In the Name of the Child: The Constitutionality of Criminalizing the Accessing of Child Pornography

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Abstract

In late 2014, the Knesset passed Amendment 118 to the Penal Code of 1977, which for the first time contains a prohibition against viewing certain materials. According to the new prohibition, consumers of obscene materials that include the image of a minor, even without possessing the publication, are liable to one year of imprisonment.

The article reviews the history of obscenity offenses in Western law and in Israel, and shows the change that they underwent, from focusing on literary works, later on performances, and finally on visual materials. In many countries new offenses were established to cope directly with the severe phenomenon of child pornography. In Israel, where no child pornography offenses have been created by the legislator, obscenity offenses have evolved from prohibitions aimed at protecting the public morals in general to de facto prohibitions against child pornography. The change is not purely academic or theoretical; these are perhaps the most enforced prohibitions against cybercrime in Israel.

The birth of a prohibition is an excellent opportunity to rethink matters. In our case, it is an opportunity to rethink obscenity offenses, including the values and balances they reflect, as well as the associated changes in society, economy, culture, and technology. The article suggests such rethinking through careful constitutional scrutiny of the new prohibition. It begins by identifying the rights infringed by the prohibition, first and foremost freedom and autonomy, as well as privacy and freedom of speech. Next, it examines the compliance of the harm caused by the prohibition with the requirements of the limitation clause. The new law passes easily the certification test, even wins praise in this regard, by creating direct criminalization through legislation rather than through a possible interpretation of the existing prohibition. The purpose of the law, according to the explanatory remarks and case law, appears at first sight logical and deserving: struggle against industrialized sexual exploitation of children. Nevertheless, the proportionality (rational suitability) test raises complex questions. In many typical cases, the type of criminalized behavior does not cause the harm attributed to it. When a person consumes materials through file sharing or by viewing them without paying and without promoting their production through some other

business model, the harm the prohibition seeks to prevent does not occur. A second problem with rational suitability has to do with the fact that the law seeks to fight a remote industry, most of whose consumers are also far and wide, and with respect to whom it is not possible to enforce the law. A third dissonance concerns the fact that in practice Israeli law is not generally interested in the welfare of foreign children, and naturally the new prohibition is too narrow to protect them in other important contexts. For example, foreign children are being exploited in sweatshops, an extensive labor market that manufactures products being sold at low cost in Israel, and no one is considering prohibiting their consumption. Regarding the necessity test, the article suggests that the term "consumption" would acquire much more logical, purposeful, and constitutional meaning if we interpreted it as “purchasing,” as opposed to merely gaining access, and that it is possible to find less harmful ways to fight the evil market of child pornography. The conclusion of the constitutional analysis is that the true purpose of the prohibition is to catch Israeli pedophiles and label them, based on the assumption that every pedophile poses a danger to our children. Such labeling is not a constitutional or otherwise appropriate way of protecting our children.

Following the constitutional analysis, the article criticizes the choice of the Israeli legislature to update the legislation concerning cybercrime precisely with regard to this topic. The article raises a series of even more difficult issues, showing how a critical look reveals that they should be evaluated from an up-to-date legislative perspective. The obscenity offenses themselves raise many questions: no one knows what "obscenity" is; the “publication” and “possession” components extend to domains that the legislator did not envision the last time it updated the statutes; the protection clause includes an obscure basis of "legitimate purpose;" and the prohibition against the publication of obscenity includes also peculiar items, such as obscene images of minors. Many other offenses in the Penal Code raise complex issues that deserve the attention of the legislators when it comes to applying them to the online domain, considering that these are old offenses, formulated to address behavior in the physical space, and not adjusted to confront the challenges of the virtual world. The article illustrates this briefly with reference to acts of indecency, rape, theft, fraud, illegal access of computer, gambling, and prohibited gaming. The cyber world raises questions that the legislators should address regarding other issues related to criminal procedure and evidentiary law, for example, operating agents on the Internet, the principle of public trials, interception of electronic mail, perusal of text messages, attorney-client privilege and more.