shall not be imposed except by virtue of the law specially enacted for the purpose of ..., protecting the rights ... of other persons, ...',⁷⁷

The proposed Section 287 restricts expression on the basis of protecting the rights of others, particularly the right to life and the right to be free from torture and cruel treatment enshrined in Section 32 of the Thai Constitution 2007. Section 32 provides:

'A person shall enjoy the right and liberty in his or her life and person [sic]. A torture [sic], brutal act or punishment by cruel or inhumane means shall not be permitted ...',⁷⁸

Therefore, it could be argued that the restriction of pornographic material that depicts real violence, bestiality and necrophilia under the proposed Section 287 would not go against the Thai Constitution 2007.

In order to be consistent with the proposed Section 287 of the Thai Criminal Code, pornography-related provisions in the Computer-Related Crime Act B. E. 2550 (2007) (Computer Crime Act 2007) would need to be amended. As examined in Chapter 6, there are three provisions that directly regulate pornographic material on the Internet, namely Sections 14 (4) and (5), 15 and 20. As regards Sections 14 (4) and (5), this thesis recommends that the phrase 'obscene computer data' in the original text of subsection (4)⁷⁹ be amended by the new phrase 'pornographic materials prohibited by Section 287 of the Criminal Code'. Therefore, the 'new' Section 14 (4) and (5) would read:

⁷⁵ See Section 5.2.4.4 (A).

⁷⁶ The recording of real rape can be prohibited on the basis that it is the recording of a crime.

⁷⁷ Official translation is available at

http://english.constitutionalcourt.or.th/index.php?option=com_docman&task=doc_download&gid=200&Itemid, visited 18th April 2011.

⁷⁸ Ibid.

⁷⁹ For the original text of Section 14 (4) and (5) of the Computer Crime Act 2007, see Section 6.3.1.2.

Whoever commits the following acts shall be liable to imprisonment for a term not exceeding ... years or to a fine not exceeding ... Baht or both: ...

- (4) inputting into a computer system pornographic material prohibited by Section 287 of the Criminal Code that is accessible to the public;
- (5) publishing or forwarding any computer data with the full knowledge that such computer data comes under paragraph ... (4)

With this amendment, Subsection (5) will make it an offence for forwarding material prohibited by Subsection (4) via emails.

7.2.2 The Liability of ISPs

The original version of Section 15 of the Computer Crime Act imposes criminal liability on ISPs.⁸⁰ This thesis proposes that the principle of ISP immunity in the EU's Electronic Commerce Directive 2000/31/EC⁸¹ should be adopted in the 'new' Section 15. First, this would mean that the 'new' Section 15 would treat ISPs merely as 'conduits' of information. Therefore, they are not responsible (both in terms of civil and criminal liability) for a third person's illegal information that is transmitted through their services. However, their immunity would be lost if they initiate the transmission of such information, select the receiver of the transmission or are involved in selecting or editing information that is transmitted through their services. Second, they are not liable for 'caches' created and stored automatically on their systems. Third, they are not liable for a third party's (illegal) content hosted on their systems as long as they lack knowledge of such content, or once they acknowledge the illegal content, they promptly remove it. (As discussed below, the thesis recommends that the MICT will notify ISPs of illegal pornographic websites, and the MICT and the IT industry regulatory body would jointly monitor the ISPs to remove or block access to such illegal pornographic websites.) It is important for the new provision to ensure that the ISPs do not have a general obligation to monitor information transmitted through their systems or content hosted on their systems. Instead, they should be under an obligation to inform the competent authorities of potentially illegal content. Lastly, if the ISPs are requested by a court to remove or block access to illegal websites, they have the obligation to comply with the court's order. Therefore the text of the 'new' Section 15 would be as follows:

- (1) The Internet Service Provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission.

⁸⁰ For the original text of Section 15 of the Computer Crime Act 2007, see Section 6.3.1.2.

⁸¹ See Section 4.6.3.

The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

- (2) The Internet Service Provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request ('cache'), on the condition that: (a) the provider does not modify the information; (b) the provider complies with conditions on access to the information; (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by the industry; (d) the provider does not interfere with the lawful use of technology, widely recognised and used by the industry, to obtain data on the use of the information; and (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.
- (3) The Internet Service Provider is not liable for the information stored at the request of a recipient of the service, on the condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
- (4) The Internet Service Provider does not have a general obligation to monitor the information that they transmit or store, nor a general obligation to actively seek facts or circumstances indicating illegal activity. However, the provider has an obligation to inform the competent public authorities of alleged illegal activities undertaken, or information provided by recipients of their service, and an obligation to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.
- (5) The Internet Service Provider has an obligation to comply with a court request for the service provider to terminate or prevent an infringement.

The ISP immunity is of particular importance; without it, the ISPs may be easily prosecuted for the third party's illegal content transmitted or stored on their systems. This would create concern amongst ISPs, and would lead them actively to seek, remove and block access to websites that they deem possibly illegal, but – in fact – may be perfectly legal. This circumstance would urge individual ISPs to censor content on the Internet, and unavoidably affect the right to freedom of expression on the Internet.

7.2.3 Regulatory Framework for Illegal Pornography on the Internet: Introducing the IT industry-led Regulatory Body

Chapter 3 suggested that, as far as the regulation of illegal pornography is concerned, the co-regulatory model – i.e. the regulatory model in which the IT industry takes a leading role in

regulating content on the Internet, and operates in close partnership with state authorities, notably the police – appears to be more compatible with the notion of freedom of expression than the pure legal/state regulation. In principle, it limits state interference with freedom of expression by making the state play the role of supporter, and at the same time allowing the private sector – especially the IT industry – to play the role of the main regulator.⁸² The discussion in Chapter 4 showed that both the CoE and the EU promote this mode of regulation and further encourage their member states to adopt it in order to deal with ‘illegal content’.⁸³ Chapter 5 illustrated how the co-regulation (with special reference to the Internet Watch Foundation of the UK) works to control pornographic materials on the Internet that are deemed illegal under UK laws (in England, such as the OPA 1959/1964 and the extreme pornography law).⁸⁴

Adopting the IWF’s model, this thesis recommends that Thailand should establish a similar IT industry-led regulatory body to control illegal pornography under the proposed Section 287 of the Thai Criminal Code (i.e. pornographic material that depicts real sexual violence, real bestiality and real necrophilia). For the purpose of the discussion here, the IT industry-led regulatory body is given a tentative name: the ‘Thai Safer Internet Centre’ (TSIC).

Much like the IWF in the UK, which works in close partnership with the Home Office and the police, the TSIC should also work in partnership with state agencies involved in the regulation of Internet pornography in Thailand, notably the TCSD of the Royal Thai Police. (This will be discussed later.)

Two other important issues are the transparency and public accountability of the private regulatory body. As examined in Chapter 5, despite *de facto* acting as a public body exercising censoring power, the IWF is *de jure* a private organisation.⁸⁵ There is no legislation compelling it to be publicly accountable (i.e. accountable to the UK Parliament or UK courts) or subject to scrutiny by any independent inspection body.⁸⁶ In view of these loopholes, this thesis proposes the passage of a law (or a provision) permitting the establishment of the TSIC. The law must stipulates that the TSIC must be accountable to the Thai Parliament and must also be subject to inspection by an external independent body

⁸² See Section 3.7.

⁸³ See Sections 4.3.2. and 4.6.2.2. It should be noted that ‘illegal content’ in the regulatory framework of the CoE and the EU refers mainly to child pornography.

⁸⁴ See Section 5.4.1.

⁸⁵ See Section 5.4.1.

⁸⁶ However, the IWF voluntarily publishes annual reports on its operation and allows external bodies, such as the police, to inspect it from time to time. See Section 5.4.1.

such as the Office of the Ombudsman.⁸⁷ In order to achieve this goal, Section 4 of the Video Recording Act 1984 (UK),⁸⁸ a provision that empowers the Home Office to designate a private organisation funded by the UK's film industry – the British Board of Film Classification (BBFC) – to function as a quasi-public organisation to deal with the classification and censorship of films and videos within the UK, can serve as a model. Thus, the provision to establish the TSIC would read as follows:

The Minister of the Ministry of Information and Communication Technology shall designate a non-profit making organisation established in the private sector as the authority responsible for making arrangements –

- (a) for receiving reports from the public on illegal content on the Internet,
- (b) for determining in the first place whether the reported content is illegal under the Criminal Code
- (c) for responsible for the implementation of website-blocking and the monitoring of ISPs to remove or block access illegal websites,
- (d) for coordinating and cooperating with law enforcement agencies in enforcing laws relating to the regulation of illegal content on the Internet,
- (e) for submitting annual reports on the operation of website-blocking to Parliament on or upon the request from Parliament, with such reports needing to be publicly accessible,
- (f) for allowing independent inspectors designated by the Office of the Ombudsman to inspect its organisation and operation annually with regard to website-blocking.

The provision establishing the TSIC would give clear legal status to the TSIC as an IT industry-led regulatory body set up by the power of the Computer Crime Act 2007 (as proposed above). It would have a duty annually or upon request to submit reports on website-blocking (such as the number of blocked URLs, the detail of blocked URLs and the grounds for blocking a particular URL) to the Thai Parliament. Via such means, it would be made accountable to the public (through the Thai Parliament). Moreover, it would also be subject to independent inspectors designated by the Office of the Ombudsman, which would make the TSIC's operation with regard to website-blocking transparent to a significant extent. The said provision should be incorporated into to the Computer Crime Act 2007.

⁸⁷ *Office of Ombudsman (Thailand)*, <http://www.ombudsman.go.th/10/eng/index1.asp>, visited 19th January 2013.

⁸⁸ Section 4 (1) of the Video Recording Act 1984 reads: 'The Secretary of State may by notice under this section designate any person as the authority responsible for making arrangements – (a) for determining for the purposes of this Act whether or not video works are suitable for classification certificates to be issued in respect of them, having special regard to the likelihood of video works in respect of which such certificates have been issued being viewed in the home; (b) in the case of works which are determined in accordance with the arrangements to be so suitable – (i) for making such other determinations as are required for the issue of classification certificates, and (ii) for issuing such certificates, and; (c) for maintaining a record of such determinations (whether determinations made in pursuance of arrangements made by that person or by any person previously designated under this section ...'

An important question raised at this point is who or what organisations should take part in the establishment of the TSIC. In the context of the UK, the establishment of the IWF was a result of discussions and an agreement between the UK Internet industry (i.e., major ISPs in the UK, the Safety Net Foundation, ISPA and the London Internet Exchange) and the relevant governmental agencies (i.e. the former Department of Trade and Industry, the Home Office and the Metropolitan Police).⁸⁹ For the establishment of the TSIC, this thesis recommends that government agencies and private sector bodies involved in the regulation of Internet pornography should hold discussions to establish the TSIC. The key issues of discussions would include the legal status of the TSIC, the administrative structure of the TSIC, objectives, duties and responsibilities of the TSIC. The relevant government agencies should include the TCSD (Royal Thai Police), the MICT and the CSG (Ministry of Culture). This thesis suggests that, in the private sector, the IT industry – especially the Thai Internet Service Provider Association (TISPA),⁹⁰ private-run hotlines – namely, Thai Hotline,⁹¹ IT Watch Hotline⁹² and Family Media Watch,⁹³ as well as NGOs that promote freedom of expression on the Internet in Thailand – namely, Thai Netizen and Freedom against Censorship Thailand (FACT) and iLaw – participate in the establishment of the TSIC. It should be noted that, at present, the TISPA is not involved in the regulation of Internet content at all; rather, its main functions are to promote the growth of the IT industry in Thailand, settle disputes between members, and arrange liaison between members.⁹⁴ However, because all major Thai ISPs are members,⁹⁵ TISPA – much like the ISPA in the UK – has a pivotal role to play in terms of establishing a common framework and making all Thai ISPs operate coherently with regard to website-blocking. Accordingly, it should be the leading organisation to establishing the TSIC. The MICT may play the role of co-ordinator, assisting the private organisations and government agencies involving the regulation of Internet content to hold discussions.

It is recommended in this thesis that the TSIC should be established as a non-profit making foundation, as in the case of the IWF. Its administration should be independent from its founding organisations. Its administrative officers should be democratically elected from the members of the private organisations involving in the establishment of the TSIC.

⁸⁹ *The IWF*, <http://www.iwf.org.uk/about-iwf/iwf-history>, visited 4th April 2012.

⁹⁰ *TISPA*, <http://www.tispa.or.th/>, visited 19th January 2013.

⁹¹ *Thai Hotline*, <http://report.thaihotline.org/>, visited 7th September 2011.

⁹² *IT Watch Hotline*, <http://www.thaiitwatch.org/>, visited 7th September 2011.

⁹³ *Family Media Watch*, <http://www.familymediawatch.org/>, visited 7th September 2011.

⁹⁴ For the objectives of TISPA see, http://www.tispa.or.th/?page_id=217, visited 19th January 2013.

⁹⁵ Members of TISPA are INET, CS Loxinfo, True, KSC, PACNET, ISSP, JI Net, TT&T, ANET, Samart, Milcom, Proimage, NTT, TOT, CAT, Dtac and TCC. See *TISPA*, http://www.tispa.or.th/?page_id=247, visited 19th January 2013.

The TSIC would play a leading role in regulating pornographic material on the Internet, and government agencies would play supportive roles. Similar to the IWF, the TSIC would have three main functions. First, it would provide a 'central hotline' to receive complaints from the public with regard to potentially illegal pornographic material (under the 'new' Section 287). Second, it would coordinate with ISPs in Thailand to implement Internet censorship. Lastly, it would liaison and co-operate with Thai police (TCSD) to enforce pornography-related laws against producers/distributors who are subject to the Thai jurisdiction.

As discussed in chapter 6, at present, both Thai government's agencies and private organisations run many hotlines.⁹⁶ However, their hotline operations are undertaken independently of each other, lacking a co-operative framework. The most notable problem of the Thai hotline system is that it does not have a common standard to judge the legality of online pornographic content because each hotline adopts its own different standard. Furthermore, in most cases, the standards of hotlines, particularly those run by private organisations, are not in line with the standard of the MICT, which under the current law – the Computer Crime Act 2007 – has the power to censor online content. Cases can arise in which a reported pornographic website found to be illegal by a privately-run hotline may not be blocked by the MICT because it is not deemed illegal under the MICT's standard. As a result, the pornographic website in question remains accessible. This would discourage the public from reporting illegal pornographic websites because they may feel that their attempts to participate in reporting Internet pornography are meaningless. Furthermore, because there are many hotlines that operate independently of each other (owing to a lack of a co-operative framework), Internet users may be confused; they do not know to which hotline (whether government-run or privately-operated) they should report, nor whether they have to report to only one hotline or to all of them. In order to solve this problem, this thesis recommends that all government-run and privately-run hotlines currently operating in Thailand be abolished, and their duties transferred to the TSIC hotline. In other words, the TSIC (much like the IWF) would function as a central hotline receiving complaints from the public. Furthermore, it is also recommended that the TSIC should adopt only one standard to judge the legality of online pornography. This standard must be consistent with the 'new' Section 287 of the Thai Criminal Code.

With regard to the second function, as examined in chapter 6 at present website-blocking is carried out by the MICT.⁹⁷ The URLs on block-lists derive mainly from the MICT and the TCSD, both of which have dedicated departments whose main duty is to search for

⁹⁶ See Section 6.5.1.

⁹⁷ See Section 6.4.1.

potentially illegal websites. The URLs reported by the public through hotlines account for only 20 per cent of URLs on the block-lists. More importantly, the MICT has never officially made the detail of the block-lists available to the public. It has already been argued that this method seriously lacks transparency and secretly curtails the right to freedom of expression of Internet users in Thailand. Essentially, Internet users do not know what websites are blocked, nor on what grounds. This thesis proposes that the MICT and the TCSD's search for illegal online content be terminated. The proposed regulation of Internet pornography should be implemented on a complaint-filing basis, meaning that there must be a complaint from the public to the TSIC before website-blocking can be carried out. Without a complaint from the public, the TSIC should not take action on its own.

7.2.4 Website-blocking under the Proposed Regulatory Framework

Admittedly, Internet censorship goes against the concept of freedom of expression. However, when it is impossible to bring a producer or a distributor of illegal pornography before a Thai court because he/she is not subject to the Thai jurisdiction, or when the illegal pornography is hosted on an overseas server, blocking such a website appears to be inevitable. The government agencies and NGOs involved in the regulation of Internet pornography, namely (1) the judge of the Central Criminal Court, (2) the judge of Buriram Provincial Court, (3) the officer of the TCSD, (4) the officers of the ITSO (the MICT), and (5) the representative of the Family Media Watch, all agreed that Internet censorship was still necessary to control pornographic material on the Internet in Thailand.

It would be true to state that Internet censorship does not mean that illegal pornographic material would be blocked entirely. However, it is sufficient to make such illegal pornography unavailable in general. Furthermore, it is a less draconian regulatory method than the possession offence that is punishable with imprisonment.

However, as Internet censorship means that the right to freedom of expression of Internet users in Thailand is unavoidably limited, it is important for government agencies and private organisations involved in the regulation of Internet pornography to assure the public that the website-blocking focuses on a very narrow range of illegal types of pornography. Censorship implementation should also be transparent and accountable, and should have a legal basis. Lastly, in order to ensure adherence with the 'transparency' policy of Internet censorship suggested by the CoE's *Recommendation CM/Rec(2007)11 on Promoting Freedom of Expression and Information in the New Information and Communication*

Environment, the TSIC should inform the public that Internet censorship is in operation,⁹⁸ so that Internet users know that their right to freedom of expression is limited to some extent because of the necessity to prohibit illegal pornography.

Under the proposed regulatory framework, the TSIC will be the principal body which implements the website-blocking. The Computer Crime Act 2007 should give the TSIC legal power to censor illegal content on the Internet. Therefore, Section 20 of the Computer Crime Act should be amended to be:

The organisation designated by the Ministry of Information and Communication Technology to regulate content on the Internet may have a power to order the ISPs to suspend/block the dissemination of pornographic material which is prohibited by the Criminal Code.

Like the IWF, the TSIC should have the power to make the initial assessment of the legality of the pornographic websites in question. In the case of the IWF, the content assessment officers are trained by the UK police in determining what websites are illegal. However, the main criticism against this is the fact that the UK police is not a judicial body, and thus lacks a judicial power to judge the legality of the online content. More importantly, it could be argued that the criteria to judge the legality of the website adopted by the UK police may be different from those of the UK courts, which would create a problem as in the following scenario. A website is considered to be illegal by the IWF officers in accordance with the UK police's adopted criteria, and is then removed from the Internet. However, if a UK court had the opportunity to consider the website in question, it might have ruled that the website is perfectly legal. Given these problems, this thesis recommends that the content assessment officers of the TSIC be trained by a court (for example, a judge from the Central Criminal Court). This would make that the TSIC to adopt criteria to determine the legality of pornographic websites that is in line with those of the Thai courts.

Another main criticism against the IWF's implementation of Internet censorship is that the legality of the online content is determined solely by the IWF (and the UK police in an appeal), without the involvement of any judicial body at any stage. Some notable academics in IT law, such as Akdeniz and Edwards, criticise that as the IWF is a private regulatory body, not a judicial body, it lacks a legal power and legitimacy to determine the legality of the online content.⁹⁹ Learning from the UK's experience, it is proposed in this thesis that a Thai court should play the role to make a final decision on whether the website in question

⁹⁸ The CoE's *Recommendation CM/Rec(2007)11*, para.1.6.

⁹⁹ Akdeniz, Y., 'Internet Content Regulation: UK Government and the Control of Internet Content', (2001), *Computer Law & Security Report*, 17 (5), pp.303-317, 307; Edwards, L., 'Pornography, Censorship and the Internet' in Edwards, L. and Waelde, C. (eds.), *Law and the Internet* (3rd ed.), (Hart Publishing, Oxford, 2009), pp.623-669, 663; See Section 5.4.1.

is legal. Under the proposed regulatory framework, the TSIC has the power to examine and make an initial decision on the legality of the website. However, the TSIC's decision is not final. As will be discussed later, a person whose right to freedom of expression is violated by the TSIC's decision and implementation of Internet censorship may appeal to a Thai court (the court of first instance). At the court, the legality of the website in question will be re-considered by a trial judge. The court's decision can reverse the decision of the TSIC. Under this framework, it could be said that, ultimately, it is a Thai court (a judicial bodies), not the TSIC, which determines the legality of the website.

7.2.5 The Website-Blocking Process

The diagram below illustrates the website-blocking process under the proposed regulatory framework :

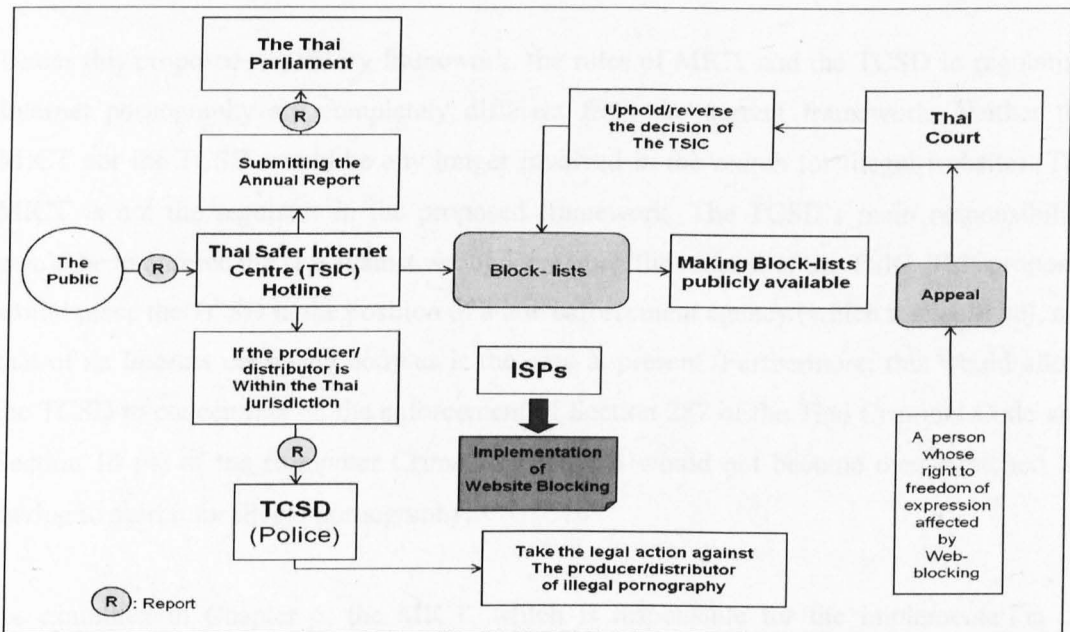


Diagram 2 - The Process of Website-Blocking Under the Proposed Regulatory Framework

Upon receiving a complaint from the public about a potentially illegal pornographic website under Section 287 of the Criminal Code and Section 14 (4) of the Computer Crime Act 2007, Internet content analysts (ICAs) of the TSIC should promptly access the URL in question to make an initial assessment.

Following the initial assessment by the ICAs, if the pornographic website in question is considered legal, the TSIC would take no further action and would inform the person who filed the complaint. However, if the website is concluded as illegal, the TSIC would incorporate the URL in question into its block-list. Then it would pass the block-list to all

ISPs in Thailand to carry out website-blocking. It would monitor the ISPs until the illegal pornographic content on the Internet had been removed (if hosted on a server in Thailand) or its access blocked (if hosted on a foreign server). Following the removal of, or blocked access to illegal pornographic content, the TSIC would inform the person who filed the complaint.

At the same time, the TSIC would notify the TCSD (Royal Thai Police) to take legal action against the producer or distributor of illegal pornographic material provided that he/she is within the Thai jurisdiction. Furthermore, it would instruct the relevant Thai ISPs to cooperate with the TCSD by giving any information required relating to the illegal pornographic website in question, such as details about whether the pornographic website is hosted on a server in Thailand or an overseas server, the IP address of the PC that is used to disseminate the illegal pornographic material, and log files.

Under this proposed regulatory framework, the roles of MICT and the TCSD in regulating Internet pornography are completely different from the current framework. Neither the MICT nor the TCSD would be any longer involved in the search for illegal websites. The MICT is not the regulator in the proposed framework. The TCSD's main responsibility would be to enforce the law against wrongdoers upon the request of the TSIC. This proposal would place the TCSD in the position of a law enforcement agency (which it should be), not that of an Internet censoring body as is the case at present. Furthermore, this would allow the TCSD to concentrate on the enforcement of Section 287 of the Thai Criminal Code and Section 14 (4) of the Computer Crime Act 2007. It would not become over-stretched by having to search for illegal pornography.

As examined in Chapter 6, the MICT, which is responsible for the implementation of website-blocking at present, has never made available to the public information about the website-blocking. The block-lists are treated as a secret between the MICT, TSCD and the Thai ISPs. In order to ensure the transparency of the website-blocking, this thesis proposes that the detail of the implementation of the website-blocking – such as the number of URLs on a block-list, what URL is blocked and on what grounds – be publicly available. The detail about the website-blocking may be published on the TSIC's website, or given to an Internet user upon a request.

One may contend that if the list of blocked URLs is revealed to the public, certain skilful Internet users may circumvent the blocking and access the prohibited websites. Therefore, the attempts to block such websites would be futile. However, making the list of the blocked

URLs known to the public does not necessarily mean that every Internet user will be able to access such blocked websites. Only few Internet users who have IT skills sufficiently to circumvent the blocking can access to the blocked websites. Furthermore, The principal aim of website-blocking is not to create a perfect barrier that prevents every single Internet user from accessing illegal online pornographic content, but to make such illegal content unavailable generally. Also, as Lessig interestingly remarks, in a world that tends to over-block expression on the Internet, it is more important to make the control of expression on the Internet transparent and obvious to people than to try to find the perfect censoring mechanism.¹⁰⁰

Regarding appeal, as already pointed out in Chapter 6, the current Section 20 of the Computer Crime Act does not allow an appeal against the website-blocking orders.¹⁰¹ This thesis recommends that Section 20 be amended to allow an appeal. The second paragraph of the proposed Section 20 would read:

A person whose right to freedom of expression is affected by the implementation of Internet censorship can appeal to a competent court.

In the IWF system, although the IWF allows a person whose right to freedom of expression is affected by its implementation of a 'notice and takedown' measure to file an appeal, the appeal system nevertheless remains subject to criticisms.¹⁰² First, the appeal is not heard by a judicial body. It is an IWF manager, who was not involved in the original assessment, who re-assesses the content; and if the appellant is still dissatisfied with the outcome of the appeal, the content is re-assessed by the police. It can be argued that both the IWF manager and the police are not judicial bodies. Second, the appeal is conducted without a representative of the appellant being present. Therefore, it fails to meet a basic requirement of fair procedure. Given the problem of Section 20 of the Thai Computer Crime Act and the IWF's drawbacks, this thesis suggests that Section 20 allow a person whose right to freedom of expression is affected by the implementation of website-blocking (under the proposed regulatory model) to appeal against an order of the TSIC. Based on the IWF's model, the person entitled to appeal is: (1) a party with a legitimate association with the content, or a potential victim or the victim's representative; (2) a hosting company; (3) a publisher; or (4) an Internet user who is being barred from accessing a website that he/she believes is legal.¹⁰³ The appellant could appeal directly to a court. The website in question would be re-assessed by a judge.

¹⁰⁰ Lessig, L., *Code: Version 2*, (Basic Book, New York, 2006), p.260.

¹⁰¹ See Section 6.4.2.

¹⁰² See Section 5.4.1.

¹⁰³ *The IWF*, <http://www.iwf.org.uk/accountability/complaints/content-assessment-appeal-process>, visited 13th April 2012.

The appellant (or its representative) should be permitted to testify before the court, arguing why the URL in question should not be blocked. The judge would take into account the testimony of the appellant and opinions of the experts (as examined in Section 7.2.1 above) to make a decision. The decision of the court could uphold or reverse the decision of the TSIC, and it would be final. The decision of the court would be passed to the TSIC, which in turn would inform the ISPs. If the court overrules the decision of the Content Assessment Team, the TSIC should request all Thai ISPs to restore the online pornographic content, or make it accessible again. If the court upholds the decision of the TSIC, the ISPs do not need to take any action.

Within the regulatory framework suggested, a Thai court has a role to play in terms of determining the legality of the website through the appeal channel. In other words, the Thai court is the body responsible for making the final decision on whether the website in question is legal. The proposal of this thesis would solve the problem that the IWF has regarding its legitimacy in deciding the legality of websites.

7.3 Regulatory Framework for Legal Pornography on the Internet: Filtering Software and Internet Literacy

Legal pornography – i.e. pornographic material that is not prohibited by the ‘new’ Section 287 of the Thai Criminal Code and the ‘new’ Section 14 (4) of the Computer Crime Act 2007 – should be allowed to be produced, disseminated and viewed. However, as discussed in chapter 3, legal pornography may not be detrimental to adults but may have harmful effects on minors’ development and their understanding of sexuality and gender relations.¹⁰⁴ In the CoE’s *Recommendation Rec(2001)8 on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services)* and the EU’s *Communication from the Commission to Council and the European Parliament, the Economic and Social Committee and the Committee of the Regions on Illegal and Harmful Content on the Internet 1996 (Communication 1996)* and *Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services (Green Paper 1996)*, there are clear statements that material that is not illegal but may be harmful to children requires a regulatory method that is different from that applied to illegal material.¹⁰⁵ Therefore, it is important for the regulatory method to strike a proper balance between the right to freedom of expression of adults, and the protection of minors from psychological harm caused by pornography. In

¹⁰⁴ See Section 3.5.3.

¹⁰⁵ The CoE’s *Recommendation Rec(2001)8*, preamble, para.9; the EU’s COM (96) 483 Final, 16th October 1996, p.6, COM (96) 487 Final, 16th October 1996, p.10. see Sections 4.3.2. and 4.6.2.1.

other words, the regulation of legal pornography should be designed to prevent children from accessing Internet pornography, whilst simultaneously avoiding imposing excessive restrictions on adults' freedom of pornographic expression (accessing and disseminating pornographic materials via the Internet).

In order to regulate legal pornography, both the CoE and the EU suggest that the power of control should be mainly in the hands of Internet users (especially parents and teachers) not the government.¹⁰⁶ In order to achieve this aim, both the CoE and the EU advocate technological solutions – i.e. filtering software and rating (content labelling) systems.

According to information from respondents who gave interviews for this thesis, officers of the Information Technology Supervision Office (ITSO) of the MICT, the representative of the Thai Hotline, the representative of Thai Netizen and the representative of FACT preferred filtering and rating systems as solutions to prevent children from accessing Internet pornography.¹⁰⁷

In line with the CoE and the EU's policies on the regulation of harmful content, this thesis recommends that filtering software and a rating system be used to regulate legal pornography in Thailand. This method would allow adults to view and disseminate pornographic expression and, whilst preventing minors from accessing pornographic expression that is harmful to them. Filtering should be implemented at an individual PC level, not at ISP level. (Parents or teachers should install filtering software on computers that are accessible to children.) Importantly, as recommended by the CoE, filtering should be voluntary-based, meaning that Internet users should be free to choose to install or not to install filter software on their PCs.¹⁰⁸ At present, as examined in chapter 6, the MICT promotes *ICT Housekeeper*, filtering software developed by MICT in co-operation with King Mongkut's Institute of Technology Ladkrabang.¹⁰⁹ The software is free, and Internet users can download it from <http://hk.mict.go.th/>. However, as explained in chapter 6, the MICT does not reveal how *ICT Housekeeper* functions, and what criteria it uses to judge the blocked websites and on what grounds. This thesis argues that it is necessary for the MICT to inform the public of the mechanism and the techniques that *ICT Housekeeper* uses to screen out pornographic (and other harmful) websites. This is to ensure that *ICT Housekeeper* is transparent, and will be able to protect young Internet users against pornographic websites, whilst not over-filtering educational websites about sex that may be

¹⁰⁶ The CoE's *Recommendation Rec(2001)8*, para.10; the EU's COM (96) 487 Final, 16th October 1996, p.20 (the EU).

¹⁰⁷ See Section 6.7.5.

¹⁰⁸ The CoE's *Recommendation Rec(2001)8*, paras.9-10.

¹⁰⁹ See Section 6.5.2.

useful and appropriate for them (especially teenagers). Moreover, if *ICT Housekeeper* operates in conjunction with any particular content ratings,¹¹⁰ it is important for the MICT to inform the public about the rating system being used.

At present, Thailand does not have its own website-rating system.¹¹¹ However, this thesis recommends that Thailand adopt a website-rating system. This would allow content providers in Thailand, especially those who want to run pornographic websites, to label their websites unsuitable for minors because of sexually explicit content. A neutral rating system, which is available at present, could be used. However, the rating scheme of the Internet Content Rating Association (ICRA), which the EU and the IWF had supported, is no longer available.¹¹² 'Restricted to Adults' (RTA)¹¹³ is an alternative website-rating system that the IT industry in Thailand could adopt. The RTA is developed by the Association of Sites Advocating Child Protection (ASACP), which is a non-governmental and non-profit organisation that aims to *inter alia* assist parents in preventing their children from pornographic websites.¹¹⁴ The RTA is a computer code,¹¹⁵ that a content provider can place 'into the header section of every page on a [website]' to indicate that a particular webpage has sexually explicit or pornographic content.¹¹⁶ The RTA works in conjunction with much of the filtering software that is available in the market;¹¹⁷ for example, Windows Parental Control Software (Windows Vista and Windows 7),¹¹⁸ CyberSentinel,¹¹⁹ Content Protection Professional,¹²⁰ Net Nanny¹²¹ and Parental Control Toolbar.¹²² There are a number of pornographic websites that have RTA labels; such as, www.hustler.com, www.xhamster.com, www.xvideos.com, www.private.com and www.asianthumbs.org. When a child attempts to access a particular pornographic webpage embodying the RTA label, the filtering software installed on that PC checks the RTA code embedded in the

¹¹⁰ It should be noted that, as the MICT did not provide information about the mechanism of *ICT Housekeeper*, we do not know what filtering techniques (i.e. black-list blocking, white-list blocking, keyword blocking, content rating-based filtering or combination thereof) *ICT Housekeeper* uses. For information about filtering techniques see Section 4.3.2, fn. 231-234.

¹¹¹ Interviews with TOT (ISP) on 27th April 2011 and with ITSO (MICT) on 3rd May 2011.

¹¹² See Section 5.4.2.

¹¹³ *The RTA*, <http://www.rtalabel.org/>, visited 21st January 2013.

¹¹⁴ *The ASACP*, <http://www.asacp.org/>, visited 21st January 2013.

¹¹⁵ The RTA code reads: '<meta name="RATING" content="RTA-5042-1996-1400-1577-RTA" />'.
¹¹⁶ *The RTA*, <http://www.rtalabel.org/index.php?content=howto>, visited 21st January 2013.

¹¹⁷ For the full list of filtering software that is compatible with the RTA label see

<http://www.rtalabel.org/index.php?content=partners>, visited 21st January 2013.

¹¹⁸ Microsoft, <http://windows.microsoft.com/en-US/windows7/products/features/parental-controls>, visited 21st January 2013.

¹¹⁹ CyberSentinel, <http://www.cybersentinel.co.uk/>, visited 21st January 2013.

¹²⁰ Content Protection Professional, http://www.contentwatch.com/products/contentprotect_pro, visited 21st January 2013.

¹²¹ Net Nanny, <http://www.netnanny.com/>, visited 21st January 2013.

¹²² Parent Control Toolbar, <http://www.parentalcontrolbar.org/>, visited 21st January 2013.

webpage; when the code is found, the filtering software blocks access to that webpage.¹²³ However, the RTA is a self-labelling system. Success in preventing children from accessing pornographic websites depends significantly on content providers voluntarily labelling their websites, and on parents and teachers installing filtering software on those PCs that children use. The MICT has a role to play here. It is recommended in this thesis that the MICT urge content providers in Thailand to rate their websites through the use of the RTA labelling system. Moreover, the MICT should encourage parents and teachers to install filtering software on computers that their children use. This would help parents and teachers to protect children to some extent. It is important to note that filtering software may not completely guarantee that children will not be able to access pornographic websites. Some children who have sufficient IT skills may circumvent the filtering software and access pornographic websites. Nonetheless, filtering software acts as an initial barrier, making it more difficult for children to access pornographic websites. In addition, it makes pornographic material on the Internet unavailable to children in general. However, the key factor to effective protection is the responsible way in which parents and teachers control and direct their children to use the Internet properly.¹²⁴

The decision of the European Commission on Human Rights in *S. v. Switzerland*¹²⁵ and the ruling the UK Court of Appeal (Criminal Division) in *R v. Perrin*¹²⁶ are worth mentioning. These two cases implicitly suggest that content providers impose certain measures to prevent children from accessing to pornographic content on their websites. The content providers should not show pornographic images on the front page (or preview page) of the websites, because children would see such pornographic images immediately once they log on to their pornographic websites. Instead, a caution informing Internet users of sexually explicit content contained in the website, and a warning that the website is not suitable for young people (under the age of 18) should be on the front page. Furthermore, as suggested by *Recommendation Rec(2001)8*, where possible, content providers should use conditional access tools – such as a credit-card verification system or age-verification system (ID card verification system). Although these tools may not fully guarantee that children will not be able to access pornographic websites since they can use their parents' credit cards or ID cards, at least the tools would make it more difficult for children to access such pornographic websites. In Thailand, it is recommended that the MICT should promote and persuade (but not compel) content providers who want to run sexually explicit websites in Thailand to voluntarily impose such conditional access on their pornographic websites. If

¹²³ *The RTA*, <http://www.rtalabel.org/index.php?content=faq#11>, visited 21st January 2013.

¹²⁴ Lessig, L., *supra*, p.247.

¹²⁵ (1992) No.17116/90, the Decision of the European Commission on Human Rights. See also Section 4.2.3.

¹²⁶ (2002) EWCA Crim 747, paras.26,51. See Section 5.2.1.2.

they have such age-verification measures in place, it would be more difficult for the Thai authorities to justify interference.

Apart from the use of filtering and rating systems, the CoE's *Recommendation CM/Rec (2009)5 on Measures to Protect Children against Harmful Content and Behaviour and to Promote Their Active Participation in the New Information and Communication Environment* advocates its member states, in co-operation with the IT industry and the civil society, to provide a safe and secure space on the Internet for children.¹²⁷ At present, in Thailand, there are some websites that are appropriate for children, such as, <http://www.inetfoundation.or.th/youngreporter/>,¹²⁸ <http://childmedia.net/>,¹²⁹ <http://www.thailandkid.com/>,¹³⁰ and <http://www.utown.in.th/tot/>.¹³¹ Nonetheless, the MICT should urge and support the IT industry and civil society to provide more websites that are suitable for young people of different ages, and also a child-friendly portal and search engines, such as, Yahoo Kids.¹³²

The EU's initiative to raise awareness amongst children, parents and educators to protect children from harmful content on the Internet (including pornographic websites) is also a policy that may prove beneficial to the Thai regulatory framework. In *Council Recommendation on the Competitiveness of the European Audiovisual and Information Service Industry by Promoting National Frameworks aimed at Achieving a Comparable and Effective Level of Protection of Minors and Human Dignity (Recommendation 1998)* and *Recommendation of the European Parliament and of the Council on the Protection of Minors and Human Dignity and the Right of Reply in relation to the Competitiveness of the European Audiovisual and On-line Information Service Industry (Recommendation 2006)*, the EU encourages its member states to raise awareness with regard to how young Internet users can be kept safe and they can be educated to make responsible use of the Internet.

According to the information from the interviews with the Thai authorities and NGOs involved in the regulation of Internet pornography, almost all of them regard education as an essential tool to safeguarding children from harm caused by Internet pornography. These authorities and NGOs include (1) the judge of the Central Criminal Court, (2) the judge of Northern Bangkok District Court, (3) the judge of Buriram Provincial Court, (4) the public

¹²⁷ *Recommendation CM/Rec (2009)5*, para.9.

¹²⁸ This website provides a channel for young people to disseminate news relating to children's activities.

¹²⁹ This website provides news and issues in which young people are interested.

¹³⁰ This website is online television and radio stations for children and teenagers.

¹³¹ This website is operated by TOT ISP. Its main aim to promote environmental care among young people.

¹³² Yahoo Kids, <http://kids.yahoo.com/>, visited, 21st January 2013.

prosecutor of Criminal Division 3 (Office of Attorney General), (5) the officer of the TCSD (Royal Thai Police), (6) the officer of the CSG (the Ministry of Culture), (7) the representative of the Family Media Watch (the Family Network Foundation or the FNF), and (8) the representative of IT Watch Hotline (Mirror Foundation).

At present, the FNF¹³³ takes an active and leading role in educating people, especially young Internet users, parents and teachers about how to use the Internet safely and how to deal with online harmful content (including Internet pornography). It provides material and information about the safe use of the Internet to the public.¹³⁴ It has been invited by many schools in Bangkok and other provinces to educate children on the safe use of the Internet and the harmful effects caused by Internet pornography.¹³⁵ Furthermore, it provides practical assistance and teaches parents and teachers IT skills that are necessary to control their children's use of the Internet. It also acts as a consultant giving advice with regard to Internet-related problems, such as the problem of children accessing Internet pornography.¹³⁶

As examined in Chapter 6, the FNF also operates the Family Media Watch hotline to receive reports on pornographic websites from the public. However, under the proposed regulatory framework it is suggested that its hotline operation be transferred to the TSIC. This would allow the FNF to focus more on teaching children to protect themselves against online pornographic materials, and to help parents and teachers deal with the problem of children accessing to Internet pornography. Furthermore, the FNF may co-operate and liaise with the CSG (Ministry of Culture), which has centres in most provinces throughout the country, to provide education and disseminate material amongst children, parents and teachers in provincial areas about the safe use of the Internet.

In summary, in order to strike a proper balance between the protection of young Internet users and the right to freedom of expression for adults, many elements are necessary. The Thai government should promote the use of filtering software, and encourage content providers in Thailand to label their websites properly. It should urge the IT industry to provide more age-appropriate websites and portals for Thai children. Young Internet users should be taught about the harmful effects of Internet pornography and how to deal with such websites when accidentally accessing any sexually explicit content. Moreover, parents and teachers should be IT literate so that they keep pace with their children to ensure the

¹³³ The FNF, <http://www.familynetwork.or.th/>, visited 21st January 2013.

¹³⁴ The FNF, <http://www.familymediawatch.org/>, visited 21st January 2013.

¹³⁵ Interview, Family Media Watch on 10th May 2011.

¹³⁶ Ibid.

safe use of the Internet. Despite filtering software, parental control is recognised as the most important tool that can protect children online effectively.

Conclusion

This thesis has examined and analysed the current Thai regulatory approach to pornographic materials on the Internet from a liberal perspective within the conceptual framework of freedom of expression. As stated in Chapter 1, there have been no studies undertaken thus far that take the freedom of expression approach to examine the regulation of Internet pornography in Thailand. This thesis contributes to the knowledge in this area by examining the implications of Thai regulation of Internet pornography on the right to freedom of pornographic expression, and by proposing a new regulatory framework that would be more compatible with the concept of freedom of expression for Thailand.

The first research question, 'How far is the current Thai regulatory approach to Internet pornography in line with the concept of freedom of expression?', is answered in Chapter 6. The conceptual framework developed in chapter 3 is used to analyse the current Thai regulatory approach. Chapter 6 concludes that the present Thai regulatory approach is barely consistent with the concept of freedom of expression, except that it now recognises sexually explicit material as a form of expression. Therefore, as a matter of principle, pornography would be regarded as expression. However, sexually explicit and pornographic expression is not entitled to the protection under the Thai Constitution 2007 and is subject to Thai obscenity laws and Internet censorship implemented by the MICT on the grounds of the protection of public morality. As a result, nowadays, there is almost no freedom for sexually explicit and pornographic expression in Thailand.

This chapter deals with the second research question, 'How can the Thai regulatory approach to Internet pornography be amended or improved to be more compatible with the (western) concept of freedom of expression?' In an attempt to frame a coherent approach to this question, in Chapters 4 and 5, this thesis examined the ECtHR, the ECJ and the UK courts' jurisprudence on freedom of expression in relation to pornography; the CoE and the EU's policies on the regulation of Internet pornography; and the UK's regulatory approach to Internet pornography within the conceptual framework developed in Chapter 3. It identified some policies and practices that are deemed to be in line to a great extent with the concept of freedom of expression. Thailand should take these policies and practices into account when seeking to improve its current regulatory approach to Internet pornography. Nonetheless, the jurisprudence of the ECtHR and the ECJ, the policies of the CoE, and the EU and the UK's regulatory approach also have some drawbacks that could result in undue

restrictions on pornographic expression. The morality-based justification for restricting pornography, and the 'realistic-looking' criterion of the English extreme pornography law, provides some examples of these drawbacks, of which the 'new' Thai regulatory framework of Internet pornography should be aware.

This thesis strongly maintains that the Thai regulatory approach to Internet pornography needs to undergo a reformation so as to give Thai people (particularly Internet users) more freedom of sexually explicit expression. Whilst most Thai people in ancient times and in the present day have permissive attitudes towards sex and sexually explicit representations, the Thai government takes a prudish position, relentlessly controlling and suppressing sexually explicit and pornographic expression. The current laws on pornography in Thailand are vague, overly wide, and largely inconsistent with the notion of freedom of expression, i.e. the notion that encourages people to have freedom of expression as much as possible.

This thesis proposes a legal framework which would give a more confined criminal provision to deal specifically with a few types of illegal pornography (violent, bestial and necrophilia types of pornography), making the scope of pornography-related law more certain and predictable. This would in effect allow more freedom of sexually explicit expression, and is arguably more consistent with a lax attitude towards sexually explicit expression exhibited by Thai people.

Furthermore, the state should change its role from a main regulator to a supporter, permitting the IT industry and individual Internet users to take the leading role in regulating Internet pornography. The state should concentrate on the enforcement of the 'new' Section 287 of the Thai Criminal Code, and the 'new' Section 14 (4) of the Computer Crime Act against producers and disseminators of illegal pornography. Internet censorship is still necessary if the illegal pornographic content is hosted on a foreign server. However, it should be implemented only when there is a complaint from the public and should be permitted by the courts. Most importantly, the scope of Internet censorship should be as narrow as possible, focusing specifically on illegal pornographic materials on the Internet.

Lastly, one may question whether the proposed regulatory framework, which is based significantly on the western concept of freedom of expression, can be viewed as being in line with the legal culture in Thailand. The author is aware that the proposal in this chapter may be deemed idealistic. It is possible that the proposed regulatory framework is not completely compatible with the legal culture in Thailand. As discussed in Chapter 6, the majority of authorities and NGOs that are involved in the regulation of Internet pornography

(11 out of 14) take paternalistic position, maintaining that Thailand is not ready for the legalisation of pornography and even consenting adults should not be permitted to access pornographic materials on the Internet.¹³⁷

Nonetheless, what is proposed in this thesis would take Thailand in a new direction with regard to the regulation of expression in general, with an expectation that Thai people would have more freedom of sexually explicit and pornographic expression than they do at present.

¹³⁷ The public prosecutor of Criminal Division 3, the judge of the Central Criminal Court, the judge of the Northern Bangkok District Court, the judge of Buriram Provincial Court, the officer of the CSG, the officers of the ITSO, the representative of Family Media Watch, the representative of the Thai Hotline and the representative of the IT Watch. See Section 6.7.6.

Appendix

Interview Questions

Perspective towards Pornography

- 1) Do you think whether pornography can communicate any ideas or views?
Yes ... what types of ideas or views?
No ... why?
- 2) Do you think whether could be reasonably regarded as a form of expression?
Yes ... why?
No ... why?
- 3) How does your organisation define 'obscenity'?
- 4) From the perspective of your organisation, what kind of pornographic material is deemed obscene and should be restricted or suppressed by obscenity law?
 - a) Materials which have sexually explicit portrayal
 - b) Materials which have sexually arousing effects on viewers (regardless of their sexually explicitness)
 - c) Materials which depicts non-violent, but degraded treatment to women
 - d) Materials which portrays sexual violence
- 5) What are the most and least important justification for restricting or suppressing obscene materials, and why?
 - a) The protection of public morality
 - b) The prevention of offensiveness
 - c) The protection of minors against sexual ideas communicated by pornography
 - d) The prevention of sexual crime, particularly rape
 - e) Bodily harm to pornographic performers
 - f) The propaganda of female subordination / images of women

Opinions on Current and Alternative Regulatory Measures

- 6) From the viewpoint of your organisation, how different is Internet pornography from pornography in the conventional media (e.g. videos, books, or magazines)?
- 7) Regarding Internet pornography, do you think that the current regulatory measures, i.e. Internet censorship and the enforcement of obscenity laws, are effective to achieve the interest(s) that you mentioned in Question No.5?
Yes ... why?
No ... why?

- 8) Apart from Internet censorship and the enforcement of obscenity laws, do you think that there are any alternative measures to achieve the interests that that you mentioned in Question No.5?

Yes ... what are they?

... Can these alternatives supersede Internet censorship and the enforcement of obscenity laws?

No ... why?

- 9) Do you think whether willing adults should be allowed to access to pornographic materials on the Internet, some of which may be deemed obscene under the current Thai obscenity laws?

Yes ... why?

No ... why?

- 10) Do you think that it would be more plausible to achieve the interests that you mentioned in Question No.5, if the scope of regulation (by Internet censorship and the enforcement of obscenity laws) will be narrowed down to focus on some specific categories of pornography, and on certain groups of viewers?

Yes ... what specific types and groups of viewers are they?

No ... why?

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**AREA Faculty Research Ethics Committee
University of Leeds**

17 June 2013

Dear Jompon

Title of study: **Regulating Sexually Explicit Content on the Internet:
Towards Reformation of the Thai Regulatory Approach**
Ethics reference: **AREA 11-026**

The above research application has been retrospectively reviewed by the Chair of the ESSL, Environment and LUBS (AREA) Faculty Research Ethics Committee and the following documentation was considered:

<i>Document</i>	<i>Version</i>	<i>Date</i>
AREA11-026application.pdf	1	31/08/11

This is a retrospective review and as such the committee has not had opportunity to amend the ethical dimension to the project if it had been necessary. Given this consideration, the Chair of the AREA Research Ethics Committee was satisfied that the necessary procedures had been put in place and are consistent with the University's guidelines on ethical conduct within research, provided the following two conditions are met

1. Data must be stored on the University's computer system rather than the applicant's laptop.
2. Data should be stored for 10 years and not destroyed before this date.

It is anticipated that the researchers involved will seek to provide the opportunity for ethical review in a timely manner in future and certainly before the research has commenced.

The committee wishes you success in your PhD studies.

Yours sincerely

Jennifer Blaikie
Research Ethics Administrator, Research Support
On behalf of Dr Anthea Hucklesby
Chair, AREA Faculty Research Ethics Committee

CC: Student's supervisor(s)

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