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“The balance between the rights of  
artists and the protection of children  
under British law”

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# Introduction

This essay examines the balance between the rights of artists and the protection of children under British law in the light of the quote from The Daily Telegraph. The essay consists of a description of relevant legislation on the topic, a section with arguments for and against restriction, an analysis of the protection under British law and a conclusion.

The English law restricting obscenity and indecency is very cryptic and difficult. The fact that several acts are overlapping each other, sometimes with identical words with an opposite meaning<sup>1</sup>, is an indication of how difficult it has been to reach a political consensus of the direction of controlling obscenity and indecency under British Law. Before dealing with the substantive law in relation to obscenity and indecency it is necessary to present the arguments for and against restriction, since it otherwise would be difficult to analyse “*the balance struck between the rights of artists and the protection of children*” later on. It might seem obvious that children should be protected, but the difference between the cover of the Nirvana album “*Nevermind*”, picturing a naked baby swimming, and pictures with crying children being abused shows that there is a balance to be made.

# Legislation

The relevant legislation on this topic are the European Convention on Human Rights art. 8 and 10, the Human Rights Act 1998, The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography - the General Assembly Resolution A/RES/54/263, the Obscene Publications Act of 1959 amended by the Obscene Publications Act of 1964, the Protection of Children Act

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<sup>1</sup> Stone, Richard “*Civil Liberties and Human Rights*”, p. 408

1978, the Criminal Justice and Public Order Act 1994 and the Sexual Offences Act 2003.

## Arguments for and against regulation

The starting point is the right to freedom of expression, which is protected, with a margin of appreciation to the member states<sup>2</sup>, in art. 10 of the ECHR and art. 10 of the HRA 1998. The HRA 1998 is more relevant in relation to freedom of expression, than other human rights protected in the ECHR, because of the margin of appreciation to the member states, which makes the rulings in the European Court of Human Rights in Strasbourg difficult to use as more than a guideline in domestic courts<sup>3</sup>, but should still be taken into account in accordance to s. 2 and 3 of the HRA 1998. Since the British Law does not have a written constitution, the freedom of expression is not protected on “constitutional level” like the US Bill of Rights in the First Amendment (a strong protection of the freedom of speech) and the Danish Constitution art. 77 (a strong protection against pre-censorship). The protection in the First Amendment is very relevant in relation to pseudo-photographs and drawings of naked children<sup>4</sup>, after the judgement in the Ashcroft-case, where the Supreme Court of the United States declared the Child Pornography Prevention Act of 1996 “§§2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional”<sup>5</sup>, which shows a different approach than the one in British Law. Most of the arguments for freedom of expression do not seem to be very strong in relation to obscenity and indecency, since the argument of truth, from the essay “*On Liberty*” written by John Stuart Mill, does not have much relevance in with the protection of children in relation to the rights of an artist. It could, however, be relevant in relation to the publishing of art, school<sup>6</sup>- and medicine-education material.

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<sup>2</sup> *Handyside v United Kingdom*

<sup>3</sup> Stone, Richard “*Civil Liberties and Human Rights*”, p. 401

<sup>4</sup> Pseudo-photographs and comics of naked children is legal in Denmark as well

<sup>5</sup> *Ashcroft v. Free Speech Coalition*

<sup>6</sup> See *Handyside v United Kingdom* ruling the destruction of the Little Red School Book written by two Danish Schoolteachers

The argument of democracy is not very strong either in relation to arguments against restriction on obscene or indecent material, since it does not “*make one better able to exercise the responsibilities of a voting citizen*”<sup>7</sup>. The argument of self-fulfilment seems to be the most fitting, of the arguments mentioned by Richard Stone<sup>8</sup>, and even though this essay is dealing with the protection of children, it could be self-fulfilling to draw a picture of a naked child if you were a paedophile, but also for an artist to publish a picture of children playing without clothes on as it was the case in the photograph by Nan Goldin named “*Klara and Edda Belly-Dancing*”. The approach taken by the Williams Committee<sup>9</sup>, in relation to reform the legislation on obscenity and indecency, was inspired by the libertarian principle in chapter one of the essay, as earlier referred to, “*On Liberty*”, generally known as the “harm principle”<sup>10</sup>. The “harm principle” in “*On Liberty*” was inspired by the book “*On the Limits of State Action*” by Wilhelm von Humboldt, but clarified by John Stuart Mill, and says that it should be possible to do anything unless it harms others. John Stuart Mill states however, which is not referred by Stone<sup>11</sup>, that: “*It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury*”<sup>12</sup>. This is a good argument in relation to the arguments for and against restriction of obscene and indecent material of children, since it is necessary for the state to protect these - even in situations where they agree to have material produced. It is not arbitrary to state, without further reference, that it harms children to be abused in obscene or indecent

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<sup>7</sup> Stone, Richard “*Civil Liberties and Human Rights*”, p. 314

<sup>8</sup> Stone, Richard “*Civil Liberties and Human Rights*”, p. 398

<sup>9</sup> The Williams Committee para. 5.1 as referred in Stone, Richard “*Civil Liberties and Human Rights*”, p. 398

<sup>10</sup> see also Wilhelm von Humboldt “*On the Limits of State Action*” and John Locke “*Two Treatises of Government*”

<sup>11</sup> Just after the quote from “*On Liberty*” cp. 1 in Stone, Richard “*Civil Liberties and Human Rights*”, p. 399

<sup>12</sup> “*On Liberty*” cp. 1

material, and this protection is very central in the discussion of to which extend children should be protected. It is not clear what the impact on morals in society of published or non-published content with children without clothes on is, but this is not as important a question as in relation to adults<sup>13</sup>, since the children does not have the same understanding of their actions and the question about a decrease/increase in sexual assaults or rapes should not be an argument for allowing abuse of some children<sup>14</sup>.

## The protection of children under British law

### The Protection of Children Act 1978.

The Protection of Children Act 1978 (PCA) is the central legislation in relation to the protection of children under British law. Most of the material under the PCA would be within the scope of the restriction in the Obscene Publications Act 1959, but it was found necessary to create separate legislation dealing with photographs and films of children<sup>15</sup>. In 1988 s. 160 of the Criminal Justice Act was created, because of the “new” problems in relation downloading material from the internet, which made possession with knowledge of the material<sup>16</sup> illegal unlike the PCA(1)(C).

The PCA is criminalizing a very wide group, since the word “person” in the PCA(1) includes everyone that a) “takes or permit to be taken or to make”<sup>17</sup>, b) “distributes or shows”, c) “has in possession with a view to their being distributed or shown by himself or others”, d) “publishes or cause to be published any advertisement

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<sup>13</sup> “There is as little in the way of scientific evidence for this beneficial effect, as there is for pornography’s harmful effects” Stone, Richard “Civil Liberties and Human Rights”, p. 401

<sup>14</sup> It is a relevant issue on the topic of whether “Pseudo-photographs” or comics of naked children should be legal

<sup>15</sup> Stone, Richard “Civil Liberties and Human Rights”, p. 418

<sup>16</sup> See *Atkins v DPP* (2000) 2 All ER 425

<sup>17</sup> *R v Bowden* - Downloading indecent material is within the scope of the PCA(1)(a), and this action is interpreted as “making” an indecent photograph.

*likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or intends to do so*”, “*of a indecent photograph of a child*”. An artist would normally fit under all these criteria, maybe with PCA1(D) as the exception.

The PCA is restricting photographs, which include films as shown in the PCA section 7(1), of children that are indecent. After the amendment by CJPOA 1994(84)(4) the PCA(1)(1)(a) is including photographs in electronic data format and pseudo-photographs. The CJPOA created a big extension of the restriction on “indecent” material, since it changed focus from protecting children to motives behind the making of the material<sup>18</sup>. This is interesting in relation to the “harm principle”, since the no children is harmed, directly, by making indecent pseudo-photographs. It may be the case that the legislation has changed focus from protecting the children to protecting morals in society. From a libertarian point of view it could be argued, that the rights of artists, at least when no harm is done to children, should be increased.

The definition of a child is given in the amendment of the PCA by s. 45 of the Sexual Offences Act 2003, where “16” substituted “ 18”, meaning that a person under the age of 18 is a child; this was done to change the definition of a child into the international definition<sup>19</sup>.

The interpretation of “indecent” is not given in the legislation, but case law shows that it “*means shocking and disgusting, but not as shocking and disgusting as “obscene”*”<sup>20</sup>. This definition is very unclear, which was thought to be an advantage by some Members of Parliament<sup>21</sup>, but from a legal point of view this is not positive, especially not when dealing with criminal offences. It should be possible to give a guide to the interpretation such as a specific attention to genitals is regarded to be indecent<sup>22</sup>,

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<sup>18</sup> Stone, Richard “*Civil Liberties and Human Rights*”, p. 421

<sup>19</sup> Akdeniz, Yaman “*Internet child pornography and the law*”, p. 19

<sup>20</sup> Stone, Richard “*Civil Liberties and Human Rights*”, p. 408 with reference to the statement of Lord Reid in *Kneller v DPP*

<sup>21</sup> Stone, Richard “*Civil Liberties and Human Rights*”, p. 408

<sup>22</sup> For an example see Optional Protocol to the Convention on the Rights of the Child on the sale of

such as the Oliver-test<sup>23</sup> used now - the problem might be that there is no political consensus of what is indecent, and then it is left to judges to decide. Case law has clarified that the jury in their decision of whether the photograph is indecent can take the age of the person into account or not<sup>24</sup>. If the age of the person in the picture is unknown the prosecutor must prove that the person is a child, and the jury must then decide whether this is the case or not – if there is “*any reasonable doubt on the issue, they should acquit*”<sup>25</sup>. It is not required for the prosecutor to prove that the defendant knew that the person in the material was a child<sup>26</sup>, which is a modification of the requirement for mens rea in accordance with PCA(2)(3). Case law has clarified that the motive of the creation of indecent material is not relevant on the issue of whether material is indecent or not<sup>27</sup>, so this is not “a way out” for artists either.

The above shows that the protection of children under British law is very strong, and that artists does not have a defense under PCA(1)(4)(a), since art is not a legitimate reason for distributing, showing or having them (*photographs or film*) in possession. The PCA(1)(4)(b) is not a defense either, since an artist sees the pictures and knows, in this relation, that they are indecent when he shoots them. Then it all comes down to whether the pictures are indecent or not, which in some cases might be hard to tell before the judge has spoken.

#### HRA 1998 – ECHR art. 10

Richard Stone argues that the vague definition of “indecent” in the PCA might be problematic in relation to art. 10 in the EHCR, with could be challenged under art. 10 of

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children, child prostitution and child pornography, General Assembly Resolution A/RES/54/263, 25 May 2000

<sup>23</sup> *R v Oliver* – the test derived from the Sentencing Advisory Panel (SAP) and was based on the COPINE-projects description of images

<sup>24</sup> *R v Owen*

<sup>25</sup> Stone, Richard “*Civil Liberties and Human Rights*”, p. 419

<sup>26</sup> *R v Land*

<sup>27</sup> *R v Graham-Kerr* and *R v Smethurst*

the HRA 1998, since it is up to a jury or a magistrate to decide whether material is so<sup>28</sup>. In the light of the judgement by the ECtHR in *Handyside*, where the “obscenity test” was “*prescribed by law*”, it is not very likely that the “indecent test” will not satisfy this condition. The courts showed the same view<sup>29</sup> in *R v Smethurst* and *Connolly v DPP*. The situation might be different in relation to the vague definition of “to make”, which some cases<sup>30</sup> has clarified the definition of. In the case of *Vereinigung Bildender Künstler v. Austria* the ECtHR would not accept the “*Austrian Government’s argument that the interference also pursued the legitimate aim of protecting public morals as neither the wording of the Copyright Act nor the terms in which the relevant court decisions were phrased, referred to that aim*”, but the as the “*prescribed by law*” criteria is most likely to be met in the PCA, and one of the aims is to protect public morals, it is very unlikely that this case changes anything in relation to the protection of children in relation to the rights of artists. The balance struck between the rights of artists and the protection of children under British law is not disproportionate in relation to the ECHR art. 10, since the protection in a copyright law is very likely to be different than the protection of children. As mentioned in the beginning, the amount of appreciation from the ECtHR to the member states makes the HRA 1998 more important to issues dealing with the freedom of expression. The artists might try to claim that art. 10 of the HRA 1998 is infringed by not giving an “artist defence” in the PCA<sup>31</sup>, since it is not necessary for the protection of morals to establish such a strong protection of normal “art with children”. The prosecutors if left with too much power, since it is rather unclear what an “indecent” picture is, and when dealing with criminal offences this is a juridical problem.

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<sup>28</sup> Stone, Richard “*Civil Liberties and Human Rights*”, p. 409

<sup>29</sup> Stone, Richard “*Civil Liberties and Human Rights*”, p. 409

<sup>30</sup> *R v Bowden and R v Smith*

<sup>31</sup> Stone, Richard “*Civil Liberties and Human Rights*”, p. 422

## Conclusion

The balance struck between the rights of artists and the protection of children under British law is a political question based on morals, which is hard to discuss in a law essay. The legalisation dealing with protection of Children under British law is not as blurry as the laws on obscenity and indecency in general, but the vague definitions in these laws, mentioned throughout the essay, has an impact on the PCA. Some might find the vague definition of “indecency” a good thing, since it gives the judges the opportunity to change it in accordance with changes in society. In some areas of law this could be a good thing, but when dealing with criminal offences there must be a clear legislation, which leaves as less space for uncertainty as possible. The vague definition of “indecent” and “make” might be, as discussed, in conflict with the criteria of being “prescribed by law” in the ECHR art. 10(2) and HRA 1998 art. 10(2). The quote from the Daily Telegraph gives an indication of the police being uncertain whether the picture was illegal or not<sup>32</sup>, and this could be prevented by creating a more specific definition of what is indecent and what is not. It is difficult to think of ways to make a stronger protection of children, than the protection under British law, but the fact is that the PCA, someday, when prosecutors think it is time, brings a case to the court that would not be in conflict with the general morals in society, but in conflict with the law. That is why Parliament should make stronger definitions and an artists defence – which would be in accordance to morals in society in relation to the protection of children. “The harm principle” could be used as a guideline on this topic, since it, in the light of the action chosen against the photographs by Tierney Gearon and Nan Goldin, seems to be the law that these pictures should be legal. A “harm principle” would protect children against harm, and with a strong definition of how to interpret “harm”, with the Oliver-test as a guideline, the legalisation would create a higher degree of certainty and being, with no doubt, in accordance with the ECHR and most important

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<sup>32</sup> The situation is comparable to the case of Tierney Gearon referred in Stone, Richard “*Civil Liberties and Human Rights*”, p. 421

the HRA 1998. The conclusion is that there is hardly any balance between the protection of children and the rights of artists under British law at the moment. The reason why a reform of the PCA is not done so far might be, that the Members of Parliament does not want to be connected with a “softer approach” on the restriction of pictures of children that might be/or not be indecent – if anyone knows what this word exactly means – or a problem with political consensus for a new Act on obscenity and indecency. It does not seem likely to see a change in this area of the law, and hopefully the prosecutors are aware of the power they have been given by Parliament.

# Tables of Authorities

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