



one in five  
un sur cinq



LEGAL RESEARCH GROUP  
**ELSA** for **CHILDREN**  
FINAL REPORT

# FOREWORD

Dear Reader,

With this Final Report, we are proud to present the outcome of the International Legal Research Project ELSA for Children. This outcome contains 23 Reports regarding the national implementation of European and International Standards on the protection of children against violence and sexual abuse in some States members of the Council of Europe.

Statistics show that about one in five children in Europe are victims of sexual violence. It is also an unfortunate fact that these statistics are compiled from only the data available. There are many cases that do not see the daylight. As an association committed to Human Rights, we see the need to raise awareness about this issue as there is a lack of information within the international community regarding Children Rights and the protection of children against sexual violence.

The aims of this Legal Research Project shaped with the idea to support the ONE in FIVE Campaign of the Council of Europe which puts the abovementioned issue under spotlight. The aim was not easy, as we wanted to tackle a very serious and tabooed issue within the legal area of Human Rights. 'ELSA for Children' reflects the 'One in Five' Campaign's aim; to reach out to the widest possible audience throughout a large partnership including community-based civil society associations. Bringing together 38,000 students of law and young lawyers in 41 countries, ELSA is in a good position to carry out comparative research.

While shaping our research areas, we chose the ratification of Lanzarote Convention (Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse) as our starting point. Determining the main points of the national legislation regarding protecting children and implementing Lanzarote Convention (if ratified) was the main idea. However, we realised the cultural background of the respective states, family structures, current issues on media and national policies are also very relevant. We wanted to get qualified, realistic, applicable legal information and accordingly structured our academic framework.

Even though the academic research was the main focus, there also have been side-events organised by our national research groups in order to promote children rights values.

Before letting you read the rest of the report, we would like to thank our National Researchers, National Coordinators and National Academic who put a lot of efforts in the outcome and in its promotion, making this result unique. Without your commitment this research would not be possible.

Our warmest gratitude goes especially to the Council of Europe, in particular to the Children's Department, the Lanzarote Committee and the Directorate for Communication. First of all because of the decision to fund the publication of this research, but, more important, for their constant support and appreciation, that was essential in all phases of this project.

The International Coordination Committee

ELSA for Children Legal Research Group

**Asja Borić, Cassandra Matilde Fernandes, Elif Yildirim, Federica Toscano,  
Khrystyna Brodych, Sara Sanz and Vasco Silva**

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# ACADEMIC FRAMEWORK

## ELSA for Children

**“How does legislation protect child victims from sexual violence in the national legal framework in Europe?”**

### ACADEMIC FRAMEWORK – QUESTIONNAIRE

#### I INTRODUCTION

##### 1 GENERAL

**Aim:** This introductory section will be a general overview on the status of the internal protection of the subjects of our research. It is very important that you give official credits of your statements, to grant the objectivity of this general part. When you will describe the implementation of international and European instruments, it's important that you cite name and number of the main legislative acts; in this way, readers will have precise references of the legal basis that sustain also the following answers.

##### *Equal Rights*

- i. Are there discrimination problems regarding sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status of men and women? Please quote official reports from National or International Institutions, reports from the main NGOs that are active in the country and/or Journalistic inquiries.

##### *Family Protection*

- ii. What is the definition given to the term “family” in your national legislation or Constitution? What is the status of marriage? What is the average marital age of

the population? Please quote official reports/statistics from National or International Institutions or official statistics from Private Institutions or NGOs.

### *Child Protection*

- iii. What is the general status of children within the respective States' cultural and historical background? What is the general approach to children rights issues in the respective state? Is there a general concern regarding children/children rights? Were there/are there any violations that has been caught the eye of the media or the legislators?
- iv. International obligations: What is the relevant legislation regarding the implementation of international treaties? What is the relationship between State law and international treaties (dualistic or monalistic approach)? What is the date of ratification of United Nations Convention on Rights of the Child? Did the State make any reservations to the Convention? What is the general status of implementation?
- v. European Obligations: If the State is an EU Member, what is the general implementation process of the Directive 2011/92/EU of the European Parliament and the European Council of 13 December 2011? Please cite the internal legal instruments of the implementation.

## 2 THE LANZAROTE CONVENTION

**Aim: To give general overview on the implementation of this legal instrument in the internal protection of this subjects. Answers should be precise and detailed, as required before, to grants objectivity.**

- vi. When did the State ratify the European Convention on Human Rights?
- vii. Is the state a party to the Lanzarote Convention? Date of signature and ratification? Did the country make any reservations to the Convention/opt out of any parts?

*If not ratified:*

- viii. Does the State plan to ratify the convention? If so, what is the plan for the ratification and when can this ratification is being expected? If not, what are the obstacles hindering a ratification?

- ix. What would be the rank of the Lanzarote Convention under the State's national legal order when ratified?

*If yes:*

- x. What is the rank of the Lanzarote Convention under your national legal order? Is there a legislation regarding its implementation? If so, indicate the source and if available, an English translation.
- xi. Does this legislation address all the issues within the Lanzarote Convention?
- xii. If there is no legislation regarding implementation yet, is there a draft legislation? If so, indicate the source and if available, an English translation. What is the composition of the body working on the draft legislation? Can the State apply the Lanzarote Convention directly?
- xiii. If the State has made reservations to the treaty what are the underlying reasons? How does the State deal with the paragraphs that have been reserved? What is the complementary legislation?

## II NATIONAL LEGISLATION

### 1 GENERAL PRINCIPLES OF THE JURISDICTION

**Aim: This section is important to frame the juridical system of the Country that is the object of the research. It's important to understand how the legislation is implemented and how victims of violations can be protected.**

- i. Please give us a brief history of the respective State and the governmental regime (Federal State/Central government?)
- ii. About the general approach of the National legislation to Human Rights, how does the State legislate Human Rights? Is there a "Bill of Rights" within the respective country or are human rights mentioned in the Constitution as fundamental principles? When was this Constitution/Bill of Rights created? Are there any specific provisions regarding Children Rights?
- iii. Are there specific judicial bodies which monitor the implementation of international and national human rights instruments (for example Constitutional Courts etc.)? Can individuals claim their constitutional rights directly (e.g. direct effect)? Is there a Constitutional Court? Is it possible to apply individually? If not, how can the individuals claim their constitutional rights in case of violation? Is



there a system of hierarchy or other jurisdictions to ask before being able to go before Constitutional/Supreme Court? Please, briefly describe the application process.

- iv. Is there a Criminal Supreme Court? Please, briefly describe the criminal procedure.
- v. What is the age of criminal liability? Are there any statistics available regarding children prisoners?

## 2 SUBSTANTIVE CRIMINAL LAW

**Aim:** In this section the research starts to explore national peculiarities. Researchers are asked to analyze the protection provided by criminal law about sexual abuse, child prostitution, child pornography, corruption of children, solicitation of children for sexual purposes.

### 2.1 Sexual Abuse

- i. How does the national legislation define the term “sexual activities”? Is it to be applied broadly or narrowly?
- ii. Does the law define and interpret the word “intentionally”? What is the criminal liability of an internationally committed crime of sexual abuse?
- iii. What is the legal age for engaging in sexual activities? How are consensual sexual activities between minors regulated?
- iv. How is the use of force, taking advantage of disability or threat regulated in regards to sexual offences against children?
- v. How is the crime of “incest” regulated?
- vi. Are there any specific provisions regulating offenders who take advantage of school and educational settings, care and justice institutions, the work-place and the community?

### 2.2 Child Prostitution

- vii. Is the State a party to the Council of Europe Convention on Action against Human Trafficking? If yes, what is the date of ratification and signature? If not, is the State planning to ratify the Convention?
- viii. How does national legislation define “child prostitution”? Is it compatible with the definition in Article 19(2) of the Lanzarote Convention? Please comment.

- ix. Does national legislation criminalize both the recruiter (the person that coordinates the business of child prostitution) and the user (the person that pays to conduct sexual activities with children)?

### **2.3 Child Pornography**

#### *Child Pornography in General:*

- x. Is the State party to the Council of Europe Convention on Cybercrime? If yes, what is the date of ratification and signature? If not, is the State planning to ratify?
- xi. How does the national legislation define “child pornography”? Is it compatible with the definition in Article 20(2) of the Lanzarote Convention? Please comment.
- xii. To whom does the State attribute the criminal liability to? Is it compatible with the Article 20(1.a) to (1.f)?
- xiii. What is the control mechanism for pornographic materials? If the state is a party to the Lanzarote Convention, did the state use the reservation right that has been given to them in the Lanzarote Convention Article 20(3) and 20(4)?

#### *Participation of a Child in Pornographic Performances:*

- xiv. Does the State criminalize intentional conduct of making a child participate in pornographic performances? Does the State highlight and differentiate between recruitment and coercion? What is the State’s approach to the attendance of pornographic performances involving the participation of children? If the State is a party to the Lanzarote Convention, did the state use the reservation right stated in Article 21(2)?

### **2.4 Corruption of Children**

- xv. Does the State criminalize the intentional causing of a child to witness sexual abuse or sexual activities, without necessarily having to participate? How does the state define “causing”? Does it involve forcing, inducement, and promise?

### **2.5 Solicitation of Children for Sexual Purposes**

- xvi. How does the State criminalize intentional sexual gratification through information and communication technologies by an adult? Does it specify that

the perpetrator should also propose a meeting with the potential child victim and come to the meeting place in order to be accused of committing this kind of crime (a.k.a. grooming)?

- xvii. Does the State criminalize aiding or abetting and attempting to the activities that have been mentioned in the subsection a, b, c, d and e?

## 2.6 Corporate Liability

- xviii. Does the State hold legal/moral persons (entities) such as commercial companies and associations liable when an action has been performed on their behalf by a person in a position at their entity? Is there a difference between leading persons (persons in position of authority) and regular employees being held liable? If yes, please describe the differences.
- xix. What kind of liability does national legislation impose? Criminal, civil or administrative? Please explain.
- xx. Does national legislation exclude individual liability when there is a corporate liability?

## 2.7 Aggravating Circumstances

- xxi. Does the state accept any aggravating circumstances for the crimes that have been described above? (e.g. when the offence damaged physical health of the child) Please, write down these circumstances and explain.

## 2.8 Sanctions and Measures

- xxii. How does the state sanction the above mentioned crimes? Is there a penalty including deprivation of liberty? How does the state legislate extradition?
- xxiii. Do you consider the sanctions effective, proportionate and dissuasive? Please comment.
- xxiv. How does the state sanction the legal persons/moral entities? What kind of measures does it include?
- xxv. Does the state legislate seizure and confiscation of materials, instruments... etc. used for committing the crime? Does the state protect *bona fide* third parties? Is there allocation of a special fund for financing prevention or intervention programmes in which these properties confiscated allocated?

- xxvi. When the crime has been committed within the family or within the close environment of the child, how does the state react?

### 3 CRIMINAL PROCEDURE

**Aim: After the analysis of the protection framed by criminal law, in this section researchers are asked to explain if national rules of criminal procedure take into consideration the particular needs and situation of the child.**

#### 3.1 Investigation

- i. How is the principle of the “best interests of the child” applied during investigation of a crime as mentioned above? Is there a protective approach to the victims? What kind of measures has been taken? Is the victim offered protection during the court proceedings? (such as appointing special representatives) If so, please indicate what kind of protective measures have been taken.
- ii. Are there any special units for investigating the crimes mentioned above within the legal force? Are they authorised to carry out covert operations? Do they investigate and analyse child pornography materials?
- iii. Is it required that the crime is reported in order to be investigated? Do the proceedings go on even in case of withdrawal from the statements?
- iv. How long is the statute of limitation? When does it start? Can it be suspended?
- v. How does the national legislation proceed when the age of the victim is not certain?
- vi. Who is responsible for recording and storing data for convicted offenders? Who do they relate to? Can and do these authorities transmit their data to other competent authorities in other states? Do the authorities respect protection of personal data rules?

#### 3.2 Complaint Procedure

- vii. How does the complaint procedure work in case of violations of Substantive Criminal Law? Are children allowed to present their individual complaint? What are the criteria for Communication to be accepted for examinations (e.g. written/oral)?



- viii. What are the rules about legal representation of children, especially in the case of complaints against their parents? What are the rules of participation of minors in trials? (Protection of their names, prohibition of media etc.)

## 4 COMPLEMENTARY MEASURES

**Aim:** In every system complementary measures have an important role in terms of prevention, education and recovery. This is the area where National Institution has more freedom of movement, because they are free to choose the more suitable means to obtain the result, meaning the protection of children. This section is of great importance, because it will allow the exchange of experiences and “good offices” between systems.

### *Preventive Measures*

- i. What kind of educational guarantees are given in relation to professionals working with children in the area of sexual exploitation and sexual abuse? What does the State do in order to assure these people are aware of these situations?
- ii. Does the State educate children regarding these issues? Does the State involve parents into this educative process?
- iii. Has the State created preventive intervention programmes for people who fear that they may commit the crime?

### *Protective Measures and Assistance to Victims*

- iv. Are there any social programmes to provide support for victims? How exactly do these programmes work?
- v. Are there any help lines in service of the victims? Are these help lines aware of the confidentiality principles?
- vi. How does the State assist victims when it comes to recovery? Are the intervention programmes (if there are any) aware of the possibility that these child victims could have sexual behaviour problems in the future? Does the State make sure to get the consent of the persons or inform them thoroughly about the intervention programmes?

## III NATIONAL POLICY REGARDING CHILDREN

**Aim: In this section researchers will describe the commitment of active citizenship and NGOs in the protection of children.**

- i. Is there a serious political discussion regarding the children in the respective country?
- ii. How has the awareness within the society regarding children's sexual abuse and exploitation been raised by committed NGOs and/or the State (use of official sources, documents, statistics...)?
- iii. If the statistics are available, how many reporting have been done regarding children's sexual exploitation in last the 5 years (e.g. police records, court records etc.)?
- iv. Are there any promotional campaigns in the State so far regarding these issues?
- v. How has the children's perspective represented in the law making process?
- vi. Who are the main national Non-Governmental Organisations working on the topic of children's rights? Does the State regulate (or not) their involvement in law making process?

## **IV OTHER**

Are there any other legal or political issues that might be relevant in the respective country? Please keep in mind that ELSA is a non-political organisation, hence only political issues which might affect the data you have provided should have been mentioned here.

## **V CONCLUSION**

Please briefly summarise the main points in your report.



## NATIONAL REPORTS





# ELSA BOSNIA AND HERZEGOVINA

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**National Researchers:**

Enida Šaćirovic- ELSA Sarajevo, Faculty of Law, University of Sarajevo  
Adrejana Romic- ELSA Banja Luka, Faculty of Law, University of Banja Luka  
Janja Marušić- ELSA Mostar, Faculty of Law, University of Mostar  
Aldijana Alic- ELSA Sarajevo, Faculty of Law, University of Sarajevo  
Sanja Slavnic- ELSA Banja Luka, Faculty of Law, University of Banja Luka  
Tijana Ristic- ELSA Banja Luka, Faculty of Law, University of Banja Luka  
Martina Zeljko- ELSA Mostar, Faculty of Law, University of Mostar  
Merima Omerašević- ELSA Sarajevo, Faculty of Law, University of Sarajevo  
Sandra Filipovic- ELSA Banja Luka, Faculty of Law, University of Banja Luka  
Darko Dizdarevic- ELSA Sarajevo, Faculty of Law, University of Sarajevo

**Academic Adviser**

Džamna Duman- Faculty of Law, University of Sarajevo

**National Coordinator**

Asja Borić – ELSA Bosnia and Herzegovina, Faculty of Law, University of Sarajevo

## I INTRODUCTION

### 1 GENERAL

i. Legislative framework: “All international instruments for the protection of human rights and fundamental liberties are embedded into the constitutional system of Bosnia and Herzegovina”<sup>1</sup> Therefore,

*“except the explicit regulation that the rights and liberties specified by the Convention for the Protection of Human Rights and Fundamental Freedoms together with the Protocols will be directly applied in Bosnia and Herzegovina and have the priority over other laws, the Constitution of Bosnia and Herzegovina contains Annex I with the additional 15 agreements on human rights.”*<sup>2</sup>

Freedom from discrimination for all persons in Bosnia and Herzegovina is guaranteed by the Article II of the **Constitution of Bosnia and Herzegovina** and the international agreements specified in the Annex I of the Constitution:

*“Non- Discrimination: The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority property, birth or other status.”*<sup>3</sup>

The constitutions of the two entities in Bosnia and Herzegovina also regulate the freedom from discrimination. The **Constitution of Federation of Bosnia and Herzegovina** in its Chapter II: “Human rights” (A. General) in Article 2, paragraph d) determines the following:

“The Federation will ensure the application of the highest level of internationally recognized rights and freedoms provided in the documents listed in the Annex to the Constitution. In particular:

(1) All persons within the territory of the Federation shall enjoy the rights:

(...)

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<sup>1</sup> Publication: “How to protect from discrimination? The application of the Law on the prohibition of discrimination in Bosnia and Herzegovina (BiH)”, Implemented by the Initiative and civil action (ICVA) in cooperation with “Rights for all BiH” and organizations of civil society in Bosnia and Herzegovina (“Kako se zaštititi od diskriminacije? Primjena Zakona o zabrani diskriminacije u Bosni i Hercegovini”; page 4 (Accessed from: [www.rightforall.ba](http://www.rightforall.ba); 27th September 2012);

<sup>2</sup> “Analysis of the harmonization of the legislation of BiH with the Convention on the Rights of the Child”, Institution of Ombudsman for human rights of Bosnia & Herzegovina in cooperation with Save the Children Norway, Sarajevo, November 2009; page 166

<sup>3</sup> Article 2, Paragraph 4, Constitution of Bosnia and Herzegovina, (Accessed from: website of the Constitutional court of Bosnia and Herzegovina: [www.ccbh.ba](http://www.ccbh.ba); 27th September 2012)



(d) To freedom from discrimination based on race, color, sex, language, religion or creed, political or other opinions, and national or social origin; (...)”<sup>4</sup>

The **Constitution of Republika Srpska** in its Chapter II: “Human rights and freedoms.” Article 10 determines the following:

*“Citizens of the Republic shall be equal in their freedoms, rights and duties; they shall be equal before the law and they shall enjoy equal legal protection irrespective of their race, sex, language, national origin, religion, social origin, birth, education, property status, political and other beliefs, social status and other personal attributes.”*<sup>5</sup>

**Statute of the Brčko District of Bosnia and Herzegovina** in its Chapter II: “Brčko district residents”, Article 13: “Rights and Obligations”, also envisages freedom from discrimination:

*“Everyone is entitled to the enjoyment of all rights and freedoms guaranteed under the Constitution and laws of Bosnia and Herzegovina and laws of the District without discrimination of any kind. In particular, everyone has the right to access all public institutions and facilities in the District; to move and determine freely his/her place of residence, business or work in the entire territory of the District; and purchase and sell movables and real estates in accordance with the law (...)”*<sup>6</sup>

Bosnia and Herzegovina is a signatory of the **Stabilisation and Association Process Agreement to the EU**, therefore making it mandatory for Bosnia and Herzegovina to harmonize its state legislature with the EU legislature, especially with the EU directives.

*“Fundamentals for the protection from discrimination on the level of all EU member states as well as potential member states are established by EU directives while the practical application is left for the state legislature of each member state.”*<sup>7</sup>

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<sup>4</sup> Article 2, Constitution of Federation of Bosnia and Herzegovina (FBiH), (“Official Gazette of FBiH”, No: 1/94, 21<sup>st</sup> July 1994.)

<sup>5</sup> Chapter 2, Article 10, Constitution of the Republika Srpska with amendments, (“Official Gazette of RS”, No. 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 31/02, 31/03, 98/03 i 115/05)

<sup>6</sup> Chapter 2, Article 13, Statute of the Brčko District of Bosnia and Herzegovina, (“Official gazette of BDBiH”, No: 1/00 i 24/05)

<sup>7</sup> Publication: “How to protect from discrimination? The application of the Law on the prohibition of discrimination in Bosnia and Herzegovina”, Implemented by the Initiative and civil action (ICVA) in cooperation with “Rights for all BiH” and organizations of civil society in Bosnia and Herzegovina (“Kako se zaštititi od diskriminacije? Primjena Zakona o zabrani diskriminacije u Bosni i Hercegovini”; page 2 (Accessed from: [www.rightforall.ba](http://www.rightforall.ba); 27th September 2012);

Although freedom from discrimination on all accounts is not precisely named in the Constitution of Bosnia and Herzegovina and the constitutions of its entities and the Brcko District (e.g. freedom from discrimination on the basis of sexual orientation, health condition, disability etc.), these anti-discriminatory regulations have been subsequently introduced with the **Law for the prohibition of discrimination in Bosnia and Herzegovina**<sup>8</sup>, which came into effect in August 2009 after the initiative of the civil society in Bosnia and Herzegovina. Except the fact that the law specifies all the anti-discriminatory orders in one place more clearly and groups them together, as well as envisions harsh sanctions for disregardment of the anti-discriminatory orders, the real significance of this law is that it “created the framework for the realization of equal rights and opportunities for all persons in Bosnia and Herzegovina and organized a system of protection from discrimination”<sup>9</sup> through the institutions of the Ombudsman for human rights of Bosnia and Herzegovina and the Ministry for human rights and refugees of Bosnia and Herzegovina. Also, the **Law for the equality of genders in Bosnia and Herzegovina**<sup>10</sup> is also significant and it developed the anti-discriminatory orders regarding genders in a more detailed manner as well as the laws that protect the rights of national minorities in Bosnia and Herzegovina and its entities: **Law for the protection of the rights of national minorities of Bosnia and Herzegovina**<sup>11</sup>, **Law for the protection of the rights of national minorities of Federation of Bosnia and Herzegovina**<sup>12</sup> and **Law for the protection of the rights of national minorities of Republika Srpska**<sup>13</sup>.

Therefore, *“Prohibition of discrimination is contained in international treaties that are directly applicable in domestic judicial system, contained in European instruments that are directly applicable or acquire legal force in process of accession of Bosnia and Herzegovina to EU, contained in the Law on Prohibition of*

<sup>8</sup> Law for the prohibition of discrimination in Bosnia and Herzegovina, (“Official Gazette of BiH”, No. 59/09)

<sup>9</sup> Publication: “How to protect from discrimination? The application of the Law on the prohibition of discrimination in Bosnia and Herzegovina”, Implemented by the Initiative and civil action (ICVA) in cooperation with “Rights for all BiH” and organizations of civil society in Bosnia and Herzegovina (“Kako se zaštititi od diskriminacije? Primjena Zakona o zabrani diskriminacije u Bosni i Hercegovini”; page 2 (Accessed from: [www.rightforall.ba](http://www.rightforall.ba); 27th September 2012);

<sup>10</sup> Law for the equality of genders in Bosnia and Herzegovina – revised version, (“Official Gazette of BiH“, No. 32/10)

<sup>11</sup> Law for the protection of the rights of national minorities of Bosnia and Herzegovina, (“Official Gazette of BiH“, No. 12/03, 93/08)

<sup>12</sup> Law for the protection of the rights of national minorities of Federation of Bosnia and Herzegovina, (“Official Gazette of FBiH“, No. 56/08)

<sup>13</sup> Law for the protection of the rights of national minorities of Republika Srpska, (“Official Gazette of RS“, No. 2/05)

*Discrimination in BiH, in the Constitution of BiH and other domestic regulations that are in conformity with above mentioned Law.* “<sup>14</sup>

Regardless of the highly developed system of legislative and institutional protection, as well as the system of application of international documents and treaties, the reports of national and international institutions and NGOs have registered the presence of problems of discrimination within the population of Bosnia and Herzegovina.

Situation in practice: “Open Society Fund Bosnia and Herzegovina” has conducted a public opinion poll regarding the perceptions of discrimination as well as experiences from those who were affected by discrimination. During the poll, the legal definitions of discriminations were read out to the surveyed persons and they were asked to take them into account when responding to the questionnaire. The result of this survey showed that

*“the highest percentage of examinees (86.3%) believes that discrimination is a problem that is currently present in Bosnia & Herzegovina. Most of the examinees (59.8%) believe that discrimination is a significant problem that is particularly present in this country.”*<sup>15</sup>

The research of the **Ombudsman for human rights of Bosnia and Herzegovina** shows that the population of Bosnia and Herzegovina is very poorly informed about the possibilities of addressing the Ombudsman for help as well as the possibility of finding protection for their rights within the judicial system, evident in the fact that

*“although more than two years have passed from the adoption of the Law, only one judicial ruling in effect has been given for the case of discrimination, that one being from the Cantonal court in Mostar (Number: P 58 0 P 056658 09 P), as well as one ruling that is still not in effect given by the Municipal court in Livno (Number: 68 0 P 017561 11 P).”*<sup>16</sup>

With the aim of improvement of the civil awareness of the different aspects of discrimination and the different ways of fighting against it,

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<sup>14</sup> “Annual report on occurrences of discrimination in Bosnia and Herzegovina for 2011”, Institution of ombudsman for human rights of Bosnia and Herzegovina, Banja Luka, February 2012 ; accessed from: [www.ombudsmen.gov.ba](http://www.ombudsmen.gov.ba) on 2nd October 2012

<sup>15</sup> “Report on the results on the public poll of the perception and experiences of discrimination” (“Izvještaj o rezultatima ispitivanja javnog mnijenja o percepciji i iskustvu diskriminacije”), Open Society Fund Bosnia and Herzegovina, page 16; accessed from: [www.diskriminacija.ba](http://www.diskriminacija.ba) on 2nd October 2012.

<sup>16</sup> “Annual report on occurrences of discrimination in Bosnia and Herzegovina for 2011”, Institution of ombudsman for human rights of Bosnia and Herzegovina, Banja Luka, February 2012 ; accessed from: [www.ombudsmen.gov.ba](http://www.ombudsmen.gov.ba) on 2nd October 2012

*“(...) web portal for public information on various aspects of discrimination and protective mechanisms in BiH is constructed and running, with support of organization Civil Rights Defenders a team of 13 BiH young journalists is created, educated to report discrimination, and a guide for journalist on how to report about this problem is in preparation.”<sup>17</sup>*

The Institution of Ombudsman for human rights in Bosnia and Herzegovina has registered a number of cases of complaints in the past few years, with most of them concerning discrimination on a national basis and mobbing, while there wasn't a single case of complaints regarding racism or xenophobia what is

*“a result of specific historic heritage and the fact that discrimination is directed primarily to BiH constituent peoples members in areas where they are minority”<sup>18</sup>.*

The Institution has not registered complaints of unequal treatment based on different sexual orientation

*“which could be attributed to their fear from being exposed to judgmental environment and to traditional intolerance toward this category of citizens in addition to the influence of religious organizations.”<sup>19</sup>*

Regarding the frequent complaints on the national basis and the basis of mobbing, the reports of the Institution of Ombudsman for human rights of Bosnia and Herzegovina are showing the following information:

*“Institution of Human Rights Ombudsman in 2011 received 191 complaints about discrimination. Apart complaints from 2011 the Department transferred 81 cases from 2010 and 1 case from 2009 so total of complaints dealt with by the Department in 2011 was 273 cases. In reporting period the Department resolved 88 cases from 2011 and 40 from 2010, deciding to close (102) or issuing recommendation (26), or through restitution of the right during the time of investigation. It is necessary to mention that a certain number of cases resolved during investigation was resolved through mediation, encouraging friendly outcome or mediation between dispute parties and there were ways that responsible organ correct its action following first addressing by the Ombudsman.(...) In 2009 main number of complaints was related to discrimination based on ethnic ground (53), and in 2010 significant decrease of such complaints occurred (14), and at the same time number of complaints regarding mobbing increased (32). In 2011 trend of increasing of mobbing*

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<sup>17</sup> Ibid, page 10

<sup>18</sup> Ibid, page 27

<sup>19</sup> Ibid, page 27

*complaints continued (41), and out of total of (43) in only a minor number of cases violation of the right was determined (4).“<sup>20</sup>*

Looking at the rights of children and the cases of child discrimination, the Institution of Ombudsman for human rights in Bosnia and Herzegovina has found that:

“especially endangered and vulnerable in BIH are children of refugees and displaced persons, returnees, national minorities (particularly Roma children), children with special needs/impairments in their psycho-physical development and children living in rural areas.“<sup>21</sup>

In their Annual report on occurrences of discrimination in Bosnia and Herzegovina for 2011, the Institution of Ombudsman for human rights in Bosnia and Herzegovina also touched the topic of the Ministry of human rights and refugees of Bosnia and Herzegovina regarding the application of the Law for the prohibition of discrimination in Bosnia and Herzegovina:

*“Ombudspersons state that this Ministry has not established a central database to comprise cases of discrimination, nor it issued a rulebook on methods of collection of cases involving discrimination within the legal deadline of 90 days“<sup>22</sup>,*

The Ministry was obligated to do that on the basis of Article 8 of the Law for the prohibition of discrimination in Bosnia and Herzegovina.

Regarding the state of discrimination in Bosnia and Herzegovina, arguments can be taken from the Report on the status of human rights in Bosnia and Herzegovina for 2011 of the **Helsinki Committee for Human Rights of Bosnia and Herzegovina**. The Report shows cases of discrimination in Bosnia and Herzegovina as well as discriminatory legal provisions including cases of negligence of relevant institutions tasked with anti-discriminatory actions.

*“Principles of equality and non-discrimination are an integral part of all declarations on human rights. Non-discrimination itself is a human right and also the most important element of all other human rights*

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<sup>20</sup> “Annual report on occurrences of discrimination in Bosnia and Herzegovina for 2011“, Institution of ombudsman for human rights of Bosnia and Herzegovina, Banja Luka, February 2012, page 11-12 ; accessed from: [www.ombudsmen.gov.ba](http://www.ombudsmen.gov.ba) on 2nd October 2012

<sup>21</sup> “Alternative report on the implementation of UN Convention on the Rights of the Child for period 01.06.2009 - end of 2011.“; Institution of ombudsman for human rights of Bosnia and Herzegovina, Banja Luka, page 6, accessed from: [www.ombudsmen.gov.ba](http://www.ombudsmen.gov.ba) on 2nd October 2012

<sup>22</sup> “Annual report on occurrences of discrimination in Bosnia and Herzegovina for 2011“, Institution of ombudsman for human rights of Bosnia and Herzegovina, Banja Luka, February 2012, page 25; accessed from: [www.ombudsmen.gov.ba](http://www.ombudsmen.gov.ba) on 2nd October 2012

*enshrined in the international documents which have been ratified by BiH. By the passage of the Law on Discrimination Prohibition in BiH (came into effect in 2009) yet another step forward has been made in legal protection of citizens who are exposed to the discrimination (the Law stipulates sanctions against those who practise discrimination).*

*Unfortunately, we have to note that all mentioned protection instruments are still nothing but a dead letter, thus even this year can be considered lost in terms of protection of citizens from discrimination and its suppression.*

*For example, discriminatory provisions haven't been deleted from the BiH Constitution, even the amendments to the BiH Constitution have not been harmonized which would refer to implementation of the Judgment of the Court in Strasbourg mentioned in the Introduction of this report. The discriminatory provisions against some categories of the population such as the disabled, unemployed, returnees, minorities, etc., have not been deleted from the entity laws. On the contrary, in some cases (in the Federation of BiH) some amendments to the law, aimed at gaining political points, deepened the existing differences between military war invalids and civil war victims, on one hand, and disabled persons whose disability was caused by illness, the so-called non-war invalids, on the other. Additional difference between them was made by including the disability allowances of the latter under Article 5 of the Law on Mode for Implementation of Savings in the Federation, which decreased their already low disability allowances by 10 %.*

*The Law on Prohibition of Discrimination in BiH stipulated that all laws and general provisions must be harmonized with it within one year from its passage. This has not been done. The laws have not been harmonized even between entities in some sectors, in particular in the sector of social and health protection.*

*Also other provisions of the Law are not implemented. The Ministry for Human Rights and Refugees in BiH, authorized to collect information about incidents and extent of the discrimination and to submit annual report thereon to the Council of Ministers, and as required, special reports proposing measures for prevention and suppression of the discrimination incidents, has not even produced a rule book on data collection. The deadline for its passage was - 90 days from the day when the Law entered into force. The rule book is a precondition for any further activity. Truly, the Ministry has drafted the text and non-governmental organizations and representatives of the bodies required to supply the information were invited to debate. The rule book has not been adopted for the objections made to the text.*

*The Law on Prohibition of Discrimination defined the Ombudsperson for Human Rights in BiH as a central institution for protection from discrimination, mandating it, within its powers, among other things, to collect and analyze statistics about discrimination cases, to submit annual report thereon, as well as extraordinary reports as required about incidents of discrimination, to make them public, to increase*

*awareness of issues related to racism and racial discrimination, and to use them within its powers and on its own accord, unlike to date, exclusively upon individual complaints.*

*Based on the 2009 and 2010 annual reports, the work of this institution by far does not indicate that it has coped adequately with this extremely important mission. It has processed a small number of cases (as average around 120 complaints per year). It has completed a half of that number, but there is no information as to how those complaints were resolved, that is, whether or not the discrimination was established in those cases, and if recommendations were given as to how to stop it. Also, by far a single extraordinary report has not been submitted to legislative authorities about discrimination incidents, and the public has not been informed about them. The experiences of the Helsinki Committee for Human Rights in BiH, which 2011 worked, among other things, also on promotion of the Law on Prohibition of Discrimination have showed that most of the citizens do not even know that the Law exists, and they do not have any knowledge about authorities given to the Ombudspersons, which is the reason why so few complaints were addressed to this institution.*

*All this leads to the conclusion that a central institution for protection from discrimination is still not competent to perform that function. Perhaps it is a result of their being understaffed in general, in particular the staff with required experience and expertise. It is surely a result of non-compliance with provisions of the mentioned Law in the part which stipulates that the Ombudspersons in BiH should have been allocated special budget funds for the work in protection from discrimination.*

*The citizens complaining about discrimination (about unlawful differentiation and forbidden unequal treatment) and seek protection either from the Helsinki Committee in BiH, from other non-governmental organizations or before relevant courts (which is still an exception in the Law application), mainly suggests that discrimination most frequently appears in the following forms:*

*sexual and other physical or non-physical harassment-the mobbing;*

*giving precedence in the process of employment to the ethnic majority against the minority group;*

*in the employment process against women, young and ethnic minorities, especially Roma people;*

*while exercising various rights – specially property rights for political affiliation,*

*in the education system by imposing limitations to children who belong to communities who are ethnic and religious minority or with parents of different political affiliation. They are not provided with education in their own religion or any other alternative subject, instead of religious education of the majority community.*

*through segregation in the education system where rights on one group of children are being violated deliberately, - always minority groups, by isolation them from the children who belong to ethnic “majority” groups by conducting teaching in mono-ethnic schools or in the so called “two-schools under one*

roof", which is common occurrence in the Federation of BiH, but is being spread in Republika Srpska. The separation has reached the level of absurd in the cases where children travel also by separate buses to such schools (Bosniaks in their buses and Croats in theirs- the Jajce case).

preventing the disabled in wheelchairs to access most of the public places even those where their rights are decided, such as the legislative authorities as well as most of executive authorities which have not removed architectural barriers and adapted entrances to their needs,

by exclusion of gender and ethnic minorities to use some restaurants,

limitation in all rights to the same extent in the health and social care sector of all those who are entitled to the rights, (childbed women who receive different allowances in different cantons in the Federation of BiH, particularly in relation to childbed women from RS who receive full allowances, and others only periodic ones or one-off payments),

the discrimination occurs also against the disabled persons whose disability allowances are not equal with respect to the cause of disability and rates for the same needs.

The mentioned and other types of discrimination have not been adequately responded to, and the discriminated persons most frequently remain with no protection. The number of reported cases of discrimination does not reflect the real state of play. There are multiple reasons for that as follows:

- Majority of citizens are not aware of the existence of the Law against Discrimination, thus they cannot recognize it or seek the protection from it.
- All official bodies are not familiarized with the Law, particularly those in local communities, who are supposed to provide protection to the citizens.
- The persons discriminated against hardly choose to use various protection instruments for fear of losing their jobs, isolation and other bad consequences in the proceedings or after they are reinstated in the form of victimization.
- A small number of pending court proceedings suggest that citizens do not trust courts either for the length of proceedings conducted before them or for the fact that it is impossible to execute judgments ruled in their favor.
- Lawyers or some non-governmental organizations who prepare complaints about discrimination are not sufficiently professionally competent in filing discrimination claims, which significantly limits judges to act upon such claims, particularly when it is noted that they themselves are not sufficiently educated and sensibilized to recognize and protect the persons who have been exposed to discrimination.

It can be concluded from the aforementioned that the Law against Discrimination in BiH although it was passed back in 2009 is not sufficiently applied, particularly in small local communities. It requires that



*individuals and vulnerable groups be encouraged to recognize and report discrimination and strengthening the institutions responsible for application of the Law in particular the non-governmental organizations in order for them to be competent and independent enough to deal with the incidents of collective and individual types of discrimination. All this aimed at efficient protection of citizens in BiH from discrimination as the main instigator of various types of human rights violations.’<sup>23</sup>*

The Helsinki Committee for Human Rights of Bosnia and Herzegovina's report was made on the basis of complaints of the citizens of the Bosnia and Herzegovina by their Legal Aid Office. The Helsinki Committee for Human Rights of Bosnia and Herzegovina paid attention to the rights of children emphasizing the importance of the Convention of the rights of children in the transition society of Bosnia and Herzegovina. One case of discrimination of the rights of children was registered by the Legal Aid Office of The Helsinki Committee for Human Rights of Bosnia and Herzegovina in 2011 regarding the religious education in schools.

*‘The problems in application of the Law on Primary and Secondary Education have existed in the territory of the entire Federation of BiH since it was passed. It was in 2011 when the problems were seriously addressed when the Minister of Education of Sarajevo Canton raised the issue of discrimination which occurred in the religious education at schools. Namely, in a number of schools only the children who belonged to the majority people had the subject of religious education and got marks for it which was calculated in the average mark. Other children who belong to other religions or the children whose parents stated that they did not wish their children to be trained in this course, were not provided for an alternative subject in this field to get marks for it, whereby they were brought into unequal position.*

*The Decision of the Minister, supported by the HCBiH, provoked sharp reactions of the religious officials who interpreted the decision to remove discrimination in application of the Law as an attempt to remove the religious education as a subject from the curricula.*

*The amendments to the Law in the Sarajevo Canton has provided for an alternative subject for the children who do not attend the religious education. Unfortunately the problem of discrimination of children in other cantons of the Federation BiH remained which is illustrated through the following example: a child of a Serb returnee and of the Orthodox religion attends school in N. The religious education classes are organized only*

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<sup>23</sup> “Report on the status of human rights in Bosnia and Herzegovina for 2011”, Helsinki Committee for Human Rights of Bosnia and Herzegovina, pages 4-7, accessed from: [www.bh-hchr.org](http://www.bh-hchr.org) on 10th October 2012

*for the children who wish to learn about the Catholic religion. In spite of the request of parents the school has not provided the religious education to the minority student justifying that with “absence of real possibilities to do so”<sup>24</sup>*

The problem of child discrimination regarding the religious education in schools was also registered by the Open Society Fund Bosnia and Herzegovina in one of their publications:

*“The reason for criticism of religious education is the claim that it is discriminatory towards minorities. That problem is evident in schools where religious education is not offered to students of all religions. The reasons for that kind of behaviour are different but the most often is the number of students from one religious group that it is too small or the lack of adequate staff in that area. That surely has far-fetching consequences and potentially harms the rights of minorities, both in the eyes of the national laws as well in the eyes of international law. Groups that are affected the most are the children of returnees and atheists and those who reject to be part of religious education for some other reason. A very small number of schools has all the conditions to organize alternative classes. The absence of alternative classes is an additional pressure on students and parents to pick the religious education offered to them.”<sup>25</sup>*

An additional disadvantage is the fact that there is not Ministry of Education at the State level in Bosnia and Herzegovina, which will regulate the education system. The education is legally regulated primarily at the level of the entity at the moment. However, a significant shift is evident when it comes to the fact that it was launched an initiative called “The Culture of Religion” in 2000, which involves the creation of a school subject that teaches students about the four major religions practiced in Bosnia and Herzegovina. Specifically, representatives of ministries have agreed on the implementation of this initiative as a form of reforms in the education system, which aims to eliminate segregation in schools and which is supported by the OSCE, Goethe Institute and the NGO "Sarajevo Open Centre."

*“The Culture of Religions initiative in Bosnia and Herzegovina has designed a school subject that teaches students about the four major religions practiced in Bosnia and Herzegovina. Different than the traditional,*

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<sup>24</sup> “Report for 2011 of the Legal Aid Office”, Helsinki Committee for Human Rights of Bosnia and Herzegovina, pages 16-17, accessed from: [www.bh-hchr.org](http://www.bh-hchr.org) on 10th October 2012

<sup>25</sup> A. Alibašić, “Religious education in public schools in Bosnia and Herzegovina: Towards a model that supports coexistence and mutual understanding”, publication “Religion and education in an open society” (“Vjersko obrazovanje u javnim školama u Bosni i Hercegovini: Ka modelu koji podržava suživot i uzajamno razumijevanje”, publication: “Religija i školovanje u otvorenom društvu”), Open Fund Society of Bosnia and Herzegovina, September 2009, Sarajevo, page 18

*confessional religious classes which provide a doctrinal point of view, the Culture of Religions course teaches all students to explore the four religions, with an emphasis on their history, culture and society.*<sup>26</sup>

The Ombudsman for Human Rights in Bosnia and Herzegovina and Save the Children Norway say the following:

*“The competent authorities of Bosnia and Herzegovina have to take urgent measures to harmonize legislation using the principle of non-discrimination with the criterium that the lower levels of government cannot prescribe a smaller scope of rights than those guaranteed by the laws of the higher instances. With the aim of building legal security it is necessary to harmonize legislation within the legal deadlines (e.g. education) and in a terminological sense it should be necessary to create revised versions of the laws that are changing together with implementing acts.”*<sup>27</sup>

Also, the newest recommendations from Child Rights Committee are declaring that Bosnia and Herzegovina should immediately stop with the segregative practice in the schools:

*“Immediately end the segregation of children in schools on the basis of ethnicity by discontinuing the policy of so-called “two-schools-under-one-roof” and mono-ethnic schools, and in doing so ensure adequate support measures and properly trained education personnel to facilitate ethnic diversity and integration in schools.”*<sup>28</sup>

According to the European Court of Human Rights Verdict<sup>29</sup> “Sejdic and Finci v. Bosnia and Herzegovina”<sup>30</sup> from 2009, some of the regulations of the Bosnian Constitution and the constitutions of its entities are discriminatory to minorities in Bosnia and Herzegovina. The Bosnian Constitution, in its Preamble, makes a distinction between two categories of citizens: the so-called “constituent peoples” (Bosniacs, Croats and Serbs) and “others” (Jews, Roma and other national minorities together with those who do not declare affiliation with any ethnic group). The House of Peoples of the Parliamentary Assembly (the second chamber) and the Presidency are composed only of persons belonging to the three constituent peoples, so the persons belonging to “others” are not able to stand for election

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<sup>26</sup> Sabina Ćudić, “Different Religions under One Roof: Towards Inclusive Religious Education in Bosnia and Herzegovina, publication “Religion and education in an open society”, Open Fund Society of Bosnia & Herzegovina, September 2009, Sarajevo, page 111

<sup>27</sup> “Analysis of the harmonization of the legislation of BiH with the Convention on the Rights of the Child“, Institution of Ombudsman for human rights of Bosnia & Herzegovina in cooperation with Save the Children Norway, Sarajevo, November 2009; page 32

<sup>28</sup> Committee on the Rights of the Child, Sixty - first session, 17 September – 5 October 2012, Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Bosnia and Herzegovina, CRC/C/BIH/CO/2-4, 5th October 2012

<sup>29</sup> For more information about this Verdict: [http://www.coe.org.rs/eng/news\\_sr\\_eng/?conid=1545](http://www.coe.org.rs/eng/news_sr_eng/?conid=1545)

<sup>30</sup> Application nos. 27996/06 and 34836/06

to the Presidency and the House of Peoples of the Parliamentary Assembly. The Court's final verdict declares that those regulations represent violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights taken together with **Article 3 of Protocol No. 1 (right to free elections)**, and **Violation of Article 1 of Protocol No. 12** (general prohibition of discrimination) to the Convention.

So Bosnia and Herzegovina needs to make constitutional changes in order of implementing this Verdict and ensuring the equal human right to all citizens of Bosnia and Herzegovina, which is one of the main state's duties in the process of EU integration.

ii. According to the Family law of the Federation of Bosnia and Herzegovina a family represents:

*“Article 1*

*A family is a living union of parents and children as well as other cognates, relatives through marriage, adopters, adoptees and persons from from a domestic partnership if they are living in a common household.”<sup>61</sup>*

**Law on protection from domestic violence of Federation of Bosnia and Herzegovina** gives a different definition of a family:

*“Article 5 – Legal definition of a family*

*A family, within the means of this law, is made up from:*

*marital and extramarital partners;*

*relatives living together: cognates and relatives from a complete adoption in a straight line without limitations, laterally together with fourth level of kinship; adopter and adoptee from incomplete adoption; relatives through marriage together with second level;*

*guarding and protégé, foster parent and foster child;*

*ex-marital and ex-extramarital partners.*

*Relationships between the members of a family are based on humane principles which imply mutual respect, support, and commitment to maintenance of harmonious relations with the development and demonstration of best traits taking into special account the protection of children, respect for gender equality and voluntary entry into marriage and extramarital union. In their mutual relations, members of a family will respect the rights,*

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<sup>61</sup> Article 1, Family law of Federation of Bosnia and Herzegovina, (“Official Gazette of FBiH“, No. 35/05 i 41/05)

*liberties and safety of other members of the family in that way so they are not limiting them, making it impossible for them or stopping them in the exercise of their rights and liberties that the members of that family have within the current regulations. A member of a family will abstain from harming the physical or psychological integrity of another member of the family, injury and discrimination on the basis of gender and age and from putting that person into a state of subordination in any way.*<sup>62</sup>

According to the **Family law of Republika Srpska**, the definition of a family is as following:

*"Article 2*

*A family, within the scope of this law, is a living union of parents, children and other relatives"*<sup>63</sup>

**Law on protection from domestic violence of Republika Srpska** in its Chapter II ("Definition of a family and violence in family") offers a different definition of that term:

*"Article 5*

*A family, within the scope of this law, is a living union of parents, children and its other members.*

*Within the scope of this law a family is consisted of:*

*spouses in a marital or extramarital union*

*their children (common or from previous unions)*

*ex-marital and ex-extramarital spouses and their children*

*adopter and adoptee*

*guardian parent and ward, as well as other persons that are living or used to live in a family union*

*parents of current and ex-spouses;*

*step-father and step-mother.*<sup>64</sup>

The Child Protection Law of Republika Srpska regulates another definition of family:

*"Article 6*

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<sup>32</sup> Article 5, Law for the protection from domestic violence of Federation of Bosnia and Herzegovina, ("Official Gazette of BiH", No. 22/05);

<sup>33</sup> Article 2, Family law of the Republika Srpska, ("Official Gazette of RS", No. 54702, 41/ 08)

<sup>34</sup> Article 5, Law for the protection from domestic violence of Republika Srpska, , („Official Gazette of RS“, No. 118/05, 17/08)

- (1) The family, in terms of this law, consists of: the spouse or common-law spouse, children (legitimate, illegitimate, adopted and foster children and children placed under guardianship and foster child), and relatives in the direct line, and lateral to the second degree of consanguinity, if they live in the same household.*
- (2) Notwithstanding paragraph 1 this Article, in determining the order of birth and number of children in the family, the children who do not live in it are included as well.*
- (3) In the total number of children in the family, by birth order, only live births are included.*
- (4) For children placed under guardianship and foster child, birth order is determined by the number of children, guardian and nurturer who live with them in the same household.*
- (5) Birth order and number of children of divorced or common law marriage is determined by the fact to whom of the parents children are entrusted by the judgment on divorce or regarding cohabitation; in which family children live in.* <sup>35</sup>

According to the Family **Law of Brčko District of Bosnia and Herzegovina**, a family is defined as following:

*“Article 2 - Family*

*A family, within the scope of this law, is a living union of parents and children and other relatives.*

*Family relationships are based on:*

- a) the protection of family life;*
  - b) equality, mutual support and respect of family members;*
  - c) obligation of parents to provide protection of interests and welfare of a child and their responsibility in raising, upbringing and education of a child;*
  - d) obligations of Brčko District of Bosnia and Herzegovina to secure the protection of a family, mother and child in accordance with the international conventions from these areas;*
  - e) providing foster care to children without parental care and the protection of adults that are not capable of caring for themselves, their rights, interests and property.*
- (3) Department of health and other services – Sub-department for social protection as a guardianship authority (hereinafter: Guardianship authority) is responsible for expert help and protection of rights and*

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<sup>35</sup> Article 6, Child Protection Law of the Republic of Srpska, („Official Gazette of RS“, No. 4/02, 17/08, 1/09)

*interests of a child and other members of the family, for dispute resolution between the members of a family as well in all cases of damaged relationships.*"<sup>36</sup>

**Child Protection Law of the Brcko District of Bosnia and Herzegovina** regulates another definition of family:

"Article 3

Family in term of this law is a living community of parents and children and other relatives. Family consists of blood, adoptive-laws and relatives, regardless of their degree of kinship."<sup>37</sup>

When looking at legal formulations of marriage and its status in the family legislation in Bosnia and Herzegovina, **Family law of Federation of Bosnia and Herzegovina** states the following:

*"Article 7*

*(1) Marriage is contracted by a woman and a man with their consent in front of a registrar.*

*(2) A registrar is a civil servant.*

*(3) Marriage partners can marry in front of a religious official after contracting a marriage in front of a registrar.*

*Article 8*

*(1) For the marriage to be valid it is necessary: a) that future marriage partners are of different sexes b) that future marriage partners have declared consent for their marriage c) that the consent is given in front of a registrar.*

*Article 10*

*(1) Marriage can not be contracted by a person that is already married.*

*Article 15*

*(1) Marriage can not be contracted by a person that has not reached the age of 18.*

*(2) Extraordinarily, a court can allow the contracting of a marriage in a contentious procedure to a person that has reached the age of 16 if it finds that there are valid reasons that the person in question is physically*

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<sup>36</sup> Article 2, Family Law of Brcko District of Bosnia and Herzegovina, („Official Gazette of RS“, No. broj 3/07)

<sup>37</sup> Article 3, Child Protection Law of Brcko District of Bosnia and Herzegovina, („Official Gazette of BDBIH“, No. 01/03, 4/04, 21/05, 19/07, 2/08)

*and mentally able to perform the rights and duties arising from marriage and that the marriage is in its best interest.*<sup>38</sup>

Therefore, based on the Family law of Federation of Bosnia and Herzegovina, citizens can contract a marriage in front of a religious official after contracting a marriage in front of a registrar.

*“Marriage partners that want to contract a marriage in front of a religious official after entering into marriage in front of a registrar are obliged to submit their extract from the register of marriages. The possibility for married partners to contract a religious marriage is a new addition to the Family law (Article 29). The earlier version of the law prescribed the civil marriage as the mandatory form while the religious version was not allowed. However, despite the ban, religious communities and religious officials had contracted such marriages. In order to avoid this de facto illegitimate practice, the new law has introduced the possibility of contracting a religious marriage but after a civil procedure.”*<sup>39</sup>

The status of marriage in the **Family law of Republika Srpska** is regulated as following:

*“Article 4*

*(1) Marriage is a legally regulated unity of life of a woman and man.*

*(2) Marriage is based on a free will decision of a woman and a man to contract a marriage based on the equality of marriage partners, mutual respect and mutual help.*<sup>40</sup>

Therefore, according to the **Family law of Republika Srpska**, the status of a civil marriage is legally definite but the status of a religious marriage is not directly defined by the law itself but rather through the interpretation of the principles of family law:

*“The principles of family law are: principle of institutionality, principle of laity, principle of the freedom of acceptance, principle of monogamy, principle of the equality of married partners, principle of completeness and durability of marriage, principle of severability of marriage. With these principles, basic rules for marriage and married union are defined. The principle of laity in marriage – as a legal entity marriage can be under the obligatory regime of the church or civil law. In our society, marriage is, as a family itself, defined by legal norms of the civil law. That is why this principle is expressing the idea of the separation of the church from*

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<sup>38</sup> Articles 7, 8, 10, 15, Family law of Federation of Bosnia and Herzegovina, Part 2, („Official Gazette of FBiH“, No. 35/05 i 41/05)

<sup>39</sup> Nerimana Traljić, Suzana Bubić, „Marital law“, Faculty of Law, University of Sarajevo, Sarajevo, 2007, page 44

<sup>40</sup> Article 4, Family law of Republika Srpska, („Official Gazette of RS“, No. 54702, 41/08)



*the state and the exclusive right of the state to independently regulate the relationships in a marriage since the state has taken over the rights from church the right to introduce regulations and it transferred the right to contract a marriage into the hands of civil institutions as well as the ability to solve all relations and disputes arising from the marriage itself. The most important consequence of the civility of the marriage is the introduction of the obligatory form of a civil marriage so some of our authors are referring to it as the principle of the mandatory form of a civil marriage (Ajžner, Mitić). However, this principle is much wider. Any form of influence and interference of religious organizations in the matter of family law is removed. Marriage bans based on religious bans are also removed. With this principle the freedom of conscience and religious thought is not harmed. Those persons, that want to enter into a marriage according to religious regulations, can do so in front of the religious official of their church (but only after contracting their marriage in front of a competent civil authority). The legal basis of the laity was contained since the first Constitution of the Federal Peoples' Republic of Yugoslavia from 1946 (Article 26, paragraph 2 as well as the ex-Law of the basic marriage in articles 2.3 and 15).<sup>41</sup>*

Marriage status, according to the **Family law of Brčko District of Bosnia and Herzegovina**, is defined as following:

*“Article 4*

*Definition of marriage*

*(1) Marriage is a legally regulated unity of life of a woman and man.*

*(2) Marriage is based on a free will decision of a woman and a man to contract a marriage based on the equality of marriage partners, mutual respect and mutual help. “<sup>42</sup>*

The average age of a bride and a groom at the time of their first marriage is increasing steadily in recent years. That is confirmed by the data provided by the Agency for statistics of Bosnia and Herzegovina which is showing considerable increase of age in marriage contracting from 2002 onwards. Namely, “girls entering into marriage were 24.3 years old on average while their partners were 27.8 years old on average”<sup>43</sup>, while in 2010 the same data shows that “girls entering into marriage were 25.7 years old on average while their partners were 28.9 years old on average.”<sup>44</sup> It can be concluded that from 2002 until today

<sup>41</sup> Marko Mladenović, Stanka Stjepanović, Milorad Živanović “Family Law”, Pale 2003, page 63

<sup>42</sup> Family law of Brčko District of Bosnia and Herzegovina, („Official Gazette of RS“, No.3/07“)

<sup>43</sup> Data taken from: [www.mojevijesti.ba](http://www.mojevijesti.ba); accessed on 4<sup>th</sup> October 2012

<sup>44</sup> “Men and women in Bosnia and Herzegovina”, (“Žene i muškarci u Bosni i Hercegovini“), Agency for

the average age of young people entering into marriage in Bosnia and Herzegovina has risen for more than a full year. Experts are claiming that this kind of statistical trend is a result of an increasingly tough economic situation in the country, unemployment of young people as well as an aspiration of young people to economically organize themselves meaning that that they become permanently employed and to find a place to live (apartment, house etc.).

Deputy Director of the Agency for Statistics of Bosnia and Herzegovina, Mr F. Fatic, has provided statistical information to the media about the number of contracted and divorced marriages in 2010:

*“In 2010 19.541 couples married which is a 5.3% decrease to 2009. During 2010 1676 persons divorced which is a 19.5% increase. During the first three months of 2011 3350 marriages were contracted and 365 were divorced which is a 42.02% increase compared to the same period of 2010“<sup>45</sup>*

In the statement of the Agency for Statistics of Bosnia and Herzegovina named “The natural migration of population in Bosnia and Herzegovina in 2011” it is evident that there is an increase in the number of contracted and divorced marriages:

*“During the year of 2011, 20.084 marriages were contracted which is a 1.79% increase compared to 2010. During the year of 2011, 1609 marriages were divorced which is a 40.77% increase compared to 2010.“<sup>46</sup>*

The poll of the same agency named „Poll regarding household expenditures in 2007“ is showing the following data regarding the structure of the population aged 15 and older and their relation towards marriage status and gender in 2007:

*“There is a percentage of 16.2% widowed women and 4.1% of widowed men. There is a percentage of 2.6% of divorced women and 1.5% of divorced men. There is a percentage of 59.8% of married women or women living in an informal marriage and 63.8% of married men or men living in an informal marriage. There is a percentage of 21.5% of unmarried women and 30.7% of unmarried men.“<sup>47</sup>*

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Statistics- Agencija za statistiku, BiH, Sarajevo, December 2011, TB 03, Tematski Bilten, ISSN 1840- 104X; accessed from [www.bhas.ba](http://www.bhas.ba) on 4<sup>th</sup> October 2012

<sup>45</sup> Data taken from [www.slobodnaevropa.org](http://www.slobodnaevropa.org); on 7<sup>th</sup> October 2012

<sup>46</sup> The release of the Agency for Statistics of BiH "Natural population in Bosnia and Herzegovina in 2011" March 2012, (Saopštenje Agencije za statistiku u BiH „Prirodno kretanje stanovništva u Bosni i Hercegovini u 2011 godini“, godina VI, broj 1, dana 28.3.2012. godini)

<sup>47</sup> Datas are taken from: “Survey on household consumption in BiH in 2007”, "Themed Bulletin:" Women and Men in BiH“, ISSN 1840- 104X, Agencija for Statistics BiH, page 13 („Anketa o potrošnji domaćinstva u BiH u 2007. god.“; Tematski bilten: „Žene i muškarci u BiH“, ISSN 1840- 104X, Agencija za statistiku BiH, str.13.)

More detailed information about the current average age of the married population is not available since the last general census was held in 1991 and the next one is scheduled for 2013.

The increasingly harder economic situation has influenced the birthrate in Bosnia and Herzegovina. Young couples are increasingly more likely to avoid having children while it was completely normal for every family to have 4 children on average just 50 years ago. The data<sup>48</sup> of the Statistics agency of Bosnia and Herzegovina for 2010 is indicating a negative ratio of natality and mortality where the number of those born in 2010 was 33.528 while the number of those died in 2010 was 35.118.

However, the research of the Ombudsman for Children of Republika Srpska has registered a problem of underage pregnancies:

*„In 2010 436 childbirths were registered with mothers who were 15 to 19 years old while there were 938 of them in 2001. There is still no data for 2011 and 2012. In 2010, too. It is interesting to note that 25 underage girls younger than 15 gave birth in the last 10 years. The office of Ombudsman claimed that the main problem of underage pregnancies is the insufficient level of information on the consequences of sexual relations and the question of criminal responsibility of adults that have age sexual relations with underage girls. They are claiming that the appropriate legislature in this aspect would significantly decrease this negative occurrence.“<sup>49</sup>*

**iii.** When talking about the general status of children and the problem of sexual harassment from the perspective of the cultural and historical background of Bosnia & Herzegovina, as well as the development of the system for the protection of the children's rights and the public awareness of the problem of sexual harassment, it is necessary to look back at the situation 50 years ago:

*“Incomplete research of sexual abuse in Macedonia, Serbia, Montenegro, Croatia, Kosovo, Vojvodina and Bosnia and Herzegovina, while they were federal units of the former Yugoslavia, confirm that this issue was mainly absent from courts. These phenomena were, as a rule, considered a taboo, and both victims and witnesses avoided reporting them to the police and courts. Although these crimes were considered the worst*

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<sup>48</sup> Annual indicators Agency for Statistics, dates are taken from: [www.bhas.ba](http://www.bhas.ba); October 2012

<sup>49</sup> Dates are taken from: [www.banjaluka.com](http://www.banjaluka.com); October 2012

*violations of individual and collective dignity, publicizing them would permanently stigmatize the victim and his/ her family.*<sup>50</sup>

Therefore, collective silence about this problem had been present until the start of this century when the debate about this problem became important all around the world.

During the war aggression towards Bosnia and Herzegovina from 1992 to 1996, there were many cases of sexual abuse of underage girls during the systematic raping of Bosniak women, confirmed by the verdicts from the International Criminal Tribunal for former Yugoslavia (ICTY)<sup>51</sup>. United Nations report about the state of human rights on the territory of the former Yugoslavia has numerous informations on children's rights abuse as well as sexual abuse of underage children and legislative difficulties in adopting procedures of those children that were conceived during war rapes:

*"E. The particular suffering of children*

*90. The Special Rapporteur is gravely concerned at the violations of the human rights of children in Bosnia and Herzegovina. He supports the work of the Committee on the Rights of the Child to implement the Convention on the Rights of the Child and, in particular, to raise international awareness of the effects of armed conflicts on children. The Convention, inter alia, prohibits the torture, abuse or neglect of children and provides for their protection in all circumstances.*

*91. The indiscriminate targeting of civilian population centres has particularly profound consequences for the children involved. They have themselves been killed and wounded in these attacks; witnessed the death and injury of others including close family members and neighbours and have seen their homes destroyed. They have been arbitrarily imprisoned in appalling conditions and there are reports of rape of children in and out of detention camps. This war has created countless orphans and a generation of refugees.*

*92. A particular problem arises with regard to the children who have been born, or are expected to be born in the near future, as a result of rape. Suggestions have been made that adoption of these children should be facilitated. At present, there would appear to be difficulties under national adoption legislation in Bosnia and Herzegovina, Croatia, as well as in the Federal Republic of Yugoslavia. In order for a married woman to*

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<sup>50</sup> Džamna Duman, „Women, gender and child sexual abuse inside and outside family: The Balkans”, Family, Law and Politics - Sexual Abuse: Children, The Balkans”, Encyclopaedia of Women and Islamic Cultures, page 1<sup>st</sup>

<sup>51</sup> International Criminal Tribunal for the former Yugoslavia verdicts, the cases: **(IT-96-23/2), (IT-96-23 i 23/1)**; [www.icty.org/case](http://www.icty.org/case)

*place her child for adoption, her husband's consent is required by law. While this provision may be regarded as serving the best interests of the child in peace-time, circumstances are fundamentally different in times of armed conflict and in the context of rape. Wives may not wish to inform their husbands that they have been raped. Husbands fighting at the front may be impossible to contact, in detention or disappeared. The national parliaments concerned may wish to consider this matter in view of the circumstances currently prevailing.*

*93. In any event, inter-country adoption may be considered, although only "as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin" (art. 21 (b) of the Convention on the Rights of the Child). The Special Rapporteur has been informed by religious leaders of Muslim communities and by concerned individuals and organizations in Croatia and in Bosnia and Herzegovina that there is a strong will to raise these children within the local communities. However that may be, in considering international assistance, the Special Rapporteur emphasizes that the wishes of the mother and the efforts of local communities should be identified, respected and supported by the international community. It goes without saying that the guiding principle in any such discussion must be the best interests of the child, as provided for in article 3 of the Convention on the Rights of the Child.*

*94. The Special Rapporteur supports the work of UNICEF as the lead agency in this field and shares its concern to avoid, at all costs, the stigmatization of, or trafficking in, babies who are born as a result of rape.<sup>52</sup>*

After the war in Bosnia and Herzegovina, a great number of NGOs was created dealing with human rights, gender rights, problems concerning abuse of women and children. The public is demanding more and more the creation of mechanisms for the protection of victims of domestic violence, especially when sexual abuse of children is present:

*"According to statistical data of the interior ministries in Bosnia and Herzegovina, 208 criminal reports on sexual abuse of children were filed between 1997 and 2001. Perpetrators were 15 to 85 years of age. Victims of violence were, as a rule, girls aged 3 to 18. According to the data of the Helsinki Committee for Human Rights in Bosnia and Herzegovina, 16% of all abuse is sexual abuse. These data include all ethnic communities in Bosnia and Herzegovina.*

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<sup>52</sup> United Nations, Report on the situation of human rights in the territory of the former Yugoslavia, submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S- 1/1 of 14 August 1992., str. 20.- 21., The Archives of the ICTY; [www.unhchr.ch](http://www.unhchr.ch)

*There are public requests all over the region to improve the existing documents by precisely defining sexual abuse of children. There are also more and more requests to develop legislative, executive and judicial powers in order for all these crimes to be efficiently registered, prosecuted and sanctioned. These issues are present in public debates and in the media, particularly in women's and feminist organizations, but so far no general position on these issues has been reached. There are no unified and developed procedures for registering sexual abuse of children in any of these countries, which is why the existing statistics are inconsistent.”<sup>53</sup>*

Therefore, under the influence of NGO activity, public debates and media support, sexual abuse of children is slowly becoming less of a taboo-topic for the citizens of Bosnia & Herzegovina. The strengthening of the public awareness about that issue, next to the NGO activity, has been greatly influenced by the current normative framework, both on a national and international level that secures an adequate of the interests of child.

*“The Constitution of Bosnia and Herzegovina, in its catalogue of rights, lists basic human rights of all persons.*

*The Constitution of Federation of Bosnia and Herzegovina standardizes the right a right for the protection of children and this right is directly affecting a child while rights of privacy, education and ban of all kinds of discrimination are not only affecting children but other members of a family as well. These rights are prescribed by the Constitution of Bosnia and Herzegovina as well. Children and their standing is also affected by the provisions of international agreements which have the power of the constitutional orders by the Annex to the Constitution of Federation of Bosnia & Herzegovina and they will be applied in Bosnia & Herzegovina.*

*Provisions that guarantee the rights of children or their protection are contained in the International Covenant on Civil and Political Rights as well as International Covenant on Economic, Social and Cultural Rights, European Social Charter, Convention on the Rights of the Child and European Convention on Human Rights and Fundamental Freedoms. It is particularly important to emphasize the Article 16 of the International Covenant on Civil and Political Rights where it is stated that all persons have a right for a legal personality that includes legal capability as well as legal capacity.*

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<sup>53</sup> Džamna Duman, „Women, gender and child sexual abuse inside and outside family: The Balkans”, Family, Law and Politics - Sexual Abuse: Children, The Balkans”, Encyclopaedia of Women and Islamic Cultures, Volume II, Brill, 2005, page 2<sup>nd</sup>

Several principles regarding the relationship of parents and children can be produced from the named sources: **protection of children, equality of parents and right for the respect of a family and personal life.**

Protection of children in their interests is particularly assured by the Convention on the Rights of the Child which is totally dedicated to children and their rights. This convention treats a child as an autonomous person with special rights and it is especially important that it standardizes the mechanism for the protection of these rights. To be honest, this mechanism is not complete compared to the one determined by the European Convention on Human Rights and Fundamental Freedoms since there is not a possibility to sue a country on an international level that harms these rights.

The guiding principle of the Convention is the application of the **standard for the best interest of a child** and the achievement of welfare in activities that concern a child. The interest of a child is something that is taken into account both by parents as well as state authorities in dispute resolution. On the side of parents there is a primary obligation of raising and development of a child and the state has the obligation to help parents and family in fulfilment of obligations and responsibilities towards a child. Besides this indirect help a state is obliged to directly help and protect the rights and interests of a child.

As it has been already said, the protection is provided by parents. The implementation of all obligations and responsibilities is something that guarantees the proper development of a child's personality. When parents stop using their parental rights in the interest of a child, when they neglect, endanger or harm the interest of a child, a competent authority is obliged to intervene by using the appropriate measures. The allowed basis for this kind of intervention is that fact that the relationships of parents and children are modelled on the basis of principles for the protection of children and the obligation of a state to take appropriate measures. By taking preventive and repressive actions a state is performing its obligation prescribed by international agreements and the one arising from the right of a child for protection in the Constitution of Federation of Bosnia & Herzegovina. Therefore, parents can not invoke their right for the respect of a family life and ask for its protection in the case of intervention and limitation of their independence in their exercise of parental care. In that same way, the Family law of Federation of Bosnia and Herzegovina bases the organization of the relationship of parents and children.

Since one of the reasons that can be a basis for intervention can be the protection of a child, our legal system has provision that allow a court to take actions limiting the right of parent for the protection of family life and to live with a child, being guided by the interest of a child. Except the protection to children provided by parents and state, some bodies commit to give special protection to a child through an alternative care for children who are temporarily or permanently deprived of their family environment or when it is not in their best interest to remain in that circle, placement in another family, appropriate institution or adoption.

*The protection of the principle of protection of a family life stems from both of our constitutions and the European Convention on Human Rights and Fundamental Freedoms. When standardizing relationships between parents and children and the exercise of parental care and their organization in practice, the competent authorities must take into account this right of parents and children and abstain from any kind of intervention that might hurt it. The possibility to limit this right is allowed only in those cases when the protection of health or morals of children is provided, respecting the legal terms regarding these relationships, otherwise it would be a cause to start a procedure against Bosnia and Herzegovina in front of the European Court for Human Rights in Strasbourg.”<sup>54</sup>*

The current **criminal legislation of Bosnia and Herzegovina**<sup>55</sup> regulates the protection of children from sexual abuse, human trafficking and all forms of exploitation through the provisions of the Criminal code of Bosnia and Herzegovina, Criminal code of Federation of Bosnia and Herzegovina, Criminal code of Republika Srpska and Criminal code of Brčko District of Bosnia and Herzegovina.

*“The Criminal Code of Bosnia and Herzegovina sanctions the following criminal offences: establishment of slavery and transportation of persons in that status, human trafficking, international recruitment for prostitution, smuggling of persons, taking hostages.”<sup>56</sup>*

*“One of the basic characteristics of the aforementioned offences is that the easiest victims can be children and young persons. The Criminal code of Bosnia and Herzegovina, Criminal code of Federation of Bosnia and Herzegovina, Criminal code of Republika Srpska and Criminal code of Brčko District of Bosnia and Herzegovina sanction the criminal offences against gender liberty and morals and amongst them sexual relationship with a child, sexual misconduct, incitement to prostitution, abuse of a child or minor for pornography, introducing a child with pornography, incest. The criminal legislature of Bosnia and Herzegovina defines the following acts as criminal offences as well: kidnapping, abduction of a child and a minor as well as an act of a person that changes the family status of a child with planting and replacement or in any other way.”<sup>57</sup>*

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<sup>54</sup> Presentation by Džamna Duman (Senior Assistant Law Faculty in Sarajevo), the seminar "Regular and subsequent registration in the register of births" („Redovni i naknadni upis u matičnu knjigu rođenih“), organized by the organization "Your Rights BiH" (Legal Aid Network) and the UNHCR, 19<sup>th</sup> - 21<sup>st</sup> December 2010, Vlačić, Bosnia and Herzegovina

<sup>55</sup> Detailed provisions of the criminal legislation of BiH in Chapter II "national legislation" of this report, section 2 "Substantive Criminal Law"

<sup>56</sup> Articles: 185, 186, 187, 189, 191, Criminal Code of Bosnia and Herzegovina ("Official Gazette of BiH", No. 37/03, 54/04, 61/04, 30/05, 55/06, 32/07)

<sup>57</sup> "Analysis of the harmonization of legislation of Bosnia and Herzegovina with the Convention on the Rights



The **Family Law of Federation of Bosnia and Herzegovina** regulates “the protection of a child in a family from all kinds of violence, abuse, maltreatment and neglect”.<sup>58</sup> Also, in its Chapter C “The rights and obligations of parents and children” regulates the obligation of parents to take care of the life and health of a child:

*“Article 134*

*(1) Parents are obliged to take care of the life and health of a child.*

*(2) Parents are obliged to take care of a child, satisfy its normal needs and protect it from all forms of vices: drugs, alcohol, tramping, robberies, stealing, prostitution, begging as well as all forms of juvenile delinquency, violence, injuries, economic exploitation, sexual abuse and all other asocial occurrences.*

*(3) For the protection of the interests of a child, parents are obliged to control its behaviour, in accordance with its age and maturity.”<sup>59</sup>*

Protection of personal rights and interests of a child in the family legislation of the Federation of Bosnia and Herzegovina is defined by the following orders:

*“(1) Guardianship authority has an obligation to act on official duty and take appropriate measures for the protection of rights and the best interest of a child based on direct knowledge or information.*

*(2) Information about the injury of a child’s rights, especially in cases of violence, maltreatment, sexual abuse and child neglect, is something that has to be promptly delivered, without delay by all bodies, organizations and physical persons to the guardianship authority.*

*(3) A court in front of which a misdemeanour or criminal procedure is started which is related to the harm of the rights of child, is obliged to inform the guardianship authority and a court with jurisdiction for measures for the protection of rights and interests of children and is obliged to deliver them an official judgment from that procedure.*

*(4) Guardianship authority will receive help on official duty from local police authorities for the measures from the Paragraph 1 of this Article.*

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of the Child” („Analiza usklađenosti zakonodavstva Bosne i Hercegovine sa Konvencijom o pravima djeteta“), The Institution of Human Rights Ombudsman of Bosnia and Herzegovina in cooperation with Save the Children Norway, Sarajevo, November 2009, pages: 148-149

<sup>58</sup> Article 127, Family law of the Federation of Bosnia and Herzegovina, („Official Gazette of FBiH“, No. 35/05 i 41/05)

<sup>59</sup> Article 134, Family law of the Federation of Bosnia and Herzegovina, („Official Gazette of FBiH“, 35/05 i 41/05)

*(5) Before taking any measures from Paragraph 1 of this Article, a guardianship authority will listen to a minor child about the facts that are related to its decision if the child is capable to understand the situation properly. An opinion of a minor child will especially be taken into account if measures of separation from parents are going to be taken.”<sup>60</sup>*

Also, Family law of Federation of Bosnia and Herzegovina regulates the possibility to deprive parental care by a court order in a non-contentious procedure:

*“Article 154*

*d) Deprivation of parental care*

*(1) Court will take away parental care in a non-contentious procedure from a parent that abuses his or her rights or grossly neglects his or her obligations or abandons a child or does not take care of a child with which he or she is not living together and clearly endangers a child's security, health or morals or does not protect a child from that kind of behaviour from another parent or person.*

*(2) Abuse of rights is especially present in cases of physical and mental violence towards a child, sexual abuse of a child, guidance of a child towards socially unacceptable behaviour and other cases of gross violations of child's rights.”<sup>61</sup>*

The **Family law of Republika Srpska** also regulates rights and obligations of parents and children in Chapter III „Relationships of parents and children“ where „parents have an obligation and right to protect their underage children and to take care of their lives and health“ also regulates the rights and duties of parents and children in Chapter III "Relations between parents and children"<sup>62</sup> and to „take care of the education of their underage children.“<sup>63</sup>

With the provisions of this law any form of physical and sexual abuse is forbidden as well as exploitation, neglect and other ways of child's rights abuse. In cases of violations of child's rights, guardianship authority has the power to take away the guardianship from parents:

*“Article 97*

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<sup>60</sup> Article 62, Family law of Federation of Bosnia and Herzegovina, („Official Gazette of FBiH“, No. 35/05 i 41/05)

<sup>61</sup> Article 154, Family law of Federation of Bosnia and Herzegovina, („Official Gazette of FBiH“, No. 35/05 i 41/05)

<sup>62</sup> Article 81, Family law of the Republika Srpska, („Official Gazette of RS“, No. 54702, 41/08)

<sup>63</sup> Article 83, Family law of the Republika Srpska, („Official Gazette of RS“, No. 54702, 41/08)

### *3. Oversight of a guardianship authority*

*(1) Parents and other members of a family must not subject a child to degrading acts, mental and physical punishments or abuse. If parents, or a parent with which a child is living with, have in any way abused their child or neglected to take care of it, neglected its upbringing or if a child has been faced with disorders in upbringing, a guardianship authority can take away their child and entrust it to another parent, some other person or appropriate institution if there is not a judicial order for entrusting a child.*

*(2) During the period of constant oversight of the parental rights, a guardianship authority will help parents with advices and other appropriate methods of social work in their excercision of parental rights, call up parents for consultations about parental rights, visit parents and children, call up parents and children for regular periodic meetings at the premises of the guardianship authorities and similiar.<sup>64</sup>*

*„Article 106*

### *5. Deprivation of parental rights and duties*

*(1) Court will take away parental rights in a non-contentious procedure from a parent which molests his child, abuses parental rights or leaves its child, disregards caring about a child and neglects its parental duties.*

*(2) A parent abuses its parental rights and duties if he or she:*

- 1. conducts physical or mental violence towards a child;*
- 2. sexually abuses a child;*
- 3. exploits a child making it work too much or works at something that is not appropriate towards its age;*
- 4. allows a child to use alcoholic drinks, drugs or other intoxicating substances or makes it do so;*
- 5. leads a child towards any form of socially unaccepted behaviour;*
- 6. in any other way grossly violates the rights of a child.*

*(3) A parent is grossly neglects its parental obligations and rights:*

- 1. if he or she leaves his or her child;*
- 2. if he or she does not take care about a child living with him or her for longer than a month;*
- 3. if he or she does not create necessary conditions for living together within a year without a valid reason if a child has been placed in another family or institution;*

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<sup>64</sup> Article 97, Family law of the Republika Srpska, (“Official Gazette of RS“, No. 54702, 41/08)

*4. if he or she neglected to take care about the basic living needs of a child living with him or her or does not follow the measures taken by the competent authority for the protection of rights and welfare of a child.*

*(4) Court can return parental rights to a parent if the reasons for which it was taken away from him or her cease to exist.*<sup>65</sup>

**Family law of Brcko District of Bosnia and Herzegovina** regulates rights of children to be protected from all forms of violence as well as the obligations of parents to protect their children from all forms of violence and in the case of omissions parental right will be taken away from parents.

*„Article 110*

*(Right from the protection from all forms of violence)*

*A child in a family has a right for the protection from all forms of violence, abuse, neglect and negligence.*<sup>66</sup>

*„Article 117*

*(Obligations of parents)*

*(1) Parents are obligated to take care of the life and health of a child.*

*(2) Parents are obligated to take care of a child, fulfill its needs and protect it from all forms of vices and wrongdoings: drugs, alcohol, tramping, robbing, stealing, prostitution, begging and all forms of juvenile delinquency as well as violence, injury, economic exploitation, sexual abuse and all other asocial occurrences.*

*(3) For the protection of the interests of a child parents are obligated to control its behaviour in accordance with its age and maturity.*<sup>67</sup>

*„Article 114*

*(Limitation and revocation of parental care)*

*(1) Limitation and revocation of parental care is possible by a decision from an official body in ways prescribed by this law.*

*(2) A parent cannot renounce its parental care.*<sup>68</sup>

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<sup>65</sup> Article 106, Family law of the Republika Srpska, (“Official Gazette of RS“, No. 54702, 41/08)

<sup>66</sup> Article 110, Family law of Brcko District of Bosnia and Herzegovina, („Official Gazzete of BDBIH“, No. 3/07)

<sup>67</sup> Article 117, Family law of Brcko District of Bosnia and Herzegovina, („Official Gazzete of BDBIH“, No.3/07“)

When talking about the injuries of the rights of a child, a topic that sparked the interest of media and legislature in Bosnia and Herzegovina is the ethnic discrimination in everyday life, animosity and violence towards children of ethnic minorities, especially Roma children. One of the burning issues that Roma children are faced with is the sexual and economic exploitation (begging).

*‘Regarding economic exploitation and street children the Committee on the Rights of the Child is concerned at the information that a significant number of children, especially Roma, are living or working on the streets, that the majority of these children are under 14 that most of them do not attend schools and nearly half of them appear to be ill. Furthermore, the Committee notes with concern that the work performed by these children is often harmful and exploitative and that many of them are compelled or forced to work (...) Although the Law strictly defined the conditions under which a child up to 15 years of age can work, there were found registered cases of violation of this Law. Practical examples given were the cases of children who worked in restaurants, bakeries and other facilities in which children worked at night. The usual practice is that such categories of employees are not registered by the retirement, disability, and health funds, which automatically represents a form of exploitation and enhances the existence of black market. Inspection takes certain measures, but there is an insufficient number of inspectors and the sole structure of inspection services, especially in FBiH, makes a more efficient supervision in this area impossible.*

*It is especially important to note the issue of begging in the streets as a form of exploitation. Department for children’s rights of the Ombudsmen Institution of BiH made a comprehensive research of this phenomena in BiH and send its recommendations to BiH authorities on how to deal with this problem. This research shows that begging is often a form of exploitation as a part of children trafficking and that the competent authorities do not have a systematic approach to eliminate this phenomenon.’<sup>69</sup>*

Apart from discrimination, violence, economic and sexual exploitation which are challenges for Roma children, one of the burning issues with those children is the lack of registration in official documents for newborns making those children officially “non-existent” and as such are not protected by the law and are suitable victims for human trafficking and all means of

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<sup>68</sup> Article 114, Family law of Brcko District of Bosnia and Herzegovina, („Official Gazzete of BDBIH“, No. 3/07)

<sup>69</sup> "Analysis of the harmonization of legislation of Bosnia and Herzegovina with the Convention on the Rights of the Child" („Analiza usklađenosti zakonodavstva Bosne i Hercegovine sa Konvencijom o pravima djeteta“), The Institution of Human Rights Ombudsman of Bosnia and Herzegovina in cooperation with Save the Children Norway, Sarajevo, November 2009, pages: 151- 152

exploitation. This problem was registered by the Institution of Ombudsman for human rights of Bosnia and Herzegovina in one of their reports.

*„Children from Roma families are in much worse situation than other kids, and it is important to underline that they are the largest and most vulnerable national minority. Most of Roma children are not registered in birth registration books, so they do not have personal documents, which hinder their access to the rights, primarily the right to education and health and social care. Such Roma children status puts them in vulnerable position and makes them exposed to exploitation by the adults (begging, prostitution, pornography, trafficking in body parts and like).“<sup>70</sup>*

In order to solve this problem it is essential to adequately implement the Article 7 of the Convention on the rights of child in Bosnia and Herzegovina.

*“The requirement in Article 7 that every child should be registered right after birth with the right to a name after birth, has a direct influence on the possibility that a child gets access to means of survival and development. Registering a child after its birth gives a child its legal identity in its country or place of birth. That identity is a basis that is used for a child to get access to the healthcare system and education. Without a birth certificate as an evidence of identity, a child is excluded from every possible tool which is necessary for survival and development. Therefore, the implementation of the Article 7 is a special precondition for the implementation of Article 24 (health rights) and Article 28 (right to elementary and secondary education) which is a specific set of rules for the survival and development from Article 6 (right to life).”<sup>71</sup>*

*iv. “It is an integral part of the General Framework Agreement for peace in Bosnia and Herzegovina known as Dayton Peace Agreement, which was initialed on November 11, 1995 in Dayton, USA and signed on December 14, 1995 in Paris. Text of the Constitution is in fact the Annex IV to the adopted Peace Agreement.*

*Apart from explicit provision which states that the rights and freedoms set forth by the European Convention on Human Rights and its protocols shall be directly applied in BiH and shall have precedence over national legislation, the Constitution also contains the Annex I – Additional agreements on human rights (15*

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<sup>70</sup> "Alternative Report of the Ombudsman for Human Rights on the implementation of the Convention on the Rights of the Child for the period from 1<sup>st</sup> June of 2009 until the end of 2011" ("Alternativni izvještaj institucije Ombudsmene za ljudska prava BIH o primjeni Konvencije o pravima djeteta za period od 1.6.2009. do kraja 2011.god."); The Institution of Ombudsman for Human Rights, Banja Luka 2011, taken from: [www.omudsmen.gov.ba](http://www.omudsmen.gov.ba) October 2012, page 6

<sup>71</sup> Presentation by Džamna Duman (Senior Assistant Law Faculty in Sarajevo), the seminar "Regular and subsequent registration in the register of births" („Redovni i naknadni upis u matičnu knjigu rođenih“), organized by the organization "Your Rights Bi H" (Legal Aid Network) and the UNHCR, 19<sup>th</sup> - 21<sup>st</sup> December 2010, Vlašić, Bosnia and Herzegovina

*instruments) that shall apply to BiH. The 1990 Convention on the Rights of the Child is among those instruments.*<sup>72</sup>

It is necessary to point out that family law legislation of Bosnia and Herzegovina (Family law of Federation of Bosnia and Herzegovina, Family law of Republika Srpska, Family law of Brčko District of Bosnia and Herzegovina) is in accordance with the provisions of the Convention on rights of child.

Judge of the Constitutional Court of Bosnia and Herzegovina, Mr Faris Vehabović, who has been recently named as a judge in the European Court for Human Rights as a candidate from Bosnia and Herzegovina, determines several things in his scientific work “Relationship between the Constitution of Bosnia and Herzegovina and the the European Convention for the Protection of Human Rights and Fundamental Freedoms”:

*“(...) and the Constitution of Bosnia and Herzegovina is a typical example of such a radical monistic approach in the application of international law regardless of how much it contradicts with considerations learned so far about state, sovereignty and the relationship between domestic and international law. That is also one of the arguments that make the Constitution of Bosnia & Herzegovina absolutely different from the constitutions of other countries, but this time in a positive way.*”<sup>73</sup>

Bosnia and Herzegovina has taken over the UN's Convention on human rights by notification of succession on the 23<sup>rd</sup> of November 1993 by which Bosnia and Herzegovina obligated itself that it must implement the Convention and harmonize its legislature with the provisions of this Convention.

*“Monitoring over the progress the State Parties achieved in implementation of assumed obligations is carried out by the Committee on the Rights of the Child (hereinafter referred to as: Committee), which periodically examines reports of the State Parties on measures undertaken to ensure the exercise of the rights recognized in the Convention. After examination of reports, the Committee adopts concluding observations - a document that refers to the specific State Party (...) The Committee examined the Initial Report of BiH*

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<sup>72</sup> "Analysis of the harmonization of legislation of Bosnia and Herzegovina with the Convention on the Rights of the Child" („Analiza usklađenosti zakonodavstva Bosne i Hercegovine sa Konvencijom o pravima djeteta“), The Institution of Human Rights Ombudsman of Bosnia and Herzegovina in cooperation with Save the Children Norway, Sarajevo, November 2009, pages 174

<sup>73</sup> Faris Vehabović, “The relation between BiH Constitution and the European Convention for the Protection of Human Rights and Fundamental freedoms,” Alumni Association of the Center for Interdisciplinary Studies, („Odnos Ustava BiH i Europske konvencije za zaštitu ljudskih prava i osnovnih sloboda“, Asocijacija Alumni Centra za interdisciplinarne postdiplomske studije- ACIPS), Sarajevo, 2006, page 45

(CRC/C/11/Add.28) in the session (see: CRC/C/SR.1030 and 1031) held on May 19, 2005, but it adopted its Concluding observations in the 1052nd session held on June 3, 2005. These Concluding observations were used as a basis for this analysis. It is particularly important to point out the positive measures that Bosnia and Herzegovina undertook in order to ensure implementation of the Convention, which were also recognized by the Committee.

The Committee identified the following positive measures:

- Adopting of a Law on protection of national minorities;
- Adopting of a Rulebook on protection of human trafficking victims;
- Adopting of a Framework law on primary and secondary education;
- Adopting of a 2002-2010 Children Action plan and establishing of a BiH Council for Children;
- Adopting of a Law on protection of mentally handicapped persons and BiH Council of Ministers decisions dated December 30, 2003 on adopting Standard rules on equalization of opportunities for persons with disabilities, which were adopted by UN General Assembly on December 20, 1993 (GA Resolution 48/96);
- Direct application of the rights and freedoms listed in the European Convention on Human Rights and Fundamental Freedoms and its protocols, which are guaranteed by the Constitution of Bosnia and Herzegovina.

(...)

The Committee noted that since 2000 the Government had adopted a number of programmes and plans of action relevant to the promotion of children's rights. It is concerned, however, that «the divergence of policies and practices resulting from the political and administrative fragmentation may hamper their correct implementation. The Committee is further concerned by the fact that despite of having over 100 ministries in the State, none of them has exclusive competence over children issues. Having aforementioned in mind, the Committee recommended that the State Party further strengthen and support the Council for Children with adequate human and financial resources, in order to empower it to develop and coordinate a comprehensive and uniform implementation of all policies throughout the country.(...) In its Concluding observations, the Committee welcomed the information that the existing State Ombudsmen will continue their activities and that the Office of Ombudsmen in its structure has a Department for the Rights of the Child. However, the Committee is concerned about the fact that this department is inefficient due to poor public awareness about its existence and function, in particular about its individual complaints mechanism. The Committee recommended that the State Party should provide support to the Office of Ombudsmen in launching public-



*awareness campaigns targeting in particular parents and children in order to inform them about the existence and functions of the Ombudsmen's Office Department for the Rights of the Child, in particular its power to receive and investigate complaints related to violation of children's rights. The State party is further encouraged to seek technical cooperation in this regard from the United Nations Children's Fund (UNICEF) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) and other organizations. Considering the BiH report, the Committee acknowledged the efforts of the State Party aimed at allocating adequate resources for social protection services, however it also expressed its concern that the children's rights are still neglected and that insufficient resources are allocated for child related programmes and policies.*

*The Committee is further concerned that there is a significant difference in public expenditure between the two Entities in the areas of social security, education and health care and that the complex structure of the State Party is not conducive to an optimal realization of the limited resources available. Due to all this, the Committee recommended that the State Party should pay particular attention to the full implementation of Article 4 of the Convention by prioritizing budgetary allocations to ensure implementation of economic, social and cultural rights of children, in particular those belonging to economically disadvantaged families, «to the maximum extent of ... resources available and, where needed, within the framework of international cooperation.» The Committee further recommends that the State party should harmonize the expenses for children's rights protection between the Entities so that a minimum level of social and health protection for all children throughout the country is guaranteed. The Committee expressed its concern about the fact that the last census was carried out in 1991 and that there is no clear division of responsibilities for collection, consolidation and analysis of data among the different government bodies. This results in limited availability of statistics on situation of children, especially those belonging to different ethnic groups and the most vulnerable groups (e.g. children of internally displaced and refugee families, victims of sexual and economic exploitation, victims of human trafficking) and makes it difficult to calculate basic human development indicators such as infant mortality rate, adult literacy, employment and poverty rate..<sup>74</sup> ”*

Through the key considerations in the “Analysis of the harmonization of the legislation of Bosnia and Herzegovina with the Convention on the Rights of the Child”, the Institution of

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<sup>74</sup> "Analysis of the harmonization of legislation of Bosnia and Herzegovina with the Convention on the Rights of the Child" („Analiza usklađenosti zakonodavstva Bosne i Hercegovine sa Konvencijom o pravima djeteta“), The Institution of Human Rights Ombudsman of Bosnia and Herzegovina in cooperation with Save the Children Norway, Sarajevo, November 2009, pages 8- 12

Ombudsman for human rights in Bosnia and Herzegovina in cooperation with NGO Save the Children Norway brings the following conclusion:

*“Revised Plan of Actions for Children for the period 2002-2010 has not yet been adopted. It is still in the form of a draft, although the adoption thereof was defined and recommended by the UN Committee on the Rights of the Child. Since after the expiration of the tenure of previous members of the Council for Children no new members were elected, one can conclude that this Council no longer exists.”<sup>75</sup>*

Since this “Analysis of the harmonization of the legislation of Bosnia and Herzegovina with the Convention on the Rights of the Child” was created in 2009, significant improvements were noticed regarding state activities for the application of the Convention on the Rights of the Child. Previous recommendations were the basis for the creation of Second, Third and Fourth periodic report about the application of Convention on the Rights of the Child. The last report was presented on 19<sup>th</sup> September 2012 on the 61<sup>st</sup> session of the UN Committee of the rights of child in Geneva. In the introductory remarks in front of the UN Committee, Mrs Saliha Đuderija, deputy minister for human rights and refugees of Bosnia and Herzegovina who led the Bosnian delegation, emphasized the advancements Bosnia and Herzegovina achieved regarding the application of the Convention on the rights of child:

*“One of the most important strategic documents, which promotes and proposes measures to protect the rights of children in Bosnia and Herzegovina, is the Action Plan for the Children of Bosnia and Herzegovina 2010 – 2014 (preceded by the Action Plan 2002-2010). These plans identified the activities on creating favorable living conditions for children and their families, their healthy physical and psychological development and inclusion in the society, and participation in decision-making, as the most important factors for acting in the best interest of the children.*

*In the context of the right of every child to grow up in a family, the Action Plan for the Children of Bosnia and Herzegovina includes the development of and support to alternative forms of care for children without parental care, presenting it as a more humane and cost-efficient form of care relative to institutional care.*

*The authorities of Bosnia and Herzegovina are aware of the fact that the institutional care of children infringes the principle of equality of each child, namely equal right of each child to live in a family environment, since a child placed in an institution is not able to live and participate in the society in the same*

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<sup>75</sup> Ibid, page 13

*way as the one living in a family environment and since children growing up in institutions become stigmatized and discriminated against.*

*Given that research, surveys and analyses conducted in European countries show that institutional placement of children in North and West European countries is decreasing and that the process of deinstitutionalization is in the final phase, while in the countries of the Central and Eastern Europe it is still underway, the authorities of Bosnia and Herzegovina have taken further steps toward achieving the fuller enjoyment of the children's rights.*

*In addition to the issue of institutional care for children, other issues related to the protection of the rights of the child in Bosnia and Herzegovina are also important for us to act upon. Therefore, the Ministry of Human Rights and Refugees of Bosnia and Herzegovina identified in the Action Plan for the Children of Bosnia and Herzegovina the issues of social inclusion of children and activities related to the most important needs for children in the fields of social and health protection, education, special forms of protection, as well as non-discrimination and ensuring fundamental human rights of children.*

*A particularly important among these issues is non-discrimination, notably the prohibition of corporal punishment at home and in institutions, where a stronger public sensitization is required. Also, specific activities are foreseen in terms of reporting and monitoring in order to ensure adequate response to violence against children and their abuse, including domestic violence.*

*Aiming to implement the recommendations of this Committee, and in particular the recommendations given by the Council of Europe Commissioner for Human Rights, the authorities of Bosnia and Herzegovina took action to fulfill this obligation in due time.*

*Namely, at its 14th session held on 20 June 2007 the Council of Ministers adopted the National Strategy to Combat Violence against Children 2007 -2010, while the activities to draft and adopt a new Strategy for period until 2015 are in progress.*

*Given that the Ministry of Human Rights and Refugees is in charge of implementing the activities on drafting the Strategy, the Ministry also set up a special team tasked with presenting the Strategy to all levels of government in Bosnia and Herzegovina identified in the Strategy as those responsible for implementing activities and reporting regularly to the Council of Ministers, as well as other levels of government in Bosnia and Herzegovina.*

*The new Strategy identifies specific problems and recent trends in violence against children in Bosnia and Herzegovina, the deficiencies of existing legislation in this area and proposals for their harmonization and improvement, as well as specific goals and measures required for preventive action and general reduction of occurrence of violence against children in BiH society.*

*The implementation of the National Strategy to Combat Violence against Children in Bosnia and Herzegovina was important in many ways: presenting the obligations of those responsible for various activities, educating and sensitizing the wider public, which also resulted in establishing partnership with NGOs.*

*Aimed at establishing a common methodology to monitor the problem of violence against children in Bosnia and Herzegovina, the formation of coalitions of NGOs was an activity that was carried out in the course of 2011 and 2012. It is important to mention the coalition of NGOs which, in collaboration with the Ministry, NGO Vesta from Tuzla and UNICEF, continued designing the methodology for monitoring the problem of violence against children by NGOs in Bosnia and Herzegovina.”<sup>76</sup>*

Other than the State strategy for the combat against violence over children on the basis of which a team was created within the Ministry for the presentation of the aforementioned strategy on all levels of organization in Bosnia and Herzegovina, the government introduced the Strategy for combatting underage delinquency and a whole series of strategies to improve pre-school upbringing and child education. In March 2012, Council of Ministers introduced a Decision for the adoption of the policy framework of early upbringing and development of children in Bosnia and Herzegovina, including an Action plan about the educational needs of the Roma people.

Bosnia and Herzegovina submitted reports and two optional protocols to the appropriate UN Committee at its 61st session in September:

1. Optional protocol about child trafficking, child prostitution and pornography
2. Optional protocol about children in armed conflicts

v. Bosnia and Herzegovina is not an EU member state but it had signed an accession agreement with the EU on the 16<sup>th</sup> June 2008. That was preceded by the initialling of 4<sup>th</sup> December 2007 in Sarajevo and negotiations from November 2005 to December 2006. That document allowed a close and permanent relationship with the EU and likely membership within it.

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<sup>76</sup> Opening address and introduction of the delegation of Bosnia and Herzegovina, Geneva 18-20 September, Presentation of the combined second, third and fourth periodic reports of Bosnia and Herzegovina on the implementation of UN Convention on the Rights of the Child; taken from : <http://www2.ohchr.org/english/bodies/crc/crcs61.htm>; September 2012

*“The text of the Agreement has 135 articles in 10 chapters : General principles; Political dialogue; Regional cooperation; Free movement of goods; Free movement of workers, work settlement, provision of services, movement of capital; Harmonization of laws, enforcement of laws and rules of competition; Justice, liberty and safety; Policies of cooperation; Financial cooperation; Institutional, general and final orders. Except the aforementioned chapters, the Agreement has 7 annexes and 7 protocols which specify obligations relating to trade of certain kinds of products (time schedule of suspension or gradual reduction of customs for industrial, agricultural and processed agricultural products, fish and fish products, and wine and alcoholic drinks – Annex I, Annex II, Annex III, Annex IV, Annex V, Protocol 1, Protocol 2, Protocol 7). Besides that, the obligations of Bosnia & Herzegovina regarding state aid are regulated in more detail (Protocol 4), land transport (Protocol 3), business settlement and financial services (Annex VI), protection of intellectual property (Annex VII), mutual administrative help regarding questions of customs (Protocol 5) and dispute resolution (Protocol 6). The Agreement is in the process of ratification with its member states. Bosnia & Herzegovina ratified the agreement in both houses of the Parliamentary Assembly of Bosnia & Herzegovina (House of Representative – 22nd October 2008 and House of Peoples – 27th October 2008) and Presidency 6th November 2008. The European Parliament supported the Agreement and asked for member states to ratify it on the plenary meeting in Strasbourg held from 20th until 23rd October 2009. Until the completion of the ratification of the Agreement of stabilization and accession, a Temporary agreement is in place from 1st July 2008.”<sup>77</sup>*

## 2 THE LANZAROTE CONVENTION

*i. “Parliamentary Assembly of Bosnia and Herzegovina has, in its resolution 234 (2002) about the application of Bosnia and Herzegovina for the membership in the European Council, elaborated the progress since the signing of the Dayton peace agreement on all fields. Parliamentary Assembly has recommended to the Council of Ministers to invite Bosnia and Herzegovina to the membership in the Council of Europe. On 12th July 2002, after it had become one of the members of the Council of Europe, Bosnia and Herzegovina ratified the European Convention on Human rights. With that act, Bosnia and Herzegovina signed an international agreement and took over the obligation to harmonize its legislature with the international obligations that re arising from that agreement.”<sup>78</sup>*

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<sup>77</sup> Taken from the web site of The Directorate for European Integration  
<http://www.dei.gov.ba/dokumenti/?id=4871>, October 2012

<sup>78</sup> Faris Vehabović, “The relation between BiH Constitution and the European Convention for the Protection of Human Rights and Fundamental freedoms”, Alumni Association of the Center for Interdisciplinary Studies, („Odnos Ustava BIH i Europske konvencije za zaštitu ljudskih prava i osnovnih sloboda“,

What is so specific about the European Convention on Human Rights and Bosnia and Herzegovina is that:

*“in the case of Bosnia and Herzegovina, the European Convention of Human Rights is not one of the international agreements with certain obligations for the signing state but one of the most important constitutional principlesu.”<sup>79</sup>*

Judge Vehabovic has proven in his scientific work that the European Convention on Human Rights is above the Constitution of Bosnia and Herzegovina which means that:

*“the rights from the European Convention on Human Rights have the supremacy over other constitutional orders. He claims two reasons for this kind of situation: 1) Constitution of Bosnia and Herzegovina gives the European Convention, by the formulation of Article II/2, such position in the constitutional system of Bosnia and Herzegovina claiming that it is „directly applicable“ and „above every other right“ which means self-enforceability of that regulation as well as the completeness of the legal system of Bosnia and Herzegovina including the constitutional system; 2) since Bosnia and Herzegovina is a typical example of the presence of a monistic legal system, by the ratification of the European Convention from 12th July 2002 and the European Convention as an international agreement, it is necessary to change legal obstacles for the full respect of obligations taken by the international agreement. As an example of inconsistency are the provisions of the Constitution regarding the way members are elected to the Presidency of Bosnia and Herzegovina and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.”<sup>80</sup>*

**ii.** The ambassador of Bosnia and Herzegovina, Mr Zdenko Martinović signed<sup>81</sup> Lanzarote Convention in the office of the Secretary General of the Council of Europe, on the 12th October 2011. And Bosnia and Herzegovina has just ratified the Lanzarote Convention on 14th of November 2012<sup>82</sup>, which will enter into force on 1st of March on 2013.

**iii.** Ministry for Human Rights and Refugees of Bosnia and Herzegovina has started the process of accession in 2009 for the following three conventions which deal with the protection of the childrens' rights, Lanzarote Convention being one of them:

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Asocijacija Alumni Centra za interdisciplinarne postdiplomske studije- ACIPS), Sarajevo, 2006, page 61.

<sup>79</sup> Ibid, page 9

<sup>80</sup> Ibid; page 11

<sup>81</sup> For more information about signing of Lanzarote Convention:

[http://www.coe.int/t/dg3/children/1in5/News/BosniaAndHerzegovinaSignature\\_en.asp](http://www.coe.int/t/dg3/children/1in5/News/BosniaAndHerzegovinaSignature_en.asp)

<sup>82</sup> While we were working on research from June until the end of October, Bosnia and Herzegovina didn't ratified Lanzarote Convention. It was ratified two weeks after we finalized our report, so the following questions will be answered under *If not ratified* section

- Convention on the International Recovery of Child Support and other Forms of Family Maintenance;
- Council of Europe Convention on contact Concerning Children;
- Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse – Lanzarote Convention.

The first report for the opinion of relevant institutions had been sent out on 11th September 2009 and it was renewed with urgencies which were sent out on 20th September 2009.

The reasons for the accession to these conventions, Lanzarote Convention among them, were sent to the General Secretariat of the Council of Ministers of Bosnia and Herzegovina on 20th October 2010 and were approved on 18th November 2010. On the 5th session of the Presidency of Bosnia and Herzegovina held on 11th February 2011, the Presidency reached an agreement of accession of Bosnia and Herzegovina to all three conventions. Therefore, the Head of Mission of Bosnia and Herzegovina to Council of Europe signed the aforementioned conventions on 12th October 2011.

On 14th November 2011, the Request for the start of the process of ratification was submitted to the Ministry of Foreign Affairs of Bosnia and Herzegovina. The Council of Ministers of Bosnia and Herzegovina determined the Suggestion<sup>83</sup> for the ratification of the Lanzarote Convention in February 2012. After that, the Parliamentary Assembly of Bosnia and Herzegovina gave its approval<sup>84</sup> for the ratification of the aforementioned conventions on its 25th session of House of Representatives from 28th March 2012 and 14th session of House of People from 19th April 2012. It is expected that the Presidency of Bosnia and Herzegovina will soon publish a decision about the ratification of these international agreements so the procedure could be continued with the deposition of ratification documents with the authorized depositories of the convention, all in accordance with the norms of international law and the Article 16 of the Law for the process of conclusion and implementation of international international agreements.<sup>85</sup>

Members of the „ELSA BIH for Children“ research team have attended a meeting with the Head of the Office of the Council of Europe in Sarajevo, Ms Mary Ann Hennessey and with

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<sup>83</sup> Suggestion for ratification of Lanzarote Convention:

[https://www.parlament.ba/sadrzaj/ostali\\_akti/ratificirani/default.aspx?id=34958&langTag=bs-BA&pril=b](https://www.parlament.ba/sadrzaj/ostali_akti/ratificirani/default.aspx?id=34958&langTag=bs-BA&pril=b)

<sup>84</sup> “Official Gazette of BiH“, No. 6/12

<sup>85</sup> Law for the process of conclusion and implementation of international international agreements, („Official Gazzete of BiH“, No. 29/00)

the Minister for Human Rights and Refugees of Bosnia and Herzegovina, Mr Damir Ljubić on 20th September 2012. One of the main results of the meeting was that the Ministry will send a memo to the institutions of Bosnia and Herzegovina to speed up the process of the ratification of the Lanzarote Convention.

And on 14th November of 2012, Bosnia and Herzegovina has ratified Lanzarote Convention, which will enter into force as regards Bosnia and Herzegovina on 1st of March 2013.<sup>86</sup>

iv. Taking into account that Bosnia and Herzegovina represents a monistic approach to the application of international law that means that the position of the Lanzarote Convention towards a national legislature will be determined with that monistic approach which means the following:

*“When looking from the perspective of monistic understanding, international and national law are part of a unique legal order which gives principles on how to solve conflicts between the orders of a national law system of one state and international law. The regulations of the international law affect the regulations of the national law and vice versa. Therefore, it can be concluded that judges in one state, when applying internal regulations, should constantly have in mind that their decisions are not in conflict with the international obligations of their country, especially not the ones from the agreements themselves.”<sup>87</sup>*

## II NATIONAL LEGISLATION

### 1 GENERAL PRINCIPLES OF THE JURISDICTION

i. The establishment of modern, democratic state<sup>88</sup> of Bosnia and Herzegovina is a result of the disintegration of the Socialist Federal Republic of Yugoslavia, voting for independence

<sup>86</sup> [http://www.coe.int/t/dg3/children/1in5/News/BiHRatification\\_en.asp](http://www.coe.int/t/dg3/children/1in5/News/BiHRatification_en.asp)

<sup>87</sup> Degan, V.Đ, "International law", Law Faculty, University of Rijeka., 2000 („Međunarodno pravo“, Pravni fakultet Sveučilišta u Rijeci, 2000)

<sup>88</sup> The Declaration of the State Anti-Fascist Council of National Liberation of Bosnia and Herzegovina (ZAVNOBiH), issued on November 25 of 1943 by the partisan government, is widely considered to be the constitutional basis of the modern Bosnia and Herzegovina. Furthermore, this Resolution states: *"Today, the nations of Bosnia and Herzegovina, through their only political representative - the ZAVNOBiH, desire that their country, which is neither Serb, nor Croat nor Muslim, but Serb as well as Croat and Muslim, should be the free and united Bosnia and Herzegovina in which the full equality, legal and otherwise, of Serbs, Muslims and Croats will be guaranteed"*. Those principles were declared in the constitutions of Democratic Federative Yugoslavia (1943- 1945), Federal People's Republic of Yugoslavia (1945- 1963) and later renamed in Socialist Federal Republic of Yugoslavia (1963- 1992), in which Bosnia and Herzegovina was constituted as one of the six State's equal republics. Before The Second World War, Bosnia and Herzegovina was part of The Kingdom of Yugoslavia (1941-1929),



by referendum<sup>89</sup>, which was held in Bosnia and Herzegovina on 29 February 1992, and recognition by the international community, on 6 April 1992 when the Republic of Bosnia and Herzegovina is recognized by the European Community and the United States, and on 22 May 1992 when Bosnia and Herzegovina was admitted as a member of the United Nations General Assembly by the resolution A/RES/46/237<sup>90</sup> of the United Nations. As a successor of the Socialist Federal Republic of Yugoslavia, Bosnia and Herzegovina became a contracting party of all conventions and agreements ratified by the Socialist Federal Republic of Yugoslavia. Shortly after gaining independence, following war conditions in Bosnia and Herzegovina ended by the General Framework Agreement for Peace (**Dayton Agreement**), in Dayton (Ohio, USA), 21 November 1995., which was signed on 14 December 1995 in Paris (France), by the Republic of Bosnia and Herzegovina, Croatian Republic and the Federal Republic of Yugoslavia. The Dayton Peace Agreement was mutually upgraded with 11 annexes, in which Annex 4 represents the Constitution of Bosnia and Herzegovina, as the highest legal and political act of the state. Constitution of Bosnia and Herzegovina, Article I, defines the continuity of Bosnia and Herzegovina in international law as a state, democratic principles, unified state with two entities: the Federation of Bosnia and Herzegovina and the Republic of Srpska (and later Brcko District of Bosnia and Herzegovina<sup>91</sup>) and the movement of goods, services, capital and persons, capital city, symbols and citizenship.

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called before The Kingdom of Serbs, Croats and Slovenians (1929- 1918), then under Austro- Hungarian Empire rule (1918- 1878), under Ottoman Empire rule (1878- 1463), The Kingdom of medieval Bosnia (1463- 1377), Banate of Bosnia (1377- 1154) and it is first written mentioned in “De administrando imperio” of Constantine VII Porphyrogenitus (945- 959).

The oldest Bosnian medieval state document is the “Charter of Ban Kulin” from 29<sup>th</sup> August of 1189, written in old Bosnian Cyrillic alphabet called “Bosančica”, in which Ban Kulin declares trade agreement between Bosnia and the Republic of Dubrovnik. Two original samples are today held in Dubrovnik and third one is in the Russian Science Academy Library in St. Petersburg.

<sup>89</sup> In the referendum voted 63.4% of the total electorate, of which 92.68% voted for independence of the Republic of Bosnia and Herzegovina

<sup>90</sup> See resolution on: <http://www.un.org/documents/ga/res/46/a46r237.htm>

<sup>91</sup> In order to contribute to a steady and righteous peace in Bosnia and Herzegovina, while respecting national, religious and cultural identity of all peoples and the right of citizens to participate in the conduct of public affairs, and on the basis of the Dayton Peace Agreement, the final decision of the Arbitral Tribunal for Dispute over Inter-Entity Boundary Line in Brcko area and the Constitution of Bosnia and Herzegovina adopted by the Annex 18.08.1999.god., the Brcko District of Bosnia and Herzegovina was founded. District was officially declared 08.03.2000. Highest act of Brcko District of BiH is the statute. Currently in effect is Revised Statute of the Brcko District of Bosnia and Herzegovina from 06.05.2008. The statute provides that everyone has the right to enjoy the rights and freedoms guaranteed by the Constitution of BiH and the Law, in particular the European Convention on Human Rights and Fundamental Freedoms, without discrimination on any grounds. (Taken from: "Analysis of harmonization of legislation of Bosnia

*"Article I****Bosnia and Herzegovina******1. Continuation***

*The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations.*

***2. Democratic Principles***

*Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.*

***3. Composition***

*Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republic of Srpska (hereinafter "the Entities").*

Constitution of Bosnia and Herzegovina regulates jurisdiction and relations between the institutions of Bosnia and Herzegovina and the Entities, organisation, jurisdiction and functioning of institutions; the Parliamentary Assembly as a legislative body, the Presidency as a collective head of state with the Council of Ministers, the Constitutional Court and the Central Bank.

## Article IV

**Parliamentary Assembly**

*The Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives.*

***1. House of Peoples***

*The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republic of Srpska (five Serbs). (...)*

***2. House of Representatives***

*The House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republic of Srpska. (...)*

#### *Article V*

### **Presidency**

*The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republic of Srpska. (...)*

#### *4. Council of Ministers*

*The Presidency shall nominate the Chair of the Council of Ministers, who shall take office upon the approval of the House of Representatives. The Chair shall nominate a Foreign Minister, a Minister for Foreign Trade, and other Ministers as may be appropriate, who shall take office upon the approval of the House of Representatives.*

#### *Article VI*

### **Constitutional Court**

#### *Composition*

*The Constitutional Court of Bosnia and Herzegovina shall have nine members.*

*a) Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency. (...)*

#### *Article VII*

### **Central Bank**

*There shall be a Central Bank of Bosnia and Herzegovina, which shall be the sole authority for issuing currency and for monetary policy throughout Bosnia and Herzegovina (...)*<sup>92</sup>

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<sup>92</sup> Constitution of Bosnia and Herzegovina (from: the website of the Constitutional Court of BiH [www.ccbh.ba](http://www.ccbh.ba), viewed on September 2012); When it comes to the constitutional regulations regarding House of Peoples and Presidency it is important to emphasize that those articles (according to European Court of Human Rights *Verdict Sejdic- Finci v. Bosnia and Herzegovina*) are discriminatory to Roma and Jews peoples in Bosnia and Herzegovina who are declared as „the others“ and prohibited from standing for election to the House of People of the Parliamentary Assembly and for the State Presidency.

*Structure of the federal government in the Federation of Bosnia and Herzegovina was established through: the Federational legislature, the Federational executive, the judicial authority, cantonal, municipal and city authorities*

*The legislative authority in the Federation of Bosnia and Herzegovina is exercised by the House of Representatives and the House of Peoples<sup>93</sup>. The House of Representatives is composed of ninety-eight delegates, provided that at least four members of one constituent people must be represented in the House of Representatives. The House of Peoples consists of fifty-eight delegates and by seventeen delegates from each of the constituent peoples and seven delegates from the "others". The term for both members of House of Representatives and House of Peoples is four years. The executive authorities in the Federation are exercised by: the President and Vice president of the Federation, the Government of the Federation, with a term of four years. The Government levels are: municipalities, ten cantons and the Federation. A judicial power is exercised by the Constitutional Court, Supreme Court, cantonal courts and municipal courts.*

*The National Assembly of the **Republika Srpska** exercises constitutional and legislative powers, and is comprised of eighty-three members, who are elected in elections held every four years. The Government of the Republika Srpska performs the executive power and the head of the Government is the Prime Minister. The President of Republika of Srpska is elected by direct election every four years. Levels of government are: the municipality or city (Banja Luka and East Sarajevo) and Republic. A judicial power is exercised by the Constitutional Court of the Republika Srpska, Supreme Court of Republika Srpska, district courts and municipal courts.*

*Organisation of government of the **Brcko District of Bosnia and Herzegovina** by the Statute of the Brcko District is based on the division of authorities<sup>94</sup>; legislative authority is exercised by the District Assembly, executive authority is exercised by the District Government and the judicial authority is exercised by the District Courts.*

***The Office of the High Representative (OHR)** is an ad hoc international institution responsible for overseeing implementation of civilian aspects of the Peace Agreement ending the war in Bosnia and Herzegovina. The position of High Representative was created under the General Framework Agreement for Peace in Bosnia and Herzegovina, usually referred to as the Dayton Peace Agreement. The High*

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<sup>93</sup> IV Structure of the Federal government, a) Legislation (Article 1, Article 2, Article 6, Article 7), b) the Executive (Article 1., Article 2), The Constitution of the Federation of Bosnia and Herzegovina, ("Official Gazette of BiH", No. 1/94 of 21 July 1994), and the Preamble of the Constitution has been amended and supplemented by Amendment II Amendment XXVII

<sup>94</sup> Chapter III, the Organisation of the functions of the Brcko District, Article 19: Separation of the powers, the Statute of the Brcko District, ("Official Gazette of BDBiH", No. 1/00 and 24/05)

*Representative is working with the people and institutions of Bosnia and Herzegovina and the international community to ensure that Bosnia and Herzegovina evolves into a peaceful and viable democracy on course for integration in Euro-Atlantic institutions. The OHR is working towards the point where Bosnia and Herzegovina is able to take full responsibility for its own affairs. The Steering Board of the Peace Implementation Council, the international body guiding the peace process, concluded at its July 2011 meeting, that it*

*“look[ed] forward to close cooperation and coordination between the enhanced EU presence, the High Representative in BiH, and other international community actors in line with their respective existing roles.”<sup>95</sup>*

In order to support Bosnia and Herzegovina, the European Union has increased its commitment to the country.

ii. The Constitution of Bosnia and Herzegovina in fact represents Annex IV of the Dayton Agreement from 1995. Particular annex to this agreement is devoted to human rights and freedoms, and it is considered as a part of the Constitution of Bosnia and Herzegovina. The UN Convention on the Rights of the Child is contained in Annex I of the Dayton Peace Agreement, and has a priority over national legislation. BiH also become a signatory to two optional protocols one of which is the Optional Protocol on the sale of children, child prostitution and child pornography in 2000, and signed the Millennium Declaration. Article II of Constitution of Bosnia and Herzegovina entitled "Human rights and fundamental freedoms" page 2 "International Standards" provides that the rights and freedoms guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms apply directly in Bosnia and Herzegovina; page 3 is applicable to children.

"Finally, on the basis of the previous law practices can be said that Annex 4 of Peace Agreement is a constitutional charter of Bosnia and Herzegovina, and that 15 international human rights treaties listed in Annex I of the Constitution of Bosnia and Herzegovina, which are directly applicable in Bosnia and Herzegovina without a need for legal

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<sup>95</sup> Datas are taken from: [www.ohr.int](http://www.ohr.int) ; The current High Representative is Dr Valentin Inzko, an Austrian diplomat.

transformations, such as the Peace Agreement and the other annexes constitute formal constitutional law of a state."<sup>96</sup>

"Highlighted value deserves European Convention and its protocols. It is legal, as agreements from the annex to the BiH Constitution, under Article II / 2 Constitution, not only directly applicable, but has priority over any other law."<sup>97</sup>

The **Constitution** of the Federation of Bosnia and Herzegovina, Article II "provides the highest level of application of internationally recognized rights and freedoms set forth in the documents in the Appendix to this constitution. Especially: j) the protection of family and children",

"Article II

*The Federation will ensure the application of the highest level of internationally recognized rights and freedoms provided in the documents listed in the Annex to the Constitution.<sup>7</sup> In particular:*

*(1) All persons within the territory of the Federation shall enjoy the rights:*

*(a) To life;*

*(b) To liberty, with arrest and detention authorized only by law;*

*(c) To equality before the law;*

*(d) To freedom from discrimination based on race, color, sex, language, religion or creed, political or other opinions, and national or social origin;*

*(e) To fair criminal proceedings;*

*(f) To freedom from torture and cruel or inhuman treatment or punishment;*

*(g) To privacy;*

*(h) To freedom of movement;*

*(i) To asylum;*

*(j) To protection of the family and of children;*

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<sup>96</sup> Mark Joseph: Five years of constitutional courts in Bosnia and Herzegovina: First Balance

<sup>97</sup> Vehabović Faris, "Relation between the BiH Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms," Alumni Center Association for Interdisciplinary Postgraduate Studies (ACIPS), Sarajevo, 2006, page 25

*(k) To property;*

*(l) To fundamental freedoms: free speech and press; freedom of thought, conscience, and belief; freedom of religion, including private and public worship; freedom of assembly; freedom of association, including to form and belong to and labor unions and the freedom not to associate; and freedom to work;*

*(m) To education;*

*(n) To social protection;*

*(o) To health;*

*(p) To nutrition;*

*(q) To shelter; and*

*(r) To protection of minorities and vulnerable groups.*

*(2) All citizens shall enjoy the rights:*

*(a) To form and belong to political parties; and*

*(b) To political rights: to participate in public affairs; to have equal access to public service; to vote and stand for election. “<sup>98</sup>*

The Constitution of Republika Srpska comprehensively regulates the rights and freedoms of citizens, organizations and institutions. The entire Chapter II of the Constitution, Article 10 to 65 which is more than a third of the entire text of the Constitution, is dedicated to the rights and freedoms. This fact alone indicates that the framers of the Constitution understood that the rights and freedoms of man and citizen's basic starting point of everything else, the economy, government, judiciary and overall health and well being of people. The citizens of the republic are equal in their freedoms, rights, and duties; they are equal before the law and shall enjoy equal protection of the law regardless of race, sex, language, ethnicity, religion, social origin, birth, education, economic status, political or other opinion, social status or any other characteristic. The Constitution of the Republika Srpska, among other things, regulates the rights and duties of parents and children.

“Article 36

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<sup>98</sup> Article 2, Constitution of the Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 1/94 of 21 July 1994)

*The family, mother and child shall enjoy special protection.*

*Marriage and legal relations in marriage and family shall be regulated by law.*

*Everyone shall have the right to decide freely to have children.*

*Parents shall have the right and duty to take care of the upbringing and education of their children.*

*Children shall be bound to take care of their parents needing help.*

*Children born out of wedlock shall have the same rights and duties as those born in wedlock.*

*Minors who are parentally neglected and persons unable to look after themselves and the protection of their rights and interests shall enjoy special protection.* <sup>99</sup>

The Statute of the Brcko District of Bosnia and Herzegovina in its provisions calls for respect for the rights and freedoms from the European Convention on Human Rights and Fundamental Freedoms.

“Article 13

Rights and obligation

4) All persons in the District shall enjoy the rights and freedoms that are given to them by the European Convention on Human Rights and Fundamental Freedoms. These rights and freedoms will have greater legal force with respect to any law that is inconsistent with the Convention. All institutions of the District will respect these rights and freedoms. District courts will enforce those rights and freedoms in accordance with the procedures provided for in the laws of the District. When dealing with matters relating to allegations of violations of these rights and freedoms, District courts shall take into account the case law of the European Court of Human Rights.”<sup>100</sup>

iii. The Ministry of Human Rights and Refugees of Bosnia and Herzegovina and the Institution of Human Rights Ombudsmen of Bosnia and Herzegovina have the function of conducting checks of implementation of signed international documents and control of the respect of human rights and freedoms and therefore the rights of children, and there are

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<sup>99</sup> Constitution of the Republika Srpska, revised text ("Official Gazette of RS", No. 3/92, 6/92, 8/92, 15/92 and 19/92)

<sup>100</sup> Article 13, Paragraph 4, (Fundamental Rights and Obligations), Statute of the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BDBiH", No. 1/00 and 24/05)



certain institutions that monitor the progress of Bosnia and Herzegovina in the field of human rights such as the Council of Europe, the UN Committee for monitoring.

The **Constitutional Court of Bosnia and Herzegovina** is responsible for the adjudication of the rights specified by the Constitution of Bosnia and Herzegovina and anyone can file a lawsuit in the event of a breach of certain rights specified by the Constitution. The Constitutional Court also oversees the implementation of international and national human rights instruments. There is also the possibility of individual appeal with the Constitutional Court. But there is a hierarchy system, before you can go on with the appeal to the Constitutional Court. Appellate process in brief is as follows: since the Constitutional Court has appellate jurisdiction over issues arising out of a verdict of any lower court in Bosnia and Herzegovina, to court any legal or physical person may address, not necessarily a citizen of Bosnia and Herzegovina, within 60 days of the decision or final verdict, only when all other remedies have been exhausted. When the Constitutional Court finds that your appeal is acceptable, it can act in two ways: the first way is to be decided on the meritum of the case and notify its decision to the competent authorities of the entity, which are then obliged to follow the Constitutional Court. A second way is that the Constitutional Court declares verdict as null and returns the case to the same court for retrial. Then the lower court shall make a verdict in accordance with the decision of the Constitutional Court on the violation of human rights and fundamental freedoms of the appellant. If the lower court does not comply with the decision of the Constitutional Court, the applicant is entitled to a new appeal to the Constitutional Court which then decides on the meritum.

Besides the Constitutional Court of Bosnia and Herzegovina, Bosnia and Herzegovina have the constitutional courts of the entities: the Constitutional Court of the Federation of Bosnia and Herzegovina and the Constitutional Court of the Republika Srpska.

Proceedings before the **Constitutional Court of the Federation of Bosnia and Herzegovina** are regulated by the **Law on the proceedings before Constitutional Court Federation of Bosnia and Herzegovina**.<sup>101</sup> The Law provides that proceedings may be instituted only by entities that are expressly authorized by of the Constitution of Federation of Bosnia and Herzegovina.

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<sup>101</sup> Law of Procedure before the Constitutional Court of the Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 6/95)

These proceedings are:

- 1) When it comes to disputes between different levels of government, or of federal agencies- the process can run only those entities that have their acts authorized to represent and advocate the level of government or institution - town, city, canton, Federation or single federal institution (active card). The same subjects can be passive cards which mean they can be the other party in the dispute. They are representing by their duly authorized entity. He can authorize the other person on his behalf to represent the party in the dispute.
- 2) An application for challenging the constitutionality of the federal law, whether adopted or is in the proposal may be submitted by the President or Vice President of the Federation, the prime minister or deputy prime ministers, one third of either chamber of the Parliament Assembly of Federation of Bosnia and Herzegovina.
- 3) Request for review of the constitutionality of the cantonal constitution or cantonal law (adopted or proposed) may be submitted: - Prime Minister of the Federation, an agency which represents Canton, third representatives in the legislature of the canton.
- 4) Request for review of the constitutionality of the federal government authority regulations (proposed or adopted) may be made by: - President of the Federation, Vice-President and Deputy Prime Minister of Federation.
- 5) Request for review of the constitutionality of a regulation that was passed by an authority cantonal, city or municipal governments (proposed or adopted) may be submitted by: Prime Minister of the Federation or the Cantonal authority which is authorized to represent the respective canton.
- 6) An application for for deciding a constitutional question arising in the proceedings before the Supreme Court of the Federation or the cantonal court is submit by these courts.
- 7) Request for deciding the vital national interests of the Federation shall be submitted in the event that the process fails to harmonize House of Peoples and the House of Representatives. Parliament shall add the amendments to the proceedings before the Constitutional Court of the Federation to determine who will be authorized to directly submit such a request to the Court.
- 9) Request about the decision for dismissing the president or vice-president of the Federation of BiH is submitted by the Federation Parliament after the submission of such a request is decided by both of Houses by two-thirds majority vote.

10) Appeal on the decision of the competent court which decides on the immunity is submitted by each party in the proceedings before the court.

11) The request for an opinion on a particular issue to the Constitutional Court can only be submitted by Deputy Prime Minister of the Federation of Bosnia and Herzegovina.

Decisions of the Constitutional Court of the Federation of Bosnia and Herzegovina are final and binding. All authorities are required to carry out and to help in the execution of the decision of the Constitutional Court of the Federation of Bosnia and Herzegovina as well as all other courts.

There is also the Constitutional Court of the Republika Srpska, which: makes decisions on conformity of laws and other regulations and general acts with the Constitution; conformity of regulations and general acts with the law; resolves jurisdictional disputes between the legislative, executive and judicial power, conflict of jurisdiction between the authorities of the republic, cities and municipalities; conformity of programs, statutes and other legal acts of political organizations with the Constitution and the law; conformity of laws, other regulations and general acts of the National Assembly with the provisions of the Constitution on the protection of vital interests of the constituent peoples; decide on issues of immunity, which arise from legislation regulating immunity in the Republika Srpska. The Constitutional Court shall monitor events of interest for the realization of constitutionality and legality, informs highest constitutional authorities on the state and problems in this area and gives them the opinions and proposals for legislation and take other measures to ensure constitutionality and legality and protection of the rights and freedoms of citizens, organizations and communities. Proceedings before the Constitutional Court, the legal effect of its decisions and other issues regarding its organization and operation are regulated by the Law on the Constitutional Court of the Republika Srpska.<sup>102</sup>

#### *"Article 4*

*1) Anyone can submit the initiative to institute proceedings to review the constitutionality and legality. Proceedings before the Constitutional Court may, without limitation, be submitted by the President, the National Assembly and the Government and other agencies, organizations, and communities under conditions specified by law.*

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<sup>102</sup> Law on the Constitutional Court of the Republic of Srpska, ("Official Gazette of RS", No. 109/2007, 99/2011)

(2) Proceedings before the Court may be initiated by:

1. The President of the Republic of Srpska
2. *The National Assembly;*
3. *Peoples Council on matters within the constitutionally established jurisdiction;*
4. *The Government of the Republic of Srpska;*
5. *Court, if the question of the constitutionality and legality is raised in court proceedings;*
6. *Republican prosecutor, if the question of the constitutionality and legality is raised in the work of the public prosecution;*
7. *The municipality, city, company, political organization or association of citizens and other organizations, if their rights are violated which are determined by the Constitution or the law,*
8. *The authority which is by the Constitution and the law empowered to suspend regulations and other general acts for discrepancy with the Constitution and law. Court may initiate the procedure for assessing the constitutionality and legality.* <sup>103</sup>

*“Article 120*

*If the Constitutional Court finds that the law is not in conformity with the Constitution or any other regulation or general act is inconsistent with the Constitution or the law, the law, regulation or general act shall cease to have effect from the date of publication of the decision* <sup>104</sup>

*“Article 25*

Participants in the process are:

1. Authorities and organizations authorized to initiate proceedings under Article 4 Paragraph 2 Law on the Constitutional Court,
2. Everyone to whose initiative proceedings are held
3. Bringer of law, regulation and general act whose constitutionality or legality is reviewed;
4. Political organization or association of citizens whose general act is being reviewed;

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<sup>103</sup> Article 4, Law on the Constitutional Court of the Republic of Srpska, ("Official Gazette of RS", No. 109/2007, 99/2011)

<sup>104</sup> Article 120, Constitution of the Republic of Srpska, Revised text - ("Official Gazette of RS", No 3/92, 6/92, 8/92, 15/92 and 19/92)

5. Government agencies between which there is a conflict of jurisdiction which the Court decides, as well as anyone which because of the acceptance or rejection of jurisdiction could not exercise its right."<sup>105</sup>

“Article 30

*In the proceedings before the Court other persons can participate which are invited by the Court. Participants in the proceedings before the Court, as well as other interested persons, may, in accordance with the Rules of Procedure of the Constitutional Court, seek access to files that are the reason for excluding the public in the work of the Court. Participant in proceeding before the Court has the right and duty, in the course of proceedings and discuss to give the initiatives, provide the necessary information and data, present and explain their position and reasons, provide answers to the allegations and the reasons of the other participants in the proceedings, and to provide evidence and take other actions relevant to decision of the Court. Participants in the proceedings before the Court bear their own costs.* “<sup>106</sup>

Before submitting a proposal-initiative, the party appeals to the District Court, which is the first instance of trial jurisdiction in all legal disputes, by the place of the first instance administrative authority, as well as the requirements for the protection of freedom and the rights established by the Constitution, if such rights and freedoms are violated by a final decision or action of an official in the administrative bodies, or the responsible person in the company, institution or other legal entity, when the protection of these rights is not secured by other court protection.

In the Brcko District of Bosnia and Herzegovina, beside the Municipal Court, there is also a Court of Appeals of the Brcko District of Bosnia and Herzegovina, which was constructed 2001 in accordance with the Statute of the Brcko District of Bosnia and Herzegovina and the Law on the Courts of the Brcko District.<sup>107</sup>

“Article 22

*(Court of Appeals)*

*(1) The Court of Appeals has jurisdiction to decide on:*

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<sup>105</sup> Article 25, Law on the Constitutional Court of the Republic of Srpska, ("Official Gazette of RS", No. 109/2007, 99/2011)

<sup>106</sup> Article 30, Law on the Constitutional Court of the Republic of Srpska, ("Official Gazette of RS", No. 109/2007, 99/2011)

<sup>107</sup> Law on the Courts of Brcko District of Bosnia and Herzegovina, ("Official Gazette of BDBiH", No. 19/07)

- *Regular appeals from the Municipal Court;*

- *Exceptional appeals from a final verdict.*

*(2) In the process of decision making on the exceptional appeals the judge will not participate again.*<sup>108</sup>

iv. Competence, organization and structure of the Court of Bosnia and Herzegovina<sup>109</sup> are regulated by the Law on the Court of Bosnia and Herzegovina.<sup>110</sup> The Court of Bosnia and Herzegovina has three divisions: criminal, administrative and appellate.

The Criminal Division consists of at least ten judges and has three divisions:

- Section I for War Crimes has four Trial Chambers. Two councils are composed of four judges, three domestic and one international judge. As a rule, national judge is the presiding judge.
- Section II for Organized Crime, Economic Crime and Corruption and has four chambers, composed of three judges.
- Section III for all other crimes within the jurisdiction of the Court and has four Chambers that are constituted by three national judges

“Article 7

Criminal jurisdiction

(1) As part of its criminal jurisdiction, the Court of Bosnia and Herzegovina has jurisdiction over offenses defined in the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina.

*(2) The Court further jurisdiction over crimes defined in the laws of the Federation of Bosnia and Herzegovina, Republic of Srpska and the Brcko District of Bosnia and Herzegovina when such crimes:*

<sup>108</sup> Article 22, Law on the Courts of Brcko District of BiH, ("Official Gazette of BDBiH", No. 19/07)

<sup>109</sup> The Court of Bosnia and Herzegovina was formed on the basis of a decision of the High Representative, Wolfgang Petritsch, and 20th November 2000. Later, powers and structure are essentially extended; first phase of defense reform is conducted during the previous period, and in defense reform processes are still ongoing, but it is already clear that the powers in respect of the defense to be transferred from the entities to the state level. The process of consolidation of police structures is still in progress, but it has previously formed the Ministry of Security which includes the operation of OSA and SIPA. Indirect taxation is formed and operational.

<sup>110</sup> The official revised version of Law on the Court (Službena prečišćena verzija Zakona o Sudu BiH), ("Official Gazette of BiH", No. 49/09.)

*a) endanger the sovereignty, territorial integrity, political independence, national security and international subjectivity of Bosnia and Herzegovina;*

*b) may have serious repercussions or adverse consequences to the economy of Bosnia and Herzegovina or may have other adverse consequences for Bosnia and Herzegovina or may cause serious economic damage or other adverse consequences beyond the territory of the entities and Brcko District;*

*(3) The jurisdiction of the Court is also:*

a) take a final and legally binding position on the implementation of the law of Bosnia and Herzegovina and the international agreements at the request of any court or entity and any court of Brcko District entrusted to implement the laws of Bosnia and Herzegovina;

b) provides practical guidance on the application of the substantive law of Bosnia and Herzegovina under the jurisdiction of the Court in connection with the crimes of genocide, crimes against humanity, war crimes and violations of the laws or customs of war, and individual responsibilities in relation to these offenses, ex officio or at the request of any entity court or the court of Brcko District of Bosnia and Herzegovina;

c) decide on matters relating to international and inter-entity criminal law enforcement, including relations with Interpol and other international law enforcement agencies, such as the transfer of the convicted person, extradition and surrender of persons who are required by any authority in the territory of Bosnia and Herzegovina by another states or international court or tribunal;

d) Conflict of jurisdiction between the courts of the Entities and Brcko District Court of Bosnia and Herzegovina, and between the Court of Bosnia and Herzegovina and any other court;

e) Reopening of criminal proceedings for criminal offenses prescribed in the laws of the state of Bosnia and Herzegovina”<sup>111</sup>

Criminal proceedings before the Court involves the rules contained in the Law on the Court of Bosnia and Herzegovina<sup>112</sup> from Article 32 to 43, which relate to: the presumption of innocence, the rights of the suspect and the accused, the principle of ne bis in idem, the

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<sup>111</sup> Article 7, Law on the Court of Bosnia and Herzegovina, Revised text ("Official Gazette of BiH", No. 49/09.), Retrieved from: [www.sudbih.gov.ba](http://www.sudbih.gov.ba)

<sup>112</sup> It is a vast version of the Law on the Court, ("Official Gazette of BiH", No. 16/02)

right to counsel, the right to appeal, the decision on appeal, the exemption, costs, benefits and rehabilitation-repeat request procedure. In criminal proceedings, there is the equitable use of the official languages of Bosnia and Herzegovina: Bosnian, Croatian and Serbian language, and both scripts - Cyrillic and Latin. Criminal proceedings may be initiated and conducted at the request of the Prosecutor.

The rules laid down in the Criminal Code of Bosnia and Herzegovina must ensure that no innocent person shall be convicted and that the perpetrator of the crime imposes criminal sanctions under the conditions prescribed by the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina, which prescribes criminal offenses, and the statutory procedure. The person in custody must be in its native language or in the language that he/she understands immediately informed of the reasons of deprivation of liberty and at the same time told that is not obliged to give testimony, and has the right on counsel of his own choice.

v. Although the Convention on the Rights of the Child, in Article I defines "child as a person under the age of 18 years," through an analysis of legislation in Bosnia and Herzegovina, we can conclude that the definition of a child in the legislation of Bosnia and Herzegovina is not in the way it is defined by the Convention. Specifically, in the criminal legislation of Bosnia and Herzegovina (Criminal Code of Bosnia and Herzegovina, Criminal Code of the Federation of Bosnia and Herzegovina and the Criminal Code of Brcko District of Bosnia and Herzegovina)<sup>113</sup> lower bound criminally responsible person is 14 years old, therefore the child is a person under 14 years, and minor is a person under 18 years, when he/she gains the ability for tortious act.

*“Article 84*

*Juvenile criminal sanctions*

*(1) a juvenile perpetrator of a criminal offense may be imposed with corrective measures and certain security measures, and older juvenile may be sentenced to juvenile prison.*

*(2) A minor who is at the time of the commitment of the offense was between fourteen and sixteen years of age (a junior juvenile) may be imposed only corrective measures.*

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<sup>113</sup> Article 1 paragraphs 8 and 9 of the Criminal Code of Bosnia and Herzegovina, Article 2, paragraphs 9 and 10 of the Criminal Code of FBiH, Article 9 and 10, paragraph 2 of the Criminal Code BDBiH



(3) *A minor who is at the time of the commitment of the criminal offense was sixteen, but had not reached eighteen years of age (a senior juvenile) educational measures may be imposed under the conditions prescribed by the law and exceptionally a punishment of juvenile imprisonment.*

(4) *A minor may be imposed with safety measures under the conditions prescribed by the law.*

(5) *A minor can not be sentenced with judicial admonition or a suspended sentence.*<sup>114</sup>

The Criminal Code of the Republika Srpska does not contain a definition of children and minors, but requires "Exclusion of criminal sanctions for children":

"Against a minor which at the time of the felony was less than 14 years of age (child) cannot be applied criminal sanctions."<sup>115</sup>

The **Criminal Procedure Code of Bosnia and Herzegovina**<sup>116</sup>, the **Law on Criminal procedure of the Federation of Bosnia and Herzegovina**<sup>117</sup> and the **Law on Criminal Procedure of the Brcko District of Bosnia and Herzegovina**<sup>118</sup>, signs that it will suspend the criminal proceedings and notify the guardian authority, if in the course of the proceeding is founded that the juvenile at time of the felony was under 14 years of age. **The Code of Criminal Procedure of the Republika Srpska**<sup>119</sup> stipulates that the procedure can not be run against a minor who has not attained the age of 14 years.

When it comes to statistics about the children-inmates, unfortunately there is no adequate system of registration of all cases of juvenile delinquency, it remains difficult to get to the actual state of the problem, pointed out by the UN Committee on the Rights of Children:

<sup>114</sup> Article 84, Criminal Code of Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 36/03)

<sup>115</sup> Article 64, Criminal Code of the Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

<sup>116</sup> Article 341, Code of Criminal Procedure of Bosnia and Herzegovina, ("Official Gazette of BiH", No. 03/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76 / 06, 29/07, 32/07, 53/07, 76/07, 15/08, 12/09 and 16/09)

<sup>117</sup> Article 362, Code of Criminal Procedure of the Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 35/03, corr. 56/03, corr. 37/03, 28/05, 55/06, 27/07, 53/07 and 9/09)

<sup>118</sup> Article 341, Code of Criminal Procedure Brcko District of Bosnia and Herzegovina, ("Official Gazette of BDBiH", No. 10/03, 48/04, 6/05, 14/07, 19/07, 21/07 and 2/08)

<sup>119</sup> Article 347, Criminal Procedure Code of the Republika Srpska, ("Official Gazette of RS", No. 50/03, 111/04, 115/04, 29/07)

*"The position of the UN Committee for the control is that there are no data on minors in conflict with the law, which is one of the many negative items that this committee attributed BiH regarding the application of the Convention on the Rights of the Child."<sup>120</sup>*

*"According to the statistics, which were published in one of the daily newspapers in Bosnia-Herzegovina, about 33,000 minors since 1999 by 2008 committed one or more offenses. At about 30,000 cases led to the appropriate criminal proceedings, and about 22,000 juveniles were sentenced to one of the sanctions provided by the law. However, official statistics do not reflect the real situation, because there is a significant number of an undiscovered juvenile crime. These official data show more how much efficient is society's response to this phenomenon, how police reacts, the prosecution and the court, official data does not provide a realistic picture.*

<sup>121</sup>

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. The term "sexual activity" is not explicitly defined in the law. In the nineteenth chapter of the Criminal Code of the Federation of Bosnia and Herzegovina<sup>122</sup> and the Criminal Code of the Brcko District of Bosnia and Herzegovina<sup>123</sup>, are defined crimes against sexual freedom and morality and there are implied: rape, sexual intercourse with a helpless person, sexual intercourse with abuse of position, sexual coercion intercourse, sexual intercourse with a child, indecent acts, satisfying lust in front of a child or a minor, promoting prostitution, exploitation of children and minors for pornography, introducing a child to pornography and incest.

In the **Criminal Code of the Republika Srpska** sexual violence against children is regulated in Art. 195. It's a brand new incrimination in the criminal legislation of the Republic of Serpska introduced by reforms in 2000 and that in several forms protects the integrity of the child , where the first paragraph provides the basic form of this felony is

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<sup>120</sup> Analysis of compatibility of BiH legislation with the Convention on the Rights of the Child, ombudsman institutions in BiH, November 2009, Sarajevo  
<http://www.ombudsmen.gov.ba/materijali/analizauskkladjenostibih.pdf>

<sup>121</sup> The daily "Blic"

<sup>122</sup> Articles: 203 to 213, Criminal Code of the Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH ", No. 36/03)

<sup>123</sup> Articles: 200 to 210, Criminal Law of the Brcko District of Bosnia and Herzegovina", ("Official Gazette of BDBiH", No. 10/03, 45/04, 6/05)

"one who commits sexual intercourse or any other sexual act with a child."<sup>124</sup> The essence of this characterization is an absolute ban on any sexual acts with a child, regardless of that they may be voluntary or initiated by the child.

**ii. The Criminal Code of Bosnia and Herzegovina** (Article 35)<sup>125</sup>, **the Criminal Code of the Federation of Bosnia and Herzegovina** (Article 37), **the Criminal Code of Republika Srpska** (Article 15), **the Criminal Code of Brcko District of Bosnia and Herzegovina** (Article 37), refers to the "intent" and includes direct or indirect intent, which differ by whether the offender was aware of his actions and wanted its perpetration or was aware that the result of his action or inaction may have prohibited consequence, but agreed to its occurrence. The perpetrator is guilty of a crime if done with the intent of article 33 (2) of the Criminal Code of Bosnia and Herzegovina and Article 35 (2) of the Criminal Code of Federation of Bosnia and Herzegovina and the Criminal Law of Brcko District of Bosnia and Herzegovina.

The Criminal Code of the Federation of Bosnia and Herzegovina defines criminal responsibility and provides the following penalties for intentionally committed a crime of sexual abuse

*"Article 207*

***Sexual Intercourse with a Juvenile***

(1) Whoever performs sexual intercourse or an equivalent sexual act with a child shall be punished by imprisonment of one to eight years.

(2) Whoever commits violent sexual intercourse or an equivalent sexual act with a child (Rape Article 203, paragraph 1) or a disabled child (Article 204 Sexual intercourse with a helpless person, paragraph 1), shall be punished by imprisonment at least three years.

(3) Whoever performs sexual intercourse or an equivalent sexual act with a child by abuse of position (Article 205 Sexual intercourse by abuse of position, paragraph 2), shall be punished by imprisonment of one to ten years.

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<sup>124</sup> Article 159, paragraph 1, Criminal Code of the Republika Srpska , ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

<sup>125</sup> Criminal Code of Bosnia and Herzegovina ("Official Gazette of BiH, No. 37/03, 54/04, 61/04, 30/05, 55/06, 32/07)

(4) Whoever perpetrates the criminal offense referred to in paragraph 1 to 3 of this Article in a particularly cruel or degrading particular way, or in the same occasion towards the same victim committed several sexual intercourses or equivalent sexual acts by several perpetrators shall be punished by imprisonment for at least five years.

(5) If the criminal offense referred to in paragraphs 1 to 3 this Article, the death of a child, or a child serious bodily injury, or its health is severely impaired, or the female child is left pregnant, the perpetrator shall be punished by imprisonment for not less than five years or a long term sentence.

Article 208

### ***Indecent acts***

*(1) Whoever in the cases of Art. 203rd (Rape), 204 (Sexual intercourse with a helpless person), 205 (Sexual intercourse by abuse of position) and 206 (Forced sexual intercourse) of this law, when there is no attempt of that crime, only an indecent act, shall be punished by imprisonment of three months to three years.*

*(2) Who in the case under Article 207 (Sexual intercourse with a child) of this law, when there is no attempt of that crime, so only a indecent act, or with the criminal offense referred to in paragraph 1 this Article against a child or a minor, shall be punished by imprisonment of six months to five years.*

Article 209

### ***Satisfying Lust in front of a child or minor***

*Whoever in front of a child or minor takes actions aimed at satisfying one's own or someone else's lust, or who indicated that the child in front of him or another person performs such acts, shall be punished by imprisonment of three months to three years.*<sup>126</sup>

In the **Criminal Code of the Republika Srpska** subjective side of felony makes intent which must include the awareness of the perpetrator in terms of age of a passive subject. If the perpetrators of the act were not aware of the fact that the passive subject is a person below 14 years, there will be a real mistake. Determining the real mistake of the offender shall be based on all the circumstances of the case. For the basic form of the felony is provided a prison sentence of 1-8 years.

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<sup>126</sup>Articles: 207, 208 and 209, Criminal Code of the Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 36/03 corr. 21/04, 69/04, 18/05)

iii. Bosnian law does not contain an express provision that stipulates the age of entry into sexual activity. However, the appropriate interpretation of positive solutions of family and criminal law can be stated as follows:

According to family law legal ability is acquired at legal age, which means with 18 years old or marriage before the legal age.<sup>127</sup> Legal ability may acquire the person who turned 16 years, provided that there has been dispensations Court in contentious proceedings, that is to eliminate all matrimonial obstacles. Legal ability can acquire minor over the age of 16 year, which has become a parent. The issue of acquiring limited legal capacity or the consequences that implies limited legal capacity are, in our opinion, of crucial importance to this question.<sup>128</sup>

Minor at the age of 14 years with limited exercise rights capacity, in civil legal aspect means that it can enter into legal issues that are of benefit to that person. Family legislation gives the possibility of a person who has a limited capacity to acknowledge paternity and maternity, provided that such persons are capable to understand the meaning of recognition statement.

Taking into account of these legal solutions, it could be concluded that our law does not allow minors less than 14 years entry into sexual activity. As a mainstay of this, there is a solution of criminal legislation, the age of 14 years is associated with the exclusion of criminal responsibility of minors under 14 years of age.

*"A minor who was at the time of the commitment of the offense between fourteen and sixteen years of age (a junior juvenile) may be imposed only corrective measures."*<sup>129</sup>

*"To a minor, who was at the time of the offense under 14 years of age (child) criminal sanctions can not be applied to."*<sup>130</sup>

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<sup>127</sup> Article 157, Family Code of the Federation of Bosnia and Herzegovina, ("Official gazette of FBiH", No. 35/05 i 41/05)

<sup>128</sup> Article 57, Family Law of the Federation of Bosnia and Herzegovina, ("Official gazette of FBiH", No. 35/05 i 41/05)

<sup>129</sup> Article 84, paragraph 2 of the Criminal Code of the Federation of Bosnia and Herzegovina ("Official Gazette of FBiH", No. 36/03 corr. 21/04, 69/04, 18/05)

<sup>130</sup> Articles: 200 to 210, Criminal Law of the Brcko District of Bosnia and Herzegovina", No. 10/03, 45/04, 6/05)  
("Official Gazette of BD BiH"), Article 64, Criminal Code of RS ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

*"The criminal legislation of the Brcko District shall not apply to a child, who at the time of the commitment of the offense is younger than fourteen years of age. "131*

Till the age of 14 the person is kept in a stage of development where their personality is not able to fully grasp the meaning and importance of sexual intercourse. Therefore, person cannot decide on matters of sexual sphere of life. Such criminally solution is based on the legal concept of a disability of a person of certain age to generally possesses free will in terms of adherence to commit rape or other sexual acts, or if such will expresses consent absolutely is not legally relevant.

**iv.** The Criminal Code of Bosnia and Herzegovina in Article 172 regulates the use of violence and threats in terms of sexual offenses as a crime against humanity;

*"Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity shall be punished by imprisonment for a term not less than ten years or long-term imprisonment. "132*

The Criminal Code of the Federation of Bosnia and Herzegovina regulates this issue with Article 206:

*"Whoever has forced another person into sexual intercourse by use of serious threat to reveal something that would seriously harm that person's honor or reputation or that of a person close to him/her, or by seriously threatening that person with some other harm, shall be punished by imprisonment for a term between six months and five years"133*

In Article 207 of the same law that applies to the criminal offense of sexual intercourse with a child, is governed:

"Whoever commits violent sexual intercourse or an equivalent sexual act with a child or a disabled child shall be punished by imprisonment of at least three years. If it is sexual acts

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<sup>131</sup> Article 9, Criminal Code of the Brcko District of Bosnia and Herzegovina ("Official Gazette of BD BiH", No. 10/03, 45/04, 6/05)

<sup>132</sup> Article 172, Criminal Code of Bosnia and Herzegovina ("Official Gazette of BiH, No. 37/03, 54/04, 61/04, 30/05, 55/06, 32/07)

<sup>133</sup> Article 206, Criminal Code of the Federation of Bosnia and Herzegovina , ("Official Gazette of FBiH, No. 36/03 corr. 21/04, 69/04, 18/05)

with a child by abuse of position person shall be punished by imprisonment for one to ten years.”<sup>134</sup>

The Criminal Code of the Republika Srpska predicts in Article 195, paragraph 2:

*„In the event when violent sexual intercourse or any other sexual act is committed with a child or a disabled person, there is a qualified form of the crime of sexual violence against children.”*<sup>135</sup>

The Criminal Code of Brcko District of Bosnia and Herzegovina also regulates the use of force and threats in connection with the commission of sexual offenses

“Whoever forces another person or threat of immediate attack upon her life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act shall be punished by imprisonment of one to ten years.”<sup>136</sup>

When it comes to sexual misconduct by using force and taking advantage of disability, in Article 204 of the Criminal Code of the Federation of Bosnia and Herzegovina and in Article 201 of the Criminal Code of Brcko District of Bosnia and Herzegovina, this offense is defined as "sexual intercourse with a helpless person," and specifies the details of the same:

*„(1) Whoever has had a sexual intercourse with another person taking advantage of that person's mental disease, temporary mental disorder, infirmity or any other state of that person which makes him/her incapable of resisting, shall be punished by imprisonment for a term between one and eight years.*

*(2) Whoever perpetrates the criminal offense referred to in paragraph 1 of this Article to the person whose state of incapacity for resistance is caused or participated by the perpetrator, shall be punished according to Article 203 (Rape) paragraph 1 of this law.*

*(3) Whoever perpetrates the criminal offense referred to in paragraph 1 of this Article in a particularly cruel or degrading particular way, or in the same occasion to the same victim committed sexual intercourse or equivalent sexual acts from multiple perpetrators shall be punished by imprisonment of one to ten years.*

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<sup>134</sup> Article 207 (2), (3), Criminal Code of the Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 36/03, 21/04, 69/04, 18/05)

<sup>135</sup> Article 195, (2), Criminal Code of the Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

<sup>136</sup> Article 200, Paragraph 1, Criminal Code the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BDBiH", No. 10/03, 45/04, 6/05)

*(4) Whoever perpetrates the criminal offense referred to in paragraph 2 of this Article in a particularly cruel or degrading particular way or in the same occasion to the same victim committed sexual intercourse or equivalent sexual acts by several perpetrators shall be punished according to Article 203 Paragraph 2 of this law.*

(5) If the criminal offense referred to in paragraph 1 this Article, caused the death of the person with whom was performed sexual intercourse or an equivalent sexual act, or made severely bodily injuries or his health is severely impaired, or if the female child is pregnant, the perpetrator shall be punished by imprisonment for 1 to 10 years.

(6) If the criminal offense referred to in paragraph 3 and 4 of this Article, the consequence referred to in paragraph 5 this Article, the perpetrator shall be punished by imprisonment for three years.<sup>137</sup>

The Criminal Code of the Republika Srpska defines this offense as "sexual intercourse with a helpless person in Article 194:

*"(1) Whoever over another person commits incest or other sexual act taking advantage of mental illness, lack of mental development, another mental disorder, disability or any other condition of that person due to which it is unable to resist, shall be punished by imprisonment of six months to five years.*

*2) If the criminal offense referred to in paragraph 1 this Article was committed against a minor in a particularly cruel or degrading particular way, or the in same occasion committed several acts by several persons, or made severe bodily injuries, serious impairment of health or pregnancy of helpless female child, the offender shall be punished with imprisonment of three to fifteen years.*

*(3) If the offense referred to in paragraph 1 and 2 this Article, caused the death of the person against whom the offense was committed, the offender shall be punished by imprisonment of at least five years.*<sup>138</sup>

v. The crime of Incest is regulated by Article 213 of the Criminal Code of the Federation of Bosnia and Herzegovina, which states that:

*"Whoever performs sexual intercourse or an equivalent sexual act with a blood relative in a straight line or a brother or sister, shall be punished by a fine or by imprisonment of six months to two years, if the same act is*

<sup>137</sup>Article 204, Criminal Code of the Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH, No. 36/03 21/04, 69/04, 18/05) and Article 201, Criminal Code of the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BD BiH", No. 10/03, 45/04, 6/05)

<sup>138</sup> Criminal Code of the Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)



*done with a minor penalty for the offender's sentence shall be 1 to 5 years, and if it is a case of a child is offender shall be punished by imprisonment for two to ten years*"<sup>139</sup>

Offense of incest, or incest in the **Criminal Code of the Republika Srpska** is stipulated in Article 201 'The basic form of this offense is designed in paragraph 1 and represents "the conduct of rape between relatives in a straight line, brother or a sister."<sup>140</sup>

The **Criminal Code of Brcko District of Bosnia and Herzegovina** provides the same definition of incest as the Criminal Code of the Federation of Bosnia and Herzegovina, but requires a different level of the penalties. (Article 210)

vi. Punishment by the Criminal Code of the Federation of Bosnia and Herzegovina and the Criminal Code of Brcko District of Bosnia and Herzegovina for:

*„teachers, educators, parents, adoptive parent, guardian, stepfather, stepmother, or other person who abused their position or relationship with a minor who has been entrusted to them for learning, education, child care or care, commits sexual intercourse with a child shall be sentenced from six months to five years."*<sup>141</sup>

Under the Criminal Code of the Republika Srpska it is regulated:

*"If the offense of sexual violence committed against children by teacher, educator, guardian, adoptive parent, a doctor, a religious official or other person who abuse their position for the child entrusted to him for learning, education, child care, it is a qualified form of this offense which carries a sentence of 5 to 15 years."*<sup>142</sup>

## 2.2 Child Prostitution

vii. Bosnia and Herzegovina signed Council of Europe Convention on Action Against Human Trafficking on January 19th 2006, after that Convention has been ratified on January 11th 2008.

viii. Analysis conducted by the Ombudsman for Human Rights in Bosnia and Herzegovina shows:

<sup>139</sup> Criminal Code of the Federation of Bosnia and Herzegovina ("Official Gazette of FBiH", No. 36/03)

<sup>140</sup> Article 201, paragraph 1, The Criminal Code of the Republika Srpska ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

<sup>141</sup> Article 205, Criminal Code of the Federation of Bosnia and Herzegovina ("Official Gazette of FBiH", No. 36/03 corr. 21/04, 69/04, 18/05) and Article 202, Criminal Code of Brcko District of Bosnia and Herzegovina, ("Official Gazette of Brcko District BIH ", No. 10/03, 45/04, 6/05)

<sup>142</sup> Criminal Code of the Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

"A high degree of non-compliance of national legislation with the Convention on the Rights of the Child and the implementation of the Optional Protocol of the Convention relating to trafficking of children, child prostitution and child pornography. Part of this discrepancy is reflected in the definitions of certain legal terms and offenses, among them are child prostitution and child pornography."<sup>143</sup>

In the **Criminal Code of Bosnia and Herzegovina** there is not defined crime of "child prostitution", but the Criminal Code of Bosnia and Herzegovina sanctions criminal offenses: "slavery and transportation of persons in this respect, human trafficking, international recruitment for prostitution, trafficking in persons, taking hostages"<sup>144</sup> In the **Criminal Code of the Federation of Bosnia and Herzegovina** and the **Criminal Code of Brcko District of Bosnia and Herzegovina** for the crime of "solicitation for prostitution"<sup>145</sup> predicts special punishment in the event when the offense was committed against a child or a minor. Also, in the Criminal Code of the Republika Srpska for the crime of "trafficking of persons for the purpose of prostitution"<sup>146</sup> predicts special punishment in the event that the offense was committed against a child or a minor.

The basic form of these offenses ("solicitation for prostitution" and "trafficking for prostitution") is committed by one:

*"(1) Whoever, for profit solicitates, encourages or entices another person to provide sexual services or in some other way allows a person to be handed to another to provide sexual services, or in any way involved in organizing or managing prostitution.*

*(4) If the offenses referred to in the preceding paragraphs were made towards a child or a minor, the offender shall be punished by imprisonment of one to twelve years."*<sup>147</sup>

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<sup>143</sup> Report of the Ombudsmen for Human Rights in Bosnia and Herzegovina on the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, downloaded [http://www.ombudsmen.gov.ba/materijali/Seksualna\\_eksploatacija\\_djece.pdf](http://www.ombudsmen.gov.ba/materijali/Seksualna_eksploatacija_djece.pdf)

<sup>144</sup> Article: 185, 186, 187, 189, 191, Criminal Code of Bosnia and Herzegovina, ("Official Gazette of BiH, No. 37/03, 54/04, 61/04, 30/05, 55/06, 32/07)

<sup>145</sup> Article 210, The Criminal Code of the Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 36/03), Article 207, Criminal Code of the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BD BiH", No. 10/03, 45/04, 6/05)

<sup>146</sup> Article 198, Criminal Code of the Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

<sup>147</sup> Article 210, paragraph 1, paragraph 4, of the Criminal Code of the Federation of Bosnia and Herzegovina ("Official Gazette of FBiH", No. 36/03), Article 207, paragraph 1, paragraph 4, Criminal Code of the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BDBiH", No. 10/03, 45/04, 6/05) and

We come to the conclusion that the definition of "child prostitution" does not exist in the criminal legislation of Bosnia and Herzegovina, thus not in compliance with the Lanzarote Convention, which Bosnia and Herzegovina still did not ratify. But "child prostitution" is derived from criminal acts "Solicitation for prostitution" and "Human trafficking for prostitution," which regulates certain penalty for the perpetrators of these crimes against children or minors.

ix. In the **Criminal Code of the Federation of Bosnia and Herzegovina** and the **Criminal Code of Brcko District**<sup>148</sup>, is determined that only the person who solicitates, encourages or entices another person to offer sexual services, or in any other way involved in organizing or managing prostitution may be punished by imprisonment for one up to five years, but not the user. The **Criminal Code of the Republika Srpska**<sup>149</sup> provides that the crime of trafficking for prostitution is made by whoever participates in any way in organizing or managing prostitution. Of course, if it's done against the child in proceedings shall be qualified form of this act.

### 2.3 Child Pornography

x. Bosnia and Herzegovina signed Council of Europe Convention on Cybercrime on February 9th 2005 and it had been ratified on May 19th 2006.

xi. As in the case of child prostitution, Bosnia and Herzegovina, in its legislation does not have exactly defined crime as "child pornography." Nearest contents of one offense in the legislation of Bosnia and Herzegovina, the content of Article 20 ("Child pornography") Lanzarote Convention, is provided in the **Criminal Code of the Federation of Bosnia and Herzegovina**, Article 211, which relates to the criminal offense of "abuse of a child or a minor for pornography," and Article 212 relating to the criminal offense of "Introduction a child to pornography."

*"Article 211"*

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Article 198, paragraph 1, paragraph 4 of the criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

<sup>148</sup> Article 210, Criminal Code of the Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 36/03), Article 207, Criminal Code of the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BD BiH", No. 10/03, 45/04, 6/05)

<sup>149</sup> Article 198, Criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

### The exploitation of a child or a **minor for pornography**

(1) Whoever uses child or a minor for taking photographs, audiovisual materials, or other pornographic content, or possesses, or imports or sells or distributes or shows such material, or such persons make to participate in pornographic performance, shall be punished by imprisonment of one up to five years.

*(2) Items that are intended or used for the perpetration of criminal offense referred to in paragraph 1 shall be forfeited and the items that resulted from the perpetration of criminal offense referred to in paragraph 1 this Article shall be confiscated and destroyed.*

Article 212

### Introducing a child to pornography

(1) Whoever sells, shows or public display or otherwise makes available documents, photographs, audio-visual and other items of pornographic content or pornographic show, shall be punished by a fine or imprisonment up to one year.

(2) Items referred to in paragraph 1 this Article shall be forfeited. <sup>150</sup>

Same offenses are codified in the **Criminal Code of Brcko District of Bosnia and Herzegovina** in the articles 208 and 209.<sup>151</sup>

The **Criminal Code of the Republika Srpska** contains two charges relating to the abuse of children and minors in the area of pornography. The first is "The exploitation of children and minors for pornography"<sup>152</sup> and the other "Production and display of child pornography".<sup>153</sup> The first provision is punishable by 6 months to 5 years for those who abuse a child or a minor to produce images, audio-visual materials and other or other objects of pornographic content, or a child or a minor use for pornographic show. A second provision is a novelty in the criminal legislation of the Republic of Srpska. The basic form of this act is done by a person who provides, distributes, publicly exhibits or displays, or otherwise makes available documents, photographs, audio-visual or other objects containing

<sup>150</sup> Article 211 and 212, Criminal Code of of the Federation Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 36/03)

<sup>151</sup> Article 208 and 209, Criminal Code the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BDBiH", No. 10/03, 45/04, 6/05)

<sup>152</sup>Article 199, Criminal Code of Republika Srpska,S ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

<sup>153</sup> Article 200, Criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

child pornography or whoever produces such materials, acquires or holds or presents child pornographic show. This offense is punishable by fines or imprisonment up to 1 year.

Since Bosnia and Herzegovina ratified the Optional Protocol to the Convention on the Rights of the Child, on the Trafficking of Children, Child Prostitution and Child Pornography, the goal of Bosnia and Herzegovina is the protection of children from trafficking, child prostitution and child pornography, in order to prevent the trafficking of children and in line with the fulfillment of this goal Bosnia and Herzegovina has developed an Action plan for Children 2011-2014 and the implementation of it will take a step forward in protecting of children and their rights in Bosnia and Herzegovina.<sup>154</sup>

**xii.** Article 211 of the Criminal Code of the Federation of Bosnia and Herzegovina and Article 208 of the Criminal Code of Brcko District of Bosnia and Herzegovina, which are related to the criminal offense of "exploitation of children or minors for pornography" punishment is determined by imprisonment of one to five years for one who uses a child or a minor for making pictures, audiovisual materials, or other pornographic content or possesses, or imports or sells or distributes or shows such material or makes such persons to participate in pornographic performance, and Article 212 of the Criminal Code of the Federation of Bosnia and Herzegovina and Article 209 of the Criminal Code of Brcko District of Bosnia and Herzegovina, which is related to the crime of "Introducing a child to pornography" punishment is determined by fine or imprisonment up to one year for those who sells, shows or public display or otherwise makes available documents, photographs, audio-visual and other items of pornographic content or pornographic show. The Criminal Code of the Republika Srpska in provision "Exploitation of children and minors for pornography" (Article 199)<sup>155</sup> provides a penalty of imprisonment of six months to five years for anyone who abuses a child or a minor to produce images, audio-visual materials and other items of pornographic or other content, or uses a child or a minor for pornographic show. A second provision "Production and display of child pornography" (Article 200)<sup>156</sup> provides *a fine or imprisonment up to one year* for the one who offers, distributes, publicly exhibits or displays, or otherwise makes available documents, photographs, audio-visual and

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<sup>154</sup> The Action Plan for Children 2011-2014, the Ministry for Human Rights and Refugees, July 2011, Sarajevo

<sup>155</sup> Article 199, Criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

<sup>156</sup> Article 200, Criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

other objects containing child pornography or who such materials produces, acquires or holds or presents child pornographic show.

xiii. Article 211, paragraph 2 of the Criminal Code of the Federation of Bosnia and Herzegovina<sup>157</sup> and Article 208, paragraph 2 of the Criminal Code of Brcko District of Bosnia and Herzegovina<sup>158</sup>, provision "exploitation of children or minors for pornography," it was determined that the objects intended or used for the perpetration of criminal offense referred to in paragraph 1 of this Article shall be forfeited and the items that were created by the perpetration of the crime paragraph 1 this Article shall be confiscated and destroyed. As far as criminal offenses under Article 212 of the Criminal Code of the Federation of Bosnia and Herzegovina and Article 209 of the Criminal Code of Brcko District of Bosnia and Herzegovina "Introducing a child to pornography", in paragraph 2 of this Article holds that the objects from the first paragraph will be confiscated.

Article 199, paragraph 2 of the Criminal Code of the Republika Srpska<sup>159</sup>, the provision of "Exploitation of children and minors for pornography," determined that items and funds under paragraph 1 this provision shall be seized. Article 200, paragraph 5, the provisions of the "Production and display of child pornography," determined that items and funds under paragraph 1 and 2 this provision shall be seized.

Bosnia and Herzegovina has signed and ratified the Lanzarote Convention not long time ago. In recent times, there is more evidence of the dangers of the spread of child pornography over the Internet and the measures to be taken. Connection to this, large number of international laws were adopted and a special significance for our criminal law has a Council of Europe Convention on Cyber Crime and the Optional Protocol to the Convention on the Rights of the Child, on the trafficking of Children, Child Prostitution and Child Pornography. They define specific measures aimed at fighting and preventing child pornography.

**xiv.** In the above-mentioned provisions of criminal legislation of Bosnia and Herzegovina, which are related to "child pornography," we realize that there is punishment for any form

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<sup>157</sup> Article 211 and 212, Criminal Code of the Federation Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 36/03)

<sup>158</sup> Article 208 and 209, Criminal Code of of the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BD BiH ", No. 10/03, 45/04, 6/05)

<sup>159</sup> Article 199 and 200, Criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

of involvement, abuse, exploitation, or guidance of children and minors in pornography, therewith in the criminal laws of Bosnia and Herzegovina is provided the same penalty regardless of whether the control or involvement of children and minors in pornography. The penalty is not included for those who attend in pornographic performance, which includes the participation of children in the same.

## 2.4 Corruption of Children

xv. There is an article 209 of the Criminal Code of the Federation of Bosnia and Herzegovina and Article 206 of the Criminal Code of Brcko District of Bosnia and Herzegovina, which is related to the criminal offense of "Satisfying Lust in front of a child or a minor," and includes a penalty for that:

"Whoever in front of a child or minor takes actions aimed at satisfying one's own or someone else's lust, or who forces the child in front of him or another person to perform such acts, shall be punished by imprisonment of three months to three years."<sup>160</sup>

Within this article and the offense it is not listed in any way to imply how the child or minor is forced on attending this act. In Article 197 of the **Criminal Code of the Republika Srpska** criminal offense "satisfaction of the sexual passion in front of others."<sup>161</sup> This offense was introduced into the criminal legislation of the Republic of Serbian by the reform in 2000, which criminalises sexual acts performed in front of others and in public. A severe form of this act exists when in the presence of a child or a minor act is done in intention of satisfying his own or others' sexual passion or when a child is forced in front of perpetrator or some other person do such actions. The perpetrator must be aware of the fact that the passive subject is a child or a minor. Even attempting this offense is punishable.

## 2.5 Solicitation of Children for Sexual Purposes

xvi. The criminal legislation of Bosnia and Herzegovina does not define or determine in great detail the "child pornography" in terms of deliberate satisfying of an adult with child pornography through information and communication technology, and also does not specify

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<sup>160</sup> Article 209 Criminal Code of Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 36/03) and Article 206, Criminal Code of the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BD BiH", No. 10/03, 45/04, 6/05)

<sup>161</sup> Article 197, Criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

that an adult has to propose a meeting with the child in order to be convicted of this offense.

**xvii.** Yes, the **criminal** legislation of Bosnia and Herzegovina incriminate:

- Attempt (Article 26 of the Criminal Code of Bosnia and Herzegovina, Article 28 of the Criminal Code of the Federation of Bosnia and Herzegovina, Article 20 of the Criminal Code of the Republic of Srpska, Article 28 of the Criminal Code of Brcko District of Bosnia and Herzegovina);

- Complicity (Article 29 of the Criminal Code of Bosnia and Herzegovina, Article 31 of the Criminal Code of the Federation of Bosnia and Herzegovina, Article 23 of the Criminal Code of the Republic of Srpska, Article 31 of the Criminal Code of Brcko District of Bosnia and Herzegovina);

- the Incitement (Article 30 of the Criminal Code of Bosnia and Herzegovina, Article 32 of the Criminal Code of the Federation of Bosnia and Herzegovina, Article 24 of the Criminal Code of the Republic of Srpska, Article 32 of the Criminal Code of Brcko District of Bosnia and Herzegovina);

- Helping /assistance (Article 31 of the Criminal Code of Bosnia and Herzegovina, Article 33 of the Criminal Code of the Federation of Bosnia and Herzegovina, Article 25 of the Criminal Code of the Republic of Srpska, Article 33 of the Criminal Code of Brcko District of Bosnia and Herzegovina)

## 2.6 Corporate Liability

**xviii.** Reforms in the criminal legislation of Bosnia and Herzegovina during 2003. "Stipulates the responsibility of a legal person for the offense, which was done by the executant in the name, for the account or for benefit of a legal person."<sup>162</sup>

The **Criminal Code of Bosnia and Herzegovina** regulates the issue of the liability of legal persons for criminal offences, and it regulates the criminal procedure against legal persons shall be conducted to the **Criminal Procedure Code of Bosnia and Herzegovina**.<sup>163</sup>

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<sup>162</sup> H. Sijerčić-Čolić, "Criminal Procedure Law" (Book I, "The criminal process operators and criminal acts"), Sarajevo, 2008. page 201

<sup>163</sup> Chapter XIV, Liability of legal persons for criminal offenses, Article 122, paragraph 4 of the Criminal Code of Bosnia and Herzegovina, ("Official Gazette of BiH, No. 37/03, 54/04, 61/04, 30/05, 55 / 06, 32/07)



#### Basis of Liability of a Legal Person

##### *Article 124*

*For a criminal offence perpetrated in the name of, for account of or for the benefit of the legal person, the legal person shall be liable: a) When the purpose of the criminal offence is arising from the conclusion, order or permission of its managerial or supervisory bodies; or b) When its managerial or supervisory bodies have influenced the perpetrator or enabled him to perpetrate the criminal offence; or c) When a legal person disposes of illegally obtained property gain or uses objects acquired in the criminal offence; or d) When its managerial or supervisory bodies failed to carry out due supervision over the legality of work of the employees.*

#### Limits of Liability of a Legal Person

##### *Article 125*

*(1) Within the conditions referred to in Article 124 (Basis of Liability of a Legal Person) of this Code, a legal person shall also be liable for a criminal offence when the perpetrator is not criminally liable for the perpetrated criminal offence.*

*(2) Liability of the legal person shall not exclude criminal liability of physical or responsible persons for the perpetrated criminal offence.*

*(3) For criminal offences perpetrated out of negligence, a legal person may be liable under the conditions referred to in Article 124, item d) of this Code, and in that case the legal person may be punished less severely.*

*(4) When in the legal person except from the perpetrator there is no other person or body that could direct or supervise the perpetrator, the legal person shall be liable for the criminal offence within the limits of the perpetrator's liability.*

If a Legal Person perpetrates criminal offence prescribed by some of the criminal codes in Bosnia and Herzegovina, than **the Criminal Code of Bosnia and Herzegovina** prescribes these sanctions to that Legal Person:

#### *Dissolution of the Legal Person*

##### *Article 134*

*(1) Dissolution of a legal person may be imposed in the case that its activities were entirely or partly being used for the purposes of perpetrating criminal offences.*

*(2) Besides the dissolution of a legal person, the property seizure punishment may be imposed.*

(3) *In addition to the dissolution of a legal person, the court shall propose the opening of a liquidation procedure.*

(4) *Creditors may be paid out from the property of the legal person upon which the punishment of dissolution has been imposed.*

### ***Laws Prescribing the Criminal Offences of Legal Persons***

#### *Article 143*

*Legal persons may be held accountable for criminal offences defined in this Code and other criminal offences defined by a law of Bosnia and Herzegovina.*

Criminal liability of legal persons, is also provided in the entity criminal laws, the Criminal Code of the Federation of Bosnia and Herzegovina Chapter XIV incriminate "Corporate liability for criminal acts"<sup>164</sup>, in the Criminal Code of the Republika Srpska Chapter XIV also criminalize "The responsibility of legal persons for criminal acts"<sup>165</sup>, as in the Criminal Code of Brcko District of Bosnia and Herzegovina, where there is also article XIV "liability of legal persons for criminal offenses"<sup>166</sup>, and we recommend the following provision:

#### **"Abuse in performing services**

An official person who, in conducting of services abuses other, inflicts serious bodily or mental suffering, intimidates and offends another person shall be punished by imprisonment of three months to five years."<sup>167</sup>

**xix.** From the previous answer, it is clear that national legislation determines criminal liability of legal persons.

Also, the legislation of Bosnia and Herzegovina stipulates Law on Obligations<sup>168</sup> and liability of legal persons based on civil rights.

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<sup>164</sup> Articles: 126 to 148, Criminal Code of Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 36/03)

<sup>165</sup> Articles: 125 to 146, Criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

<sup>166</sup> Articles: 126 to 148, Criminal Law of the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BD BiH", No. 10/03, 45/04, 6/05)

<sup>167</sup> Article 182, Criminal Code of Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 36/03)

<sup>168</sup> Law on Obligation relation of Bosnia and Herzegovina ("Official Gazette of BiH, No. 2/92, 13/93, 13/94 Law on the takeover of Code on Obligations of Yugoslavia, changes), the Law on Obligation relations of Republika Srpska (" Official Gazette of RS", No. 17 / 93, 3/96, 39/03, 74/04 and 19/05) and Law on

"Legal person is responsible for the damage to third parties caused by his authorized body that acts on behalf of a legal entity and it is its integral part. Legal person is responsible for the actions of that individual and collective authority action. The only condition that is required is that an authority of the legal person caused the damage to a third person in the execution of or in connection with the exercise of their functions. Legal person is responsible for the damage, regardless of his guilt, that is a legal entity can not be linked to the fact that the damage occurred without his fault or that his authority acted as they should have been. Responsibility of the legal person is based on the irrefutable assumption of guilt (*praesumptio Juris et de jure*). A legal entity can be released from responsibility under the same conditions as the release of persons who are responsible to the rules of objective responsibility, which is regulated by the law of obligations. Compensation for victims may require only from a legal entity, and not from the person who caused the damage, as is the case for employer liability for the acts of its employees when the employee intentionally inflict harm. But when the injured party compensation is payed, legal person has the right of recourse against the person who intentionally harms or acted with carelessness to cause the damage, if for the particular the case something else is defined by law. This rule shall expire within six months from the date of remuneration."<sup>169</sup>

**xx.** No, national legislation doesn't exclude individual liability when there is corporate liability.

## 2.7 Aggravating Circumstances

**xxi.** In the **Criminal Code of the Federation of Bosnia and Herzegovina** and the **Criminal Code of Brcko District of Bosnia and Herzegovina** there are aggravating circumstances to the offenses: rape, sexual intercourse with a child and sexual intercourse with a helpless person. In these crimes the aggravating circumstances are reflected in the increase of prison sentence if the offense caused a death of a child or a child was seriously bodily injured, or his health is severely impaired, or if the woman became pregnant. In the case of criminal offenses: solicitation of prostitution, incest and sexual misconduct there is an aggravating circumstance if the offense is committed against a child or a minor in that case there is much more severe sentence. In the case of a criminal offense "Sexual

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Obligation relations of Brcko District of Bosnia and Herzegovina (taken from SFRY)

<sup>169</sup> Abedin Bikic, "Obligational Law, General Part", Sarajevo, 2007, page 225th to 226th

intercourse with a helpless person" aggravating circumstance is if the offense was committed in a particularly cruel way or particularly humiliating way, or on the same occasion against the same victim committed sexual intercourse or equivalent sexual acts by several perpetrators in this case leads to heavier sentences.<sup>170</sup>

In The **Criminal Code of the Republika Srpska** criminal offense "sexual violence against children," the aggravating circumstances: if the act forcefully committed, if the perpetrator was an educator, adoptive parents, doctor or other person misusing their position on which he was entrusted with a child to care, education, etc., if done in a particularly cruel or humiliating manner, by many persons, if there is a big mismatch in the maturity of the offender and the victim, if there was a serious bodily injury, serious damage to the health, pregnancy, and death of the child victim. In the offense "producing and displaying child pornography," the aggravating circumstances are: age of a passive subject, a special method of perpetration, if made through the media or on the internet. All these circumstances affect the imposition of heavier penalties.<sup>171</sup>

## 2.8 Sanctions and Measures

xxii. The Criminal Code of the Federation of Bosnia and Herzegovina and the Criminal Code of Brcko District of Bosnia and Herzegovina provide fines and prison sentences of up to three months imprisonment for the above listed offenses.<sup>172</sup>

The Criminal Code of the Republika Srpska felony "sexual violence against children," the basic form provides a sentence of 1-8 years. For qualified forms of this act provided sentences, while the most severe form, ie, when the death of the child occurs imprisonment for a minimum period of 10 years or a long term sentence. For "child prostitution" provided is a prison sentence of 1-12 years. For "producing and displaying child pornography," a fine or imprisonment up to 1 year, while the most severe form of punishment is imprisonment of 6 months to 5 years. For "Satisfying sexual passion in front of others," namely the severe

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<sup>170</sup> Article 203, 204, 207, 208, 210, 213 of the Criminal Code of Federation of Bosnia and Herzegovina, ("Official Gazette", No. 36/03) and Articles: 200, 201, 204, 205, 207 and 210, Criminal Code of the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BD BiH ", No. 10/03, 45/04, 6/05)

<sup>171</sup> Some datas are taken from: Special Report-Prevention of child exploitation in South East Europe, the sexual exploitation of children in RS

<sup>172</sup> Chapter XIX, Criminal offenses against sexual freedom and morality, Criminal Code of the Federation of Bosnia and Herzegovina, ("Official Gazette No. 36/03) and Criminal Code of Brcko District of Bosnia and Herzegovina, ("Official Gazette of BDBiH", No. 10/03, 45/04, 6/05)

form in which there is participation of a child or a minor ,a fine or imprisonment up to three years.

**xxiii.** We believe that the penalties for above mentioned offenses are too lenient, when making laws and determining penalties for the same sufficient attention was not paid to the seriousness of these offenses, the potential victims, the consequences suffered by victims, their families and the whole society and the environment, and that all relevant facts had not been taken into account related to these acts, and especially the fact that in this case children and minors are involved. I also think that just because the fines are too lenient for such terrible crimes convicted offenders do not become aware of the seriousness of the criminal offense, and that the desired effect of rehabilitation is not achieved, and we release criminals back among potential victims with a high possibility of re-commission of the same crime, also we give space and wrong message to all potential perpetrators and we do not achieve the effect of suppressing future same or similar offenses.

I think punishments are too lenient, and devastating for the victims and their families, because after these incidents, the only fact that may give them comfort is the fact that the perpetrator will be justly punished for a criminal offense, so too lenient punishments become a seed of discontent of victims and therefore of entire society that wants a safe environment.

**xxiv.** The Criminal Code of Bosnia and Herzegovina provides following penalties for legal persons when they commit crimes:

*“Dissolution of the Legal Person*

*Article 134*

*Dissolution of a legal person may be imposed in the case that its activities were entirely or partly being used for the purposes of perpetrating criminal offences.*

*Besides the dissolution of a legal person, the property seizure punishment may be imposed.*

*In addition to the dissolution of a legal person, the court shall propose the opening of a liquidation procedure.*

*Creditors may be paid out from the property of the legal person upon which the punishment of dissolution has been imposed.*<sup>173</sup>

**xxv.** The previous analysis of all of these crimes, we have concluded that the state of Bosnia and Herzegovina from time to time seizes objects and property for the purpose of „obtaining evidence and objects, which are used in the determination of the facts in a criminal proceeding, or preventing the commission of criminal offenses, and prevent the use or disposal of certain assets.”<sup>174</sup>

The state of Bosnia and Herzegovina protects the interests of bona fide third party, and there is a special fund for the financing of preventive interventions or programs for the confiscation of property or goods.

*"This procedural action (seizure of objects and property) is specific to the investigation, but it is possible to take action before the start of the investigation, as an emergency investigation. Temporary seizure of assets is the independent act but this action is also taken in the search of premises, movable property and people. As in the case of the search of premises and persons, and seizure of objects and property constitutes a restriction of the basic human rights, provided by constitutional or international law on human rights. It is the right to privacy and free correspondence, and the right to peaceful enjoyment of his possessions (Article 17 of the International Covenant on Civil and Political Rights, Article 8. European Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 1 of Protocol No. 1 of the European Convention for the protection of Human rights and Fundamental freedoms). Therefore, the measures under temporary seizure of objects and property may be taken only under the statutory conditions and statutory procedures, which provide assurance that the rights of citizens shall be limited only that much it is necessary for the successful conduct of criminal proceedings."*<sup>175</sup>

**xxvi.** „The obligation of the state is to ensure family protection is standardized, as a principle upon which is based the regulation of relations in the family”<sup>176</sup>, the Family Code of the Federation of Bosnia and Herzegovina (Article 2, Paragraph 2).

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<sup>173</sup> Chapter XIV, Liability of legal persons for criminal offenses, Dissolution of legal persons, Article 134, Criminal Code of Bosnia and Herzegovina ("Official Gazette of BiH, No. 37/03, 54/04, 61/04, 30/05, 55 / 06, 32/07)

<sup>174</sup> Sijerčić-Čolić, H. Hadžiomerađić, M. Jurčević Kaurinović M., D. Simović, "Comments on Criminal Law / Criminal Procedure Code of Bosnia and Herzegovina", Sarajevo, 2005, page 208th to 210th

<sup>175</sup> H. Sijerčić-Čolić, "Criminal Procedure Law" (Book I, "The criminal process operators and criminal acts"), Sarajevo, 2008. whatever., page 363rd

<sup>176</sup> Nerimana Traljić, Suzana Bubić, "Marital Law" Sarajevo University Faculty of Law in Sarajevo, Sarajevo,

"Article 380

***Procedure for protection from domestic violence***

*In the event that a criminal offense has been committed within the family or close to the child environment, the country is taking action to protect the rights and best interests of the child. This implies that they are obliged to provide police protection, guardianship authority and the court for the violations.*"<sup>177</sup>

"Article 147

*(1) The authority of guardianship is required ex officio to take special measures to protect the rights and best interests of the child, at the request of one or both parents or ex officio guardianship authority may decide to place the child and his entrusting's custody to another person or entity, if this is necessary to protect the best interests of the child.*"<sup>178</sup>

The Family Code of the Republika Srpska standardizes the basic provisions:

"Republika of Srpska provides special protection for family (mother and child) in accordance with internationally recognized human rights and fundamental freedoms."<sup>179</sup>

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

i. The Code of Criminal Procedure of Bosnia and Herzegovina<sup>180</sup> (The Criminal Procedure Code of Bosnia and Herzegovina<sup>181</sup>, the Law on Criminal Procedure of the Federation of Bosnia and Herzegovina<sup>182</sup>, the Law on Criminal Procedure of the Republic of Serbian<sup>183</sup> and the Criminal Procedure Code of the Brcko District of Bosnia and Herzegovina<sup>184</sup>) provides

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2007, page 20th

<sup>177</sup> Procedure for protection from domestic violence, Article 380, Family Code of Federation of Bosnia and Herzegovina

<sup>178</sup> Article 147 (1), Family Code of the Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 35/05 and 41/05)

<sup>179</sup> Article 3, Family Code of the Republic of Srpska, ("Official Gazette of RS", No. 54 702, 41/08)

<sup>180</sup> Criminal Procedure Code of Bosnia and Herzegovina, („Official Gazzete of BiH, No. 36/03, 13/05, 48/05, 76/06, 32/07, 76/07, 21/07, 2/08, 12/09, 16/09)

<sup>181</sup> Criminal Procedure Code of the Federation of Bosnia and Herzegovina, ("Official Gazzete of FBiH", No. 35/03, ispr. 56/03, ispr. 37/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09)

<sup>182</sup> Criminal Procedure Code of the Federation of Bosnia and Herzegovina, ("Official Gazzete of FBiH", No. 35/03, ispr. 56/03, ispr. 37/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09)

<sup>183</sup> Criminal Procedure Code of the Republika Srpska, ("Official Gazzate of RS", No. 50/03, 111/04, 115/04, 29/07)

<sup>184</sup> Criminal Procedure Code of the Brcko Distrcit of Bosnia and Herzegovina, („Official Gaazzate of

"careful handling" of a minor when they take actions that the minor is present. This particularly refers to examination, when everyone involved in the process must be circumspect, taking into account the mental development, sensitivity and personal characteristics of the minor so as not to adversely affect the child's development. Juvenile judge, who said the measure juvenile shall ex officio (or on a prosecutor, warden or a guardian to supervise minor) to make a decision on changing the decision and change execution. Since the beginning of the preparatory proceedings the juvenile must have a lawyer.<sup>185</sup>

*"The measures that the court determines to protect witnesses: insurance psychological, social and professional assistance, changing the hearings, control methods of interrogating witnesses of the judge or the presiding judge asking questions directly on behalf of the parties and counsel, testimony through technical means for transferring image and sound, removal of the accused, exceptions to direct evidence, it limits the right of inspection of documents and records, and stretched his attorney, additional measures to ensure the anonymity of witnesses, temporary or permanent anonymity during all stages of talks with the child to ensure the best interests of the child. Do not drop out of sight to the Law on Criminal Procedure conversation with the child victim is always recorded."<sup>186</sup>*

The hearing is recommended in the presence and with the assistance of appropriate professionals (psychologists, psychiatrists, social pedagogues). The child should try not to listen repeatedly to accelerate procedures, avoid contact with perpetrator not to read expert opinion and stop disparaging remarks of defense at the expense of the child in his presence. The hearing of a minor should be done carefully in order to not to be detrimental to the psychological well-being of that minor, especially if that minor is damaged by the offense. The hearing of minors will be done with the help of educators, psychologists, or other professional persons.

The **Family law of the Federation of Bosnia and Herzegovina** regulates relationships in the family through principle that:

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BDBiH“, No. 10/03, 48/04, 6/05, 14/07, 19/07, 21/07, 2/08, 17/09)

<sup>185</sup> Article 342 (1), (2) of the Criminal Procedure Code of Bosnia and Herzegovina, Article 348 of the Criminal Procedure Code of the Republika Srpska and Article 363 (2) of the Criminal Procedure Code of the Brcko District of Bosnia and Herzegovina

<sup>186</sup> Article 154, Criminal Procedure Code of the Republika Srpska, ("Official Gazzate of RS", broj 50/03, 111/04, 115/04, 29/07)



*„Parents are obligated to protect interests of the well-being of child and the State should secured protection of the family and the child in the need through tutelar protection of the children and protection of the children without parental care.”<sup>187</sup>*

The Family law of Federation of Bosnia and Herzegovina has special regulations, which are related to the protection of rights and interests of children in the Article 150:

*„The guardianship authority has official duty to take special measures regarding protection of the rights and the best interest of the child, based on the immediate cognition or notifications about those kind of problems. The guardianship authority will listen a minor child before taking any kind of measures, if a child is capable to undersand what is going on, and the opinion of a child would be considered and respected in the case of measures of saporating the child from the parents.”<sup>188</sup>*

*“The guardianship authority is also obliged ex officio to take special measures to protect the rights and best interests of the child, at the request of one or both parents or ex officio guardianship authority may decide to place the child and his entrusting's custody to another person or entity, if it is necessary to protect the best interests of the child.”<sup>189</sup>*

The **Family Law of the Republika Srpska** ensures special protection to the family, a mother and the child in accordance with internationally recognized Human Rights and basic freedoms.<sup>190</sup>

*Protection issues and providing legal aid to the family and its members is carried on by the municipal authority responsible for social protection. Family and its members enjoy judicial protection, and all agencies, organizations and individuals are required to promptly notify the guardian in respect of children's rights, particularly on violence, abuse, sexual abuse and child abuse”<sup>191</sup>*

The **Family Law of Brcko District of Bosnia and Herzegovina** regulates the relations in the family based on „the parental commitment to ensure protection of the the best interests

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<sup>187</sup> Article 2 (2), Family Law of Federation of Bosnia and Herzegovina, („Official Gazzate of FBiH“, No. 35/05 i 41/05)

<sup>188</sup>Article 150 (1)(5), Family Law of Federation of Bosnia and Herzegovina, („Official Gazzate of FBiH“, No. 35/05 i 41/05)

<sup>189</sup> Article 147 (1), Family Law of Federation of Bosnia and Herzegovina, („Official Gazzate of FBiH“, No. 35/05 i 41/05)

<sup>190</sup> Article 3, Family Law of the Republika Srpska, („Official Gazzate of RS“, broj 54702, 41/08)

<sup>191</sup> Article 13, Family Law of the Republika Srpska, („Official Gazzate of RS“, broj 54702, 41/08)

and well-being of the child, as well as to ensure their responsibilities in the upbringing and education of the child. “<sup>192</sup>

*“The family relations are based on the Brcko District of Bosnia and Herzegovina obligation to ensure the protection of the family, mother and child, in accordance with international conventions in this field and providing foster care for children without parental care.”<sup>193</sup>*

According to the report of the **Ombudsman for Children of Republika Srpska** regarding the status of sexual exploitation, it is also emphasized the necessity of conducting in the best interests of the child.

*“Kids are treated like someone who needs our care and protection, and if there is sufficient evidence to initiate proceedings against the abuser, the child is always treated as a protected victim witness, and during all procedures the obligation of all relevant institutions is to always conduct in the best interest of the child.”<sup>194</sup>*

**ii.** In the Federation of Bosnia and Herzegovina in the case when:

*“offense is committed within the family or close the child environment, the country is taking action to protect the rights and best interests of the child. This implies that they are obliged to provide police protection, guardianship authority and magistrates' court.”<sup>195</sup>*

There are no special forces carried out an investigation in the case of the above crimes, the Prosecution of Bosnia and Herzegovina is in charge of the investigation in all cases. Inside the Prosecution of Bosnia and Herzegovina, there are three separate departments, which deal with certain crimes, but none of them has its own jurisdiction works in which they appear by children or adolescents as victims.

In the Republika Srpska there are special departments within the Ministry of Internal Affairs, which deal with the above issues and with investigating the works, gather evidence related to each individual's work, including child pornography.<sup>196</sup> Police Service collects evidence and investigates and informs the competent prosecutors responsible for the course

<sup>192</sup> Article 1, Family Law of the Brcko District of Bosnia and Herzegovina, (“Official Gazzate of BDBIH, broj 23/97)

<sup>193</sup> Article 2, Family Law of the Brcko District of BiH, (“Official Gazzate of BDBIH, broj 23/97)

<sup>194</sup> "Preventing Exploitation of Children in Southeast Europe," Sexual exploitation of children in the Republika Srpska, Report of the Ombudsman for Children of the Republika Srpska, Banja Luka, 2012

<sup>195</sup> Article 380, Procedure for protection from violent behavior on the family, Family Law of Federation of Bosnia and Herzegovina, („Official Gazzate of FBiH“, No. 35/05 i 41/05)

<sup>196</sup> "Preventing Exploitation of Children in Southeast Europe," Sexual exploitation of children in the Republika Srpska, Report of the Ombudsman for Children of the Republika Srpska, Banja Luka, 2012

of investigation and indictment. From March 2010 within the framework of the Ministry of Internal Affairs of the Republika Srpska, the Criminal Police, the Department formed to prevent the high-tech crime. Within this department special emphasis in the future will be placed on the training and education of staff and combat child pornography.<sup>197</sup>

iii. According to the criminal procedure law in Bosnia and Herzegovina the report crime as “a way of informing the prosecutor on the criminal offense is possible through the application or report.”<sup>198</sup> Registration on the criminal offense is submitted to prosecutor, in written form or orally, while the report is also submitted to the competent prosecutor by an authorized person, but it contains a lot more arguments about the crime committed (statements, pictures, drawings, etc.).

*“The application and the report are not evidence in criminal proceedings, but it provides the first information about the existence of grounds for suspicion of a crime.”<sup>199</sup>*

With the aim of criminal protection of minors in Bosnia and Herzegovina, the Criminal Procedure Code of Bosnia and Herzegovina determines the obligation to report the criminal offenses by:

*„Medical workers, teachers, pedagogues, parents, foster parents, adoptive parents and other persons authorized or obligated to provide protection and assistance to minors, to supervise, educate and raise the minors, are obligated to immediately inform the authorized official or the Prosecutor about their suspicion that the minor is the victim of sexual, physical or any other form of abuse“<sup>200</sup>*

In addition to these mandatory reporting of crimes, there is optional reporting by citizens. Only when the crime was reported to the prosecutor, the prosecutor may order the investigation, if there are grounds for suspicion that a criminal offense has been committed. This rule applies to the territory of both entities, including the Republika Srpska; crime must be reported to be processed. Applications are submitted by the institutions that come into contact with the family or family members, social work centers, schools, health institutions

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<sup>197</sup> The proceedings of the Annual Conference of the Network of Ombudsmen for Children of South East Europe

<sup>198</sup> H. Sijerčić-Čolić, "Criminal Procedure Law" (Book I, "The criminal process operators and criminal acts"), Sarajevo, 2008. page 30

<sup>199</sup> Ibid, page 33

<sup>200</sup> Article 213, Criminal Procedure Law of Bosnia and Herzegovina, ("Official Gazette of BiH, No. 36/03, 13/05, 48/05, 76/06, 32/07, 76/07, 21/07, 2/08, 12 / 09, 16/09)

or any other institutions. If the minor is one of those people who can refuse to testify, he (she) cannot be questioned as a witness, if in given age and mental development is unable to understand the significance of his privilege not to testify. The court according to circumstances and collected evidence provides the process continues.

**iv. Limitation for criminal prosecution expires if elapsed:**

1. Thirty five years from the commission of the criminal offense for which, according to the law, the punishment can be long-term imprisonment,
2. Twenty years after the commission of the criminal offenses for which a sentence of imprisonment can be more than ten years,
3. Fifteen years after the commission of the criminal offense for which a sentence of imprisonment can be more than five years,
4. Ten years after the commission of a criminal offense for which a sentence of imprisonment can be more than three years,
5. Five years from the commission of the criminal offense for which a sentence of imprisonment can be more than one year,
6. Three years from the commission of a criminal offense for which a sentence of imprisonment can exceeded one year or a fine. Obsolescence begins from the moment of the adulthood of the injured party.

**v. National law always protects the interests of the victim, going in her favor.**

"The general rule is that the court, in deciding on the merits of the criminal justice requirements, must fully establish all the facts relevant to the judgment, and in case of doubt whether there is a fact to the detriment of the accused must be taken that it does not exist, or if it is a fact in favor of the defendant must assume that it exists."<sup>201</sup>

**vi. To record data on convictions and the provision of data, the **Criminal Procedure Code of Bosnia and Herzegovina** undertakes:**

*„Article 411*

***Centralisation of data***

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<sup>201</sup>. H. Sijerčić-Čolić, "Criminal Procedure Law" (Book I, "The criminal process operators and criminal acts"), Sarajevo, 2008. Page 328

*Criminal offense of counterfeiting money and putting into circulation, illicit production, processing and distribution of narcotic drugs and poisons, human trafficking, production and dissemination of pornographic material, as well as other criminal offenses in respect of which the treaties provides centralization of data, the Court is required - without delay deliver to the competent Ministry of Bosnia and Herzegovina, the offense and the offender and the final verdict. When it comes to the money laundering offense or an offense in connection with money laundering, information must, without delay, be submitted to the authority of Bosnia and Herzegovina in charge of preventing money laundering.*<sup>202</sup>

Exchange of information with competent authorities in other countries depends on the agreements and conventions on international criminal assistance, with respect to data protection.

### 3.2 Complaint Procedure

**vi.** A child or a minor, according to the **Criminal Procedure Code of Bosnia and Herzegovina** has a legal representative, and the ability to give evidence in writing or orally.

People who are legally authorized to file an appeal are called subjects appeal. In addition to the prosecutor, the right to appeal is extended to the legal representative, marital or non marital spouse of the defendant, parent or child and the adoptive parents, and adoptees. However, if an authorized person does not submit an appeal within the statutory deadline, the first instance verdict becomes final.

**vii.** As we said, when the offense is committed within the family or child's environment, the country is taking action to protect the rights and best interests of the child, which implies the involvement of custodial authority, who shall ex officio make decisions that serve the best interest of the child. As required by law, the participation of minors in criminal proceedings as a criminal offense under the provisions of the **Criminal Procedure Code of Bosnia and Herzegovina**, implies that the trials in which minors are being tried, are closed for media. Also, paragraph 4 Article 86 Criminal Procedure Code of Bosnia and Herzegovina, reads:

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<sup>202</sup> Article 411, Criminal Procedure Law of Bosnia and Herzegovina ("Official Gazette of BiH, No. 36/03, 13/05, 48/05, 76/06, 32/07, 76/07, 21/07, 2/08, 12 / 09, 16/09)

*„When hearing a minor, especially if the minor is victim of an offense, shall be handled carefully, that the hearing would not have an adverse effect on the psychological well-being the minor. If necessary, the hearing will be performed with the help of teachers or other professional.“<sup>203</sup>*

And Article 90 which refers to the recording and examination of witnesses on audio-visual equipment, which reads:

*"The hearing of witnesses may be recorded on audio-visual equipment at all stages of the proceedings. It must be recorded in the case when it comes to minors under sixteen years of age who were injured by the offense, and if there are grounds to fear that the witness can not be examined at trial."<sup>204</sup>*

These provisions are determining participation and testimony of a juvenile in the trial.

## 4 COMPLEMENTARY MEASURES

i. Practice shows that there are no universal standards, nor a developed system for keeping records in cases of violence against children, and also the work of the police and judiciary and other competent institutions is more difficult due to lack of a unified database on violence against children and offenders against children in Bosnia and Herzegovina. For now overall concern about violence against children falls on the centers for social work, police, some non-governmental organizations<sup>205</sup> and a handful of public institutions.

During an interview with representatives of the institution "Cantonal Centre for Social Work" from Sarajevo, we got information about education of professionals who work at this center, dealing with child victims of sexual exploitation and abuse. Namely, all the professionals who are employed in the Centre, those who work with child victims of abuse; social workers, psychologists, educators and lawyers have a completed college education at the appropriate higher education institution, and the exam of competence. In addition to these basic conditions, the majority of employees are in a constant process of further education. Psychologists, social workers and teachers, mostly have finished one of psychotherapeutic training and are licensed to work as a psychotherapist. They very often attend additional programs, training, workshops and seminars on the subject.

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<sup>203</sup> Article 86 (4), Criminal Procedure Law of Bosnia and Herzegovina ("Official Gazette of BiH, No. 36/03, 13/05, 48/05, 76/06, 32/07, 76/07, 21/07, 2/08, 12 / 09, 16/09)

<sup>204</sup> Article 90, Criminal Procedure Law of Bosnia and Herzegovina ("Official Gazette of BiH, No. 36/03, 13/05, 48/05, 76/06, 32/07, 76/07, 21/07, 2/08, 12 / 09, 16/09)

<sup>205</sup> One positive example is the NGO "Women Mostar", issued Handbook for Professionals "How to recognize violence and help child victims of violence?"

Regarding the problem of preventing *violence against children* in Bosnia and Herzegovina, the State passed „Government strategy for fight against children violence 2007-2010“. Based on Report of government strategy implementation, all positive results of this strategy regarding social sector can be seen:

*„Dealing with prevention within social department, we can conclude that almost quarter of questioned examinees (22%) declare existence of counseling center for children, youth and parents. We can see that progress has been made in comparison with research report last year (2009-15%). It is of great importance to note that during 2010 rate of questioned examinees from this sector was lower. Number of users of these counseling centers is significantly reduced. For example, in 2010 there were 656 and in 2009 there were 922 users. It is still a question whether this reduction of 7% reporting units in 2010 resulted in reduced percentage of counsel users by third (30%). According to reports from 2010 and last year reports, competent , professional capacity in counsel centers is prevailed by social workers ,although in lower percentage (53%) while other professions are : lawyers 20%, psychologists 12% and pedagogues 6%. If we take a look at previous reporting period (2009), we can state that in mentioned counseling centers number of lawyers as competent workers has risen.*

*In 2009., sector of social protection in the Republika Srpska published “Practical guide in the case of domestic violence“ which encompasses procedure in case of violence against children, while in Federation of Bosnia and Herzegovina above mentioned “Practical guide in case of domestic violence” was in process of editing during 2009 but it hasn’t been finished until today.*

*According to reports, we can conclude that during 2010. number of coordinating teams that fight against violence of children has grown on a local level. Currently, we have a total of 19 (19%) coordinating teams, in comparison to 12 % according to reports from 2009. In 2010. Bosnian and Herzegovinian Social Services reported the significant growth of registered victims of violence against children. This increase measures the influence of formal Social control in Bosnia and Herzegovina.”<sup>206</sup>*

ii. Children are educated about this problem by the government but just in terms of recommendations and action plans. If we want to ephasize the importance of this problem, raise the public awareness and deal with the problem consequently, we need to involve parents and children together with educated personal. Currently, it is rather disorganized and uncoordinated, because entitets and Brčko District, each canton within Federation of Bosnia

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<sup>206</sup> „Report of implementation of the National Strategy to Combat Violence against Children 2007-2010“, Sarajevo, April 2012

and Herzegovina, as well as each county in the Republika Srpska, separately regulates educational policy.

Regarding the sector for education and raising public awareness through public lectures, seminars etc., following advancement were registered:

*„Number of public discussions, lectures or seminars for professionals or general public regarding the issue of raising awareness of occurrence, characteristics and consequences of violence against children has risen thrice in all of the above mentioned sectors. In fact, during 2009 total number of lectures in all sectors regarding this subject was 385, while in 2010. there were total of 1046 lectures. This fact gives us the right to deduce that community took this problem very seriously and that formal institutions organized great number of public discussions and lectures regarding this subject (see table 3). Especially affirmative information is linked to the sector of education within which 645 lectures have been organized during 2010, unlike the previous year where only 141 lectures were held. After the educational sector, great advancement in these common social activities are reported by police forces where 116 lectures were held during 2010 as opposed to previous year in which only 40 lectures were organized. In addition, all other sectors report significant growth.“<sup>207</sup>*

iii. Bosnia and Herzegovina hasn't carried out these programs on governmental level. Talking to employees from „Cantonal center for social work“ Sarajevo, we found out that this particular center carried out a project of working with bullies - respectively, with male violent offender. They tried to work on the changes in their behaviour, attitudes and prevention of further violent behaviour.

iv. The **Laws of social protection** in Bosnian and Herzegovinian entities, anticipate rehabilitation, integration, resocialization and children care (treatment). These laws include service and day care centers.

In **Canton Sarajevo** there is a social program which gives support to children, victims of violence, exploitation and abuse called „Day care center“, which is for children who work on the street. This project is carried out in partnership between „The Cantonal Center for Social Work “Sarajevo as implementer and Save the Children Norway as donator. Triennial regional project Save the Children Norway was developed because of the need for help in implementation of children rights for protection against all forms of violence, abuse and

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<sup>207</sup> Report of implementation of The National Strategy to Combat Violence Against Children 2007 - 2010“, Sarajevo, April 2012, page 11



exploitation, for children on the streets and for children who work and live in the street – so called „invisible children“ or children under risk.

In **Herzegovina-Neretva Canton** was signed protocol to help the victims of violence, which sets the principles, procedures, housing and financial aid to help victims of violence. It was signed by: the Ministry of Health, Labour and Social Affairs of the Herzegovina-Neretva Canton, the Ministry of Finance of the Herzegovina-Neretva Canton, the Herzegovina-Neretva Canton, NGO "Women of Bosnia and Herzegovina", "Caritas" and "Center for Women". This protocol regulates cooperation between the police, social welfare centers, health institutions, judicial institutions and non-governmental organizations, how to help victims of violence, and referral mechanisms between them.

v. Gender Centre of the **Federation of Bosnia and Herzegovina** established emergency telephone number 1265 for victims of domestic violence in the Federation of Bosnia and Herzegovina. And for the **Republika Srpska** emergency phone was established by number 1264. The number is a free and provides confidential and anonymous information.

**Local Democracy Foundation** has also No. 033-222-000, which victim of violence can call and asked for help. The victims of violence can be addressed by each police department, as well as centers for social work.

vi. These issues were resolved by specific program of work with the victim. Professionals are fully aware of the consequences that violence, especially sexual, has impact on the physical, mental health, socialization and on the future lives of the victims, so they work on repairing those harmful consequences.

State institutions, primarily the Centers for Social Works and NGOs, are working on a voluntary basis. And every victim, in accordance with the provisions and principles of the victims, has a right to be fully informed by all agencies in relation to all information related to their treatment, rehabilitation and information related to the rights that can be exercised.

Child victims are usually placed in the shelters for adult victims of domestic violence, which is not an appropriate practice. In addition, children are placed in other families or institutions for the care of children. The physical safety of the victims is often a problem since there are not appropriate measures or procedures prescribed by the police to commit the removal and disposal of the victims from the environment in which violence occurs until the completed trial and punishment of the perpetrators, although children are considered as protected victims. Protecting the identity of the child victim is not legally regulated precisely;

it also creates an additional problem. Also, there is the problem of ensuring that legal aid child or caregivers because there is no cooperation between the police and the organizations that provide legal assistance.

### III NATIONAL POLICY REGARDING CHILDREN

i. Bosnia and Herzegovina in recent years made very important strategic documents in terms of children's rights, including:

- The Action Plan for the Children of Bosnia and Herzegovina 2002 - 2010<sup>208</sup>
- The Code of Ethics of Research on Children<sup>209</sup>
- The Strategy against Juvenile Delinquency in Bosnia and Herzegovina 2006 - 2010<sup>210</sup>
- Resolution of the fight against violence against women<sup>211</sup>
- Strategy of Bosnia and Herzegovina for resolving Roma people problems<sup>212</sup>
- The National Action Plan for Prevention of Trafficking in Bosnia and Herzegovina 2008 - 2012
- Development strategy of pre-primary education in Bosnia and Herzegovina<sup>213</sup>
- The National Strategy to Combat Violence against Children 2007 - 2010<sup>214</sup>
- Policy on the protection of children without parental care and families at risk in Bosnia and Herzegovina 2006 – 2016
- Resolution on the prevention of juvenile delinquency and treatment in the event of violence among children and youth
- Convention against Discrimination in Education<sup>215</sup>
- Strategy for preventing and combating domestic violence in Bosnia and Herzegovina for the period 2009-2011.<sup>216</sup>
- Resolution on improvement of family protection in Bosnia and Hercegovina<sup>217</sup>
- Resolution on the prevention and treatment of juvenile delinquency in the case of violence among children and youth<sup>218</sup>

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<sup>208</sup> Draft revised in June 2009 years

<sup>209</sup> "Official Gazette of BiH", No. 26/06

<sup>210</sup> "Official Gazette of BiH", No. 14/08

<sup>211</sup> "Official Gazette of BiH", No. 15/08

<sup>212</sup> "Official of Gazette BiH", No. 67/05

<sup>213</sup> Adopted by the Council of Ministers of BiH in February 2005

<sup>214</sup> Issued by the Ministry of Human Rights and Refugees of BiH

<sup>215</sup> UNESCO Convention ratified by the SFRY Convencion against Discrimination in Education since 9<sup>th</sup> October 1963

<sup>216</sup> "Official Gazette of BiH", No. 50/09

<sup>217</sup> "Official Gazette of BiH", No. 50/09

<sup>218</sup> "Official Gazette of FBiH", No. 10/08

- Strategic plan for the prevention of domestic violence for the Federation of Bosnia and Herzegovina 2009-2010<sup>219</sup>
- Action plan for the children of the Republika Srpska 2001-2010<sup>220</sup>
- The strategy for the development of the family 2009-2014.

ii. Save the Children Norway regional office for South-East Europe,<sup>221</sup> led by the UN Convention on the Rights of the Child, seeks to promote and through its cooperation with partner organizations to ensure fulfillment of the rights of every child. Child should be protected from all forms of violence, and if violence happens, it should be ensured that every child has adequate protection. Strengthening the capacity of the Council for Children in recent years, Save the Children Norway has been trying to establish a foothold for the protection of children from all forms of violence at the state level. There for, Bosnia and Herzegovina has meet the requirements of the UN Secretary General to participate in the development of the UN Study on Violence Against Children. As the next step, the first report on violence against children has been made, which provided initial information about what needs to be done in order to create a unified state mechanism which will provide maximum protection to children from all forms of violence, particularly related to physical and sexual violence, which are daily increasing. It is still the main problem nonexistence of public awareness of the dispersion and growth of violence against children in Bosnia and Herzegovina. Another problem is in victims lack of knowledge and ignorance about their rights and possibilities. The third problem lies in the fact that violence against children is not recognized as a problem by an adult who comes in contact with children (parents, police, teachers, counselors, teachers, social workers, health workers and others). Often indiscriminate and unfair professional approach to the treatment of child abuse in the media is also one of the problems.

iii. With regard to sexual abuse and exploitation of children, Report on the Implementation of the National Strategy for Combating Violence against children 2007-2010, registered the following cases:

*"In 2010 were registered 674 children victims of violence, which is a significant increase compared to 2009 year when he recorded 305 child victims of violence. Particularly worrying is the number of child victims of*

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<sup>219</sup> "Official Gazette of FBiH", No. 75/08

<sup>220</sup> "Official Gazette of RS", No. 43/01

<sup>221</sup> From 2012 on it is called: Save the Children (North West Balkan)

*both sexes under the age of 5 years, and a large increase in cases of violence against children aged 15-16 years in the case of both sexes. When it comes to victims of violence by type of violence, sex and age of the victim is still the most common forms of violence against children infliction of light bodily injuries (43%) and physical abuse (20%). In cases of physical violence as victims prevail boys aged 11-18, while in cases of psychological abuse as victims prevail both boys and girls. For information about the so-called "peer violence" in 2010. We registered a dramatic increase in reported cases to the extent of 240 cases compared with 50 cases reported in 2009 year. It still prevalent physical violence and mild form of it (bodily injury) that have 199 registered offender. Males predominate as perpetrators of violence. Criminal and misdemeanor charges, as formal indicators of reported cases of violence against children in Bosnia and Herzegovina, show that in 2010, the police filed 684 applications which representing a significant increase compared to 2009 year when 320 cases were reported. The perpetrators continue to dominate men in the percentage of 84% (76% in 2009, respectively). According to the forms of violence, in 2010 the most common was physical violence, followed by physical abuse, economic exploitation, sexual abuse and negligence. Compared to 2009 there was an increase in all forms of violence. When it comes to the issue of so-called "cyber crime", we recorded a reduction in the establishment of special departments dealing with this issue for 33% of cases in 2009 to 15% in 2010. This information is logical, given the tendency to study cyber crime, especially in terms of quality, within the reporting units mainly positioned at the level of the entity ministries of Interior. We think that this issue has been done much, because the problem of cyber crime, particularly the protection of children from various types of abuse in cyberspace, was "taboo" until a year or two ago, and today we can still speak of the system funneled action. Certainly, these departments should strengthen human resources and finance, and should present the results of their work to the public"<sup>222</sup>*

iv. One of the most significant projects within the National Action Plan for Children 2002 - 2010 was a project by UNICEF in cooperation with institutions of Bosnia and Herzegovina, and the project was called "Strengthening the social protection and inclusion of children in Bosnia and Herzegovina." Here are some details about the project from the Report on the implementation of the Action Plan for Children 2002 - 2010:

*"On the 59th session of the Council of Ministers, held on September 11, 2008 the decision was made about forming a Steering Committee for coordinating of the project entitled "Strengthening the social protection and inclusion of children in Bosnia and Herzegovina." Committee is chaired by the Minister of Civil Affairs,*

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<sup>222</sup> „Report on the Implementation of the National Strategy to Combat Violence against Children 2007 - 2010", Sarajevo, April 2012, pages: 27- 29

*and the members are representatives of UNICEF and the representatives of state and entity institutions, signatories of the Protocol of Cooperation. Management boards at the entity and state level are formed and they are coordinated by the Ministry of Human Rights and Refugees of Bosnia and Herzegovina, through the Expert Team at the state level. The project "Strengthening the social protection and inclusion of children in Bosnia and Herzegovina" is realized completely through the institutions in Bosnia and Herzegovina, including three levels: the level of the community, the level of social security institutions and the level of development and adoption of work policies. In the framework of the project "Strengthening the Social Protection and Inclusion of children in Bosnia and Herzegovina", whose realization is supported by UNICEF, in order to improve child development and parenting capacity improvements, we started with the establishment of 10 integrated centers for parents and children (ICRD) in the Federation of Bosnia and Herzegovina and the Serbian Republic. They will be complementary to all existing municipal services, which provide services in the fields of health, nutrition, education and social protection. They will not replace the existing services in these areas; their aim is to help them to work better and to complement the existing deficiencies in the services that they provide at the municipal level. Thus, the Steering Committee for the coordination of the project decided to initiate the project of creating the integrated center of early childhood development for parents and children in territory of Federation of Bosnia and Herzegovina. Integrated center of early childhood development for the parents and children is a model that aims to promote and achieve a challenging and responsible parenting and early growth and development of children, from birth to age of ten, with a special focus on children from birth to three years of age. UNICEF, in collaboration with the Federal Ministry of Education and Science, Federal Ministry of Health and the Federal Ministry of Labour and Social Policy, created a proposition of integrated center of early childhood development and work programs of the center. Municipals of Novi Grad Sarajevo and Novi Travnik have already implemented activities for the opening of the integrated center. These activities considering the opening of integrated centers are also conducted in the Serbian Republic. "<sup>223</sup>*

v. Establishment of the **Council for Children of Bosnia and Herzegovina** and the adoption of the "Action Plan to combat violence against children Bosnia and Herzegovina 2002 – 2010" significant progress has been made towards the promotion of children's participation in law making, but still not so significant that we could claim that children in Bosnia and Herzegovina are participating in law making process.

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<sup>223</sup> Report on implementation of the Action Plan for Children in Bosnia and Herzegovina 2002- 2010, Sarajevo, June 2011

Despite the fact that Child Rights Committee recommended to Bosnia and Herzegovina to strengthen and support the work of the Council for Children through human and financial resources the situational analysis prepared by two NGOs from Bosnia and Herzegovina; “Our Children” Sarajevo and “Zdravo da ste” Banja Luka, showed that Council for Children of Bosnia and Herzegovina is not functioning well in the practice.

“Not only that State has not done anything with the recommendations of the Committee, the State has allowed the situation in which this body hasn’t worked since 2007. Council for Children was the only mechanism for coordinating policy-making for children and monitoring implementation of the Action Plan for Children. Some of the activities in the domain of Council for Children conducted by the Ministry of Human Rights and Refugees

Herzegovina, in whose shelter and worked Council. Unlike the Federation, who was waiting to activate the mechanism at the level of BiH, the RS government has been developing its own system of mechanisms to protect children and families. In addition to the Child Protection Fund, which operates at the entity level, Council for Children and the Republika Srpska Ombudsman for Children were formed and their financing issue is provided from the budget of the Republika Srpska. In 2011 mandate of the Council of the Republika Srpska has expired and at the moment the process of the formation of new session is going on, in which will participate NGOs as well.

In FBiH, child protection and protection of the family are generally the responsibility of Canton/county in the Brcko District of the Department for Child Protection and completely depends on the economic power of the cantons counties.”<sup>224</sup>

This situational analysis showed also that policy and law making process in Bosnia and Herzegovina carry on without children participation and participation of parents. The only way of children’s influence on decision making process is available in educational institutions through Council of pupils.

*“The policy and law making process in Bosnia and Herzegovina carry on without child participation and participation of parents. Generally, adults hardly accept the right of child to participate, especially government officials. Only in educational institutions children and young people are in position to cooperate with the*

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<sup>224</sup> “NGO report on the situation of children and children's rights in Bosnia and Herzegovina 2009-2011”, prepared by two NGOs: “Our Children” Sarajevo and “Zdravo da ste” Banja Luka with support of Save the Children Norway, page 3; taken from: [www.zastitimodjecuodnasilja.org](http://www.zastitimodjecuodnasilja.org); October 2012

*adults - their teachers. The Framework Law on Primary and Secondary Education in BiH and entity laws regarding education regulate major issues and rules of relations between all participants in the learning process, as well as parents. Based on these laws, schools may adopt rules governing the issue of rules of conduct at school. Though the right of children to participate is well-regulated by legal provisions, and by rule books in the primary and secondary schools, the practice evidently presents resistances, different practices and unequal conditions at the community level for the realization of children's participation. NGOs contribute with their projects to improvement of the atmosphere in the schools for general student activities. We can say that the school system formally ensure pupils' participation in some forms of governance or decision-making in schools during the last year, but it is necessary to work on the functioning and quality improvement of the facilities and programs of these bodies. In the future, special attention should be given to changing the situation regarding participation/ involvement of children in the local community and the local authorities. Research shows that children's participation at this level is passive and indirect, with no possibility of direct active participation and not through intermediaries, "delegates." The access does not mean that children meets the obligations set by adults, it means that children should also participate in the creation of plans and tasks to be addressed in the future. In our study, the largest shift in relation to the period prior to 4 years was recorded in relation to the existence of the Council of pupils in schools and all schools now have this body, but still between 20 and 40% of students not able to participate in decision making or articulating their voices when it comes to the scope of the school curriculum, choosing excursions, leisure activities, decision-making and management of schools, the work of teachers, etc. The reason for this is seen in the lack of support for the work of the Students' Council, not well informed children about their rights and lack of supportive atmosphere in the schools where there is students' participation."*<sup>225</sup>

vi. The group of non-governmental organizations that deal with the rights of the child; Citizens Association "Zdravo da ste" Banja Luka, HUG "Our Children" Sarajevo, Citizens Association "Future" Modrica, Citizens Association "Lighthouse" Prijedor, Citizens Association "Happy Gypsies" Tuzla, Citizens Association "Earth Child" Tuzla, Citizens Association "Association for mentally handicapped persons" in Banja Luka, CA "Be Active" Sarajevo, CA "Center for the Rights of the Child", Konjic, CA "Foundation of Local Democracy" Sarajevo, CA "Our Children" Zenica, CA "Step by Step" Sarajevo, CA "The sun is a common " Trebinje, on the initiative of the Save the Children Norway, signed a

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<sup>225</sup> "NGO report on the situation of children and children's rights in Bosnia and Herzegovina 2009-2011", prepared by two NGOs: "Our Children" Sarajevo and "Zdravo da ste" Banja Luka with support of Save the Children Norway

memorandum of cooperation with the aim of developing partnerships, improving the situation of children's rights in Bosnia and Herzegovina and the formation of NGO Network for the Rights of the Child called "Stronger Voice for Children". At the moment, the work of this NGO Network is supported by the European Commission, Save the Children and UNICEF BiH.

These non-governmental organizations, whose work towards the protection and assistance to women and children victims of domestic violence, are a tremendous social resource of knowledge, practice and experience in dealing with these issues and are positioned as a strong and competent partner of government. In the area of domestic violence, if we exclude the important activities conducted by NGOs on awareness raising and education of the public through various awareness campaigns, workshops, seminars and panel discussions, the most important activities are law and psychosocial support programs and the protection of victims of domestic violence, running shelters and maintaining of emergency telephone hotline for victims of violence. **Law on Protection from Domestic Violence** provides that the provision of physical protection and realization of rights and interests of victims of domestic violence, without fear or danger, the police and the Centre for Social Work and Social Welfare Service may, with the prior consent of the victim; the victim of violence temporarily disposed the relevant accommodation - safe house. **Safe house** is intended for temporary care of women and their children - victims of domestic violence and a realization of the rights of victims of domestic violence to the physical and psychological security, and should provide protection of the life, physical integrity and mental health and prevent further violent behavior in the family. Accommodation in the safe house is done on the basis of a decision adopted by the competent social work center, or the relevant police station.

## IV OTHER

## V CONCLUSION

While researching on this topic, we came to those brief conclusions:

- The majority of the State party's laws have been harmonized with the provisions of the Convention on the Rights of the Child, but there are still some of them which will need to be harmonized with the provisions of the Convention. Since Bosnia and Herzegovina has recently ratified **Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse**, it will mean that Bosnia and Herzegovina will



need to harmonize domestic legislation according to this Convention; especially when it comes to domestic criminal laws, which are in some provisions different than Convention's provisions.

- The big problem for the effective implementation of children rights in Bosnia and Herzegovina are the State party's complex political and administrative structure, (two entities, ten cantons and administrative districts) and each of this administrative part has different regulations, what means that children of Bosnia and Herzegovina are being subject to variations in the fulfilment of their rights depending on the territory in which they reside. Due to this problem, Child Rights Committee recommended to Bosnia and Herzegovina:

*„The Committee recommends that the State party consider enacting a comprehensive child rights Act at the national level, which fully incorporates the principles and provisions of the Convention and its Optional Protocols and provides clear guidelines for their consistent and direct application throughout the territory of the State party.“<sup>226</sup>*

- One of the crucial problems for activism in the field of children rights in Bosnia and Herzegovina is the fact that State doesn't fund enough child rights bodies and organizations, which makes them to „feel alone” in this field. Getting in the contacts with the centers for social work, we realized that they should also be provided by more sources as well as there should be more organized „safe houses“ for the victims of sexual abuse and exploitation.

*„Rationalize the work of the various child rights bodies and provide them with the necessary human and financial resources to carry out their role with efficiency (...) Establish a budgeting process which adequately takes into account children's needs at the national and territory levels, with clear allocations to children in the relevant sectors and agencies, as well as specific indicators and a tracking system.“<sup>227</sup>*

- One of the aggravating circumstances during our research was the fact that there is not data archive with the information about the case of domestic violence of children or information about sexual abuse of children, sexual exploitation of children; or there is but it is hard to approach to that kind of information.

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<sup>226</sup> Committee on the Rights of the Child, Sixty - first session, 17 September – 5 October 2012, Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Bosnia and Herzegovina, CRC/C/BIH/CO/2-4, 5th October 2012

<sup>227</sup> Committee on the Rights of the Child, Sixty - first session, 17 September – 5 October 2012, Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Bosnia and Herzegovina, CRC/C/BIH/CO/2-4, 5th October 2012

- The positive thing about State's involvement in this field of children rights is newly adopted National Strategy to Combat Violence against Children 2011- 2014 as well as newly ratified Council of Europe Convention on the Protection of Children against Sexual Exploitation and Abuse, which will enter into force on 1<sup>st</sup> March of 2013. We honestly hope that those two important documents for Bosnia and Herzegovina will be implemented completely and that future generations of Bosnian kids will benefit from it.

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**National Researchers**

Paulina Bače

Martina Bosak

Nives Gabrić

Katarina Garma

Anja Lučić

Tina Matić

Iva Mihalinec

Dora Skalicki

Vedrana Smlatić

Petra Terzin

**National Coordinator**

Marko Dolenec

**National Academic Advisor**

doc. dr. sc. Ivana Milas Klaric

## I INTRODUCTION

### 1 GENERAL

#### Equal Rights

i. According to the research conducted by Freedom House, a non-governmental organisation for the promotion of freedom, which covered events that happened in the period from 1 January 2011 to 31 December 2011 in 195 countries and 14 territories, Croatia scored a 2 for civil liberties on a scale of 1-7 (1 signifies the highest level of freedom and 7 the lowest level of freedom). Countries and territories with grade 2 have less civil liberties, due to various factors such as the limited independence of the media, limiting union activity, and discrimination against minority groups and women.<sup>1</sup>

Based on the Freedom House survey, which included a range of civil rights and freedoms that were respected and less respected, and the grade that Croatia was given, I have decided which freedoms to present as the least respected. These are gender equality, minority rights and sexual orientation.

The Constitution of the Republic of Croatia prohibits **gender discrimination**. Nevertheless, a high percentage of women are unemployed and earn less than men. Under the Gender Equality Act 2008 women should be equally represented in the lists of candidates, but only 35 percent of candidates for the elections in December 2011 were women. Also, a large and under-recognized problem in Croatia is domestic violence against women.<sup>2</sup> “The Ombudsman notes that the legislative framework for combating bullying exists, and that it is being improved and developed through application. What does not exist is a system of measures to help and support victims of violence and their children when the repressive apparatus has done its part in the prosecution of offenders.”<sup>3</sup> Respect for the rights of minorities has improved over the last decade, although the Serbian population continues to face harassment from the local population.

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<sup>1</sup> Freedom House, Freedom in the world, Washington, viewed on 14 August 2012, <http://www.freedomhouse.org/report/freedom-world/2012/croatia>

<sup>2</sup> Freedom House, Freedom in the world, Washington, viewed on 14 August 2012, <http://www.freedomhouse.org/report/freedom-world/2012/croatia>

<sup>3</sup> Višnja Ljubičić, “Izvješće o radu za 2011”, Ombudsman for Gender Equality, viewed on 14 August 2012, [http://www.prs.hr/attachments/article/97/Izvjesce\\_o\\_radu\\_za\\_2011\\_Pravobranitelja\\_ice\\_za\\_ravnopravnost\\_spolova\\_.pdf](http://www.prs.hr/attachments/article/97/Izvjesce_o_radu_za_2011_Pravobranitelja_ice_za_ravnopravnost_spolova_.pdf)

Despite the Constitutional Act on the Rights of National Minorities 2002 that enhances the protection of the status of **national minorities** in the society and the method of selecting their representatives for the participation in public life and administration of local affairs through councils and representatives of national minorities in the units of self-government, the presence of minorities in the public sector is insufficient. Around 70 000 Serbs are registered as refugees. The Action Plan for an accelerated housing program to assist returnees was fully implemented in October 2011, but further improvement in housing is still needed.<sup>4</sup> The Roma minority also faces a lot of discrimination, but on a much wider scale (access to education, welfare, healthcare, employment and adequate housing), and with widespread poverty. There has been progress in education, especially pre-school education, while further progress in ensuring that Roma children complete primary and secondary education is very low. Many Roma don't have a settled status (permanent residence and citizenship), which creates difficulties when it comes to providing services, access to education, healthcare and free legal aid. All these examples are the reason why unemployment is high despite various measures, such as vocational training for young Roma women.<sup>5</sup>

The Anti-Discrimination Act 2008<sup>6</sup> provided for the first time protection against discrimination based on **sexual orientation**. It was only in 2008 that the legal framework of protection was formed, while its implementation in practice is still in development.

Based on the report of the Ombudsman, which integrated the reports of all ombudsmen, the conclusion is that the overall number of complaints in relation to 2010 did not increase, but there was an increase (from 45 in 2010 to 60 in 2011) in the number of cases in which the Ombudsman for Gender Equality detected discrimination.<sup>7</sup> The largest increase is seen in the case of gender discrimination, while complaints regarding sexual orientation are slowly

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<sup>4</sup> Freedom House, *Freedom in the world*, Washington, viewed on 18 August 2012, <http://www.freedomhouse.org/report/freedom-world/2012/croatia>

<sup>5</sup> European Commission, "Izvešće o napretku Hrvatske za 2011.", *Delegacija Europske unije u Republici Hrvatskoj*, viewed on 18 August 2012, [http://www.delhrv.ec.europa.eu/files/file/articles-hr\\_rapport\\_2011\\_en-1318419216.pdf](http://www.delhrv.ec.europa.eu/files/file/articles-hr_rapport_2011_en-1318419216.pdf)

<sup>6</sup> „This Act provides for the protection and promotion of equality as the highest values of the constitutional order of the Republic of Croatia, creates assumption for the achievement of equal opportunity and for protection against discrimination on grounds of race or ethnic background or skin color, sex, language, religion, political or other opinion, national or social origin, property status, trade union membership, education, social status, marital or family status, age, health status, disability, genetic heritage, gender identity, expression or sexual orientation“ (The Anti – Discrimination Act, Official Gazette, 85/08, Art 1.).

<sup>7</sup> Of 188 received complaints, 16 cases (8.5%) were related to gender discrimination.

increasing as they did in 2010 and 2009 as well. Their number is still significantly lower than expected, which indicates that people are not familiar with the possibility of addressing the Ombudsman for Gender Equality, and those who are familiar are still reluctant to use legal instruments for protection. The predominant discriminatory bases in proceedings before courts are race, gender and sexual orientation, and the highest number of cases relates to employment, hate crimes and violence during the Pride parade in Split.<sup>8</sup> "The distribution of homophobic and transphobic hate crimes is greatest in the context of maintaining Pride parades in Croatia. In 2011 the first Pride parade in Split was jeopardized by violence, when more than 3500 protesters threw rocks, bottles and other objects at the participants of the Pride parade. Eight people were injured and the police recorded 44 cases of hate crimes based on sexual orientation."<sup>9</sup>

### Family Protection

ii. Neither the sources of family law, nor the Constitution of the Republic of Croatia itself contain an exact definition of family. In the primary source of family law, the Family Act (Official Gazette, 61/11), there is no legal definition of the family. "The family is under special protection of the Republic. Marriage and legal relations in marriage, cohabitation and family are regulated by law."<sup>10</sup> the constitutional norm is a norm of a categorical nature and requires special consideration for the needs of the family at different times. The reluctance of the legislator for a more durable statutory definition of family determination is conditioned by the realization that family relations are not static and that endless processes take place in them that deprive or diminish the initial meaning of existing legal norms.<sup>11</sup>

"Family members are spouses and common-law spouses, former spouses and common-law spouses, relatives by blood in a direct line, adoptive parents and adopted children, relatives of the lateral line to the third degree and relatives by marriage up to the second degree"<sup>12</sup> –

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<sup>8</sup> Jurica Malčić, "Izvešće o pojavama diskriminacije za 2011.", Republic of Croatia, Ombudsman, viewed on 19 August 2012, <http://www.ombudsman.hr/dodaci/Izvje%C5%A1%C4%87e%20o%20pojavama%20diskriminacije%20za%202011.pdf>

<sup>9</sup> Amnesty International, "Nezaštićeni", Amnesty International Croatia, viewed on 19 August 2012, <http://amnesty.hr/wp/wp-content/uploads/2012/06/Neza%C5%A1ti%C4%87eni.pdf>

<sup>10</sup> Constitution of the Republic of Croatia (consolidated text, Official Gazette, 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10), Art. 61.

<sup>11</sup> Mira Alinčić, "Obitelj u obiteljskom zakonodavstvu", *Revija za socijalnu politiku*, viewed on 20 August 2012, <http://www.rsp.hr/ojs2/index.php/rsp/article/viewFile/579/568>

<sup>12</sup> Criminal Code (Official Gazette, 57/11), Art 89(30)



the purpose of the of dull recital of family members in the Criminal Code is not to determine who makes close family and who extended family, but who of the family members can be punished under it.

The status of marriage in Croatia is regulated by the Family Act. The status of marriage is provided only for a heterosexual community if it fulfils the other two hypotheses for the existence of marriage<sup>13</sup>.

According to the Croatian Bureau of Statistics, the average age for the first marriage increases with the passage of time and development. Thus, the average age for the first marriage in 2000 was 28.6 for men, while for women it was 25.3. The data from 2010 indicate that the average age is growing fast, so that the average age for the first marriage was over 30 for men, or more specifically 30.1, and for women it was over 27, or more specifically 27.2<sup>14</sup>

### **Child Protection**

iii. The Convention on the Rights of the Child is considered a document that for the first time included all children's rights, incorporated children's rights into human rights and is a milestone in the treatment of the latter. Therefore, it will be described the general status of the child before 1992, when Croatia ratified the Convention, and the situation today. The former approach and attitude towards children's rights, as seen through our (family) legislation was completely different than it is today. Children were not perceived as a special group to which special measures of protection should be applied, but were treated incidentally. Parental rights were the starting point and parents were always mentioned in the first place (in relation to support, education, etc.). Thus, the Marriage and Family Relations Act 1978, which regulates the relationship between parents and children, talks primarily about the parental right - Art. 69 "Parents have the right and duty to keep their underage

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<sup>13</sup> For the existence of a marriage it is necessary: 1. that the bride and groom are persons of a different sex, 2. that the bride and groom gave their consent to the marriage, 3. that the marriage in a civil ceremony was contracted before a registrar or that the marriage in a religious ceremony was made under the provisions in Article 8 and Article 20, Paragraph 1 and 4 of this Act. (Family Act, Official Gazette, 61/11, Art 24).

<sup>14</sup> Croatian Bureau of Statistics, "Prirodno kretanje stanovništva u 2010", viewed on 19 August 2012, [http://www.dzs.hr/Hrv\\_Eng/publication/2011/SI-1439.pdf](http://www.dzs.hr/Hrv_Eng/publication/2011/SI-1439.pdf)

children safe and ensure that they are alive and healthy" or Art. 71 "Parents have the right and duty to ensure that their underage children have an education".<sup>15</sup>

In the Constitution of 1990 that was influenced by the then awareness and international law, the term "child" was only mentioned once. "A physically and mentally disabled and socially neglected child is entitled to special care, education and welfare."<sup>16</sup>, while in other cases children were treated as passive subjects. Almost always, they were dependent on their parents in exercising their rights.

In contrast, the new Family Act, which is under the influence of the Convention, approaches the parent - child relationship in a completely different way. The relationships have been established so that the child's rights and duties are in the first place, parental rights are no longer mentioned – they are replaced by the term parental care, which consists of the duties, responsibilities and rights in order to protect the child's welfare. A parent cannot relinquish the care for their child, and that care may be limited and taken from the parent by the relevant authorities for the reasons stated by the Family Act.

The norms of the present Constitution, in relation to children's rights, have not progressed much since 1990, and should be updated and incorporate the principles of the Convention. In such a fundamental document childhood should be recognized as the comprehensiveness of developmental and active needs of children as equal citizens.

Furthermore, the Convention has established new legal standards such as "the best interest of the child" and "child benefit" that must be implemented in the national legislation in order to fulfil the full purpose of the latter. In all actions concerning the child, Member States are obligated to give priority to the best interest of the child, no matter who undertakes them. In Croatia, a lot has been done concerning the implementation of the Convention since all of the laws and regulations follow the Convention, but nevertheless we are still far from the desired goal. It is imperative that these legal standards prescribed by the Convention be implemented and that they obtain more specific content because every time an excessive event occurs we realize how little we invest in child care and prevention programs.<sup>17</sup>

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<sup>15</sup> M. Jelavić, "Zaštita dječjih prava nije među prioritetima", *Civilno društvo*, vol. 34, winter 2009, p. 13

<sup>16</sup> Constitution of the Republic of Croatia (Official Gazette 056/1990), Art 63

<sup>17</sup> M. Jelavić, "Zaštita dječjih prava nije među prioritetima", *Civilno društvo*, vol. 34, winter 2009, p. 13-14.

Awareness of the importance of the problem of violating children's rights has grown throughout history and the number of reported cases has grown in parallel as well. The approach to the problems of children's rights changed as awareness grew. In recent years, this awareness has been growing more rapidly, the public is more sensitive so more and more cases of violation of children's rights are revealed. The media give more and more space to issues such as violence against children, children's rights, and the relevant experts and representatives of civil society are invited to participate in TV shows and printed media. Today, the problems of children's rights are approached from a wide range of options - from the side of the civil society, the media, research, humanitarian actions to the establishment of the Office of the Ombudsman for Children in 2003, by which the children became recognized as a distinct social group that is entitled to special protection, and the "Brave phone". All of this is aimed at raising public awareness and the responsibility of every citizen to protect children. The goal of this comprehensive approach is the active involvement and the participation of children in making decisions that affect them<sup>18</sup>.

A new major issue and concern when it comes to children's rights themselves is their violation through the electronic media and the lack of education of teachers and parents on this topic.

Today, more and more information is available on the Internet to adults, young people and children, so responsibility in the handling, use and understanding of that information is growing too.

Progress in this area is visible. On 5 June 2012 a Strategic Partnership Agreement to establish a Centre for Safer Internet was signed at the Police Directorate by seven institutions. The Centre for Safer Internet is part of the IPA 2009 twinning project "Strengthening capacities in the field of prevention of sexual exploitation and abuse of children and providing assistance to vulnerable crime victims" and one of its goals is providing the possibility of unilateral online reports of illegal, harmful and dangerous content and activities.<sup>19</sup>

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<sup>18</sup> H. Hrpka, J. Tomić, "Vrijeme velikog pomaka", *Civilno društvo*, vol. 34, winter 2009, p. 16-17.

<sup>19</sup> Ministry of the Interior of the Republic of Croatia, Sporazumom o strateškom partnerstvu uspostavljen Centar za sigurniji Internet, viewed on 25 August 2012, <http://www.mup.hr/127413.aspx>

A long-time social problem is the violation of children's rights by the media. The problem assumed major proportions in 2004 when around the end of October the Committee on the Rights of the Child expressed concern caused by the violation of the privacy rights of children in the Croatian media. Sensationalism in the media took upon itself the obligation to inform the public and many public media at the time followed that trend, and not just the tabloids.<sup>20</sup>

Today the situation has improved, although the situation is still worrisome because editors, publishers, etc., still do not notice in many situations that the child's well-being is seriously compromised by particular media coverage.

Furthermore, The Institution of the Ombudsperson for Children was established in 2003 as the first specialized institution of its kind in The Republic of Croatia. Its goal was to protect and promote children's rights and interests. The urge for establishing the institution came from recommendations of The UN Committee on the Rights of the Child (1996) which recommended the establishment of an independent watchdog body. The scope of The Ombudsperson for Children had been laid down in The Ombudsperson for Children Act (Official Gazette 96/2003). The act safeguards, monitors, and promotes the rights and interests of Croatian children. In addition, it is based on The Constitution of The Republic of Croatia, The UN Convention on the Rights of the Child, other international documents and the legislation of The Republic of Croatia. The Ombudsperson for Children acts on the basis of complaints, or on his or her own initiative, whether in responding to individual violations of children's rights and interests, or in general. The Ombudsperson for Children is appointed by the Croatian Parliament for a period of eight years, acts independently and autonomously, adhering to principles of equity and morals.<sup>21</sup>

iv. Relevant legislation in the implementation of international agreements is the Constitution, the Act on the Conclusion and Implementation of International Agreements (Official Gazette, 28/96), the Vienna Convention regarding the law on international

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<sup>20</sup> UN report: Hrvatski mediji krše prava privatnosti, Index, viewed on 25 August 2012, <http://www.index.hr/vijesti/clanak/-una-hrvatski-mediji-krse-prava-privatnosti-djece/246797.aspx>

<sup>21</sup> M.Hrabar et al, "Evaluation of the institution of the Ombudsperson for Children", viewed on 26 October 2012, <http://www.dijete.hr/hr/component/content/article/66-ostalo/756-evaluacija-institucije-pravobranitelja-za-djecu.html>

agreements, which Croatia has accepted by a notification of succession to the UN Secretary General and the Vienna Convention on succession regarding international agreements, which refers to the specific problem of state succession.

The Constitution of the Republic of Croatia stipulates in Chapter VII who is in charge of concluding international agreements, which depends on the nature and content of the international agreement.<sup>22</sup> As regards the Act on the Implementation of International Agreements, it provides a procedure for the conclusion and execution of any international agreement including the loan and guarantee agreements between the Croatian and international financial institutions to fund individual projects.

The relationship between the international and domestic law is based on the monistic principle. This is what the Croatian Constitution tells us about it: "International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia, and have primacy over the law. Their provisions may be amended or repealed only under conditions and in the manner specified therein, or in accordance with the general rules of international law."<sup>23</sup>

Legal monism understands that national law and international law constitute a single legal system, and the legal rules of international law can be directly applied in the courts and other state bodies, with no added regulatory activities of the parliament or the government.<sup>24</sup>

The Socialist Federal Republic of Yugoslavia ratified the Convention on the Rights of the Child on 3 January 1991. Since Croatia was a part of it to 25 October 1991, it was decided, on the basis of the Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia on 25 June 1991 and the Decision of the Croatian Parliament, and the

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<sup>22</sup> "(1) The Croatian Parliament acknowledges international agreements which require the adoption or amendment of laws, international agreements of military and political nature and international agreements that are financially binding on the Republic of Croatia. (2) International agreements which give international organizations or alliances powers derived from the Constitution of the Republic of Croatia are acknowledged by a two-thirds majority vote of all the members of the Croatian Parliament. (3) The President of the Republic shall sign the instrument of ratification, accession, approval or acceptance of international agreements approved by the Croatian Parliament in conformity with paragraphs 1 and 2 of this Article. (4) International agreements not subject to ratification by the Croatian Parliament are concluded by the President of the Republic on the proposal of the Government or the Government of the Republic of Croatia itself " Constitution of the Republic of Croatia. (Official Gazette, 76/10), Art 140.

<sup>23</sup> Constitution of the Republic of Croatia (Official Gazette 76/10), Art 141.

<sup>24</sup> S. Rodin, T. Čapeta, Učinci direktiva Europske unije u nacionalnom pravu, viewed on 30 August 2012, [http://www.pravo.unizg.hr/\\_download/repository/Direktive\\_final\\_2008%5B1%5D.pdf](http://www.pravo.unizg.hr/_download/repository/Direktive_final_2008%5B1%5D.pdf)

succession of SFRY of 8 October 1991, that Croatia was to be considered a party to the conventions that SFRY and its predecessors (Kingdom of Yugoslavia, the Federal People's Republic of Yugoslavia) ratified. One of the accepted conventions was the Convention on the Rights of the Child. Therefore, Croatia has been considered a party to the Convention since its independence, i.e. 8 October 1991, and has included it in its own legislation by ratifying it on 12 October 1992.<sup>25</sup>

Croatia has made a reservation, which reads: "The Republic of Croatia reserves the right not to apply Article 9, Paragraph 1 of the Convention since the internal legislation of the Republic of Croatia provides the right of the competent authorities (centres for social work) to decide on the separation of children from their parents without prior judicial review".<sup>26</sup> However, on 26 February 1998 the Croatian Government adopted the "Decision on the withdrawal of the reservation to Article 9, Paragraph 1 of the Convention on the Rights of the Child ", so that today there are no more reservations to the Convention.<sup>27</sup>

Since 1992, when Croatia ratified the Convention on the Rights of the Child, a lot has changed regarding the rights of the child and even the status of the child itself, pointing to the positive implementation of the Convention in its large majority. Children's rights in the Convention can be divided into: survival rights, development rights, participation rights and protection rights.

A big step has been made in the normative area, i.e. in the implementation of the Convention on the Rights of the Child into national legislation. Almost all of our laws and regulations follow the Convention. Adoption of the Act on the Ombudsman for Children in 2003, amendments to the Criminal Act, Family Act, Criminal Procedure Act, etc. are getting closer all legislation to the Convention. In the area of health care are all aligned to the Convention Regulations, e.g. the state is the main insurer of healthcare for vulnerable groups and compulsory health insurance is secured for people under 18, who have permanent or temporary residence in Croatia.

Furthermore, according to the Convention, children have the right to an adequate standard of living, and if their parents or guardians cannot afford such a standard, the state has to

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<sup>25</sup> United Nation Treaty Collection, viewed on 28 August 2012,  
[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en#3](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#3)

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

help them. Thus, under the Child Support Act, a parent or other person designated by law is entitled to financial support for child support. The funds allocated for child support amounted to about 0.5% of GDP in 2008 and the first half of 2009.<sup>28</sup>

## 2 THE LANZAROTE CONVENTION

i. Croatia ratified the Convention on the Protection of Human Rights and Fundamental Freedoms on 5 November 1997.

ii. The Republic of Croatia signed the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Violence on 25 October 2007, ratified it on 21 September 2011, and the Convention entered into force on 01 January 2012. There are no reservations to the Convention.<sup>29</sup>

v. The Republic of Croatia follows the monistic principle, which means that international agreements are above the law and so is the Convention itself. International agreements are implemented directly. Therefore, in order for a legal rule of international law to have an application in the national legal order, there need not be a legal norm, i.e. an implementing law that allows it. The Lanzarote Convention is implemented directly.

vi. The question has been answered under number v.

vii. The question has been answered under number v.

vii. Croatia has not made a reservation to the Convention.

## II NATIONAL LEGISLATION

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<sup>28</sup> A. Brajša-Žganec et al., *Analiza stanja prava djece i žena*, UNICEF, viewed on 31 August 2012, [http://www.unicef.hr/upload/file/370/185135/FILENAME/Analiza\\_stanja\\_prava\\_djece\\_i\\_zena.pdf](http://www.unicef.hr/upload/file/370/185135/FILENAME/Analiza_stanja_prava_djece_i_zena.pdf)

<sup>29</sup> Council of Europe, *Zaštita djece od seksualnog iskorištavanja i seksualnog nasilja*, viewed on 28 August 2012, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=1&DF=&CL=ENG>

## 1 GENERAL PRINCIPLES OF THE JURISDICTION

i. Croatia is a small country situated in Middle Europe. But the size of the country isn't important when history matters. Croatia has a big history of its state and governmental regime which has changed a lot during the centuries. Not being free and independent country until modern history (1990-ies) was the thing that influenced on this county a lot and left some marks on it permanently. In addition to that you can probably assume that today's independence of Croatia was achieved by a long history of struggle. In the last century Croatia was a part of Yugoslavia and had its own limited independence in internal political decisions and matters. But, the reality was much different and Croatia wanted to gain its independence.

In 1991 Croatia aimed to leave Yugoslavia as a sovereign country, while the Communist leaders of Serbia directly and by manipulating the Serbian minority in Croatia opposed the dissolution of Yugoslavia and wanted Croatia to remain a part of Yugoslavia dominated by Serbian majority and leaders of Serbian Communist party.. That's the reason why the war started. It lasted for 5 years and the result was Croatian independence.

On January 15, 1992, the Republic of Croatia was recognized as a sovereign state by the Ministerial Council of the European community and on the same day it was also recognized by many European and non-European countries. The Republic of Croatia was admitted as a full member to the United Nations at the 45th meeting of the General Assembly of the United Nations on May 22, 1992.

Croatia has been independent for almost 22 years and since it established as a free and sovereign country and its governmental regime hasn't changed much with exception regards the rule of the president of the republic whose authorities were seriously declined in the year of 2000/2001.

According to the Croatian Constitution, the government of Croatia is organized on the principle of the separation of powers into the legislative, executive and judicial branches.



The President of the Republic is the head of state, elected directly by the people, for a term of five years. It can be elected for a maximum of two terms<sup>30</sup>. The President of the Republic shall represent the Republic at home and abroad, be responsible for abiding by the Constitution, and ensure the continuance and unity of the Republic and the regular functioning of government. The president is commander-in-chief of the armed forces and Chairman of the National Defense Council.

The Government of the Republic of Croatia consists of a Prime Minister, Ministers and other members. They must exercise executive powers in conformity with the Constitution and law. All decisions, operations, organizations must be regulated by law and by procedural rules. The Government is responsible to the Parliament. The Prime Minister, ministers and members of the Government are jointly responsible for the decisions made by the Government and are personally responsible for their respective departments<sup>31</sup>.

The judicial power is exercised by courts, which are autonomous and independent. They administer justice in accordance with the Constitution and law. There is a Supreme Court, as the highest court, with the duty to ensure uniform application of laws and equality of citizens. There are also commercial courts, as a separate judicial branch. The establishment, jurisdiction, composition and organization of courts and court proceedings are regulated by law. Judges shall, in conformity with law, enjoy the same immunity as representatives of the Croatian Parliament. Judicial service is permanent and the Constitution sets the conditions when a judge may be relieved of his duties. A judge may not be transferred against his will. Judges may be brought to disciplinary proceedings in front of State Judiciary Council composed of a president and 14 members. According to the Constitution, the members of the State Judiciary Council are elected by the Croatian Parliament (Sabor) for a period of eight years<sup>32</sup>.

ii. Human rights were always very important in Croatian legislative. That is why they were immediately mentioned in the Constitution which was delivered during the time when Croatia fought for its independence. The Constitution was adopted in 1990, actually 22<sup>nd</sup>

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<sup>30</sup> Constitution of the Republic of Croatia, Articles 94 - 107, Official Gazette (NN 85/10)

<sup>31</sup> Ibid, art. 108 - 117

<sup>32</sup> Ibid, art. 118 - 124

December 1990 by Croatian Parliament. At that moment the strongest political power in the parliament was popularly-elected, right-of-centre Croatian Democratic Party (HDZ). It is very important to mention that before declaring the independence the referendum regards the independence was held in Croatia. Practically 90% of the voters voted in favour of independence. On the basis of this fact we can state that the independence was the policy of all political options active in Croatia. Croatian Constitution is often referred to as “Christmas Constitution,” anticipating its departure from the ailing Yugoslav Federation. Due to all that there is no Bill of Rights in Croatia.

Human rights are mentioned in the Constitution and they are divided into many types, such as: fundamental, personal, political, social and cultural rights<sup>33</sup>. Every human being has right to live and there is no capital punishment in Croatia. Man's freedom and personality are inviolable and nobody can be deprived of liberty, nor can liberty be restricted if so isn't specified by law. Furthermore, no one can be arrested or detained without a written court order based on law. Such an order shall be read and given to the arrested person at the moment of arrest. The arrested person shall be immediately informed in a way understandable to him of the reasons for arrest and of his rights determined by law. Any person arrested or detained shall have the right to appeal to the court, which shall without delay decide on the legality of the arrest.

There are some specific provisions due to children but there are also some provisions from which we can conclude that they are very important for children. One of those provisions is that all citizens are guaranteed respect for their family life, dignity, reputation and honour. Or the provision related to education which says that Primary education shall be compulsory and free. That means that all children must attend elementary school in order to gain fundamental education. Also it says that the costs of it are provided by the country. There are couple of Provisions that are specifically oriented on children and their protection: One of them says that it is parents duty to bring up, support and educate their children, and that they shall have the right and freedom to decide independently on the upbringing of their children. They are also responsible to ensure full and harmonious development of their children personalities. Nevertheless, the parents are not the only one who should take care

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<sup>33</sup> Ibid, art. 14 - 70

of the children. Due to the Constitution everyone shall have the duty to protect children and also, helpless persons. Children can't be employed before reaching the legally determined age, nor may they be forced or allowed to do work which is harmful to their health or morality. When community can't protect children in a necessary amount the State shall take special care of parentless minors or parentally neglected children. But, not only parents and whole community have obligations to children. According to Constitution children have some obligations too. They are bound to take care of their old and helpless parents.

iii. Constitutional judicature was introduced in the Republic of Croatia in 1963 and the Constitutional Court began to work in 1964. It was divided in two historical periods:

(1) Constitutional judicature in the former Socialist Republic of Croatia from 1963 to 1990 - the period when Croatia was one of the six federal units (republics) of the former Socialist Federal Republic of Yugoslavia and

(2) Constitutional judicature in the Republic of Croatia after 1990 - the period after the Republic of Croatia gained independence and sovereignty.

The work of the Constitutional Court is regulated by the Constitutional Act on the Constitutional Court of the Republic of Croatia published in "Narodne novine", No. 99/99 of September 29, 1999, and the text of the Constitutional Act on Revisions and Amendments of the Constitutional Act on the Constitutional Court of the Republic of Croatia published in "Narodne novine", No. 29/2002 of March 22, 2002.

In the first article of the Act it is stated that This Constitutional Act regulates conditions and procedure for the election of judges of the Constitutional Court of the Republic of Croatia and termination of their office, conditions and terms for instituting proceedings for the review of constitutionality and legality, procedure and legal effects of its decisions, protection of human rights and fundamental freedoms are guaranteed by the Constitution and other issues of importance for the performance of duties and functions of the Constitutional Court.

This Act considered to be the part of the Croatian Constitutional System consisting of the Constitution by itself and this Act.

In accordance with the Constitution Constitutional Court consists of thirteen judges who are elected by the Parliament upon proposal of the Parliamentary committee which has jurisdiction regards constitutional matters. They are to be elected for a term of eight years, from among outstanding jurists, especially judges, public prosecutors, lawyers and university professors of law. The court has its own president who is elected by the judges of the Constitutional court for a term of four years. The judges of the Constitutional Court may not perform any other public or professional duty and they enjoy the same immunity as members of the Croatian Parliament. Also, a judge of the Constitutional Court may be relieved of office before the expiry of the term for which he was elected if he so requests, if he is sentenced to a term of imprisonment, or if he is permanently incapacitated for performing his office, as established by the Constitutional Court itself After understanding the way the Constitutional Court is organized it is important to know what are his specific duties.

It: - decides on the conformity of laws with the Constitution and may repeal a law if it finds it to be unconstitutional;

- decides on the conformity of other regulations with the Constitution and law and may repeal or annul any other regulation if it finds it to be unconstitutional or illegal.;

- protects the constitutional freedoms and rights of man and citizen in proceedings instituted by a constitutional complaint;

- decides jurisdictional disputes among the legislative, executive and judicial branches;

- supervises the constitutionality of the programmes and activities of political parties and may ban their work if their programme or their activities threaten violence against the democratic constitutional order, independence, unity or territorial entirety of the Republic of Croatia;

- supervises the constitutionality and legality of elections and the republican referendum and decides electoral disputes which do not fall within the jurisdiction of courts;

- at the proposal of the Government of the Republic of Croatia, establishes that the President of the Republic is permanently unable to perform his duties, in which case the duties of the President of the Republic are temporarily assumed by the Speaker of the Croatian Parliament;

- in proceedings instituted by a two-thirds majority vote of all representatives of the Parliament, decides by a two-thirds majority vote of all the judges on the impeachment of the President of the Republic. If the

Constitutional Court sustains the impeachment, the duty of the President of the Republic ceases by force of the Constitution <sup>34</sup>

But, the majority of Constitutional Court's work is to protect violated human rights and to provide human freedom in the society. That is possible via constitutional complaint. The constitutional complaint represents an instrument for the protection of the basic rights and freedoms of citizens in front of the Constitutional Court.

Everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution. This means it is possible to apply individually. But, that is not possible to do it directly.

According to article 62 of the mentioned Act it is said that if there are some other legal remedies provided against violation of the constitutional rights, the constitutional complaint may be lodged only after that remedies have been exhausted. From a practical aspect this means that citizens before using the constitutional complaint should absolve the administrative or regular judicial procedure. That means that constitutional complaint is treated as an exceptional and specific legal instrument which can be used only if the national legal order did not foresee any other method of protection of the breached right. So the hierarchy system is clearly visible. Furthermore, to use this specific legal instrument there are some other conditions that must be fulfilled: (As we have already mentioned) it can be used only if previously all other instruments for protection foreseen within the legal system were exhausted and only against final acts (when referring to judicial decisions on which there is a petition against the breach of the right of the citizen).

The Constitutional complaint can be filed within a period of 30 days from the day of receiving the decision.

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<sup>34</sup> Ibid, art. 129

If the constitutional court of Croatia decides to accept the complaint that automatically means that the previous decision becomes abrogated. Still, the constitutional court can initiate a procedure on the basis of the constitutional complaint before the exhaustion of the regular legal protection in a situation where:

- there is doubt that the regular court did not proceed in a reasonable period of time and with that behaviour breached the right of the complainer or,
- with the disputed single legal act the citizens constitutional rights were abusively breached.

As we have concluded the right for application of the constitutional complaint must be explicitly foreseen, as well as its content. Every constitutional complaint must contain:

(Article 65 of the Constitutional Act):

- the name and surname of the submitter;
- the registration number of the submitter;
- the address of permanent or temporary residence;
- if the complaint is filed through an authorized person then its name and surname;
- the number of the decision on which the constitutional complaint is based on;
- the constitutional right which the complainer feels is breached (it must be explicitly stated which articles of the Constitution guarantee breached rights);
- the reasons for the complaint submitting;
- evidence that all other legal instruments were exhausted;
- the complaint has been filed within the legally permissible period of time; and
- the signature of the person submitting the complaint

The complaint mandatory have to contain the contested act in the original form or a copy verified by a notary. Complaint will be examined by a council of six judges. They can decide only, when all judges are present. If the council cannot achieve unanimity, or if the council feels that the subject of the constitutional complaint has a wider meaning, the decision on

the complaint can be made during a general meeting of the Constitutional court. In Croatia, with exception of Municipal Criminal Court of Zagreb, all courts have full jurisdiction. It means that they decide in criminal and civil matters.

iv. There is not a Supreme Criminal Court in Croatia but the final decisions in Criminal matters are passed by the Supreme Court of Croatia. But, The High Criminal Court will be established on 1st of January 2015<sup>35</sup>.

Criminal proceeding is a set of legally regulated activities, defined by regulations, that are executed by authorities and other persons determined by the law whenever there is a suspicion that a criminal act has been committed. The goal of the criminal procedure is to determine, ( by the court) if the criminal act has been committed who has committed the act, or, has it been committed by the defendant, can a sentence or other measure set forth by criminal law be pronounced against the perpetrator.

To start procedures prior to criminal proceedings (criminal investigation, emergency investigation prior to the formal commencement of investigation), submitting the request for investigation, decision on conducting the investigation, indictment; shall be undertaken if there is reasonable suspicion that a person has committed a crime. That level of certainty can vary. Every person is innocent and shall not be considered guilty of a crime until proven guilty by a court's final decision. That because only the court, within the criminal procedure, can determine whether a person has committed a crime. Reasonable suspicion means that there is a certain level of certainty based on gathered information and evidence that a certain person has committed a crime.

Only the authorized prosecutor can initiate a criminal procedure.

Institution of criminal proceedings depends exclusively and only on the authorized prosecutor. Whether an act ends before a court, and whether it will be taken through criminal proceedings depends only on the authorized prosecutor instituting a criminal procedure. The court shall never institute a criminal procedure *ex officio*, or issue the decision on the commencement of criminal proceedings without a motion with which

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<sup>35</sup> Criminal Procedure Act, art. 19.e, Official Gazette (NN 152/08, 76/09, 80/11, 121/11)

authorized prosecutor institutes criminal proceedings. After the authorized prosecutor submits a motion that institutes criminal procedure, and provides that the legal conditions are met, the court shall issue an act that commences the criminal procedure. Authorized prosecutor are, firstly, State Attorney – for criminal offenses subject to public prosecution, secondly, Private Prosecutor – for criminal offences subject to private charge and an Injured Person – can replace the State Attorney if the State Attorney establishes that there is no foundation for the institution and conducting of criminal proceedings.

Prosecution commences in various situations, when:

- Investigative Judge issues a decision on conducting the investigation
- Investigative Judge issues approval to the authorized prosecutor to raise direct indictment
- President of the panel orders the trial (main hearing) based on a direct indictment if there was no objection against the indictment or President of the panel did not demand to question the indictment
- Indictment becomes final
- President of the panel or single judge orders the trial (main hearing) in summary proceedings
- Single judge issues penal order.

We can divide criminal proceeding in five phases:

1. Investigation,
2. Indictment with possible control of the indictment,
3. Trial (main hearing) with rendering and pronouncement of judgment,
4. Procedure following an appeal against a judgment and
5. Serving the judgment.

**Investigation** is a group of procedural actions that shall be conducted by the investigating judge, upon the request of the authorized prosecutor, when reasonable suspicion exists that a certain person has committed a criminal offense. The purpose of investigation is to collect evidence and information necessary for a decision on whether to refer an indictment or to discontinue proceedings as well as evidence that may not be possible to repeat at the trial or



if its examination may involve some difficulties. The investigation judge shall conclude the investigation when he finds that the case has been sufficiently clarified so that the indictment may be preferred or the proceedings discontinued

**Indictment** is an indicting act of the State Attorney or the subsidiary prosecutor in the regular criminal proceedings. The proceedings before the court shall be conducted only on the basis of the indictment. The court shall serve the indictment to the defendant and his defense counsel. They are entitled to submit an objection to an indictment within a term of eight days from the day it is served. The president of the panel may make the request for examination of the indictment up until the trial is scheduled and not later than two months from the day when the indictment is submitted to the court. An indictment shall become final on the day when the non-trial panel, deciding on the request from the president of the panel, agrees with the indictment. Also, when an objection against it is being rejected it becomes final.

**The trial** is a part before a court where the procedural materials needed to reach the judgment are considered publicly, orally, contradictorily and directly. The president of the panel shall order the day, hour and place of the trial with an order. He should also direct the trial. His duty is to maintain order and to protect the court's dignity. The trial shall be held in open court and any person 18 or over the age of 18 may be present at the trial. When the trial is over the judgment must be rendered. It is the most important act in criminal procedure and it can be rendered only by a court. Then it follows pronouncement of the judgment which consists of reading of the judgment and brief statement of reasons for the judgment. There are four types of judgment:

1. Judgment rejecting the charge
2. Judgment of acquittal
3. Judgment of conviction
4. Judgment of "determination"

But, against all that judgments there are some legal remedies which can be used.

**Appeal** is the only ordinary all-encompassing judicial remedy against the judgment. An appeal shall be reviewed in the second instance by the higher court than the one that

rendered the judgment (devolutive quality of an appeal). A filed appeal shall stay the execution of the judgment (suspension quality of an appeal). It may be taken within a term of fifteen days from the day the copy of the judgment is served.

There are a couple of grounds for challenging a judgment: 1. For substantial violation of the criminal procedure provisions 2. For violation of the Criminal Code 3. For erroneous or incomplete determination of the factual situation 4. In regard to the decision on criminal sanctions, confiscation of pecuniary benefit, costs of criminal proceedings, claims for indemnification as well as the decision to publish the judgment in the media.

When a judicial decision becomes final, appeal cannot be used. Against final judicial decision **extraordinary judicial remedies** may be stated. There are 3 types of extraordinary remedies like: 1) **Reopening of criminal proceedings**, 2) **Extraordinary mitigation of punishment**, 3) **Request for the protection of legality** and a 4) **Request for extraordinary review of final judgment**

The final judgment means that the judgment cannot be recalled or altered within the proceedings, but it shall be enforced. The judgment shall become final after it can no longer be challenged by an appeal or when it is not subject to appellate review. If there was no appeal, the first instance judgment shall become final after the expiry of the term for appeal. If an appeal was filed and the second instance court confirmed or revised the first instance judgment, it shall become final on the day the second instance court reached the decision.

v. According to article 10 of Croatian Criminal Code it is stated that criminal legislation shall not be applied to a child who, at the time of committing a criminal offense, had not reached fourteen years of age. That article represents Exclusion of Applying Criminal Legislation to Children. So, we can conclude that the age of criminal liability is 14 years of age.

Also, in the following article (article 11) it is stated that this code shall apply to young perpetrators of criminal offenses (juveniles and adolescents), unless a special statute on young perpetrators provides otherwise.

Juvenile perpetrator of criminal offences are persons who turned 14 but not yet 18 at the time of committing the criminal offence, against whom legal proceedings have not been initiated (crime report dropped), interlocutory proceedings have been terminated or a proposal for a penal sentence has been filed. Legal proceedings through a senate have been

validly concluded by issuing the decision on termination of proceedings or pronouncing of sanctions.

**Younger juvenile** is a person who turned 14 but not yet 16 at the time of committing a criminal offence and who may not be sentenced to juvenile imprisonment but may only be given educational measures.

**Older juvenile** is a person who turned 16 but not yet 18 at the time of committing a criminal offence and who may be given educational measures, but may also be sentenced to juvenile imprisonment, if the Code foresees any conditions for that.

The regulation regards the criminal liability of the young adults is generally regulated in the Criminal Act where it is stated in article 10 that this law is to be applied unless the specific law has different regulation. The Criminal Act does not define how old is young adult criminal. This definition is given in the Law on the Courts of Juveniles where in article 2 they are defined as persons between 18 and 21 years old. This rule is applied in practice of criminal courts. The new regulation is given in the art. 48 of of the Courts for Juveniles where a privileged position in the criminal procedure is not given to persons from 18 to 21 years but also to youngsters from 21 to 23 years. The level of the specific procedure rights is much lower for those who are 21 to 23 years old comparing to persons from 18 to 21 years of age.

The number of juveniles to whom criminal sanctions were pronounced amounted to 814 in 2011. Out of that number, 766 were educational measures, that is, 94.1%. When pronouncing criminal sanctions, juveniles are divided to older and younger juveniles. The number of convicted older juveniles (498) decreased by 15.4% and the number of convicted younger juveniles (316) by 6.0%, all compared to 2010. There were 15 juvenile imprisonment sentences (increase of 15.4%) and 33 suspended juvenile imprisonment sentences (decrease of 26.7%) pronounced to older juveniles. The largest number of criminal offences recorded was against property, that is 2 131 crime reports (63.1%) and 661 accusations.

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. Regarding the general structure of criminalizing sexual abuse, firstly, criminal law defines the criminal offenses of sexual abuse and exploitation of a minor separately<sup>36</sup> from the criminal acts against sexual freedom.<sup>37</sup>

Further, in the criminal offenses of sexual abuse of a child, the law makes a distinction between abuse committed against a child under the age of fifteen from the abuse of a child of fifteen years of age.<sup>38</sup> With regard to sexual abuse of a child under fifteen years of age, we distinguish sexual activities in the essence of which is the commitment of the act with a child *per se*,<sup>39</sup> from the sexual activities which are committed under violent circumstances,<sup>40</sup> to be explained more thoroughly later.<sup>41</sup> The law also distinguishes lewd acts committed under the circumstances with<sup>42</sup> or without the use of force.<sup>43</sup>

With regard to criminal acts committed against a child above the age of fifteen, criminalized are the sexual activities in which the person who committed the act has taken advantage of the child's dependent state in relation to him or her.<sup>44</sup>

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<sup>36</sup> CC 2011 c 17

<sup>37</sup> *ibid* c 16

<sup>38</sup> For further explanation on the development of CC 2011 and its differences towards previous CC 1997, see: K. Turković, A. Maršavelski, 'Nacrt posebnog dijela novog Kaznenog zakona - pregled pet glava' (2010) 17 Croatian Ann. of Crim. L. and Prac. 503.

<sup>39</sup> CC 2011 art 158(1), "Whoever performs forcible sexual intercourse or an equivalent sexual act against a child under fifteen or sexual coercion or engagement in equivalent sexual acts with a third person or induces the victim into performing such an act on himself or herself, shall be punished by imprisonment for one to ten years."

<sup>40</sup> *ibid* art 158(5), "Whoever performs forcible sexual intercourse or an equivalent sexual act against a child under fifteen years of age by force or threat, deceit, abuse of authority or helpless or dependent state of the victim, shall be punished by imprisonment for three to fifteen years."

<sup>41</sup> See below c 2(2)(a)(iv)

<sup>42</sup> CC 2011 art 158(6), "(6) Whoever under the conditions of paragraph 5 of this Article performs lewd acts against a child under fifteen years of age, shall be punished by imprisonment for one to eight years."

<sup>43</sup> *ibid* art 158(2), "Whoever performs lewd acts against a child under fifteen years of age, or induces the child to perform lewd acts with a third person or himself, shall be punished by imprisonment for six months to five years."

<sup>44</sup> *ibid* art 159(1), "Whoever performs sexual intercourse or an equivalent sexual act upon a child above the age of fifteen by using his/her status or relationship towards a child who is entrusted to him/her for education, upbringing, custody or care, shall be punished by imprisonment for six months to five years."

Under the term 'sexual activities' the following is implied: sexual intercourse or an equivalent sexual act, sexual coercion or engagement in equivalent sexual acts with a third person or inducing the victim into performing such an act himself or herself.<sup>45</sup> Moreover, the legislation also defines lewd acts as sexual activities, also as inducing a person to undertake or participate in a lewd act with another person or oneself.<sup>46</sup> In addition to the mentioned sexual activities, the national legislation criminalizes satisfying lust in the presence of a child under the age of fifteen<sup>47</sup> as well as seduction of a child for the purpose of satisfying lust.<sup>48</sup>

Therefore, we may conclude that the acts criminalized under sexual activities are applied fairly broadly.

ii. The law does not use the term 'intentionally', but by contrast, stresses the case when the offender does not realise that the child is under fifteen years of age, but has reasonable doubts for assuming, that the child is above that age, and undertakes sexual activities without use of force and equivalent circumstances.<sup>49</sup> Therefore the offender is also in error of having committed a criminal act. This leads us to conclude, *argumentum a contrario*, that in the cases other than this the law implies that the act was committed intentionally. Therefore, all these forms of criminal offenses can be perpetrated only intentionally, i.e. if the perpetrator is known with the fact or at least permitting the fact of committing a criminal offense.<sup>50</sup>

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<sup>45</sup> *ibid* art 158(1); the former CC 1997 mentions only the terms "sexual intercourse and an equivalent sexual act".

<sup>46</sup> *ibid* art 158(2),(6)

<sup>47</sup> *ibid* art 160(1), "Whoever, in the presence of a child under fifteen years of age, performs acts aimed at satisfying his own lust or the lust of a third person, shall be punished by imprisonment for at most one year."

<sup>48</sup> *ibid* art 161, "An adult who in intention to commit an offense from Article 158 towards a child under fifteen years of age, by communication technologies or by another manner suggests a meeting with that person oneself or a third person and takes the measures to realize that meeting, shall be punished by imprisonment for at most three years."; this criminal act was introduced by CC 2011 and it is known as the criminal act of "grooming".

<sup>49</sup> *ibid* art 158(4), "If the perpetrator was in an avoidable mistake that the child from the paragraph 1 of this Article was at least of fifteen years of age, shall be punished by imprisonment for six months to five years. If the perpetrator was in an avoidable mistake that the child from the paragraph 2 of this Article was at least of fifteen years of age, shall be punished by imprisonment for at most three years."

<sup>50</sup> D. Derenčinović, P. Novoselec, L. Cvitanović, K. Turković, A. Kurtović, I. Bojanić, V. Grozdanić, *Posebni dio kaznenog prava* (P. Novoselec, editor, Pravni fakultet u Zagrebu, 2007) 168.

Crimes of sexual abuse against a child are classified into several categories, and accordingly, the criminal liability or sanctions differ in accordance with the determined penalty.

Given that the legal age for consensual sexual intercourse in Croatian legislative is fifteen, the basic criminal act is sexual child abuse under the age of fifteen.

Criminalized is the act of sexual activities *per se* (broadly applied definition above) with a child, therefore sexual intercourse and equivalent sexual acts<sup>51</sup> in addition to lewd acts,<sup>52</sup> and the offender shall be sentenced from one to ten years of imprisonment, or from six months to five years respectively.

Qualified is the case of sexual intercourse or equivalent acts if they involve violence or threat, coercion, seduction or abuse of authority, or the child's helpless or dependent state, in which case the offender shall be sentenced to imprisonment from three to fifteen years.<sup>53</sup> In case of committing lewd acts under the given circumstances, the offender shall be sentenced to imprisonment from one to eight years.<sup>54</sup>

Additionally, the law criminalizes serious criminal offenses of sexual abuse for which the highest penalties are determined.<sup>55</sup> The essence of the criminal offense comprises the following qualified circumstances: the child suffered serious physical injury, or his physical or emotional development is seriously threatened, or the child became pregnant, the act involved several perpetrators, or the act was committed against a particularly vulnerable child or it was committed by a member of the family or any person with whom the child shares the household, or it was committed under particularly ruthless and brutal circumstances. If the offender committed an act of sexual child abuse without the use of force, and under the circumstances given, shall be sentenced to imprisonment from three to fifteen years.<sup>56</sup> In

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<sup>51</sup> CC 2011 art 158(1)

<sup>52</sup> *ibid* art 158(2)

<sup>53</sup> *ibid* art 158(5)

<sup>54</sup> *ibid* art 158(6)

<sup>55</sup> *ibid* art 166

<sup>56</sup> *ibid* art 166(1), "If, by the criminal offense referred to in paragraph 1 of Article 158, paragraphs 1 and 2 of Article 162, paragraphs 1 and 2 of Article 163 and paragraph 1 of Article 164, a serious bodily injury is inflicted on the child or his health is severely impaired or the female child is left pregnant, or his physical or emotional development is seriously threatened, or the act involved several perpetrators, or the act was committed against a particularly vulnerable child or it was committed by a member of the family or any

case of the given circumstances, for sexual abuse with the use of force and comparable circumstance, the offender shall be sentenced to imprisonment for not less than five years.<sup>57</sup> As most serious circumstances, the law defines the child's death as consequence of the mentioned criminal offense, in which case the offender shall be sentenced to not less than ten years or long-term imprisonment.<sup>58</sup>

iii. Legal age for engaging in sexual activities is fifteen.<sup>59</sup> But if the child is under fifteen, and the age difference between the persons engaged in sexual intercourse or an equivalent act or in a lewd act does not exceed three years, in that case no criminal offense of sexual child abuse has been committed.<sup>60</sup>

iv. With the basic criminal offense of sexual child abuse under the age of fifteen, criminalized are the sexual activities with a child *per se*, without the use of force and comparable circumstances. However, the law with the same criminal act defines as qualified comparable circumstances the use of force or threat, seduction, coercion or abuse of authority, or the child's helpless or dependent state in relation to him or her. In that case, for sexual intercourse or an equivalent sexual act with a child under fifteen, the offender shall be sentenced from three to fifteen years of imprisonment.<sup>61</sup> For lewd acts committed under the given circumstances, the offender shall be sentenced to imprisonment from one to eight

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person with whom the child shares the household, or it was committed under particularly ruthless and brutal circumstances, the perpetrator shall be punished by imprisonment for not less than eight years or by long-term imprisonment.”

<sup>57</sup> *ibid* art 166(2), “If, by the criminal offense referred to in paragraph 5 of Article 158, paragraph 3 of Article 162, paragraphs 3 of Article 163 and paragraph 2 of Article 164, a serious bodily injury is inflicted on the child or his health is severely impaired or the female child is left pregnant, or his physical or emotional development is seriously threatened, or the act involved several perpetrators, or the act was committed against a particularly vulnerable child or it was committed by a member of the family or any person with whom the child shares the household, or it was committed under particularly ruthless and brutal circumstances, the perpetrator shall be punished by imprisonment for not less than five years.”

<sup>58</sup> *ibid* art 166(3), “If, by the criminal offense referred to in Article 158, Article 162, Article 164, the death of the child was caused, the perpetrator shall be punished by imprisonment for not less than ten years or long-term imprisonment.”

<sup>59</sup> *ibid* art 158; in the previous CC 1997 the legal age for engaging in sexual activities was fourteen years of age.

<sup>60</sup> *ibid* art 158(3); in the previous CC 1997 consensual sexual activities between minors were not regulated.

<sup>61</sup> *ibid* art 158(5)

years.<sup>62</sup> Serious criminal acts under the given circumstances have been dealt with in the above paragraph.<sup>63</sup>

v. It is provided that a person who engages in sexual intercourse or an equivalent act with a descending or ascending relative, brother, sister, half-brother or half-sister, by blood or adoption, shall be sentenced to imprisonment for at most one year.<sup>64</sup>

However, the person who was a child at the time of the sexual activity committed, shall not be punished.<sup>65</sup>

vi. In criminalizing the offenses of sexual abuse of a child under fifteen, in case of the use of force and threat, the law also provides the abuse of authority or the child's helpless or dependent state in relation to the offender, defining thus these circumstances as comparable to force.<sup>66</sup>

However, the law particularly criminalizes the case when a child above fifteen is placed in someone's responsibility for the purpose of upbringing, education, charity, and that person engages in sexual activities with the child, or coerces the child into sexual activities with another person or coerces the child into performing sexual activities himself.<sup>67</sup> The offender shall be sentenced to imprisonment from six months to five years. The same penalty is imposed if the offender is a relative by blood or adoption in the descending or ascending line, stepfather or stepmother who engages in sexual activities with a child of fifteen years of age.<sup>68</sup>

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<sup>62</sup> *ibid* art 158(6)

<sup>63</sup> See above c 2(2)(a)(ii)

<sup>64</sup> CC 2011 art 179(1), "Whoever performs sexual intercourse or an equivalent sexual act with a relative by blood in a direct line or with a sibling shall be punished by a fine or imprisonment not exceeding one year."

<sup>65</sup> *ibid* art 179(2), "the person who was a child at the time of the sexual activity committed, shall not be punished."

<sup>66</sup> *ibid* art 158(5)

<sup>67</sup> *ibid* art 159(1)

<sup>68</sup> *ibid* art 159(2)



## 2.2 Child Prostitution

vii. Croatia signed the Council of Europe Convention on Action against Trafficking in Human Beings on 16th May 2005 and ratified the Convention on 5th September 2007 which further entered into force on 1st January 2012.<sup>69</sup>

vii. Croatian criminal law defines a criminal act of pandering in which the offender, for the purpose of financial exploitation or any other benefit, seduces or coerces child into prostitution, or organizes or acts as accessory to child prostitution. A criminal act of pandering implies that the offender knew or must have had knowledge or assumed that the victim was a child, the sentence for this offence being one to ten years of imprisonment.<sup>70</sup>

In this manner, the essence of this criminal offense overlaps with the definition of the Lanzarote Convention, in the sense that the act of prostitution is performed for the purpose of profit or other benefit, but differs in relation to the addressee of this benefit. Croatian law takes into consideration only the benefit that the offender takes for himself, unlike the Lanzarote Convention which provides a broader definition, in that the remuneration could also be promised to the child or another person. By contrast, the Criminal Law does not mention that the child could be given any recompense.

In addition to the basic criminal offense of pandering, there is also a qualified act, committed under the circumstances of force or threat, deceit, abuse of authority or helpless or dependent state of the victim, for which a sentence of three to fifteen years of imprisonment may be imposed.<sup>71</sup> Also criminalized is the publication of the exploitation of

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<sup>69</sup> Council of Europe Treaty Office  
<<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=27/08/2012&CL=ENG>> accessed 20 August 2012

<sup>70</sup> CC 2011 art 162(1), "Whoever, for profit, organizes, assists or induces a child in offering sexual services, shall be punished by imprisonment for one to ten years."

<sup>71</sup> *ibid* art 162(3), "Whoever induces a child by force or threat, deceit, abuse of authority or helpless or dependent state of the victim, in offering sexual services, shall be punished by imprisonment for three to fifteen years."

the child's sexual services, for which a sentence of six months to five years of imprisonment is provided.<sup>72</sup>

The above mentioned imprisonment penalties shall therefore be imposed on the recruiter of the child prostitution.

ix. Croatian criminal law takes into consideration, as earlier mentioned, the liability of the recruiter but equally so that of the user. In child prostitution under the circumstances of the use of force or threat, deceit, abuse of authority or the child's helpless or dependent state, the user shall be sentenced to an equal penalty as the recruiter, from three to fifteen years of imprisonment, if he knew or must have had knowledge of the given circumstances.<sup>73</sup> Contrarily, the user who conducts sexual activities with a child of fifteen years of age, with remuneration, shall be sentenced to imprisonment from six months to five years,<sup>74</sup> if he knew or must have had knowledge of the person being a child.<sup>75</sup>

## 2.3 Child Pornography

### Child pornography in general:

x. The Republic of Croatia is a member of the Convention on Cybercrime of the Council of Europe which was signed on 23 November 2001 when was adopted at the conference of the Council of Europe in Budapest. After the adoption of the Law on Ratification of the Convention, Croatia has ratified the Convention on Cybercrime as the second state on 17 October 2002. The provisions of the Convention are implemented in the Croatian Criminal Code by the Act on modifications and amendments to Criminal Code, which entered into force on 1 October 2004 when a sufficient number of states ratified the Convention. It was added to the Criminal Code as "Child pornography on a computer system or network" and Article 197a<sup>76</sup> which criminalized a number of socially unacceptable behaviours related to

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<sup>72</sup> *ibid* art 162(4), "Whoever publishes the exploitation of the child's sexual services, shall be punished by imprisonment for sixth months to five years."

<sup>73</sup> *ibid* art 162(3)

<sup>74</sup> *ibid* art 162(2)

<sup>75</sup> The user who conducts sexual activities with a child under fifteen shall be liable for the act of sexual abuse under CC 2011 art 158.

<sup>76</sup> Criminal Code (NN 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11) -Child pornography on a computer system or network  
Article 197 a

Whoever produces, offers, distributes or procures through a computer system or network for himself or for

computers and computer networks. The Convention on Cybercrime has enabled the police and judicial authorities more effective prosecution of perpetrators of criminal offenses against the confidentiality, integrity and availability of computer data and systems and the fight against criminal offenders of child pornography.

xi. In the Croatian Criminal Code, which entered into force on 1<sup>st</sup> January 1998, there is no definition of the term "child pornography" or pornography in general. Legislators believed the term is too extensive and it is not easy to define. Despite the lack of definition, from the Article 196 (1)<sup>77</sup> can be concluded that pornographic material are photographs, audiovisual materials, and other items of pornographic content. Because of the large gap between reality and the current Criminal Code, as a result of globalization and progress in all fields, new Criminal Code is prepared and will enter into force on 1<sup>st</sup> January 2013. It is compatible with the Convention on Cybercrime, Lanzarote Convention and other documents that the Republic of Croatia has signed in the meantime.

Article 163 (6) of the new Criminal Code defines child pornography as "material that visually or otherwise shows a real child or realistically depicted non-existent child or a person who looks like a child engaged in real or simulated sexually explicit conduct or showing sexual organs of children in sexual purposes. Materials that have an artistic, medical, scientific, information or similar importance should not be considered pornography in terms of this Article".<sup>78</sup> The definition is made based on the Article 20 (2) Lanzarote Convention<sup>79</sup> and has

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another person, or who possesses in a computer system or on a computer-data storage medium pornographic contents which show children or minors engaged in sexually explicit conduct or which are focused on their sexual organs, shall be punished by imprisonment for one to ten years.

Whoever makes accessible to a child, through a computer system, network or a computer-data storage medium, the pictures, audio visual material or other objects of pornographic content, shall be punished by a fine or by imprisonment not exceeding three years.

Special devices, objects, computer programs or data used or adapted for the perpetration of criminal offense referred to in paragraphs 1 and 2 of this Article shall be forfeited.

<sup>77</sup>Criminal Code (NN 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11) - Abuse of children or juveniles in pornography

Article 196

Whoever uses a child or a juvenile for the purpose of making pictures, audio visual material or other objects of a pornographic nature, or possesses, imports, sells, distributes or presents such material, or induces such persons to take part in pornographic shows shall be punished by imprisonment for one to five years.

<sup>78</sup>Criminal Code (NN 125/11), Article 163 (6)

<sup>79</sup>Lanzarote Convention – Offences concerning child pornography  
Article 20

been further extended with parts from paragraph (3) in which the state is given the option to retain the right not to apply.

xii. Pursuant to paragraph (1) of the same article was made Article 163 (2)<sup>80</sup> of the new Croatian Criminal Code that criminal liability for offenses related to child pornography attributed to everyone who has any connection with child pornography, from direct producers to the end users who knowingly gain access to child pornography through information and communication technologies. The right of reservations from the Lanzarote Convention, Article 20 (4), has not been used. Opinions are divided. Liberal claims that the new Criminal Code is too hard on those who are in no way in contact with an actual child. They state that it would lead to the criminalization of a large number of people because the criteria are lower, more people will satisfy them and instead of a reduction it will come to an increase in criminal activity. After the new law, which criminalizes and only surfing through the sites that do not have to show a child but just a person who looks like a child, entry into force, the number of pedophiles that have never touched a child will suddenly increase. There is a possibility that the law will not have desired legal effect on increasing the security but it will draw attention to capturing easily available end users through their IP addresses, instead of discovering the real sex offenders and rapists who, when put photographs and

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Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalized:

- a) producing child pornography;
- b) offering or making available child pornography;
- c) distributing or transmitting child pornography;
- d) procuring child pornography for oneself or for another person;
- e) possessing child pornography;
- f) knowingly obtaining access, through information and communication technologies, to child pornography.

For the purpose of the present article, the term “child pornography” shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes.

Each Party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material:

- consisting exclusively of simulated representations or realistic images of a non-existent child;
- involving children who have reached the age set in application of Article 18, paragraph 2, where these images are produced and possessed by them with their consent and solely for their own private use.

(4) Each Party may reserve the right not to apply, in whole or in part, paragraph 1.f.

<sup>80</sup>Criminal code (NN 125/11) - Exploitation of children for pornography

#### Article 163

The punishment referred to paragraph (1) of this Article shall be inflicted on an unauthorized recording, products, offers, makes available, distributes, expands, imports, exports, obtains for himself or for another, sells, gives, displays or possesses child pornography or knowingly accesses through information and communication technologies.

videos on the Internet, skilfully hiding behind various proxy and are rarely discovered. They are also refer to one of the basic principles of law which says that "if the perpetrating the criminal offense has no victim, there is no crime," thus raising a question whether viewing pictures is the worst thing than sexual harassment, rape and physical abuse. Supporters of the new Criminal Code considered that the tightening of sanctions and the introduction of new offenses is necessary to decrease the crime rate. They believe that capturing the end users (those who only watch) will get to the drop in demand for the content of child pornography, and thus to a narrowing of the pornography market. The main argument is the prevention and correction of "moderate pedophiles" who buy and watch, and the ability to get through them to dealers and producers of pornographic material, and thereby break the whole chain. Thing about which everyone agrees is that the penalties for sexual abuse of children are too small in the legal and judicial practice, and is also mentioned the disproportion amount of penalties in compared to the actual gravity of the offense and harm to the victim. Also in Croatia, there is the problem of frequent determining the minimum penalty prescribed in many easier or more difficult cases.

xiii. Ministry of Internal Affairs is responsible for the control, detection and suppression of child pornography, along with the police. Unfortunately, despite many attempts, we did not get any further information from the Ministry. For protection of children from violence in general, responsible are police, courts and social welfare centres (child protection centres). Child protection in general is the responsibility of the police, courts and social welfare centres (child protection centres). They act according to the Law on Protection from Domestic Violence<sup>81</sup>, Family Law<sup>82</sup>, Criminal Law<sup>83</sup>, Criminal Procedure Code<sup>84</sup> and the Law on Juvenile Courts<sup>85</sup>. The results of an international research project BECAN<sup>86</sup> for Croatia pointed out the poor organization and functioning of the system where the common problem is losing or lack of official documents, contradictory data and the lack of relevant data. But Croatia is already working to improve the system, the National Strategy for

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<sup>81</sup> Law on Protection from Domestic Violence (NN 137/09, 14/10, 60/10)

<sup>82</sup> Family Law (NN 116/03, 17/04, 136/04, 107/07, 57/11, 61/11)

<sup>83</sup> Criminal Law (NN 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11), respectively from January 1, 2013 Criminal Law (NN 125/11)

<sup>84</sup> Criminal Procedure Code (NN 152/08, 76/09, 80/11, 121/11)

<sup>85</sup> Law on Juvenile Courts (NN 84/11)

<sup>86</sup> BECAN – Balkan Epidemiological Study on Child Abuse and Neglect

Protection against Domestic Violence for the period 2011 by 2016 in which is described the current situation and given the goals to be achieved by 2016.

### **Participation of child in pornographic performances**

xiv. In the Croatian Criminal Code, which is in force until 31<sup>st</sup> December 2012, there is no article that refers to the participation of children in pornographic performances. The new Criminal Code, which will 1<sup>st</sup> January 2013 take effect, severely criminalizes procuring a child in any manner and for any purpose as well as each participation of a child in pornographic shows. According to the Article 21 of Lanzarote Convention<sup>87</sup> which refers to offenses related to the participation of children in pornographic performances, composed Article 164 of Croatian Criminal Code<sup>88</sup> entitled "Exploitation of children in pornographic performances". In the Article have been introduced all the provisions of Article 21 of the Convention and the content is additionally expanded with the provisions in paragraph (5) relating to the confiscation of all devices, tools and computer programs, and the destruction of pornographic material formed through perpetration of criminal offense. Croatia did not

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<sup>87</sup>Lanzarote Convention – Offences concerning the participation of a child in pornographic performances  
Article 21

Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalized:

a)recruiting a child into participating in pornographic performances or causing a child to participate in such performances;

b)coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes;

c)knowingly attending pornographic performances involving the participation of children.

Each Party may reserve the right to limit the application of paragraph 1.c to cases where children have been recruited or coerced in conformity with paragraph 1.a or b.

<sup>88</sup>Criminal Code (NN 125/11) - Exploitation of children in pornographic performances

Article 164

Whoever child entices, recruits, or encouraged to participate in pornographic performances shall be punished by imprisonment from one to eight years.

Who earns from pornographic performances in which it participates child, or otherwise exploits the child in pornographic performances shall be punished by imprisonment from one to ten years.

Whoever, by force, threat, deception, fraud, abuse of power or position, or difficult position or relation of dependency, coerces or induces child to participate in pornographic performance, shall be punished by imprisonment from three to twelve years.

Imprisonment from paragraph 1 of this Article shall be inflicted who is watching pornographic show live or via communication gadget if he knew or should have known that in it participates a child.

Special devices, equipment, computer programs or data designed, adapted or used to commit or facilitate the perpetrating the criminal offense referred to in paragraphs 1, 2 and 3 of this Article shall be confiscated, and pornographic material that has emerged of the offense from paragraph 1 and 2 this article will be destroyed.

use the right of reservations from the Article 21 (2) of Lanzarote Convention, but already severely criminalizes visits to all pornographic performances in which children are involved. In the new Criminal Code, under Article 87 (7)<sup>89</sup> a child is considered a person who has not attained the age of eighteen. In the law, any contact of children with pornography has been described as a crime, so the state makes no difference between recruitment and coercion when it comes to participation of a child in pornography. General recruitment is regulated by the Labor Act that its provisions leave very little room for the minors' work. According to Article 17 (1) of the Labour Act<sup>90</sup>, persons under the age of fifteen years shall not be employed in general as well as persons over fifteen and under eighteen years old who attend compulsory primary education. Considering that the basic obligatory education is available to all Croatian citizens, and ends about the age of eighteen, the legislature has limited work of minors. There are always exceptions, so those juveniles who, for unknown reasons, do not attend school but working, protects the Article 19 (1) of the Labour Act<sup>91</sup> which prohibits the employment of minors in performing certain activities that may endanger their safety, health, morality or development.

## 2.4 Corruption of Children

xv. In the Republic of Croatia, in accordance with Article 160 of the Criminal Code that states that "Whoever, in the presence of a child younger than fifteen years performs sexual acts aimed at satisfying one's own lust or the lust of a third person, shall be punished by imprisonment for up to one year."<sup>92</sup>, also states that the presence of a child who is younger than fifteen years perpetrates offense from Article 152 to Article 155, under Article 158 or Article 159 hereof, shall be punished by imprisonment for up to three years. Deliberately exposing a child to witness sexual activity and sexual abuse, without necessarily participating in them, is regulated as an offense by the state.

In cases where there is no physical contact with the child but the perpetrator makes actions designed to meet his/her own or someone else's lust in front of children is regulated as a

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<sup>89</sup>Criminal Code (NN 125/11), Article 87 (7)

<sup>90</sup>Labour Act (NN 149/09, 61/11, 82/12), Article 17 (1)

<sup>91</sup>Labour Act (NN 149/09, 61/11, 82/12), Article 19 (1)

<sup>92</sup> „Criminal Code", The Official Gazette of the Republic of Croatia "Narodne Novine" No. 125/11, Article 160, Paragraph 1, „Whoever, in the presence of a child younger than fifteen years performs sexual acts aimed at satisfying one's own lust or the lust of a third person, shall be punished by imprisonment for up to one year."

criminal offense by this article. The committing act is any act which may lead to or enhance sexual arousal or prolong the existing arousal.

With this provision, the legislator has incriminated behaviour in the sphere of sexuality where there was no physical contact between the perpetrator and the victim, but only a visual bond which cannot be classified under the term lewd act, but that, because of the sexual and corruptive influence on the victim, deserves to be classified as criminal behaviour.

Such behaviour was classified by the legislator under the concept of satisfying lust, which in this study can be linked to the notion of “causing”. Such actions in which the perpetrator is intentionally exposing a child to sexual activity or actions designed to gratify lust in front of others are the ones that are objectively designed to achieve sexual excitement of the offender or a third person and to enhance or prolong the existing arousal.

Article 158 states that whoever performs lewd acts with a minor under the age of fifteen years or makes the minor perform lewd acts with another person or on oneself, shall be punished by imprisonment for six months to five years.<sup>93</sup> Paragraph 3 of this article states that there is no criminal offense referred to in paragraph 1 and 2 if the difference in age between persons who perform sexual intercourse or an equivalent sexual or lewd act is not more than three years.<sup>94</sup>

It is not relevant whether satisfying lust is achieved by the fact that it is done in front of a child or by the action, regardless of the child's presence. The sexual sphere of a child enjoys full criminal-law protection from sexual intercourse with an equivalent sexual and lewd act, regardless of the child's consent, or even boost. Therefore, the criminal-justice protection of a child against criminal activities which satisfy lust is only a further form of protection of its sexual sphere.

There is a difference in sentencing based on whether certain sexual and lewd acts in front of a child were performed by duress, with the use of deceit, fraud or misuse of power or

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<sup>93</sup> Ibid., Article 158, Paragraph 1, „Whoever performs lewd acts with a minor under the age of fifteen years or makes the minor perform lewd acts with another person or on oneself, shall be punished by imprisonment for six months to five years.”

<sup>94</sup> Ibid., Paragraph 3, „There is no criminal offense referred to in paragraph 1 and 2 if the difference in age between persons who perform sexual intercourse or an equivalent sexual or lewd act is not more than three years”



position, or the depending relationship of the child to the perpetrator. Thus paragraph 5 of Article 158 states that whoever commits sexual intercourse or an equivalent sexual act with a child under the age of fifteen years by duress, with the use of deceit, fraud or abuse of authority or difficult position, or the depending relationship of the child to the perpetrator, shall be punished by imprisonment for three to fifteen years.<sup>95</sup> Paragraph 6 of the same article states that anyone who performs a lewd act against a child younger than fifteen years under the conditions of existence of force, threats, deception, fraud or misuse of power or position, or a relationship of child's dependency, shall be punished by imprisonment for one to eight years.<sup>96</sup>

The offender who was under the eliminable misapprehension that a child from paragraph 1 of Article 158 has a minimum of fifteen years shall be punished by imprisonment for six months to five years, and if the offender who was under the eliminable misapprehension that a child from paragraph 2 of the same article has a minimum of fifteen years shall be punished by imprisonment of up to three years.

In Croatian legislation, the term "causing" is defined as satisfying lust in front of a child or a juvenile. It differs from the criminal act of lewd behaviour precisely because of the fact that in the realization of this crime there is no contact between the bodies of the perpetrator and victim. The term "in front" suggests that they are in some sort of a contact that is not tactile, but can be visual or any other direct contact. Telephone conversation, especially a conversation in which the victim, because it is being blackmailed, cannot arbitrarily terminate that same contact, but is forced to participate in it should be regarded as direct contact.

## **2.5 Solicitation of Children for Sexual Purposes**

xvi. Sexual gratification through the information and communication technology with intent by an adult offender is regulated by Article 161 of the Criminal Code of the Croatian criminal legislation which states that adult acting person contacts a juvenile under the age of

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<sup>95</sup> Ibid., Paragraph 5, „Whoever commits sexual intercourse or an equivalent sexual act with a child under the age of fifteen years by duress, with the use of deceit, fraud or abuse of authority or difficult position, or the depending relationship of the child to the perpetrator, shall be punished by imprisonment for three to fifteen years.”

<sup>96</sup> Ibid., Paragraph 6, „Anyone who performs a lewd act against a child younger than fifteen years under the conditions of existence of force, threats, deception, fraud or misuse of power or position, or a relationship of child's dependency, shall be punished by imprisonment for one to eight years. ”

fifteen years with the intention that they or another person commit the offense from the Article 158 of the Criminal Code, through information and communication technologies, or otherwise, suggest meeting with them or another person and then take measures for this meeting to happen, shall be punished by imprisonment not exceeding three years.<sup>97</sup> In the second paragraph of this legal article it is stated that whoever collects, provides or transmits data on a person under the age of fifteen years for an offense referred to in paragraph 1 of this article shall be punished by imprisonment not exceeding one year. An attempted criminal offense referred to in paragraph 1 of this article shall be punished.<sup>98</sup>

Our criminal code specifies that the offender should propose or initiate a meeting with a potential victim or propose a meeting between a victim and another person.

The notion of seduction or “grooming” does exist in Croatian criminal legislation and it is dealt with in Article 161 of the Criminal Code.

xvii. Aiding, facilitating and attempting criminal acts of sexual abuse, child prostitution and child pornography is regulated by the state as an offence. The characteristics of these criminal acts were effectuated by the very act of helping, facilitating and attempts.

All actions, that create either necessary or only favourable conditions for executing a criminal offense for another person, are classified under the concept of facilitating and assisting. Facilitating can also be done by omission, i.e. passivity, tolerance.

An attempt to commit these crimes is considered the first step in their implementation. An attempt is considered as such when the offender started any of the actions that will be included in such an offense.

## 2.6 Corporate Liability

xvii. In the Croatian legislation, the state considers the legal person liable if the offense was committed against children by private persons, i.e. employees in a legal entity (for example,

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<sup>97</sup> Ibid., Article 161, Paragraph 1, „Adult acting person contacts a juvenile under the age of fifteen years with the intention that they or another person commit the offense from the Article 158 of the Criminal Code , through information and communication technologies, or otherwise, suggest meeting with them or another person and then take measures for this meeting to happen, shall be punished by imprisonment not exceeding three years.”

<sup>98</sup> Ibid., Paragraph 2, „Whoever collects, provides or transmits data on a person under the age of fifteen years for an offense referred to in paragraph 1 of this article shall be punished by imprisonment not exceeding one year. An attempted criminal offense referred to in paragraph 1 of this article shall be punished.”

institutions, companies, organizations, etc.). In such cases, civil liability is prescribed. The civil liability of both natural and legal persons is prescribed by the provisions of the Law of Obligations, which gives an opportunity to the injured party in the civil case to exercise the right to compensation for damage caused due to mental pain and injury.

Differentiating the position of a natural person in a legal person is essential for personal or criminal liability. More severe penalties are prescribed if the offense is committed by a person close to the child, a person that has the child's trust, a person which is entrusted with the child's care and education or a person with whom a child has a relationship based on dependency. This is evident in almost all legal articles of the Criminal Code related to crimes of sexual abuse and exploitation of children. Closely, the Article 159 - Sexual abuse of a child older than 15 years – talks that whoever, with a child who is older than fifteen years and who is entrusted to him/her for education, upbringing, custody or care, performs sexual intercourse or an equivalent sexual act upon such a person, or encourages the child to perform sexual intercourse or an equivalent sexual act with another person, or to auto perform a sexual act equivalent to a sexual intercourse on himself/herself, shall be punished by imprisonment for six months to five years.<sup>99</sup> The punishment referred to in paragraph 1 of the same article shall be appointed to a blood relative or to a relative by adoption in a direct line, step-father or step-mother that performs sexual intercourse or an equivalent sexual act upon a child that is older than fifteen years, or encourages the child to perform sexual intercourse or an equivalent sexual act with another person, or encourages a child to auto perform a sexual act equivalent to a sexual intercourse on himself/herself;<sup>100</sup> Article 163 - Abuse of children or juveniles in pornography – talks about whoever recruits, encourages or induces a child to take part in the shooting of child pornography or who organizes or makes the shooting possible shall be punished by imprisonment for one to eight years. Whoever induces a child by duress, with the use of deceit, fraud or abuse of

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<sup>99</sup> Ibid., Article 159, Paragraph 1, „ whoever, with a child who is older than fifteen years and who is entrusted to him/her for education, upbringing, custody or care, performs sexual intercourse or an equivalent sexual act upon such a person, or encourages the child to perform sexual intercourse or an equivalent sexual act with another person, or to auto perform a sexual act equivalent to a sexual intercourse on himself/herself, shall be punished by imprisonment for six months to five years.”

<sup>100</sup> Ibid., Paragraph 2, „The punishment referred to in paragraph 1 of the same article shall be appointed to a blood relative or to a relative by adoption in a direct line, step-father or step-mother that performs sexual intercourse or an equivalent sexual act upon a child that is older than fifteen years, or encourages the child to perform sexual intercourse or an equivalent sexual act with another person, or encourages a child to auto perform a sexual act equivalent to a sexual intercourse on himself/herself.”

authority or difficult position, or the depending relationship of the child to the perpetrator to take part in the shooting of child pornography shall be punished by imprisonment for three to twelve years.<sup>101</sup>; Article 164 - Abuse of children or juveniles in pornographic - shows that whoever recruits, encourages or induces a child to take part in a pornographic show shall be punished by imprisonment for one to eight years. Whoever induces a child by duress, with the use of deceit, fraud or abuse of authority or difficult position, or the depending relationship of the child to the perpetrator to take part in a pornographic show shall be punished by imprisonment for three to twelve years.<sup>102</sup>

The difference in the responsibilities related to the position of individuals in the legal entity exists when it comes to criminal liability of natural persons and is irrelevant to the case concerning civil liability of legal persons.

xix. Croatian national legislation regulates civil liability for legal persons but regulates both criminal and civil liability for natural persons for crimes related to sexual violence against children.

For example, when a school compensates damages for the criminal acts of child sexual abuse by its employee, for that kind of responsibility there is no regulation that specifies that the school, as a legal person, shall be required to pay a higher or lower compensation to the injured person due to the position that the perpetrator has as an employee.

With criminal liability, the person's position or his/her relationship with a minor is important and therefore severe punishments are prescribed for teachers, educators and persons entrusted to safeguard the child, as well as child's guardian, step-father, step-mother, as people who have established particular relationship based on trust with the child.

xx. Croatian national legislation does not exclude individual liability in cases where the liability of legal persons is present. Since for the Croatian national legislation relating to

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<sup>101</sup> Ibid., Article 163, Paragraph 3, „Whoever recruits, encourages or induces a child to take part in the shooting of child pornography or who organizes or makes the shooting possible shall be punished by imprisonment for one to eight years. Whoever induces a child by duress, with the use of deceit, fraud or abuse of authority or difficult position, or the depending relationship of the child to the perpetrator to take part in the shooting of child pornography shall be punished by imprisonment for three to twelve years.

<sup>102</sup> Ibid., Article 164, Paragraph 3, „Whoever recruits, encourages or induces a child to take part in a pornographic show shall be punished by imprisonment for one to eight years. Whoever induces a child by duress, with the use of deceit, fraud or abuse of authority or difficult position, or the depending relationship of the child to the perpetrator to take part in a pornographic show shall be punished by imprisonment for three to twelve years.

sexual offenses, there is only a civil liability of legal persons, the perpetrator of such a crime is personally responsible for the commission of the offenses in both criminal justice and civil law sense. Liability of legal persons does not exclude the personal liability of the perpetrator of the criminal act of sexual misconduct neither in accordance with the criminal nor the civil law regulations by the Croatian Criminal Code and the Law on Obligations.

## 2.7 Aggravating Circumstances

xxi. The Croatian Criminal Code does not define specifically extenuating and aggravating circumstances. There is a general rule about choosing the type and measures of punishment in Article 56 (2)<sup>103</sup> of the current Criminal Code which enumerates the circumstances relevant to sentencing. All stated circumstances may be extenuating or aggravating, depending on whether they are in favour of the claimant or the defendant. They affect whether the punishment will be higher or lower, but always within the limits prescribed by the law. The court, based on the existence of certain circumstances, assesses their significance for meting out penalties in a specific case. In the new Criminal Code content of the Article 56(2) is given in the shorter version in Article 47<sup>104</sup>. But in part of the criminal law that relates to offenses of sexual abuse of a child, the novelty is an Article 166 which prescribes penalties for severe forms of abuse and exploitation of children. The article quotes the offenses from previously stated articles with certain circumstances of the offense and consequences arising from the criminal offense. The content of this article refers to the

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<sup>103</sup> Criminal code (NN 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11)- A General Rule on the Selection of the Type and Range of Punishment  
Article 56

Determining the type and range of penalties that will apply, the court shall take into consideration all the circumstances that affect the sentence by type and a less or more difficult for the offender (mitigating and aggravating circumstances), especially this: the degree of guilt, motives which the offense was committed, the degree of danger or injury offense protected object, the circumstances in which the offense was committed, the circumstances in which the offender lived prior to committing the crime and compliance with the laws of his or her conduct, the circumstances in which he lives and his conduct after the commission of a criminal works, especially the relationship between the injured and compensation for damage, the totality of the social and personal causes that contributed to the commission of the offense.

<sup>104</sup>Criminal code (NN 125/11) - Meting of punishments  
Article 47

In selecting the type and length of sentence, the court shall, on the basis of the degree of guilt and sentencing purposes, to evaluate all the circumstances that affect the sentence by type and a less or more severe (mitigating and aggravating circumstances), and in particular the degree of danger or injury to the protected object, the motives for the crime was committed, the degree of injury offenders duties, the manner of committing and wrongful effects of the offense, perpetrator former life, his personal and financial circumstances and his conduct after the commission of the offense, the relationship between the victim and the effort to compensate for the damage.

Elevation of penalties must not exceed the degree of guilt.

crimes of sexual abuse of a child younger than fifteen years (Art. 158)<sup>105</sup>, the procuring a child (Art. 162)<sup>106</sup>, the exploitation of children for pornography (Art. 163)<sup>107</sup>, and the use of children in pornographic performances (Art. 164)<sup>108</sup>. Listed acts are difficult by itself, but according to the Article 166<sup>109</sup> they receive additional weight if the child suffered serious

<sup>105</sup> Criminal Code (NN 125/11) - Sexual abuse of a child younger than fifteen years

Article 158

Whoever performs sexual intercourse or an equated sexual act with a child under the age of fifteen years, or states him that performs sexual intercourse or an equivalent sexual act with a third person or against oneself out of the sexual intercourse equated sexual act, shall be punished by imprisonment for one to ten years.

Whoever over child younger than fifteen years perform a lewd act, or states him that perform lewd act with another person or against oneself perform a lewd act, shall be punished by imprisonment from six months to five years.

Whoever performs sexual intercourse or an equated sexual act with a child under the age of fifteen years with the use of force or threats, deceit, fraud or misuse of power or position, or severe dependency of the child's relationship to him, shall be punished by imprisonment from three to fifteen years.

<sup>106</sup> Criminal Code (NN 125/11) - Procuring of a child

Article 162

Whoever, for profit or other benefits lures a child, recruits, encouraged to provide sexual services, or organizes or enables providing sexual services with a child, and he knew or should have known that it is a child, shall be punished by imprisonment from one to ten years.

Whoever uses sexual services of a child who reached the age of fifteen with giving any kind of compensation, and he knew or should have known that it is a child, shall be punished by imprisonment from of six months to five years.

Whoever, the person for who knew or should have known that it is a child, for profit by force, threat, deception, fraud, abuse of power or position or a dependency relation, coerces or induces to offer sexual services, or who uses sexual services of that child with payment, and he knew or should have known for these circumstances, shall be punished by imprisonment of three to fifteen years.

<sup>107</sup> Criminal Code (NN 125/11) - Exploitation of children for pornography

Article 163

Whoever lures a child, recruits, encouraged participating in the making of child pornography or who organizes or enables its recording shall be punished by imprisonment from one to eight years.

The punishment referred to paragraph 1 of this Article shall be punished who an unauthorized records, products, offers, makes available, distributes, expand, imports, exports, obtains for himself or for another, sells, gives, display or possess child pornography or knowingly access to it through information and communication technologies.

Whoever a child by force, threat, deception, fraud, abuse of authority or difficult position or, coerces or induces to record of child pornography, shall be punished by imprisonment from three to twelve years.

<sup>108</sup> Criminal Code (NN 125/11) - Exploitation of children in pornographic performances

Article 164

Whoever a child lures, recruits, encourage to participate in pornographic performances shall be punished by imprisonment from one to eight years.

Who earns from pornographic performances in which participates a child, or otherwise exploits the child in pornographic performances, shall be punished by imprisonment from one to ten years.

<sup>109</sup> Criminal Code (NN 125/11) - Serious crimes of sexual abuse and exploitation of children

Article 166

If the offense referred to in Article 158 Paragraph 1, Article 162 paragraph 1 and 2, Article 163 paragraph 1 and 2 and Article 164 paragraph 1 of this Act, the child suffered serious bodily injury or is compromised his physical or emotional development or the child is left pregnant, if the crime involved more than one offender or the offense is committed against particularly vulnerable child or is committed by a family member or a person with whom the child lives in the same household, or is committed in an especially cruel or degrading manner, shall be punished by imprisonment from three to fifteen years.

If the offense referred to in Article 158(5), Article 162(3), Article 163 (3), Article 164 (2) of this Act the child

bodily injury or is compromised his physical or emotional development or the child is left pregnant, if the crime involved more than one offender or the offense is committed against particularly vulnerable child, if committed by a family member or a person with whom the child lives in the same household, or was committed in an especially cruel or degrading manner, especially if the offense caused the death of a child.

## 2.8 Sanctions and Measures

xxii. The above mentioned crimes are sanctioned in the Chapter 17 „Criminal offenses against sexual abuse and exploitation of a child“ and Chapter 9, „Criminal offenses against humanity and human dignity“ of Croatian Criminal Code. Penalty includes deprivation of liberty for all of them.

**Sexual abuse** is sanctioned in Article 158 – Sexual abuse of a child younger than 15 years, Article 159– Sexual abuse of a child older than 15 years and Article 166 - Serious offences against sexual abuse and exploitation of a child.

Article 158 talks about Sexual abuse of a child younger than 15 years and states that whoever performs sexual intercourse or an equivalent sexual act on a child younger than 15 years, or forces a child to perform sexual intercourse or an equivalent sexual act with a third person or an equivalent sexual act on itself shall be punished by imprisonment for one to ten years. If the offender was in avoidable mistake that the child has at least fifteen years shall be punished by imprisonment for six months to five years.

Whoever performs lewd acts on a child younger than 15 years or makes a child to perform lewd act with another person or on itself shall be punished by imprisonment for six months to five years<sup>110</sup>. If the offender was in avoidable mistake that the child has at least fifteen years shall be punished by imprisonment for maximum three years.

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suffered serious bodily injury or is compromised his physical or emotional development or the child is left pregnant, if the crime involved more than one offender or the offense is committed against particularly vulnerable child or is committed by a family member or a person with whom the child lives in the same household, or is committed in an especially cruel or degrading manner, shall be punished by imprisonment for at least five years.

If the offense referred to in Article 158, Article 162, Article 163 or Article 164 this Act, caused the death of the child, the offender shall be punished by imprisonment not less than ten years or long term imprisonment.

<sup>110</sup>“*Criminal Code*“, The Official Gazette of the Republic of Croatia “Narodnenovine” No. 125/11, Article 158, Paragraph 2, “Whoever performs lewd acts on a child younger than 15 years or makes a child to perform lewd act with another person or on itself shall be punished by imprisonment for six months to five years”.

If the age difference between persons performing sexual or an equivalent act from the paragraphs 1 and 2 is not bigger than three years, there is no criminal offense.

Whoever performs sexual intercourse or an equivalent sexual act on a child younger than 15 years by using force or threat, deceit, fraud or abuse of position, difficult position or relationship of child's dependence, shall be punished by imprisonment for three to fifteen years<sup>111</sup>. If under the same conditions a lewd act has been performed on a child younger than fifteen years, the perpetrator shall be punished by imprisonment for one to eight years.

Article 159 talks about Sexual abuse of a child older than 15 years and states that whoever on a child older than 15 years who is entrusted to him/her for upbringing, education, custody or care, performs sexual intercourse or an equivalent sexual act, or makes the child to perform the sexual intercourse or an equivalent sexual act with another person, or performs an equivalent sexual act on itself, shall be punished by imprisonment for six months to five years<sup>112</sup>. The same punishment shall be applied against the blood relative, adoptive relative in straight line, step-father or step-mother with, who a child who is older than fifteen years, performs sexual intercourse or an equivalent sexual act, or makes the child perform the sexual intercourse or an equivalent sexual act with another person, or performs an equivalent sexual act on itself.

Article 166 talks about serious offences against sexual abuse and exploitation of a child. If the offenses from Article 158 Paragraph 1, Article 162 Paragraph 1 and 2, Article 163 Paragraph 1 and 2, Article 164 Paragraph 1 cause serious body injuries or impair its physical and emotional development, or the child becomes impregnated, if a number of perpetrators participated, if it is perpetrated on a vulnerable child or it is perpetrated by a family member or a person who lives in the same household with a child, or is performed in a particularly

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<sup>111</sup>Ibid, Article 158, Paragraph 5, „Whoever performs sexual intercourse or an equivalent sexual act on a child younger than 15 years by using force or threat, deceit, fraud or abuse of position, difficult position or relationship of child's dependence, shall be punished by imprisonment for three to fifteen years“.

<sup>112</sup>Ibid, Article 159, Paragraph 1, „Whoever on a child older than 15 years who is entrusted to him/her for upbringing, education, custody or care, performs sexual intercourse or an equivalent sexual act, or makes the child to perform the sexual intercourse or an equivalent sexual act with another person, or performs an equivalent sexual act on itself, shall be punished by imprisonment for six months to five years . The same punishment shall be applied against the blood relative, adoptive relative in straight line, step-father or step-mother with, who a child who is older than fifteen years, performs sexual intercourse or an equivalent sexual act, or makes the child perform the sexual intercourse or an equivalent sexual act with another person, or performs an equivalent sexual act on itself.“.



cruel or humiliating way, the perpetrator shall be punished by imprisonment for three to fifteen years.

If the offenses from Article 158 Paragraph 5, Article 162 Paragraph 3, Article 163 Paragraph 3, Article 164 Paragraph 2 cause serious body injuries or impair its physical and emotional development, or the child becomes impregnated, if a number of perpetrators participated, if it is performed on a vulnerable child or it is performed by a family member or a person who lives in the same household with a child, or is performed in a particularly cruel or humiliating way, the perpetrator shall be punished by imprisonment for not less than five years.

If the offenses from the Articles 158, 162, 163 and 164 cause the death of the child, offender shall be punished by imprisonment for not less than ten years of long term imprisonment.

**Child prostitution** is sanctioned in the Article 162as Pandering which states that whoever for profit or other benefit lures, recruits or encourages a child to offer sexual services, or organizes or enables sexual service with a child, and knew or was supposed to know that the person is a child, shall be punished by imprisonment for one to ten years. Whoever uses sexual services from a child older than fifteen years by giving any kind of reimbursement or performance, and knew or was supposed to know that the person is a child, shall be punished by imprisonment for six months to five years.

Whoever knew or was supposed to know that the person in a child, for profit by force or threat, or by deceit, fraud or abuse of position, difficult position or relationship of child's dependence, forces or makes a child to offer sexual services, or uses sexual services from that child for compensation, and knew or was supposed to know the mentioned circumstances, shall be punished by imprisonment for three to fifteen years<sup>113</sup>. Whoever advertises exploitation of sexual services of a child, shall be punished by imprisonment for six months to five years.

**Child pornography** is sanctioned Article 163 - Exploitation of children for prostitution, Article 164 - Exploitation of children for pornographic plays and Article 165 - Introducing

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<sup>113</sup>Ibid, Article 162, Paragraph 3, „Whoever knew or was supposed to know that the person in a child, for profit by force or threat, or by deceit, fraud or abuse of position, difficult position or relationship of child's dependence, forces or makes a child to offer sexual services, or uses sexual services from that child for compensation, and knew or was supposed to know the mentioned circumstances, shall be punished by imprisonment for three to fifteen years“

pornography to children. Article 163 talks about Exploitation of children for prostitution and states that whoever lures, recruits or encourages a child on participating in filming child pornography, or whoever organizes or enables its filming, shall be punished by imprisonment for one to eight years<sup>114</sup>.

The same punishment shall be applied towards the offender who unauthorized films, produces, offers, makes available, distributes, spreads, imports, exports, purchases for itself or another one, sells, gives, presents or possesses child pornography or consciously accesses it through communication technologies. Whoever by use of threat or force, or by deceit, fraud or abuse of position, difficult position or relationship of child's dependence, forces a child on filming child pornography, shall be punished by imprisonment for three to twelve years. A child shall not be punished for production and possession of pornographic material which shows him/herself alone or with another child, if they have produced and possessed that material with the consent from each of them and only for their personal use<sup>115</sup>.

Paragraph 6 of that article defines Child pornography as material which visually or in other way shows a real child or realistically showed non existing child or a person that looks like a child, u a real or simulated sexually explicit behaviour or which shows genitals of children in sexual purpose. Materials that have artistic, medical, scientific, informative or similar significance shall not be considered pornography.

Article 164 talks about exploitation of children for pornographic shows and states that whoever lures, recruits or encourages a child on participating in pornographic shows, shall be punished by imprisonment for one to eight years<sup>116</sup>. The same punishment shall be applied to perpetrator who watches pornographic shows in live or through communication devices, or who knew, had to know and could know that a child is participating in it.

Whoever benefits from pornographic shows in which a child in taking part, or in other way exploits the child for pornographic shows, shall be punished by imprisonment for one to ten years.

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<sup>114</sup>Ibid, Article 163, Paragraph 1, „Whoever lures, recruits or encourages a child on participating in filming child pornography, or whoever organizes or enables its filming, shall be punished by imprisonment for one to eight years“.

<sup>115</sup>Ibid, Article 163, Paragraph 5, „A child shall not be punished for production and possession of pornographic material which shows him/herself alone or with another child, if they have produced and possessed that material with the consent from each of them and only for their personal use“.

<sup>116</sup>Ibid, Article 164, Paragraph 1, „Whoever lures, recruits or encourages a child on participating in pornographic plays, shall be punished by imprisonment for one to eight years“.

Whoever by use of threat or force, or by deceit, fraud or abuse of position, difficult position or relationship of child's dependence, forces or makes a child to take a part in the pornographic show, shall be punished by imprisonment for three to twelve years.

Sexual abuse, prostitution and pornography are also included in the Chapter 9 – „Criminal offenses against humanity and human dignity“ and are sanctioned in Article 106 as Human Trafficking. Whoever recruits, transports, transfers, hides or hands over a child, or exchanges or transfers the supervision of a child for exploitation of its work through forced labour or servitude, established slavery or a similar relationship, exploitation for prostitution or other forms of sexual exploitation including pornography, or for concluding illegal or forced marriage or illegal adoption, or illegal transplantation of parts of a human body, or for exploitation in armed conflicts, shall be punished by imprisonment for one to ten years.

Whoever by force or threat, or by deceit, fraud, kidnap or abuse of position, difficult position or relationship of child's dependence, by giving or receiving financial compensation or other benefit for receiving a consent of a person who has supervision over other person, or in other way recruits, transports, transfers, hides or hands over a child, or exchanges or transfers supervision of a child for exploitation of its work through forced labour or servitude, established slavery or a similar relationship, exploitation for prostitution or other forms of sexual exploitation including pornography, or for concluding illegal or forced marriage or illegal adoption, or illegal transplantation of parts of a human body, or for exploitation in armed conflicts, shall be punished by imprisonment for three to ten fifteen.

The same punishment shall be applied if the criminal offense from the paragraphs 1 and 2 was performed by official person while performing her /his duties, or if it is committed against a larger number of persons or has intentionally put in danger life of one or more persons.

Whoever, knowing the fact that the person is victim of human trafficking, uses its services which are result of one of the forms of its exploitation states in paragraphs 1 and 2, shall be punished by imprisonment from one to ten years.

**Corruption of children** is sanctioned in the Article 165 - Introducing pornography to children, Articles 160 - Satisfaction of lust in front of a child younger than 15 years, and in Article 61- Luring of children for satisfaction of sexual needs.

Article 165 states that whoever sells, gives, shows or publicly exhibits through a computer system, network od a media for storing computer data or in other way makes accessible

documents, photographs, audio-visual content or other objects of pornographic content or shows a pornographic show to a child younger than fifteen years, shall be punished by imprisonment for not more than three years.

Article 160 states that whoever, in the presence of a child younger than fifteen years, performs acts with the aim to satisfy his/her own lust or the lust of a third person, shall be punished by imprisonment for not more than one year.

Whoever, in the presence of a child younger than fifteen years, performs criminal offense of sexual intercourse without consent, rape, serious criminal offense against sexual freedom, lewd acts or sexual exploitation of a child, shall be punished by imprisonment for not more than three years. The attempts shall also be punished.

**Solicitation of Children for Sexual Purposes** is sanctioned in the Article 161 which states that an adult who, to a person younger than fifteen years, with an intent that he/she or another person perpetrates a crime from the Article 158 of this Code over the person younger than fifteen years, through information communication technology or in other way suggests a meeting with him/her or with another person, and which takes measures that the meeting happens, shall be punished by the imprisonment for maximum three years. Whoever collects, gives or transfers information about the person younger than fifteen years with the aim of committing the crime from the paragraph 1 of this article, shall be punished by the imprisonment for maximum one year<sup>117</sup>.

Regarding **extradition**, the „Act on mutual legal assistance in criminal matters“ in Article 32 states that a Croatian national may not be extradited for criminal prosecution or enforcement of a prison sentence in a foreign state, nor he may be transferred as a convicted person from the Republic of Croatia to another state for the purpose of serving the prison sentence.

Article 33 states that a foreigner may be extradited to another state for the purpose of criminal prosecution or enforcement of a sanction implying deprivation of liberty, if that state requested extradition or has taken over criminal prosecution or enforcement of a criminal verdict, upon request of the Republic of Croatia, i.e. with its consent.

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<sup>117</sup>Ibid, Article 161, Paragraph 2, „Whoever collects, gives or transfers information about the person younger than fifteen years with the aim of committing the crime from the paragraph 1 of this article, shall be punished by the imprisonment for maximum one year“.

Article 34 states that a foreigner who has been prosecuted or convicted based on a decision of a foreign judicial authority of the requesting state, for criminal offences punishable pursuant to the law of that state, shall be extradited to that state, for the purpose of carrying out the criminal proceedings, i.e. enforcement of sanctions which include deprivation of liberty, provided that the domestic law incorporates corresponding essential features of the relevant offences.

Extradition for the purpose of carrying out criminal proceedings may only be granted for offences that are punishable pursuant to the domestic law by prison or security measure implying deprivation of liberty for the longest period of at least one year or by application of a more severe penalty<sup>118</sup>.

Extradition for the purpose of enforcement of sanctions including deprivation of liberty may be granted when, in cases of offences referred to in paragraph 1 of this Article, a final verdict has been issued for the prison sentence or security measure implying detention, determined for a period of at least four months<sup>119</sup>.

As an exception, if the request for extradition covers several separate criminal offences out of which some fail to satisfy the conditions referred to in paragraphs 1 and 2 of this Article in respect of the duration of the penalty that may be determined or if the offences concern only pecuniary fine, the extradition may also be granted for these offences. Extradition shall be allowed if the requesting state guarantees that it would grant the request of the Republic of Croatia of the same kind<sup>120</sup>.

xxiii. I consider the sanctions effective, proportionate and dissuasive. Compared to German law, our sanctions are similar, in some cases even stricter. The new Criminal Code includes also measures against solicitation of children for sexual purposes, what wasn't sanctioned in

<sup>118</sup> „Act on mutual legal assistance in criminal matters“, The Official Gazette of the Republic of Croatia “Narodnenovine” No. 178/04, Article 34, Paragraph 2, „Extradition for the purpose of carrying out criminal proceedings may only be granted for offences that are punishable pursuant to the domestic law by prison or security measure implying deprivation of liberty for the longest period of at least one year or by application of a more severe penalty“

<sup>119</sup> Ibid., Article 34, Paragraph 3, „Extradition for the purpose of enforcement of sanctions including deprivation of liberty may be granted when, in cases of offences referred to in paragraph 1 of this Article, a final verdict has been issued for the prison sentence or security measure implying detention, determined for a period of at least four months“

<sup>120</sup> Ibid., Article 34, Paragraph 4, „Extradition for the purpose of enforcement of sanctions including deprivation of liberty may be granted when, in cases of offences referred to in paragraph 1 of this Article, a final verdict has been issued for the prison sentence or security measure implying detention, determined for a period of at least four months“

the old Criminal Code. The new Criminal Code has introduced a whole new chapter dedicated only to criminal offenses against sexual abuse and exploitation of a child, which I consider very effective. It seems that the legislators have understood how vulnerable the children are, especially in the virtual world, where is pretty hard to control the offenses.

In Croatia there is no special fund for the victims of sexual violence, but some initiatives have been made towards introducing a protocol about acting in cases of sexual violence. In that way a standardized procedure would be announced towards children victims of sexual violence, similar to the protocol made for the victims of violence in the family.

xxiv. The „Act on responsibility of legal persons for the criminal offences „prescribes prerequisites of punishment. Article 3 of that act prescribes the foundation of responsibility of legal persons and states that the legal person shall be punished for a criminal offence of a responsible person if such offence violates any of the duties of the legal person or if the legal person has derived or should have derived illegal gain for itself or third person. The responsible person within the meaning of this Act is a natural person in charge of the operations of the legal person or entrusted with the tasks from the scope of operation of the legal person. Responsibility of legal person is based on the guilt of the responsible person<sup>121</sup>.

Article 8 prescribes types of punitive measures and states that for their criminal offences, legal persons may be imposed penalties, and pronounced suspended sentences and security measures. For their criminal offences, legal persons may be punished with fines or termination of the legal person.

If the criminal offence is punishable by imprisonment for a term of up to one year, the legal person may be punished by a fine of 5.000,00 to 5.000.000,00kuna. If the criminal offence is punishable by imprisonment for a term of up to 5 years, legal person may be punished by a fine of 10.000,00 to 6.000.000,00kuna. If the criminal offence is punishable by imprisonment for term of up to 10 years, legal person may be punished by a fine of 15.000,00 to 7.000.000,00kuna. If the criminal offence is punishable by imprisonment for a term of up to 15 years or by long-term imprisonment, the legal person may be punished by a fine of

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<sup>121</sup> „Act on the responsibility of legal persons for the criminal offences“, The Official Gazette of the Republic of Croatia “Narodnenovine” No. 151/03, 110/07 and 45/11, Article 4, „The legal person shall be punished for a criminal offence of a responsible person if such offence violates any of the duties of the legal person or if the legal person has derived or should have derived illegal gain for itself or third person.

Under the conditions referred to in paragraph 1 of this Article the legal person shall be punished for the criminal offences prescribed by the Criminal Code and other laws prescribing the criminal offences.“

20.000,00 to 8.000.000,00kuna<sup>122</sup>. Instead of a fine the court may pronounce a suspended sentence on the legal person and simultaneously determine that the fine shall not be collected if the legal person does not commit another criminal offence within the time specified by the court, which may not be shorter than one or longer than three years. Suspended sentence may be pronounced for criminal offences punishable by imprisonment for a term of up to three years, and the court has imposed a fine on the legal entity in the amount of up to 50.000,00 kuna.

The legal person may be terminated if it has been established for the purpose of committing criminal offences or if the same has used its activities primarily to commit criminal offences. There is also a possibility for security measures to be imposed, such as : ban on performance of certain activities or transactions, ban on obtaining of licenses, authorizations, concessions or subventions, ban on transaction with beneficiaries of the national or local budgets, and confiscation.

According to the research of Croatian Bureau of statistics, in the period from 2005 to 2009, criminal offenses against sexual freedom and sexual morality created only less than 10 % of the total lawsuits and condemnations for responsibility of legal persons for the criminal offences<sup>123</sup>.

xxv. Regarding the crimes related to child pornography, the special objects, resources, computer programs or data meant, adapted and used for the perpetration of the criminal offense and to make it easier to perpetrate it shall be forfeited and the objects that are the result of the perpetration of the criminal offense shall be forfeited and destroyed. The Article 79 states generally that the security measure of forfeiture may be ordered with regard to an object which was designed for, or used in, the perpetration of a criminal offense, or came into being by the perpetration of a criminal offense, when there is a danger that the

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<sup>122</sup> Ibid., Article 10, „If the criminal offence is punishable by imprisonment for a term of up to one year, the legal

person may be punished by a fine of 5.000,00 to 5.000.000,00 kuna.

If the criminal offence is punishable by imprisonment for a term of up to 5 years, legal person may be punished by a fine of 10.000,00 to 6.000.000,00kuna.

If the criminal offence is punishable by imprisonment for term of up to 10 years, legal person may be punished by a fine of 15.000,00 to 7.000.000,00kuna.

If the criminal offence is punishable by imprisonment for a term of up to 15 years or by long-term imprisonment, the legal person may be punished by a fine of 20.000,00 to 8.000.000,00“ kuna.

<sup>123</sup>Croatian Bureau of statistics, „*Analysis of Responsibility of legal persons for the criminal offences 2005. – 2009.*“, Zagerb, 2010.

object will be used again for the perpetration of a criminal offense or when the purpose of protecting the public safety, public policy or moral reasons.

The state doesn't mention protection of *bona fides* third parties. However, Articles 30 – 32 talk about mistake of law and mistake of fact, and in certain cases protect the perpetrator.

Article 30 states a perpetrator does not act intentionally if at the time of the perpetration of a criminal offense he is not aware of one of its material elements. If that mistake was avoidable, perpetrator shall be punished according to rules of negligence, if the Code prescribes punishment for such an offense also when committed by negligence.

Article 31 states that the perpetrator shall not be punished for intent if at the time of the perpetration of a criminal offense he mistakenly assumed that the circumstances existed, which, had they actually existed, would have rendered his conduct lawful. If that mistake was avoidable, perpetrator shall be punished according to rules of negligence, if the Code prescribes punishment for such an offense also when committed by negligence.

Article 32 states that the perpetrator who, at the time of committing the criminal offense, doesn't know and was not required to know that the offense is prohibited, shall not be culpable. If that mistake is avoidable, the punishment may be mitigated.

For now there isn't any special fund for financing prevention or intervention programmes, apart from the ones conducted by NGO-s.

xxvi. There are two Articles that sanction the crimes committed within the family or within the close environment of the child, and those are previously quoted articles 159 and 166. The state steps in when parents do not follow the rules and regulations of the Family Act, i.e. when they do not exercise their rights and fulfil their responsibilities towards children. The benefits and interests of the child in such cases are being protected by the social welfare centre and the court in an extra-contentious procedure. Only rarely children themselves can identify that their rights are being infringed. And the situations when the children themselves notify the state institutions about it are even rarer. Having this in mind, the Family Act stipulates that “every person is obliged to notify a social welfare centre about



infringement of the child's rights, especially about all forms of physical or mental violence, sexual abuse, neglect or negligence, abuse or exploitation of the child."<sup>124</sup>

Immediately upon receiving such information, a social welfare centre is obliged to examine the case and take measures for the protection of the child's rights. In some cases the social welfare centre shall implement some of the preventive measures towards parents for the protection of the child's rights; and sometimes, when the situation demands, it shall notify the court about the infringement of the child's rights. The court shall then decide in extra-contentious procedure whether to impose more repressive measures upon the parents. The implementation of some of these measures shall include the cooperation with the police authorities, state attorney or ombudsperson for children.

Most of the measures for the protection of the child's benefits and interests are of personal nature; since the children are dependent on their parents, and being one of the most vulnerable groups in society. Some of personal measures are: a warning to the parents of the errors and omissions related to the care and raising of the child, supervision over the exercise of parental care and revocation of the right of the parent to live with the child and raise it. In addition, there are measures for the purpose of protecting property interests of the child; such as a request from the parents to render accounts for managing the child's property and the incomes of the child.

Less rigorous measures are of preventive character and implemented by the social welfare centre, in cases when parent does not significantly neglect the child's upbringing, raising and education. If, however, a parent abuses or gravely infringes parental responsibilities and duties more rigorous measures shall be applied, by the court in an extra-contentious procedure.<sup>125</sup>

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<sup>124</sup> Family Act, Official Gazette 116/2003, Zagreb, article 108(1) Every person is obliged to notify a social welfare centre about infringement of the child's rights, especially about all forms of physical or mental violence, sexual abuse, neglect or negligence, abuse or exploitation of the child. (2) After the reception of the notification, the social welfare centre has to examine the case and undertake measures for the protection of child's rights. (3) If the social welfare centre has received this notification from the other authority or institution, it is obliged to inform that authority or institution about the undertaken measures. (4) The court where the misdemeanour or criminal proceedings against the violation of child's right is held, has to inform the social welfare centre and the court (which is competent of pronouncing measures for protection child's rights) about instituting proceeding.

<sup>125</sup> Alinčić, M.; Hrabar, D.; Jakovac-Lozić, D.; Korać Graovac, A.: Family Law, Official Gazette, Zagreb, 2007, p. 282-285.

However, among the other institutes, it is also important to emphasize the role of the ombudsman for children, who was introduced by the Law on the Ombudsman for children in 2003. The main goal of his work is protection and promotion of children's rights according to the Croatian regulations and international Treaties, but he is also entitled to warn the public about their violation and therefore undertake required measures.<sup>126</sup> The State also protects children's rights by appointing children's parents as a «guarantors». The «guarantor», in this case, is a person who guarantees that children's rights will not be violated, and that the harmful consequence will never happen. Otherwise, they will suffer more severe punishment.

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

i. “The best interest of the child” is a criterion for treating a child and making decisions regarding him/her established by the Convention on the Rights of the Child. Following the Convention, the best interest of the child should be a priority regardless of actions being taken by public or private institutions of social care, courts, administration or juridical bodies.<sup>127</sup>

The Criminal Procedure Act in Article 43 stipulates that the victim of crime has right to psychological and other specific assistance and support of the body, organization or institution providing help to victims of crime according to the law, right to participate in the criminal procedure as a damaged party and other rights established by law. Besides that, the victim - child or minor - has right to get an attorney who will be paid by state budget, right for his/her personal data to be kept secret and right for public to be excluded from the process. The court, state attorney, investigator and the police should treat the child or younger minor, the victim of crime, very tactfully bearing in mind his/her age, personality and other circumstances to avoid harmful consequences for child's or younger minor's education and development.<sup>128</sup>

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<sup>126</sup> Alinčić, M.; Hrabar, D.; Jakovac-Lozić, D.; Korać Graovac, A.: Family Law, Official Gazette, Zagreb, 2007, p. 258.

<sup>127</sup> Alinčić, M.; Hrabar, D.; Jakovac-Lozić, D.; Korać Graovac, A.: Family Law, Narodne novine, Zagreb, 2007.

<sup>128</sup> The Criminal Procedure Act, Narodne novine 121/11, Zagreb, art 43.

Juvenile Courts Act stipulates that the president of the Court, if he finds it necessary, decides on assigning the attorney to the damaged party or to the damaged party in the capacity of accuser to protect his/her legal interest. That decision is to be made upon suggestion of the investigation judge, namely judge for young people.<sup>129</sup>

Minor cannot be questioned in the capacity of witness if he/she is not, due to his/her age and psychological development, capable of understanding the very meaning of the right not to witness, but information given by him/her through experts, relatives and other persons in contact with him/her can be used as evidence. Questioning of minor, especially if he/she is a damaged party, will be carried out with tact not to harm him/her psychologically.

During investigation questioning is in principle done by video-link. Questions put by judge, state attorney or defense attorney are presented to the child, in an understandable way, by expert court collaborator who has previously prepared the child for questioning. During that kind of questioning the child is to be placed in separate room designed appropriately for children.

If the witness is a child who is at the same time damaged party, the questioning is to be done with assistance of a psychologist, pedagogue or similar expert. Investigative judge will order the questioning to be video and audio taped. It will be done in a room without presence of judge and other parties. They can put questions through investigative judge and psychologist, pedagogue or other expert.

If a child or younger minor damaged by one or more following crimes (first degree murder, infanticide, participation in suicide, illegal freedom deprivation, kidnapping, abuse of public duty or force, domestic violence, rape, sex with disabled person, forced sex, sex as result of position abuse, sex with child, acts of indecency, satisfying lust in front of a child or a minor, soliciting, using children or minors for pornography, introducing pornography to children, incest, violation of duty to support, taking off child or a minor, change of family situation, extramarital life with a minor, preventing or not executing decisions for child or minor protection, trafficking and slavery, international prostitution) is questioned in the capacity of

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<sup>129</sup> Juvenile Courts Act, Narodne novine 84/11, Zagreb

the witness, questioning can take two sessions at the most and is done with assistance of psychologist, pedagogue or other expert.

Children and younger minors in a capacity of damaged party can be questioned in their own premises or some other venue they stay in or in a centre for social care instead in the Court. When child or younger minor has been questioned in previously described way, his/her statement will be read or reproduced at the trial.

Data collected by audio-visual devices will be destroyed after 5 years starting from the date of final judgment.

Furthermore, if a minor is questioned in the capacity of witness, the court chamber may order for him/her to be questioned outside the hearing by its president or a judge, member of the court chamber. It can also be decided to do it by the local investigating judge regarding the region the witness or the expert is from.

Limited number of interrogation of a child is legally stipulated only regarding court procedure – it understands two interrogations for a child or younger minor at the most. But in reality it does not mean that a child will be interrogated about the crime actually just two times, as we know that the court procedure is preceded, as already mentioned, by police investigation.

Data about minor participating in the court procedure is considered a secret and everybody or person knowing these data are to keep them confidential.

Any time, from the very beginning to its closure, the court chamber may exclude the public entirely or just for one part of the hearing according to its own decision or according to suggestion of the parties participating the court procedure due to protection and well-being of the minor. If a minor is present at the hearing in the capacity of witness or a damaged party, he/she will be asked to leave the courtroom as soon as his/her presence is no longer necessary.<sup>130</sup>

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<sup>130</sup> <http://www.antikorupcija.hr/Default.aspx?sec=438>

ii. Special police officers for young people are officers trained to work with children and younger minors regardless of them being perpetrators or victims of crimes against them. These officers have affinity to work with that group of young people, they are highly educated, mostly with degree in social sciences; criminologists, social pedagogues, pedagogues, psychologists, social workers, jurists etc, all of them with special training for working with minors. The training lasts 6 weeks and is focused, among other things, on methods and techniques of questioning children – perpetrators of crime. These officers are authorized to conduct first informative interviews with children and minors.<sup>131</sup>

In certain specifically listed offenses some of which are related to children special police actions are prescribed by Article 332 of the Criminal Procedure Act. These actions may be taken by the police and confidants who are temporarily restricted of individual constitutional citizen rights. Actions are as follows:

- a) surveillance and technical recording of telephone conversations and other communications from distance,
- b) intercepting, collecting and recording computer data,
- c) entering the premises for the purpose of conducting surveillance and technical recording of premises,
- d) secret surveillance and technical recording of individuals and objects,
- e) using undercover agents and informants,
- f) simulating sale and purchase of objects as well as simulating giving and taking bribe,
- g) providing simulated business services and concluding simulated legal affairs,
- h) supervised transport and delivery of objects of criminal offense.

Specific evidence listed in Article 332 of the Criminal Procedure Act may be stipulated for crimes committed against children and minors. <sup>132</sup>

Special units within the police investigate and analyze child pornography material.

iii. Everybody has the obligation to inform the Center for social care about violation of child's rights especially about all kinds of physical and mental abuse, sexual abuse, about cases of neglecting a child or careless actions regarding him/her, about abuse or exploitation of a child and the Center needs to take measures to protect the child. If he/she has been

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<sup>131</sup> <http://www.antikorupcija.hr/Default.aspx?sec=438>

<sup>132</sup> The Criminal Procedure Act, Narodne novine 121/11, Zagreb, art 332.

damaged by a crime, the Center needs to inform the police or state attorney about it. Every child or any other person can file a report or ask for help regarding any inappropriate behavior against child. The report can be filed to the following authorities:

1. Center for social care
2. The school; it needs to inform the proper authorities
3. The police (to special police officers dealing with legal protection of children and minors)
4. Ombudsman for children
5. NGOs dealing with protection of children's rights
6. State attorney, directly

There are no limitations on possible ways of reporting on misdemeanors or crimes. The report can be filed by a child-victim, his/her legal representative or any other citizen, legal person or state body that has information about crime committed. Report can be filed anonymously or under false name. In general, the report about crime should be taken from damaged child or his/her parents or legal representative by police officer specialized in minor delinquency and crimes against young people and family. The report can be filed in police station, but equally in child's home or Center for social care if circumstances show that it is the best way to protect child's interest and lower secondary victimization. If minor is 16 he/she can file the criminal prosecution or private charges himself/herself. Minor under 16 can do it only through a legal representative.<sup>133</sup>

The Criminal Procedure Act in Article 2 stipulates that state attorney has duty to undertake criminal prosecution if there is reasonable doubt that certain person has performed criminal act persecuted in a line of duty and if there are no legal obstacles for persecution of the person involved.<sup>134</sup>

iv. Period of limitation depends on the penalty anticipated for specific crime. The Criminal Act in Article 81. stipulates:

(1) Prosecution is in the state of statute limitation after:

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<sup>133</sup> <http://www.antikorupcija.hr/Default.aspx?sec=438>

<sup>134</sup> The Criminal Procedure Act, Narodne novine 121/11, Zagreb, art 2.

- 40 years for crimes subjected to possible punishment of long lasting jail sentence and sentences of longer than 15 years of imprisonment,

-25 years for crimes subjected to possible punishment of jail sentence longer than 10 years of imprisonment,

-20 years for crimes subjected to possible punishment of jail sentence longer than 5 years of imprisonment,

-15 years for crimes subjected to possible punishment of jail sentence longer than 3 years of imprisonment,

-10 years for crimes subjected to possible punishment of jail sentence longer than 1 year of imprisonment,

-6 years for other crimes.

(2) Criminal prosecution is limited to the crime of genocide (art 88), the crime of aggression (art 89), crimes against humanity (art 90), war crimes (art 91), and other offenses that do not expire according to the Croatian Constitution or international law.

(3) If before the expiration of the periods referred to in paragraph 1 of this Article, the first-instance judgment, limitations for criminal prosecution shall be extended for two years.<sup>135</sup>

The course of limitation is regulated by Article 82. of the Criminal Act and it stipulates that

(1) Limitation of criminal prosecution starts with the day the crime has been committed. If the consequence characteristic for the crime appears later, statute limitation starts from that moment.

(2) Time in which criminal prosecution is not possible or it cannot go on is not incorporated in limitation.

(3) For crimes referring to in Criminal Procedure Act 1: slavery (art 105 (3)), trafficking (art 106 (2 and 3)), murder (art 110), murder in the first degree (art 111), death (art 112(1)), assisted suicide (art 114), mutilation of female sex organs (art 116), heavy physical injury (art 118), very heavy physical injury (art 119), heavy crimes against sexual freedom (art 154 (1)(2)), sexual abuse of a child under age of 15 (art 158), sexual abuse of a child older than 15 (art 159), soliciting of a child (art 162), using child for pornographic materials (art 163), using child for pornographic shows (art 164), heavy crimes of child sexual abuse and exploitation (art 166), facilitating extra marital life with a child (art 170), abandoning family member in a difficult situation (art 171), abandoning a child (art 176), neglecting and violating child's

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<sup>135</sup> The Criminal Act, Narodne Novine 125/11, Zagreb, art 81.

rights (art 177) committed against the child the statute limitation starts with the moment the victim becomes of age.

The Criminal Act stipulates that limitation of prosecution for crimes committed against child and minor cannot become effective until child or minor becomes of age. That stipulation gives possibility for child or minor to start the criminal prosecution of the perpetrator once he/she becomes of age independently of his/her parents or legal representatives.<sup>136</sup>

The Criminal Procedure Act stipulates in Article 3 that doubt regarding the existence of the facts which constitute the elements of the definition of the criminal offence, or which are conditions for the implementation of a certain provision of the criminal law, shall be decided in favour of the defendant.<sup>137</sup> If the case refers to a minor, his/her guardian is informed and he represents him/her. If the person is of age, he/she can represent himself/herself. If some doubts about the age of a person or if there is no document about it, the person will be considered to be a minor and will be given a representative.

vi. Ministry of Internal Affairs is the main institution responsible for recording and storing data for convicted offenders. Data are stored separately in both electronic system and in paper files<sup>138</sup>. Currently, regulation of transmission of the data is in the process of alignment with the *acquis communautaire* and soon Republic of Croatia will be part of the European Criminal Record Information System what will ensure better cooperation in finding and processing the criminal offenders. So far the cooperation between Croatian authorities and authorities in foreign countries in this matter was also satisfied and transmission of data was usual, but sometimes it lasted very long due different and sometimes very difficult preconditions. By transmission of data authorities completely respect protection of personal data. Informations are available only to authorized bodies and institutions (courts, state prosecutor offices and ministries upon request for certain procedures). If some other institutions request informations, e.g. schools when employing teachers or jails when

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<sup>136</sup> The Criminal Act, Narodne Novine 125/11, Zagreb, art 82.

<sup>137</sup> The Criminal Procedure Act, Narodne novine 121/11, Zagreb, art 3(2)

<sup>138</sup> Dana contains the following informations: personal informations, information about the conviction, criminal offence, about sanctions and about changes in the conviction.



employing guardians, Ministry of Internal Affairs gives only information if persons was criminal offender or not without any details.

### 3.2 Complaint procedure

vii. The first stage of the criminal procedure are the preliminary proceedings within which evidence is collected about possible criminal offence and its perpetrator in order to decide whether to try the suspect or drop the charges. The preliminary proceedings, consequently, include criminal prosecution, investigation and indictment.<sup>139</sup>

Criminal prosecution begins with filing a criminal application with the public prosecutor. «Applications filed with a court, the police or a public prosecutor lacking the proper jurisdiction shall be accepted and immediately forwarded to the public prosecutor with proper jurisdiction.»<sup>140</sup>

Accepted criminal applications are registered with the Register of Criminal Applications. Thereupon, the inquiry into the criminal offence begins i.e. information is detected and collected about possible criminal offence, its perpetrator and other circumstances relevant to the procedure. The inquiry into the criminal offence is followed by a preliminary (evidentiary) hearing conducted by the investigating judge, at which witnesses are interrogated who are protected under international law and cannot be interrogated at the trial, or witnesses who could alter their testimony under influence. In addition, the preliminary hearing enables the presentation of evidence that can be used at the trial, as well as the evidence that affects the indictment decision.<sup>141</sup>

When the inquiry has been completed, there follows the decision on the application by the public prosecutor. The public prosecutor may issue an order to conduct an investigation if there is ground to suspect that a crime has been committed for which long prison term is

<sup>139</sup> Z. Đurđević, S. Gluščić: Criminal Procedure Law: Handbook, Official Gazette, Zagreb 2010, p.45

<sup>140</sup> Criminal Procedure Act, Official Gazette 121/11, Zagreb, art 205(3);(1) The report shall be filed with the competent State Attorney in writing or orally. (2) If the report is filed orally, the person who filed it shall be warned about the consequences of a false report. An oral report shall be entered in the record and if the report was conveyed by telephone or using other means of telecommunication, an official note shall be made. (3) If the report was filed with the court, the police authority or a State Attorney lacking jurisdiction, they shall receive it and immediately forward it to the State Attorney having jurisdiction.(4) The State Attorney enrolls criminal applications in the register of criminal applications as soon as they are submitted except in the cases from art 206 (7)(8) of this act. (5) Minister of Justice prescribes the way of conducting of the register of criminal applications.

<sup>141</sup> Z. Đurđević, S. Gluščić: Criminal Procedure Law: Handbook, Official Gazette, Zagreb 2010, p.48

prescribed, or a crime to which a regular procedure applies. After the investigation, the public prosecutor brings charges.

From the arraignment on, the suspect becomes the accused and is entitled to enter a plea to the charges and evidence against him. On this basis the grand jury decides whether the charges are justified, and if yes, issues a decision to confirm the charges. At this stage of the procedure, parties may negotiate the terms for pleading guilty and reaching agreement on the sanction, which in Croatian legislation is known as settlement or agreement between the parties. Settlement between the parties enables passing a convicting court judgement without trial, with both parties consenting to the content of the judgement.

When the bill of indictment with the decision of the grand jury and the trial file has been submitted to the court with proper jurisdiction, the case then enters the stage of trial. Preparations for the trial (preparatory hearing) are conducted by the president of the trial chamber. At the preparatory hearing formal things are done relevant to holding the trial, new evidence is presented that has been collected following the indictment, and items and documents are obtained that are in the possession of the court or another authority. At the final stage of the preparatory hearing, the president of the trial chamber determines the time and venue for the trial, as well as which witnesses and experts to call, and what other evidence to obtain.

“The main hearing begins with the introductory formalities conducted by the president of the trial chamber (checking the identity of the accused, whether he/she was provided written information about his/her rights, preventing consultations between the parties and witnesses or experts...). This is followed by the reading of the suit claim and the plea of the accused, and the opening statements of the parties, and presentation of evidence.”<sup>142</sup> Evidence at the hearing is presented in the following order: evidence of the prosecution, evidence of the defence, evidence of the prosecution to rebut the claims of the defence,

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<sup>142</sup> Criminal Procedure Act, Official Gazette 121/11, Zagreb, art 413(1) When the president of the council determines that all summoned persons have appeared, when the panel decides to hold the trial in the absence of some of the summoned persons or when the panel decides to postpone a decision on such issues, the president of the panel shall call on the accused to give his personal data, except data about prior convictions in order to determine his identity. (2) Presiding judge will determine if the defendant has received and understood the written „instruction on rights“. If the defendant did not receive the „instruction on rights“, the president of the council will proceed as described in art 350(1), and if the defendant has received the „instruction on rights“, but he did not understand it, the president of the council will explain it to him.

evidence of the defence in response to the rebuttal, evidence of the court, evidence of the facts decisive in pronouncing the criminal law sanction. After the presentation of evidence has been completed, there follow the closing statements of the parties in the following order: prosecutor, injured party, defence attorney, accused.

After the closing statements, the chairman of the trial chamber closes the hearing and goes on to pass the judgement. The parties are entitled to appeal against the judgement by means of regular and special remedies. Regular remedies include: appeal against a judgement passed by a court of the first instance, appeal against a judgement of a court of the second instance, and complaint against a decision. Special remedies include: motion for retrial, motion for the protection of law, motion for extraordinary examination of a final judgement.

Croatian legislation differentiates between the notion of a “child” (a person aged 0-14 years), “minor” (a person aged 14-18 years) and “young adult” (a person aged 18-21 years). A child cannot submit a charge by himself, but by its legal representative (a parent, foster- parent or legal guardian). On the other hand, a minor of sixteen years of age or more may submit a private charge by himself. A private charge must be submitted with the court which has (subject matter and territorial) jurisdiction. The private prosecutor, in his statement given to the court in charge of the proceedings, may withdraw the private charge until the conclusion of the trial. In such a case he forfeits his right to submit the private charge anew for the same criminal offence<sup>143</sup>.

As regards criminal offences prosecuted upon a private charge; the private charge must be submitted within a term of three months from the day when the authorized person learns of the offence and perpetrator.

Certainly, one of the most important methods of collecting evidence is the interrogation of defendant and the examination of witnesses and experts.

When the defendant is interrogated for the first time, he shall be asked for his personal data (first name and surname, the day, month and year of his birth, the place of his birth, his

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<sup>143</sup> Criminal Procedure Act, Official Gazette 121/11, Zagreb, article 60(1) The private charge will be submitted to the court having jurisdiction over the case. (2) The private prosecutor can, with his statement to the court, drop the private charge until the end of the dispute. In that case he loses the right to submit the private charge again for the same crime. (3) The private prosecutor has the same rights as the State Attorney, except the rights which belong to him as the government body. (4) Articles 54-59 are applicable on the public prosecutor.

ethnic group, occupation...) Thereafter, the defendant shall be instructed on his rights in a written form, and then he shall declare whether he shall be represented by a defense counsel of his own choosing.

The written instruction on defendant's rights must contain information on the charges placed against him as well as of the main grounds for suspicion against him, if beforehand he had not been served a warrant of investigation; he shall be instructed that he need not present his defence or answer any questions; that he is entitled to examine, transcribe, copy and record the files and objects that can be used as evidence against him and that he is entitled to be represented by a defence counsel of his own choosing or by a defence counsel that shall be appointed to him in accordance with the provisions of Criminal Procedure Act, who shall be financed out of the State Budget. Interrogation shall be performed in such a manner that the defendant's person is fully respected. "The defendant shall be interrogated orally and during interrogation he may be permitted to use his notes. It is forbidden to use force, threat, deception or other similar means to obtain a defendant's statement or confession."<sup>144</sup>

As far as the examination of witnesses is concerned; persons who are likely to furnish information regarding the offence, the perpetrator and other relevant circumstances shall be summoned as witnesses.

Every person summoned as witness is bound to appear at the court and to testify, unless otherwise prescribed by Criminal Procedure Act.

According to Criminal Procedure Act, article 285, paragraph 1 the following persons are exempted from the duty to testify: the defendant's spouse or common-law spouse, the defendant's linear relatives by blood, collateral relatives by blood to the third degree and relatives by affinity to the second degree, the defendant's foster-parent and adopted child. Furthermore; attorneys, public notaries, tax consultants, physicians, dentists, psychologists, and social workers regarding information disclosed to them by the defendant while

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<sup>144</sup> Criminal Procedure Act, Official Gazette 121/11, Zagreb, article 276 (1) Examination should be carried out in the way of absolute respect do the defendant. (2)The defendant shall be interrogated orally and during interrogation he may be permitted to use his own notes. (3)During the examination, no matter if the defendant answers the questions or not, he has the right to manifest about every circumstances charged and to take out facts in his defense. (4)When the defendant finishes his statement, he will be asked, if needed, to bring up evidences, to fill in the blanks or to eliminate the contradictions and ambiguities in his examination. (4)It is forbidden to use force, threat, deception or other similar means to obtain defendant's statement or confession.

performing their respective professions. Also, journalists and their editors in the media regarding sources of information and data coming to their knowledge in the performance of their profession and provided that their sources were used in the editorial process, except if they are released of keeping information confidential.

As regards to the examination of witnesses; “witnesses shall be examined separately and in the absence of other witnesses. The witness shall be bound to give his answers orally. In addition, the witness shall be informed of his duty to tell the truth and not to withhold anything and that giving false testimony is a criminal offence.”<sup>145</sup>

In special cases, i.e. when a witness examined is a child, the examination shall be carried out in the absence of the judge and parties in a room where the child is situated, by means of technical devices for video and audio taping operated by professional technician. The examination is carried out with the assistance of a psychologist, educator or other expert person. The parent or legal guardian of the child shall be present during the examination, except in cases when their presence is contrary to the interests of criminal proceedings or a child. The child may be questioned - under the authorization of the investigating judge - by the parties through the expert person. The examination shall be video-taped and audio-taped. The video and audio tape shall be sealed and entered in the record. A child can only exceptionally be re-examined, and that in the same manner.

To protect the most vulnerable groups in society (such as children and minors), Criminal Procedure Act, article 285, paragraph 4 prescribes that a minor who due to his age and mental development is unable to understand the meaning of the right to exemption from testifying cannot testify as a witness, but the information obtained from him through expert persons, relatives or other persons who have been in contact with him can be used as evidence.

viii. Children must have a person who shall be their legal representative. In most cases, children are represented by their parents. However, a child can be represented in legal

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<sup>145</sup> Criminal Procedure Act, Official Gazette 121/11, Zagreb, article 288(1) Witness shall be examined separately and in the absence of other witnesses. The witness shall be bound to give his answers orally. (2)Firstly, witness will be asked for name and last name, name of his father, profession, residence, place of birth, age, personal identity number, and his relationship with defendant and injured party. (3)After that, witness will be warned that he has to tell the truth, that he is not allowed to pass over, and that giving the false statement is crime. The witness will be also warned that he does not have to answer the questions predicted in art 45(1)(3), and also in art 286(1).

matters by its foster-parents and legal guardians too. According to Croatian Family Act parents have a right, - and at the same time a responsibility - to represent their child: “Parents are obliged and entitled to represent their child and make legal transactions on its behalf, unless stipulated differently by this Act”<sup>146</sup>.

The role of parents in legal representation of their child ends when the child acquires legal capacity. Generally, legal capacity is acquired at full age i.e. at the age of eighteen. However, legal capacity prior to the age of eighteen may be acquired by marrying before full age (with permission of the court) or by acquiring the legal capacity by the decision of the court. There is a possibility that parents maintain legal representation even after the age of eighteen of their child; in cases when had been decided, in special procedure, that parents shall maintain their parental care after full age of their child<sup>147</sup>.

There are, however, some exceptions to the rule that the parents are legal representatives of their children. For instance, Family Act allows for a minor of sixteen years of age to submit to a court a proposal for issuing the court’s decision on the permission for her/his marriage, as well as to appeal against the court’s decision if rejected. Also, when a minor with court’s permission enters into marriage, she/he does so independently; without legal representation by her/his parents.

Also, parents’ representation of their child is not necessary in certain circumstances in which a minor is entitled to give statements relating to her/his personal conditions and interests; e.g. “maternity and paternity may be acknowledged independently by a minor who has turned sixteen years of age.”<sup>148</sup>

Parent is not allowed to represent its child when the interests of the child and the parent are in conflict. In such situation a social welfare centre shall appoint a special guardian to a child.

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<sup>146</sup> Family Act, Official Gazette 116/2003, Zagreb, article 98(1)Parents are obliged and entitled to represent their child and make legal transactions on its behalf, unless stipulated differently by this Act. (2)Abstention of the child is the duty and the right of the parents. (3)Parents have duty and right, according to this Act, to manage the property of their child until its majority.

<sup>147</sup> Alinčić, M.; Hrabar, D.; Jakovac-Lozić, D.; Korać Graovac, A.: Family Law, Official Gazette, Zagreb, 2007, p. 261.

<sup>148</sup> Family Act, Official Gazette 116/2003, Zagreb, article 57(1) Maternity and paternity may be acknowledged independently by a minor who has turned sixteen years of age. (2)Maternity and paternity can be also acknowledged by the person who is partially incapacitated, if he/she is capable of understand the meaning of acknowledging, except he/she is, by the special decision of the court, forbidden to give statements concerning his/hers personal status.

“Special guardian shall be appointed; to a person in case when interests of the person and its legal representative (parent, foster - parent or guardian) are in conflict; when there is a conflict of interests between persons represented by the same legal representative, and in some special cases prescribed by law.”<sup>149</sup> In Croatian legal system, a special guardian representing a child involved in a legal dispute with its parents is referred to as “collision of interests’ guardian”. In general, “every person victim of criminal offence has according to the law a right to efficient psychological and other help and assistance provided by the state body, organisation or institution for assisting the victims of crime. The victim has the right to participate in criminal proceedings as an injured party, and has other rights prescribed by law.”<sup>150</sup>

Besides the aforementioned rights, a child or a minor injured by the criminal offence has additional rights: a legal representative financed out of the State Budget, confidentiality regarding its personal data and the exclusion of the public from the trial. In addition, “a court, state attorney, investigating judge and police must treat a child or minor injured by the criminal offence with special attention and utmost consideration, taking into account the victim’s age, personality, and other circumstances; in order to avoid any negative effects to the upbringing and development of the child or minor.”<sup>151</sup> Exceptionally, in connection with the criminal offences against sexual freedom and sexual morality the victim in such cases has the right: to counselling financed out of the State Budget prior to the examination; when examined by the police officers and the state attorney to be examined by a person of the

<sup>149</sup> Alinčić, M.; Hrabar, D.; Jakovac-Lozić, D.; Korać Graovac, A.: Family Law, Official Gazette, Zagreb, 2007, p. 382.

<sup>150</sup> Criminal Procedure Act, Official Gazette 121/11, Zagreb, article 43(1) The victim of criminal offence has, according to the law, right to efficient psychological and other help and assistance provided by the state body, organization, institution for assisting the victims of crime according to this act, the right to participate in criminal proceedings as an injured party, and other rights prescribed by law. (2) The victim of the criminal offences (for which the prescribed punishment is five or more years of jail) has also right to get advisor who is guaranteed by state before giving the statement in criminal proceedings if he/she suffers more severe psychophysical damages or more severe consequences of the crime. He/she also has the right of reimbursement of pecuniary and non-pecuniary damages from the state fund under conditions and on the way prescribed by special law. (3) The court, State Attorney, investigator or the police, while undertaking the first step, have to inform the victim about his/her rights from the art. 44(1)(2) and the rights which he/she has as the injured party.

<sup>151</sup> Criminal Procedure Act, Official Gazette 121/11, Zagreb, article 44(1) A child or the minor who is victim of the crime has, except the rights which has the victim from article 43, the right to have the assignee provided by the state, the confidentiality of personal data and the exclusion of the public. (2) A court, state attorney, investigation judge and the police must treat a child or minor injured by the criminal offence with special attention and utmost consideration, taking into account the victim’s age, personality and other circumstances, in order to avoid any negative effects to the upbringing and development of the child or minor.

same sex; to refuse to answer strictly personal questions; to demand to be examined by means of technical devices for video and audio taping; to confidentiality regarding her/his personal data and the exclusion of the public from the trial. Prior to the first examination a court, state attorney, investigating judge and police must inform the victim of criminal offence against sexual freedom and sexual morality of her/his rights.

## 4 COMPLEMENTARY MEASURES

### Preventive Measures

i. After some time spent on research of the subject one conclusion came up, that Croatia doesn't offer enough in education of professionals in the area of sexual exploitation and sexual abuse yet. There are some steps forward but it is still things to be done, especially in explanation of protocol, i.e. who is in charge for the certain steps.

First, I would refer to medicine doctors, because they are among professionals first who meet with abused child. In my research I received help from specialist in family medicine<sup>152</sup>, who confirmed that the education depends on free will of doctors and their own organisation. She, together with few colleagues and with association of Autonomous Women's House Zagreb ("Autonomna ženska kuća Zagreb")<sup>153</sup> held a big number of workshops in many cities all around country for colleague doctors, psychologists and social workers, on the subject of all types of violence against woman and children, including the sexual. They searched for the support from state districts, some of which showed interest and gave financial support, and some of which have shown no interest, which is not good information due to the importance of this issue.

A lot of doctors while meeting a child victim don't know who to call, talk to and which are their legal obligations. That causes problems, serious as breaking the law etc.

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<sup>152</sup>MD Dijana Ramić Severinac.

<sup>153</sup> Autonomous Women's House Zagreb is feminist, non-governmental and non-profit organization, which priority is working in civil society. AWHZ was founded on December 14th, 1990., in order to respond on need for safe shelter for women and their children exposed to violence - psychical, psychological, sexual, economical or institutional.



Big research of Child protection centre -Zagreb<sup>154</sup> shows that medical doctors are aware of lack of knowledge and education in this area. Almost 86% of paediatricians and 83% of school doctors, general practitioners and family doctors want to be educated more in area of abuse and neglect of children.<sup>155</sup>

Since the Campaign 1 in 5 started performing, the situation in Croatia is improving regarding the relations of the state to education. Head of campaign is Ministry of Social Policy and Youth<sup>156</sup>. Project and workshops are co-financed by Ministry of Science, Education and Sports. Projects and workshops are held by Udruga roditelja korak po korak (Parent's Association Step by Step)<sup>157</sup>. On the workshops organised by Parents' Association Step by Step participate professionals from the education area, social and medical protection, representatives of the police and local government and all the others interested in protection of children's rights and interests.

There is a special education in Ministry of the Interior for police officers who work with children - victims of sexual abuse and exploitation. There is a special course<sup>158</sup> for this area and passing the course is a main request for employment on positions in a specific area in police system. Other requirements are high education (degree in criminology, psychology, social work, law, pedagogy etc.) and affinity for work with children. On Police Academy in Zagreb there are basic courses for other police officers on the subject of domestic violence that provide knowledge in criminal law protection of children. Police Academy also performs extra education of special police officers who treat children, victims of crimes. Police officers are also educated in this area through seminars, conferences or courses organised in the country or abroad.

On faculties, where future professionals are being educated, there is also not enough education on this issue. On Faculty of Social Work and Faculty of Teacher Education there are subjects but they are optional.

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<sup>154</sup>Poliklinika za zaštitu djece grada Zagreba - Child protection center Zagreb - its activities are treatment of children and families, research and publications, education of professionals from medical and other institutions, supervising. It was recognized by Council of Europe and included in Campaign 1 in 5.

<sup>155</sup>Poliklinika za zaštitu djece grada. 2008.-2011. Piartis. Aug. 2012. <[www.poliklinika-djeca.hr](http://www.poliklinika-djeca.hr)>

<sup>156</sup> Former Ministry of Families, Veteran's Affairs and Intergenerational Solidarity

<sup>157</sup> Parents' Association "Step by Step" is a non-governmental and non-profit association whose main objective is to promote value of the community focused on children.

<sup>158</sup> Course duration is six weeks.

ii. Referring to education of children in matters of sexual abuse, situation in Croatia is far from the ideal. There is no system education in school. It is not the subject in psychology or biology classes. Themes in master classes are violence, physical and psychical, but not sexual. Some experts think that it is needed for safety and equality in schools, and the public mostly agrees with the idea.

Theoretically there is possibility for the class master to choose the subject of sexual violence for the pupils, but it depends on his will.

In some schools in the country, teachers, pedagogues and psychologists are informed and organised by themselves, and they joined to the Council of Europe programme Building a Europe for and with children and Council of Europe campaign to stop sexual violence against Children<sup>159</sup>. In 2011 they organised extracurricular activities for children such as workshops, presentations and lessons. Psychology students also held lessons about the subject matter for high school students. In some schools external experts hold lessons for parents.

Ministry of social policy and youth, as the head of Campaign 1 in 5, made an Action plan for 2011 for implementing the campaign, and according to that plan Family centres<sup>160</sup> conduct the programme and hold lessons in schools and kindergartens for children, for parents and teachers, in 2011 and continued in 2012. Parents' association step by step also contributes the campaign through its CAP programme and it is among several institutions mostly involved in this campaign. They conduct CAP programme<sup>161</sup> in Croatia since 2000. The programme is based on three types of violence: violence between coevals, violence by adults and sexual violence. The leader of the project Marina Trbus<sup>162</sup> says that people accept the programme against violence between coevals better than programmes against sexual violence because there is general opinion that it is not so often and it is kind of a taboo or shame to talk about. She says that Lanzarote Convention helps them boost both

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<sup>159</sup>Campaign 1 in 5

<sup>160</sup>Family centers are institutions founded by Republic of Croatia based on Social care law, NN 33/12

<sup>161</sup> The CAP (Child Assault Prevention) Programme is one of the most acknowledged and one of the best world programs in primary prevention of child abuse. The CAP seeks to integrate the best resources of a community in an effort to reduce a child's or a young person's vulnerability to verbal, physical and sexual assault. The Child Assault Prevention (CAP) Project originates in Columbus, Ohio in the late 1970's, as a response to the rape of a young child.

<sup>162</sup>Marina Trbus, professor of psychology, leader of CAP programme in Croatia

programmes (CAP and 1 in 5) because it gives them legal grounds for what is ought to be done.

All these activities and events are in order to raise and develop education of children and parents. Majority of them where happening recently, through 2011. and 2012., and are still in form of extracurricular activities.

iii. Croatia still doesn't have any prevention programmes for people who fear that they may commit the crime. For the time of being, it is just an idea that is mentioned among experts as a necessity, because it is required by Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse<sup>163</sup>. It was talked about on expert debates, discussions and on round table "Prevention of sexual harassment and abuse of children"<sup>164</sup>.

### **Protective Measures and Assistance to Victims**

iv. One of the first social programmes to notice are helplines, which provide help and support for victims, conversation to educated volunteers and professionals about their problem.<sup>165</sup>

Helplines don't offer enough, so volunteers address victims to Child protection center in Zagreb where children receive proper help and treatment. Children also go to other hospitals for children, such as Children's hospital Zagreb, where they are appointed by their general practitioners; and mental institutions as well. The Child protection centre is a specialized institution in health care system where children also arrive appointed by their general practitioners. The centre receives children from the whole country, because for now it is the only institution of that type in Croatia<sup>166</sup>. They receive 40% of sexually abused children from Zagreb, and 60% from the rest of the country. Centre has multidisciplinary approach and victims are treated by highly profiled specialists. Victims of sexual abuse have advantage in this clinic and receive treatment within five days.

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<sup>163</sup>Lanzarote Convention.

<sup>164</sup>Event organised by Parents' association step by step, Ombudsman for children and Child protection center Zagreb scheduled within activities in Action plan for enforcement of Campaign 1 in 5.

<sup>165</sup>More about this type of support in next question, number v.

<sup>166</sup> It is the centre for abused and neglected children.

Other public institutions, such as Social care centres, which are the first institutions that need to be informed about abuse, have limited support for victims. Family centres also are not the institutions that provide support programmes, although they work on prevention and organise lessons in schools.<sup>167</sup>

Children can also turn to non-governmental and non-profit organisations. The best example is Autonomous Women's House Zagreb<sup>168</sup>, an institution for abused woman and children that provides safe shelter in a period up to twelve months, as well as physical and psychological recovery, counselling and all similar care. Institution also acts as an intermediary between the women (and their children) and the relevant institutions (social, legal, medical, educational, humanitarian).

Children homes all over country are facilities for children without parents or proper family care, where employers are specialists who work with children and give them treatment and recovery in cases that need it.

v. There are several helplines in service for the victims in Croatia. There is "Hrabri telefon" ("Brave phone"), an organisation founded in 1997 and registered in 2000, which today runs several programmes. Among them one is advisory helpline for abused and neglected children, known under the same name as the organization: "Hrabri telefon". Advisory helpline is free and anonymous phone-line opened every working day from 9 am until 8 pm on the number 0800 0800. Except on the phone line, advisory help is also possible on the Internet i.e. Chat every working day from 3 pm until 6 pm, also on e-mail and forum. Besides from the children, help can be asked from parents and professionals who work with children and other adults who are voluntarily involved to help children.

"Hrabritelefon" is led by following principles: accessibility, confidentiality and the best interests of the child. Principle of accessibility is shown from the services which are free of charge for all users, confidentiality means that the information about users are used

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<sup>167</sup>Family centers and Social care centers are institutions founded by Republic of Croatia based on Social care law, NN 33/12.

<sup>168</sup>Autonomna ženska kuća Zagreb is feminist, non-governmental and non-profit organisation, which priority is working in civil society. AWHZ was founded on December 14th, 1990., in order to respond on need for safe shelter for women and their children exposed to violence - psychical, psychological, sexual, economical or institutional.

exclusively for statistical analyses and are not available to public, strictly confidential. Counselling and support are aimed with the principle of the best interest of the child.

Users contact the advisory helpline regarding the matter of child protection from abuse and neglected types of violence, the questions are mostly raised by children. The line is also open for advices in parenting, raising the children and education. According to statistics incoming calls primarily refer to physical and emotional child abuse.

People who work on the “Hrabri telefon” helpline are volunteers, around forty of them, scheduled in shifts of 3 to 4 hours per day. They are students of final years in humanistic faculties (psychology, social work, education and rehabilitation) who passed special education, continue educating, and are monitored by experts: psychologists, psychiatrists and social workers.

Apart from “Hrabri telefon” organisation exists “Plavi telefon” (“Blue line”) organisation with its helpline “Plavi telefon”. It is opened every working day from 9 am until 9 pm, and its goal is to help children, young and adults, from giving information to solving abuse etc. People who work on this phone line are also volunteers, around twenty five of them involved, who are also educated and monitored by experts.

There are also other helplines on the areas of all bigger cities in Croatia available for children, parents and everyone else who need advice of experts.

vi. The answer on first question is given under question number iv. The most important thing when it comes to recovery of victims is co-operation of institutions: Child protection centre, Social care centre, police department, judiciary, schools and kindergartens.

The state offers posttraumatic treatment and support in Child protection centre through health care system. Other hospitals and clinics also work through health care system, but this centre is a specialized institution.<sup>169</sup> The services are free for children in Croatian healthcare

There is a tendency to decrease a number of interrogating of victims, so the centre has two special rooms with cameras and microphones, where a child talks to a psychologist. Everything is filmed and observed from the other room by other subjects in trial: judge,

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<sup>169</sup> The services are free of charge for children in Croatian healthcare.

state attorney, the defendant and his lawyers. Cases finish quickly; child is questioned only once, in friendly environment, the tape is used as evidence in court. Unfortunately, judges show lack of interest for this type of examination, only two judges in 2011 used the forensic room of the centre.

The specialists are aware of the possibility that child victims could have sexual behaviour problems in the future. It could be agreed to observe the situation with the child in the future.

The legal system has clearly instructed institutions how to react and work in cases of sexual violence and abuse, and there is a protocol of actions. All people working with children should know and obey the rules but there is a doubt how it works in practice. Institutions i.e. people who work on Campaign 1 in 5 and similar programmes, workshops etc. are teaching professionals who work with victims what is their legal obligation.

### **III NATIONAL POLICY REGARDING CHILDREN**

i. Child sexual abuse and harassment are the hardest forms of violence against children. Considering aforementioned, the Republic of Croatia is taking the necessary activities whose goals are securing the most efficient way of protecting children from sexual abuse, protecting the victims of sexual abuse and preventing this crime from happening. Certain rules and regulations are being decreed. As a part of National plan of activities for children's rights and interests between the year 2006 and 2012 certain precautions, which are directed towards the protection of children from all the forms of abuse and neglect, are provided. The national strategy of protection against family violence between the year 2011 and 2016 is introducing a series of measures which define protection of children, i.e. measures directed towards development and conduction of professional care oriented towards the needs of each child with a history of family violence. A better child protection can be applied if all of the relevant participants on all of the levels of society are working together to stop sexual abuse of children and protect them against all forms of dangers that modern lifestyle brings. Considering this, The Ministry of Internal Affairs has nominated a project called Maximizing the capacity of The Ministry of Internal Affairs in suppression of child sex abuse, as well as providing police help to the vulnerable victims, has been carried out as a part of IPA European Commission for the year 2009. It involves empowerment of institutions in suppressing and fighting against sexual abuse of children. The Ministry of Internal Affairs is, along with numerous partners, also planning to introduce a preventive

program called „New media“, whose goal would be elevating the security and protection of children from a series of modern technology abuse (with the focus on the internet, computers and cell phones), as well as informing the public on potential threats and risks of misuse of the new media. Civil society organizations and their expertise and continuous, supported, work also have a significant role in protection of children. Some of the organizations representatives were included in the preparation of this Action Plan – The Coordination of Organizations for Children have presented their plan of activities as well as their work on this area of expertise, with their emphasis on the work of Parents Association „Step by Step“ whose work CAP program of prevention of child abuse has been known in Croatia since 1999.

The Office of Children Ombudswomen, whose work began on 25th of September 2003, has been recognized by the public in these past few years, which is definitively an indicator of rising public awareness of children's rights and the success of the existing model. In the past three years (from 2009 to the end of 2011), for example, the Office has been mentioned 1499 times in the mass media, with 357 radio and 286 television broadcasts. Numerous public statements were an opportunity for addressing the principles of children's legal rights as well as their best social interests. During the year 2011, the Office answered numerous questions, indicating the journalist's interests in children's legal rights. The whole report has been posted on the websites of Croatian Parliament and the Office of Children Ombudswomen.

ii. Civil society organizations are involved as follows:

- Organizing public presentations on projects that include children's rights focused on prevention of sexual abuse
- Organizing workshops for teachers, social and health workers, police, the church and other self-government workers
- Organizing meetings in collaboration with The Office of Children Ombudswoman and Zagreb Polyclinic for children protection, with topics concerning the prevention of sexual abuse of children
- Organizing pilot implementation of CAP programs for children with development issues (presentations for parents and staff, workshops for children). They, also, educate new CAP teams in implementations of Preschool, Basic and TeenCAP. They deal brochures with informations regarding CAP programs

- Publication of educative texts on their webpage
- Cooperation with other national and local participants in the realization of the program
- Involvement in tv and radio shows and cooperation with newspapers during their presentations on prevention of sexual abuse
- Direct work with children in order to establish the forms of sexual abuse
- Providing professional advice

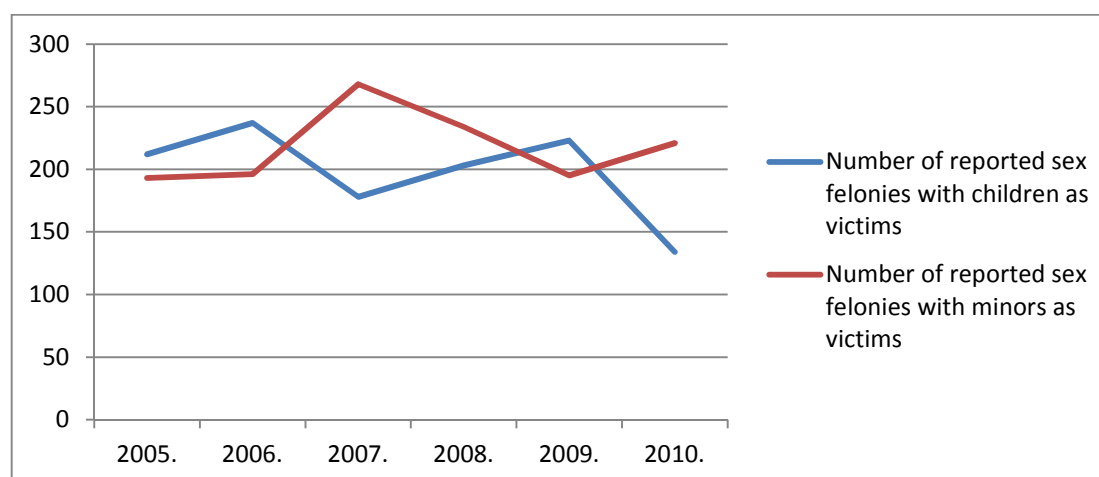
iii. In order to procure a real assessment of the weight of socially negative event and create necessary precautions and modality during the criminal procedures, we are inclined to have access to the latest data that can point us at the severity and the trend of this event. In the situation of the extent and trend of sexual abuse of children, we have to rely on statistical data, which can be obtained from certain institutions, such as The Ministry of Internal Affairs, the police stations, the state Attorney, the courthouses and The Office of Judicial Statistics of the State Institute of Statistics of Croatia. The main notion is a presumption that the trend of sexual delicts is fairly accurate within the data procured by the Ministry of Internal Affairs and the state Attorney's office. Based on the data given by the Office of Analytics of the Ministry of Internal Affairs we can follow the trend of sexual felonies, the quota of each felony, territorial allocation and age and sex of the felons and victims.

**Table 1. Total number of felonies against sexual freedom and morality with children and minor as victims between 2005 and 2010.**

YEAR	The number of sex felonies against children	The number of sex felonies against minors
2005.	212	193
2006.	237	196
2007.	178	268
2008.	203	234
2009.	223	195
2010.	134	221

**Chart 1. Trend of sexual felonies against children (blue) and minors (red)**





**Table 2: Number of victims in years 2005 and 2006 (by age and sex)**

Felonies	Victims in 2005.				Victims in 2006.			
	Until 14 years		14-18 years		Until 14 years		14-18 years	
	Male	Female	Male	Female	Male	Female	Male	Female
Article 188. st. 4.5 i 6 - Rape	0		4	17	0	1	2	29
Article 189. Sexual intercourse with an infirm person	0		2	2	0		3	4
Article 190. Forced intercourse	0		0	1	0		0	1
Article 191. Intercourse with abuse of position	0	2	0	2	0		4	2
Article 192. Intercourse with a child	22	18	4	26	8	25	2	27
Article 193. Fornication	11	69	9	58	7	65	4	57
Article 194. Fornication in front	8	47	4	27	8	25	3	43

of a child or a minor								
Article 195 Pimping	0		0	3	0		0	1
Article 196 Child or minor pornographic abuse	4	1	2	5	2	4	4	5
Article 197 Introducing children to pornography	10	15	1	17	10	3	0	0
Article 197a Children pornography on PC or internet	2	0	2	5	42	29	0	1
Article 198 Incest	1	2	0	2	3	5	0	4
<b>TOTAL</b>	<b>58</b>	<b>154</b>	<b>28</b>	<b>165</b>	<b>80</b>	<b>157</b>	<b>22</b>	<b>174</b>

Table 3: Number of victims in years 2007 and 2008 (by age and sex)

Felonies	Victims in 2007.				Victims in 2008.			
	Until 14 years		14-18 years		Until 14 years		14-18 years	
	Male	Female	Male	Female	Male	Female	Male	Female
Article 188. st. 4.5 i 6 - Rape	0	0	5	27	0	6	6	25
Article 189. Sexual intercourse with an infirm person	0	0	0	2	0	0	0	12
Article 190. Forced intercourse	0	0	0	0	0	0	0	0

Article 191. Intercourse with abuse of position	0	0	2	1	0	0	0	5
Article 192. Intercourse with a child	10	20	6	35	13	15	1	24
Article 193 Fornication	18	43	5	95	9	65	9	73
Article 194 Fornication in front of a child or a minor	6	42	7	30	15	51	5	20
Article 195 Pimping	1	0	1	2	0	0	0	4
Article 196 Child or minor pornographic abuse	1	10	1	13	2	5	2	22
Article 197 Introducing children to pornography	10	9	5	6	11	13	0	2
Article 197a Children pornography on PC or internet	1	4	2	17	0	4	4	16
Article 198 Incest	0	3	3	3	0	1	0	4
<b>TOTAL</b>	<b>47</b>	<b>131</b>	<b>37</b>	<b>231</b>	<b>50</b>	<b>153</b>	<b>27</b>	<b>207</b>

Table 4: Number of victims in years 2009 and 2010 (by age and sex)

Felonies	Victims in 2009.				Victims in 2010.			
	Until 14 years		14-18 years		Until 14 years		14-18 years	
	Male	Female	Male	Female	Male	Female	Male	Female
Article 188. st. 4.5 i 6 - Rape	0	0	1	21	0	0	0	25
Article 189. Sexual intercourse with an infirm person	0	0	0	1	0	0	2	8
Article 190. Forced intercourse	0	0	0	1	0	0	0	1
Article 191. Intercourse with abuse of position	0	1	0	4	0	0	0	5
Article 192. Intercourse with a child	9	28	2	27	9	21	3	36
Article 193 Fornication	17	60	5	75	3	56	3	54
Article 194 Fornication in front of a child or a minor	11	44	11	14	2	27	2	23
Article 195 Pimping	0	0	0	2	0	0	0	8
Article 196 Child or minor pornographic abuse	3	10	2	9	0	2	3	11

Article 197 Introducing children to pornography	23	12	4	5	5	3	0	1
Article 197a Children pornography on PC or internet	0	4	0	11	0	4	1	34
Article 198 Incest	1	0	0	0	0	2	0	1
<b>TOTAL</b>	<b>64</b>	<b>159</b>	<b>25</b>	<b>170</b>	<b>19</b>	<b>115</b>	<b>14</b>	<b>207</b>

In the period set in the tables we can see that the most common felony is fornication (35,4 %), followed by fornication in front of a child or a minor (24,1 %), sexual intercourse with a child (16,7 %), introducing children to pornography (10,4 %), children pornography on PC or internet (7,6 %), child or minor pornographic abuse (3,7 %) and incest (1,5 %). In cases where minors are involved, the most common felonies are as follows: fornication (34,5%), rape (12,5%), fornication in front of a child or a minor (14,6%), children pornography on PC or internet (6,5%), child or minor pornographic abuse (6,1%), incest (1,3%). Regarding the prosecution of felonies against sexual freedom and morality with children and minors as victims, the number of legal registrations, prosecutions and verdicts is as follows: in the year 2007 - 249 registrations, 203 prosecutions, 164 verdicts; in the year 2008 – 312 registrations, 224 prosecutions, 130 verdicts; and in the year 2009 - 236 registrations, 152 prosecutions, 130 verdicts.

iv. Currently in Croatia, the European Council is promoting a campaign called „One of five“ with the goal of preventing sexual abuse of children, which started in Rome, in the end of November 2010. This campaign has two main goals:

- Promoting of signing, ratification and implementation of Convention of European Council about protecting the children from sexual abuse (so-called Lanzarote Convention)
- Supporting children, parents, experts and society with knowledge in preventing and notifying the authorities in sexual abuse of children, which can raise public awareness on such matters.

The campaign has been successfully implemented in kindergartens, schools and various other institutions in Republic of Croatia.

**The campaign has been successfully implemented in kindergartens, schools and various other institutions in Republic of Croatia.**

v. The Office of Children Ombudswomen offers its opinions on the matters of decreeing regulations of protection of children against sexual abuse. The experts of health department, social workers, the police and civil organizations are inclined to assist in the creation of legislative regulations, if needed.

vi. Holders of campaign for prevention of sexual abuse and molesting of children are:

**National level:**

- Former Ministry of family, war veterans and intergenerational solidarity
- Ministry of Justice
- Ministry of Internal Affairs
- Ministry of Health and Social Care
- Ministry of Science, Education and Sports
- Office for Human Rights of Government of the Republic of Croatia

**Local level:**

- Family Centres
- Units of local and regional self-government
- Civil society organizations

**Non-government organizations in Republic of Croatia are:**

1. **Brave phone** - helpline for abused and neglected children is non-governmental, non-profit organization founded in 1997, and registered in 2000 with goals to provide direct help and support to abuse and neglect children and their families and work on prevention of abuse and neglect as well as unacceptable behaviour of children and youth. In professional work Organization leads with several principals: accessibility (all activities and services are free of charge for users); confidentiality (information about users are used exclusively for statistic analyses that are not available to public) and the best interests of the child (counselling and support are aimed with this principal). In every day work organization place an efforts in achieving and stimulating positive changes in society and own growth and progress it

terms of professional standards of quality in providing services to users. Also, in taking care for employees and volunteers who have been included more than 500 so far in the work of Brave phone.

**Web page:** <http://www.hrabritelefon.hr/hr/home>

2. **Blue phone** - is non governmental, non-profit organization founded 1991.

**Web page:** <http://www.plavi-telefon.hr/>

3. **Parents' Association "Step by Step"** is a non-governmental and non-profit association whose main objective is to promote value of the community focused on children. Such society perceives children as its most valuable treasure and creates a priority for their welfare, development and education. Moreover, the restoration of the value of parenting is considered as a possibility for balancing work and care for children while doing everything in our might to start appreciating parenting and make it easier. Association's activities include promotion of children's rights as well as rights of their families to honourable life; cooperation with preschool, school and other institutions which take care of children and families; joint efforts of Association's members before authorities, institutions and local communities; organization of seminars and public lectures; distribution; cooperation with domestic and foreign organizations and encouraging donations and sponsorships.

**Main objective and activities of the Association:**

- Encouragement of the educational politics which provides equal opportunities and approach to free compulsory education for all children;
- Encouragement of the volunteer participation of parents in matters of great importance for their children;
- Encouragement of the use of methodology focused on children in nurseries and schools in order to provide better learning environment where children like to learn and continually question their knowledge, adopting democratic attitudes, values and behaviour.
- Working with adults, especially parents, teachers and educators with the aim of promoting interculturalism, multiculturalism, inclusion, child assault prevention,

prevention of different kinds of addictions, setting up standards in practical work which will lead to better living conditions of children and adults;

- Encouragement of partner relations between children and adults in order to achieve their rights; encouragement of socially responsible business sector with the aim of fulfilling the needs of children and their parents;
- Cooperation with government institution and other associations in promoting the value of community focused on children.

**Web page:** <http://www.udrugaroditeljakpk.hr/>

4. **UNICEF** has been active in Croatia since 1947, when the first shipment of aid in food and clothing sent by UNICEF arrived on the territory of the then SFRY. From an agency providing aid in food, clothing, footwear, equipment and medicines, UNICEF has been transformed into an agency raising funds for programmes to protect and promote the rights of children and forming partnerships between individuals, companies and the government for the better life of children in Croatia and the world.

**Web page:** <http://www.unicef.hr>

## IV OTHER

## V CONCLUSION

Croatia is the only post-communist country in which the parallel process of democratization and transition bred the process of state creation and war. After the disintegration of Yugoslavia, Croatia had a lot of challenges ahead. As a young and inexperienced state in which all three processes culminated and jeopardized the process of state creation and development, Croatia reached its then goals through strong struggle for sovereignty. The crown of that long-suffering struggle for development was the conclusion of negotiations on membership in the European Union, so Croatia will become a full member on 1 July 2013. In the process of accession Croatia had to fulfil various requirements in order to implement *acquis communautaire*. Of the 35 chapters, Croatia had the most difficulty with Chapter 23 - Judiciary and fundamental rights. The rule of law, human rights and minority rights proved to be crucial and decisive in the closure of negotiations with the European Union in June last year. However, Croatia still has a long way to go in order to truly become a modern and organized country in which human rights are fully respected.



The Republic of Croatia signed the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Violence on 25 October 2007, ratified it on 21 September 2011, and the Convention entered into force on 01 January 2012. Also, there are no reservations to the Convention. According to legal monism which is accepted in the Croatian legal order, Convention is above national laws and under the Constitution and it is directly applicable.

In 2011 there was a reform of the criminal legislation and new Criminal Code was laid down. It will enter into force on the 1<sup>st</sup> of January 2013 and it is completely in accordance with international obligations which Croatia has taken over in past 20 years among which important role also has Lanzarote Convention. It has introduced a lot of changes and for are most important those related to the Lanzarote Convention. All criminal offences related to the sexual exploitation and abuse are mentioned in the separate chapter and some new offences are introduced which hasn't been included in the Criminal Code from 1997. Legal age for engaging in sexual activities is fifteen. But if the child is under fifteen, and the age difference between the persons engaged in sexual intercourse or an equivalent act or in a lewd act does not exceed three years, in that case no criminal offense of sexual child abuse has been committed.

In the previous Croatian Criminal Code there is no definition of the term "child pornography" or pornography in general, but finally, new Criminal Code introduced the definition and it is compatible with the Convention on Cybercrime, Lanzarote Convention and other documents that the Republic of Croatia has signed in the meantime.

Article 163 (6) of the new Criminal Code defines child pornography as "material that visually or otherwise shows a real child or realistically depicted non-existent child or a person who looks like a child engaged in real or simulated sexually explicit conduct or showing sexual organs of children in sexual purposes. Materials that have an artistic, medical, scientific, information or similar importance should not be considered pornography in terms of this Article". The definition is made based on the Article 20 (2) Lanzarote Convention and has been further extended with parts from paragraph (3) in which the state is given the option to retain the right not to apply. New Croatian Criminal Code attributes criminal liability for offenses related to child pornography to everyone who has any connection with child pornography, from direct producers to the end users who knowingly gain access to child pornography through information and communication technologies. The right of reservations from the Lanzarote Convention, Article 20 (4), has not been used.

The new Criminal Code severely criminalizes procuring a child in any manner and for any purpose as well as each participation of a child in pornographic shows.

According to the Article 21 of Lanzarote Convention which refers to offenses related to the participation of children in pornographic performances, composed Article 164 of Croatian Criminal Code entitled "Exploitation of children in pornographic performances". In the Article have been introduced all the provisions of Article 21 of the Convention and the content is additionally expanded with the provisions in paragraph (5) relating to the confiscation of all devices, tools and computer programs, and the destruction of pornographic material formed through perpetration of criminal offense. Croatia did not use the right of reservations from the Article 21 (2) of Lanzarote Convention, but already severely criminalizes visits to all pornographic performances in which children are involved. In the new Criminal Code, under Article 87 (7) a child is considered a person who has not attained the age of eighteen.

Sexual gratification through the information and communication technology with intent by an adult offender is regulated by Article 161 of the Criminal Code of the Croatian criminal legislation which states that adult acting person contacts a juvenile under the age of fifteen years with the intention that they or another person commit the offense from the Article 158 of the Criminal Code, through information and communication technologies, or otherwise, suggest meeting with them or another person and then take measures for this meeting to happen, shall be punished by imprisonment not exceeding three years. In the second paragraph of this legal article it is stated that whoever collects, provides or transmits data on a person under the age of fifteen years for an offense referred to in paragraph 1 of this article shall be punished by imprisonment not exceeding one year. An attempted criminal offense referred to in paragraph 1 of this article shall be punished.

Our criminal code specifies that the offender should propose or initiate a meeting with a potential victim or propose a meeting between a victim and another person.

The novelty is that term "grooming" now exists in Croatian criminal legislation and it is dealt with in Article 161 of the Criminal Code.

The above mentioned crimes are sanctioned in the Chapter 17 „Criminal offenses against sexual abuse and exploitation of a child“ and Chapter 9 „Criminal offenses against humanity and human dignity“ of Croatian Criminal Code. Penalty includes deprivation of liberty for all of them.

In the Croatian legislation, the state considers the legal person liable if the offense was committed against children by private persons, i.e. employees in a legal entity (for example, institutions, companies, organizations, etc.). In such cases, civil liability is prescribed. The civil liability of both natural and legal persons is prescribed by the provisions of the Law of Obligations, which gives an opportunity to the injured party in the civil case to exercise the right to compensation for damage caused due to mental pain and injury.

“The best interest of the child” is a criterion for treating a child and making decisions regarding him/her established by the Convention on the Rights of the Child. Following the Convention, the best interest of the child should be a priority regardless of actions being taken by public or private institutions of social care, courts, administration or juridical bodies.

The Criminal Procedure Act also stipulates that the victim of crime has right to psychological and other specific assistance and support of the body, organization or institution providing help to victims of crime according the law, right to participate the criminal procedure as a damaged party and other rights established by law. Besides that, the victim - child or minor - has right to get an attorney who will be paid by state budget, right for his/her personal data to be kept secret and right for public to be excluded from the process. The court, state attorney, investigator and the police should treat the child or younger minor, the victim of crime, very tactfully bearing in mind his/her age, personality and other circumstances to avoid harmful consequences for child's or younger minor's education and development.

Minor cannot be questioned in the capacity of witness if he/she is not, due to his/her age and psychological development, capable of understanding the very meaning of the right not to witness, but information given by him/her through experts, relatives and other persons in contact with him/her can be used as evidence.

During investigation questioning is in principle done by video-link. Questions put by judge, state attorney or defense attorney are presented to the child, in an understandable way, by expert court collaborator who has previously prepared the child for questioning. During that kind of questioning the child is to be placed in separate room designed appropriately for children.

If the witness is a child who is at the same time damaged party, the questioning is to be done with assistance of a psychologist, pedagogue or similar expert. Investigative judge will order the questioning to be video and audio taped. It will be done in a room without presence of judge and other parties. They can put questions through investigative judge and psychologist, pedagogue or other expert.

Children and younger minors in a capacity of damaged party can be questioned in their own premises or some other venue they stay in or in a centre for social care instead in the Court. When child or younger minor has been questioned in previously described way, his/her statement will be read or reproduced at the trial.

Furthermore, if a minor is questioned in the capacity of witness, the court chamber may order for him/her to be questioned outside the hearing by its president or a judge, member of the court chamber. It can also be decided to do it by the local investigating judge regarding the region the witness or the expert is from.

Limited number of interrogation of a child is legally stipulated only regarding court procedure – it understands two interrogations for a child or younger minor at the most. But in reality it does not mean that a child will be interrogated about the crime actually just two times, as we know that the court procedure is preceded, as already mentioned, by police investigation.

Data about minor participating in the court procedure is considered a secret and every body or person knowing these data are to keep them confidential.

Any time, from the very beginning to its closure, the court chamber may exclude the public entirely or just for one part of the hearing according to its own decision or according to suggestion of the parties participating the court procedure due to protection and well-being of the minor. If a minor is present at the hearing in the capacity of witness or a damaged party, he/she will be asked to leave the courtroom as soon as his/her presence is no longer necessary.

“The best interest of the child” is ensured that everybody has the obligation to inform the Center for social care about violation of child’s rights especially about all kinds of physical and mental abuse, sexual abuse, about cases of neglecting a child or careless actions regarding him/her, about abuse or exploitation of a child and the Center needs to take

measures to protect the child. If he/she has been damaged by a crime, the Center needs to inform the police or state attorney about it.

After this research we can conclude that Croatia doesn't offer enough in education of professionals in the area of sexual exploitation and sexual abuse yet. There are some steps forward but it is still things to be done. There is a special education in Ministry of the Interior Affairs for police officers who work with children - victims of sexual abuse and exploitation. There is a special course for this area and passing the course is a main request for employment on positions in a specific area in police system. On Police Academy in Zagreb there are basic courses for other police officers on the subject of domestic violence that provide knowledge in criminal law protection of children. Police Academy also performs extra education of special police officers who treat children, victims of crimes. Police officers are also educated in this area through seminars, conferences or courses organised in the country or abroad.

Referring to education of children in matters of sexual abuse, situation in Croatia is far from the ideal. There is no system education in school. It is not the subject in psychology or biology classes. Themes in master classes are violence, physical and psychical, but not sexual. Some experts think that it is needed for safety and equality in schools, and the public mostly agrees with the idea.

Ministry of social policy and youth, as the head of Campaign 1 in 5, made an Action plan for 2011 for implementing the campaign, and according to that plan Family centres conduct the programme and hold lessons in schools and kindergartens for children, for parents and teachers, in 2011 and continued in 2012. Parents' association step by step also contributes the campaign through its CAP programme and it is among several institutions mostly involved in this campaign. They conduct CAP programme<sup>170</sup> in Croatia since 2000. The programme is based on three types of violence: violence between coevals, violence by adults and sexual violence.

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<sup>170</sup> The CAP (Child Assault Prevention) Programme is one of the most acknowledged and one of the best world programs in primary prevention of child abuse. The CAP seeks to integrate the best resources of a community in an effort to reduce a child's or a young person's vulnerability to verbal, physical and sexual assault. The Child Assault Prevention (CAP) Project originates in Columbus, Ohio in the late 1970's, as a response to the rape of a young child.

Considering aforementioned, the Republic of Croatia is taking the necessary activities whose goals are securing the most efficient way of protecting children from sexual abuse, protecting the victims of sexual abuse and preventing this crime from happening.

Civil society organizations and their expertise and continuous, supported, work also have a significant role in protection of children, but the most important role has the Office of Children Ombudswoman, whose work began on 25th of September 2003, has been recognized by the public in these past few years, which is definitively an indicator of rising public awareness of children's rights and the success of the existing model. Numerous public statements were an opportunity for addressing the principles of children's legal rights as well as their best social interests.

The increasing transformation of social role of children and of traditional conduct towards them is present in Croatia in past years and it helped a lot in highlighting the importance for the protection and respect of children's rights. Even more important is that number of protecting mechanisms has increased and today they are satisfactory and sufficient, but there is still huge need for raising the awareness and educate the children, parents and all people working with children how to properly use them. We truly hope that this Legal research group will give its contribution both to education and to establishing the common legal framework for the protection of the children from the sexual abuse and exploitation.

## ACKNOWLEDGEMENTS

We are grateful to all members of Department for Family Law at the Faculty of Law, University of Zagreb especially to its Head, Professor Dubravka Hrabar, to assistant professor Irena Majstorović and to our academic advisor assistant professor Ivana Milas Klarić for their unlimited and constant support during the research.

Also, we are grateful to Government Team for Social Networks for helping us finding the right persons for some answers and to Ministry for Internal Affairs for being prompt in giving them.

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**National Researchers**

Natalia Aleksejeva,

Kati Kruut,

Liis Lõhmus

**Academic Advisor**

professor Jaan Ginter, mag.iur Maria Tamm

**National Coordinator**

Natalia Aleksejeva

**Special thanks to:**

Andres Aru, Head of the Chancellor of Justice Children's Rights Department

Toomas Palu, Executive Director of UNICEF Estonia

## I INTRODUCTION

### 1 GENERAL

i. The Constitution of the Republic of Estonia prohibits discrimination for any reason, however there are several serious discrimination issues remaining in Estonia.<sup>1</sup>

#### **Gender-Based Discrimination**

Although women have the same legal rights as men under the law and are entitled in theory to equal pay for equal work, this is not the case in practice. While women's average educational level is higher than that of men, their average pay in general is lower, and there continue to be female- and male-dominated professions.<sup>2</sup>

In 2011 The Estonian Ministry of Social Affairs released a publication on the wage difference between men and women in Estonia. According to the research, the wage difference in the year 2008 was about 31,4 %<sup>3</sup>, whereas the average wage difference in European Union is 15%. Taking into account that according to Eurostat the range of difference in salaries by gender is 3-27% it is clearly seen that gender-based discrimination is quite a serious issue in Estonia. Most of the companies still prefer hiring men to women. Women constitute slightly less than half of the work force; they also carry most major household responsibilities.

Violence against women, including spousal abuse, is reportedly also common and continues to be the subject of discussion and media coverage. Neither domestic violence nor marital rape is criminalized, although they could be prosecuted under the general clauses of the Estonian Penal Code, prohibiting physical violence and rape.<sup>4</sup> The studies show that 40 percent of the crimes, including domestic violence, go unreported. Even when the police are called, the abused spouse often declines to press charges due to societal pressure.<sup>5</sup>

There are also reports, stating that women are trafficked for prostitution.

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<sup>1</sup> Constitution of the Republic of Estonia, <http://www.president.ee/en/republic-of-estonia/the-constitution/index.html>

<sup>2</sup> Estonia Human Rights Report, <http://www.ncbuy.com/reference/country/humanrights.html?code=en&sec=5>

<sup>3</sup> Ministry of Social Affairs, publication on Gender pay gap in Estonia 2011.

<sup>4</sup> Penal Code of the Republic of Estonia (Karistusseadustik), <https://www.riigiteataja.ee/akt/104042012003>

<sup>5</sup> Estonian Human Rights Report

The Estonian Women's Studies and Resource Centre, Civil Training Center, Round Table of Harju County Women, and other non-governmental organizations (NGOs) are working to promote women's rights in Estonia.

### **Racial and Ethnic Discrimination**

During the years of the country's forced annexation by the Soviet Union, large numbers of non-Estonians, predominantly ethnic Russians, were encouraged to migrate to the country to work as labourers and administrators. These immigrants and their descendants made up approximately one-third of the total population, about 40 percent of whom were born in the country.

The Law on Cultural Autonomy provides for the protection of cultures of citizens belonging to minority groups. Some non-citizens alleged that the law is discriminatory, because it restricts cultural autonomy only to citizens; however, non-citizens may participate fully in ethnic organizations, and the law includes subsidies for cultural organizations. In districts where more than one-half of the population speak a language other than Estonian, the law entitles inhabitants to receive official information in that language. All residents, whether or not they were citizens, could complain directly to the State Court about alleged violations of human or constitutional rights. The State Court justices review each case. All decisions are issued in Estonian, but if a complaint is received in a language other than Estonian (usually Russian), the court provides a translation.

However, some non-citizen residents, particularly ethnic Russians, continue to allege job, salary, and housing discrimination because of Estonian language requirements. According to Amnesty International, linguistic minorities face discrimination in a number of areas, especially in employment and education. Migrants were exposed to harassment by state officials and attacks by extremist groups. Criminal investigations into allegations of excessive use of force by police were dismissed. Also Estonian Security Police (Kaitsepolitsei) made allegations against the Legal Information Centre for Human Rights (LICHR), which it claims is widely seen as an attempt to misrepresent the organization and to undermine its work.<sup>6</sup>

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<sup>6</sup> Wikipedia: Human Rights in Estonia, [http://en.wikipedia.org/wiki/Human\\_rights\\_in\\_Estonia#cite\\_note-humarightswatch1-2](http://en.wikipedia.org/wiki/Human_rights_in_Estonia#cite_note-humarightswatch1-2)

The United Nations Special Rapporteur on racism, reporting on a visit to Estonia in September 2007, expressed his concern at the conditions of the Russian-speaking minority. The Rapporteur noted a high level of discrimination particularly in the field of employment, where Russian speakers suffer unemployment rates almost twice as high as among ethnic Estonians. The Rapporteur urged the government to take measures to facilitate the naturalization process of stateless people.

The government started to implement the “New Strategy for Integration of Society (2008-2013)”, which aims at improving knowledge of the Estonian language among those who do not speak it as a first language, providing free language courses for citizenship applicants and for a number of different groups of workers.<sup>7</sup>

Workers from minority groups faced regular monitoring of their Estonian language proficiency by the Language Inspectorate, a state agency charged with overseeing the implementation of the Language Act. According to the data made public in 2008, and referring to 2007, around 97 per cent of the teachers in Russian schools and kindergartens checked by the Inspectorate failed the controls. Local media and organizations raised concerns about the discriminatory character of the linguistic requirements.<sup>8</sup>

According to Human Rights Watch report, the organisation did not find systematic, serious abuses of human rights in the area of citizenship. Non-citizens in Estonia were guaranteed basic rights under the Constitution of Estonia. However there were some problems concerning the successful integration of some who were permanent residents at the time Estonia gained independence.<sup>9</sup>

The President's roundtable continued to seek practical solutions to the problems of non-citizens. The Government continued implementing an integration program aimed at fostering the integration of the non-Estonian-speaking population into society. At least 10 NGOs developed and implemented local programs to assist the integration of non-Estonians into society.<sup>10</sup>

### **Sexual Orientation-Based Discrimination**

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<sup>7</sup> Amnesty International's Report 2009, <http://report2009.amnesty.org/en/regions/europe-central-asia/estonia>

<sup>8</sup> Amnesty International's Report 2009

<sup>9</sup> Human Rights Watch, Integrating Estonia's Non-Citizen Minority, <http://www.hrw.org/en/reports/1993/10/01/integrating-estonia-s-non-citizen-minority>

<sup>10</sup> Estonia Human Rights Report

Homosexual sex, which was illegal in the Soviet Union, was legalized in Estonia in 1992. Homosexuals are not banned from military service and there are no laws discriminating them.

As an obligation for acceptance into the European Union, Estonia transposed an EU directive into its own laws banning discrimination based on sexual orientation in employment from 1 May 2004. The Law on Equal Treatment, which entered into force on 1 January 2009, prohibits discrimination on the basis of sexual orientation in areas other than employment, such as health care, social security, education and the provision of goods and services.<sup>11</sup>

Since 2006, the Penal Code prohibits public incitement to hatred on the basis of sexual orientation. There are several gay clubs in Tallinn. Pride parades have been organised since 2004. From 6 June to 12 June 2011, Estonia hosted Baltic Pride, a festival to promote greater support and awareness for LGBT people.

However several surveys and practical cases showed that there is a high level of discrimination against gay, lesbian and bisexual people in Estonia. They also showed that the households headed by same-sex couples are not eligible for the same legal protections available to opposite-sex couples.

In June 2006, Dutch Ambassador to Estonia Hans Glaubitz requested he be transferred to the Dutch consulate in Montreal, Canada after ongoing homophobic and racial verbal abuse being hurled against his partner, an Afro-Cuban dancer named Raúl García Lao, by citizens in the capital of Tallinn. The incident made international headlines. A released statement by the Estonian authorities stated that they "regretted the incidents very much".<sup>12</sup>

There is currently no legal recognition of either same-sex marriage or civil union in Estonia. However, the launch of a new Family Law proposal by the Estonian Ministry of Justice, which explicitly declared marriage to be an institution between a man and a woman, provoked a public debate on this issue starting from December 2005. The public debate was called by the Ministry of Social Affairs, which said it had reservations about the draft law.

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<sup>11</sup> Country Report: Estonia, 2010, On Measures to Combat Discrimination, [http://www.non-discrimination.net/content/media/2010-EE-Summary%20country%20Report%20LN\\_FINAL.pdf](http://www.non-discrimination.net/content/media/2010-EE-Summary%20country%20Report%20LN_FINAL.pdf)

<sup>12</sup> The Guardian: Ambassador Quits Estonia Over Gay Abuse, <http://www.guardian.co.uk/world/2006/jun/08/gayrights.nickpatonwalsh>

The public debate brought about a significant response from LGBT rights groups, which opposed the Family Law proposal and urged the government to not discriminate between same-sex and heterosexual couples in marriage, stating that, "We call on the government to drop a clause in the draft law on the family, which does not allow the registration of same-sex marriages or partnerships". On January 4, 2006, five Estonian NGOs supporting gay rights issued a press release asking for the government to draft a new partnership law that would give same-sex couples equal rights with heterosexual couples.<sup>13</sup>

On the other hand, various conservative politicians claimed that Estonia was not yet ready for same-sex marriage, and that there is no need to create a separate law on same-sex unions since existing laws already imply the protection of some of these unions (even though there is no explicit legal mention of same-sex unions).<sup>14</sup>

In July 2008, the Ministry of Justice announced that it was drafting a law on registered partnership for same-sex couples. The law, which was initially expected to come into force in 2009, was intended to provide a number of rights for same-sex couples, such as inheritance and shared property ownership. The law had the support of most factions in Estonia's Parliament.

The Ministry of Justice studied proposals for the recognition of unmarried couples, including same-sex couples. A comprehensive report was released in July 2009 which looked at three options: the recognition of unregistered cohabitation, the creation of a partnership registry, and the opening of marriage to same-sex couples. It left the decision of which model to implement up to the legislature and other "stakeholders". On July 1, 2010 a new family law was passed, defining marriage as between a man and a woman and declaring unions between members of the same sex "null and void". Prime Minister Andrus Ansip was quoted as saying, "I do not believe that Estonia, Latvia and Lithuania would soon accept same-sex marriage in the eyes of the law".

On May 25, 2011, Chancellor of Justice Indrek Teder requested that the Ministry of Justice to introduce civil partnership law. He found that unrecognising same-sex relationships is contrary to the constitution of Estonia. Thereafter the subject of partnership law again

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<sup>13</sup> Estonian Gays Want Right to Wed, <http://www.sawfnews.com/lifestyle/5630.aspx>

<sup>14</sup> UK Gay News, First Test of Tolerance and Common European Values in Estonia for Gays, <http://www.ukgaynews.org.uk/Archive/2006jan/1002.htm>

became an actual political topic in Estonia. The Reform Party and the Social democratic Party agree to introduce a partnership law, conservative the Union of Pro Patria and Res Publica is still against it. The Centre Party is supporting to discuss it. The proposal is expected to be drafted this year.<sup>15</sup>

### **Disability-Based Discrimination**

While the Estonian Constitution provides for the protection of persons with disabilities against discrimination, and both the Government and some private organizations provided them with financial assistance, little has been done to enable persons with disabilities to participate normally in public life. There is no public access law, but some effort was made to accommodate persons with disabilities; for example, ramps were installed at curbs on new sidewalk construction, and public transportation firms acquired some vehicles that are accessible, as have some taxi companies. The law allows for persons with serious sight, hearing, or speech impediments to become naturalized citizens without having to pass an examination on the Constitution and language.<sup>16</sup>

There is also a discrimination problem regarding the HIV-positive members of the society. In 2011, the Estonian Network of PIWH <sup>17</sup>(People Infected with HIV) did an exhaustive study on the stigmatization index of HIV-positive individuals in Estonia. The results of the study were quite unpleasant – in general HIV-positive individuals are often being verbally and physically abused, discriminated (8% of HIV-positives were not given the medical care they required and were entitled to) and threatened.

ii. According to § 27 of the Constitution of the Republic of Estonia: „the family, being fundamental to the preservation and growth of the nation and as the basis of society shall be protected by the state. Spouses have equal rights. Parents have the right and the duty to raise and care for their children. The protection of parents and children shall be provided by law. The family has a duty to care for its needy members”.<sup>18</sup>

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<sup>15</sup> Wikipedia: Recognition of Same-Sex Unions in Estonia,  
[http://en.wikipedia.org/wiki/Recognition\\_of\\_same-sex\\_unions\\_in\\_Estonia#cite\\_note-0](http://en.wikipedia.org/wiki/Recognition_of_same-sex_unions_in_Estonia#cite_note-0)

<sup>16</sup> Estonian Human Rights Report

<sup>17</sup> The study on the stigmatisation indice of HIV positive individuals in Estonia -  
[http://www.ehpv.ee/Docs/HIV\\_pos\\_stigma\\_uurimuse\\_raport\\_12052011.pdf](http://www.ehpv.ee/Docs/HIV_pos_stigma_uurimuse_raport_12052011.pdf)

<sup>18</sup> Constitution of the Republic of Estonia, Clause 27.

Though the term “family” is not defined neither by the Constitution, nor by the Family Law Act, it is generally determined as a relationship between spouses. The term “family life” also includes non-marital partnership between a man and a woman, a relationship between a child and his/her biological and/or foster parents and the relations between other relatives. According to the Estonian Child Protection Act, one parent family is equal to full family.<sup>19</sup>

According to the Estonian statistics, the average marital age of men is 30,4 years, while the average marital age of women is 27,9 years.<sup>20</sup>

**iii.** The principle of protecting children in Estonia has always given priority to the interests of the child. Child protection is ensured by national, local and social authorities. All the authorities and institutions dealing with the promotion of welfare of people living in Estonia must observe the interests of the child in their activities.

In Estonia, child protection is organised on three levels: local, county and state level. The local level (city or rural municipality) is the first level to deal with child protection and assistance. Decisions concerning all Estonian children are made at the state level. The county level between these two levels assists and monitors the local level in guaranteeing and executing the child protection and assists the state level in carrying out child protection tasks.<sup>21</sup> Several important steps have been taken to strengthen the child protection system in Estonia. Since 1 January 2009, there is a common European helpline 116,111 which can be used to notify about a child in danger. The European hotline number for missing children 116 000 was launched at the beginning of 2011. The hotline enables to pass on information about missing children, the counsellors give preliminary advice how to act in the situation and carry out crisis counselling. The hotline works closely in co-operation with Police and Border Guard Board.<sup>22</sup> In 2010 the Department of Children and Families was established in the Ministry of Social Affairs. In the same year the special Departments for Child Protection were opened in the Estonian Police and Border Guard Board Prefectures. On 19 March 2011 the position of the Ombudsman for Children was created, when the Chancellor of Justice took over the tasks to protect and promote children's rights. The Ombudsman for Children in Estonia is the Chancellor of Justice, Indrek Teder. To fulfil the tasks of the

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<sup>19</sup> Child Protection Act of the Republic of Estonia (Eesti Vabariigi Lastekaitse seadus), Clause 26, <https://www.riigiteataja.ee/akt/121032011050>

<sup>20</sup> Statistics Estonia, Statistical Yearbook of Estonia 2011.

<sup>21</sup> The Ombudsman for Children in Estonia, <http://lasteombudsman.ee/en/child-protection-system-in-estonia>

<sup>22</sup> Lasteabi.ee, <http://www.lasteabi.ee/eng>



Ombudsman for Children, there is the Children's Rights Department in the Office of the Chancellor of Justice which employs 4 persons.<sup>23</sup>

Clause 10 of the Estonian Child Protection Act importantly establishes the principle of non-discrimination. Children have an equal right to receive assistance and care and to develop, regardless of their gender or ethnic origin, regardless of whether they live in a two-parent family or single-parent family, whether they are adopted or under curatorship, whether they are born in wedlock or out of wedlock, or whether they are healthy, ill or disabled. The child also has the right to participate in the development of child protection programmes either personally or through a representative selected by the child. The principle of taking the child's opinion into consideration and the principle of involvement are reflected in Clauses 11 and 16 of the Child Protection Act.<sup>24</sup> At the same time, child protection activists in Estonia, the Institute of Human Rights and the Chancellor of Justice have pointed to the need to modernise the Child Protection Act. Therefore, the Ministry of Social Affairs has started analysing the Child Protection Act and drawing up the concept for the new Act.

In Estonia, several strategy documents on children have been adopted. The Strategy for Guaranteeing the Rights of Children 2004–2008 was the first development plan which focused on the welfare and life of children, and one of its important outcomes is also improved cooperation between different areas and ministries in ensuring the rights of children. In the course of implementing the strategy, several other development plans and strategy documents on the rights and welfare of children were also drawn up. For example, in 2005 the Government approved the conception of child protection aimed at creating an integrated system for protecting the rights of children and obtaining proposals for amending laws and regulations in this area (e.g. the Family Law Act). In 2010, the Ministry of Social Affairs has started drawing up the development plan for children and families 2011–2020, which aims to ensure better protection of the rights of children as well as raising the quality of life of families.<sup>25</sup>

Supervision over compliance with the rights of children is exercised by the Ombudsman for Children. His job is to protect the rights of children in their relations with the individuals

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<sup>23</sup> The Ombudsman for Children in Estonia

<sup>24</sup> Child Protection Act of the Republic of Estonia

<sup>25</sup> ENOC (European Network of Ombudspersons for Children), Estonia: Children's Rights References in the Universal Periodic Reviews, <http://www.crin.org/enoc/resources/infodetail.asp?id=23806>

and authorities that perform public functions. The Ombudsman's task is also to ensure that all those who make decisions affecting children are guided by their best interests and take into account the opinions of children. The Ombudsman for Children helps to make the voices of children heard by decision-makers. He has recently released his first report on the protection of children and children's rights in Estonia. According to the report, one in four adults and one in six children in Estonia has never heard of the notion of children's rights. Also, approximately 25 percent of parents do not consider physical punishment of children to constitute domestic violence. In his statement coinciding with the International Child Protection Day, Ombudsman said that physical punishment of children should be clearly prohibited by the law and parents must learn to use alternative correction methods. The report also points out that every tenth child has witnessed violence at home, while around 50 percent have been bullied at school at least once in their life. The Ombudsman for Children Indrek Teder noted that the problems revealed in the report require consistent, deliberate and systematic attention.<sup>26</sup>

Several campaigns and information activities have been carried out and debates in the media have been organised in order to raise the awareness of the public about noticing mistreatment of children and notifying and preventing it. The representatives of Children's Rights Department in the Office of the Chancellor of Justice are carrying out special campaigns and debates, supervising the film festivals and organize events to raise the public awareness about children's rights in Estonia. An important role in child protection in Estonia is also played by non-governmental organisations which in close cooperation with the state help to guarantee the rights of children and provide services to children and families.<sup>27</sup>

**iv.** Chapter IX of the Constitution of the Republic of Estonia states that the procedure for the relations of the Republic of Estonia with other states and with international organisations shall be provided by law. Foreign relations can take place as participation of Estonia in the international legislative drafting or as everyday operative activities in organising relations between countries via negotiations and correspondence. Foreign relations are managed by the foreign relations bodies – the Riigikogu, the President of the

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<sup>26</sup> ERR News: Justice Chancellor Introduces First Report on Children's Rights, <http://news.err.ee/society/c003d85d-fd5c-4878-b121-4d2b56b9bc72>

<sup>27</sup> ENOC

Republic, the Government of the Republic, the Ministry of Foreign Affairs and other ministries within their areas of government. Foreign relations are also regulated by the principles and rules of the international law. The relevant rules of the international law become rules of the Estonian legal system by signing or ratification of international agreements.<sup>28</sup>

According to the Estonian Foreign Relations Act, the right to initiate the ratification of the international treaties belongs to the Ministry of Foreign Affairs. If any other ministry or the State Chancellery considers it necessary to ratify any international treaty, it should present the proposal to the Ministry of Foreign Affairs and if the answer is positive, the respective preparation steps should be taken. Depending on whether the Republic of Estonia is negotiating an entirely new international agreement or acceding to the already existing international treaty, the preparation steps are different.

In the first case the required negotiations should be conducted to prepare the text of the agreement. In the case of acceding to the international treaty, the already existing text of the treaty should be analyzed and translated into Estonian and the draft explanatory note should be prepared. All the required documents should be presented to the Ministry of Foreign Affairs, which controls their accordance to the Estonian legal acts.<sup>29</sup> The international treaties are then signed by the Government of the Republic. Those treaties that need ratification are presented to the Riigikogu. The same rule applies to the agreements changing the state borders, agreements requiring an approval, amendment or cancellation of Estonian laws in order to be applied, agreements by which the Republic of Estonia joins with international organisations and associations and the agreements by which the Republic of Estonia takes military or proprietary obligations. The Riigikogu ratifies agreements via approving a law and the ratification law is published in the State Gazette. International treaties ratified by the Riigikogu are signed by the President of the Republic of Estonia; those ratified by the Government can be signed either by the Prime Minister or by the Minister of Foreign Affairs. The note concerning the entry into force is signed by the Minister of Foreign Affairs or the respective authorized person. The date of entry into force is specified in the treaty.

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<sup>28</sup> The Estonian State Portal, Foreign Relations and International Agreements, [https://www.eesti.ee/eng/riik/valissuhted\\_ja\\_valislepingud/](https://www.eesti.ee/eng/riik/valissuhted_ja_valislepingud/)

<sup>29</sup> Estonian Ministry of Foreign Affairs, <http://www.vm.ee/?q=node/4518#II>

The Republic of Estonia does not sign any such international agreements that are in discrepancy with the Constitution. An international agreement can be in discrepancy with an Estonian legal act regulating the same matter and in this case the international agreement is taken as a basis for activities and decisions.<sup>30</sup>

The relationship between State law and international treaties is monalistic.

Estonia ratified the United Nations Convention on the Rights of the Child on 21<sup>st</sup> October 1991 with no reservations.

v. Estonia is the state member of European Union since the year 2004.

According to the Estonian Ministry of Justice 2012-2013 year plan, the legal analysis and draft explanation note for the implementation of Directive 2011/93/EU of the European Parliament and the European Council of 13 December 2011 should be prepared by the Ministry of Justice Department of Criminal Law and Criminal Procedure during 2012-2013, to be then presented to the State Government.<sup>31</sup>

## 2 THE LANZAROTE CONVENTION

i. Estonia ratified the European Convention on Human Rights in 1996.

ii. Estonia signed the Lanzarote Convention September 17, 2008, but has not ratified it so far. However, according to the Estonian Ministry of Justice 2012-2013 year plan, the legal analysis and draft explanation note for the implementation of the Lanzarote Convention together with Directive 2011/93/EU of the European Parliament and the European Council of 13 December 2011 should be prepared by the Ministry of Justice Department of Criminal Law and Criminal Procedure during 2012-2013, to be then presented to the State Government.

## II NATIONAL LEGISLATION

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<sup>30</sup> Estonian Ministry of Foreign Affairs

<sup>31</sup> The Ministry of Justice of Estonia 2012-2013 Year Plan,  
<http://www.just.ee/orb.aw/class=file/action=preview/id=56077/Justiitsministeeriumi+t%F6%F6plaan+astaks+2012.pdf>

## 1 GENERAL PRINCIPLES OF THE JURISDICTION

i. Estonians are one of the longest-settled European people and have lived along the Baltic Sea for over 5,000 years. The Estonians were an independent nation until the 13th century A.D. The country was subsequently conquered by Denmark, Germany, Poland, Sweden, and finally Russia, whose defeat of Sweden in 1721 resulted in the Uusikaupunki Peace Treaty, granting Russia rule over what became modern Estonia.

Independence remained out of reach for Estonia until the collapse of the Russian empire during World War I. Estonia declared itself an independent democratic republic on February 24, 1918. In 1920, by the Peace Treaty of Tartu, Soviet Russia recognized Estonia's independence and renounced in perpetuity all rights to its territory.

The first constitution of the Republic of Estonia was adopted in 1920 and established a parliamentary form of government.<sup>32</sup> The parliament Riigikogu (State Assembly) elected a Riigivanem who acted both as Head of Government and Head of State. During the Era of Silence political parties were banned and the parliament was not in session between 1934 and 1938 as the country was ruled by decree by Konstantin Päts, who was elected as the first President of Estonia in 1938. In 1938 a new constitution was passed and Riigikogu was convened once again, this time bicamerally, consisting of Riigivolikogu (upper house) and Riiginõukogu (lower house), both meaning State Council in direct translation.<sup>33</sup> Estonia's independence lasted for 22 years, during which time Estonia guaranteed cultural autonomy to all minorities, including its small Jewish population, an act that was unique in Western Europe at the time.

Leading up to World War II (WWII), Estonia pursued a policy of neutrality. However, the Soviet Union forcibly incorporated Estonia as a result of the Molotov-Ribbentrop Pact of 1939, in which Nazi Germany gave control of Estonia, Latvia, and Lithuania to the Soviet Union in return for control of much of Poland. In August 1940, the U.S.S.R. proclaimed Estonia a part of the Soviet Union as the Estonian Soviet Socialist Republic (E.S.S.R.).

In the late 1980s, looser controls on freedom of expression under Soviet leader Mikhail Gorbachev reignited the Estonians' call for self-determination. In November 1988, Estonia's

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<sup>32</sup> U.S. Department of State, Diplomacy in Action, Estonia, <http://www.state.gov/r/pa/ei/bgn/5377.htm>

<sup>33</sup> Wikipedia: Politics of Estonia, [http://en.wikipedia.org/wiki/Politics\\_of\\_Estonia](http://en.wikipedia.org/wiki/Politics_of_Estonia)

Supreme Soviet passed a declaration of sovereignty; in 1990, the name of the Republic of Estonia was restored, and during the August 1991 coup in the U.S.S.R., Estonia declared full independence. The U.S.S.R. Supreme Soviet recognized independent Estonia on September 6, 1991. Unlike the experiences of Latvia and Lithuania, Estonia's revolution ended without blood spilled. After more than 3 years of negotiations, on August 31, 1994, the armed forces of the Russian Federation withdrew from Estonia.<sup>34</sup>

In 1992, a constitutional assembly introduced amendments to the 1938 constitution. After the draft constitution was approved by popular referendum, it came into effect July 3, 1992. Under the constitution adopted on June 28, 1992, Estonia has a parliamentary system of government, with a prime minister as chief executive.<sup>35</sup> Politics in modern Estonia takes place in a framework of a parliamentary representative democratic republic, whereby the Prime Minister of Estonia is the head of government, and of a multi-party system. Legislative power is vested in the Estonian parliament. Executive power is exercised by the Government which is led by the Prime Minister. The Judiciary is independent of the executive and the legislature.<sup>36</sup>

The President is elected indirectly by parliament or, if no candidate wins a two-thirds majority in parliament, by an electoral college composed of members of parliament and of local councils' representatives. Estonia holds presidential elections every 5 years. The next presidential election will be in 2016. The President serves a maximum of two terms.<sup>37</sup> As Estonia is a parliamentary republic, the President is mainly a symbolic figurehead and holds no executive power. The President is obliged to suspend his (or her) membership in any political party for the term in office. Upon assuming office, the authority and duties of the President in all other elected or appointed offices terminate automatically.<sup>38</sup>

Parliamentary elections take place every 4 years; members are elected by direct ballot in local districts and by proportional representation. A party must gather at least 5% of the votes to take a seat in parliament. Citizens 18 years of age or older may vote in parliamentary elections and be members of political parties. EU citizens who are 18 years of age or older

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<sup>34</sup> U.S. Department of State

<sup>35</sup> Estonian Government,

[http://www.mongabay.com/reference/country\\_studies/estonia/GOVERNMENT.html](http://www.mongabay.com/reference/country_studies/estonia/GOVERNMENT.html)

<sup>36</sup> Wikipedia: Politics in Estonia

<sup>37</sup> U.S. Department of State

<sup>38</sup> President of the Republic of Estonia, <http://www.president.ee/en/>

and registered in the population register may vote in European Parliament elections and if they are registered in a local district population register, they may also vote in local elections. In addition, non-citizen long-term residents may vote in local elections, although they may not run for office.

After parliamentary elections, the president traditionally asks the party with the most votes to form a new government. The president chooses the prime minister - usually the leader of the largest party or coalition in the parliament--with the consent of the parliament to supervise the work of the government. The Estonian Government has 12 ministers.

At the local level, Estonians elect government councils by proportional representation. The individual councils vary in size, but election laws stipulate minimum size requirements depending on the population of the municipality.

Estonia's Supreme Court, the Riigikohus, has 19 justices, all of whom receive lifetime tenure appointments. The parliament appoints the chief justice on nomination by the president. Estonians may vote via the Internet in local, Estonian parliamentary elections, and European Parliament elections.<sup>39</sup>

ii. Human rights in Estonia are acknowledged as generally respected by the government. Individuals are guaranteed basic rights under the Constitution, legislative acts, and treaties relating to human rights ratified by the Estonian government.<sup>40</sup> The Constitution opens with a set of general provisions and a forty-eight-article section establishing the fundamental rights, liberties, and duties of citizens. Freedom of expression and assembly, freedom of information, the right to petition the courts, and the right to health care are all guaranteed. Censorship and discrimination on the basis of nationality, gender, religion, or political belief are forbidden.<sup>41</sup>

Estonia is a party to the United Nations (UN) Conventions on Human Rights and is dedicated to protecting and promoting human rights and fundamental freedoms in Estonia and through international organisations. Expanding the observance of principles of human rights, democracy and rule of law, as well as the development of international law, is one of Estonia's five foreign policy priorities. Estonia's particular focus is on supporting freedom

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<sup>39</sup> U.S. Department of State

<sup>40</sup> Wikipedia: Human Rights in Estonia

<sup>41</sup> Estonian Government

of expression and media and issues related to the rights of women, children and indigenous peoples. Estonia places a high importance on close co-operation with organisations working to promote human rights. It is in the running to be a member of the United Nations (UN) Human Rights Council from 2013-2015 because it would like to make more effective the protection, advancement, and awareness of human rights and fundamental freedoms through international channels and steps.<sup>42</sup>

Estonia's membership in international organisation and its bilateral relations provides it with a number of opportunities to address the protection, promotion, as well as violations of human rights. Estonia is actively engaged with human rights issues within the framework of the European Union (EU), UN, Organisation for Security and Co-operation in Europe (OSCE), and the Council of Europe.

Within the EU Common Foreign and Security Policy, Estonia has focused on keeping its human rights priorities on the EU agenda and also served as a representative of the EU in negotiations on these topics with third countries in the UN. The EU has defined human rights as an important foreign policy area and Estonia has supported the achievement of human rights goals that are important to the EU, including abolishing the death penalty and eliminating violence against women.

Over the years, Estonia has intensified its human rights-related work in the UN. Estonia was the chair of the Consultative Committee of the UN Development Fund for Women (UNIFEM) from 2007-2009, and an Estonian expert was a member of the UN Permanent Forum on Indigenous Issues from 2005-2007. For more than ten years Estonia has also made regular voluntary contributions for promoting human rights, including the rights of women, children, and indigenous peoples. The contributions have supported the activities of the UN Office of the High Commissioner on Human Rights (OHCHR), the UN Children's Fund (UNICEF), the UN Development Programme (UNDP), the UN Population Fund (UNFPA), the UN Development Fund for Women (UNIFEM), the UN Girls' Education Initiative (UNGEI), and the UN Fund for Indigenous Populations.<sup>43</sup>

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<sup>42</sup> Estonian Ministry of Foreign Affairs, Estonia as a Candidate for the UN Human Rights Council, <http://www.vm.ee/?q=node/10668>

<sup>43</sup> Estonian Ministry of Foreign Affairs, Human Rights and Estonia, [http://www.vm.ee/?q=en/human\\_rights](http://www.vm.ee/?q=en/human_rights)



iii. Estonia has a three-level court system. County courts and administrative courts adjudicate matters in the first instance. Appeals against decisions of courts of first instance shall be heard by courts of second instance. Courts of appeal are courts of second instance (sometimes also called circuit courts or district courts). The courts of appeal are situated in Tartu and Tallinn. The Supreme Court, situated in Tartu, is the court of the highest instance.

A statement of claim is filed with the court of first instance, an appeal with the court of second instance and an appeal in cassation with the court of third or the highest instance. A matter shall be heard in the Supreme Court only after all previous court instances have been passed. The filing of an appeal is governed by respective codes of court procedure.<sup>44</sup>

When a person thinks that his/her human rights have been violated, he/she should address a court (normally an administrative court) to establish an infringement. It is possible to demand the elimination of the violation or compensation for the damages.

When a person has gone through all the instances of the court of the Republic of Estonia but has not achieved the desired result, he/she has the right to turn to the European Court of Human Rights. A number of requirements must be met before that. It is important that all national instances of the court be addressed, that the appeal be against a country that has joined the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that the violation has taken place after joining the convention on 16 April 1996.<sup>45</sup> The court in Strasbourg can establish whether the country has violated a person's fundamental rights, but it cannot annul judgments of Estonian courts. However, the judgement of the European Court of Human Rights may later be a basis for a review procedure in the Supreme Court.<sup>46</sup>

According to the Constitution of the Republic of Estonia, the Supreme Court is the highest court in Estonia and shall review court judgments by way of cassation proceedings. The Supreme Court is also the court of constitutional review, i.e. the constitutional court.

The Supreme Court employs 19 judges. All judges (except the Chief Justice of the Supreme Court) administer justice in one of three Chambers: the Civil Chamber, the Criminal

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<sup>44</sup> Estonian Court System, <http://www.kohus.ee/6908>

<sup>45</sup> Eesti.ee, Violation of Human Rights, [https://www.eesti.ee/eng/topics/citizen/oigusabi/mida\\_teha\\_voi\\_kuhu\\_ja\\_kellele\\_kaevata\\_kui/inimoiguste\\_rikkumine](https://www.eesti.ee/eng/topics/citizen/oigusabi/mida_teha_voi_kuhu_ja_kellele_kaevata_kui/inimoiguste_rikkumine)

<sup>46</sup> Supreme Court of Estonia, [http://www.riigikohus.ee/vfs/1264/Riigikohus\\_brozh2011\\_ENG\\_www.pdf](http://www.riigikohus.ee/vfs/1264/Riigikohus_brozh2011_ENG_www.pdf)

Chamber or the Administrative Law Chamber. The Chief Justice of the Supreme Court is ex officio the Chairman of the Constitutional Review Chamber.

The Supreme Court adjudicates constitutional review cases either at the sessions of the Constitutional Review Chamber or sitting en banc. Constitutional Review Chamber hears cases in panels of at least three members. By way of constitutional review the Supreme Court verifies the conformity of legislation of general application, refusal to issue an instrument of legislation of general application or an international agreement with the Constitution. In addition, the Constitutional Review Chamber of the Supreme Court has several more specific functions. For example, the Riigikogu may request from the Supreme Court an opinion on the interpretation of the Constitution in conjunction with the European Union law, if the interpretation of the Constitution is of decisive importance in the passing of a draft Act which is necessary for the fulfilment of obligations of the Member State of the European Union.

The following can have recourse to the Supreme Court by way of constitutional review

- the President of the Republic,
- the Chancellor of Justice,
- local government councils and courts.

The Constitutional Review Court Procedure Act does not provide for the possibility to address the Supreme Court with individual constitutional complaints. Nevertheless, in its practice the Supreme Court has accepted the possibility of individual complaints in the cases when a person has no other effective possibilities to exercise the constitutional right to the protection of the courts.

Pursuant to the Constitutional Review Court Procedure Act, the Supreme Court shall adjudicate a constitutional review case within four months as of the receipt of the appeal.<sup>47</sup>

**iv.** There are four Chambers in the Supreme Court: the Civil Chamber, the Criminal Chamber, the Administrative Law Chamber and the Constitutional Review Chamber. Every justice (except the Chief Justice of the Supreme Court) belongs either to the Civil, the Criminal or the Administrative Law Chamber. There are six justices in the Criminal

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<sup>47</sup> Supreme Court of Estonia

Chamber of the Supreme Court. Since 2009 the Chairman of the Criminal Chamber is Priit Pikamäe.

According to the Criminal Procedure Code of Estonia, the judicial proceedings for alleged crime are started after the authorities have been informed. This information can be received in various ways such as through a written report given to the Public Prosecutor's Office or an investigating body or an oral report which will be written down later on or a publication in the press.<sup>48</sup> After receiving such information, pre-trial investigation is carried out by entitled institutions including the Police and Border Guard Board, Security Police Board, Tax and Customs Board, Competition Board, the Prisons Department of the Ministry of Justice and the prison, within the limits of their competence.<sup>49</sup>

The main goal of the pre-trial investigation is to collect evidence with regard to alleged crime. However, the Public Prosecutor's Office and the investigative body have to, as it is usual in a civil law system, collect evidence either against or in favour of the accused. They have this responsibility because the pre-trial procedure is conducted to reach the pure facts.

Having collected the evidence, it is the investigative body that decides whether or not the collected evidence is sufficient enough to continue the proceedings to the Public Prosecutor. Where they decide not to pursue the file, the victim has the right to appeal against this decision initially to the prosecutor and if it has not been changed, the applicant can appeal against the public prosecutor's decision, via an advocate, to the circuit court. Where the collected evidence is sufficient according to the investigative authority, they prepare a reasoned order on charging the person under investigation with a criminal offence. The prosecutor is responsible for ensuring the legality and efficiency of the pre-trial investigation. When it is needed he or she has the authority to issue orders to investigative bodies or to annul or to amend the orders of them and even to remove the officer from the investigation.

The Public Prosecutor is the entitled authority to complete pre-trial investigation by verifying the summary of charges. He/she has the power to approve or amend the summary of charges and if he or she thinks that there is a lack of evidence, he/she has also the power to terminate the proceedings. On the other hand, the prosecutor has the right to annul the

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<sup>48</sup> Criminal Justice in Estonia, [http://www.justice.gov.tr/e-journal/pdf/CRIMINAL\\_JUSTICE.pdf](http://www.justice.gov.tr/e-journal/pdf/CRIMINAL_JUSTICE.pdf)

<sup>49</sup> Estonian Code of Criminal Procedure (Kriminaalmenetluse seadus),  
<https://www.riigiteataja.ee/akt/109072012005>

order of the investigator claiming that there is no need to proceed. In that case the prosecutor him/herself can resume the criminal proceedings. The prosecutor, who receives a criminal file, shall declare the pre-trial proceedings completed, require the investigative body to perform additional acts, if it is needed. If it is necessary, the prosecutor him/herself shall perform additional acts after the receipt of the file. A copy of the criminal file is given to the criminal defence counsel and submitted for examination. Having submitted the file for examination and thereafter being convinced that the necessary evidence in the criminal matter has been collected, the prosecutor shall prepare the statement of charges.

Having received a statement of charges, the judge at the first instance court holds a preliminary hearing on the following grounds:

- 1) in order to apply or to alter the preventive measures;
- 2) to return the statement of charges to the Prosecutor's Office, if it is not prepared in a proper way;
- 3) to decide whether or not it is needed to continue the proceedings (if there is no ground for criminal proceedings, such as the death of a suspect or accused or where an amnesty precludes the imposition of a punishment and so on, the judge decides not to go on proceedings).

If there is no problem to pursue the case according to the preliminary hearing, the hearing shall be held with the participation of all parties including prosecutor, accused, counsel etc. Apart from some exceptions, which are mentioned explicitly in the law, a hearing cannot be held without all parties.

If one of the parties of the case does not agree with the judgement he/she can appeal against it. The right to appeal to the Supreme Court also exists where the second instance court changed or overturned the judgement of the first instance court.

After the appeal proceedings, if the judgement of conviction is made as a result of the hearings, that commission of the criminal offence by the accused is proved, the next step will be the execution of this sentence.<sup>50</sup>

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<sup>50</sup> Criminal Justice in Estonia

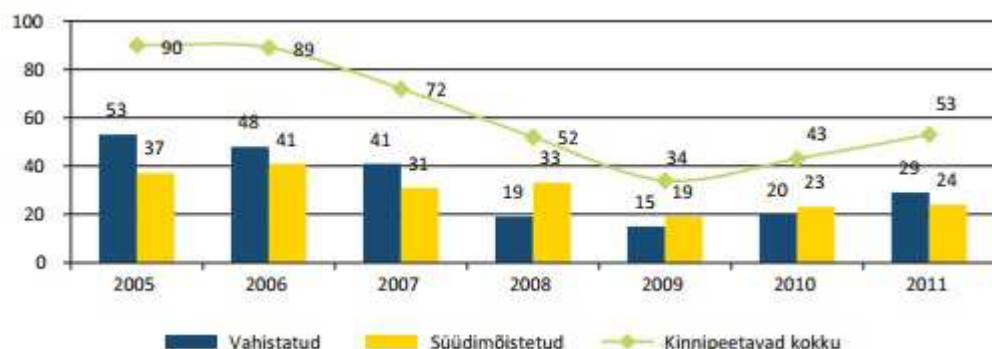
v. The age of criminal liability in Estonia is 14 years. Minors younger than 14 years old are incapable of guilt and all the criminal proceedings against them are terminated on the grounds of their age. If commencement of criminal proceedings is refused or a criminal proceeding is terminated for the reason that the unlawful act was committed by a minor who was incapable of guilt on the grounds of his or her age, the investigative body or Prosecutor's Office shall refer the materials of the criminal matter to the juvenile committee of the place of residence of the minor. If a Prosecutor's Office finds that a minor who has committed a criminal offence in the age of 14 to 18 can be influenced without imposition of a punishment or a sanction prescribed in Clause 87 of the Penal Code, the Prosecutor's Office shall terminate the criminal proceeding by a ruling and refer the criminal file to the juvenile committee of the place of residence of the minor. Prior to referral of materials to a juvenile committee, the nature of the act with the elements of a criminal offence and the grounds for termination of the criminal proceeding shall be explained to the minor and his or her legal representative.

According to the statistics, provided by the Ministry of Justice of Estonia, by the end of the year 2011, there were 53 prisoners of less than 18 years of age in the Estonian prisons - 24 of them were convicted offenders and 29 were those under arrest. The number of the arrested minors was 9 times bigger than that in 2010 and almost 2 times bigger than that in 2009. The number of convicted offenders was pretty much at the same level, as in 2010. Unlike in 2011, in previous years the number of arrested minors was smaller than that of convicted ones.

The following table demonstrates the available statistics regarding prisoners of less than 18 years of age in the Estonian prisons:<sup>51</sup>

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<sup>51</sup> Vahistatud – persons under arrest, süüdimõistetud – convicted offenders; kinnipeetavad kokku – total number of prisoners.



By the end of 2011, there were 21 boys and 3 girls among the convicted minors (there were no girls at all the year before). There were no convicted offenders of 14 and 15 years of age, 7 of the offenders were 16 and 17 were 17 years old.<sup>52</sup>

According to the information, available on the Estonian Prison Service website, there are currently 80 minors in the Estonian prisons; this is the total number of all the prisoners – both convicted offenders and persons under arrest.<sup>53</sup>

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. The term “sexual activities” is not directly defined by the Estonian national legislation. 7th Division of the Estonian Penal Code criminalizes offences against sexual self-determination – these offences include rape, satisfaction of sexual desire by violence, compelling person to engage in sexual intercourse, compelling person to satisfy sexual desire, sexual intercourse with descendant, sexual intercourse with child and satisfaction of sexual desire with child.<sup>54</sup>

According to the Estonian Supreme Court (Riigikohus) decision nr 3-1-1-95-04, sexual intercourse is defined as the insertion of a male's penis into a female's vagina, but also the insertion of a male's penis into a mouth or anus or the insertion of any other body part or foreign object into a female's vagina. Sexual intercourse is distinguished from the sexual activities not qualified as sexual intercourses by the fact that at least on the one part a genital organ is involved. Other forced sexual activities are criminalized by the Penal Code as the

<sup>52</sup> Ministry of Justice of Estonia, Crime in Estonia in Year 2011, [http://www.just.ee/orb.aw/class=file/action=preview/id=57202/Kuritegevus\\_Eestis\\_2011.pdf](http://www.just.ee/orb.aw/class=file/action=preview/id=57202/Kuritegevus_Eestis_2011.pdf)

<sup>53</sup> Estonian Prison Service, <http://www.vangla.ee/41291>

<sup>54</sup> Penal Code of the Republic of Estonia

satisfaction of sexual desire by violence. These activities include, for example, masturbation, touching the genitals or other erogenous zones, stripping oneself naked etc. It doesn't matter, if sexual activities are hetero-, homo- or bi-sexual.<sup>55</sup>

**ii.** According to Clause 16 of the Estonian Penal Code, intent is deliberate intent, direct intent or indirect intent.

A person is deemed to have committed an act with deliberate intent if the aim of the person is to create circumstances which belong to the necessary elements of an offence and is aware that such circumstances occur or if he or she at least foresees the occurrence of such circumstances. A person is also deemed to have committed an act with deliberate intent if the person assumes that the circumstances which constitute the necessary elements of an offence are an essential prerequisite for the achievement of the aim.

A person is deemed to have committed an act with direct intent if the person knowingly creates circumstances which belong to the necessary elements of an offence and wants or at least tacitly accepts the creation of the circumstances.

A person is deemed to have committed an act with indirect intent if the person foresees the occurrence of circumstances which constitute the necessary elements of an offence and tacitly accepts that such circumstance may occur.

A person is guilty of committing rape, satisfaction of sexual desire by violence, compelling person to engage in sexual intercourse, compelling person to satisfy sexual desire, sexual intercourse with descendant, sexual intercourse with child or satisfaction of sexual desire with child, if the crime was committed with at least indirect intention.<sup>56</sup>

**iii.** The legal age for engaging in sexual activities in Estonia is 14 years of age. An adult person, who engages in sexual intercourse with a person of less than 14 of age shall always be punished, no matter, whether there was any violence used against a child or not. The Penal Code also states that a person is deemed to be incapable to comprehend if he or she is less than 10 years of age.<sup>57</sup>

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<sup>55</sup> Penal Code Commentary, p. 412-418

<sup>56</sup> Estonian Penal Code, Clause 56

<sup>57</sup> Estonian Penal Code, Clause 147

The consensual sexual activities between minors are not regulated by the Penal Code. To be held responsible for sexual intercourse with a child, a person has to be at least 18 years of age.

iv. Estonian legal system protects the sexual self-determination of a child, so it doesn't matter, if an adult person, who engages in sexual intercourse or satisfies his sexual desire with a person less than 14 years of age, uses force or threat against a child or takes an advantage of his or her disability – a person under 14 years of age cannot legally consent to sexual activities, so in such cases, sexual abuse of a child is always assumed. The main purpose of criminalizing all the sexual activities with a person less than 14 years of age is to prevent the sexual abuse and exploitation of children and protect their normal development.

v. The crime of incest is regulated by clause 144 of the Penal Code, which criminalizes sexual intercourse with descendant. According to this clause, a parent, a person with the rights of a parent, or a grandparent, who engages in sexual intercourse with his or her child or grandchild shall be punished by up to 5 years' imprisonment.

vi. The Penal Code criminalized the employment of person prohibited, based on law, from working with children. An employer who employs a person for work or service related to children if it is prohibited based on law, or a person authorised to issue activity licences who issues an activity licence for provision of services to children if this is prohibited by law shall be punished by a fine of up to 300 fine units. The same act, if committed by a legal person, is punishable by a fine up to 3200 euros.

## 2.2 Child Prostitution

vii. Estonia signed the Council of Europe Convention on Action against Human Trafficking on February 3, 2010, but has not ratified the Convention yet. However the Convention was taken as one of the principle international treaties, while drafting the new regulation of the Estonian Penal Code, which contained new human trafficking clauses. For example, the principle from the Article 4, clause b, which states that the consent of a victim of "trafficking in human beings" to the intended exploitation shall be irrelevant, was adopted.<sup>58</sup>

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<sup>58</sup> The Parliament of Estonia, Karistusseadustiku ja sellega seonduvate seaduste muutmise eelnõu, [www.riigikogu.ee/%2F%3Fop%3Ddemsplain%26page%3Dpub\\_file%26file\\_id%3Dfc4c619a-4b3b-8891-7c60-afda3cd81779%26&ei=ubmTULqXCdCGhQfh74DQBA&usg=AFQjCNFakw9WL2EGwb30oM6Uiddo2](http://www.riigikogu.ee/%2F%3Fop%3Ddemsplain%26page%3Dpub_file%26file_id%3Dfc4c619a-4b3b-8891-7c60-afda3cd81779%26&ei=ubmTULqXCdCGhQfh74DQBA&usg=AFQjCNFakw9WL2EGwb30oM6Uiddo2)



There is no information available, of whether Estonia is planning to ratify the Convention.

**viii.** According to Lanzarote Convention, the term “child prostitution” shall mean the fact of using a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment, regardless if this payment, promise or consideration is made to the child or to a third person.

The Estonian Penal Code does not give the explanation to the term „child prostitution“. It is criminalized by the general article of the Penal Code „Trafficking in Human Beings“ and “Human Trafficking with the Purpose of Child Exploitation”.<sup>59</sup>

**ix.** Estonian national legislation criminalizes the recruiter – the person that coordinates the business of child prostitution. There is currently no specific clause, which would criminalize the user - person that pays to conduct sexual activities with children. Such person may be responsible under any of the clauses of the Penal Code, which criminalize the offences against sexual self-determination (generally either sexual intercourse with child, or satisfaction of sexual desire with child).

The Estonian Social Democratic Party has recently made a preposition to Riigikogu, to add the specific clause to the Penal Code, which would criminalize the actions of a person, who pays or offers to pay with the purpose to conduct sexual activities with a person of less than 18 years of age. The issue has been discussed in June 2012.<sup>60</sup>

### 2.3 Child Pornography

**x.** Estonia is a party to the Council of Europe Convention on Cybercrime. The date of signature is November, 23, 2001. The date of ratification is May, 12, 2003.

**xi.** Estonian national legislation does not directly define the term “child pornography”.

**xii.** According to clause 178 of the Penal Code, criminal liability is attributed to a person, who manufactures, stores, hands over, displays or makes available in any other manner of pictures, writings or other works or reproductions of works depicting a person of less than

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<sup>59</sup> Estonian Penal Code, Clauses 133 and 175

<sup>60</sup> Karin Kangro, Riigikogu arutas alaealistelt seksi ostmise kriminaliseerimist, <http://www.postimees.ee/865768/riigikogu-arutas-alaealistelt-seksi-ostmise-kriminaliseerimist/>

18 years of age in a pornographic situation, or person of less than 14 years of age in a pornographic or erotic situation.

It is almost compatible with the Article 20 (1.a) to (1.f) of Lanzarote Convention, with the exception of the act of knowingly obtaining access, through information and communication technologies, to child pornography, which is criminalized by section 1.f. of Article 20 of the Lanzarote Convention.

**xiii.** The availability of child pornography on someone's computer is controlled by the Estonian Police and Border Guard Board. If someone accidentally comes across a pornographic material, depicting a child, in the internet he or she can report this directly to the Police and Border Guard Board or it is also possible to contact the Internet policeman.

**xiv.** Clause 175 of the Estonian Penal Code criminalizes human trafficking with the purpose of child exploitation, which is among other things "inducing minors to participate as models or actors in pornographic or erotic performances". The national legislation does not highlight and differentiate between recruitment and coercion.

## **2.4 Corruption of Children**

**xv.** Clause 179 of the Estonian Penal Code criminalizes handing over, displaying or making otherwise knowingly available pornographic works or reproductions thereof to a person of less than 14 years of age, engaging in sexual intercourse in the presence of such person or knowingly sexually enticing such person in any other manner. Any person who performs such act shall be punished by a pecuniary punishment or up to 3 years' imprisonment. A person is guilty, if he had at least indirect intention to commit the crime.

The Act to Regulate Dissemination of Works which Contain Pornography or Promote Violence or Cruelty prohibits dissemination and exhibition to minors of works which contain pornography or promote violence or cruelty and the presence of minors in shops, cinemas, video theatres or on the premises of other places of business (hereinafter specialised places of business) which are licensed to disseminate or exhibit works which contain pornography or promote violence or cruelty. Clause 3 of this legal act states that specialised places of business shall display a sign "prohibited to minors". Upon dissemination outside of specialised places of business of works which contain pornography or promote violence or cruelty: they shall be offered in a manner which prevents examination of the works by minors and the works shall not be displayed in a visible place.

If the rule of law is broken and any work, which contains pornography or promotes violence or cruelty, has been made available or shown to a minor, it is punishable as a misdemeanour, on condition that it was committed with at least indirect intent.<sup>61</sup>

There is no specific term for “causing” in the Estonian Penal Code.

## **2.5 Solicitation of Children for Sexual Purposes**

**xvi.** The crime of grooming is criminalized as „sexual enticement of children” by Clause 179 of the Estonian Penal Code. It does not specify that the perpetrator should also propose a meeting with the potential child victim and come to the meeting place in order to be accused. If the perpetrator proposes a meeting, it is punishable under the clause 178<sup>1</sup>.

According to the clause 178<sup>1</sup> section 1, making a proposal for meeting a person of less than 18 years of age who was not capable of comprehending the situation, or a person of less than 14 years of age, or concluding an agreement to meet him or her, and performance of an act preparing the meeting, if the aim of the meeting is to commit an offence provided for in Clauses 133, 133<sup>1</sup>, 141 - 146, 175, 178 or § 179 of this Code with respect to the specified person, is punishable by a pecuniary punishment or up to 3 years' imprisonment. Section 2 of the same clause states that that the same act, if committed by a legal person, is punishable by a pecuniary punishment.

**xvii.** There is a general rule, stated by the Penal Code, that the offenders are principal offenders and accomplices.<sup>62</sup> Clause 22 of the Penal Code defines that the accomplices are abettors and aiders. An abettor is a person who intentionally induces another person to commit an intentional unlawful act. An aider is a person who intentionally provides physical, material or moral assistance to an intentional unlawful act of another person. Unless the accomplice has any special personal characteristics, that means circumstances which constitute a necessary element of an offence prescribed in the Special Part of the Code or another Act and which describe the personal characteristics, aims or motives of an offender., a punishment shall be imposed on an accomplice pursuant to the same provision of law which prescribes the liability of the principal offender.

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<sup>61</sup> Commentary to the Estonian Penal Code, p 250-251

<sup>62</sup> Clause 20 of the Penal Code

If an accomplice lacks the specific personal characteristics which pursuant to law constitute prerequisites for the liability of the principal offender, a court may mitigate the punishment of an accomplice, as provided by the clause 60 of Penal Code.<sup>63</sup>

The above mentioned rules apply to all the criminal offences, punishable under the Penal Code, including those mentioned in the subsections a, b, c, d and e.

Besides, there is a special clause 133<sup>1</sup>, in the Penal Code, which criminalizes aiding trafficking in human beings, including trafficking in minors. This clause criminalizes such acts as transporting, delivering, shipping, accepting, hiding and housing the victim of human trafficking or aiding human trafficking in any other way.

Clause 175 of the Penal Code criminalizes both inducing a person under 18 years of age to commit or continue committing the crime, to beg, to engage in prostitution or work in similar circumstances and to participate in pornographic or erotic performances or representations, as well as aiding the above mentioned acts.

## 2.6 Corporate Liability

**xviii.** Clause 14 of the Estonian Penal Code states that in the cases provided by law, a legal person shall be held responsible for an act which is committed in the interests of the legal person by its body, a member thereof, or by its senior official or competent representative. The provisions of this Act do not apply to the state, local governments or to legal persons in public law. Clause 37 of the Penal Code states that legal persons with passive legal capacity are capable of guilt.

All the provisions, concerning the prosecution of criminal offences, applicable to an individual are also applicable to a legal person. The basis for punishment is also the same: a person, either an individual or a legal person, shall be punished for an act if the act comprises the necessary elements of an offence, is unlawful and the person is guilty of the

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<sup>63</sup> Clause 60 of the Estonian Penal Code. Mitigation of punishment in cases provided by law

- (1) In the cases specified in the General Part of this Code, a court may mitigate the punishment of a person pursuant to the procedure provided for in subsections (2)–(4) of this section.
- (2) The maximum rate of a mitigated punishment shall not exceed two-thirds of the maximum rate of the punishment provided by law.
- (3) The minimum rate of a mitigated punishment shall be the minimum rate of the corresponding type of punishment provided for in the General Part of this Code.
- (4) If the Special Part of this Code prescribes life imprisonment as a punishment for a criminal offence, an imprisonment for a term of not less than three years shall be imposed in mitigation of the punishment.

commission of the offence.<sup>64</sup> As a result a legal person can also be responsible for the omission and the attempt of crime and the same circumstances precluding unlawfulness (clauses 27-31 of the Penal Code) are applicable to him.<sup>65</sup>

A legal person can be responsible as for criminal offence, so for misdemeanour. However, a legal person is not responsible for all the offences, but can only be responsible under the clauses contained in the Special Part of the Penal Code or any other legal act, where the responsibility of a legal person is specified. These clauses contain a special sentence, which states „ the same act, if committed by a legal person...“. As a matter of fact a legal person is responsible for almost all the offences an individual is responsible for, unless the offence is only possible to be committed by an individual.<sup>66</sup>

In general, a legal person is responsible for the offences, committed by its persons in position of authority: a body, a member thereof, or by its senior official or competent representative. However it can also be responsible for the offence, committed by a regular employee, if the offence is committed under the command or at least the approval of the body or a leading person. In such case the act of taking advantage of another person has to be detected.<sup>67</sup>

In both cases, where the offence was committed by a person in position of authority and by a regular employee, a condition of committing the offence in the interests of a legal person must be met. That means, that the offence has to be committed in the field of this legal persons' activity or at least in the related field of activity. A legal person is not guilty of the offence, which was committed in the person's position of authority own interest or any third party's interest. Neither is it guilty of the offence, which was not related to the employee's work tasks or which was committed outside working hours.<sup>68</sup>

- xix. For criminal offences, committed by legal persons, national legislation imposes criminal liability, generally pecuniary punishment in the amount of 3200 – 16000000 euro. However, a court may also impose the compulsory dissolution on a legal person, who has committed a criminal offence, if commission of criminal offences

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<sup>64</sup> Clause 2 of the Estonian Penal Code

<sup>65</sup> Commentaries of the Penal Code, p. 77

<sup>66</sup> Commentaries of the Penal Code, p.77-78

<sup>67</sup> Estonian Supreme Court's Decisions, RKKK 3-1-1-82-04, 3-1-1-145-05, 3-1-1-9-08

<sup>68</sup> Estonian Supreme Court's Decision, RKKK 3-1-1-108-03

has become part of the activities of the legal person,<sup>69</sup> for example if a legal person is guilty of trafficking in human beings or manufacturing works involving child pornography or making child pornography available.<sup>70</sup>

For misdemeanours national legislation also imposes criminal liability, generally pecuniary punishment in the amount of 32 - 32000 euro.<sup>71</sup>

**xx.** Clause 14 section 2 of the Penal Code states that prosecution of a legal person does not preclude prosecution of the natural person who committed the offence. Thus national legislation does not exclude individual liability when there is a corporate liability. Charging an individual, who committed the offence in the interests of a legal person and a legal person itself is a regular case and does not represent the violation of the principle *ne bis in idem*.<sup>72</sup>

## 2.7 Aggravating Circumstances

**xxi.** According to Estonian Penal Code the same aggravating rules apply to all types of crimes.

The general aggravating circumstances are:

- 1) self interest or other base motives;
- 2) commission of the offence with peculiar cruelty, or degradation of the victim;
- 3) commission of the offence knowingly against a person who is less than 12 years of age, pregnant, in an advanced age, in need of assistance or has a severe mental disorder;
- 4) commission of the offence against a person who is in a service, financial or family-related dependent relationship with the offender;
- 5) commission of the offence during a state of emergency or state of war;
- 6) commission of the offence by taking advantage of a public accident or natural disaster;

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<sup>69</sup> Clause 46 of the Estonian Penal Code

<sup>70</sup> Clause 178 of the Estonian Penal Code

<sup>71</sup> Clause 47 of the Estonian Penal Code

<sup>72</sup> Estonian Supreme Court's Decisions, RKK 3-1-1-7-04, 3-1-1-137-04

- 7) commission of the offence in a manner which is dangerous to the public;
  - 8) causing of serious consequences;
  - 9) commission of the offence in order to facilitate or conceal another offence;
  - 10) commission of the offence by a group;
  - 11) taking advantage of an official uniform or badge in order to facilitate commission of the offence.
- Self interest means that the offender wants to receive any kind of material benefit, which may be money, things, property, freedom from financial obligation etc. This is considered a base motive, because the offender is trying to get the above mentioned, committing the crime. Other base motive is any generally condemned motive, e.g. envy, greed, reckless careerism etc.
  - Peculiar cruelty means that the offender takes pleasure in violence or uses brutal violence, despite victims' suffering. Degradation of the victim means physical or verbal abuse, making the victim do humiliating acts. The act was committed in a cruel and agonizing way if it caused a victim great pain or long-lasting physical impairments.<sup>73</sup>
  - A person younger than 12 years is a minor, a person younger than 10 years old is not capable to comprehend the situation. This aggravating circumstance applies only to offender, who is aware of a victim's age.<sup>74</sup> A person may be in need of assistance, because of his or her age (a child or an old man), health condition, pregnancy, but also a sleeping, drunk, unconscious or for any other reason motionless person.
  - A service dependent relationship means a superior-subordinate relationship in a public service, legal person etc. Financial dependency may be based on a contract, tortious conduct etc. Family-related dependent relationship is based on the relationship of dependency between family members.
  - The state of emergency is declared by Riigikogu on the basis of the President's of the State proposal, in case if the state's constitutional regime is at risk and this risk cannot be

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<sup>73</sup> Commentary's of the Estonian Penal Code, page 195

<sup>74</sup> Commentary's of the Estonian Penal Code, page 195

overcome without the use of the emergency measures, specified in the State of Emergency Act. The state of emergency can be declared for up to 3 months.

The state of war is declared by Riigikogu on the basis of the President's of the State proposal. According to the Constitution of Estonia, in case of the crime of aggression, directed against the state, the state of war can also be declared by the President himself. The state of war lasts until the Riigikogu on the basis of the President's proposal declares an end to it.

The aggravating circumstance is that the offender commits the offence during this period; it's no matter, whether it's the state of emergency or the state of war.

- The public accident may be for example fire, epidemic etc. Natural disaster is a flood, forest fire, drought, storm, downpour etc. The aggravating circumstance is not just the commitment of the offence during the period or in the place of public accident or natural disaster, but taking advantage of it – for example the offender may take an advantage of the fact, that people's attention and efforts are addressed to relieving the disaster.
- A manner, which is dangerous to public, is committing the offence with the use of poisoning, explosion, arson etc, no matter what the final consequences are.
- Causing of serious consequences can be e.g. physical harm (death, health damage).
- Commission of the offence in order to facilitate or conceal another offence is the aggravating circumstance, if the perpetrator operated with a purpose of facilitating or concealing another offence (with a deliberate intent), no matter whether he succeeded or not.
- Commission of the offence by a group is a joint offence. If at least two persons agree to commit an offence jointly, each of them shall be held liable as a principal offender (joint principal offenders). An offence is deemed to be a joint offence also if an act committed by several persons jointly and in agreement comprises the necessary elements of an offence.
- Taking advantage of an official uniform (for example the policeman uniform) or badge (for example a sign) is the facilitation of the commission of the offence. If the uniform or badge was used to hide the crime this is also considered the aggravating circumstance.



## 2.8 Sanctions and Measures

<b>Criminal offence</b>	<b>Sanction against an individual</b>	<b>Sanction against a legal person</b>
<b>Rape</b> (if committed against a person of less than 18 years of age)	6 to 15 years' imprisonment	-
<b>Satisfaction of sexual desire by violence</b> (if committed against a person of less than 18 years of age)	1 to 10 years' imprisonment.	-
<b>Compelling person to engage in sexual intercourse</b> (if committed against a person of less than 18 years of age)	up to 5 years' imprisonment.	-
<b>Compelling person to satisfy sexual desire</b> (if committed against a person of less than 18 years of age)	up to 5 years' imprisonment	-
<b>Sexual intercourse with descendant</b>	up to 5 years' imprisonment	-
<b>Sexual intercourse with child</b>	up to 5 years' imprisonment	-
<b>Satisfaction of sexual desire with child</b>	up to 5 years' imprisonment	-
<b>Human trafficking</b> (if committed against a person of less than 18 years of age)	3 to 15 years' imprisonment	pecuniary punishment or compulsory dissolution
<b>Aiding human trafficking</b> (if committed against a person of less than 18 years of age)	2 to 10 years' imprisonment	pecuniary punishment or compulsory dissolution
<b>Human trafficking for the purpose of child exploitation</b>	2 to 10 years' imprisonment	pecuniary punishment or compulsory dissolution

<b>Manufacture of works involving child pornography or making child pornography available</b>	pecuniary punishment or up to 3 years' imprisonment	pecuniary punishment or compulsory dissolution
<b>Agreement of sexual purpose for meeting with child</b>	pecuniary punishment or up to 3 years' imprisonment	pecuniary punishment
<b>Sexual enticement of children</b>	pecuniary punishment or up to 3 years' imprisonment	pecuniary punishment

As a supplementary punishment for offences imposed on natural persons, clause 53 of the Penal Code states that if a court convicts a person of a criminal offence and imposes imprisonment for a term of more than three years or life imprisonment, the court may, in the cases provided by law, impose a supplementary punishment according to which the convicted offender is to pay an amount up to the extent of the total value of all the assets of the convicted offender.

Extradition is carried out on the basis of European Convention on Extradition (1957) and its two additional protocols and in some cases on the basis of Convention On Simplified Extradition Procedure Between the Member States of the European Union (1995) and Convention on the Extradition Between the Member States of the European Union (1996). The last two conventions are not considered independent legal acts, but only contain some important aspects, related to extradition procedure between the European Union member states and are based on 1957 year convention.<sup>75</sup>

The Convention on Extradition provides that the Contracting Parties undertake to surrender to each other all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for carrying out a sentence or detention order. The Convention is not applied in case of military or political offences. In case of fiscal offences extradition is granted only if the Contracting Parties have so decided in respect of any such offence or category of offences. If the offence for which

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<sup>75</sup> Estonian Ministry of Justice, <http://www.just.ee/26326>

extradition is requested is punishable by death under the law of the requesting Party, extradition may be refused.<sup>76</sup>

**xxiii.** In the context of the Estonian legal system the sanctions for the crimes against children, mentioned above, are proportionate. The sanction applied to the offender in every particular case depends on the particular specific circumstances and evidence, which the police have managed to collect. It is often discussed among people that the punishments applied to child offenders are not strict enough. However it has to be understood that punishments are not applied for the offender's general tendency, but for the particular crime he has committed.<sup>77</sup>

Besides, Estonia pays much attention on the crime prevention programs. The penalty, applied to paedophile, usually goes in complex with special preventive measures: psychological treatment, the prohibition of visiting websites, created for children; the prohibition of communicating with minors of less than 14 years of age etc. If during the period of probation a person breaks any of those restrictions the probation period will be extended or a person may be sent to jail.<sup>78</sup> Whether the sanctions are effective and dissuasive depends on every particular case: some offenders continue committing child abuse crimes soon after their release, some of them do not. That, however, generally depends on a particular person, not a sanction.

**xxv.** A court may apply confiscation of the object used to commit an intentional offence if it belongs to the offender at the time of the making of the judgment or ruling. In the cases provided by law, a court may confiscate the substance or object which was the direct object of the commission of an intentional offence, or the substance or object used for preparation of the offence if these belong to the offender at the time of the making of the judgment and confiscation thereof is not mandatory pursuant to law.

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<sup>76</sup> Estonian Courts, <http://www.kohus.ee/7254>

<sup>77</sup> Prokurör: pedofiilide karistused on piisavad, <http://www.delfi.ee/news/paevauudised/eesti/prokuror-pedofiilide-karistused-on-piisavad.d?id=27338783>

Pille Alaver: pedofiil võib olla kes tahes meie hulgast, <http://www.minut.ee/article.pl?sid=12/03/30/1229242>

<sup>78</sup> Urmo Soonvalt, Pomerants: kohtunikud ei suutu pedofiilide süütegudesse liiga leebelt, <http://www.delfi.ee/news/paevauudised/eesti/pomerants-kohtunikud-ei-suutu-pedofiilide-suutegudesse-liiga-leebelt.d?id=63776930>

As an exception, a court may confiscate the above mentioned objects or substance if it belongs to a third person at the time of the making of the judgment or ruling and the person:

- 1) has, at least through recklessness, aided in the use of the objects or substance for the commission or preparation of the offence,
- 2) has acquired the objects or substance, in full or in the essential part, on account of the offender, as a present or in any other manner for a price which is considerably lower than the normal market price; or
- 3) knew that the objects or substance was transferred to the person in order to avoid confiscation thereof.<sup>79</sup>

In the case of confiscation, the rights of third persons remain in force. The state shall pay compensation to third persons, except in the cases provided for in subsections 83 (3)<sup>80</sup> and (4)<sup>81</sup>, 83<sup>1</sup> (2)<sup>82</sup> and 83<sup>2</sup> (2)<sup>83</sup> of the Penal Code.

Confiscated objects shall be transferred into state ownership or, in the cases provided for in an international agreement, shall be returned.<sup>84</sup> There are no regulations concerning

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<sup>79</sup> Clause 83 (1), (2), (3) of the Penal Code

<sup>80</sup> Clause 83 section 3 states that as an exception, a court may confiscate the objects or substance specified in subsections (1) and (2) of this section if it belongs to a third person at the time of the making of the judgment or ruling and the person:

- 1) has, at least through recklessness, aided in the use of the objects or substance for the commission or preparation of the offence,
- 2) has acquired the objects or substance, in full or in the essential part, on account of the offender, as a present or in any other manner for a price which is considerably lower than the normal market price; or
- 3) knew that the objects or substance was transferred to the person in order to avoid confiscation thereof.

<sup>81</sup> Clause 83 section 4 states that in the absence of the permission necessary for the possession of an object or substance, such object or substance shall be confiscated.

<sup>82</sup> Clause 83<sup>1</sup> section 2 states that as an exception, a court shall confiscate the assets or substance specified in subsection (1) this section if these belong to a third person at the time of the making of the judgment or ruling, and if:

- 1) these were acquired, in full or in the essential part, on account of the offender, as a present or in any other manner for a price which is considerably lower than the normal market price; or
- 2) the third person knew that that the assets were transferred to the person in order to avoid confiscation.

<sup>83</sup> Clause 83<sup>2</sup> section 2 states that as an exception, a court may confiscate the assets of a third person on the bases and to the extent specified in subsection (1) this section if these belong to the third person at the time of the making of the judgment or ruling, and if:

- 1) these were acquired, in full or in the essential part, on account of the offender, as a present or in any other manner for a price which is considerably lower than the normal market price; or
- 2) the third person knew that that the assets were transferred to the person in order to avoid confiscation.

allocation of a special fund for financing prevention or intervention programmes in which the confiscated properties would be allocated.

**xxvi.** The Estonian Constitution states that everyone is equal before the law. If a family member or a member of the close environment of the child commits the offence against a child, he is responsible under one or several clauses of the Penal Code, which criminalizes offences against sexual self-determination and offences against a minor.

However, if the offence was committed by a child's parent, parental rights may be revoked by court order. This does not relieve the parent of the obligation to provide financial support for the child. A child may be removed from parental custody also without revocation of the parents' parental rights. A social worker shall monitor the necessity of separating a child from his or her parents. If the child's health or life would be endangered by remaining with his or her parent, a guardianship authority may remove the child from the parent's custody before a court decision. Brothers and sisters from one family who are removed from a home and family must not be separated unless it is against the children's best interests for them to remain together.<sup>85</sup>

Clause 27 of the Estonian Child Protection Act states that the child and his or her parents shall not be separated against their will except if such separation is in the best interests of the child, if the child is endangered and such separation is unavoidable, or if such separation is demanded by law or a judgment which has entered into force.<sup>86</sup>

Clause 134 of the Estonian Family Law Act provides that if the physical, mental or emotional well-being or the property of a child is endangered by abuse of the parent's right of custody, neglecting the child, inability of the parents to perform their obligations or conduct of a third person and the parents do not wish or are unable to prevent danger, a court shall apply necessary measures for the prevention of danger.

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<sup>84</sup> Clause 85 of the Penal Code

<sup>85</sup> Eesti.ee, Orphans and Children Deprived of Parental Care,  
[https://www.eesti.ee/eng/topics/perekond/lapsed\\_perekonnas/orvud\\_ja\\_vanemliku\\_hoolitsuseta\\_lapsed\\_1](https://www.eesti.ee/eng/topics/perekond/lapsed_perekonnas/orvud_ja_vanemliku_hoolitsuseta_lapsed_1)

<sup>86</sup> Republic of Estonia Child Protection Act, [www.childcentre.info/.../legislation/estonia/dbaFile1076...](http://www.childcentre.info/.../legislation/estonia/dbaFile1076...)

Clause 135 of the same legal act explains that a court may separate a child from the parents only if damage to the interests of the child cannot be prevented by other supporting measures applied in the relationship between the parents and the child.<sup>87</sup>

If a crime against a child was committed by a member of the close environment, a court may impose a temporary restraining order to protect the rights and privacy of a child. That means that a perpetrator is forbidden to stay in certain places, stated by the court; to approach a child and talk to him.<sup>88</sup> The Penal Code states that violation of a restriction order or other measure of protection of personality right imposed by a court decision, if this poses a danger to the life, health or property of persons, or repeated violation of a restriction order or other measure of protection of personality right is punishable by a pecuniary punishment or up to one year of imprisonment.<sup>89</sup>

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

i. Clause 3 of the Republic of Estonia Child Protection Act states that child protection is based on the principle that the best interests of the child shall be a primary consideration at all times and in all cases. It can be stated that the possibilities of special treatment to secure the rights and interests of child victims/witnesses, based on this principle, are present in the new law of criminal procedure, which came into force 1.08.2012.

Clause 70 of the Code of Criminal Procedure states that the investigator may appoint a child protection official, social worker or psychologist to participate in the interrogation of a witness under 14 years of age. Participation of a child protection official, social worker or psychologist in the child interrogation is mandatory, if the investigator himself lacks a specific training and:

- 1) A witness is younger than 10 years of age and a repeated interrogation may cause harm to child's mental health.

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<sup>87</sup> Estonian Family Law Act,  
<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXXXXX33K3&keel=en&pg=1&ptyyp=RT&tyyp=X&query=perekonnaseadus>

<sup>88</sup> Clause 141<sup>1</sup> of the Estonian Code of Criminal Procedure

<sup>89</sup> Clause 331<sup>2</sup> of the Estonian Penal Code

- 2) A witness is younger than 14 years of age and the interrogation is based on family violence or sexual abuse case.
- 3) A witness has a speech, learning or mental disability.

The interrogation of a child may be video recorded. In cases mentioned above the video recording of the interrogation is mandatory, because, if due to his age or mental condition a child cannot take part in court proceedings, the tape will later be used in trial as evidence. The same rules apply to child victims.<sup>90</sup>

Those witnesses under 14 years of age, who are capable and are allowed to participate in court proceedings, shall not be cross-examined. A witness who is a minor of less than 14 years may be heard in the presence of a child protection official, social worker or psychologist who may question the witness with the permission of the judge. A judge shall make a proposal to a witness who is a minor of less than 14 years of age to tell the court everything he or she knows concerning the criminal matter. After a witness who is a minor of less than 14 years of age has given testimony, he or she shall be examined by the parties to the court proceeding in the order determined by the court. The perpetrator is allowed to ask a child witness questions via his lawyer. The court shall overrule leading and irrelevant questions. Taking into consideration witnesses' mental or physical condition and his or her age, a court may interrupt the examination of the witness and question him or her on its own initiative or on the basis of questions, written down by the parties of court proceedings. If the presence of a minor is not necessary after he or she has been heard, the court shall ask him or her to leave the courtroom. The same rules apply to child victims.<sup>91</sup>

If due to his age or health condition a child victim or witness cannot take part in court proceedings, he is not appointed any special representatives. Instead, the **testimony given by witness or victim in pre-trial procedure is being disclosed and used as evidence in the court.**<sup>92</sup>

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<sup>90</sup> Clause 70 of the Estonian Code of Criminal Procedure,  
<http://legislationline.org/download/action/download/id/1666/file/1f0a92298f6ba75bd07e101cdb93.htm/preview>

<https://www.riigiteataja.ee/akt/109072012005#jg5>

<sup>91</sup> Clause 290 of the Estonian Code of Criminal Procedure

<sup>92</sup> Clause 290<sup>1</sup>

ii. Since the year 2009 there are special Child Protection Services in all the Police Prefectures of the Estonian Police and Border Guard Board, which are authorized to detect and investigate all the criminal offences against children and to carry out operations, related to these cases. They also investigate and analyze child pornography materials.

There is also a Special District Prosecutor in The Southern District Prosecutor's Office and the Department for Juvenile Crimes in Northern District Prosecutor's Office, who direct pre-trial proceedings in child abuse and domestic violence cases and ensure the legality and efficiency thereof and represent public prosecution in court.

iii. As has already been mentioned in the General Jurisdiction part, the reason for the commencement of criminal proceedings, as stated in the Estonian Code for Criminal Procedure, is a report of a criminal offence or other information indicating that a criminal offence has taken place. The grounds for a criminal proceeding are constituted by ascertainment of criminal elements in the reason for the criminal proceeding.

The Code for Criminal Procedure contains the principle of mandatory criminal proceedings, which means that investigative bodies and Prosecutors' Offices are required to conduct criminal proceedings upon the appearance of facts referring to a criminal offence unless the circumstances provided for in Clause 199 of this Code which preclude criminal procedure or the grounds to terminate criminal proceedings for reasons of expediency pursuant to Clauses 201 (2), 202, 203, 203<sup>1</sup>, 204, 205 or 205<sup>1</sup> of this Code exist.

According to the above mentioned clauses, the grounds for termination of criminal proceedings are the referral of materials to juvenile committee, if a Prosecutor's Office finds that a minor who has committed a criminal offence in the age of 14 to 18 can be influenced without imposition of a punishment or a sanction; lack of public interest in proceedings and negligible guilt; lack of proportionality of punishment; reconciliation of the parties; if the crime was committed by foreign citizens or in foreign states; assistance received from person upon ascertaining facts relating to subject of proof; in case of competitive crime.

Withdrawal of the statement itself is not a ground for termination of criminal proceedings, if there are still facts referring to a criminal offence. Neither can the proceedings be terminated due to reconciliation of the parties, as according to the clause 203<sup>1</sup> of the Code of Criminal Procedure, the criminal proceedings cannot be terminated on this ground, in case of serious crimes, including the offences against sexual self-determination or in case, where the offence was committed by an adult against a minor.



iv. The limitation periods are regulated by the Penal Code. It is stated that no one shall be convicted of or punished for the commission of a criminal offence if the following terms have expired between the commission of the criminal offence and the entry into force of the corresponding court judgment:

- 1) ten years in the case of commission of a criminal offence in the first degree;
- 2) five years in the case of commission of a criminal offence in the second degree.<sup>93</sup>

A criminal offence in the first degree is an offence the maximum punishment prescribed for which in this Code is imprisonment for a term of more than five years, life imprisonment or compulsory dissolution.

A criminal offence in the second degree is an offence the punishment prescribed for which in this Code is imprisonment for a term of up to five years or a pecuniary punishment.<sup>94</sup>

Offences against humanity, war crimes and offences for which life imprisonment is prescribed do not expire. A misdemeanor expires after two years have passed between the commission thereof and the entry into force of the corresponding judgment or decision. A tax misdemeanor expires after three years have passed between the commission thereof and the entry into force of the corresponding judgment or decision.

In the case of an intermittent offence, the limitation period shall be calculated as of the commission of the last act. In the case of a continuous offence, the limitation period shall be calculated as of the termination of the continuous act.

The limitation period of a criminal offence is interrupted with the performance of the following procedural act in the criminal proceeding:

- 1) application of a preventive measure with regard to the suspect or accused, or seizure of his or her property, or property which is the object of money laundering;
- 2) the prosecution of the accused;
- 3) adjournment of the hearing of a matter in the case the accused fails to appear;
- 4) interrogation of the accused in the court hearing;
- 5) ordering of expert assessment or additional evidence in the court hearing.

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<sup>93</sup> Clause 81 of the Estonian Penal Code

<sup>94</sup> Clause 4 of the Estonian Penal Code

If the limitation period of a criminal offence is interrupted, the limitation period shall commence again with the performance of the procedural act provided above. A person shall however not be convicted of or punished for the commission of a criminal offence if the period between the commission of the criminal offence and the entry into force of the corresponding court judgment is five years longer than the general term.

The limitation period of offence is interrupted:

- 1) in the case a suspect, accused or person subject to proceedings absconds from pre-trial proceedings, extra-judicial proceedings or court, until the person is detained or appears before the body conducting the proceedings;
- 2) upon commencement of criminal proceedings in a matter of an act with elements of a misdemeanour, until the termination of the criminal proceedings;
- 3) upon commission of a criminal offence against sexual self-determination against a person younger than eighteen years of age, until the victim attains 18 years of age unless the reason for the criminal proceedings became evident before the victim attained such age.

In the first two cases, the limitation period shall not be resumed if more than fifteen years have passed from the commission of the criminal offence or more than three years have passed from the commission of the misdemeanor.

v. If the age of the victim is not certain, but there is a reason to believe that he or she a child, it is assumed that the victim is a child and he or she is treated with respects to this, until the victim's real age is specified.<sup>95</sup>

vi. The Estonian Centre of Registers and Information Systems is responsible for recording and storing data for convicted offenders. All this data is stored in the Punishment Register.

The Punishment Register is a state database holding data about punished persons and their punishments. Since year 2012 the Punishment Register is a part of the state-wide e-File. The valid records of the Punishment Register are public – except misdemeanour cases where the person has only one valid misdemeanour record with the main punishment being

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<sup>95</sup> H.Pärna, K.Janter, Saatjateta ja kaubitsetud lapsed,  
[http://www.childcentre.info/public/Saatjata\\_ja\\_kaubitsetud\\_lapsed.pdf](http://www.childcentre.info/public/Saatjata_ja_kaubitsetud_lapsed.pdf)

less than 200 euro (50 fine units) and with no additional punishment. The Punishment Register also doesn't publish the data about punishments of minors.

Everyone, including the competent authorities of other states, can ask for data from the Punishment Register electronically or sending a query application by email or regular mail.<sup>96</sup>

The publicity of the Punishment Register is in accordance with the law, the data, regarding person's convictions and punishments is not considered sensitive.<sup>97</sup>

Unfortunately there is still no Sexual Offender Registry in Estonia. It has been discussed that such register should be established to enable the police, courts, prisons and other administrative services to have more information on the exact location of sex offenders and that it would also help improve the cooperation with other countries.<sup>98</sup>

### 3.2 Complaint Procedure

**vii.** In case of criminal offence, a person can get the quickest help from the Police and Border Guard Board. Victims of a crime can also receive help from their rural municipality government or city government and the volunteers of Victim Support. Since 1 January 2009, there is also a common European helpline 116,111 which can be used to notify about a child in danger. A report of a criminal offence shall be submitted to an investigative body or a Prosecutor's Office orally or in writing. A person can generally report a crime by calling the toll-free number of the police, calling the alarm centre or going to the nearest police station. A report in which a person is accused of a criminal offence is a complaint of crime. An oral report of a criminal offence which is submitted directly on site of the commission of the offence shall be recorded in a report, and a report of a criminal offence communicated by telephone shall be recorded in writing or audio-recorded.<sup>99</sup> A person of every age can present his or her individual complaint.

An investigative body or Prosecutor's Office shall, within ten days as of the receipt of a report of a criminal offence, notify the person who submitted the report of the refusal to

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<sup>96</sup> Estonian Centre of Registers and Information Systems (ERIK), Punishment Register,  
<http://www.rik.ee/en/punishment-register>

<sup>97</sup> Madis Filippov, Tuhanded inimesed esitavad karistusregistrisse enda kohta päringuid,  
<http://www.postimees.ee/780168/tuhanded-inimesed-esitavad-karistusregistrisse-enda-kohta-paringuid/>

<sup>98</sup> Rain Kooli, Pille Alaver: Eestis tuleks luua seksuaalkurjategijate register,  
<http://uudised.err.ee/index.php?06249368>

<sup>99</sup> Eesti.ee

commence criminal proceedings pursuant to subsection 199 (1) or (2) of the Criminal Procedure Code of Estonia. According to this subsection, the criminal proceedings shall not be commenced, if there are no grounds for criminal proceedings, the limitation period for criminal offence has expired, an amnesty precludes imposition of a punishment, the suspect or the accused is dead or the suspect or accused who is a legal person has been dissolved a decision or a ruling on termination of criminal proceedings has entered into force in respect of a person in the same charges on the bases provided for in Clause 200 of this Code. If circumstances specified in Clause 199 of this Code which preclude criminal proceedings become evident in pre-trial proceedings, the proceedings shall be terminated on the basis of an order of the investigative body with the permission of a Prosecutor's Office, or by an order of a Prosecutor's Office.

**viii.** A person younger than 15 years of age should have a legal representative to participate in criminal proceedings.

According to the Family Law Act, a parent who has the right of custody is the legal representative of a child. Parents who have joint custody have a joint right of representation.<sup>100</sup>

In case, where parents cannot represent a child, including in the case of complaint against parents, the legal representative of a child is the appointed representative of the local government.<sup>101</sup>

Clause 11 of the Code of Criminal Procedure states that the principle of public access applies to the pronouncement of court decisions without restrictions unless the interests of a minor, spouse or victim require pronouncement of a court decision in a court session held *in camera*. In the interests of a minor a court may declare that a session or a part thereof be held *in camera*.<sup>102</sup>

## 4 COMPLEMENTARY MEASURES

**i.** Most of the professionals working with children in the area of sexual exploitation and sexual abuse are social workers, police officers, medical workers, paediatricians and child

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<sup>100</sup> Clause of the Estonian Family Law Act

<sup>101</sup> Estonian Police and Border Guard Board, <http://www.politsei.ee/et/teenused/lingid/seaduslik-esindaja/index.dot>

<sup>102</sup> Clause 12

psychologists or psychiatrists. There are social workers, working with children, in all the city administrations and local governments, all of them should have a higher social work education or a special training, which allows them to work with children. Psychologists and psychiatrists, working with children, should have a higher education in psychology or psychiatry with a specialization in child psychology or psychiatry. All the medical workers and paediatricians are also required to have a higher medical education with a specific specialization. Police officers, working with these children are the representatives of special Child Protection Services and have all received a special training to work with children.

All the professionals working with children in the area of sexual exploitation and sexual abuse are generally required to have a special training for working with abused children.

In the recent years, various training events have been organised to boost institutional capacity by raising the awareness and qualification of experts dealing with children and young people. Special attention is given to developing the skills of police officers, prosecutors and judges in dealing with children. Regular training for specialists and officials has been provided to offer them information about the rights of the child, human trafficking, sexual harassment and other issues relating to violence.<sup>103</sup>

**ii.** There is a special Sexual Education class in some Estonian schools, where among other things, children can learn about sexual behaviour and risks, related to it, including sexual violence, abuse and exploitation. Some organizations, including Estonian Sexual Health Association and Estonian Medical Association have asked the Estonian Ministry of Education and Research to make the Sexual Education class mandatory in all school programs. However this problem has not been solved so far. In some schools sexual education issues are discussed in Human Studies class, but in some schools sexual abuse and exploitation problems are not discussed with children at all.<sup>104</sup>

**iii.** In June 2012 the Estonian Parliament has approved chemical castration for sex offenders. The bill has been adopted in the second reading. Estonian Justice Minister Kristen Michal said that chemical castration, which is administration of medication to suppress libido, will be applied to mainly convicted paedophiles.

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<sup>103</sup> ENOC: European Network of Ombudspersons for Children

<sup>104</sup> Seksuaalkasvatus koolis kohustuslikuks, <http://www.delfi.ee/news/paevauudised/eesti/seksuaalkasvatus-koolis-kohustuslikuks.d?id=11858703>

According to the new legislation, courts will be able to impose a course of medical treatment on sex offenders, who would be obliged to take special medication for up to three years. Chemical castration may also be a precondition for the offender to be released on parole.<sup>105</sup>

The State has not created any preventive intervention programmes for people who fear that they may commit the crime, but have not yet been convicted for any of such crimes. If a person fears that he or she may commit the crime, he or she must seek a regular psychological or psychiatric help.

**iv.** The Estonian Victim Support Act entered into force on 1 January 2004; the part covering victim support services entered into force on 1 January 2005.

According to the law, all persons who have fallen victim to negligence, mistreatment or physical, mental or sexual abuse, i.e. all those to whom suffering or injury have been caused, are entitled to victim support. A crime is not a prerequisite for victim support.

The purpose of the victim support service is to maintain or improve a victim's ability to cope. For improved coping, a victim needs both emotional support and information on the forms of assistance available (such as psychological counselling, legal assistance etc), and guidance on how to address the organisations. If a victim is assisted in due course, his/her coping ability can be maintained.

The law also provides for the establishment of a network of victim support centres in all counties. Victim support centres are located on police premises and, for the time being, partly on Pension Board premises. The main duty of regional victim support services is to create and employ a network of organisations in the region which offer assistance and services to victims of crime, and to develop and strengthen this network where possible. The newly created victim support centres employ 35 victim support co-ordinators who have undergone two-month training to obtain systematic knowledge and skills in victim support work so as to be able to organise the provision of victim support services to victims and be able to incorporate the regional victim support system into the nationwide network.<sup>106</sup>

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<sup>105</sup> Ministry of Justice of Estonia, Riigikogu võttis vastu keemilise kastreerimise eelnõu, <http://www.just.ee/56881>

<sup>106</sup> Estonian Ministry of Social Affairs, Victim Support, <http://www.sm.ee/eng/activity/benefits-and-support/victim-support.html>

v. The child helpline service was launched at 01.01.2009 using the nationwide free of charge round the clock operational helpline number 116 111. The objective of the service is to enable everybody to report about a child in need, forward the information to respective specialists and to offer children and other people primary social counselling and crisis counselling, if necessary. The service is provided in accordance with Article 59 of the Estonian Child Protection Act, according to which every person is required to immediately notify the social services departments, police or some other body providing assistance if the person knows of a child who is in need of protection or assistance.

The number 116 111 can be called from all over Estonia using both fixed and mobile phones.

The calls are answered by experienced counsellors who have passed the necessary training. They are ready to listen to the problems and advice how to act at once and in the long run.

The helpline is aware of the confidentiality principles. Counselling is anonymous; no one asks for the name of the person.<sup>107</sup>

vi. There are no State intervention programmes, when it comes to the victims' recovery. However, according to the Victim Support Act, the victims have the right to compensation.

The circle of those entitled to compensation has been extended. Compensation is now also available to victims of violent crimes committed through negligence (earlier, compensation was available only to victims of intentionally committed crimes). The degree of the criminal offence (such as whether serious health damage has been suffered or not) is determined by forensic medical examination. After a forensic medical examination report is prepared, the victim must address the local Pension Board office for compensation.

The rights of European Union citizens have also been extended, regardless of their permanent place of residence (such as tourists), alongside the rights of citizens of the countries which have joined the European Convention on the Compensation of Victims of Violent Crimes. However, the rights will be extended to the parties to the Convention after Estonia has joined it.

Compensation for a victim's funeral expenses and medical treatment expenses is available to the persons who actually incurred these expenses, in the present case, to the child's parents.

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<sup>107</sup> Child Support Helpline in Estonia, <http://www.lasteabi.ee/eng>

Besides the expenses of restoring physical health, the cost of restoring mental health is also compensated. The law also extends compensation for medical treatment expenses to psychological counselling and psychotherapy.<sup>108</sup>

### III NATIONAL POLICY REGARDING CHILDREN

i. There is no serious political discussion, regarding the children in Estonia. However there have been several discussions in regard of children's rights and child protection issues, mostly raised by the Ombudsman for Children in Estonia.

In December 2011, The Ombudsman for Children drafted a manual "Informing about a child in need of help and data protection". With this manual, the Ombudsman for Children hopes that children's problems will be noticed even more and encourages to inform about every abuse case involving a child, but also for instance if the primary needs of a child are not fulfilled. The manual is mainly targeted to specialists in the field of education, medicine, social work and police who work with children daily. The manual was drafted in cooperation with the Data Protection Inspectorate and specialists.

The manual gives an overview which information, in which cases, to whom and via which channels can be communicated about a child in need of help, without an approval from the child and/or his/her legal representative, and based on which legal provisions. Information concerning abuse and special needs of children must be communicated to the rural municipality's or city government's child care official and in case of need to the police, who have the legal basis to interfere and the capabilities to provide help.

The precondition for helping a child is that the information about the child's need for help has reached a competent official or institution. Therefore early detection and work in networks are important pillars of child protection. The network consists of people who are in close contact with the child: a kindergarten or school teacher, head of a hobby group, coach, doctor, parents of a friend or playmate, youth police officer, etc. All of them have an important role in detecting the child's needs and notifying competent institutions. But the Child Protection Act states that every person has the obligation to immediately inform about

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<sup>108</sup> Estonian Ministry of Social Affairs, Victim Support



a child in need of help (subsection 59 (1) of the CPA), be they relatives, neighbours or random people passing by. Leaving a child without assistance or protection is on everyone's conscience who notices that a child needs help but does not inform anyone of it. One cannot justify not informing anyone of the situation, with a claim that he/she was not sure whether the child's need for help was credible enough or informing anyone about the situation might seem as an accusation targeted towards the family or as shaming the child. Competent institutions decide and determine whether there is need for intervention or how important the information is. For instance, a physical education teacher must inform someone about his/her doubts when he/she notices blue marks on the back of a child or a doctor must inform someone about his/her doubts when a child has come to see him/her with many traumas and there is a doubt that these traumas have not been caused by the child. A neighbor must inform if frequent yelling, crying and throwing of things takes place in a family with children. A parent of a child's playmate has to inform someone of the situation when his/her child's friend accidentally breaks a mug and is extremely afraid that he/she will be beaten as a punishment.

“Inform anyone of a child in need of help!” emphasizes the Ombudsman for Children, Indrek Teder, in the summary of the manual. “A child needs help if his/her life, health, feeling of security, development or wellbeing is under threat. Everyone is obliged to notify about a child in need of help. One should inform the rural municipality government or a city government (if possible, a child protection official directly) or the police about it. The rural municipality government or city government and the police are administrative institutions, whose public task, pursuant to law, is to help and protect a child. To carry out this task, the rural municipality government or city government and the police can process personal data related to the child's need for help. As the rural municipality government or city government and the police have the right to process personal data, one can inform them about the child's need for help without the approval from the child and/or his/her legal representative. Data protection is not an obstacle.”

In the course of drafting this manual, Margit Sarv, Senior Adviser, and Andres Aru, Head of the Children's Rights Department of the Office of the Chancellor of Justice, led a project with an aim to analyse situations when information about a child in need of help, despite the obligation prescribed in the Child Protection Act, did not reach competent institutions rapidly enough. One of the causes of the problem is that due to limitations prescribed in the Personal Data Protection Act, specialists working daily with children have been feeling

insecure when processing the personal data of a child in need of help. Therefore the Chancellor of Justice as the Ombudsman for Children decided that there is a dire need for a single and unambiguous manual, which would help specialists who work with children daily fulfill their obligations, pursuant to law, in relation to helping children and informing of the child's need for help, at the same time following the principles of personal data protection. Led by the Ombudsman for Children, the manual was drafted in cooperation with the Data Protection Inspectorate and representatives from the field of social work, the police, healthcare and education and citizens' associations fighting for children's rights.

The manual "Informing about a child in need of help and data protection" is sent to local governments, the Police and Border Guard Board and organizations and associations working with children, so that it can be taken into use and circulated.<sup>109</sup>

In March 2012 the The Ombudsman for Children in Estonia also organised a roundtable "Children's poverty – let's find solutions!". The aim of the roundtable was to draw the decision makers' attention to the problems that associate with the children's poverty in Estonia and to jointly seek solutions to these problems. The members of the Social Affairs Commission of the parliament, the Minister of Social Affairs, the Minister of Education and Research, the Minister for Regional Affairs and representatives of the Associations of Estonian Cities, the Associations of Municipalities of Estonia, universities and NGOs took part in the roundtable.<sup>110</sup>

The bad news came in the midst of a financial crisis that has affected many European countries. For Estonia one major toll of the crisis is the rise in child poverty. A recent report by the Ombudsman for Children said that in 2010 more than 63,000 lived in absolute poverty or at risk of poverty. That's 26 percent of all Estonians under the age of 18.

The report highlights the biggest challenge for Estonia is to get help directly to children instead of through family subsidies. It is also said that the social circle around the child is very important. For example, better cooperation between the school, doctors and child

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<sup>109</sup> Chancellor of Justice of Estonia, The Ombudsman for Children drafted a manual to inform about a child who needs help, <http://oiguskantsler.ee/en/the-ombudsman-for-children-drafted-a-manual-to-inform-about-a-child-who-needs-help>

<sup>110</sup> The Ombudsman for Children in Estonia, Roundtable "Children's Poverty – Let's Find Solutions!", <http://lasteombudsman.ee/en/roundtable-childrens-poverty-lets-find-solutions>

protection services is key to a child's development, and it has been improving in the past couple of years.

One of the things the Chancellor of Justice Office Children's Rights Department has done is set up a free breakfast program at schools for all the children. This makes sure to feed those children who need it without pointing them out to their peers. The Justice Chancellor's Office has also proposed a new measure to give free psychological help to poor families.<sup>111</sup>

On Child Protection Day, June 1st, the Ombudsman for Children introduced to the public the research on children's rights and parenthood, which was carried out in Estonia for the first time. The research shows that the general public awareness of the children's rights issues is very low. Children are not enough included in the decisions, which impact their welfare. Most adults do not inform anyone of child in need of help, as they are unable to assess, whether the child needs this help or not. The parents themselves admit that they lack knowledge of how to raise their children. Many of them consider the physical punishment of children allowed.<sup>112</sup>

ii. Besides the above mentioned reports, discussions and the research, the specialists of the Chancellor of Justice of Estonia Children's Rights Department generally work to raise the awareness within the society regarding children's rights. Their work includes making special reports and presentations for children in schools and other institutions, introducing them the general issues of children's rights. The representatives of the department always participate in different events, campaigns and film festivals, dedicated to children and their rights, giving speeches and sharing their opinions on the particular issues. All this however does not include raising the society's awareness particularly regarding children's sexual abuse and exploitation, as the particular Department does not deal with these issues and cases in their work sphere.

The non-governmental non-profit organization, Estonian Union for Child Welfare also works actively to raise the public awareness of children's rights and contribute to child welfare movements, organizing discussions, conferences and holding different studies and analyzes. There has also been created the **Estonian Union for Child Welfare children's**

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<sup>111</sup> Euroviews, Estonia's Children Victims to Economic Crisis, <http://www.euroviews.eu/?p=3725>

<sup>112</sup> The Ombudsman for Children in Estonia, <http://lasteombudsman.ee/et/lasteombudsman-tutvustab-lastekaitsepaeval-lapse-oiguste-ja-vanemluse-monitooringut>

**rights information centre Märka Last (Notice the Child)** to help the development of a child-friendly society, where every activity thinks of the children's interests and every child is provided with support for the development of their personalities, talents and abilities.<sup>113</sup> There is also a special magazine Märka Last being published regularly. The Autumn 2011 issue of the magazine contained several articles on child sexual education and child sexual abuse.<sup>114</sup> Besides that nothing else has been done to raise the society's awareness regarding child sexual abuse and exploitation.

UNICEF Estonia is another non-governmental organization, which works to raise the awareness about child protection.<sup>115</sup> Some of their brochures contain the information about trafficking in human beings and how not to become the victim of it.

A few projects and campaigns on child sexual abuse and exploitation have been carried out by Tartu Child Support Centre, which cooperates with ECPAT International.<sup>116</sup> In November 2012 a conference in cooperation with the international project „Child Abuse Victim and Offender –Two Sides of the Coin“ is about to take place. However this conference and other workshops and studies, organized by the Support Centre, are generally meant for specialists working with children particularly and not for the wide public.

There has been created a special website Laps netis (Child in the Internet) to raise the awareness regarding children's safety in the Internet and the risks of sexual abuse and exploitation they can meet there. The website contains several related videos and materials for children and their parents.<sup>117</sup>

In general it can be said that there has not been a lot of action undertaken by committed NGOs or the State to raise the awareness within the society regarding children's sexual abuse and exploitation.

**iii.** The statistics on how many reporting has been done regarding children's sexual exploitation in the last 5 years is available in the Ministry of Justice of Estonia annual reports.

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<sup>113</sup> Estonian Union for Child Welfare, <http://www.lastekaitseliit.ee/?lang=en>

<sup>114</sup> Magazine Märka Last, Autumn 2011, <http://ajakiri.lastekaitseliit.ee/2012/07/sugis-2011/>

<sup>115</sup> UNICEF Estonia, <http://www.unicef.ee>

<sup>116</sup> Tartu Child Support Centre, <http://www.tugikeskus.org.ee/kodu/>

<sup>117</sup> Laps netis, <http://lapsnetis.eesti.ee/>

Up to April 2012 the old Estonian Penal Code was in force, which contained the following articles regarding child sexual exploitation:

- 1) Article 175 – disposing minors to engage in prostitution
- 2) Article 176 – aiding prostitution involving minors
- 3) Article 177 – use of minors in manufacture of pornographic works
- 4) Article 177<sup>1</sup> – use of minors in manufacture of erotic works
- 4) Article 178 - **manufacture of works involving child pornography or making child pornography available**
- 5) **Article 179 – sexual enticement of children**<sup>118</sup>

The following table provides the results of the statistical research, carried out by the Ministry of Justice of Estonia:

- All records from 2006-2011 <sup>119</sup>		2006	2007	2008	2009	2010	2011
§ 175	- Disposing minors to engage in prostitution		1	9	5	1	
§ 176	- Aiding prostitution involving minors	2	4	6	2		
§ 177	- Use of minors in manufacture of pornographic works	10	4	4	1	2	40
§ 177 <sup>1</sup>	- Use of minors in manufacture of					4	7

<sup>118</sup> Estonian Penal Code 2011, <https://www.riigiteataja.ee/akt/106012011010>

<sup>119</sup> Ministry of Justice of Estonia, Statistics on the Crime Rate, <http://www.just.ee/30140>

	erotic works						
§ 178	- Manufacture of works involving child pornography or making child pornography available	29	22	52	27	76	17
§ 179	- Sexual enticement of children	11	10	29	20	13	57

iv. In general there have been no specific promotional campaigns in Estonia, regarding sexual exploitation of children, so far.

v. The old regulation of the Estonian Penal Code, which was in force up to April 2012, contained several clauses, which criminalized certain elements of trafficking in human beings, including trafficking in minors. Among them were clauses, criminalizing child sexual exploitation, which have already been mentioned above.

The analysis made by the Ministry of Justice of Estonia in 2009 showed, however, that those articles did not contain all the prohibited aspects of human trafficking, especially those, regarding minors. In particular, the old regulation of the Penal Code did not specify that trafficking in minors is punishable even if no violence or deception has been used against a minor. In other words the regulation was not in accordance with human trafficking regulations, established in international legal acts – that is, minors should always be considered as victims, no matter under which circumstances the offence against them was perpetrated. This problem, regarding minors, was one of the main reasons why the new specific clauses of trafficking in human beings were added to the Estonian Penal Code in spring 2012.

According to the new regulation of the Estonian Penal Code, trafficking in minors, which included the use of threat, force, violence, deception etc is punishable under Clause 133

section 2 item 2 (human trafficking against a person of less than 18 years of age). If no force or any other kind of violence was used against a minor, the act is still punishable under Clause 175 of the Penal Code (human trafficking with the purpose of child exploitation).<sup>120</sup>

When it comes to laws, which impact children's welfare, the professionals working with children and children's rights always participate in the law making process, sharing their opinions on the particular issues.

**vi.** The main Non-Governmental Organisations working on the topic of children's rights in Estonia are:

- Estonian Union for Child Welfare
- United Nations Children's Fund (UNICEF) Estonia
- SOS Children's Village

## **IV OTHER**

### **Crime Rate in General**

According to statistics, provided in the yearbook of crimes in Estonia by the Ministry of Justice, 75% of all the crimes against sexual self-determination, committed in 2011, were committed against minors.<sup>121</sup> A dramatic increase saw the crimes, committed via communication and information technologies, such as child sexual enticement (grooming). The number of these cases reached as high as 57 compared to 13 in 2010. There were 11 cases of agreement of sexual purpose for meeting a child, though in 2010 there was only one such case. The offenders mostly proposed meetings, communicating with children via Internet. There were also more cases of using minors in manufacture of pornographic and erotic works, comparing to previous 4 years. On the other hand, there was committed much less of such crimes as rape and satisfaction of sexual desire by violence.<sup>122</sup>

The increase in figures does not suggest that more sexual crimes against children are being committed, Pille Alaver, head of the Child Protection Service at the North Police Prefecture,

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<sup>120</sup> The Parliament of Estonia, Karistusseadustiku ja sellega seonduvate seaduste muutmise seaduse eelnõu seletuskiri

<sup>121</sup> Ministry of Justice of Estonia, Crime in Estonia in the Year 2011, [http://www.just.ee/orb.aw/class=file/action=preview/id=57202/Kuritegevus\\_Eestis\\_2011.pdf](http://www.just.ee/orb.aw/class=file/action=preview/id=57202/Kuritegevus_Eestis_2011.pdf)

<sup>122</sup> Ministry of Justice of Estonia, Crime in Estonia in the Year 2011

said. She said that it is instead a sign that the topic is acute and the law enforcement agencies have become more efficient in monitoring the online environment, paying particular attention to the safety of children, she said. It is also known that most of the child abuse and exploitation cases remain unreported. The increase of number of such cases may also mean that victims are becoming more eager to come to the police and report the crimes.

Also, Alaver said, the criminalization in 2010 of child grooming - actions undertaken by an adult to establish an emotional connection with a child for the purpose of sexual activity or exploitation - has contributed to the rise in the number of cases. Before grooming became a criminal offense, adults could freely contact children online and the police had no right to intervene, said Alaver. "The offenders could say they were joking or just experimenting to see what the kid would say," she explained.<sup>123</sup>

The following table provides a review of the number of sexual crimes of all kind, committed against children, in the period of 2006-2010 years.<sup>124</sup>

<b>Crime</b>	2006	2007	2008	2009	2010
Rape	57	41	67	49	27
Satisfaction of sexual desire by violence	41	24	35	49	38
Compelling person to engage in sexual intercourse	2	4	4	1	0
Compelling person to satisfy sexual desire	0	4	12	5	2
Sexual intercourse with descendant	0	2	3	2	1
Sexual intercourse with child	30	10	11	14	11
Satisfaction of sexual desire with child	62	23	28	25	28
Crimes committed against children in connection with prostitution	2	5	15	7	1

<sup>123</sup> Ingrid Teesalu, Child Sexual Enticement Cases More Frequent, <http://news.err.ee/Society/82b02f55-f8bb-490b-a495-1738f6fe79db>

<sup>124</sup> Ministry of Justice of Estonia, Crime in Estonia in the Year 2010, [http://www.just.ee/orb.aw/class=file/action=preview/id=54602/KuritegevusEestis2010\\_web.pdf](http://www.just.ee/orb.aw/class=file/action=preview/id=54602/KuritegevusEestis2010_web.pdf)



Use of minors in manufacture of pornographic works	10	4	4	1	2
Use of minors in manufacture of erotic works	-	-	-	-	4
Manufacture of works involving child pornography or making child pornography available	29	22	52	27	76
Agreement of sexual purpose for meeting with child					1
Sexual enticement of children	11	10	29	20	13
Total	244	149	260	200	204

## V CONCLUSION

Estonia is taking efforts in legislation, law enforcement, education, prevention programmes and social support to reduce child sexual abuse and exploitation. However, children in Estonia remain at risk of sexual violence, so a lot is still needed to be done. More attention has to be paid on raising the awareness within the society regarding the issues of children's sexual abuse and exploitation: the first step could be the organization of special events, conferences and discussions, distribution of brochures and reading materials, asking the specialists working with children to give more public speeches and share their opinions on children's rights problems in the country. More information campaigns have to be held to promote children's rights.

Special sexual education programmes have to become mandatory in the Estonian schools, so children could learn about risks of abuse and exploitation they can meet in their everyday life and ways to avoid them.

Estonia has moved to harmonize its laws with international conventions protecting children and prohibiting human trafficking, and has also taken practical steps, especially in its justice system, to benefit children. However many legislative problems still need to be discussed and solved – adding a special clause, criminalizing child prostitution to the Estonian Penal Code; entry into force of a new regulation of the Estonian Child Protection Act; bringing

the definitions of child pornography and other specific terms into legal acts – are just a few of them.



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**National Researchers:**

Sonja Helminen

Miika Honkanen

Isabella Lehti

Sini Majlander

Vilma Pasanen

Henriikka Pulli

Louna Taskinen

Laura Tuuli

**National Advisor:**

Timo Ojala

**National Coordinator:**

Laura Päivinen

## I INTRODUCTION

### 1 GENERAL

- i. According to Suomen Perustuslaki, *The Constitution of Finland* (731/1999), discrimination on the basis of age, origin, language, religion, ideology, opinion, health, disability or on other personal grounds is prohibited (s 6). Section 11 of the Chapter 11 of Rikoslaki, *the Criminal Code* (39/1889) also prohibits discrimination in general, whereas section 3 of the Chapter 47 of the Criminal Code prohibits discrimination in employment. In addition, Yhdenvertaisuuslaki, *the Equality Act* (21/2004) obligates the authorities to promote equality and prohibits discrimination in employment and working life, commercial activity, labour market organisations and entry into education, while Laki naisten ja miesten välisestä tasa-arvosta, *the Gender Equality Act* (609/1986) prohibits gender discrimination in employment.

In Finland, there exists an official group for the monitoring of discrimination. The group includes representatives from the Ministries of Justice, Internal Affairs, Education, Labour and Social Affairs and Health as well as other officials, trade unions, and NGOs representing different groups, such as disabled people, the Roma, the Sami and sexual minorities.<sup>1</sup>

Within the framework of the monitoring group, human rights NGO Ihmisoikeusliitto, *Finnish League for Human Rights* has compiled a report on discrimination problems in Finland.<sup>2</sup> According to the report, in 2007 käräjäoikeudet, *the Finnish district courts*<sup>3</sup>, dealt with 29 cases of alleged discrimination, 13 of which concerned discrimination in employment (Criminal Code c 47 s 3). In all of the 16 cases concerning discrimination in general (Criminal Code c 11 s 11), ethnic origin was the alleged basis of discrimination. Most of the complainants belonged to the Roma minority and the alleged discrimination had occurred in the provision of services. In 58% of the cases, the courts found that discrimination had occurred. In the cases concerning discrimination in employment, ethnic origin, gender and age were the

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<sup>1</sup> The homepage of the group monitoring discrimination, viewed on 7 November 2012, <[www.yhdenvertaisuus.fi](http://www.yhdenvertaisuus.fi)>.

<sup>2</sup> M. Aaltonen, M. Joronen and S. Villa, 'Syrjintä Suomessa 2008', 2009, Ihmisoikeusliitto (Finnish League for Human Rights).

<sup>3</sup> More information about the Finnish court system in the chapter II of this report.

alleged grounds in 19%, 25% and 25% of the cases, respectively. In 50% of the cases discrimination was found to have occurred.<sup>4</sup>

According to a report by Poliisiammattikorkeakoulu, *the Police College of Finland* on suspected hate crimes reported to the police, 860 crimes were classified as hate crimes, a reduction of 15 % compared to the previous year. The motive was related to the ethnic or national background of the alleged victim in 86 % of the cases, and the most common of these suspected crimes were assaults. In 6 % of the cases, the motive related to religion or ideology; in 5 % to sexual orientation; and in 2.4 % to disability.<sup>5</sup>

According to a Eurobarometer survey in 2009 12 % of Finns said they had experienced some form of discrimination,<sup>6</sup> in the 2008 the percentage was 15.<sup>7</sup> Examples of discrimination cited in the Finnish League for Human Rights' report *Syrjintä Suomessa 2008*, include bullying in schools as a form of discrimination that occurs on the basis of sexual orientation or ethnic origin and problems in the education system especially for the Roma, the Sami, asylum seekers and disabled people.<sup>8</sup> Inequalities between men and women in working life have persisted and men's average wages are higher than those of women. According to research, having a family can hamper a woman's employment prospects while a similar effect has not been noted for men.<sup>9</sup> Also the UN CEDAW Committee has called for measures to tackle segregation in job markets and expressed concern at the prevalence of discrimination against immigrant women.<sup>10</sup> Discrimination in working life was also seen to occur on the basis of ethnic origin (especially for the Roma people) and disability.<sup>11</sup>

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<sup>4</sup> Aaltonen et al, '*Syrjintä Suomessa 2008*', p. 28 – 32.

<sup>5</sup> J. Niemi, '*Polisin tietoon tullut viharikollisuus Suomessa 2010*', Poliisiammattikorkeakoulun raportteja 95, Tampere, 2011 p. 9.

<sup>6</sup> Special Eurobarometer 317, 'Discrimination in the EU in 2009', 2009, p. 23.

<sup>7</sup> Special Eurobarometer 296, 'Discrimination in the European Union: Perceptions, Experiences and Attitudes', 2008, p. 13.

<sup>8</sup> Aaltonen et al, '*Syrjintä Suomessa 2008*', p. 62 – 76.

<sup>9</sup> Aaltonen et al, '*Syrjintä Suomessa 2008*', p. 98 – 106.

<sup>10</sup> Committee on the Elimination of Discrimination against Women, '*Concluding observations of the Committee on the Elimination of Discrimination against Women: Finland*', 2008, p. 6.

<sup>11</sup> Aaltonen & al, '*Syrjintä Suomessa 2008*', p. 87 – 98.

The Committee on the Rights of the Child has also expressed its concern at the widespread occurrence of discrimination against immigrant and refugee children and children belonging to ethnic minorities as well as disabled children.<sup>12</sup>

- ii. The definition of family has always been complex in the Finnish legislation. In the 1990s, the subject was widely discussed and two committee reports were made.<sup>13</sup> The committee reports did not lead to simplifying the definition of the term but, some principles were recognized: The aim of the legislator is neutral family law and principle of neutrality should be followed in defining the term family.<sup>14</sup> According to the report of Perhetoimikunta, *the Family Committee*, neutrality is interpreted to mean the avoidance of groundless different treatment.<sup>15</sup>

Family is not defined in the Constitution. In the Government Bill 309/1993 on the reformation of fundamental rights, the right to privacy is discussed. In the bill it is suggested that the right to privacy, which is regulated in the Constitution section 10, includes the protection of family life, and thus protection of family life is not separately mentioned in the Constitution. According to the bill, family life is interpreted in the same way as in article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; no further definition is given.<sup>16</sup>

According to the Government Bill 200/2000 legislation concerning family can be divided into two categories; actual family legislation and legislation regarding family. Actual family legislation regulates rights and obligations of the parties, how to form and break family relations and for example the right to financial support and the rules of inheritance.<sup>17</sup> Also according to Perhekäsityöryhmän mietintö, *the Family Term Committee's report*, the purpose of the definition of family in private law is to define the ones, who have the right to inheritance

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<sup>12</sup> Committee on the Rights of the Child, 'Consideration of reports submitted by State parties under article 44 of the Convention. Concluding Observations: Finland', 2011, Section III B 24.

<sup>13</sup> KM 1992:12 (Family Committee report) and STM 1993:26 (Family Term Committee report).

<sup>14</sup> KM 1992:12, p. 79-80.

<sup>15</sup> KM 1992:12, p.80.

<sup>16</sup> HE 309/1993, p. 53.

<sup>17</sup> HE 200/2000, p. 4.



and financial support. In private law, family is defined with biological factors and marriage.<sup>18</sup> To conclude the insight of the term family in private law is a classical nuclear family.

In legislation regarding family, it is defined, how family relations affect individual's other rights and obligations, such as welfare benefits.<sup>19</sup> In connection with welfare benefits, it is common to speak of a financial support assumption, which means that the group of people living in a same household are supposed to support each other financially. According to this assumption, in public law, and especially in social law, family is usually interpreted to be a group of people, who share the same household.<sup>20</sup>

In criminal law, the term family is not specially defined, but the term has a special meaning when dealing with family violence. Although the term family violence is not used in the Criminal Code, the special nature of violence in close relationship is recognized for example among restraining orders. In Laki lähestymiskiellosta, *the Act on Restraining Order*, (898/1998) perheen sisäinen lähestymiskielto, *intra family restraining order*, is mentioned. The intra family restraining order is defined in the Act on Restraining Order in section 2(2). It concerns people living in the same household. Also when considering to put assault in private place under public prosecution<sup>21</sup>, it was specially mentioned that the purpose was to prevent family violence. The term family violence was defined to refer to a violent behavior among the people living in the same household.<sup>22</sup> In criminal law, in some cases, family is also defined by biological and genetic relations. For example incest is criminalized in Criminal Code in the chapter about crimes against public order (Criminal Code c 17 s 22). Incest is defined to be sexual intercourse with an own biological child or other descendant, own parent or other ascendant, or sibling (Criminal Code c 17 s 22(1)). In this case, a close genetic relationship is the defining factor of family.<sup>23</sup>

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<sup>18</sup> STM 1993:26, p. 10.

<sup>19</sup> HE 200/2000, p.4.

<sup>20</sup> STM 1993:26, p. 7 and p. 10. To mention, particularly among young people, the legislator recognizes housing arrangements, whose purpose is not to create family relations. For example housing benefit in Act on Student Grant isn't reliable on one's partner's incomes, opintotukilaki, *Act on Student Grant* (65/1994) s 14.

<sup>21</sup> More about public prosecution in the Finnish Police homepage, viewed on 30 October 2012, <<http://www.poliisi.fi/poliisi/home.nsf/pages/E23ED9E330FA6185C2256BBA0038694C?opendocument>>.

<sup>22</sup> HE 144/2003, p.4.

<sup>23</sup> See more about Incest Chapter II 2(a)(v) of this report.

It is not possible to present a comprehensive list of all laws concerning and defining family.<sup>24</sup> Some laws give rights and obligations to family members without defining the term in the legislation. Finally, it is important to emphasize that a child's right to financial support and care does not depend on the child's family relations.<sup>25</sup> Children's rights are secured as individual's rights.<sup>26</sup>

According to Government Bill 200/2000, marriage has preserved its role as a form of an established relationship, although other options of a common life such as cohabitation and registered partnership have become more and more common. Marriage is no longer the only option for organizing a common life together and raising children.<sup>27</sup> It should also be mentioned, that in Finland polygamous marriages are not possible. It is separately concluded in Government Bill 309/1993 that polygamous marriages do not fit in the Finnish legal system.<sup>28</sup>

Marriage still contains some legal effects that cannot be achieved in any other way. For example, the presumption of paternity is still connected to marriage. According to Isyyslaki, *the Paternity Act* (700/1975) section 2, if a couple is married when the child is born, the husband is considered to be the father of the child.

According to Tilastokeskus, *Statistics Finland* the average age of couples entering their first marriage was 30.6 years among women and 32.9 years among men in 2011. The average age of the persons entering marriage for the first time has risen about 8 years among both women and men in the past decade. The number of marriages has decreased and divorces are also common. According to Statistics Finland, 28 408 couples got married in 2011. This

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<sup>24</sup> HE 200/2000, p. 5.

<sup>25</sup> Laki lapsen elatuksesta, *Act on the Financial Support of a Child*, (704/1975) s 2 and in Laki lapsen huollosta ja tapaamisoikeudesta, *Act on the Child Custody and the Right to Access*, (361/1983) it is defined that parents or other custodians have the primary obligation to take care of their children.

<sup>26</sup> See also Constitution s 6(3), "Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development".

<sup>27</sup> HE 200/2000, p.5. Also Laki avopuolisoiden yhteistalouden purkamisesta, *Act on the Dissolution of the Household of Cohabiting Partners* (26/2011) came into force on 1 April 2011 and Laki rekisteröidystä parisuhteesta *the Act on Registered Partnership* (950/2011) on 1 March 2002.

<sup>28</sup> HE 309/1993, p.56.

is 1544 less than in 2010. According to the same report, 13 469 divorces were granted in 2011.<sup>29</sup>

- iii. The status of children has followed the improvement of the status of women in Finland's historical background, because child's status in society was very much dependent on the status of the mother.<sup>30</sup> The improvement of the status of the child started, when the government took legislative action to improve the status of children born outside of marriage. In 1922 legislation was introduced on the status of children born outside of marriage by enacting *Laki aviottomista lapsista, the Act on adulterine children* (173/1922). The act recognizes the child's right to financial support. A man could be obligated to support a child, whom he most likely had conceived. The main interest of the law was to secure a sufficient financial support to all children. However, the improvement was not very significant, because a child born outside of marriage did not either get the same financial support than a marital child or even the right to inherit.<sup>31</sup>

In 1921 *Laki oppivelvollisuudesta, Act on compulsory education* (101/1921) was accepted. According to the act, every child between the ages 7 and 13<sup>32</sup> was under compulsory education. However it is notable that in the Government Bill 13/1919 the child's right to education was not highlighted as much as the status of Finland as a civilized nation.<sup>33</sup>

In the 1970s, Finland finally took big legislative steps to improve the status of children.<sup>34</sup> The Government Bill 90/1974 contained many legislative proposals to improve children rights of which the two most important were the Paternity Act (700/1975) and the Act on Child's Financial Support (704/1975). Significant factor in the Government Bill 90/1974

<sup>29</sup> Suomen virallinen tilasto (SVT), *Siviilisäädyn muutokset 2011*, Tilastokeskus (*Statistics Finland*), Helsinki, 2012, description page.

<sup>30</sup> S. Ojala, '*Eurooppalaistuva oikeuskulttuuri ja suomalainen parisuhdeoikeus*', 2001, Edita Publishing, p.18.

<sup>31</sup> Act on Adulterine Children (173/1922) s 4 and s 5 and S. Ojala 2001, p. 21.

<sup>32</sup> Apart from some exceptions such as mentally challenged children, look Act on Compulsory Education (101/1921) s 1(3), people living more than 5 kilometers from school and people living in a municipality, which has less than 3 person per square kilometer s1(2).

<sup>33</sup> HE 13/1919. Act on Compulsory Education (101/1921) was later on revoked, and the legislation concerning education was confirmed in the 1990s. In the Government bill 86/1997 it is said that it was time to reform the scattered laws concerning education. Present law concerning compulsory education is *Perusopetuslaki, Basic Education Act* (628/1998).

<sup>34</sup> In the Government Bill 90/1974 it is said that legislative improvements concerning children rights were made in the other Nordic Countries already in the 1960s, so it was about time Finland to notice the flaws in the legislation concerning children.

was that the parity of all children, regardless of their parentage, was highlighted.<sup>35</sup> A child's right to a childhood was mentioned and the child was recognized as an independent person. As a result, a new Paternity Act came into force in 1975. In the Paternity Act, child's right to a father and the importance of the father to child's mental development was recognized. In the same year also a new law on the Financial Support of the Child came into force.

Child Custody and Right to Access Act (361/1983) came into force on 1 January 1984. The law highlights the child's right to proper care and the child's best interest. The main objective of the act was to improve the legal protection of children and give the child a better opportunity to influence their own status.<sup>36</sup> The old Holhouslaki, *Act on Guardianship of Children and Incompetent Persons* (34/1898) regulated mostly financial relations between guardians and their ward.<sup>37</sup> The purpose of the new law was to start regulating the personal relations between the child and his or her custodian.<sup>38</sup> For example in Child Custody and Right to Access Act (361/1983) s 1(3) physical discipline was finally prohibited.

The Constitution (731/1999) recognizes the child as an independent person (s 6(3)) and acknowledges the child's vulnerable status and his or her right to wellbeing and personal development (s 19(3)).<sup>39</sup> The general approach to child-related issues is the child's best interest, which is highlighted in laws concerning children.<sup>40</sup>

There has been a general concern regarding disputes concerning the custody of a child, although most of the disputes end in agreement between the parents. According to the temporary report 2/2012 of the Ministry of Justice, about 90 % of the cases concerning the custody of children and the right to visit are settled in the social services department.<sup>41</sup> In

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<sup>35</sup> Because of this development towards the parity of all children also adulterine children also got the right to inherit; Perintökaari, *Inheritance act* (710/1975) c 2 s 4 was removed and c 8 s 8 was changed.

<sup>36</sup> HE 224/1982, p. 4-5.

<sup>37</sup> HE 224/1982, p.3.

<sup>38</sup> HE 224/1982, p.4-5 and Child Custody and Right to Access Act (361/1983) s 1. The old Act on Guardianship of Children and Incompetent Person was not revoked. It continued to regulate the financial side, look HE 224/1982 p. 4. The law was reformed in 1999, when Holhoustoimilaki, *the Guardianship Services Act* (442/1999) came into force.

<sup>39</sup> See more Chapter II 1(i) of this report.

<sup>40</sup> For example Lastensuojelulaki, *the Child Welfare Act* (417/2007) s 4. Though there has been conversation about, how do Finnish procedural laws take the child's best interest into notice. See Chapter II 3(i) of this report.

<sup>41</sup> OM 2/2012, p.14.

2011 social services department confirmed 44 933 agreements on the custody of the child and right to visit.<sup>42</sup>

District courts handle on average 3600 cases concerning the custody of the child and the right to visit. In about 44 % of the cases child's custody and right to visit is discussed the first time.<sup>43</sup> According to the Act on the Custody of the Child and Right to Access (361/1983) it is also possible to change the verdict if the circumstances are changed.<sup>44</sup> About 44 % of the cases in district courts concern changing the given verdict based on a change of the circumstances. About 12 % of the cases concern changing the agreement on child's custody and right to visit.<sup>45</sup> Some of the conflicts become so called "custody dispute circles" in which the parents try to drag the case to court several times, in the worst case scenario till the child is 18-years old. According to a research made by Oikeuspoliittinen tutkimuslaitos, *National Research Institute of Legal Policy*, in 2006, about 25 % of the child custody cases handled in district courts are these kinds of "custody dispute circles".<sup>46</sup> The amount of these kinds of cases in *Hovioikeudet, Courts of Appeal* is about 34 % of all the child custody cases.<sup>47</sup>

The duration of a child custody hearing in district courts is on average 8 months, but almost half of the cases take over 9 months. Hearing times are longest in the biggest district courts such as Helsinki, Espoo and Oulu.<sup>48</sup>

Finnish government has noticed the issues concerning the disputes of child's custody and recognizes that a prolonged custody hearing can have a negative effect on a child's mental condition.<sup>49</sup> As a result, Finland has started testing the so called Follo –model. The aim was to test the model without any legislative changes, so the committee considering the testing

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<sup>42</sup> A.Forss & S. Säkkinen, '*Lapsen elatus ja huolto 2011*', Terveiden ja hyvinvoinninlaitos 12/2012, Suomen virallinen tilasto, 2012, p. 1.

<sup>43</sup> OM 2/2012, p. 16.

<sup>44</sup> Child Custody and Right to Access Act, (361/1983) s 12.

<sup>45</sup> OM 2/2012, p. 16.

<sup>46</sup> E. Valkama & A. Litmala, '*Lasten huoltoriidat käräjäoikeuksissa*', Oikeuspoliittisentutkimuslaitoksen julkaisuja 224, (publication by the National Research Institute of Legal Policy), Porvoo, 2006, p.82.

<sup>47</sup> E. Valkama & A.Lasola, '*Lasten huoltoriidat hovioikeuksissa*', Oikeuspoliittisentutkimuslaitoksen julkaisuja 234, (publication by National Research Institute of Legal Policy), Helsinki, 2008, p. 55.

<sup>48</sup> Valkama & Litmala, 2006, p. 53.

<sup>49</sup> OM 2/2012, p. 11.

of the Follo –model decided that the best way to organize the testing, was to apply only parts of the original model.<sup>50</sup>

In the Finnish Follo-model the main idea was to use professional assistants in the mediation process concerning the custody of the child in courts.<sup>51</sup> Professionals were decided to be hired for example from the social services and they were demanded to have special experience in the field of family couple and development psychology and especially working with families that have divorced.<sup>52</sup> The two year testing period started on the 1<sup>st</sup> of January 2011 in the district courts of Helsinki, Espoo, Oulu and Pohjois-Karjala.<sup>53</sup> The aim of the project was to shorten the time of the custody dispute process, achieve a sustainable agreement on child's custody, deal with the disagreements of the parents effectively and decrease the work load of courts and social services.<sup>54</sup> The testing was executed within the limits of the existing law called *Laki riita-asioiden sovittelusta ja sovinnon vahvistamisesta yleisissä tuomioistuimissa*, *Act on mediation in civil matters and confirmation of settlement in general courts* (394/2011).

Positive results have been achieved with the Follo –model. Till November 2011 district courts had had under way 234 issues of which 109 had ended in the mediation. Of those 109, 63 % had ended in agreement and 12 % in part-agreement. The average duration of the mediation was 1.5 months. This is much less than the average duration of a trial. Mediations have also decreased the number of reports asked from social services during a child custody trial. Because of the decrease, the waiting period for the report has shortened essentially.<sup>55</sup> The feedback given by the professionals and judges has mainly been positive. There has yet been no chance to collect and analyze the feedback given by the parties.<sup>56</sup> Because of the positive results the Ministry of Justice has decided to prolong the testing till the end of the year 2013 and widen the project to seven new district courts.<sup>57</sup> The Ministry of Justice has appointed a committee to research the possibility to make the use of professional assistant mandatory in child custody cases. The committee has proposed that the use of the

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<sup>50</sup> OM 61/2010, description page.

<sup>51</sup> OM 61/2010, description page.

<sup>52</sup> OM 61/2010, p. 18.

<sup>53</sup> OM 1/31/2010, on 18 November 2010.

<sup>54</sup> OM 2/2012, p. 11.

<sup>55</sup> OM 2/2012, p.53-54.

<sup>56</sup> OM 2/2012, p. 47-49, p. 55.

<sup>57</sup> OM 1/31/2010, 1st March 2012.

professional assistants in child custody cases becomes one of municipality's statutory obligations.<sup>58</sup>

### *Media*

There have been cases that have caught the eye of media in the past few years. Korkeimman oikeuden, *The Supreme Court's*, case 2005:93 aroused big media hype and affected the renewal of the definition of a sexual act in the Criminal Code. In the case, the father had repeatedly caressed and given long kisses during the years 1996-2001 to his underage children who were born in 1993 and 1995. The Supreme Court stated that the father had not committed a sexual act, because he did not try to achieve sexual satisfaction with the acts that was, at the time, an essential part of the definition of sexual act given in the Criminal Code (563/1998) c 20 s 10(2). The case got a lot of publicity and the public thought that the court had given a wrong verdict. The definition of the sexual act was finally changed in connection with the implementation of the Lanzarote convention.<sup>59</sup>

The Government Bill 282/2010 mentions also a case of the Court of Appeal. In the case a man, who pushed his finger several times to the anus of an 8-year-old boy in a swimming center was not convicted of a sexual abuse. According to the court the act was not considered sexual abuse, because the man did not try to achieve sexual satisfaction.<sup>60</sup> According to the present legislation penetration to one's anus is interpreted to be a sexual act but not sexual intercourse. There has been discussion of changing the definition of sexual intercourse so that it would cover penetration with finger. In the report 25/2012 of the Ministry of Justice, it is suggested that penetration to one's anus with an object or a finger would be interpreted as a sexual intercourse, which is at the moment defined in Criminal Code C 20 S 10(1).<sup>61</sup>

Family violence and family killings have been wildly presented in the media. One particular case which has been a topic of public discussion happened on the 13<sup>th</sup> of May 2012. The case has spread several investigations and heated a wider conversation on the state of the

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<sup>58</sup> OM 36/2012, description page.

<sup>59</sup> In the Government bill 282/2010 the definition of the sexual act is discussed (p. 7-9). The new definition does not include the demand for sexual satisfaction, Criminal Code C 20 S 10(2).

<sup>60</sup> HE 282/2010, p. 8.

<sup>61</sup> OM 25/2012, description page.

child welfare. In the case, the father's and his girlfriend's abuse of an 8-year-old child led to the death of the child.<sup>62</sup> During the investigation older assaults and several child welfare declarations were also revealed from the background.<sup>63</sup> The child had already once been taken into custody, but had been returned back to her father.<sup>64</sup> Because of this the Police has started to investigate whether an offence has been committed in the office of the Helsinki Child Welfare Authority.<sup>65</sup> The child's father and his girlfriend are prosecuted for murder. Trial started in the district court of Helsinki on the 30<sup>th</sup> of August 2012.<sup>66</sup> The Government has decided that this case should be investigated thoroughly and thus has established an independent investigation group to do so. The investigation group is led by the Finnish Red Cross Secretary General. Also the Ministry of Social Affairs and Health has established a research group to clarify, how the Child Welfare Act (417/2007) and the child welfare practice work, and how the legislation should be changed.<sup>67</sup>

Child welfare's biggest problems are a great amount of clients and the incompetence of the staff. According to the report of Etelä-Suomen aluehallintovirasto, *the Regional State Administrative agency of Southern Finland*, published on the 28<sup>th</sup> of November 2011, there are on average 38.5 client families per social worker in the Social Services Open Welfare Department, when the recommendation of the Ministry of Social Affairs and Health would be average 25-30 client families per social worker.<sup>68</sup> The number of client families was over

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<sup>62</sup> N. Ranta, 'Viihdetaiteilijaa ja naisystävää epäillään 8-vuotiaan tytön murhasta', in MTV3 28 August 2012, viewed on 19 September 2012, <<http://www.mtv3.fi/uutiset/rikos.shtml/viihdetaiteilijaa-ja-naisystavaa-epaillaan-8-vuotiaan-tyton-murhasta/2012/08/1605556>>.

<sup>63</sup> 'Surmatun tytön naapurit: kantelimme monta kertaa viranomaisille' in Helsingin Sanomat on 3 September 2012, viewed on 19 September 2012, <<http://www.hs.fi/kotimaa/Surmatun+tyt%C3%B6n+naapurit+Kantelimme+monta+kertaa+viranomaisille/a1305596933091>>.

<sup>64</sup> 'Kahdeksan vuotiaan tytön kuolema käynnisti selvitysten sarjan' in Helsingin Sanomat on 3 September 2012, viewed on 28 October 2012 <<http://www.hs.fi/kotimaa/Kahdeksanvuotiaan+kuolema+k%C3%A4ynnisti+selvitysten+sarjan++/a1305596926811>>.

<sup>65</sup> A. Blencowe, 'Lastensuojelun toimista tutkinta 8-vuotiaan tytön tapauksessa', in YLE on 3 September, viewed on 19 September, 2012, <[http://yle.fi/uutiset/lastensuojelun\\_toimista\\_tutkinta\\_8-vuotiaan\\_tyton\\_tapauksessa/6279539](http://yle.fi/uutiset/lastensuojelun_toimista_tutkinta_8-vuotiaan_tyton_tapauksessa/6279539)>.

<sup>66</sup> T. Hirsimäki, 'Syyttäjä vaatii elinkautista 8-vuotiaan tytön murhasta', in YLE on 30 August 2012, viewed on 18 September 2012, <[http://yle.fi/uutiset/syyttaja\\_vaatii\\_elinkautisia\\_8-vuotiaan\\_murhasta/6275288](http://yle.fi/uutiset/syyttaja_vaatii_elinkautisia_8-vuotiaan_murhasta/6275288)>.

<sup>67</sup> 'SPR:stä johtaja 8-vuotiaan tytön kuoleman tutkintaan', in Helsingin Sanomat on 24 October 2012, viewed on 28 October 2012 <<http://www.hs.fi/kotimaa/SPRst%C3%A4+johtaja+8-vuotiaan+tyt%C3%B6n+kuoleman+tutkintaan/a1305609764232>>.

<sup>68</sup> M. Miettinen & M.-L. Steenroos, 'Lupaako laki liikaa', Etelä-Suomen aluehallintoviraston julkaisuja 15/2011, Hämeenlinna, 2011, p.45.



50 in eight municipalities.<sup>69</sup> According to the same report only 58% of the staff of the social services open welfare is qualified for the job.<sup>70</sup> Qualification requirements are in Laissa sosiaalihuollon ammatillisen henkilöstön kelpoisuusvaatimuksista, *the Act on Qualification Requirements for Social Welfare Professionals*, (272/2005).

- iv. The relevant sections on the implementation of international treaties can be found in Chapter 8 of the Constitution, which regulates competence in the area of foreign policy issues (s 93), acceptance of international obligations and their denouncement (s 94) and bringing into force of international obligations (s 95).

According to the section 95 of the Constitution, the relationship between national law and international treaties is dualistic, that is, the entry into force of an international obligation in the national legal system requires a separate introductory act or decree.

The date of ratification of the Convention on the Rights of the Child is 20<sup>th</sup> June 1991. Finland has made no reservations to the Convention.<sup>71</sup> The Committee on the Rights of the Child published its concluding observations on Finland's report on the implementation of the Convention on the Rights of the Child on the 17<sup>th</sup> of June 2011. In its remarks, the Committee welcomes a number of measures undertaken by the Finnish government in relation to the Convention. These include the National Action Plan to reduce the use of corporal punishments, the Development Programme on Child and Youth Policy, the Child Welfare Act of 2007 and amendments to it and the Act on Measures for Preventing the Distribution of Child Pornography. However, the Committee also expresses concern at several issues, including the continuing discrimination against children from ethnic minorities, the lack of measures to guarantee the rights of children seeking asylum, the lack of a coordination system that would oversee the full implementation of the Convention on all levels (national, municipal, regional), the long duration of custodial disputes, the high number of children living in families with substance abuse problems and in institutions, the lack of adequate mental health services for children and young people, the prevalence of

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<sup>69</sup> Etelä-Suomen aluehallintovirasto, 15/2011, p. 45.

<sup>70</sup> Etelä-Suomen aluehallintovirasto, 15/2011, description page.

<sup>71</sup> Homepage of United Nations, Treaty Collection, viewed on 7 November, <<http://treaties.un.org/Home.aspx?lang=en>>.

bullying and of sexual and gender-based harassment of girls and the difficulties faced by certain groups of children in the education system.<sup>72</sup>

- v. According to the Ministry of Justice, it is currently being estimated whether the Directive will require any changes to the current legislation. After changes made with view to implementing the Lanzarote Convention, it seems that the Finnish legislation already quite extensively fulfils the requirements of the Directive. Any possible changes are likely to be of a minor character and related to extending the background checks for people working with children to volunteer workers.<sup>73</sup>

## 2 THE LANZAROTE CONVENTION

- i. Finland ratified the European Convention on Human Rights on 10 May 1990.<sup>74</sup>
- ii. Finland signed the Lanzarote Convention on the 25<sup>th</sup> of October 2007 and ratified it on the 9<sup>th</sup> of June 2011. Finland did not make such reservations to the Convention that would have required inclusion in the instrument of ratification.<sup>75</sup> However, Finland has made a reservation, which is allowed in subparagraph 2 of paragraph 3 of article 20 (pictures produced by children solely for their own private use).<sup>76</sup> Finland does not apply paragraph 2 of article 24, when it comes to the attempt of offences mentioned in articles 20(1)(e)(possessing child pornography), 20(1)(f)(knowingly obtaining access, through information and communication technologies, to child pornography), 23(solicitation of children for sexual purposes). Finland does not apply paragraph 2 of article 24, when it comes to 20(1)(d) procuring child pornography only for oneself.<sup>77</sup>
- v. The Convention as an entity has been implemented into the national legal order by the presidential decree 1037/2011. The legislative changes required have been made to the

<sup>72</sup> Committee on the Rights of the Child: Consideration of reports submitted by State parties under article 44 of the Convention. Concluding Observations: Finland, 2011.

<sup>73</sup> Phone conversation with *Counsellor of Legislation of the Ministry of Justice* Janne Kanerva on 24 August 2012.

<sup>74</sup> Homepage of Council of Europe, Treaty Office (Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse), viewed on 7 November 2012, <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=8&DF=22/08/2012&CL=ENG>>.

<sup>75</sup> Homepage of Council of Europe, Treaty Office (Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse), viewed on 7 November 2012, <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=8&DF=22/08/2012&CL=ENG>>.

<sup>76</sup> HE 282/2010, p. 56, see more about the reservation Chapter II 2(c)(xiii).

<sup>77</sup> HE 282/2010, p. 62-63.

relevant Acts, namely the Criminal Code (39/1889), *Laki liiketoimintakiellosta, the Business Prohibition Act* (1059/1985), the Child Welfare Act (417/2007) and *Rikosrekisterilaki, the Criminal Records Act* (770/1993).

- vi. There is no one piece of legislation which includes all the changes made with view to implementing the Convention; the necessary changes have been made to the relevant Acts (see above).

## II NATIONAL LEGISLATION

### 1 GENERAL PRINCIPLES OF THE JURISDICTION

- xxvii. The Republic of Finland became independent on the 6<sup>th</sup> of December 1917 after a period of almost 100 years under the Russian rule as an autonomous Grand Duchy in the Russian Empire (1809-1917). Before Russian rule, Finland belonged to the Swedish Empire from the 13<sup>th</sup> century to the beginning of the 19<sup>th</sup> century. After gaining independence, Finland became a member of the United Nations in 1956, of the Council of Europe in 1989, and of the European Union in 1995.<sup>78</sup>

Finland has a central government, and the form of government is parliamentary democracy. The unicameral Parliament is the highest state organ and consists of 200 members who are elected by a direct, proportional and secret vote by the citizens of Finland for a term of four years. The legislative powers vest in the Parliament. Before the enactment of the 1906 Parliament Act, the people of Finland were presented by the Diet and four Estates - the nobles, clergy, burghers and the peasant. Before independence, the highest state organ in Finland was the Grand Prince (the King of Sweden and later the Russian Tsar).<sup>79</sup>

The President is the head of state and he is elected by the citizens of Finland in a direct and secret vote. The term for president is six years and maximum two terms consecutively. Originally, Finland was going to become a monarchy after gaining independence and a German prince was selected to become the King of Finland. However, after the First World War, the monarchy decision was discarded and Finland became a republic. The powers of the President have been diminished over time. Nowadays, one of the President's most

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<sup>78</sup> Decree 1/1956, Decree 21/1989 and Decree 103/1994.

<sup>79</sup> A. Jyränki & J. Husa, *Valtiösääntöoikeus*, Lakimiesliiton Kustannus, Hämeenlinna, 2012, p. 20-30.

important tasks is to lead foreign policy together with the Government.<sup>80</sup> Finland has had twelve different presidents since its independence.

The Government is comprised of the Prime Minister and Ministers. The Government has to enjoy the confidence of the Parliament. The President appoints the prime minister, whom the Parliament has elected, and the ministers, which the Prime Minister has proposed. Governmental powers belong to the Government and the President. Finland has had 72 Governments since its independence. The Governments have changed from being mostly minority and non-partisan caretaker governments to majority governments.<sup>81</sup> Before independence, when Finland was under Russian rule, the Senate of Finland exercised governmental powers together with the Tsar who was represented by the Governor-General of Finland.<sup>82</sup>

In addition to the Parliament, President and the Government, the current Finnish administrative structure consists of independent courts of justice that exercise judicial power, and of central administration and other public administration. The central administration consists of central, regional and local state administration. The central state administration consists of twelve ministries and their executive agencies and institutes. They have undergone many changes since 1980. Regional state administration consists of authorities through which the ministries carry out their responsibilities at regional and local level. A reform concerning regional state administration was done in 2010 and there are currently two important bodies: Aluehallintovirasto, *the Regional State Administrative Agencies*, and Elinkeino-, liikenne- ja ympäristökeskus, *Centres for Economic Development, Transport and the Environment*. Finally, local state administration is divided into state local districts.<sup>83</sup> The other public administration consists of a) local authorities i.e. the municipalities, and b) central government agencies such as the Bank of Finland, the Social Insurance Institution of Finland, and the Population Register Centre. According to the section 121 of the Constitution, the municipalities (in total 336) have self-government. This means that they are

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<sup>80</sup> Jyränki & Husa, p. 39-41, 50, 58, 60, 170-171.

<sup>81</sup> Homepage of the Government of Finland, viewed on 4 September, 2012. <[www.government.fi](http://www.government.fi)>, viewed on 25 August 2012, <<http://valtioneuvosto.fi/tietoa-valtioneuvostosta/hallitukset/en.jsp>>.

<sup>82</sup> Jyränki & Husa, p. 26-27, 30-31.

<sup>83</sup> The respective agencies that operate at state local district level are the local police, prosecutor, enforcement office, register offices, employment offices, tax offices, customs, and legal aid offices. For information about the central administration, see the Finnish public sector online services portal, viewed on 25 August 2012, <[http://www.suomi.fi/suomifi/english/state\\_and\\_municipalities/index.html](http://www.suomi.fi/suomifi/english/state_and_municipalities/index.html)>.

entitled to take care and decide on their own local matters, but in addition, they are also obligated to provide certain statutory state administration services such as education, health care, and social welfare services including child welfare services.<sup>84</sup> The duties of the municipalities are mainly administrative; they do not have legislative or executive powers.<sup>85</sup> The Åland Islands province has provincial autonomy under which the Åland parliament has also legislative powers in certain matters.<sup>86</sup>

- xxviii. According to the section 1(2) of the Constitution of Finland, the Constitution “guarantees the inviolability of human dignity and the freedom and rights of the individual and promotes justice in society.” The Finnish “Basic rights and liberties” are included under the chapter two of the Constitution. The current Constitution came into force in 2000, after a reform which gathered the previous four constitution level statutes into one.<sup>87</sup> Even though the current Constitution is new, basic rights and liberties were acknowledged already in the 1870’s Diet, and in 1906, freedom of expression, assembly and association were confirmed to have the status of constitutional law. During the 1995 fundamental rights reform, the basic rights and liberties went through a comprehensive reform, and for example, economical, social and cultural rights were added to the Constitution. The current Constitution depicts the basic rights and freedoms as they were after the 1995 reform.<sup>88</sup>

The spectrum of rights guaranteed in the Constitution is broad and includes equality; the right to life, personal liberty, integrity and security; the principle of legality in criminal cases; freedom of movement; right to privacy; freedom of religion and conscience; freedom of expression and right of access to information; freedom of assembly and freedom of association; electoral and participatory rights; protection of property; educational rights; right to one’s language and culture; the right to work and the freedom to engage in

<sup>84</sup> The municipalities have the right to collect tax for their own matters and statutory services. In addition, the state gives funding for the municipalities to provide the statutory services. Jyränki & Husa, p. 213-215. See also Kuntalaki, *the Local Government Act* (365/1995).

<sup>85</sup> Jyränki & Husa, p. 213.

<sup>86</sup> About Åland, see Ahvenanmaan itsehallintolaki, *the Act on the Autonomy of Åland* (1144/1991) and Jyränki & Husa, p. 107-110, 221.

<sup>87</sup> Suomen hallitusmuoto, *the Form of Government Act* (94/1919), Valtiopäiväjärjestys, *the Diet Act* (7/1928), Laki valtakunnanoikeudesta, *Act on the High Court of Impeachment* (273/1922), Laki eduskunnan oikeudesta tarkastaa valtioneuvosten jäsenten ja oikeuskanslerin virkatointen lainmukaisuutta, *Ministerial Responsibility Act* (274/1922).

<sup>88</sup> P. Hallberg, H. Karapuu, T. Ojanen, M. Scheinin, K. Tuori, V-P. Viljanen, *Perusoikeudet*, WSOYpro, Helsinki, 2011, p. 31-35, and Jyränki & Husa, p. 33.

commercial activity; the right to social security; responsibility for the environment; and protection under law. The Finnish constitutional rights system protects the basic rights and freedoms to a high level as they can only be limited or restricted with an Act passed by the Parliament, or with an Act that has been enacted using the same order that is used to enact the Constitution.<sup>89</sup>

The Finnish constitutional rights apply for everyone within the jurisdiction of Finland, also to children.<sup>90</sup> In addition, there are some references directly to children and some of the constitutional rights can be considered mostly of importance to children. According to the section 6(2) (“Equality”), no one shall be treated differently on the ground of age, and according to the section 6(3) children should be treated equally and as individuals and they should be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.<sup>91</sup> The section 12(1) (“Freedom of Expression and right of access to information”) protects children against harmful programs, and the section 16 (“Educational rights”) states that everyone has the right to free basic education. In addition, the section 19(3) (“Right to social security”) stipulates that the public authorities have to support families and others responsible for providing for children so that they can ensure the wellbeing and personal development of the children.

Children’s rights are also protected in lower level statutes such as the Child Custody and Right of Access Act (361/1983), Child Welfare Act (417/2007), Basic Education Act (628/1998), and the Paternity Act (700/1975). For example, according to the Basic Education Act, children have the right and the obligation to complete free basic compulsory schooling (usually for nine years). Children also have the right to sufficient maintenance, the right to meet the parent with whom he or she does not reside with, the right of action for the establishment of paternity, and the right to present his or her view on a child welfare case that affects him or her.

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<sup>89</sup> For more information about the other requirements on limitation and restriction of constitutional rights, see Hallberg et al., p. 139-170. See also section 80 of the Constitution.

<sup>90</sup> For an exception, see the section 14: “Electoral and participatory rights”.

<sup>91</sup> This implies that children might not be able to claim their rights independently but instead the child’s parent or custodian represents the rights of the child. As children grow, they are gradually given more power to influence matters pertaining to themselves.

The national constitutional rights framework is complemented by European Union law including the European Charter of Fundamental Rights<sup>92</sup>, as well as international human rights treaties and instruments.<sup>93</sup> The international human right treaties and instruments are binding on Finland under international law after Finland has ratified them. However, as Finland is a dualistic state, the international treaties and instruments need to be incorporated or transformed into domestic Finnish law with an Act or a Decree or both in order for them to become part of the domestic legal order.<sup>94</sup> The status of them in the Finnish domestic legal order depends on the nature of the statute that has been used to incorporate or transform them.<sup>95</sup> Some of the most important human rights instruments which Finland has ratified and which have been made part of the domestic Finnish law are the following (in brackets the year when the treaty came to force in Finland):

- The UN International Covenant on Civil and Political Rights (1976)<sup>96</sup>
- The UN International Covenant on Economical, Social, and Cultural Rights (1976)<sup>97</sup>
- The European Convention on Human Rights (1990)<sup>98</sup>
- The UN Convention on the Rights of the Child (1991)<sup>99</sup>.

xxix. Finland does not have a Constitutional Court. Instead, an essential part of monitoring constitutionality and hence the implementation and interpretation of constitutional rights in Finland, has been the prior control of statutes and other matters by the Finnish Parliament's Constitutional Law Committee. In brief, this means that the Committee drafts statements about the constitutionality and adherence to international human rights of statutes and other

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<sup>92</sup> Charter of Fundamental Rights of the European Union (2000/C 364/01).

<sup>93</sup> Hallberg et al., p. 171.

<sup>94</sup> Jyräki & Husa, p. 293-294. See also section 94 ad 95 of the Constitution.

<sup>95</sup> Hallberg et al., p. 182, 815.

<sup>96</sup> Laki kansalaisoikeuksia ja poliittisia oikeuksia koskevan kansainvälisen yleissopimuksen eräiden määräysten hyväksymisestä, *Act on some provisions of the International Covenant on Civil and Political Rights* (107/1976) and Decree 108/1976.

<sup>97</sup> Decree 6/1976.

<sup>98</sup> Laki ihmisoikeuksien ja perusvapauksien suojaamiseksi tehdyn yleissopimuksen ja siihen liittyvien lisäpöytäkirjojen eräiden määräysten hyväksymisestä, *Act on the European Convention on Human Rights* (438/1990) and Decree 439/1990.

<sup>99</sup> Laki lapsen oikeuksia koskevan yleissopimuksen eräiden määräysten hyväksymisestä, *Act on the Convention on the Rights of the Child* (1129/1991) and Decree 60/1991.

matters before they are passed. The prior control has been exercised in Finland since the 1860's.<sup>100</sup>

Even though there is no Constitutional Court, individuals can rely on the other existing courts to claim their constitutional rights. The Finnish general judicial court system in civil and criminal matters consists of three instances: *Käräjäoikeudet*, *District Courts* (in total 27), *Hovioikeudet*, *Courts of Appeal* (in total 6) and *Korkein oikeus*, *the Supreme Court*. Administrative law matters (decisions made by authorities) are reviewed by *Hallinto-oikeudet*, *the general Administrative Courts* and *Korkein hallinto-oikeus*, *the Supreme Administrative Court*. In addition, there are special courts: *Markkinaoikeus*, *the Market Court*, *Työtuomioistuin*, *the Labour Court*, *Vakuutusoikey*, *the Insurance Court* and *Valtakunnanoikeus*, *the High Court of Impeachment*.<sup>101</sup>

Of the three criminal and civil law instances the two lower instances are in principle unrestricted. However, a leave for continued consideration is required for certain minor civil disputes and criminal offences for the Courts of Appeal.<sup>102</sup> The leave should nevertheless always be granted when there is a cause to doubt the correctness of the conclusion of the District Court or if there are some other important reasons.<sup>103</sup> A leave to appeal is always required for the Supreme Court, unless a Court of Appeal has been the first instance to examine a case.<sup>104</sup> The grounds on which the Supreme Court can grant a leave to appeal and how the request for appeal should be done are stated in the chapter 30 of *Oikeudenkäymiskaari*, *the Code of Judicial Procedure* (4/1734).<sup>105</sup> According to the chapter, a request for leave of appeal should be delivered to the Court of Appeal, addressed to the Supreme Court, within 60 days from the day the decision of the Court of Appeal was made

<sup>100</sup> Jyränki & Husa, p. 28-29, 83, 349-358. See also the Constitution of Finland, section 74.

<sup>101</sup> See The Constitution of Finland, chapter 9 - Administration of Justice, for powers granted to courts.

Provisions on special courts are given by separate acts: *Markkinaoikeuslaki*, *the Market Court Act* (1527/2001), *Vakuutusoikeyslaki*, *the Insurance Court Act* (132/2003), *Laki työtuomioistuimesta*, *Act on the Labour Court* (646/1974), as well as section 101 of the Constitution of Finland.

<sup>102</sup> The Code of Judicial Procedure, c 25a.

<sup>103</sup> The Code of Judicial Procedure, c 25a, s 11.

<sup>104</sup> The Code of Judicial Procedure, c 30, s 2.

<sup>105</sup> According to c 30, s 3: "Leave to appeal may be granted only if it is important to bring the case before the Supreme Court for a decision with regard to the application of the law in other, similar cases or because of the uniformity of legal practice; if there is a special reason for this because of a procedural or other error that has been made in the case on the basis of which the judgment is to be reversed or annulled; or if there is another important reason for granting leave to appeal."



available for the parties.<sup>106</sup> According to the chapter 2 section 9 of the Code of Judicial Procedure, the decision on admissibility is decided by two or three members of the Supreme Court. It is also possible to request a leave for a precedent from the Supreme Court after obtaining a decision from a District Court.<sup>107</sup> Administrative decisions made by the authorities can in turn be appealed to an Administrative Court and thereafter normally to the Supreme Administrative Court.<sup>108</sup> After all domestic legal remedies have been exhausted, it is usually possible for individuals to apply to the European Court of Human Rights or use the remedies available at European Union level.<sup>109</sup>

International human rights (after they have been incorporated or transformed into domestic law) and constitutional rights have direct effect in Finland: individuals can individually base their claim on them and the courts can base their judgements on them.<sup>110</sup> The courts even have to take them into account *ex officio* if individuals have not based their claim on them.<sup>111</sup> For example, in its decision KKO 2012:81 concerning secrecy of correspondence, the Supreme Court referred directly to the right to privacy as guaranteed by the section 10(2) of the Constitution and the article 8 of the European Convention on Human Rights.<sup>112</sup> Secondly, in addition to their direct effect and applicability, the courts should interpret statutes so that the interpretation is in conformity with constitutional rights and human rights i.e. interpret the statutes in a constitutional rights and human rights friendly way.<sup>113</sup>

<sup>106</sup> The appeal instructions are annexed to the decision of the Court of Appeal, see Code of Judicial Procedure, c 30, s 4.

<sup>107</sup> Both parties have to consent to the procedure. See Laki oikeudenkäynnistä rikosasioissa, *the Criminal Procedure Act* (689/1997), c 30a.

<sup>108</sup> See Hallintolainkäyttölaki, *the Administrative Judicial Procedure Act* (586/1996), and Hallintolaki, *Administrative Procedure Act* (434/2003).

<sup>109</sup> J. Virolainen, P. Pölönen, *Rikosprosessioikeus. 1: Rikosprosessin perusteet*, WSOY Lakitieto, Helsinki, 2003, p. 59. See also e.g. the article 26 of the European Convention on Human Rights.

<sup>110</sup> D. Frände, E. Havansi, D. Helenius, R. Koulou, J. Lappalainen, H. Lindfors, J. Niemi, J. Rautio, J. Virolainen, *Prosessioikeus*, Sanoma Pro, Helsinki, 2012, p. 92, 233, and Hallberg et al., p. 181-182, 869-873, and Jyränki & Husa, p. 83, 381. The direct effect of constitutional rights was one of the aims of the 1995 fundamental rights reform. Hallberg et al., p. 869.

<sup>111</sup> Hallberg et al., p. 872.

<sup>112</sup> In the decision, the court stated that the section 10(2) of the Constitution and the article 8 of the European Convention on Human Rights was breached when a prison guard had accidentally opened a letter that was intended for a remand prisoner. The court referred to the case law of the European Court of Human Rights as well as its own case law and stated that the effective realization of fundamental and human rights requires that damages are sometimes paid to a person whose fundamental or human rights have been severely breached by a public official. In the particular case, the court considered that the prisoner was not entitled to damages as the breach was such a minor one.

<sup>113</sup> Jyränki & Husa, p. 83, 381. Hallberg et al., p. 816, 864. The section 22 of the Constitution is the legal basis for constitutional rights and human rights friendly interpretation of statutes. Hallberg et al., p. 189.

This includes taking into account relevant human rights case law in interpretation<sup>114</sup> and interpreting also the constitutional rights in a human rights friendly way.<sup>115</sup> Also individuals can refer to international human rights and constitutional rights as an interpretation tool in the interpretation of statutes. Thirdly, if a conflict between the Constitution and an Act cannot be solved in an individual case by interpreting the Act in a constitutional rights friendly way, the courts must in that case *ex officio* give primacy to the provisions of the Constitution according to the section 106 of the Constitution. In addition, according to the section 107 of the Constitution, if a decree or another statute lower level than an act is in conflict with the Constitution or an act, the courts must not apply the decree or a statute lower level than an act.<sup>116</sup> Fourthly, human rights and related case law can be used to fulfil existing caps in domestic law.<sup>117</sup>

In addition to the courts, there are also other institutions which review constitutionality and human rights issues in Finland, and in fact, according to the section 22 of the Constitution, all public authorities shall guarantee “the observance of basic rights and liberties and human rights”<sup>118</sup>. For example, both valtioneuvoston oikeuskansleri, *the Chancellor of Justice of the Government*, and eduskunnan oikeusasiamies, *the Parliamentary Ombudsman*, monitor the implementation of international and national human rights, and anyone who believes that a constitutional or human right has not been fulfilled can file a complaint to the Chancellor or to the Ombudsman.<sup>119</sup> In addition, Finland has Ihmisoikeuskeskus, *a Human Rights Centre*, that promotes fundamental and human rights. The centre was established by an act in 2012 and is administratively part of the Office of the Parliamentary Ombudsman. The centre does not, however, handle individual complaints or cases.<sup>120</sup> An important addition regarding the

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<sup>114</sup> Hallberg et al., p. 178. Jyränki & Husa, p. 380-382.

<sup>115</sup> Jyränki & Husa, p. 85, 87, 99, 380.

<sup>116</sup> Hallberg et al., p. 813. Jyränki & Husa, p. 358-360.

<sup>117</sup> Jyränki & Husa, p. 101, 381-382.

<sup>118</sup> See more about the duty of the public authorities to guarantee constitutional and human rights on Hallberg et al., p. 116-119. The section 22 of the Constitution is also the legal basis for constitutional rights and human rights friendly interpretation of statutes. Hallberg et al., p. 189.

<sup>119</sup> The Constitution of Finland, c 10, s 108 and 109. Laki valtioneuvoston oikeuskanslerista, *Act on the Chancellor of Justice of the Government* (193/2000). Laki eduskunnan oikeusasiamiehestä, *The Parliamentary Ombudsman Act*, c 3 (197/2002). See the homepage of the Office of the Chancellor of Justice on how to file a complaint, viewed on 19 August 2012, <<http://www.chancellorofjustice.fi/index.html>> and the homepage of the Parliamentary Ombudsman on how to file a complaint, viewed on 19 August 2012, <<http://www.oikeusasiamies.fi/Resource.php/ea/english/complaints/index.htm>>.

<sup>120</sup> The chapter 3 of the Parliamentary Ombudsman Act. See also the homepage of the Parliamentary Ombudsman about the Human Rights Centre, viewed on 19 August 2012,

implementation of children's rights is Lapsiasiainvaltuutettu, *the Ombudsman for Children*, who monitors the implementation of children's rights and gives annual reports concerning children and youth to the Finnish government. The Ombudsman for Children does not either handle individual complaints or cases.<sup>121</sup>

- xxx. There is no separate Criminal Supreme Court in Finland. Instead, according to the section 99 of the Constitution, the general Supreme Court has the power to examine both civil and criminal law cases. Also, the criminal procedure is in some parts similar to the civil procedure. For example, the due process and fair trial guarantees in the section 21 of the Constitution apply to all procedures.<sup>122</sup> In addition, the Code of Judicial Procedure contains provisions applicable both to civil and criminal law cases.<sup>123</sup> On the other hand, there are also laws that are intended specially for criminal procedure. These include, for example, *Laki oikeudenkäynnistä rikosasioissa, the Criminal Procedure Act* (689/1997), *Laki syyttäjälaitoksesta, the Act on Prosecution Service* (439/2011), *Pakkokeinolaki, the Coercive Means Act* (450/1987), *Esitutkintalaki, the Criminal Investigation Act* (449/1987), and *Poliisilaki, the Police Act* (493/1995).<sup>124</sup>

In addition to the due process requirements, there are several other principles that should be followed in criminal procedure and these include among other things those required by the European Convention on Human Rights and other international instruments.<sup>125</sup> The main procedural principles that are followed in the Finnish criminal procedure are the principle of immediacy, principle of orality, concentration of proceedings, publicity of the proceedings, and the contradictory principle.<sup>126</sup> Other important principles include, for example, that the suspect has the right not to contribute to the solving of the case or give any type of

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<<http://www.oikeusasiamies.fi/Resource.phx/ea/english/hrc/general.htm>>.

<sup>121</sup> *Laki lapsiasiainvaltuutetusta, Act on the Ombudsman for Children* (1221/2004). See also the homepage of the Ombudsman for Children, viewed on 20 August 2012, <<http://www.lapsiasia.fi/en/frontpage>>.

<sup>122</sup> "Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice. Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and good governance shall be laid down by an Act."

<sup>123</sup> See the c 12, s1 of the Criminal Procedure Act about the applicability of the Code of Judicial Procedure to criminal law cases.

<sup>124</sup> Note that the latter three acts have been annulled by new acts (806/2011, 805/2011, 872/2011,) which shall come into force on 1 January 2014.

<sup>125</sup> Frände et al., p. 92-99.

<sup>126</sup> For more information about the procedural principles see Frände et al, p. 119-234.

statements (the principle of self-incrimination)<sup>127</sup>, the presumption of innocence<sup>128</sup>, and the free evaluation of evidence.<sup>129</sup>

The Finnish criminal procedure can be divided into four main stages: 1) pre-trial investigation, 2) consideration of charges, 3) court trial, and 4) sentencing and enforcement. Normally, after an offence has been reported and there is a reason to suspect that a crime has been committed, the police starts a pre-trial investigation to find out whether a crime was committed.<sup>130</sup> In the investigation, information is collected about the circumstances of the crime and the identity of the parties concerned among other things.<sup>131</sup> The principle of impartiality has to be followed in the investigation which means that both pro and contra information about the suspect needs to be collected.<sup>132</sup> If there are no reasons to the contrary, the case is forwarded to prosecutor for consideration of charges.<sup>133</sup>

On the basis of the pre-trial investigation information, the public prosecutor determines whether to bring charges against the suspect or not. If the offence is subject to prosecution that rests with the injured party, the prosecutor is not entitled to bring charges unless it is the will of the injured party or unless there is a very important public interest to bring charges.<sup>134</sup> If the offence is subject to public prosecution and there is a prima facie case against the suspect, the prosecutor should bring charges unless there are reasons not to.<sup>135</sup> If the prosecutor does not bring charges, the injured party has a secondary right to bring charges against the suspect.<sup>136</sup> Charges are brought by making an application for a summons normally to a District Court.<sup>137</sup>

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<sup>127</sup> The Criminal Procedure Act, c 4, s 3.

<sup>128</sup> The Criminal Procedure Act, c 4, s 2.

<sup>129</sup> The Code of Judicial Procedure, c 17, s 2: "After having carefully evaluated all the facts that have been presented, the court shall decide what is to be regarded as the truth in the case."

<sup>130</sup> Also the customs or border guard authorities can carry out pre-investigation in certain cases. The Criminal Investigation Act, s 2.

<sup>131</sup> The Criminal Investigation Act, s 5.

<sup>132</sup> The Criminal Investigation Act, s 7.

<sup>133</sup> The Criminal Investigation Act, s 43.

<sup>134</sup> The offences which are subject to prosecution that rests with the injured party are specified in the Criminal Code (39/1889). M. Vuorenpää, *Prosessioikeuden perusteet: prosessioikeuden yleisiä lähtökohtia sekä menettely käyräjoikeuden tuomioon asti*, WSOYpro, Helsinki, 2009, p. 143-144. See also the Criminal Investigation Act, s 3.

<sup>135</sup> The Criminal Procedure Act, c 1, s 6.

<sup>136</sup> Frände et al., p. 427.

<sup>137</sup> The Criminal Procedure Act, c 5, s 1.

If there are no reasons to the contrary, the District Court shall issue a summons.<sup>138</sup> After preparation, the case is transferred to the main hearing or simple cases can also be decided in a written procedure (summary trial).<sup>139</sup> The court may only give a judgement on an act which charges have been brought or for which the court can give a judgement on its own initiative.<sup>140</sup> If the injured party has also made a claim for compensation with regards to the offence, the court may also decide on that in the same procedure.<sup>141</sup> In the District Courts, cases are normally heard by one judge together with three lay judges. Simple cases can be heard by one judge only. In complex and large cases, three judges hear the case.<sup>142</sup> The judgement must be either conviction or acquittal.<sup>143</sup> After all appeal instances have been used, the judgement becomes final and it is enforced. Sentences are enforced by Rikosseuraamuslaitos, *the Criminal Sanctions Agency*.<sup>144</sup>

### *Criminal procedure in the Supreme Court*

Regarding the application procedure to the Supreme Court, we refer to the question iii. of this report's section "General principles of the jurisdiction". If the Supreme Court has granted a leave for appeal, the court requests a response from the opposing party unless it has already been done in connection with the request for leave for appeal.<sup>145</sup> Cases are decided on the basis of written trial documents, unless it is necessary to hold an oral hearing of the case, and in which case also the documentation presented at the hearing is taken into account.<sup>146</sup> Normally a case is decided by five members of the Supreme Court. If the case is important in principle or if the court wants to change its previous precedent, a case is decided by eleven members of the court or all members of the court.<sup>147</sup> Precedents given by the Supreme Court are not considered directly binding under law but they guide the lower courts, and secure conformity and consistency of how laws are applied.<sup>148</sup>

<sup>138</sup> The Code of Judicial Procedure, c 5, s 8.

<sup>139</sup> The Criminal Procedure Act, c 5, s 12, and c 5a, s 1.

<sup>140</sup> The Criminal Procedure Act, c 11, s 3.

<sup>141</sup> Frände et al., p. 575.

<sup>142</sup> The Code of Judicial Procedure, c 2.

<sup>143</sup> The Criminal Procedure Act, c 11, s 4.

<sup>144</sup> Laki rikosseuraamuslaitoksesta, *Act on the Criminal Sanctions Agency* (953/2009), s 1.

<sup>145</sup> The Criminal Procedure Act, c 30, s 10.

<sup>146</sup> The Criminal Procedure Act, c 30, s 20 and 21a.

<sup>147</sup> Laki korkeimmasta oikeudesta, *Act on the Supreme Court* (665/2005), c 2, s 7.

<sup>148</sup> Jyränki & Husa, p. 327.

xxxi. According to the Criminal Code (39/1889), criminal liability starts after one has reached the age of fifteen. There are some special arrangements for persons below the age of 18 in the Criminal Code, and for those considered “young offenders” (15-20 years of age) in *Laissa nuoren rikoksesta epäillyn tilanteen selvittämisestä, Act on Examining the Situation of a Young Offender Suspected of a Crime* (633/2010). The section 6 of the Criminal Code states, for example, that if the offence was committed under the age of 18, a mitigated penal latitude is to be used, juvenile penalty can be used as a punishment, unconditional sentences (prison sentences) should not usually be imposed, and that in certain cases criminal punishments can also be waived completely. Therefore, the amount of child prisoners in Finland is already limited as unconditional sentences are not usually imposed on children in the first place, and if they are, the person might be over 18 years at the time of sentencing and hence not considered a child prisoner anymore.

Rikosseuraamuslaitos, *The Criminal Sanctions Agency* keeps a record and makes statistics of the child prisoner amounts. It announces the number of persons in prison twice every month (on the 1<sup>st</sup> and 16<sup>th</sup> day of each month), and can make and provide statistics by request if possible. According to the prison announcement on the 1<sup>st</sup> of September 2012, there were four child remand prisoners and two child convict prisoners (of which none were female) on the 1<sup>st</sup> of September 2012.<sup>149</sup> According to a yearly statistic made by the Criminal Sanctions Agency, there were two child convict prisoners (equivalent of 0,1 per cent of the total amount of prisoners) of which none were females, and in total two child remand prisoners (equivalent of 0,3 per cent of the total amount of remand prisoners) on the 1<sup>st</sup> of May 2012.<sup>150</sup> In addition, another yearly statistics made by the Criminal Sanctions Agency’s specifies that there were on average ten child prisoners (including both remand and convict child prisoners) every day in the year 2011, and that in total two child convict prisoners and 34 child remand prisoners entered a prison in 2011.<sup>151</sup>

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<sup>149</sup> Phone interview with researcher Peter Blomster from the Criminal Sanctions Agency, 7 September 2012.

<sup>150</sup> Rikosseuraamuslaitos, Rikosseuraamuslaitoksen monisteita 4/2012: Rikosseuraamusasiakkaat 1.5.2012, viewed on 9 August 2012, <<http://www.rikosseuraamus.fi/uploads/17k65c6j.pdf>>. For similar statistics in 2011 see Rikosseuraamuslaitoksen monisteita 3/2011: Rikosseuraamusasiakkaat 1.5.2011, viewed on 9 August 2012, <<http://www.rikosseuraamus.fi/uploads/sc1y3cj.pdf>>.

<sup>151</sup> Rikosseuraamuslaitos: Rikosseuraamuslaitoksen tilastoja 2011, viewed on 9 August 2012, <<http://www.rikosseuraamus.fi/uploads/7b7wbut147l7k.pdf>>. See especially charts 3, 15, 24 and 25 for child prisoners and prisoners under 21-years-old.

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

- i. Sexual activities has a specific legal definition in the Criminal Code of Finland (39/1889, hereinafter the CC). Sexual activities has been defined with the terms *sexual intercourse* and *sexual act*. According to section 10(1) of chapter 20 of the Criminal Code sexual intercourse refers to the sexual penetration, by a sex organ or directed at a sex organ, of the body of another.<sup>152</sup> According to the CC, c 20, s 10(2) a sexual act refers to an act that, taking account to the offender and the victim as well as the circumstances, is sexually significant.<sup>153</sup>

It depends on the offence what kind of sexual activities are criminalized. As far as sexual abuse of a child is concerned, all sorts of sexual activities which are conducive to impairing a development of a child are criminalized. This means that the sexual act which is considered as forbidden can even be just sexually suggestive talk and does not need to include any touching of a child, for example.<sup>154</sup> Furthermore, sexual act can be photographing a child who is posing sexually, making a child to watch masturbation or sexual intercourse, touching a child on genital areas etc.<sup>155</sup> The definition of sexual act covers all sorts of conducts that can damage the health and the development of a child. The definition is applied broadly and the main concern is to examine whether an act is sexually significant in order to be conducive to impairing the development of a child.

Although it was nothing to do with the Lanzarote Convention, it is worth mentioning that the definitions of the sexual act were modified at the same time with the implementation of the Convention. It can be considered as a huge improvement for the protection of the victims of sex offences. Before the changes were made into the definition, the definition of sexual act was legislated as follows: when the offender committed a sexual act he or she needed to do it in purpose of getting sexual arousal or satisfaction – if there was not such purpose, the offender could not be held criminally liable. The Supreme Court stated in the case No. KKO 2005:93 that it could not be proved if a father of two children was seeking

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<sup>152</sup> Criminal Code (39/1889), c 20, s 10(1).

<sup>153</sup> Criminal Code (39/1889), c 20, s 10(2).

<sup>154</sup> HE 282/2010 vp, p. 7. See also KKO 2005:93.

<sup>155</sup> T. Ojala, *Lapsiin kohdistuvat seksuaalirikokset*, Edita, Porvoo, 2012, p. 81-82.

sexual satisfaction while giving long kisses with his tongue to his children. The prerequisites of the sexual act were not fulfilled and the father was not found guilty to sexual abuse of a child. The precedent led to some other ambiguous judgements. In one of the cases, for example, the offender had put his finger ten times into the anus of a young boy in a public swimming pool. However, the Court of Appeal did not consider that the accused was guilty of a sexual abuse of a child because it could not be proved that he had had a purpose of getting sexual satisfaction. Nowadays the definition does not require that the perpetrator has been seeking sexual arousal or satisfaction while conducting the sexual act, which is a major improvement.

- ii. In the Criminal Code of Finland intent is prerequisite for criminal liability.<sup>156</sup> The Criminal Code, c 3, s 6 does define only *seuraustahallisuus*<sup>157</sup>, *which means an intent to cause a certain consequence* (consequence-intention). But in case of sexual crimes it is rather a question of the intention concerning the other circumstances which are written in the statutory definition of an offence.<sup>158</sup> So called *olosuhdetahallisuus*, *circumstance-intention*, is not defined in the law but left to be defined in legal praxis.<sup>159</sup>

When the Lakivaliokunta, *Law Committee of the Finnish Parliament* pronounced about the circumstance-intention, it adverted to the legal definition of the CC, c 4, s 1 *Mistake as to the definitional elements of an offence*<sup>160</sup>, according to which the offender has to be aware of the existence of all the factors required for the completion of the statutory definition of the offence in order to have criminal liability.<sup>161</sup> When it comes to sexual abuse of a child (the CC, c 20, s 6), the offender needs to be aware of that the victim is under 16 years old, for example. However, in this case it needs to be highlighted that the offender can be aware of the age of the victim even if the victim has lied that he or she is 16 years old if the offender

<sup>156</sup> Criminal Code (39/1889), c 3, s 5.

<sup>157</sup> Criminal Code (39/1889), c 3, s 6. The consequence-intention: "A perpetrator has intentionally caused the consequence described in the statutory definition if the causing of the consequence was the perpetrator's purpose or he or she had considered the consequence as a certain or quite probable result of his or her actions. A consequence has also been intentionally caused if the perpetrator has considered it as certainly connected with the consequence that he or she has aimed for."

<sup>158</sup> P. Koskinen, 'Rikosoikeuden yleiset opit ja rikosvastuun perusteet' in *Rikosoikeus*, T. Lappi-Seppälä et al. Juridiikkaonline, WSOYpro, 1 November 2008, viewed on 14 August 2012, chapter I.7.

<sup>159</sup> P. Koskinen, 'Rikosoikeuden yleiset opit ja rikosvastuun perusteet' in *Rikosoikeus*, T. Lappi-Seppälä et al. Juridiikkaonline, WSOYpro, 1 November 2008, viewed on 14 August 2012, chapter I.7.

<sup>160</sup> Criminal Code (39/1889), c 4, s 1.

<sup>161</sup> Criminal Code (89/1889), c 4, s 1.



has kept it possible that the child still might be under the age of 16. Circumstances during the sexual act as well as the stage of development of the victim have influence in the assessment of the awareness of the offender.

The Supreme Court has kept the same alignment when pronouncing that circumstance-intention demands the offender to be aware of all the essential elements of the offence in question. For example, in the case No. KKO 2012:66 the accused person had bought sexual services from the victim of pandering. The offence which were examined in the case was the CC, c 20, s 8 *Abuse of a victim of prostitution*, in which provision it is required that the victim is a victim of pandering or a victim of trafficking in human beings. The Supreme Court stated that the offender needs to be aware of that the victim is indeed a victim of pandering. The accused person was not found guilty in the offence because it could not be proved that he had been aware of that the victim was a victim of pandering.

According to the CC, c 20, s 6(1) *Sexual abuse of a child*, the sentence for sexual abuse of a child is imprisonment at least four months and at most four years. Furthermore, the sentence is imprisonment at least one year and at most ten years, according to the CC, c 20, s 7 *Aggravated sexual abuse of a child*. The latter provision is applied if there has been sexual intercourse, the offence has been committed in an especially humiliating manner or other circumstances mentioned in the aggravated provision (see also paragraph 2(g) of chapter II of this report) occurs and in addition the offence is aggravated when assessed as a whole.

- iii. The legal age for engaging in sexual activities is 16 years of age.<sup>162</sup> According to the CC, c 20, s 7a, sexual activities between minors are regulated in a manner that it is not a question of sexual abuse of a child if the act does not violate the sexual autonomy of the victim and there is not great difference in either the ages or the mental and psychical maturity of the couple.<sup>163</sup> For example, in cases where two young people are in a relationship and other person is 14 years old and the other is 16 years old the conduct is not regarded as sexual abuse of a child, if the persons are acting unanimously together.<sup>164</sup>

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<sup>162</sup> Criminal Code (39/1889), c 20, s 6(1).

<sup>163</sup> Criminal Code (39/1889), c 20, s 7a.

<sup>164</sup>T. Ojala, p. 120.

In principle a minor can be sentenced for sexual abuse of a child.<sup>165</sup> This is possible for instance when the age of the victim is much under the age of 16. For example, if the victim is only 12 years old and the offender is 15 years old, the conduct might be regarded as sexual abuse of a child. It is considered that a 12-year-old or a younger child does not have competence to give his or her consent to engaging in sexual activities in any cases. The sexual act in these cases always automatically violates the sexual autonomy of a child.<sup>166</sup>

Furthermore, over five years difference between the ages of the couple is regarded as “great difference”, when it comes to provision of c 20, s 7a. For example if the victim is 15 years old and the offender is about 21 years old, sexual activities between the couple is more likely to be considered as forbidden.<sup>167</sup>

It is also good to highlight that the age difference alone does not make the conduct a crime. If the age difference is just about five years, other things as well have influence in the examination such as whether the couple is in a real relationship, what kind of activities they have done together and how often and so on.<sup>168</sup>

- iv. Firstly, using force, taking advantage of disability or threat and these kinds of circumstances can raise the level of seriousness in offences; for example in situations where there is a question of sexual abuse of a child.<sup>169</sup> If some of the aggravating factors of the offence mentioned in the CC, c 20, s 7 (the offence has been committed an especially humiliating manner, for example) have happened and the the offence is aggravated also when assessed as a whole, the offence is considered as aggravated sexual abuse of a child in place of sexual abuse of a child and the penal scale will be larger. See more about these aggravating factors in the paragraph 2(g) of chapter II of this report.

Secondly, those kind of circumstances can also have an effect upon the concurrence of offences; for example a person who is abusing a sleeping child can be sentenced for both sexual abuse of a child (c 20, s 6) and coercion into a sexual act (c 20, s 4) (or even rape if

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<sup>165</sup> HE 282/2010, p. 48.

<sup>166</sup> T. Ojala, p.120.

<sup>167</sup> T. Ojala, p.118.

<sup>168</sup> T. Ojala, p.118.

<sup>169</sup> Criminal Code (39/1889), c 20, s 7.

the offender has penetrated into the body of the victim).<sup>170</sup> Forcing by the use or threat of violence and coercion are particularly mentioned in the provisions of the *Rape* (c 20, s 1) and the *Coercion into sexual act* (c 20, s 4) for example.

- v. Sexual intercourse between immediate family members is criminalized in Finland and regarded not as a sex offence but as an offence against public order.<sup>171</sup> According to the CC, c 17, s 22 *Incest*, sexual intercourse is criminalized between a parent and a child; between a grandparent and a grandchild; between a great-grandparent and a great-grandchild; and between siblings. The family relationship needs to be genetic, which means that the provision is not to be applied between half-siblings or between a stepfather and a stepchild.

If the person is under the age of 18 he or she will not be punished if he or she has been in sexual intercourse with his or her parent or grandparent. This means that only the parent or the grandparent will be sentenced for incest.

The provision is sexually neutral so it does not matter if those persons are same gender.

- vi. The CC, c 20, s 5 *Sexual abuse* is a specific provision which criminalizes those conducts where the offender has abused his or her authority or position. There are four subsections of the section 5(1) that criminalizes different types of conducts. First two subsections (s 5(1)(1) and s 5(1)(2)) are concerning the situations where the victim is under 18 years old. The other two subsections (s 5(1)(3) and s 5(1)(4)) can be applied regardless of the age of the victim.

The CC, c 20, s 5(1)(1) criminalize conducts where the offender is a teacher or such person, for example a supervisor at a summer camp, and this person abuses his or her position and seduces a minor to sexual intercourse or another sexual act.<sup>172</sup> C 20, s 5(1)(2) criminalize activities where the dependence is a result from a great difference of the ages between an offender and a minor and the offender takes advantage of immaturity of the victim.

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<sup>170</sup> KKO 2010:52: in which case the offender had photographed genitals of a sleeping child. See also T. Ojala and HE 283/2010, p. 11.

<sup>171</sup> Criminal Code (39/1889), c 17, s 22.

<sup>172</sup> Criminal Code (89/1889) c 20, s 5. See also I. Rautio, 'RL 20: Seksuaalirikokset' in *Rikosoikeus*, T. Lappi-Seppälä et al. Juridikkonline, WSOYpro, 1 November 2008, viewed on 17 October 2012, chapter II.9.

The CC, c 20, s 5(1)(3) concerns the situations where the victim is a patient in a hospital or other institution and his or her capacity for defending himself or herself has been impaired. Those victims can be an old person who is living in a rest-home or a patient in a hospital, for example. The impaired capacity can be result from the medication or an illness or such.<sup>173</sup>

In the last subsection of the offence (s 5(1)(4)) it is criminalized situations where the victim is especially dependent on the offender and the offender takes advantage of this dependence. This dependence can be due to the membership of a religious community. Furthermore, the dependence can occur if the offender has an authority to make decisions concerning an accommodation, livelihood or medical treatment of the victim, for instance.<sup>174</sup> For example in the case No. KKO 2011:1 there was a situation where a doctor had abused his patient by groping and sucking the breasts of the patient. The doctor claimed that it was a regular treatment method which he was conducting. The victim gave her consent for the sucking and such because at first she thought that those measures were essential for medical examination. The Supreme Court stated that consent has no influence in these cases where a patient is significantly dependent on the treatment given by a doctor. The victim had gone to the doctor's practice because of the suspicion of a breast cancer. The offender was sentenced for a sexual abuse (c 20, s 5) and violation of official duty (c 40, s 9) to a fine (4800 euros). The offender was also liable for compensating the harm to the victim (1200 euros).

If a victim is under 16 years old the concurrence of offences has effect also in these situations. In these cases the conduct is considered as a sexual abuse (c 20, s 5) and additionally as a sexual abuse of a child (c 20, s 6) or aggravated sexual abuse of a child (c 20, s 7). It is good to notice that special dependence of the child on the offender is one of the aggravating elements mentioned in the c 20, s 7(1)(2)(c).

## 2.2 Child Prostitution

- vii. Finland is a party to the Council of Europe Convention on Action against Human Trafficking (CETS No. 197). Finland signed the Convention on 29<sup>th</sup> of August 2006 and it

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<sup>173</sup> Rautio, 'RL 20: Seksuaalirikokset' in *Rikosoikeus*, viewed on 17 October 2012, chapter II.9.

<sup>174</sup> Rautio, 'RL 20: Seksuaalirikokset' in *Rikosoikeus*, viewed on 17 October 2012, chapter II.9.

was ratified on 30<sup>th</sup> of May 2012. The Convention came into force on 1<sup>st</sup> of September 2012.<sup>175</sup>

- viii. In the CC there is not a specific definition of child prostitution. However, child prostitution can be defined using two provisions that criminalize purchase of sexual services from a young person and pandering. In these provisions child prostitution is defined in two different ways. First one can be found in the CC, c 20, s 8a *Purchase of sexual services from a young person*. In this norm the definition is “A person — by promising or giving remuneration, induces a person younger than 18 years of age to engage in sexual intercourse or to perform another sexual act.” The second definition is in the CC, c 20, s 9(1)(1) *Pandering*. In this section the child prostitution is defined as “sexual intercourse or a comparable sexual act or a manifestly sexually obscene act performed by a child younger than 18 years of age are offered for remuneration”<sup>176</sup> Despite of the different formulation, both have same meaning.

The Lanzarote Convention Article 19(2) defines child prostitution. In the Finnish legislation the definition of child prostitution includes also a given or a promised remuneration, as does the Article 19(2). In section 132 of the Explanatory Report of the Lanzarote Convention it is told that the remuneration does not have to be monetary payment.<sup>177</sup> Also according to the Government Bill (HE 34/2004) the remuneration can be other than a monetary payment. Actually the remuneration does not need to even be financial. This means for example that even approving an exam for a child can be regarded as remuneration. The Finnish definition is compatible with the definition in the Convention.<sup>178</sup>

The definition of sexual act (sexual activities) in the context of child prostitution means basically any type of sexual act performed by a child. Also making a child to participate in

<sup>175</sup> More about it in HE 122/2011 vp, the Government Bill (draft law). The Convention (CETS No.197) did not make it necessary to make any major changes to the Finnish national legislation and no changes were made in to the Criminal Code of Finland. Finland was already obligated by many international instruments. Some examples of these instruments are the *Palermo Convention* and especially *the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (A/RES/55/25), *the Council of the EU Framework Decision on combating trafficking in human beings* (2002/629/JHA ) and *the Council of the EU Framework Decision on combating the sexual exploitation of children and child pornography* (2004/68/JHA).

<sup>176</sup> Criminal Code (39/1889), c 20, s 9(1), HE 6/1997 vp, p.186 and HE 34/2004 vp, p.85. – This definition is used also in the criminalization of *Trafficking in human beings* (the CC, c 25, s 3 and c 25, s 3a.).

<sup>177</sup> Council of Europe, Explanatory Report of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 2007, last viewed on 28 October 2012.

<sup>178</sup> HE 34/2004 vp, p.85. See also Council Framework Decision 2004/68/JHA.

pornographic performances is regarded as prostitution. These performances can be e.g. striptease shows, making a child to pose in pornographic pictures or making a child to be an actor in pornographic videos etc.<sup>179</sup>

- ix. Finnish legislation criminalizes both the user and the recruiter of prostitution. Using sexual services of a child is criminalized in the CC, c 20, section 8a *Purchase of sexual services from a young person*. Recruiting for prostitution is criminalized as follows: the CC, c 20, section 9 criminalizes *Pandering*; c 20, section 9a *Aggravated pandering*; c 25, section 3 *Trafficking in human beings* and c 25, section 3a *Aggravated trafficking in human beings*.<sup>180</sup> Selection between pandering and trafficking in human beings depends on the level of control the offender has over the victim. The greater the control over a person is the greater the chance is that the crime is regarded as trafficking in human beings in place of pandering.<sup>181</sup>

What is more, it is good to mention that if the victim is under 16 years of age, the conduct is also considered (in addition to the offences mentioned above) as a child abuse crime (c 20, s 6 *Sexual abuse of a child* or c 20, s 7 *Aggravated sexual abuse of a child*). Furthermore, depending on the circumstances the conduct can be regarded also as a crime mentioned in the CC, c 20, s 1 *Rape*; s 2 *Aggravated rape*; s 3 *Coercion into sexual intercourse*; s 4 *Coercion into a sexual act*; s 5 *Sexual abuse*.<sup>182</sup>

### 2.3 Child Pornography

#### *Child Pornography in General:*

- x. The Finnish Government signed the Council of Europe Convention on Cybercrime (CETS No. 185) on 23<sup>rd</sup> of November 2001. The ratification process was done on 24<sup>th</sup> of May 2007 at the same time with the implementation of the Council of the European Union

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<sup>179</sup> HE 34/2004 vp, p85.

<sup>180</sup> Both of the crimes (pandering and trafficking in human beings) are supplemented by Chapter 20 Section 8b *Solicitation of a child for sexual purposes*. The subsection 2 of the norm criminalizes a solicitation for prostitution. This provision covers the cases which does not include coercion or the offender does not benefit from the conduct. Human trafficking crimes requires coercion of some kind and pandering crimes requires that the offender benefits from the conduct.

<sup>181</sup> HE 34/2004 vp, p.100.

<sup>182</sup> HE 282/2010 vp, p.50.

Framework Decision on attacks against information systems (2005/222/JHA). The Convention came into force on 1<sup>st</sup> of September 2007.<sup>183</sup>

- xi. Child pornography crimes are criminalized mainly<sup>184</sup> in chapter 17 of the Criminal Code. At first, the Finnish legislator has not used the word “child pornography” in the CC. The CC uses the concept of “*sexually obscene pictures or visual recordings depicting children*”.<sup>185</sup> Basically, what is considered as sexually obscene pictures (or visual recordings, here in after with a word picture is meant also any type of visual recordings unless otherwise mentioned) depicting children depends on the case. At least all the pictures which combine sexuality and a child are regarded as sexually obscene.<sup>186</sup> The last-mentioned means basically any type of pictures that represents a child in a sexual context. In this assessment (what is regarded as sexually obscene) the age of a child is relevant, how he or she is depicted, how the sexuality occurs and what is the overall impression of the image.<sup>187</sup> This definition covers at least all the acts mentioned in Explanatory Report, section 143<sup>188</sup>.

Child pornography is defined in Article 20(2) of the Convention. The definition includes “real” or “simulated” pictures. Also in the CC realistic (simulated) pictures are regarded as a forbidden material (as well as the real pictures of course). The criminalization is realised as follows:<sup>189</sup>

- i. If the picture was depicting a *real* situation, it does not matter either the picture has been taken by photographing or has been drawn or has been painted. So the material in this case is forbidden regardless of the technique how the picture is created.<sup>190</sup>
- ii. *Realistic* pictures are forbidden only if they confusingly remind photos, videos or such visual recordings. If the realistic pictures are drawn, painted or such, the pictures are not regarded

<sup>183</sup> See HE 153/2006 vp.

<sup>184</sup> Solicitation of a child for producing child pornography is criminalized in the CC, c 20, s 8b(1).

<sup>185</sup> Criminal Code, c 17, s 18, *Distribution of sexually obscene pictures*, c 17, s 18a *Aggravated distribution of sexually obscene pictures depicting children* and c 17, s 19 *Possession of sexually obscene pictures depicting children*.

<sup>186</sup> HE 6/1997, p.147-148.

<sup>187</sup> HE 6/1997, p.147-148.

<sup>188</sup> In section 143 of the Explanatory Report of the Lanzarote Convention: “a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between children, or between an adult and a child, of the same or opposite sex; b) bestiality; c) masturbation; d) sadistic or masochistic abuse in a sexual context; or e) lascivious exhibition of the genitals or the pubic area of a child”

<sup>189</sup> LaVM 43/2010 vp; see also T. Ojala, p.170–171.

<sup>190</sup> It's good to mention that it is not criminalized if the depiction is deemed justifiable because of the informative nature or manifest artistic value of the film or recording (Criminal Code, c 17, s 18(3)).

as forbidden material. (The realistic situation means cases where there has not been a real child in those pictures. Those pictures are only depicting an imagined sex scene.)

Government Bill states that a word “simulated” has not been defined in the Convention and that is why the word does leave room for national interpretation. Finnish legislator’s interpretation is that with a word “simulated” is meant *an imitation of reality*.<sup>191</sup> The latter means that simulated pictures have to confusingly remind photos, videos or such visual recordings depicting reality. Pictures which are drawn, painted or such, does not fit in this definition. The definition is compatible with the definition in Article 20(2).

Finally it must be mentioned that the definition of “sexually obscene pictures” is quite old fashioned and should probably be replaced with some other formulation. In fact, this definition is quite widely criticised in Finland and something should be done to it in near future. As far as sexual crimes against children are concerned, a better formulation could be *e.g.* “child pornography”. It would be more present-day and also more compatible with the international obligations. In addition, the term would highlight the blameworthiness of that type of crimes. Moreover, it could be better if these offences were placed in the chapter 20<sup>192</sup> of the Criminal Code instead of keeping them in the chapter 17. This would lead to better consistency inside the Criminal Code, because the main purpose of criminalizing the child pornography is to protect the health and development of children rather than to protect the public order which, in turn, is the main purpose of the chapter 17 of the Criminal Code.

- xii. The CC covers comprehensively all sorts of perpetrators.<sup>193</sup> In c 17, s 18 the criminal liability is attributed to producers<sup>194</sup>, exporters and importers and additionally to all sorts of distributors regardless of whether the distributing is commercial or non-commercial. The possession of child pornographic materials is criminalized in c 17, s 19. The latter provision includes a criminalization of a person who knowingly obtains an access through information and communication technology to child pornographic materials.<sup>195</sup>

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<sup>191</sup> HE 282/2010 vp, p.53.

<sup>192</sup> Main purpose of the chapter 20 is to protect the sexual autonomy of human beings.

<sup>193</sup> Criminal Code, c 17, s 18, s 18a and s 19; also see HE 282/2010 vp, p.51 – 56.

<sup>194</sup> If the child is under 16 years of age, the producer is perpetrated also either in c 20, s 6, *Sexual abuse of a child* or c 20, s 7, *Aggravated sexual abuse of a child* (T. Ojala, p.171).

<sup>195</sup> This is a new criminalization in Finland. The Finnish Government wanted to criminalize an act of obtaining an access to child pornographic materials despite of is it done through ICT or not. However, the Legal



The Finnish legislation is compatible with Article 20(1)(a) to (1)(f). All conducts mentioned in those paragraphs are criminalized either in c 17, s 18 *Distribution of sexually obscene pictures* (or in its aggravated version c 17, s 18a) or in c 17, s 19 *Possession of sexually obscene pictures depicting children*. When it comes to paragraph 1.d (procuring), the conduct is not particularly mentioned in the CC, but the Finnish legislator deems the word “possession” to cover procuring for oneself. Procuring for another is deemed to be distributing.<sup>196</sup>

- xiii. Pornographic materials in general are not forbidden in Finnish legislation. Only child pornography, bestiality and pornography depicting violence are criminalized. The latter two are criminalized only if they are produced, exported, imported or distributed in some manner. Possession of these kinds of pictures is not prohibited.<sup>197</sup>

It is also prohibited to deliver or market pornography (in purpose of gaining) by causing public offence. The latter means that it is prohibited to put pornography on public display, deliver pornography unsolicited to another and openly offer pornography for sale or advertise it.<sup>198</sup> It is relevant that the conduct is conducive to causing public offence.<sup>199</sup> In practice the marketing of pornographic materials has been done by placing magazines, videos etc. to some places in stores where they are not directly on sight, on top of the shelves for instance.

It is good to mention that according to Kuvaohjelmaki, *the Act on Audiovisual Programmes* (710/2011) section 6 it is prohibited to provide pornography to a person under 18 years of age due to the classification demands. Illegal exhibition or distribution of pornographic programmes to a person under 18 years of age is also criminalized in the CC, c 17, s 18b *Illegal exhibition or distribution of audiovisual programmes to a minor*. Mediakasvatus- ja kuvaohjelmakeskus, *the Finnish Centre for Media Education & Audiovisual Media*, which job is to supervise the compliance of the Act on Audiovisual Programmes has authority to make inspections to audiovisual programme providers' business premises. The Centre has also

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Affairs Committee (of the Finnish Parliament) considered that the provision would be too open to various interpretations if the criminalization was not limited to using ICT (LaVM 43/2010 vp; see also T. Ojala, p.27.).

<sup>196</sup> HE 282/2010 vp, p.52.

<sup>197</sup> Criminal Code (39/1889), c 17, s 18; see also HE 6/1997 vp.

<sup>198</sup> Criminal Code (39/1889), c 17, s 20 *Unlawful marketing of obscene material*.

<sup>199</sup> M. Majanen, 'RL 17: Rikokset yleistä järjestystä vastaan' in *Rikosoikeus*, T. Lappi-Seppälä et al. Juridiikkaonline, WSOYpro, 1 November 2008, viewed on 22 August 2012, chapter II.7.

authority to impose a penalty payment to enforce its advice.<sup>200</sup> The supervision made by the Centre is primarily ex post control by nature. The classification and labelling of audiovisual materials are nowadays done mainly by the program providers themselves. The classification is made by a person called “classifier”.<sup>201</sup> Basically any person who is at least 18 years of age and is deemed suitable for the job can be trained to be a classifier.<sup>202</sup> Furthermore the Act regulates for example on what time is it appropriate to broadcast pornography in a TV (according to section 6 of the Act, at a time of day when under 18 years old children do not normally watch TV). Further, the Act regulates primarily about the classification and labelling of audiovisual programmes.

Finland did make one reservation provided by the Lanzarote Convention Article 20(3). Because of the reservation right the Finnish legislation does not prohibit pictures representing children who have reached 16 years of age but are under 18 years of age, if the pictures are produced and possessed with the consent of those children and solely for their own private use. This is not mentioned in the CC but the legislator considered it acceptable and left it to be regulated by the general principles of criminal law.<sup>203</sup>

The general principles of criminal law mentioned above means basically three different options. Firstly it is possible that the conduct is not regarded as a child pornography crime, because of *the doctrine of consent* – for example, if a child between the age of 16 and 18 years have voluntarily created pictures with his or her partner, it can be considered that the “victim” has given a consent to an act and the act therefore is legitimate. Secondly, court has an option to waive punishment because of the CC, c 6, s 12(2) *Waiving of punishment* in which provision there is mentioned following: “A court may waive punishment if the perpetrator has committed the offence under the age of 18 years and the act is deemed to be the result of lack of understanding or of imprudence”. And thirdly, the prosecutor have an option to decide not to prosecute due to c 1, s 7(2) of the Criminal Procedure Act (689/1997), if the offender is

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<sup>200</sup> Act on Audiovisual Programmes (710/2011), section 19, section 24 and section 25.

<sup>201</sup> Section 13 of the Act.

<sup>202</sup> HE 190/2010 vp.

<sup>203</sup> HE 282/2010 vp, p.56; see also LaVM 4/2004 vp.

under 18 years of age and the act is deemed to be the result of the lack of understanding rather than heedlessness of the prohibitions of the law.<sup>204</sup>

Above there are only mentioned situations where the “victim” has reached the age of 16 and he or she has given consent to creating pictures from the common sexual act. However, it is also good to notice that in Finland the doctrine of consent can be used although the child is under 16 years old. In these cases the age of the “victim” cannot be much less than 16 years<sup>205</sup> and the picture need to be produced in circumstances which do not include any abuse of a child. Further, there must not be great difference in the ages of the couple. In order the consent to be valid, the consent must be given in advance, voluntarily and it has to be accurate enough.<sup>206</sup> In the case No. KKO 2001:7 it was pronounced that a 12 years old child cannot give a valid consent to the conducts which are damaging his or her health. Although the case was concerning the situation where the offender had provided strong alcohol to a child and the conduct were damaging the health of a child, it can be stated in general that if a child is young enough he or she is incompetent to give a valid consent to activities which are impairing his or her development. Sexual acts are these types of activities which are conducive to impairing the development of a child and therefore a young child is incompetent to give a valid consent to those kinds of acts.<sup>207</sup>

*Participation of a Child in Pornographic Performances:*

- xiv. At first, it is good to refer to the paragraph 2(b) of chapter II of this report (Child Prostitution), in which is mentioned provisions that criminalizes partly the conduct mentioned in Article 21(1)(a) to (1)(b). This is because making a child to participate in pornographic performances is regarded as prostitution.<sup>208</sup> That is why the recruiting and coercion is criminalized in c 20, s 9 *Pandering*, and s 9a *Aggravated Pandering* and in c 25, s 3 *Trafficking in human beings* and s 3a *Aggravated trafficking in human beings*. Above mentioned

<sup>204</sup> HE 282/2010 vp, p. 56.

<sup>205</sup> D.Frände, *Yleinen rikosoikeus*, translated into Finnish by M. Wahlberg, Edita Publishing Oy, Porvoo, 2012, p. 138. If the child is considered to be too young, he or she cannot give a valid consent regarding the doctrine of consent.

<sup>206</sup> See T. Ojala, p. 177.

<sup>207</sup> Frände, p.138; also see KKO 2001:7 which is concerning about the case where the perpetrator were held guilty of committing an assault (the CC, c 21, s 5(1)), because he or she had provided strong alcohol to the victim who was 12 years old. See also T. Ojala, p. 119-120, where is mentioned that the doctrine of consent cannot be used if the child is under 13 years of age.

<sup>208</sup> HE 34/2004 vp, p.85.

provisions do not, however, criminalize conduct which does not include coercion or from which the perpetrator does not benefit. These types of solicitation crimes are criminalized in c 20, s 8b(2) *Solicitation of a child for sexual purposes*. The Finnish legislation meets the requirements mentioned in Article 21(1)(a) to (1)(b) of the Lanzarote Convention.

As mentioned in paragraph 2(b) of chapter II of this report, the Finnish legislation does differentiate the recruitment and coercion. As mentioned earlier, the selection between these two offences (pandering and trafficking in human beings) depends on the level of control the offender has over the victim. The greater the control over a person is the greater the chance is that the crime is regarded as trafficking in human beings in place of pandering. Furthermore, the offence can also be regarded as Rape, Coercion into sexual intercourse or Sexual abuse, for example.<sup>209</sup>

A person attending pornographic performances that involve participation of children under 18 years of age is criminalized in the CC, c 20, s 8c. This is a new provision if compared to the time before the ratification of the Lanzarote Convention. Finland did not use the reservation right stated in Article 21(2) of the Lanzarote Convention.<sup>210</sup>

## 2.4 Corruption of Children

- xv. Intentional causing of a child to witness sexual abuse or sexual activities is criminalized as sexual abuse of a child (c 20, s 6 and s 7) (listed in the Government Bill as an example of other sort of sexual act on a child).<sup>211</sup> The section of the CC mentions some of the modus operandi and some more are listed in the Government Bill (e.g. inveiglement of a child to watch masturbation, sexual intercourse or pornographic movies).<sup>212</sup>

It is not specifically defined how the “causing” should happen. The definition of a sexual act<sup>213</sup> can be used as a starting point in this question; the main focus is laid on the question

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<sup>209</sup> HE 282/2010 vp, p57; also see p.50.

<sup>210</sup> HE 282/2010 vp, p. 57–58.

<sup>211</sup> Criminal Code (39/1889), c 20, s 6(1). See also HE 6/1997 vp. p. 181/II.

<sup>212</sup> HE 282/2010 vp, p. 10–11.

<sup>213</sup> Criminal Code (39/1889), c 20, s 10(2).

whether the act the child is to be witnessed is sexually significant in order to be conducive to impair the child's development.<sup>214</sup>

No forcing, inducement or promise is needed for the criminal liability to exist.<sup>215</sup> Those kinds of circumstances can of course have an effect on the aggravation level of the offence.

It is also good to notice that the legislation on pornography offences in general is as well meant to provide security to children against sexual acts and activities. For example, c 17, s 18b *Illegal exhibition or distribution of audiovisual programs to a minor* criminalize distribution of pornography to a minor.

## 2.5 Solicitation of Children for Sexual Purposes

- xvi. One of the biggest novelties the Lanzarote Convention brought on in the Criminal Code of Finland was the criminalization of the so called grooming.<sup>216</sup> The crime has its own section in the CC and the punishment of the offence is from a fine to at most one year imprisonment (14 days being the overall minimum of imprisonment time).<sup>217</sup>

The use of information and communication technologies is not mentioned in the section, so the section does not outline any *modus operandi*.<sup>218</sup> In the Government Bill it is pronounced that grooming is an offence that precede attempt of other offences.<sup>219</sup> The Criminal Code of Finland does not require that the offender proposes a meeting. Proposing other sort of an intercourse is enough to fulfil the essential elements of the offence. This is because child pornography can be made also without actually meeting the child (with using a web camera as an example).<sup>220</sup>

Moreover, it does not matter if the initiative to intercourse comes from the child because adults do carry the final responsibility in these matters.<sup>221</sup> It is also mentioned in the Government Bill that if the child and the perpetrator actually meet or some other kind of

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<sup>214</sup> HE 282/2010 vp, p. 104.

<sup>215</sup> KKO 2011:34.

<sup>216</sup> HE 282/2010 vp, p. 58.

<sup>217</sup> Criminal Code (39/1889), c 20, s 8b(1).

<sup>218</sup> Criminal Code (39/1889), c 20, s 8b.

<sup>219</sup> Attempt to distribute sexually obscene pictures or (more severely) sexually abuse a child (HE 282/2010 vp).

<sup>220</sup> Criminal Code (39/1889), c 20, s 8b(1). See also HE 282/2010 vp, p. 106.

<sup>221</sup> The adult can choose to not actively take the chance.

intercourse actually happen, the offence usually fulfils the essential elements of an attempted offence of a child pornography or sexual abuse of a child, which are both criminalized in their own sections.<sup>222</sup>

- xvii. In Finland abetting has a legal definition: “A person who, before or during the commission of an offence, intentionally furthers the commission by another of an intentional act or of its punishable attempt, through advice, action or otherwise, shall be sentenced for abetting on the basis of the same legal provision as the perpetrator. – “. <sup>223</sup> Abetting can be both physical and psychological. The borderline between abetting and being a perpetrator is not clear in Finland.<sup>224</sup>

Attempt is criminalized in Finland only if mentioned in the section at issue. Regarding sexual abuse of a child: yes<sup>225</sup>. Regarding child prostitution: yes, when it comes to trafficking in human beings<sup>226</sup>; yes, when it comes to pandering<sup>227</sup>; yes when it comes to purchase of sexual services from a young person<sup>228</sup>; and yes, when it comes to abuse of a victim of prostitution<sup>229</sup>. Regarding child pornography: yes, when it comes to distributing sexually obscene pictures and no, when it comes to possession of sexually obscene pictures.<sup>230</sup> Regarding corruption of children: yes, as an attempt to sexual abuse of a child.<sup>231</sup> When it comes to other sorts of corruptive offences: no, when it comes to illegal exhibition or distribution of audiovisual programmes to minor<sup>232</sup> and no, when it comes to unlawful marketing of obscene materials.<sup>233</sup> Regarding solicitation of children for sexual purposes: yes, but only when it comes to solicitation of a child for prostitution – an attempt regarding solicitation of a child for producing child pornography and solicitation of a child for committing sexual abuse crime against him or her are not criminalized.<sup>234</sup>

Finland used the reservation right provided by the Article 24(3) of the Lanzarote Convention in regard to Article 20(1)(e), 20(1)(f) and 23. The reservation right were also

<sup>222</sup> HE 282/2010 vp, p. 106.

<sup>223</sup> Criminal Code (39/1889), c 5, s 6.

<sup>224</sup> Koskinen, chapter I.7.

<sup>225</sup> Criminal Code (39/1889), c 20, s 6(3).

<sup>226</sup> Criminal Code (39/1889), c 25, s 3(3).

<sup>227</sup> Criminal Code (39/1889), c 20, s 9(2).

<sup>228</sup> Criminal Code (39/1889), c 20, s 8a(3).

<sup>229</sup> Criminal Code (39/1889), c 20, s 8(3).

<sup>230</sup> Criminal Code (39/1889), c 17, s 18(2), s18a(2) and s 19.

<sup>231</sup> Criminal Code (39/1889), c 20 s 6(3). See also HE 282/2010 vp, p. 64.

<sup>232</sup> Criminal Code (39/1889), c 17, s 18b.

<sup>233</sup> Criminal Code (39/1889), c 17, s 20. See also HE 282/2010 vp, p. 64.

<sup>234</sup> Criminal Code (39/1889), c 20, s 8b(3).

used partly in regard to Article 20(1)(d) and it was done as follows: an attempt concerning procuring child pornography to oneself is not criminalized. However, an attempt concerning procuring for another is criminalized due to the provisions of distributing sexually obscene pictures.

## 2.6 Corporate Liability

- xviii. Corporate criminal liability is regulated in Chapter 9 of the CC. Legal person is able to be held liable when an offence has been committed on the behalf or for the benefit of the corporation.<sup>235</sup> An instrument of punishment is Corporate fine which is at least 850 euros and at most 850,000 euros.<sup>236</sup> It is important to note that the Corporate fine has not been used very often in Finland and it has not been used in any cases regarding the sex offences.

There is a difference if the offence has been committed by a regular employee or by a person who is in a leading position of the company. If a leading person has committed or has been party in committing the crime, the prerequisites of the offence will be met more easily. Further, if a leading person has allowed the commission of the offence, the corporate can be held liable more easily. If an employee (or an agent) has committed the crime, it still requires some kind of negligence by the leading person.<sup>237</sup> It is also worth mentioning that the leadership does not need to be official. Also a person who exercises actual decision-making authority is regarded as a leading person, regardless of whether the person is part of the statutory organ of the corporation or not.

If an offence includes corporate liability, it needs to be regulated particularly and separately in the CC.<sup>238</sup> Below are listed the crimes that include Corporate fine as a sanction, when it comes to sexual crimes against children:

Child pornography<sup>239</sup>

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<sup>235</sup> Criminal Code (39/1889), c 9, s 3(1) and HE 95/1993.

<sup>236</sup> Criminal Code (39/1889), c 9, s 5.

<sup>237</sup> H. Jaatinen, *Oikeushenkilön rangaistusvastuu*. Lakimiesliiton Kustannus, Jyväskylä, 2000, p. 68. – He is speaking about the doctrine of *forbidden risk-taking*, which means in this case that a leading person has neglected his or her supervisory duty and that is why he or she has taken a forbidden risk and the corporate shall be held liable because of the lack of supervision.

<sup>238</sup> Criminal Code (39/1889), c 9, s 1.

<sup>239</sup> Criminal Code (39/1889), c 17, s 24 and c 20, s 13.

c 17, s 18 *Distribution of sexually obscene pictures*

c 17, s 18a *Aggravated distribution of sexually obscene pictures depicting children*

c 17, s 19 *Possession of sexually obscene pictures depicting children*

c 20, s 8b(1) which is concerning about solicitation of a child for producing child pornography.

Child prostitution<sup>240</sup>

c 20, s 9 *Pandering*

c 20, s 9a *Aggravated pandering*

c 25, s 3 *Trafficking in human beings*

c 25, s 3a *Aggravated trafficking in human beings*

- xix. As mentioned, the liability is criminal by nature. The type of punishment is corporate fine. Additionally the liability may be civil if in the operations of the corporation has been caused injury (or harm). The liability may lead to indemnity for the sufferings of the victim. The latter is regulated in Vahingonkorvauslaki, *Tort Liability Act* (412/1974).
- xx. Only human beings can commit a crime. In Finland the criminal liability is separated and the corporate liability is not parallel to the criminal liability of a natural person.<sup>241</sup> Legislation does not exclude individual liability when there is a corporate liability. However, it is good to notice that a corporate can be held liable for the crime even if the offender cannot be identified<sup>242</sup> or otherwise is not punished.<sup>243</sup> By saying “otherwise is not punished” is meant following: the offender either disappears (escapes), dies or the offender cannot be punished because of the limitation of the prosecution by lapse of time, for example.

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<sup>240</sup> Criminal Code (39/1889), c 20, s 13 and c 25, s 10(1).

<sup>241</sup> HE 282/2010 vp, p.67 in fine; also see Jaatinen, p.22. for example.

<sup>242</sup> This doctrine is so called *anonymous guilt* (the *collective knowledge* doctrine is equivalent to it in the USA). See Jaatinen, p.83. In this case the offender remains unknown, but the crime itself has been committed in operations of a corporation.

<sup>243</sup> Criminal Code (39/1889), c 9, s 2(2).



## 2.7 Aggravating Circumstances

xxi. In Finland there are at least three different situations where the level of a punishment can be raised, as far as the aggravated circumstances mentioned in Article 28 of the Lanzarote Convention are concerned.<sup>244</sup> First and the most common way is that there is a specific aggravated offence regulated in addition to the regular form of the offence<sup>245</sup>. Secondly, a person may be considered to be perpetrated several crimes at the same time and this may lead to a harder punishment. The latter is carried out by the chapter 7 – *Joint punishment*. Thirdly, the general provisions of determining the sentence may have an influence on the sentence in an aggravating manner; those rules are regulated in chapter 6 of the CC.

More about those three cases mentioned above:

### *a. Aggravated provisions*

Examples about these provisions are:

c 17, s 18a *Aggravated distribution of sexually obscene pictures depicting children*. (Distribution of child pornography)

c 20, s 7 *Aggravated sexual abuse of a child*

c 20, s 9a *Aggravated pandering*

c 25, s 3a *Aggravated trafficking in human beings*.

In c 17, s 18a there is mentioned four aggravating circumstances. The first is that the child is particularly young.<sup>246</sup> Second circumstance is that the picture is depicting severe violence or particularly humiliating<sup>247</sup> treatment of the child. Third circumstance is that the offence is committed in a particularly methodical manner. And fourthly, the offence was committed within the framework of a criminal organization.

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<sup>244</sup> HE 282/2010 vp, p.74.

<sup>245</sup> Rape (c 20, s 1) and Aggravated rape (c 20, s 2), for instance.

<sup>246</sup> The age is not defined specifically. However, at least under 10 years old child is considered as particularly young. (See T. Ojala, p.173.).

<sup>247</sup> This means for example that the offence was committed by several people abusing a child together or the picture is depicting a child and an animal. (See T. Ojala, p.174.).

In c 20, s 7 there is mentioned also four circumstances. To begin with, if the abuse includes sexual intercourse with a child, the sexual intercourse is considered as an aggravating element. The second circumstance is that the victim is particularly vulnerable because of his or her age or the stage of development of him or her. Thirdly, the crime maybe be regarded as aggravated if the offence is committed in an especially humiliating manner. Fourthly, if the offence is conducive to causing special injury to the child due to the special trust he or she has put in the offender or the special dependence of the child on the offender, the offence maybe aggravated.<sup>248</sup>

In c 20, s 9a there is also mentioned four circumstances. Firstly, the sought of considerable financial benefit. Secondly, committing the offence in a particularly methodical manner. Thirdly, there has been inflicted grievous bodily harm, a serious illness or a state of mortal danger to the victim. Fourthly, the object is a child younger than 18 years of age.

In c 25, s 3a there are mentioned four aggravating circumstances. Firstly, there has been used violence, threats or deceitfulness. The second one is equivalent to the third circumstance mentioned in c 20, s 9a. Thirdly, the offence has been committed against a child younger than 18 years of age or against a person whose capacity to defend himself or herself has been substantially diminished. Fourthly, the offence has been committed within the framework of a criminal organization.

It needs to be highlighted that the circumstances mentioned above does not automatically lead to a situation where the crime is considered aggravated. It is inevitable that the offence is aggravated also when assessed as a whole. For example in the case No. KKO 2011:102 a grandparent was kept as a near person comparable to a parent and it was seen to fulfil one of the aggravating elements of the offence c 20, s 7 Aggravated sexual abuse of a child. However, a grandparent was not convicted for aggravated sexual abuse of a child because of the overall assessment. This was because the conducts of the grandparent were occasional and the sexual act had included only touching and such.<sup>249</sup>

*b. The Concurrence of offences*

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<sup>248</sup> These offenders with a special trust element can be parents, grandparents or may be a coach of a child, for instance.

<sup>249</sup> KKO 2011:102.

As mentioned in paragraph 2(a) of chapter II of this report, the sentence can have an effect upon concurrence of the offences. For example, when a person produces child pornography and therefore commits a crime mentioned in c 17, s 18 *Distribution of sexually obscene pictures* (or aggravated section 18a), the person can commit another several crimes at the same time. This means for instance that if the victim of the crime is under 16 years of age, the crime of producing child pornography, can be considered also as an offence mentioned in c 20, s 6 *Sexual abuse of a child* (or c 20, s 7 *Aggravated sexual abuse of a child*). Furthermore, if a child has been coerced into a sexual intercourse at the same time when producing a picture, the offence could be considered additionally as Rape or Aggravated rape (or Coercion into sexual intercourse).

c. *The general provisions of determining the sentence*

According to the CC, c 6, s 4, the sentence shall be determined in a way that it is in just proportion to the harmfulness and dangerousness of the offence.<sup>250</sup> In the Government Bill<sup>251</sup>, it is said that all the conducts mentioned in paragraphs (a) to (e)<sup>252</sup> of the Article 28 of the Lanzarote Convention are considered as particularly harmful and dangerous in the meaning of c 6, s 4. This means that those methods of committing the crime mentioned in those paragraphs have an aggravating effect on the sanction at the stage when the judge is determining the length of the sentence.

When it comes to paragraphs (f) and (g)<sup>253</sup> of the Article 28, in the CC, c 6, s 5(2)<sup>254</sup> it is said that if the perpetrator is a member of a group which is organized for committing serious crimes, it may increase the punishment. Furthermore, chapter 17, section 1a, of the CC (*Participation in the activity of a criminal organisation*), criminalizes a participation in the activity of the criminal organization of which is planning to commit serious crimes.<sup>255</sup> Previous

<sup>250</sup> Criminal Code (39/1889), c 6, s 4.

<sup>251</sup> HE 282/2010 vp, p.74.

<sup>252</sup> Paragraphs of the article 28 of the Lanzarote Convention: “(a) the offence seriously damaged the physical or mental health of the victim; (b) the offence was preceded or accompanied by acts of torture or serious violence; (c) the offence was committed against a particularly vulnerable victim; (d) the offence was committed by a member of the family, a person cohabiting with the child or a person having abused his or her authority; (e) the offence was committed by several people acting together.”

<sup>253</sup>“(f) the offence was committed within the framework of a criminal organisation; (g) the perpetrator has previously been convicted of offences of the same nature.”

<sup>254</sup> *Grounds increasing the punishment.*

<sup>255</sup> What is meant by “serious crime” in a context of sexual crimes against children, the maximum statutory

offences of the perpetrator can be taken into consideration because of s 5(5), if the crime is similar to the earlier offences or the conduct otherwise indicates that the perpetrator is heedless of the prohibitions of the law. Also an earlier criminality which has been convicted abroad can have same kind of aggravating effect due to the last-mentioned subsection.<sup>256</sup>

## 2.8 Sanctions and Measures

### xxii. *Sexual abuse crimes:*

Rape: imprisonment (1 year to 6 years).<sup>257</sup> Aggravated Rape: imprisonment (2 years to 10 years).<sup>258</sup> Coercion into a sexual intercourse: imprisonment (14 days to 3 years).<sup>259</sup> Coercion into a sexual act: fine or imprisonment (14 days to 3 years).<sup>260</sup> Sexual abuse: fine or imprisonment (14 days to 4 years). Sexual abuse of a child: imprisonment (4 months to 4 years). Aggravated sexual abuse of a child: imprisonment (1 year to 10 years).

### *Prostitution:*

Purchase of sexual services from a young person: fine or imprisonment (14 days to 2 years). Trafficking in human beings: imprisonment (4 months to 6 years). Aggravated trafficking in human beings: imprisonment (2 years to 10 years). Pandering: fine or imprisonment (14 days to 3 years). Aggravated pandering: imprisonment (4 months to 6 years). Abuse of a victim of prostitution: fine or imprisonment (14 days to 6 months).

### *Child pornography:*

Distribution of sexually obscene pictures: fine or imprisonment (14 days to 2 years). Aggravated distribution of sexually obscene pictures depicting children: imprisonment (4 months to 6 years). Possession of sexually obscene pictures depicting children: fine or imprisonment (14 days to 1 year).

### *New provisions after the ratification of the Lanzarote Convention:*

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sentence must be imprisonment for at least four years.

<sup>256</sup> HE 282/2010 vp, p.75.

<sup>257</sup> Criminal Code (39/1889),c 20, s 1(1).

<sup>258</sup> Criminal Code (39/1889),c 20, s 2(1).

<sup>259</sup> Criminal Code (39/1889),c 20, s 3(1).

<sup>260</sup> Criminal Code (39/1889),c 20, s 4(1).

Solicitation of a child for sexual purposes: fine or imprisonment (14 days to 1 year).  
 Attending sexually obscene (pornographic) performances involving the participation of children: fine or imprisonment (14 days to 2 years).

*Other:*

Illegal exhibition or distribution of audiovisual programmes to minor: fine or imprisonment (14 days to 6 months). Unlawful marketing of obscene material: fine or imprisonment (14 days to 6 months).<sup>261</sup>

The Criminal Code of Finland has sections *Deprivation of personal liberty* (c 25, s 1) and *Aggravated deprivation of personal liberty* (c 25, s 2).<sup>262</sup> These sections are mainly meant to provide general protection to personal freedom of movement and against internment.<sup>263</sup> The penalty is fine or imprisonment (14 days to 2 years) regarding deprivation of personal liberty and imprisonment (4 months to 4 years) regarding aggravated deprivation of personal liberty.

Regarding extradition of evidence and other procedural help there is a law called *Laki kansainvälisestä oikeusavusta rikosasioissa, Act on International Legal Assistance in Criminal Matters* (4/1994).<sup>264</sup> More specific legislation about extradition is to be found in other laws.<sup>265</sup> Finland does also apply the Council Framework Decision regarding the European arrest warrant and the surrender procedures between Member States which regulates for example extradition of offenders.<sup>266</sup>

- xxiii. National Research Institute of Legal Policy published a survey about sex offences against children in year 2009.<sup>267</sup> The survey studied, amongst other things, the judicial practice in Finland regarding sex offences. According to the survey, in the 21<sup>st</sup> century, the highest increase in number has happened in conditional discharge for sexual abuse crimes against

<sup>261</sup> Criminal Code (39/1889), c 20, s 5(1), s 6(1), s 7(1) and s 8(1); c 25, s 3(1) and s 3a(1); c 20, s 9(1) and s 9a(1); c 17, s 18(1), s 18a(1), s 18b(1), s 20(1); c 20, s 8b(1); c 20, s 8c.

<sup>262</sup> Criminal Code (39/1889), c 25, sections 1 and 2.

<sup>263</sup> HE 94/1993 vp. p. 158.

<sup>264</sup> Act on International Legal Assistance in Criminal Matters (4/1994).

<sup>265</sup> For example, Act on Extradition on the Basis of an Offence Between Finland and Other Member States of the European Union (1286/2003). And between the Nordic countries there is uniform legislation.

<sup>266</sup> 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. Official Journal L 190, 18/07/2002, p. 0001–0020.

<sup>267</sup> V. Hinkkanen, *Lapsen seksuaalinen hyväksikäyttö - tutkimus rangaistuskäytännöstä ja seksuaalirikosten uusimisesta*. Oikeuspoliittisen tutkimuslaitoksen tutkimustiedonantoja 92, National Research Institute of Legal Policy, Helsinki, 2009, viewed on 8 September 2012.

children. This could be explained by the increased number of reported offences as well as the strengthened authoritative control.<sup>268</sup> After year 1999, the lengths of unconditional imprisonments have also increased.<sup>269</sup>

It was also pronounced in the survey that recidivism is not common in sex criminality and that the risk for recidivism does not increase in process of time.<sup>270</sup> The biggest risk for recidivism is amongst those who have been convicted for an offence regarding sexually obscene pictures (a pornographic offence).<sup>271</sup> It was also mentioned in the survey that a conviction for a pornographic offence could be a notable risk to commit new another types of sex offences.<sup>272</sup>

But the main question remains: Are the sanctions effective, proportionate and dissuasive? To give a proper answer to the question is not an easy task. In the EU law *effectiveness* means that the sanction must achieve its desired purpose. *Proportionate* means basically two things. First, the sanction needs to be in just proportion to the harmfulness of the offence and the sanction must not exceed what is necessary to achieve the purpose of the sanction. Second, the sanction must be in line with the other offences in general. *Dissuasive*, which is the most hard to examine, requires that sanctions must be adequate to prevent future crimes.<sup>273</sup> Some thoughts about the issue will be followed, but wider examination is not possible within the limits of this report.

To begin with, it is important to note that the Finnish theory of sanctioning differs much from the same theory introduced by the EU. The dissuasive sanction, which is been promoted by the EU, refers to the legal theory of *deterrence* (prevention), which basically means that the sanction is seen to have a deterrent (fear) effect. The deterrent effect prevents the offender from committing a crime in the first place.<sup>274</sup> However, in the Nordic

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<sup>268</sup> Hinkkanen, p. 35.

<sup>269</sup> Hinkkanen, p. 36.

<sup>270</sup> Hinkkanen, p. 81.

<sup>271</sup> Hinkkanen, p. 82.

<sup>272</sup> Hinkkanen, p. 84.

<sup>273</sup> COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS ((COM 2011) 573 Final), Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, 2011, viewed on 3 November 2012, p.9. See also S. Melander, *Rikosoikeus 2010-luvulla*, FORUM IURIS, Helsinki, 2010, p. 18, where is particularly mentioned that the offence needs to be in just proportion also to the other offences.

<sup>274</sup> S. Melander, *Rikosoikeus 2010-luvulla*, FORUM IURIS, Helsinki, 2010, p. 18.

countries there is a more diverse theory of prevention which is called the theory of *indirect general prevention*. According to the latter theory, the offender does not commit a crime, not because of the fear of the sanction, but because the crime has several other effects on the offender. The sanction has an effect on morality and values of individuals rather than a fear. People do not commit a crime because they share the same moral code with the legislator (see more about the theory in Lappi-Seppälä 2009, link in footnote 275). The maximum lengths of sentences in Finland are not as long as they are in the other countries of Europe and one reason to this is the above mentioned difference in the sentencing theories. According to the theory of indirect general prevention, the perpetrator shares the same moral code with the legislator more effectively, if the sentences are fair and just and, in addition, respects the rights of the individuals.<sup>275</sup>

When it comes to *prevention* (deterrence, which means a preventative effect on a single perpetrator), as mentioned earlier, as far as the sex offences and particularly sexual abuse offences against children are concerned, the risk for recidivism is not high. This review points out that the Finnish sanctions for sex offences are dissuasive enough to prevent perpetrators from committing similar crimes in future. However, when it comes to child pornography crimes, the risk for recidivism is much higher than the risk is among the sex offenders. One may consider this to mean that the sanctions for those crimes are not dissuasive enough, but equally good theory could be that these crimes are not so easy to monitor and the risk of getting caught is lower. Either way, the risk for recidivism is not so high if compared to some other common crimes, the traffic crimes for instance.<sup>276</sup>

As far as the *general prevention* (which means a preventative effect on society) is concerned, it is hard to make a generic conclusion because of the nature of these crimes. It is true that the number of sex offences against children has increased in recent years, but it is hard to tell if the increased number is actually due to more effective control mechanism and the increased number of the reports made of these offences rather than a real increase in the number of committed crimes. However, as we all know, a large number of these crimes still remain unreported. Thus, it is hard to tell if these crimes are actually increased or not, and further, it

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<sup>275</sup> T. Lappi-Seppälä, 'Imprisonment and Penal Policy in Finland' in *Scandinavian Studies in Law*, Stockholm Institute for Scandinavian Law, vol. 54 Criminal Law, September 2009, viewed on 3 November 2012. <<http://www.scandinavianlaw.se/pdf/54-17.pdf>>

<sup>276</sup> Hinkkanen, p. 82 and 85 (The comparison).

is hard to tell if the dissuasive effect on the society is effective enough or not. This would require a wider examination to be made in Finland.

When it comes to effectiveness and proportion, the blameworthiness of sex offences against children is quite high in Finland. The Criminal Code of Finland offers a wide scale of punishment, especially when the sexual abuse of a child is concerned (4 months to 4 years and 1 to 10 years if the crime is assessed as an aggravated sexual abuse of a child). It is also possible to convict a joint punishment due to the concurrence of the offences. Like mentioned in the report of the Law Committee of the Finnish Parliament, the minimum sentence of 4 months is rare when it comes to the general form of the offence.<sup>277</sup> The minimum sentence of 4 months imprisonment is normally used in the aggravated provisions of an offence rather than in the general provisions. This review shows that these crimes are taken seriously.

All in all, it is hard to make a generic conclusion on whether the sanctions are effective, proportionate and dissuasive or not. Also the different sanctioning theory may lead to a different result. However, if compared to other common crimes made in Finland, like an assault, theft or driving while intoxicated, the risk of recidivism is particularly low when it comes to sex offences. Everyone may draw their own conclusions regarding the issue.

- xxiv. As mentioned in chapter f, corporate criminal liability is regulated in chapter 9 in the Criminal Code of Finland.<sup>278</sup> It includes legislation about prerequisites for liability, waiving of punishment, corporate fine, waiving of the bringing of charges, joint corporate fine and enforcement of a corporate fine. Coercive Measures Act (450/1987) regulates for example prohibition of transfer and collateral confiscation, normal confiscation and search. Chapter 10 in the Criminal Code of Finland regulates forfeitures.

In Finland there is a detached law regarding business prohibition and this kind of prohibition reaches every area of business.<sup>279</sup> In Finland it is not possible to set a business prohibition to a corporate only because it has compromised a section in the Lanzarote

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<sup>277</sup> LaVM 43/2010 vp.

<sup>278</sup> Legal person is held liable if an offence has been committed on the behalf or for the benefit of the corporation. For more information, see chapter f above.

<sup>279</sup> **Business Prohibition Act** (1059/1985). See also HE 282/2010 vp, p. 71.



Convention but when a corporate has committed other than a remote crime and when this action is regarded harmful as a whole to creditors, contracting parties, public finance or to the fair financial competition.<sup>280</sup>

- xxv. Chapter 10 of the Criminal Code legislates about forfeiture, and it concerns confiscation of materials, proceeds, an instrument of crime and other properties etc. The confiscation of proceeds is necessary due to the c 10, s 2. For example, in case No. KKO 2005:17 a landlord has been convicted to forfeiture the rental incomes of 146 440 euros to the State. In the case the landlord (who was a lawyer) was convicted to pandering because in the house called “red house” which he or she owned was used solely for pandering business. In addition to the confiscation of proceeds, the sentence was unconditional imprisonment for one year.

Pornographic pictures or other visual recordings depicting children are able to be confiscated due to c 10, s 5(1). An object that has been used in the commission of an intentional offence can be confiscated due to c 10, s 4(2c). The latter means for example, that if there has been used some item in a commission of sexual abuse of a child, the item can be ordered to be forfeited to the State.

It is good to mention that the provisions about confiscation do not make it possible to shut down websites that contain child pornographic materials. However, section 18 of the *Laki sananvapauden käytämisestä joukkoviestinnässä, Act on the Exercise of Freedom of Expression in Mass Media* (460/2003) makes it possible to the court to order website to be shut down. This order can be given to a keeper of the transmitter, server or other comparable device, for instance.<sup>281</sup>

In Finland there has not been taken any actions that the proceeds which are confiscated would be allocated directly to some special fund just because these proceeds have been confiscated due to a committed sexual crime against a child. Although, *Raha-automaattiyhdistys, Finland's Slot Machine Association* (RAY) is a public association which is funding the activity of several civic organizations<sup>282</sup> and such civic activity which is helping

<sup>280</sup> **Business Prohibition Act (1059/1985), section 3.** See also HE 282/2010 vp, p. 71.

<sup>281</sup> It is also good to notice that the implementation of the Directive *on combating the sexual abuse and sexual exploitation of children and child pornography* (2011/92/EU) is in progress. The Directive will provide better cooperation of the member states regarding the issue. (T. Ojala, p. 215-216).

<sup>282</sup> These kinds of associations are Victim support Finland (Rikosuhripäivystys), the Mannerheim League for

the victims of offences. RAY is funding about a thousand health and social welfare organizations every year.<sup>283</sup> It is also good to mention the State Treasury which is a government agency that compensates injuries of victims of offences.

What comes to bona fide third parties, the demand of intention<sup>284</sup> means that bona fide third parties cannot be guilty of sex offences. There is, however, some borderline problematic regarding the level of knowledge. A landlord can for example be convicted for pandering if the rented flat is used for prostitution when prostitution is fairly probable (and the landlord is aware of this probability).<sup>285</sup>

- xxvi. Blameworthiness increases especially when the offender is a person to whom the child should be able to trust.<sup>286</sup> This has been taken into account so that the existence of a near relationship is included directly in the essential elements of the offences.<sup>287</sup> This means that if the offender is for example a family member or in a comparable position to a family member the offence title can be changed into the aggravated *modus operandi*.<sup>288</sup> According to the research made by the National Research Institute of Legal Policy, 45 % of the offences committed by a parent was regarded as an aggravated sexual abuse of a child.<sup>289</sup>

It is, however, important to keep in mind that in order the offender to be convicted for aggravated *modus operandi*, the offence has to have been aggravated also when assessed as a whole.<sup>290</sup> For example in case No. KKO 2011:102 a grandparent was regarded as a near person comparable to a parent and that was seen to fulfil one of the aggravating elements of the offence. However, a grandparent was not convicted for aggravated sexual abuse of a child because of the overall assessment. This was because the conducts of the grandparent were occasional and the sexual act had included only touching and such.

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Child Welfare (Mannerheimin lastensuojeluliitto), Rape crisis centre (Tukinainen ry) just to mention few.

<sup>283</sup> HE 282/2010 vp, p. 39 and 41.

<sup>284</sup> Circumstance-intention.

<sup>285</sup> KKO 2005:17.

<sup>286</sup> See e.g. Hinkkanen, p. 38. See also HE 6/1997 vp and KKO 2011:102.

<sup>287</sup> To the aggravated *modus operandi*.

<sup>288</sup> See e.g. T. Ojala, p. 134. It is also good to notice that the age limit for sexual abuse is 18 if the offender is a close family member.(compared to the "normal" protection age which is 16 years of age. See Criminal Code, c 20, s 6.).

<sup>289</sup> Hinkkanen, p. 28.

<sup>290</sup> Criminal Code, c 20, s 7(1).

It is also good to notice that if the offence happens within a family, the offender can be guilty of several crimes with a quite similar description of the offence. For these kinds of situations the Criminal Code of Finland offers a general principle, according to which “the sentence shall be determined so that it is in just proportion to the harmfulness and dangerousness of the offence, the motives for the act and the other culpability of the perpetrator manifest in the offence.”<sup>291</sup> And as said in paragraph 2(g) of chapter II (subparagraph c) of this report, Article 28(d) “the offence was committed by a member of the family — ” is regarded as particularly harmful in the meaning of this principle. In these kinds of situations there can also actualize different kinds of child welfare measurements, for example custody.

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

- i. In Finland, the leading principle of child law is the principle of the best interest of a child. This interest must be met whenever enforcing the law or making decisions regarding a child. The principle itself has been adapted to the Finnish legal system from the UN Convention on the Rights of the Child, article 3 paragraph 1. It is specifically mentioned in the Child Custody and Right of Access Act<sup>292</sup> s 1 and in the Child Welfare Act<sup>293</sup> s 1.

It is noteworthy, that although the principle of the best interest of a child is not as itself included to the Finnish criminal procedural laws, it still has a considerable meaning. This results from the fact that Finland is a member state of the European Union and the Finnish judicial system is therefore strongly affected by the union based regulation and the binding preliminary rulings given by the European Court of Justice, where the principle of the best interest of a child has been emphasized. The Court of Justice has e.g. ruled that ‘the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place’.<sup>294</sup> Thus, the principle of the best interest of a child must always be taken into consideration both during the preliminary investigation and during the

<sup>291</sup> Criminal Code (39/1889), c 6, s 4.

<sup>292</sup> Child Custody and Right of Access Act (361/1983).

<sup>293</sup> Child Welfare Act (417/2007).

<sup>294</sup> Case C-105/03 Criminal proceedings against Maria Pupino.

court procedure in a case involving a child. The aim is to ensure that no special damage is directed to the child due to the investigation or the court procedure and that the child is protected from becoming a secondary victim.<sup>295</sup>

The relevant national regulations are placed in the Criminal Investigations Act<sup>296</sup> s 39 a, and the Code of Judicial Procedure<sup>297</sup> c 17, s 11, where special measures have been ordered to be adapted, when a child is heard during the investigation process. According to the Criminal Investigations Act s 39 a, the hearing of the plaintiff or the witness must be video recorded or recorded with a similar voice- and image recorder during the pre-trial criminal investigations, if due to the young age or mental state of the person heard he or she cannot be heard personally in the court without causing him or her damage. Accordingly, the hearing methods must be adjusted to the level of development of the person heard, people participating to the hearing and other circumstances of the hearing. It should also be noted, that the head of investigation has the authority to decide that other person than an investigating authority can ask the questions from the person heard. This person could e.g. be a social worker with the experience of working with children. The defendant must, however, always be guaranteed a possibility to ask questions from the person heard, either directly or through another person.

Correspondingly, according to the Code of Judicial Procedure c 17, s 11 (2), the video or otherwise recorded statement given in a pre-trial criminal investigation by a person aged under fifteen or a person who is mentally incapacitated may be admitted as evidence in court. However, this can be done only provided that the defendant is ensured with an opportunity to present questions to the person heard. It is also noteworthy that the head of investigation can decide that the defendant's questions are asked by the authority conducting the hearing. This way the person heard does not have to face the defendant. Other ways to conduct the pre-trial hearing so that both the defendant's and the heard person's rights are assured are to let the defendant follow the hearing behind a tinted glass or to let him or her take part in the hearing via remote access. The recording of the hearing can also be delivered

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<sup>295</sup> P Hirvelä, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa*, WSOYPro, Helsinki, 2006, p. 233. See also United Nations Office for Drug Control and Crime Prevention, *UN Handbook on Justice for Victims*, Centre for International Crime Prevention, New York, 1999, p. 9-10.

<sup>296</sup> Criminal Investigations Act (449/1987).

<sup>297</sup> Code of Judicial Procedure 31.12.1734.

to the defendant afterwards. After having seen the recording, the defendant may compile questions that are later asked from the person heard. The hearing of a child is usually conducted as early in the process as possible and preferably only once. However, especially with small children, one hearing is not usually enough and thus there are generally 2 – 3 hearings conducted. The aim is still always to minimize the number of stressful situations for the child.<sup>298</sup>

There have been many cases regarding the hearings of minors before the Finnish Supreme Court. In the case No. KKO 2006:107, the court declared that a video recording of a 9-year-old child's hearing, which was conducted during the preliminary investigation, could be used as evidence in the court even though the defendant had not had the possibility to ask questions from the child during the hearing. This was deemed possible because the defendant could comment the video in court. Accordingly, in the case No. KKO 2008:68 the court declared that a psychologist's statement of the child could not be used as evidence, while it had not been recorded and the defendant had not had the possibility to ask questions from the child.

#### *Personal hearing during the court process*

If the personal hearing of the minor in the court process is deemed necessary, there is a special regulation governing the methods of this hearing. According to the Code of Judicial Procedure c 17, s 21, a person under the age of fifteen or a person who is mentally incapacitated may be heard as a witness or for probative purposes if the court deems it appropriate. However, it is also required that this personal hearing is of central significance to the clarification of the matter and that the hearing would probably not cause any suffering or other harm that can injure the person heard or his or her development. In the Supreme Court case No. KKO 2008:84, the court declared that a video hearing of a child could not be used as evidence in the court, because the child had reached the age of fifteen after the preliminary investigation. Hence, a personal hearing in the court was conducted.

When discussing the personal hearings of minors, noteworthy are also the sections of the Code of Judicial Procedure that regulate the special measures applied in order to protect any

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<sup>298</sup> T. Ojala, *Lapsiin kohdistuvat seksuaalirikokset*, Edita Publishing Oy, Porvoo, 2012, p. 222.

heard person during the court hearings. According to the c 17, s 34, a witness, another person heard for probative purposes and an injured party may be heard in the main hearing without the presence of a party or another person. This is possible provided that the court deems it is appropriate, such hearing is necessary and the other party is reserved an opportunity to put questions to the person being heard. According to the section, the necessity for special measures to be adapted may arise, first of all, from the need to protect the person being heard or a person related to him or her from a threat directed at life or health. Secondly, the special arrangement might be necessary if the person being heard would otherwise not reveal what he or she knows about the matter. Thirdly, it might be necessary to apply special measures if a person disturbs or attempts to mislead the person being heard during his or her testimony. It should also be noted that according to the section, a witness or other person may also be heard in a hearing closed to the public, as provided in Laki oikeudenkäynnin julkisuudesta yleisissä tuomioistuimissa, *the Act on the Publicity of General Court Proceedings*.<sup>299</sup>

According to the c 17, s 34 a, on the other hand, a witness, another person to be heard for probative purposes or a party may be heard in the main hearing without his or her appearance in person. This is made possible with the use of a video conference or other appropriate technical means of communication, meaning that the persons participating in the hearing have only an audio and video link with each other. According to the section, applying this measure is possible when the court deems it suitable, a party is reserved an opportunity to put questions to the person being heard and there is some special reason for applying this method. This kind of reason may be e.g. the necessity to protect the person to be heard or a person related to him or her from a threat directed at life or health. In addition, the method can be applied, if a person to be heard cannot, due to illness or another reason, appear in person in the main hearing, or his or her personal appearance in proportion to the significance of the testimony would cause unreasonable costs or unreasonable inconvenience. It might also be that the credibility of the statement of the person to be heard can be reliably assessed without his or her personal appearance in the main hearing. In the latter two cases the hearing can also be conducted via phone call. However, what is more relevant in this context, according to the section, the method can

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<sup>299</sup> Act on the Publicity of Court Proceedings in General Courts (370/2007).

also be applied if the person to be heard has not reached the age of fifteen years or he or she is mentally incapacitated.

*Conducting the personal hearing of a child in the court*

If a child, who has reached the age of fifteen, is heard personally in the court, the questioning is conducted by a member of the court provided that the court does not find a special reason to have the parties conduct the questioning themselves. At any rate, all the parties must be guaranteed a possibility to ask questions from the heard person either through the court or, when the court deems it appropriate, directly from the person. The hearing is attempted to carry out in one appointment so that the child's normal daily rhythm wouldn't be disturbed.<sup>300</sup> If necessary, the hearing can also be conducted in other room than the court room. This practice is often utilized when hearing small children. The hearing can take place e.g. in a more comfortable preparation facility or in the judge's office. The hearing can be conducted also completely out of the court, in a room specifically designed for hearing children e.g. in the social authorities premises. The choice of location aims to minimize the child's stress and anxiety level.<sup>301</sup>

When a minor is a party in a criminal procedure his or her legal representative and guardian is usually his or her custodian. In many cases this person is also the child's biological parent. When the child has reached the age of fifteen years she or he has the right to speak beside his or her legal representative in a matter that regards him- or herself personally or his or her interest and rights. When the child's interest is in conflict with that of his or her custodian, a separate legal guardian must be appointed. The appointment is given by a district court following an application by a social officer. According to *Terveiden ja hyvinvoinninlaitos, STAKES*'s<sup>302</sup>, guide book, the need for a legal guardian should always be evaluated when the question is about sexual abuse or an assault within a family.<sup>303</sup> The legal guardian's appointment gives the guardian a right to make decisions about some matters specifically stated in the assignment. These rights can be e.g. the right to make a report of an offence,

<sup>300</sup> A.-K. Aaltonen, *Lapsioikeus ja lapsen oikeus tuomioistuimissa*, Edita Publishing Oy, Porvoo, 2009, p. 272.

<sup>301</sup> A.-K. Aaltonen, p. 272.

<sup>302</sup> STAKES (National Research and Development Centre for Welfare and Health) was an expert agency whose key functions were research, development and statistics. Since 2009 STAKES has been a part of the National Institute for Health and Welfare.

<sup>303</sup> S Taskinen, *Lapsen seksuaalisen hyväksikäytön ja pahoinpitelyn selvittäminen. Asiantuntijaryhmän suositukset sosiaali- ja terveydenhuollon henkilöstölle. Stakes, Oppaita 55*. STAKES, Helsinki, 2003, p. 121.

the right to request prosecution, the right to give permission to conduct a psychological or somatic examination of the child or the right to give a permission to interrogate the child.<sup>304</sup>

When dealing with sex offences the complainant always has a right to a legal counsel and to a support person. According to the Criminal Procedure Act c 2, s 1 a, the court may appoint a counsel for the injured party for criminal investigations and, in a case relating to a sexual offence against a child where the injured party has a claim in a case prosecuted by the public prosecutor, also for the trial unless this is for a special reason deemed unnecessary. According to the c 2, s 3, the support person, on the other hand, may be appointed to an injured party, who does not make a claim in the trial but who is being heard in person in order to resolve the case and is deemed to be in need of assistance during the criminal investigation or the trial. Where the legal assistant offers mainly legal aid to the complainant, the support person gives also moral support. This kind of support is especially important for a child. Many times, when a child has been appointed a legal guardian, the same person also acts as the child's legal assistance. These matters are further discussed below.

- ii. The report of a crime can be done in which ever police station, but the preliminary investigation is usually conducted by the police of the local area, where the crime has been committed. Helsingin poliisilaitos, *The Helsinki Police Department*, is the only police department in Finland where there is a special unit in operation that handles only sexual offences regulated in c 20 of the Criminal Code. The unit handles only local cases.<sup>305</sup> If the investigation of a suspected crime in a local police department is prolonged e.g. due to the complexity of the case or international connections, the local police department may ask the case handling to be transferred to Keskusrikospoliisin väkivaltayksikkö, *the National Bureau of Investigation's Violence Unit*.<sup>306</sup>

The preliminary investigation is conducted or at least led by the police. The police have educated some of their own personnel to interrogate and to hear a child, and these tasks are tried to be centralized to these officers in keeping with what is provided in Asetus

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<sup>304</sup> P Hirvelä, *Lapsen seksuaalisen hyväksikäytön selvittäminen*, WSOYPro, Helsinki, 2007 p. 49 – 50.

<sup>305</sup> Phone interview with Detective Inspector Jyri Hiltunen from the Helsinki Police Department, 7 November 2012.

<sup>306</sup> Phone interview with Chief Inspector Jaakko Ridanpää from the National Bureau of Investigation, 7 November 2012.



esitutkinnasta ja pakkokeinoista, *the Statute on Criminal Investigations and Coercive Measures*<sup>307</sup> s 11. However, the police may also utilize the social- and healthcare workers during the preliminary investigations. This is regulated by Laki lapseen kohdistuneen seksuaalirikoksen selvittämisen järjestämisestä, *Act Governing the Organizing of the Investigation of Sexual Offence Against a Child*.<sup>308</sup> According to this act, a proper hospital district is obliged to organize services required by the police, the prosecutor and the court in order to investigate a sexual offence against a child and an assault relating thereto.

According to the Police Act<sup>309</sup> s 31 a, the police officers have the right to undertake undercover activities if they are necessary to prevent, detect or investigate criminal activities referred to in the Coercive Measures Act<sup>310</sup> c 5 a, s 2 or an offence referred to in the Criminal Code<sup>311</sup> c 17, s 18(1)(1) or a punishable attempt of such offence. However, the rule applies only when the persons, on whom information is gathered, behaviour or other circumstances give reasonable cause to suspect that they could commit the offence in question. According to the Coercive Measures Act, the undercover activities can be applied to crimes like e.g. aggravated sexual abuse of a child, trafficking in human beings, aggravated trafficking in human beings and aggravated distribution of sexually obscene pictures depicting children. Also according to the Criminal Code, the undercover activities can be applied to the aggravated distribution of sexually obscene pictures depicting children. Thus, when the conditions mentioned above are met, the police have the right to use covert operations. The covert operation is always governed by the National Bureau of Investigation or Suojelupoliisi, *the Finnish Security Intelligence Service*. The individual performing the covert operation must have completed the training approved by Poliisihallitus, *the Police Board*. He or she also has to be a volunteer and have both the personal qualities appropriate for the operation and the expertise on police work demanded by the operation.<sup>312</sup>

In Finland there is also in operation a special virtual community policing group located in Helsinki. The group patrols visibly in the internet and its goal is to pre-empt crimes, to lower

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<sup>307</sup> The Statute on Criminal Investigations and Coercive Measures (5751988).

<sup>308</sup> Law governing the organizing of the investigation of sexual offence against a child 1009/2008.

<sup>309</sup> Police Act (493/1995).

<sup>310</sup> Coercive Measures Act (450/1987).

<sup>311</sup> Criminal Code 19.12.1889/39.

<sup>312</sup> Ministry of the Interior's degree on the organization of the data collection and supervision by the police (V: 1.4.2008 K, A: 25.3.2008, SK: 174/2008).

the threshold to contact the police and ultimately to intervene into the crimes committed online, sexual crimes against children among others. In June 2011 Helsingin nettipoliisi, *the Helsinki Virtual Community Policing Group*, and the Finnish organisation Pelastakaa lapset ry, *Save the Children*, conducted a survey to investigate child sexual abuse on the internet. The survey was carried out online in four popular Finnish online communities and it could be answered anonymously. Based on the survey, there was a report conducted that examined the replies by respondents under the age of sixteen. There were 2,283 of them of whom 62 % were girls and 38 % boys. 10 % of all respondents indicated that they were less than twelve years old. The results of the survey were worrying. According to the survey from the total of 2,267 respondents 46 % of the girls and 13 % of the boys had been contacted over the internet in form of sending sexually harassing messages, photos or videos by an adult or someone who was clearly older than the respondents. Of the total of 2,260 respondents, 52 % of the girls and 12 % of the boys had been asked to send photos of themselves scantily dressed or naked via the internet. In addition, of the total of 2,262 respondents, 48 % of the girls and 15 % of the boys had been propositioned online for sex by a stranger.<sup>313</sup> The results of the survey strongly suggest that the internet-related sexual abuse of children may be a much broader problem in Finland than previously realised.

In Finland there is also in force Laki lapsipornografian levittämisen estotoimista, *the Act Regarding the Blocking of the Distribution of Child Pornography*.<sup>314</sup> According to s 1 of the aforementioned act the purpose of the act is to protect children and their constitutional rights by promoting measures with which the access to foreign websites including child pornography can be blocked. According to s 4 of the act, the police have a right to compose, maintain and update a list of internet sites that include child pornography. In Finland the list is upheld by the National Bureau of Investigation and regularly delivered to over thirty big telecommunications operators that then may voluntarily restrict the access via their services to the websites in question. The measures applied in Finland are a part of

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<sup>313</sup> The results of the survey can be accessed in full in the homepage of the Helsinki Police Department, viewed on 10 November 2012, <[http://www.poliisi.fi/poliisi/helsinki/home.nsf/files/090BDA4507957157C22579A30035D002/\\$file/Seksuaalinenh%C3%A4irint%C3%A4web2011\\_eng.pdf](http://www.poliisi.fi/poliisi/helsinki/home.nsf/files/090BDA4507957157C22579A30035D002/$file/Seksuaalinenh%C3%A4irint%C3%A4web2011_eng.pdf)>.

<sup>314</sup> The Act Regarding the Blocking of the Distribution of Child Pornography (1068/2006).

COSPOL Internet Related Child Abusive Material Project accepted by the European Police Chief Task Force in the fall of 2006.<sup>315</sup>

- iii. According to the Criminal Investigations Act s 2, the police or other investigation authority has to perform the preliminary investigation of a crime, when due to a report of a crime or otherwise there is a reason to suspect that a crime has been committed. When the question is about a sexual offence against a child, the police usually require information from the health- and child welfare officers in order to decide whether the statutory requirements for starting a criminal investigation are met. If, in the light of gathered information, the police have a justifiable reason to suspect that the crime has been committed, the preliminary investigation is started.<sup>316</sup>

In Finland all sex offences against a child are under public prosecution.<sup>317</sup> This means, that they are deemed so grave in their nature that the society has a special interest to prosecute the suspected offenders and a duty to insure that the best interest of a child is met. This being the case, it is not necessary that the suspected victim or his or her guardian reports the crime. Reporting is, however, always a primary right of the parties involved. Accordingly, it is without relevance if the report done by the suspected victim or his or her guardian is later withdrawn.

In Finland there is no general duty to report a committed crime. However, according to the Criminal Code c 15, s 10, a person who knows of e.g. rape, aggravated rape, aggravated sexual abuse of a child, trafficking in human beings or aggravated trafficking in human beings and fails to report it to the authorities or the endangered person when there is still time to prevent the offence, shall be sentenced, if the offence or a punishable attempt thereof is committed, to a fine or to imprisonment for at most six months. Penalty of perjury does not, however, apply to the close relatives of the perpetrator or persons living

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<sup>315</sup> See also the homepage of the National Bureau of Investigation, viewed on 7 November 2012, <<http://www.poliisi.fi/poliisi/krp/home.nsf/pages/A12612E6A0B3A1EBC2257549003F446E>>.

<sup>316</sup> STM, (2009:30), Sosiaali- ja terveysministeriön selvityksiä, *Lasten seksuaalisen hyväksikäytön selvittäminen*. Työryhmän muistio. Helsinki, 2009, p 38. (Reports of the Ministry of Social Affairs and Health 2009:30, p. 38.)

<sup>317</sup> HE 282/2010 p. 86 – 87.

with him or her or a person who is close owing to another comparable personal relationship.

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In addition, according to the Finnish Child Welfare Act s 25, certain persons have a specifically regulated duty to ‘notify the municipal body responsible for social services without delay and notwithstanding confidentiality regulations if, in the course of their work, they discover that there is a child for whom it is necessary to investigate the need for child welfare on account of the child’s need for care, circumstances endangering the child’s development, or the child’s behaviour’. According to the section, the duty applies to persons employed by, or in positions of trust for, social and health-care services; education services; youth services; the police service; Rikosseuraamuslaitos, *the Criminal Sanctions Agency*; fire and rescue services; social welfare and health care service providers; education or training provider; a parish or other religious community; a reception centre and organisation centre<sup>319</sup>; a group family home and other housing unit<sup>320</sup>; a unit engaged in emergency response centre activities or a unit engaged in morning and evening activities for schoolchildren as well as persons working in a principal or contractor relationship or as independent professionals, and to all health care professionals. However, also a person other than those referred to above may submit a notification, notwithstanding any confidentiality regulations that may apply. In addition, it is noteworthy, that according to the section, the specifically mentioned persons also have a duty, notwithstanding confidentiality provisions, to notify directly the police when they have cause to suspect on the basis of circumstances that have come to their knowledge that the child is a victim to a sex offence<sup>321</sup>.

- iv. According to the Criminal Code c 8, s 1, the statute of limitation starts to expire from the day the individual crime is committed. If the crime consists of maintaining the illegal state of affairs, the statute of limitation starts to expire when this state of affairs ends. According to the Criminal Code c 8, s 4, the statute of limitation can be continued by one year once by application if the preliminary investigation of the crime requires special and time-taking actions and hence the investigation would be incomplete by the expiration date. The same

<sup>318</sup> Hirvelä, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa*, p. 41.

<sup>319</sup> Referred to in s 3 of laki kansainvälistä suojelua hakevan vastaanotosta, *the Act on Reception of People Seeking International Protection* (746/2011).

<sup>320</sup> Referred to in section 28 of laki kotoutumisen edistämisestä, *the Act on the Promotion of Integration* (1386/2010).

<sup>321</sup> Punishable under chapter 20 or chapter 21 of the Criminal Code.

applies, if the preliminary investigation has started exceptionally late or the defendant is on the run and very important public interest requires the continuation. These requirements are, however, seldom deemed to be met in regard of a sex offence against a child.

The general statutes of limitation are regulated in Criminal Code c 8, s 1. At the moment the general statutes of limitation apply also to the sex offences against children. Hence, in the situation where the most severe penalty provided for the offence is fixed-term imprisonment for over eight years, the right to bring charges is time-barred if charges have not been brought within twenty years. Accordingly, in the situation where the most severe penalty is imprisonment for more than two years and at most eight years, the right to bring charges is time-barred if charges have not been brought within ten years. Finally, in the situation where the most severe penalty is imprisonment for over a year and at most two years, the right to bring charges is time-barred if charges have not been brought within five years and, in the situation where the most severe penalty is imprisonment for at most a year or a fine, within two years.

However, in order to protect the realization of the best interest of a child, according to the Criminal Code c 8, s 1, the right to bring charges for sexual abuse of a child and aggravated sexual abuse of a child becomes time-barred at the earliest when the complainant reaches the age of twenty-eight years. The same applies to rape, aggravated rape, coercion into sexual intercourse and coercion into sexual act, sexual abuse, pandering, aggravated pandering, trafficking in human beings and aggravated trafficking in human beings directed at a person under the age of eighteen years. Also, the statute of limitation expires when the victim of the crime turns twenty-three years, if the crime in question has been solicitation of the child to sexual purposes.

- v. As mentioned above, according to the Criminal Investigations Act s 2 the police or other investigation authority has to perform the preliminary investigation of a crime, when due to a report of a crime or otherwise they have a justifiable reason to suspect that a crime has been committed. The section does not require that there is a certainty about the victim's age even when the age has significance on whether all the elements of the offence are met. The police is seen to have the required "reason to suspect" even when the age of the victim is not certain.

- vi. The data for convicted criminals is recorded in the criminal register and in the ticket register that are both held by Oikeusrekisterikeskus, *the Legal Register Centre*. The Legal Register Centre operates under the Ministry of Justice. According to the Criminal Records Act, s 3, the recorded data must be kept in secret. However, notwithstanding the secrecy, data about a person may be delivered from the criminal records to a court of law for the hearing of a pending case or to the public prosecutor for prosecution, consideration of charges or coercive measures. Accordingly the data may be delivered to the Criminal Sanctions Agency that takes care of the probation and the prison service, for the enforcement of a sentence and for the establishment of a person's aptitude. The data can also be delivered to the appropriate official in the Ministry of Justice for the presentation of matters of pardon and to oikeuskansleri, *the Chancellor of Justice of the Government* and eduskunnan oikeusasiamies, *the Parliamentary Ombudsman* for the performance of their duties as overseers of legality and to pre-trial investigation authorities for coercive measures.<sup>322</sup>

In addition, information from the criminal records shall be delivered to the authorities of a foreign state for dealing with criminal matters as provided in Article 13 of the European Convention on Mutual Assistance in Criminal Matters<sup>323</sup> or as separately agreed upon or provided.<sup>324</sup> Correspondingly, according to Criminal Code c 7, s 9, the unconditional imprisonment and community service sanctions and comparable consequence condemned in another member state of the European Union or in Iceland or Norway are taken into consideration in Finnish criminal procedure e.g. when assessing the length of the imprisonment.

### 3.2 Complaint Procedure

- vii. The criminal procedure can be divided to four main stages; investigation, consideration of charges, trial in court and execution of penalty. There are two general Procedural Acts in Finnish legislation that regulate the criminal procedure. The two general Acts are applied throughout the procedure but in addition there are specific acts that provide the rules for the specific questions (e.g. investigation, publicity etc.). The general Acts are the Code of Judicial

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<sup>322</sup> Criminal Records Act s 4 (1).

<sup>323</sup> the European Convention on Mutual Assistance in Criminal Matters (TrS 30/1981).

<sup>324</sup> S 4 (2) of the Criminal Records Act.

Procedure and the Criminal Procedure Act. The latter applies only to criminal procedure, but the first applies also to civil procedure.

Most of the sex offences of the Criminal Code are subject to public prosecution. This means that the prosecutor has a right to bring charges at his or her own discretion even if the injured party would not have notified the crime to be prosecuted. However the decision of the prosecutor is not based solely on his or her free discretion, but the decision must meet certain criteria regulated in legislation. In cases of complainant offences the prosecutor can bring charges in a matter only if the injured party has notified the crime to be prosecuted. According to the Criminal Procedure Act c 1, s 14 (1), also the injured party of the matter in question also always has a reversionary right to bring a charge if the following circumstances apply: if the prosecutor decides not to prosecute in a specific matter, or if the prosecutor or the investigating authorities decide that the preliminary investigation will not be conducted or it is suspended or terminated.

A specialty in Finnish criminal process is the prosecutor's obligation to sue the injured party's claim for damages in connection with bringing charges.<sup>325</sup> According to the Criminal Procedure Act c 3, s 9, on a request by the injured party the injured party's claim can be dealt with in the same trial where the criminal matter is solved if this can be done without impeding the proceedings of the case and if the claim is not apparently unfounded. Claiming for damages within the same trial is not always possible, but for economical reasons it is preferable to do this. Claiming for damages by the prosecutor best serves in routine cases. However, in the most serious cases, such as sexual offence, the prosecutor normally does not do this, because the claims are often very complicated and require presentation of evidence by expert witnesses.<sup>326</sup> If the injured party's claim for damages will not be dealt alongside with the criminal matter, the injured party may bring a claim for damages later on in order to obtain compensation.

As mentioned above, most of the sex offences are subject to public prosecution. The remaining are complainant offences, but according to the Criminal Code c 20, s 11, in these cases also the prosecutor shall bring a charge without the notification of the injured party if

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<sup>325</sup> Criminal Procedure Act c 3, s 9.

<sup>326</sup> Hirvelä, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa*, p. 146.

a very important public interest requires the prosecution. In addition, concerning certain sexual offences the law still provides a special provision of waiving of measures. Waiving of measures means that if the injured party that has reached eighteen years of age regarding an offence referred to in c 20, s 1 of the Criminal Code on his or her own considered free will requests that charges are not brought, the prosecutor may, according to Criminal Code c 20, s 12, waive the bringing of charges, unless an important private or public interest requires that charges are brought.

If certain circumstances occur, the prosecutor may prosecute a complainant offence even without the notification of bringing the charges by the injured party. According to the Criminal Procedure Act c 1, s 3 (2), if the custodian, guardian or other legal representative of a minor has directed an offence, for which the public prosecutor is not to bring a charge without a notification, at a minor or a person otherwise under trusteeship, the prosecutor may bring a charge. The provision is necessary so that the offender could not avoid the trial for the sole reason that only he or she is incapacitated to use the child's right of action and hence be the only person to notify the crime to be prosecuted. According to the Criminal Procedure Act, if an offence is directed at a person without full legal capacity (e.g. a minor) and the public prosecutor is not to bring a charge without a notification by the injured party (a complainant offence), the guardian or other legal representative of that person shall have a right to make the notification for bringing a charge. As regards an offence directed at the person of a minor, his or her custodian (the person responsible for care and custody) or other legal representative shall have the right to make the notification.<sup>327</sup>

There are some situations where children are allowed to present their individual complaint. A person without full legal capacity shall alone have the right to request that a charge is brought if an offence has been directed at a property which is under his or her sole administration or if it concerns a transaction which he or she has the eligibility to execute. According to the Criminal Procedure Act c 1, s 4 (2), a person without full legal capacity has the right also when an offence has been directed at his or her person and he or she is at least eighteen years of age and can obviously understand the significance of the matter. If a minor is at least fifteen years of age, he or she shall, according to the Criminal Procedure Act c 1, s

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<sup>327</sup> Criminal Procedure Act c 1, s 4 (1).



4 (3) have a right parallel to the right of his or her custodian or other legal representative, to request that a charge is brought for an offence directed at his or her person.

The criminal case becomes pending when the application for a summons arrives at the registry of a district court or if the prosecutor summonses the defendant, when the summons is served on the defendant.<sup>328</sup> The prosecutor is to bring a charge by delivering a written application for a summons to the registry of a district court.<sup>329</sup> According to the Criminal Procedure Act c 5, s 1 (1) the court may order to the extent deemed necessary, that the prosecutor can bring a charge by self-summonsing the defendant.

*The criteria for evidence to be accepted for examinations*

There is no unambiguous determination on the quality of evidence accepted for examinations. Hence the accepted form of communication is not determined. In principle the evidence may be written as well as oral. However, it is provided in the Code of Judicial Procedure c 17, s 11 (1) that the following shall not be admitted as evidence in a court, unless otherwise provided: 1) A private written statement drawn up for the purpose of a pending or imminent trial, unless the court admits it for a special reason; and 2) An oral statement entered or otherwise stored in the record of a criminal investigation or another document.

According to the Code of Judicial Procedure c 17, s 8 a, evidence shall be admitted in the main hearing, unless it is to be admitted outside of a main hearing on the basis of some specified provisions provided either in the Code of Judicial Procedure or the Criminal Procedure Act.

In the cases where a child is to be heard in court some special provisions are applied. These provisions ensure that the best interest of a child is taken into consideration and that the child is not affected by the methods of examination. According to the Criminal Investigations Act s 39 (1), an examination report must be done in every preliminary hearing. The child's description can also be recorded in an audio or video recording. According to the Criminal Investigations Act s 39 a, the injured party and the witness

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<sup>328</sup> Criminal Procedure Act c 5, s 2.

<sup>329</sup> Criminal Procedure Act c 5, s 2.

examination shall be recorded on a video recording device or a comparable other video and audio recording if the examination report is intended to be used as evidence in legal proceedings and the injured party or the witness cannot be heard in trial in person without causing harm by courtesy of their young age or mental activity derangement.

It is provided in the Code of Judicial Procedure c 17, s 11 (2), that if the statement given in pre-trial investigation by a person who has not reached the age of fifteen years or a person who is mentally incapacitated has been recorded on a video recording device or on a comparable video and audio recording, the statement may nonetheless be admitted as evidence in court if the defendant is provided with an opportunity to present questions to the person being heard. C 17 s 21 of the Code of Judicial Procedure contains provisions on the hearing of such a person as a witness or for probative purposes. The defendant is not obliged to present the questions, and if he or she decides not to utilize the opportunity given, the recording can be used as evidence in proceedings.<sup>330</sup>

Due to the aforementioned we can reach a conclusion that as a rule the legislator has made a decision not to have children heard in the main hearing if possible. The provision of the Code of Judicial Procedure provides the circumstances that has to apply so that the hearing of a child can be replaced with a video recording recorded in a pre-trial hearing, whereas the mentioned provision in the Criminal Investigations Act provides the ways of executing the hearing and recording it.

According to the Criminal Investigations Act s 39 a, the age and the stage of development of the person to be heard shall be taken into consideration when choosing the method of hearing, the number of persons being involved in it and other significances of executing the hearing. As provided in the Statute on Criminal Investigations and Coercive Measures<sup>331</sup> s 11, the investigation focusing on a child should be executed, if possible, by police officers specialized in executing such task. According to the Criminal Investigations Act s 39 a, the officer in charge of the investigation may decide that someone outside the investigation authorities shall, under the supervision of the investigation authorities, execute the hearing and present the questions. Normally children under the age of 6 – 7 will be heard by a

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<sup>330</sup> Hirvelä, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa*, p. 197.

<sup>331</sup> Statute on Criminal Investigations and Coercive Measures (575/1988).

forensic psychologist, psychiatrist, pediatrician, or some other expert<sup>332</sup> and older by the investigation authorities, the police that is.<sup>333</sup> The aim is that the child will not be heard more than three times.<sup>334</sup>

Executing a recorded pre-trial hearing in accordance with the aforementioned requirements is also in line with the child's best interests and makes it possible that the child will not be heard personally in court trial. There are no legislative barriers however, to do so.<sup>335</sup> In this arrangement the most significant aspect of protecting the child is that he or she does not have to deal with the criminal matter after the preliminary investigation has been executed. However, a child older than fifteen years of age cannot be heard in preliminary investigation, but will have to come before court to be heard.<sup>336</sup> At the moment this is considered as a clear flaw and thus there seems to be a general consensus that the situation should be changed in the near future.

What has been problematic for a long time is that contrary to the Criminal Investigations Act s 39 a, the defendant has not always been given an opportunity to present questions to the person being heard. In these cases the recording from the hearing cannot be used as evidence in the proceedings due to a procedural fault and hence in the worst case the sentence will not be given.

- viii. Normally the custodians (the persons responsible for care and custody) of a minor shall also act as their trustees and statutory representatives as provided in the Guardianship Services Act<sup>337</sup> c 2, s 4 (1). According to the Criminal Procedure Act c 1, s 4 (1), a custodian represents a minor also in the criminal cases related to the person of a minor unless otherwise provided. This means that the custodian or another legal representative exercises the rights of a minor and pleads for them, as provided in the Code of Judicial Procedure c 12, s 1. However, a minor who has attained fifteen years of age shall have an independent right to be heard in a matter concerning their person, parallel to that of the person responsible for their care and custody or their other legal representative. As mentioned

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<sup>332</sup> Hirvelä, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa*, p. 196 and 362, see also HE 52/2002, p. 47.

<sup>333</sup> Hirvelä, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa*, p. 326.

<sup>334</sup> Taskinen, p. 76.

<sup>335</sup> HE 190/2002, p. 23.

<sup>336</sup> Provided e.g. in the Code of Judicial Procedure c 17, s 11 (2).

<sup>337</sup> Guardianship Services Act (442/1999).

above, the minor's parallel right of action, specifically the right to bring a charge, is noted in the Criminal Procedure Act, where in c 1, s 4 (3) it is provided that if a minor is at least fifteen years of age, he or she shall have a right parallel to that of the custodian or other legal representative to request that a charge is brought for an offence directed at their person.

If in a criminal case concerning the child's person there is a contradiction between the opinions and interests of a custodian and a child, the child can be appointed another person to plea for him or her (a guardian). As it is provided in c 2, s 10 (3) of *Laki sosiaalihuollon asiakkaan asemasta ja oikeuksista*, the *Act of Position and Rights of a Social Welfare Client* (812/2000), the guardianship authorities<sup>338</sup> have been given a right to act in such contradictory cases. According to the mentioned provision, if in a matter concerning the person of the child there is a reasonable doubt that the custodian cannot impartially guard the best interests of the child, the guardianship authorities shall file for a petition for the appointment of a guardian to a court<sup>339</sup> or notify the same to the guardianship authorities regardless of any duty of confidentiality<sup>340</sup>.

The Ministry of Social Affairs and Health has provided a guide book to guide the authorities with applying the provision in question. According to the guide book, a contradictory situation prevails when objectively assessed, there is a reason to assume, that the custodian cannot impartially supervise the best interests of the child.<sup>341</sup> The impartiality of a legal representative is endangered for example when the adverse party is the custodian himself or herself or their spouse or another person close to the family. There is a contradiction when the custodian or a person close to him or her is suspected of having maltreated or sexually abused the child.<sup>342</sup> The notification shall always be made if it turns out that the parents do not want to act in a matter or if the parents are blaming each other.<sup>343</sup> In a guide book provided by STAKES it is recommended to evaluate the need of a guardian in all cases of sexual abuse of a child that are suspected to have happened within his or her family.<sup>344</sup>

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<sup>338</sup> In Finland maistraatit, *the magistrates*, practice the duties of the Guardianship Authorities.

<sup>339</sup> Referred to in the Guardianship Services Act c 8, s 72.

<sup>340</sup> Referred to in the Guardianship Services Act c 10, s 91.

<sup>341</sup> STM, (2001:11), *Sosiaali- ja terveysministeriön oppaita 2001:11, Sosiaalihuollon asiakkaan asema ja oikeudet*, Helsinki, 2001, p. 41.

<sup>342</sup> STM, (2001:11), p. 41.

<sup>343</sup> Hirvelä, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa*, p. 332.

<sup>344</sup> Taskinen, p. 121.

The regulations concerning designation of a guardian are provided in the Child Welfare Act. According to the mentioned Act c 4, s 22, a guardian to deputize for a custodian in exercising the child's right of action in a child welfare case shall be designated if the following circumstances apply: 1) There is a reason to assume that the custodian is unable to supervise the child's interests in the case without prejudice; and 2) Designation of a guardian is necessary in order to investigate a case or otherwise to safeguard the interests of the child.

An application for designating a guardian may be submitted by a registry office functioning as guardianship authority as laid down in the Guardianship Services Act, or by a municipal body responsible for the social services, or by the custodian. The designation of a guardian can be made by a registry office functioning as the guardianship authority if the custodian and the municipal body responsible for the social services concur with the decision. The guardian shall otherwise be designated by a court of law. According to the Child Welfare Act c 4, s 22, the designation of a guardian is subject to the provisions concerning designation of a guardian's deputy laid down in the Guardianship Services Act or in another act.

The provisions on designation of a guardian are going to clear along with a new Criminal Investigations Act.<sup>345</sup> According to the new Act c 4 s 8, the court shall order a guardian for a party less than eighteen years of age for the investigation if there are reasonable grounds to believe that the custodial parent or other legal representative cannot impartially guard the best interests of the child in the case, and if the designation of a guardian is not clearly unnecessary. The officer in charge shall, where needed, submit the application for designating a guardian to the court. The application can also be submitted by the prosecutor, the guardianship authorities adverted to in the Guardianship Services Act (magistrate) or the Social Authorities referred to in *Sosiaalihuoltolaki, the Social Welfare Act* (710/1982) s 6 (1). According to the new Criminal Investigations Act, the court's designation of a guardian will be in effect until the end of the criminal proceedings for which preliminary investigation the designation was issued.<sup>346</sup>

The injured party has a right to have a counsel in sex offence cases. The right does not depend on the party's financial situation, but every injured party in specific cases has a right

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<sup>345</sup> The Criminal Investigations Act (449/1987) was overruled by the new Criminal Investigations Act (805/2011). The new Act will come into effect in January 2014.

<sup>346</sup> Criminal Investigation Act (805/2011) c 4, s 8.

to get a counsel that is paid by the government. According to the Criminal Procedure Act c 2, s 1 a, a court may appoint a counsel for the injured party for the investigation and, where the injured party has a claim in a case prosecuted by the prosecutor, for the trial in a case relating to a sexual offence referred to in c 20 of the Criminal Code. The right is conditional, and presupposes that it is not deemed unnecessary for a special reason. Under conditions referred to in c 2, s 1 a of the Criminal Procedure Act, an adequately qualified support person may be appointed for the injured party if it is deemed that he or she needs assistance in the investigation or in the trial in an offence referred to in c 20 of the Criminal Code. According to the Criminal Procedure Act, c 2, s 3, the aforementioned applies when the injured party does not make a claim in the trial but is being heard in person in order to resolve the case.

Before the amendment 243/2006 to the Criminal Procedure Act, attendants to help and support the complainant, counsels and support persons that is, were alternative, and the injured party could not have been appointed a support person if he or she was appointed a counsel for the trial.<sup>347</sup> The alternative nature of these different kinds of attendants was considered a clear deficiency, and thus got removed with the amendment in 2006. In addition to the aforementioned, the injured party's right to a support person is assured also in the Code of Judicial Procedure. According to the Code of Judicial Procedure c 17, s 21 (1), a person who has not reached the age of fifteen can be heard as a witness or for probative purposes if the court deems this appropriate and if hearing this person personally is of central significance to the clarification of the matter; and if hearing the person would probably not cause the said person suffering or other harm that can injure him or her or his or her development. The court shall, when necessary, appoint a support person for the person to be heard to whom the provisions in c 2 of the Criminal Procedure Act are applied to.<sup>348</sup> However, due to the amendments in the Criminal Procedure Act, this specific provision no longer brings any additional value to assisting a child during the procedure.

The task of the counsel is to take care of the judicial interests of the injured party. According to the Criminal Procedure Act, c 2, s 7, a counsel shall as soon as possible confer with the injured party and undertake the measures necessary for upholding the rights of the client -

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<sup>347</sup> Hirvelä, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa*, p. 335.

<sup>348</sup> Code of Judicial Procedure, c 17, s 21 (2).

also on appeal in a higher court if needed. The support person is to provide personal support to the injured party in the investigation and in the trial and assist him or her in the matters arising from the resolution of the case, as it is provided in the Criminal Procedure Act, c 2, s 9. In sex offence cases the victim, a child especially, often needs mental support regardless of the requirements set out in the case. A support person is considered essential because the counsel cannot be expected to carry out to provide the needed mental support alongside taking care of the more concrete duties.<sup>349</sup>

According to the Criminal Procedure Act, c 2, s 1 a, the injured party's right to a counsel is dependent on the complainant's own claim in the case. There have been conflicting opinions in the Finnish forensic literature on whether the injured party is ineligible for a counsel if he or she only parallels to the prosecutor's prosecution.<sup>350</sup> Some authors state that a lack of an independent claim excludes the right to a counsel<sup>351</sup> whereas some think the phrasing of the provisions do not create barriers for appointing a counsel in such case<sup>352</sup>. The injured parties may want to self-monitor their own interests e.g. in hearing of the witnesses or to reserve the right to submit a claim for damages later on in the procedure.

Appointing of a counsel or a support person has been made as easy as possible. In principle, the authorities unprompted inform the injured party about the right to an attendant. According to the Investigations Act s 29 (3), the injured party must be informed prior to the hearing if he or she is ineligible for a counsel or a support person or for both. The authorities may also, according to the Investigation Act s 10 (2), act on their own initiative in appointing an attendant. The prosecutor or the officer in charge of the investigation can put out a motivation to a court of law for appointing an attendant. Also the court can appoint an attendant unprompted in the beginning of the court proceedings, although this is normally not necessary, for the injured party's need of an attendant has been met already earlier in the process.

Given the aforementioned, a child may at least in principle have several persons to support and assist him or her in the criminal procedure: own parent as a custodian; a guardian to

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<sup>349</sup> Hirvelä, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa*, p. 335.

<sup>350</sup> Hirvelä, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa*, p. 336.

<sup>351</sup> J. Virolainen, *Rikosprosessioikeus I*, Pandecta Oy, Rovaniemi 1998, p. 206; D. Frände, *Finsk straffprocessrätt I*, Forum Iuris, Helsinki 1999, p. 307.

<sup>352</sup> Hirvelä, *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa*, p. 336.

exercise the child's right of action if the opinions and interests of a child and a parent are in collision; a support person to provide mental support and a counsel to take care of the child's judicial interests. Generally the roles combine and the same person acts as a guardian and as a counsel. In most of the cases the child's best interests are also the parent's best interests, hence there is no need for a guardian, and so a custodian acts as a mental supporter and pleads for the child.

### *Minors and publicity of a trial*

When analyzing a trial there are several points regarding publicity that ought to be noticed. First of all there is the publicity of the basic information of the case e.g. the specified crime, the role of a prosecutor and the name of the parties. The basic information of a case is normally public, and some of the information cannot even be ordered to be kept secret. However, a court may order the identity of the injured party in a case prosecuted by a prosecutor to be kept secret. According to the Act on Publicity of Court Proceedings in General Courts c 2 s 6, (1) (1), rejecting the publicity of the identity of the injured party in a criminal case requires that the case concerns a particularly sensitive aspect of the private life of a party (as the case often is in sex crimes). According to a recently published research on publicity in court proceedings in general courts by Rebecca Kadoch, 56 % of all the crimes before the District Courts in which the identity of the injured party was kept secret were sex crimes where the victim was a child or a young adult under eighteen years of age.<sup>353</sup>

Secondly comes up the question about the publicity of the trial documents. The trial documents become public as provided in c 3, s 8 of the Act on Publicity of Court Proceedings in General Courts. A trial document shall be kept secret to the extent that it contains sensitive information regarding matters relating to the private life, health, disability or social welfare of a person.<sup>354</sup> The court may, on the request of a party or also for a special reason, decide that a trial document shall be kept secret to the extent necessary if it contains

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<sup>353</sup> R. Kadoch, *Oikeudenkäynnin julkisuus yleisissä tuomioistuimissa*, Oikeuspoliittisen tutkimuslaitoksen tutkimustiedonantoja 112, Hakapaino Oy, Helsinki 2012, p. 35. The study was executed by collecting information of cases closed in Finnish district courts from 1 November 2009 to 30 April 2010. The study was executed by National Research Institute of Legal Policy, which is an institute that produces independent research on crime, and justice, which supports planning and decision-making in criminal and legal policy. The academic framework is multidisciplinary, combining particularly the disciplines of law and social science.

<sup>354</sup> Act on Publicity of Court Proceedings in General Courts, c 3, s 9, subs 1 (2).



information which is to be kept secret on the basis of the provisions of another Act and revealing this information would probably cause significant detriment or harm to the interests that said secrecy obligation provisions are to protect.<sup>355</sup>

Oral proceedings in a trial are in principle public unless the court orders on the basis of c 4, s 15 of the Act on Publicity of Court Proceedings in General Courts that the oral proceedings shall be held without the presence of the public.<sup>356</sup> S 15 includes a list of 7 items and if any of them applies, the court may, on the request of a party of the case or also for a special reason, decide that oral proceedings shall be held in full or to the necessary extent without the presence of the public. According to the item 6, the trial might be imposed to be held closed, if a person below the age of fifteen years or a person whose legal capacity is limited is heard in the case. As mentioned earlier in this study report, in most of the cases the child is not heard anymore in the trial, but the decision about a closed proceedings can also be made based on the item 2, if sensitive information regarding matters relating to the private life, health, disability or social welfare of a person is presented in the case. The information to be revealed during the hearing in a sex crime usually is sensitive. Therefore, according to the study, slightly over 50 % of all the crimes before the District Courts whose oral proceedings were not public, were sex crimes where the victim had not reached the age of eighteen.<sup>357</sup>

Finally there is the question about the publicity of the court's ruling. According to the Act on Publicity of Court Proceedings in General Courts, c 5, s 22 (1), this information is public. However, the court may order the decision to be kept secret to the necessary extent if the ruling contains information which is to be kept secret in accordance with s 9 (secrecy of a trial document); information which has been ordered to be kept secret in accordance with s 10 (an order regarding secrecy); or secrecy of information that was protected by the holding of oral proceedings without the presence of the public.<sup>358</sup> The conclusions of the decision and the legal provisions applied are always public, even in such cases mentioned above, where the publicity of the decision has been limited. According to the Act on Publicity of Court Proceedings in General Courts, c 5, s 24 (2), the court may, however, order the

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<sup>355</sup> Act on Publicity of Court Proceedings in General Courts c 3, s 10.

<sup>356</sup> Act on Publicity of Court Proceedings in General Courts, c 4, s 14.

<sup>357</sup> Kadoch, p. 104.

<sup>358</sup> Act on Publicity of Court Proceedings in General Courts, c 5, s 22 (1).

identity of the injured party in a criminal case, if said case concerns a particularly sensitive aspect of the victim's private life, to be kept secret unless the party in question requests otherwise.

Nonetheless, a public caption on the matter referred to in the Act on Publicity of Court Proceedings in General Courts c 5, s 25 shall be given at all times, if the matter is of social importance, or it has generated considerable interest in public also in the cases in which the decree itself is ordered to be kept secret. The caption includes an outline of the matter and of the justification. Nowadays, however, the court's decrees as a whole tend to be written in a way that the conclusions and the justification can become public without disclosing the identity of the injured party.

There are no specific provisions concerning the presence of the media in a trial, but the Act on Publicity of Court Proceedings in General Courts provides the rules for recording of the oral proceedings. Naturally recording of a trial is possible only if the trial in question is public, hence recording will not come in question if the trial is ordered to be kept secret. In public proceedings, someone other than the court may take a photograph, tape record or in comparable manner record and transfer video and audio signals outside the court room by technical means only with the permission of the chairperson and in accordance with their instructions as it is provided in the Act on Publicity of Court Proceedings in General Courts c 4, s 21 (1). However, according to c 4, s 21 (2) of the Act on the Publicity of Court Proceedings in General Courts, a permission for recording before the beginning of consideration of the case or when the decision of the court is pronounced shall not be granted if there is a cogent reason for dismissing it. In law drafting work, the age of the parties has been given as an example of a cogent reason.<sup>359</sup>

All the aforementioned provisions are to protect victims to whom the publicity of the proceedings or the trial can cause significant detriment or harm. These groups are either the victims of unusually unpleasant and humiliating crimes (e.g. sex crimes), or children. As expressed above, the statistics show that as for the secrecy, the objectives of the law have been achieved. The study by Rebecca Kadoch shows that regardless of the area of publicity,

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<sup>359</sup> HE 13/2006, p. 62.

the majority of all the cases where the publicity had been limited were sex offences<sup>360</sup> where the victim was under eighteen years of age.

## 4 COMPLEMENTARY MEASURES

### *Preventive Measures*

- vii. Professionals such as personnel of public health, education, voluntary work and people working in criminal procedure must be educated to confront sexually abused children. Information and material should be spread effectively to professionals. There are guides and handbooks concerning sexual exploitation and abuse for diverse educational usage.<sup>361</sup>

In 2007, Ministry of Social Affairs and Health compiled a plan of action for years 2007-2011 to promote sexual and reproduction health. The aim of the plan of action is to improve preparedness of schools', public service of social welfare's and public health's personnel to identify diagnostics of children who have been victims of sexual violence. The plan of action requires that people working in field of social welfare and health care, teaching and education should be informed of sexual abuse as a part of their compulsory education.<sup>362</sup>

Personnel of public health are educated in many ways. In 2001, doctors received instructions on how to treat and examine sexually abused children. These instructions were published in a journal called *Duodecim*<sup>363</sup>. In 2006, the treatment recommendation was updated by a working group set by the *Suomalainen Lääkäriseura Duodecim*, *Finnish Medical Society Duodecim* and *Suomen Lastenpsykiatriyhdistys*, *Finnish Society for Child and Adolescent Psychiatry*. The aim of treatment recommendation is to improve and develop good practise in public health while investigating a suspicion of child's sexual abuse. The treatment recommendation is directed to professionals in public health but it also informs child welfare inspectors, police and judicial officers.<sup>364</sup>

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<sup>360</sup> Kadoch, p. 28 – 29.

<sup>361</sup> HE 282/2010 p. 22.

<sup>362</sup> HE 282/2010 p. 23.

<sup>363</sup> Duodecim is a scientific society with almost 90% of Finnish doctors and medical students as members. Duodecim Medical Publications Ltd. carries out the Society's mission to publish medical information. Homepage of The Finnish Medical Society Duodecim. Viewed on 13 September 2012, <<http://www.duodecim.fi/web/english/home>>.

<sup>364</sup> HE 282/2010 p. 22.

In 2003, a working group set by Ministry of Social Affairs and Health finished a recommendation on how to detect children's assault and sexual abuse. Centre for Research and Development of Welfare and Health called STAKES<sup>365</sup> published the recommendations in a comprehensive guide. The specification describes how to make a child welfare notification, how to report an offence, how to examine acute situations in hospital emergency room, how to make a clearance requested by the police in hospitals and family clinics, how to perform a child's interview, how to rule a guardian to a child and how to petition a restraining order. There are also other guides published by STAKES and Västoliitto, *The Family Federation*<sup>366</sup>. Purpose of these guides is to offer tools for professional to confront sexually mistreated children. In 2004 and 2005, STAKES organised two long trainings to therapists and nursing personnel. In Finland, the obligations of continuing training are concerned in *Laki terveydenhuollon ammattihenkilöistä, Act on Health Care Professionals* (559/1994) and *Social Welfare Act* (710/1982).<sup>367</sup>

In school legislation, monitors of education have an obligation to devise a plan in pursuance of a syllabus. It must include a plan to protect students from violence, bullying and harassment. The plan must be implemented and its execution must be monitored. Measures and distributions to prevent crisis and problem situations must be described as a part of syllabus. The sexual harassment retains sexual exploitation and sexual abuse. The employer and the personnel itself are primary responsible for educating personnel.<sup>368</sup>

NGOs like Raiskauskriisikeskus Tukinainen, *Rape crisis centre Tukinainen*<sup>369</sup> educates and guides professionals who confront people that have experienced sexual violence.<sup>370</sup> The effects of sexual violence to individuals and guidance on judicial and psychological matters are discussed in Tukinainen's education. Rape crisis centre Tukinainen organizes also special

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<sup>365</sup> STAKES (National Research and Development Centre for Welfare and Health) was an expert agency whose key functions were research, development and statistics. Since 2009 STAKES has been a part of the National Institute for Health and Welfare.

<sup>366</sup> The Family Federation is a social and health sector organization focusing on families. The Federation provides services, acts as an advocate and carries out research. Homepage of the Family Federation, viewed on 28 September 2012, <[http://www.vaestoliitto.fi/in\\_english/](http://www.vaestoliitto.fi/in_english/)>.

<sup>367</sup> HE 282/2010 p. 22-23.

<sup>368</sup> HE 282/2010 p. 23.

<sup>369</sup> Rape crisis centre Tukinainen is for them, who have been sexually assaulted and also a national resource centre. Homepage of the Rape Crisis Centre Tukinainen. Viewed on 17 September 2012, <[http://174.132.188.98/~tnainen/in\\_english](http://174.132.188.98/~tnainen/in_english)>.

<sup>370</sup> HE 282/2010 p. 23.

education to certain occupational groups such as teachers, public health nurses and personnel of public health. In addition to education, Tukinainen has a project that educates and counsels how to confront decorously and appreciatively customers who have experienced sexual violence.<sup>371</sup> Project is followed through with Police College of Finland and Finland's Slot Machine Association, called RAY<sup>372</sup> funds it.<sup>373</sup>

The Lanzarote convention article 36(1) obliges that education must be organised also to people involved in criminal procedure. In 2010, Ministry of Justice organised education in association with Rape crisis centre Tukinainen. The subject of the education was how to confront a victim of sexual abuse. It was organised for trial counsels and judges of general courts. Also in 2010, education about legal psychology and hearing of a child in court was organised.<sup>374</sup> Education and the updating of education should be organised regularly.<sup>375</sup>

The Lanzarote convention article 34(1) requires that personnel, units and facilities responsible for investigation are specialised and educated in prevention of children's sexual exploitation and abuse. One possible realisation of the Lanzarote convention article 34(1) in Finland is the so-called Lastentalo -malli, *Child house model*. It gathers all the service from different sectors in one place.<sup>376</sup> All the detection happens in one place and one educated professional makes the interview. The most important is the co-operation between different authorities.<sup>377</sup>

Decree on Preliminary Investigation and Coercive Measures (575/1988) legislates children's treatment in preliminary investigation. According to section 11 of the decree, investigation measures must be given to a policeman specialised in this assignment. The authority of preliminary investigation must consult a doctor or other expert if the investigation measures can be made. The police have educated its personnel to interview children and the hearing of children is centralised on certain policemen. Police College of Finland organises every

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<sup>371</sup> HE 282/2010 p. 24.

<sup>372</sup> RAY grant funding is collected from slot machine and casino gaming operations, and it is channelled to health and social welfare organisations. Homepage of RAY. Viewed on 17 September 2012, <<https://www.ray.fi/en/beneficiaries/results/facts>>.

<sup>373</sup> HE 282/2010 p. 24.

<sup>374</sup> HE 282/2010 p. 94.

<sup>375</sup> HE 282/2010 p. 95.

<sup>376</sup> HE 282/2010 p. 89-90.

<sup>377</sup> HE 282/2010 p. 91, see more about the child house model Sosiaali- ja terveystieteiden ministeriön selvityksiä 2009:30 p. 48.

year education concerning preliminary investigation. Keskusrikospoliisi, *National Bureau of Investigation* has a unit specialised on child pornography crimes.<sup>378</sup> There are also key prosecutors that specialise on certain types of crimes e.g. sex offences. This group of prosecutors is educated regularly.<sup>379</sup>

In 2006 Päivi Hirvelä<sup>380</sup> published doctoral thesis called *Rikosprosessi lapsiin kohdistuvissa seksuaalirikoksissa*, *Criminal procedure in sex offences against children*. It is made especially for prosecutors, attorneys, judges, policemen and any professionals that work with sexually mistreated children.<sup>381</sup>

There are also some important quarters of organizational activities that educate voluntary workers. Suomen liikunta ja urheilu, *Finnish sports federation*, later SLU serves as an umbrella organisation for all of its member organisations. In 2004, SLU developed *Reilun pelin periaatteet*, *Principles of fair play*. These principles are compiled to protect children from sexual exploitation and abuse and these principles count among for example non-violence, prevention of sexual harassment and respect for other people. In 2002, SLU has compiled a guide called *Lupa välittää- lupa puuttua. Sukupuolinen ja seksuaalinen häirintä liikunnassa ja urheilussa*, *Permit to care, permit to step in. Sexual harassment in physical education and sports*. The guide contains information about sexual harassment and abuse and it also contains codes of conduct to prevent and solve sexual harassment and abuse. In education of sport instructors and coaches SLU strives to increase the awareness of the prevention of children's sexual abuse.<sup>382</sup>

The Lanzarote convention article 5(3) demands that each party shall take the necessary legislative or other measures, in conformity with its internal law, to ensure that the conditions to accede to those professions whose exercise implies regular contacts with children ensure that the candidates to these professions have not been convicted of acts of sexual exploitation or sexual abuse of children. The chapter concerns only professional activity not voluntary workers.<sup>383</sup> In Finland, there is *Laki lasten kanssa työskentelevien*

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<sup>378</sup> HE 282/2010 p. 90.

<sup>379</sup> HE 282/2010 p. 91.

<sup>380</sup> Päivi Hirvelä is a Finnish Doctor of Jurisprudence.

<sup>381</sup> HE 282/2010 p. 23.

<sup>382</sup> HE 282/2010 p. 23.

<sup>383</sup> HE 282/2010 p. 24.

rikostaustan selvittämisestä, *Act on Checking the Criminal Background of Persons Working with Children* (504/2002). According to section 2 of the Act, it applies to work performed in employment and civil service relationships which involves, on a permanent basis and to a material degree and in the guardian's absence, raising, teaching or caring for or looking after a minor or other work performed in personal contact with a minor. According to section 3 of the Act, an employer must ask a person to produce an extract from the criminal record when the person is employed or appointed for the first time to such a position or when such work is assigned to that person for the first time. According to section 10 of the Act, anyone who wilfully or through gross negligence fails in his duty to obtain a person's criminal record shall be sentenced to pay a fine, unless more severe punishment is prescribed elsewhere in the law.

In Finland, neither the Act on Checking the Criminal Background of Persons Working with Children (504/2002) nor other legislation stipulate a prohibition to work with children if a person has been convicted of a sexual crime. However, procedure to check the criminal background strives to prevent sex offenders to work with children. The employers consider the suitability of each job applicant.<sup>384</sup> A criminal record extract costs 13.40 euros. It is free for students who need it for practical training period.<sup>385</sup>

In 2009, a member of the Finnish Parliament Antti Kaikkonen (the Centre Party) proposed kirjallinen kysymys, *an interrogatory* related to demanding criminal record extract from voluntary workers working with children. Kaikkonen said that demanding a criminal record would protect children and advance supervisions could pre-empt paedophilia cases. The Minister of Culture and Sport, Stefan Wallin (Swedish People's Party), answered that there are over half a million people in club activities and it is possible that people convicted of sex offences take part of voluntary work. Clubs and organisations are always responsible for supervision. Strict monitoring is foreign to Finnish voluntary work and it could lead to reduction of voluntary workers. In addition, demanding of criminal records could lead to a significant increase in the number of criminal record extracts being asked, and could therefore be hard to realise in practice. There could also arise some judicial issues. Wallin

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<sup>384</sup> HE 282/2010 p. 25.

<sup>385</sup> The Legal Register Centre public portal. Viewed on 3 September 2012, <[www.oikeus.fi/oikeusrekisterikeskus](http://www.oikeus.fi/oikeusrekisterikeskus)>.

said that the most important thing is to develop preventive measures and operate openly.<sup>386</sup> It is possible that Finland will make some minor changes to legislation related to Act on Checking the Criminal Background of Persons Working with Children.<sup>387</sup>

- viii. The objectives of the Lanzarote convention article 6 are already secured in children's and the youth's education. National Board of Education has compiled a syllabus for every educational level. Pre-emptive education of sexual exploitation and abuse is part of sexual education, which in turn is part of health education.<sup>388</sup> In the Lanzarote convention article 6, school is not mentioned as specific provider of information. Although some children are in home schooling information can be provided also in other ways. Information about sexual exploitation and sexual abuse is best to affiliate with sexual education in common. Information must be given to children appropriate to their age and level of development. The information given to children should not diminish their trust to adults. The responsibility of giving information belongs primary to parents. However, in some situations when parents are part of sexual abuse or due to cultural differences open conversation is impossible. Sometimes children could be more responsive when a teacher, a doctor or a psychologist presents the information.<sup>389</sup>

Sexual education is wide-ranging and it should increase awareness and knowledge. Publication called WHO:n Seksuaalikasvatuksen standardit Euroopassa, *Standards for Sexuality Education in Europe - A framework for policy makers, educational and health authorities and specialists* serves as a guideline to sexual education in Finland. There are also other guides and material to educate children.<sup>390</sup> Ministry of Social Affairs and Health has published a guide for student health care. It is the first publication that gives directions nationwide and it includes central aims of student health care.<sup>391</sup> There are also other guides and instructions

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<sup>386</sup> KK 1111/2009.

<sup>387</sup> See more on question Academic Framework- Questionnaire, International obligations, v.

<sup>388</sup> HE 282/2010 p. 27.

<sup>389</sup> HE 282/2010 p. 26.

<sup>390</sup> National Institute for Health and Welfare public portal. Viewed on 18 September 2012, <[http://www.thl.fi/fi\\_FI/web/fi/aiheet/tietopaketti/amis/seksuaaliterveys/seksuaalikasvatus](http://www.thl.fi/fi_FI/web/fi/aiheet/tietopaketti/amis/seksuaaliterveys/seksuaalikasvatus)>.

<sup>391</sup> Ministry of Social Affairs and Health public portal. Viewed on 18 September 2012, <[http://www.stm.fi/julkaisut/nayta/-/\\_julkaisu/1058703](http://www.stm.fi/julkaisut/nayta/-/_julkaisu/1058703)>.



given to school public health nurses and other professionals. These guides give tools to confront young people.<sup>392</sup>

In 2005 STAKES<sup>393</sup> published a guide called *Turvataitoja lapsille, Protection skills for children*. The guide can be used to educate children in secondary school and upper secondary school and it has instructions how to recognize and avoid threatening situations. Children should talk to a safe adult if they are worried. The aim of the guide is to encourage children to think themselves and to learn from their experiences.<sup>394</sup>

Viestintä- ja mediataito, *Communicative and media skills* is a syllabus for primary, secondary and upper secondary school. The subject gives young people tools to react critically to media and the central point is to teach students to look after their privacy, security and data protection while using the media. Ministry of Transport and Communications established Lasten ja nuorten mediafoorumi, *Media forum for children and young people*. Its aim is to decrease harmful contents of Internet and media, and also to decrease risks and harm that are caused to children.<sup>395</sup>

NGOs have also an important role in media education. For example Mannerheimin lastensuojeluliitto, *the Mannerheim League for Child Welfare*<sup>396</sup> has produced plenty of material for children's, and for parents to use in connection with upbringing. The organisation maintains an online service called Nuorten netti, *Internet for young*. Also Pelastakaa lapset, *Safe the children Finland* has published material to improve children's media skills and the safe use of communication and information technology.<sup>397</sup> Ihmisoikeudet.net<sup>398</sup> has published a campaign called Mun rajat!, *My limits!*. The campaign encourages teachers and children to

<sup>392</sup> National Institute for Health and Welfare public portal. Viewed on 18 September 2012, <[http://www.thl.fi/fi\\_FI/web/fi/aiheet/tietopaketti/amis/seksuaaliterveys/opiskeluterveydenhuolto](http://www.thl.fi/fi_FI/web/fi/aiheet/tietopaketti/amis/seksuaaliterveys/opiskeluterveydenhuolto)>.

<sup>393</sup> STAKES (National Research and Development Centre for Welfare and Health) was an expert agency whose key functions were research, development and statistics. Since 2009 STAKES has been a part of the National Institute for Health and Welfare.

<sup>394</sup> HE 282/2010 p. 27.

<sup>395</sup> HE 282/2010 p. 27.

<sup>396</sup> The Mannerheim League for Child Welfare is the largest child welfare organization in Finland. It promotes the wellbeing of children and of families with children, increases respect for childhood and seeks to make it more visible, and sees that children's views are taken into account in public decision-making. Homepage of the Mannerheim League for Child Welfare. Viewed on 17 September 2012, <<http://www.mll.fi/en/>>.

<sup>397</sup> HE 282/2010 p. 27-28.

<sup>398</sup> Ihmisoikeudet.net is a website that is common project of Finnish section of Amnesty international, Finnish League for Human Rights, UN Association of Finland and OneWorld network. Homepage of Ihmisoikeudet.net. Viewed on 17 September 2012, <<http://www.ihmisoikeudet.net/>>.

create a safe environment together, and the message of the campaign is that sexual self-determination belongs to everyone as a human right.<sup>399</sup>

Ministry of Justice has set a working group to prepare a guide called *Lapsi rikoksen uhrina, Child as a victim of a crime*. It is directed to parents whose children have experienced sexual abuse. The aim is to provide information of central points of criminal procedure and improve the position of children. The guide will be published online in Spring 2013.<sup>400</sup>

- ix. In Finland, there are no specific intervention-programmes to prevent children's sexual abuse. People who fear that they might commit a sexual crime can seek help from a mental health clinic if the problem can be considered as mental. Special plans of action and individual therapy can be seen to be effective to prevent sex offences. The problem of these programmes is that they are usually realised in form of groups. Finland is a sparsely inhabited country so the programmes are hard to execute in real life. There are not so many therapists educated to prevent sex offences, and sometimes, if a person is afraid that he or she will commit a sex offence it can be difficult to get public mental health service.<sup>401</sup>

Nevertheless, there is an intervention programme that is organised to sex offenders convicted to unconditional imprisonment. STOP- programme (Sex Offender Treatment Programme) decreases recidivism of sex offences. Working in STOP-programme takes place in groups of 7 to 8 people. The main content of the programme is to become aware of scheme of things and operations model of sex offences. Prisoners also become aware of harm caused to victims and they practise skills of non-criminal life. Prisoners take part in groups sessions 3 to 5 times a week and they have in total 180 hours of group sessions. STOP-programme takes eight months and it is organised in Riihimäki prison. Convicts who apply to STOP programme must have over 8 months of imprisonment left so they can follow the programme through.<sup>402</sup> Within the limits of legislation, it is possible to organise programmes like STOP-programme outside prison and also before a person is convicted of

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<sup>399</sup> Homepage of Ihmisoikeudet.net. Viewed on 18 September 2012, <<http://www.ihmisoikeudet.net/index.php?page=mista-on-kysymys>>

<sup>400</sup> Ministry of Justice public portal. Viewed on 18 September 2012, <<http://www.om.fi/Etusivu/Valmisteilla/Kehittamishankkeita/1330603625912>>.

<sup>401</sup> HE 282/2010 p. 28.

<sup>402</sup> The Criminal Sanctions Agency public portal. Viewed on 1 September 2012, <[www.rikosseuraamus.fi/6349.htm](http://www.rikosseuraamus.fi/6349.htm)>.

a sex offence. The main objective is to alleviate anxiety and to prevent criminal conduct. Medical attention to distress and psychosocial care is possible if the person is willing.<sup>403</sup>

The biggest single service provider in Finland, for programmes mentioned in the Lanzarote convention article 7, is Sexpo- foundation<sup>404</sup>. Sexpo organises a help line service, an Internet service and single therapy sessions for people who may commit a sex offence. These services are free of charge. Sexpo organises also short-term and long-term therapy and these services are subject to charge.<sup>405</sup> There are a few sexual therapists that work in Sexpo- foundation. All the therapists work in metropolitan area. Therefore the possibilities to seek treatment for people living in other parts of Finland are inadequate. Service is subject to a charge and that also limits possibilities to seek treatment.<sup>406</sup>

People who have taken part in STOP-programme in prison often continue therapy sessions in Sexpo- foundation. The problem is that people who seek treatment are often not that wealthy. Sexpo co-operates with Kriminaalihuollon tukisäätiö<sup>407</sup>, later Krits and together they strive to apply financial aid to offer therapy treatment to people who have been convicted to a short, suspended sentence or to people who fear they may commit a sex offence. So far Sexpo-foundation and Kriminaalihuollon tukisäätiö haven't got financial aid from Finland's Slot Machine Association RAY or other founders. In Sweden, there is an operations model working online called "www.preventell.se". Preventell.se is for those who feel they have lost control of their sexual behaviour, who are perhaps worried about their thoughts and actions, or who are afraid they might hurt themselves or someone else. Sexpo- foundation strives to offer similar sort of help line and treatment to people who fear they might commit a sex offence.<sup>408</sup>

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<sup>403</sup> HE 282/2010 p. 28.

<sup>404</sup> Sexpo Foundation has been working to promote sexual wellbeing in Finland since 1969. Its functions include varied services such as counselling, therapy, consultation and education in matters of sexuality and relationships. Homepage of Sexpo Foundation. Viewed on 18 September 2012, <<http://www.sexpo.fi/sexpo-in-english/>>.

<sup>405</sup> Phone interview with the head of training division and a psychotherapist of Sexpo- foundation Jussi Nissinen on 9 October 2012.

<sup>406</sup> HE 282/2010 p. 28.

<sup>407</sup> Kriminaalihuollon tukisäätiö (NGO) is a non-profit after-care foundation for sentenced offenders and their families. The purpose of Krits is to improve the deprived status and living conditions of released prisoners and clients of community sanctions and their families in the society.

<sup>408</sup> Phone interview with the head of training division and a psychotherapist of Sexpo- foundation Jussi Nissinen on 9 October 2012.

“Probationary liberty under supervision” is enacted in Criminal Code c 2c s 8. According to the Government Bill 140/2012, sex offender’s commitment to medication would be a condition to probationary liberty under supervision. Medication is expected to prevent recidivism of sex offences.<sup>409</sup> Medication would be started in prison. Sex offender would be obligated to take part of the medication also in conditional release, after probationary liberty under supervision.<sup>410</sup> Sex offender must give a written consent to medication and a doctor must explain all the effects of the medication.<sup>411</sup> At the most 10 sex offenders would start the medication every year. Total expenses of medication and psychological treatment would be under 20 000 euros per one person per annum.<sup>412</sup>

According to Helsingin Sanomat<sup>413</sup>, Åbo Akademi University’s<sup>414</sup> court of inquiry aims to start a new sort of treatment to paedophiles. The treatment provides preventative therapy to men who belong to the risk group. The model for the treatment is from Germany and there the results have been encouraging.<sup>415</sup> The treatment would work in same cognitive-behaviouristic structure as STOP- programme and it would strive patients to identify their impulses and risk-situations. Treatment also contains a so-called good lives-model<sup>416</sup> where patients search for and focus on positive things in their lives. Treatment would also include sexological treatment, relationship behavioural models and other scheme of things. Also medication is possible if a person is willing. In beginning, there will be a group of 15 men. In the future, the aim is to organise treatment also for women and young people.<sup>417</sup> The therapy takes a year and it works on one's own initiative. Preventative measures would easily pay off

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<sup>409</sup> HE 140/2012 p. 4.

<sup>410</sup> HE 140/2012 p. 24.

<sup>411</sup> HE 140/2012 p. 48.

<sup>412</sup> HE 140/2012 p. 18, see more about probationary liberty under supervision and medication OM, Työryhmämietintö, 2009:1. Seksuaalirikollisten hoito, Oikeusministeriö, 2009.

<sup>413</sup> Finnish newspaper.

<sup>414</sup> Åbo Akademi University is a Finnish University, which does research in all of its twelve departments.

Homepage of Åbo Akademi. Viewed on 17 September 2012, <<http://www.abo.fi/forskning/en>>.

<sup>415</sup> STT ‘Pedofiileille ehkä ennalta ehkäisevää hoitoa’ in homepage of Finland’s biggest newspaper, Helsingin Sanomat. Viewed on 24 August 2012.

<[http://www.hs.fi/kotimaa/Pedofiileille+ehka%C3%A4+ennalta+ehka%C3%A4isev%C3%A4%C3%A4+h](http://www.hs.fi/kotimaa/Pedofiileille+ehka+ennalta+ehkaisevaa+hoitoa/a1305595140411)oitoa/a1305595140411>.

<sup>416</sup> See more [www.goodlivesmodel.com](http://www.goodlivesmodel.com).

<sup>417</sup> Phone interview with special researcher of Åbo Akademi Katarina Alanko on 9 October 2012.

because annual costs of prisoners and victims are high. Ministry of Justice could fund a part of the project and treatment could start in spring 2013 with psychological testing.<sup>418</sup>

*Protective Measures and Assistance to Victims*

- x. The Lanzarote convention article 11 is in most part on top of the Lanzarote convention article 14. Protective measures and assistance to victims are reviewed in the answer to question vi.<sup>419</sup>
- xi. In Finland, there are many help lines for victims and their family who have to take up with sexual exploitation and abuse. NGOs like the Mannerheim League of Child Welfare has organised help line services for children and young people since 1980. Help line is open for calls from Monday to Friday from 2 pm to 8 pm and on Saturday and Sunday from 5 pm to 8 pm. Calling is free of charge. Voluntary duty officers are educated and calls are confidential. MLL provides also Internet service where young people can write questions and duty officers answer them within two weeks. MLL organises help line and Internet services also for adults. Parents can ask questions on parenthood and children's upbringing. These calls and questions are anonymous and confidential.<sup>420</sup>

Victim support Finland is a national service that offers support to victims of a crime, their family and witnesses of a crime. Victim support Finland organises a helpline and it is open for calls from Monday to Tuesday from 1 pm to 9 pm and from Wednesday to Friday from 5 pm to 9 pm. Calls are anonymous. Victim support Finland provides also legal assistance and offers guidance in questions related individual's legal rights. Lawyers are on call from Monday to Thursday from 5 pm to 7 pm. Website [www.rikunet.fi](http://www.rikunet.fi) is a confidential and information secure Internet Service provider where you can present questions anonymously also in English. Crime victims, their close ones and witnesses may obtain a support person provided by Victim support Finland when necessary.<sup>421</sup>

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<sup>418</sup>STT 'Pedofiileille ehkä ennalta ehkäisevää hoitoa' in homepage of Finland's biggest newspaper, Helsingin Sanomat. Viewed on 24 August 2012, <http://www.hs.fi/kotimaa/Pedofiileille+ehk%C3%A4+ennalta+ehk%C3%A4isev%C3%A4%C3%A4+hoitoa/a1305595140411>.

<sup>419</sup> HE 282/2010 p. 35.

<sup>420</sup> HE 282/2010 p. 39, see also [www.mll.fi](http://www.mll.fi).

<sup>421</sup> Homepage of Victim Support Finland. Viewed on 11 October 2012,

There are also many other help lines and Internet help services. Rape crisis centre Tukinainen organises a free help line for conversations and information about sexual assault and abuse and Tukinainen offers also free legal consultation where a person can get information about sex offences, restraining orders, sexual molestation and harassment. There is opportunity for free legal assistance and support when reporting a sex offence to the police, during the preliminary investigation and during the trial. Person can agree on a personal appointment with the lawyer, who can also serve as a legal counsel in court.<sup>422</sup>

Naisten Linja, *Women's line* is a national, toll-free helpline for all women and girls who have experienced violence or threat of violence, and also for their friends and relatives. All calls are confidential and the calls can be made anonymously.<sup>423</sup> Naisten netti, *Net aid for women* is a service of Women's Line that provides free guidance and support for abused women and girls and their friends and family. A person can post a question or a message that will be answered by a Women's Line volunteer within 10 days.<sup>424</sup>

Helsinki mission organises Nuorten Kriisipiste, *Crisis point to young people*, which offers toll-free and confidential conversational therapy with a crisis worker. Service is for young people aged from 12 to 29 years and also for their family members.<sup>425</sup> The Evangelical Lutheran Church of Finland organises also help lines for conversation and Internet services where a person can send a question and it will be answered within 5 days. The Evangelical Lutheran Church has also an Internet priest. Personnel of church are aware of confidentiality and professional secrecy. Municipality and Finland's Slot Machine Association RAY fund help line services.<sup>426</sup>

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<<http://www.riku.fi/fi/victim+support/>>.

<sup>422</sup> Homepage of Rape Crisis Centre Tukinainen. Viewed on 11 October 2012, <[http://174.132.188.98/~tnainen/in\\_english/](http://174.132.188.98/~tnainen/in_english/)>.

<sup>423</sup> Homepage of Women's Line. Viewed on 28 September 2012, <<https://www.naistenlinja.fi/en/public/how+can+we+help+you/>>.

<sup>424</sup> Homepage of Women's Line. Viewed on 28 September 2012, <<https://www.naistenlinja.fi/en/public/how+can+we+help+you/net+aid+for+women/>>.

<sup>425</sup> Homepage of Helsinkimissio. Viewed on 28 September 2012, <<http://www.helsinkimissio.fi/?sid=442>>.

<sup>426</sup> HE 282/2010 p. 39.

- xii. The starting point is that all damage that follows from sexual abuse is harmful and must be reacted. Help should be provided until victim is fully recovered. Support and help must be provided also to adults that have experienced sexual abuse when they were children.<sup>427</sup>

Municipalities hold the primary responsibility of physical and psychosocial treatment. Physical treatment relates to detecting the sexual abuse. Psychosocial treatment lasts for a long time and the need for treatment usually continues into adulthood. Guarantee for treatment<sup>428</sup> means that everyone should get treatment in certain time. Regardless of the guarantee for treatment, fulfilment of children's psychiatric treatment has been criticised. State funding is insufficient and there are regional differences in the availability of services. There are not enough educated psychotherapists for children and young people. Ministry of Social Affairs and Health has published a plan of action that aims to improve victim's gravitation to treatment. Families of limited means should also have access to treatment.<sup>429</sup>

The Lanzarote convention article 14(2) requires each Party to take measures, under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims. In addition to The National Health Service there are several third sector quarters that provide support to victims.<sup>430</sup> Many different organisations and quarters of public health offer psychological help to victims and victim's near relatives and friends. Victim support Finland, Rape Crisis Centre Tukinainen and the Mannerheim League for Child Welfare offer peer support group, phone and Internet services. Also municipal mental health services are available.<sup>431</sup>

Lanzarote convention article 14(3) requires that there must be a possibility to remove the alleged perpetrator or the possibility to remove victim from his or her family environment if his or hers parents or persons who take care of him or her are involved in his or her sexual exploitation or sexual abuse. The Act on Restraining Orders (898/1998) was amended with intra family restraining order (711/2004) so that restraining orders can now be imposed

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<sup>427</sup> HE 282/2010 p. 40.

<sup>428</sup> Ministry of Social Affairs and Health public portal. Viewed on 18 September 2012, <[http://www.stm.fi/sosiaali\\_ja\\_terveyspalvelut/asiakkaanoikeudet/hoitoon\\_paasy](http://www.stm.fi/sosiaali_ja_terveyspalvelut/asiakkaanoikeudet/hoitoon_paasy)>.

<sup>429</sup> HE 282/2010 p. 41.

<sup>430</sup> HE 282/2010 p. 41.

<sup>431</sup> HE 282/2010 p. 42.

within a family. According to The Act on Restraining Orders ((898/1998 amendments up to 384/2010 included), later ARO) c 1, s 1(2), if the person who feels threatened and the person against whom the restraining order is applied for, live permanently in the same residence, a restraining order may be imposed to prevent an offence against life, health or liberty or a threat of such an offence. According to ARO c 1, s 3(2), the person on whom an intra family restraining order has been imposed must leave the residence where he or she and the person protected permanently live together, and he or she may not return there. Also police, prosecutor or social authority can petition intra –family-restraining order.<sup>432</sup> According to ARO c 1, s 7(2) restraining orders may be imposed for at most one year. However, an intra the family restraining order may only be imposed for at most three months. According to Child Welfare Act (683/1983) c 9, s 40 a child can be transferred out of family environment and taken to custody if measures of support of open welfare are not enough. Open welfare includes treatment, therapy and family work.

### III NATIONAL POLICY REGARDING CHILDREN

- i. In 2011 LL.D. and researcher in the University of Helsinki Suvianna Hakalehto-Wainio wrote in newspaper Helsingin Sanomat about the notice Finland had gotten from the United Nation's Committee on Children rights. According to the notice, there are flaws in informing on children's rights and incoherence in supervision regarding children's rights. Hakalehto-Wainio claims that more assertive measures should be taken when it comes to the realisation on children's rights.<sup>433</sup> This year the editorial in Keskisuomalainen pronounced that there still exist some flaws even though children's position in Finland has gotten better in the long run.

Finnish NGOs also keep up the conversation regarding children's rights. For example Lastensuojelun keskusliitto, *Finnish Central Union of Child Welfare*, has participated in the discussion by telling its stands regarding the problems in the flow of information<sup>434</sup> and the

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<sup>432</sup> HE 282/2010 p. 41.

<sup>433</sup> S. Hakalehto-Wainio, Helsingin Sanomat. 20.7.2011.

<sup>434</sup> A press release concerning the fact that in Finland the secrecy legislation is applied too easily 3.9.2012. Viewed on 7 November 2012, <[http://www.lskl.fi/tiedotaa/tiedotusvalineille/tiedotteet/tiedonkulun\\_ongelmat\\_lastensuojelussa\\_selvitettava.2640.news](http://www.lskl.fi/tiedotaa/tiedotusvalineille/tiedotteet/tiedonkulun_ongelmat_lastensuojelussa_selvitettava.2640.news)>.



proper terminology<sup>435</sup>. In 2011 even a research concerning sexual abuse of a child was published in Åbo Akademi.<sup>436</sup> There have also been plans to reconsider the legislative measurements against rape offences<sup>437</sup> which awoke conversation in the Finnish Parliament also on sex offences against children<sup>438</sup>. In Interrogatory KK 572/2012 a question was raised concerning the effectiveness of prevention of sexual offences towards children as well as prevention of recidivism of that sort of offences.

- ii. There are many organizations that take part in the fight for children's rights. They produce information material about sexual abuse<sup>439</sup>, arrange campaigns against sexual abuse<sup>440</sup> as well as for example training for private persons who are interested in the subject. It is also possible for NGOs to take part in public discussion with releasing for example press releases and taking part in different exhibitions. To mention one example, Pelastakaa Lapset Suomi, *Save the Children Finland*, has a stand in different exhibitions.<sup>441</sup> The Family Federation,<sup>442</sup> offers also a lot of information on its Internet page and National Research Institute of Legal Policy, as well as the Ministry of Justice, publish researches on many subjects - also on sexual abuse of children. National Research Institute of Legal Policy publishes also every year a publication on the criminality situation in Finland.<sup>443</sup>

Regarding sex tourism, the three biggest package trip providers have signed an international contract, according to which they inform their customers and partners in cooperation on sex tourism.<sup>444</sup>

<sup>435</sup> A press release concerning the need of changing the offence title for sexual abuse of a child 21.6.2012.

Viewed on 7 November 2012,

<[http://www.lskl.fi/tiedottaa/tiedotusvalineille/tiedotteet/lapsen\\_seksuaalinen\\_hyvaksikaytto\\_rikosnimike\\_vanhentunut.2597.news](http://www.lskl.fi/tiedottaa/tiedotusvalineille/tiedotteet/lapsen_seksuaalinen_hyvaksikaytto_rikosnimike_vanhentunut.2597.news)>.

<sup>436</sup> The news archive for Åbo Akademi, viewed on 7 November 2012,

<<http://www.abo.fi/public/fi/News/Item/item/4484>>.

<sup>437</sup> Kanerva J. 2012, Raikausrikosten lainsäädännölliset muutostarpeet, Arviomuistio (writer's own translation: the Legislative Need for Change in Rape Offences, an estimate memorandum).

<sup>438</sup> KK 572/2012 vp.

<sup>439</sup> See e.g. Homepage of Suomen Delfins ry, *Finnish Delfins ry*. Viewed on 7 November 2012,

<[http://www.suomendelfins.fi/index.php?option=com\\_content&view=article&id=73&Itemid=57](http://www.suomendelfins.fi/index.php?option=com_content&view=article&id=73&Itemid=57)>.

<sup>440</sup> For example Save the Children Finland, has a campaign against sexual abuse of children on the Internet.

For more information, see <http://www.pelastakaalapset.fi/en/>.

<sup>441</sup> For example in Finland's biggest exhibition for Health and Welfare, TERVE-SOS, in May 2012

<sup>442</sup> A social and health sector organization focusing on families, see more

<[http://www.vaestoliitto.fi/in\\_english/](http://www.vaestoliitto.fi/in_english/)>.

<sup>443</sup> The National Research Institute of Legal Policy public portal. Viewed on 7 November 2012,

<<http://www.optula.om.fi/Etusivu/Julkaisut/Rikollisuustilanne>>.

<sup>444</sup> HE 282/2010 p. 47.

An official way of raising the awareness is to inform the changes in law, which is taken care for by the State and different organizations.

- iii. To police knowledge sex offences against children have come as follows: in year 2007 1025 cases (in which 376 an imputative judgement was given), in year 2008 1321 cases (in which 494 an imputative judgement was given), in year 2009 1068 cases (in which 484 an imputative judgement was given) and in year 2010 1102 cases, in year 2011 the situation was 640 cases in half a year<sup>445</sup>. In this context it is good to mention that the increase is explained by increase in effectiveness of authoritative control and the increase in the risk for apprehension.<sup>446</sup>
- iv. In Finland, there are promotional campaigns regarding these issues. Just to mention some, SROY<sup>447</sup> started 1.6.2012 a campaign supporting safe leisure activities and competitive sports and Amnesty has a campaign *Mun rajat!*<sup>448</sup> which promotes sexual independency as a human right<sup>449</sup>.

In Government Bill 282/2010 it was highlighted that campaigns that increase awareness must carry out in an appropriate way. So the matter must be regarded with seriousness without stirring up hysteria or reservations.<sup>450</sup>

- v. Different NGOs take care of the children's voice in the law making process. They are given possibility to for example express their literal opinions when the Government Bill is regarding a matter that concerns their work.<sup>451</sup>
- vi. The law does not specifically regulate the status of NGOs in law making process. In law making process, though, the Ministry of Justice sets a working group to study the need for

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<sup>445</sup> nine percents more than at the same time previous year.

<sup>446</sup> National Research Institute of Legal Policy. Researches 258. Crime and Criminal Justice in Finland 2010. Helsinki 2011. p. 105.

<sup>447</sup> Suomen Ratsastusopettajain yhdistys, *Association for Finland's riding teachers*

<sup>448</sup> *My limits!*

<sup>449</sup> Homepage of Ihmisoikeudet.net. Viewed on 7 November 2012, <<http://www.ihmisoikeudet.net/index.php?page=mista-on-kysymys>>.

<sup>450</sup> HE 282/2010 vp, p. 43.

<sup>451</sup> see the answer to the next question.

changes and the working group do ask opinions from different institutions. These opinions are included in the memorandum of the working group.<sup>452</sup>

This sort of working group was also set to study the need for changes regarding enforcement of Lanzarote Convention. The working group got a literal opinion from Lastensuojelun keskusliitto, *Central Union for Child Welfare*; Pelastakaa Lapset ry, *Save the Children Finland*; Mannerheimin lastensuojeluliitto, the *Mannerheim League for Child Welfare*; Lasten perusoikeudet ry, *Children's Fundamental Rights ry*; Oikeuspoliittinen tutkimuslaitos, *Department of Criminal Policy for Ministry of Justice*; Kuluttajavirasto, *the Consumer Agency*; Kriminaalihuollon tukisäätiö<sup>453</sup>; Opetus- ja kulttuuriministeriö, *Ministry of Education and Culture*; Suomen matkatoimistoalan liitto, *The Association of Finnish Travel Agents*; Kuljetus- ja viestintäministeriö, *Ministry of Transport and Communications* as well as from Sexpo-säätiö, *Sexpo Foundation*.<sup>454</sup>

## IV OTHER

Finland is a constitutional state, thus individual issues are solved elsewhere than at the political level. Above all, being a constitutional state means executing the rule of law, as stated in the Constitution of Finland, c 1, s 2 (3): The exercise of public powers shall be based on an act and the law shall be strictly observed in all public activity. However, the political, economical and legal decision-making is intricately linked to each other in the society. The legislator may impose a norm, but the realization of it in accordance with the will of the legislator is not guaranteed. The position and the content of the Constitution are also affected by international politics, perceptions of the functions and roles of the state, as well as by the major social changes. Consequently, the Constitution seeks to reflect the existing state and the basic values of the society, and it is amended to reflect the changes as well as to usher the society to the desired path. Apulaisoikeuskansleri, *the Deputy Chancellor of*

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<sup>452</sup> Kansanvalta.fi - the Democracy Data Bank public portal. Viewed on 7 November 2012, <<http://www.kansanvalta.fi/Etusivu/Kansalaisvaikuttaminen/Paatoksentekeonosalistuminen/Lainvalmisteluunosallistuminen>>

<sup>453</sup> a non-profit after-care foundation for sentenced offenders and their families

<sup>454</sup> OMML 67/2010, Lasten suojeleminen seksuaaliselta riistolta ja hyväksikäytöltä, lausuntotiivistelmä, p. 11.

*Justice* Mikko Puumalainen has stated that politics can be made within the fundamental rights, but not above them.<sup>455</sup>

Sexual violence against children was a hot topic in the public debate in the spring of 2010. One of the most controversial issues in this debate was the Confession secrecy in relation to the child welfare notification obligation of s 25 of the Child Welfare Act. The debate got political scopes, and finally some of the ministries participated in it. The minister responsible for child welfare matters, peruspalveluministeri, *Minister of Health and Social Services* at the time, held a discussion meeting in May 2010, which covered topics such as amending the legislation as well as changing the interpretation of Kirkkolaki, the *Church Code*<sup>456</sup> with compiling instructions. In addition to the officials from different ministries, present in the meeting was kulttuuri- ja urheiluministeri, *Minister of Culture and Sports* at the time, who is in charge of the church affairs, and bishops from both the Evangelical-Lutheran and the Orthodox Church.<sup>457</sup> It was decided in the negotiations that changing the legislation on professional confidentiality of the priests and the obligation to notify is not necessary, and thus the issue was left to be solved within the Church.

In December 2010 the aforementioned ministers and the Minister of Justice at the time met the bishop<sup>458</sup> of the city of Mikkeli. The premise of the discussion meeting was that the church shall, with the decision of the Bishops' Conference and by providing training, give a clear code of conduct on how and under what circumstances exceptions to confidentiality can be made without, however, changing the norms of confession or of pastoral counselling.<sup>459</sup> Lutheran Church had previously highlighted that the Confession secrecy is unconditional; hence the obligation of making a child welfare notification had received less attention. In this meeting, it was stated that by providing new guidelines, accentuating the

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<sup>455</sup> M. Puumalainen *XLIII Asianajajapäivät 14.1.2011: Oikeuspolitiikan foorumi: Suomalaisen oikeusvaltion kehittämisen haasteet ja mahdollisuudet*, 2011, p. 1.

<sup>456</sup> The Church Code (1054/1993) is an act applied to the Evangelical-Lutheran Church of Finland. The Code is enacted by eduskunta, *the Parliament of Finland* based on a motion given by kirkolliskokous, the *Church Assembly of the Evangelical-Lutheran Church*.

<sup>457</sup> Both the bishops became later archbishops of their own Church. Sosiaali- ja terveysministeriön tiedote, STM (178/2010): Ministerit Risikko ja Wallin sekä kirkkojen edustajat keskustelivat rippisalaisuudesta ja lastensuojelusta, 27 May 2010, viewed on 25 October 2012, <<http://www.stm.fi/tiedotteet/tiedote/-/view/1510122>>.

<sup>458</sup> Bishop of the Evangelical-Lutheran Church.

<sup>459</sup> STM, (393/2010), Sosiaali- ja terveysministeriön tiedote, 393/2010: Lapsen etu aina ensisijainen ripissä ja sielunhoidossa - uusilla ohjeilla ilmoitusvelvollisuus selkiytty, 8 December 2010, viewed on 25 October 2012, <<http://www.stm.fi/tiedotteet/tiedote/-/view/1546003>>.

obligation to make a child welfare notification, and by providing training, the primary nature of child protection would improve in confession and in pastoral counselling.<sup>460</sup>

In January 2011 Suomen evankelis-luterilaisen kirkon Kirkkohallitus, the *Church Administration of the Evangelical-Lutheran Church of Finland* published a code of conduct called '*Aika puhua - aika vaieta - Rippisalaisuus ja vaitiolovelvollisuus kirkossa*'<sup>461</sup> to clarify the Confession secrecy and the confidentiality obligations within the Church. It is stated in the code of conduct that according to the Church Code c 25, s 8 (1), within Church Administration shall apply what is provided in Laki viranomaisten toiminnan julkisuudesta, *Act on the Openness of Government Activities*. The applicability of the Act on the Openness of Government Activities is nevertheless restricted by c 5, s 2 (the Confession secrecy), c 6, s 3 (confidentiality in general); c 6, s 12 (confidentiality obligations of the lecturers) or c 24 (submission and appeal) of the Church Code. In addition, a document that refers to pastoral counselling or diaconal work concerning a private person shall be considered confidential.<sup>462</sup>

The Code of Judicial Procedure c 17, s 23 provides a list of those who cannot testify in court. However, it explicitly provides that rules concerning whether priests can testify are given separately. They are provided in c 5, s 2 (2) of the Church Code. According to the provision, when a priest is heard as a witness, he or she cannot disclose what has been entrusted to him or her in a private confession or pastoral counselling. The non-disclosure provisions apply both to the personality of the confessant and the content of the confession.<sup>463</sup> Even though on the basis of the phrasing of c 17, s 23 of the Code of Judicial Procedure the confidentiality obligations concern only a priest, according to the Church Code c 6, s 12, the mentioned provisions shall be applied to a lecturer also.<sup>464</sup>

In February 2011, the Bishops' Conference approved a report on consolidation of the Confession secrecy and child protection. The Bishops' message was that the preservation of absolute confidentiality of the Confession secrecy does not prevent interfering in child welfare matters. The report emphasises that the duty to notify and professional

<sup>460</sup> STM, (393/2010).

<sup>461</sup> *Aika puhua - aika vaieta - Rippisalaisuus ja vaitiolovelvollisuus kirkossa, Suomen ev.lut. kirkon kirkkohallituksen julkaisuja 2011: 2*, Hakapaino Oy, Helsinki, 2011, p. 49.

<sup>462</sup> The Church Code c 25, s 8 (1).

<sup>463</sup> See e.g. the Church Code c 5, s 2 (2).

<sup>464</sup> *Aika puhua - aika vaieta - Rippisalaisuus ja vaitiolovelvollisuus kirkossa, Suomen ev.lut. kirkon kirkkohallituksen julkaisuja 2011: 2*, p. 49.

confidentiality are not contradictory. Instead, the Confession secrecy and the promotion of child welfare can be part of the same process.<sup>465</sup> Furthermore, according to the report, child protection is an essential part of the vocation of a Christian.<sup>466</sup> The report also provides the practical guidelines for confession and pastoral counselling in accordance with the needs of child protection.

Priests and lectors are obliged to take action to prevent planned crimes and to protect possible victims, if they become aware of such matters in the course of a confession or pastoral counselling.<sup>467</sup> However, for the Confession secrecy, according to the Church Code c 5, s 2 (3), it is essential that the identity of the confessant will not be revealed if the crime is notified to authorities by the priest. The Confession secrecy, as described in the Church Code c 5, s 2, does not concern laymen or other church employee groups.<sup>468</sup> On the contrary, according to the present child welfare legislation, every employee and elected person in the parish is obliged, notwithstanding any confidentiality provisions, to notify the police when they have a reasonable reason to suspect on the basis of circumstances that have come to their knowledge an act punishable under Chapter 20 of the Criminal Code.<sup>469</sup> These acts include sexual crimes directed at children.

If a priest or a lector hears about a crime from the offender, it is their duty to try and help the offender to mend his or her life and to make sure the affair does not recur.<sup>470</sup> A priest has the option not to proclaim absolution to the offender until he or she has begun to settle and mend the damage he or she has caused.<sup>471</sup> If a priest, in a confession, hears about a sexual abuse of a child from the victim, he or she is obliged to help the victim in every possible way, and ensure that the victim is safe from further abuse. In order to protect the

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<sup>465</sup> Piispainkokouksen selonteko rippisalaisuuden ja lastensuojelun yhteensovittamisesta, 9 February 2011, viewed on 25 October 2012, <[http://sakasti.evli.fi/sakasti.nsf/0/F359F1ED9F897DD0C225770E0034026E/\\$FILE/SELONTEKO-RIPPISALAIUUS-JA-%20LASTENSUOJELU.pdf](http://sakasti.evli.fi/sakasti.nsf/0/F359F1ED9F897DD0C225770E0034026E/$FILE/SELONTEKO-RIPPISALAIUUS-JA-%20LASTENSUOJELU.pdf)>, p. 1.

<sup>466</sup> Piispainkokouksen selonteko rippisalaisuuden ja lastensuojelun yhteensovittamisesta, p. 1.

<sup>467</sup> Piispainkokouksen selonteko rippisalaisuuden ja lastensuojelun yhteensovittamisesta, p. 5.

<sup>468</sup> Piispainkokouksen selonteko rippisalaisuuden ja lastensuojelun yhteensovittamisesta, p. 1.

<sup>469</sup> Child Welfare Act, s 25, (3).

<sup>470</sup> Piispainkokouksen selonteko rippisalaisuuden ja lastensuojelun yhteensovittamisesta, p. 5.

<sup>471</sup> Piispainkokouksen selonteko rippisalaisuuden ja lastensuojelun yhteensovittamisesta, p. 2.

victim, the priest can, withstanding the Confessional secrecy, report both the crime and the culpable to the authorities as long as the identity of the confessant is not revealed.<sup>472</sup>

To conclude, the confidentiality obligations of priests and lecturers should be clearer now. As a rule, if a priest has a cause to suspect on the basis of circumstances that have come to his or her knowledge that the need of child welfare should be investigated, or that a child has been a victim of sexual abuse, the priest is, notwithstanding any confidentiality provisions, obliged to notify either the social authorities or the police.<sup>473</sup> However, if this information has come to his or her knowledge in a private confession or within pastoral counseling, the provisions of the Child Welfare Act are not applied. In these situations, a priest is bound by the provisions on Confessional secrecy of the Church Code. However, the debate continues and solutions are sought by emphasizing that the use of criminal justice and criminal legislation should be avoided to the last.<sup>474</sup>

## V CONCLUSION

### Substantive criminal law

Before the implementation of the Lanzarote Convention, Finland was already bound by several international instruments concerning sexual abuse of children and these kinds of crimes were already quite comprehensively criminalized in Finland.<sup>475</sup> However, the Convention introduced two wholly new crimes for the Finnish legislation. Attending pornographic performances involving the participation of children and so called “grooming” are now criminalized in Finland. Moreover, the Convention made it essential to make some minor changes into existing provisions of the Criminal Code. Obtaining an access to a website which contains child pornographic material is now more clearly

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<sup>472</sup> Piispainkokouksen selonteko rippisalaisuuden ja lastensuojelun yhteensovittamisesta, p. 5.

<sup>473</sup> See the Child Welfare Act, s 25.

<sup>474</sup> J. Iljäs, *Henriksson painottaa hyväksikäyttötapausten ehkäisemisessä uskonnollisten yhteisöjen vastuuta*, homepage of K24, 22 October 2012, viewed on 25 October 2012, <<http://www.kotimaa24.fi/uutiset/politiikka/9444-henriksson-painottaa-hyvaksikayttotapausten-ehkaisuissa-myos-uskonnollisten-yhteisojen-vastuuta>>.

<sup>475</sup> For example, the Palermo Convention and especially the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (A/RES/55/25), the Council of Europe Convention on Cybercrime (CETS No. 185), the Council of the EU Framework Decision on combating trafficking in human beings (2002/629/JHA), the Council of the EU Framework Decision on combating the sexual exploitation of children and child pornography (2004/68/JHA), the Council of the EU Framework Decision on attacks against information systems (2005/222/JHA) etc.

criminalized in Finland. The Finnish legislation is now updated to meet the latest requirements of international obligations concerning the sexual abuse of children. It can be regarded as a reasonable response to the challenges brought by the information and communication technologies.

During the implementation a huge improvement was also made to the level of protection of the victims of sex offences, in spite of it was not one of the requirements of the Convention. In the Criminal Code of Finland the definition of *sexual act* was awfully outdated and a time for the reconstruction was essential. See more about the issue in paragraph 2(a)(i) of chapter II in this report.

During the last two decades several independent and separate changes have been made into the Criminal Code of Finland concerning sex offences and pornography offences. Therefore, at some point in near future it could be necessary to make a more comprehensive examination of the Criminal Code and examine if the provisions are consistent enough or not. Some terminology and provisions might need a little fix to achieve better consistency inside the Criminal Code and, in addition, to make the legislation more compatible with the international obligations. For example the concept of “sexually obscene pictures”<sup>476</sup> can be considered as outdated and could be replaced with some better formulation to be more present day. Furthermore, one may consider it to be rather odd to regulate child pornography crimes in chapter 17 of the Criminal Code which mainly criminalize conducts against public order. Main purpose of criminalizing child pornography crimes is to protect the health and development of children, therefore more appropriate could be if these provisions were placed in the chapter 20 of the Criminal Code which main purpose is to protect sexual autonomy of people.

All in all, it seems at this point that the legislation of substantive criminal law is in relatively good state and is updated to meet the latest requirements of international obligations concerning sexual abuse and sexual exploitation of children.

## **Criminal procedure**

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<sup>476</sup> The concept is used in the Criminal Code to mean child pornography, for example. For more information, see paragraph 2(c)(xi) of chapter II in this report. Also see the Criminal Code (39/1889) chapter 17, sections 18, 18a and 19.



All in all, the Lanzarote treaty did not have much effect on the Finnish procedural laws. The duty to ensure that the best interest and rights of a child are always respected during the investigations and criminal proceedings was already covered in the relevant Finnish acts before signing of the treaty. At the moment, *in books*, the rights of the victim and especially that of a child seem to be very well assured, although the principle of the best interest of a child is not written in the procedural laws. It seems, however, that *in action* those rights are not always secured in the way they should be according to the law.

According to the latest surveys, there are some disquieting problems relating to the implementation of the rights of the victims in criminal proceedings.<sup>477</sup> E.g. the victims might not be aware of their rights, there are too few educated professionals to conduct the hearings of children and the durations of the proceedings are often worryingly long.<sup>478</sup> The latest problem has also been observed by the European Court of Human Rights, which has given Finland numerous condemnatory decisions relating to the matter.<sup>479</sup> The oldest condemnations are from the time before the enactment of the Criminal Procedure Act in 1997, and from the perspective of the regulations the situation improved for as a rule, after the enactment, it was no longer possible to postpone the main hearing.<sup>480</sup> However, regardless of all the implemented measures, the duration of proceedings still stays a major problem. It has also been highlighted, that at the moment the quality and the result of the proceedings are much varied depending on what court handles the case.<sup>481</sup>

<sup>477</sup> P. Honkatukia, *Uurit rikosprosessissa – Haavoittuvuus, palvelut ja kohtelu, Oikeuspoliittisen tutkimuslaitoksen tutkimuksia* 252, p. 114, Hakapaino Oy, Helsinki, 2010.

<sup>478</sup> H. Alinen, 'Kuka kertoisi uhrille oikeudet', *Lakimies Uutiset* 6/2012, September 2012, p. 8-11.

<sup>479</sup> See e.g. Oikeusministeriön mietintöjä ja lausuntoja 87/2010 – Oikeusprosessin pitkittymisen estäminen, page 12, viewed on 7 November 2012, <[http://www.om.fi/Satellite?blobtable=MungoBlobs&blobcol=urldata&SSURIdatatype=BlobServer&SSURIdcontainer=Default&SSURIsession=false&blobkey=id&blobheadervalue1=inline;%20filename=OMML\\_87\\_2010%20ty%F6gryhm%E4n%20mietint%F6%2052%20s%20.pdf&SSURIsscontext=Satellite%20Server&blobwhere=1290611429292&blobheadername1=Content-Disposition&ssbinary=true&blobheader=application/pdf](http://www.om.fi/Satellite?blobtable=MungoBlobs&blobcol=urldata&SSURIdatatype=BlobServer&SSURIdcontainer=Default&SSURIsession=false&blobkey=id&blobheadervalue1=inline;%20filename=OMML_87_2010%20ty%F6gryhm%E4n%20mietint%F6%2052%20s%20.pdf&SSURIsscontext=Satellite%20Server&blobwhere=1290611429292&blobheadername1=Content-Disposition&ssbinary=true&blobheader=application/pdf)>.

<sup>480</sup> The working group of Ministry of Justice states in its report (OM, Työryhmämietintö 2007:2. Oikeudenkäynnin kokonaiskeston lyhentäminen, Oikeusministeriö, 2007, page 26) that before the enactment postponement of main hearing in district court was considerably more conventional and delayed the proceedings.

<sup>481</sup> V. Hinkkanen: Oikeuspoliittisen tutkimuslaitoksen tutkimustiedonantoja 92, Lapsen seksuaalinen hyväksikäyttö, tutkimus rangaistuskäytännöstä ja seksuaalirikosten uusimisesta, viewed on 7 November 2012, <<http://www.optula.om.fi/Satellite?blobtable=MungoBlobs&blobcol=urldata&SSURIdatatype=BlobServe>>.

All in all, the fact that the aforementioned problems are now widely conversed both in the Finnish public and professional discussion suggests that they have been well acknowledged and the growing trend in Finland is to further improve the taking into consideration the victims and their rights, especially those of children, also *in action*.

## ABBREVIATIONS

	<i>English</i>	<i>Finnish</i>
c	Chapter of an Act/Code	Luku
HE	Government Bill	Hallituksen esitys
KK	Interrogatory (to the Speaker of Parliament)	Kirjallinen kysymys
KKO	The Supreme Court	Korkein oikeus
KM	Committee report	Komiteanmietintö
LaVM	Report of the Legal Affairs Committee Parliament of Finland	Lakivaliokunnan mietintö of the
OMML	Report/Statement of the Ministry of Justice	Oikeusministeriön mietintö/lausunto
OM	Ministry of Justice	Oikeusministeriö
s	Section of an Act/Code	Pykälä
STM	Ministry of Social Affairs and Health	Sosiaali- ja terveysministeriö
The CC	The Criminal Code of Finland (39/1889)	Rikoslaki (39/1889)

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**National Researchers**

Eva-Maria Bauer

Helena Krüger

Laura Jones

Maximilian Voigt

Karina Wagner

Timo Heller

Jannik Zerbst

**Academic Adviser**

Prof. Joachim Renzikowski

**National Coordinator**

Tino Boche

## I INTRODUCTION

### 1 GENERAL

#### *Equal Rights*

- xiv. As in many countries, also in Germany discrimination in every day life is an issue.<sup>1</sup> Due to the fact that this general introduction is not meant to give a complete documentation of discrimination problems, only a few aspects will be highlighted.<sup>2</sup> Over the last years, several measures on an international and national level have been taken to avoid discrimination. One of them is the *General Equal Treatment Act* (Allgemeines Gleichbehandlungsgesetz) which was adopted in 2006 with the aim of avoiding discrimination on grounds of age, disability, ethnic origin, sex, religion and sexual identity in the areas of civil, tax, employment as well as procedural law.<sup>3</sup> After the law entered into force the so-called *Federal Anti-discrimination Agency* (Antidiskriminierungsstelle des Bundes) was established, an independent focal point to which persons affected by discrimination may turn.<sup>4</sup> Besides its advisory services the agency tries to encourage people to report discrimination.<sup>5</sup> The Federal Anti-

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<sup>1</sup> Federal Anti-Discrimination Agency, Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestage, Federal Anti-Discrimination Agency, December 2010, 17/09/2012, [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/gemeinsamer\\_bericht\\_ads\\_.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/gemeinsamer_bericht_ads_.pdf?__blob=publicationFile).

<sup>2</sup> For further and more detailed information see: European Union Agency for Fundamental Rights, *The Annual Report 2011 – Fundamental rights: challenges and achievements in 2011*, Publications Office of the European Union, 2012, 17/09/2012, [http://fra.europa.eu/fraWebsite/attachments/FRA-2012\\_Annual-Report-2011\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA-2012_Annual-Report-2011_EN.pdf), p. 123ff.; ECPAT International, *Global Monitoring report on the status of action against commercial sexual exploitation of children*, ECPAT International, 2012, 17/09/2012, [http://www.ecpat.de/uploads/media/Global\\_Monitoring\\_Report-GERMANY\\_aktuell.pdf](http://www.ecpat.de/uploads/media/Global_Monitoring_Report-GERMANY_aktuell.pdf), p. 8ff.; Federal Anti-Discrimination Agency, *Research Project – Discrimination in Everyday Life, Perceptions of Discrimination and Anti-Discrimination Policy in our Society*, Federal Anti-Discrimination Agency, Heidelberg, July 2008, 18/09/2012, [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/forschungsprojekt\\_diskriminierung\\_im\\_alltag.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/forschungsprojekt_diskriminierung_im_alltag.pdf?__blob=publicationFile); European Union Agency for Fundamental Rights, *Fundamental rights of migrants in an irregular situation in the European Union*, Vienna, 2011, 18/09/2012, [http://fra.europa.eu/fraWebsite/attachments/FRA\\_2011\\_Migrants\\_in\\_an\\_irregular\\_situation\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA_2011_Migrants_in_an_irregular_situation_EN.pdf).

<sup>3</sup> General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz) of 14 August 2006, last amended by the Act of 5 February 2009 (Federal Law Gazette I p. 160).

<sup>4</sup> Federal Anti-Discrimination Agency, 2012, 17/09/2012, [http://www.antidiskriminierungsstelle.de/EN/AboutUs/Tasks/Research/research\\_node.html](http://www.antidiskriminierungsstelle.de/EN/AboutUs/Tasks/Research/research_node.html).

<sup>5</sup> Federal Anti-Discrimination Agency, 2012, 17/09/2012, [http://www.antidiskriminierungsstelle.de/EN/AboutUs/Tasks/PublicRelationsWork/public\\_relations\\_work\\_node.html](http://www.antidiskriminierungsstelle.de/EN/AboutUs/Tasks/PublicRelationsWork/public_relations_work_node.html).

Discrimination Agency uses the collected data to work out statistics on all grounds of discrimination and submits a detailed report to the German Bundestag every four years “detailing cases of discrimination and [making] recommendations on how to eliminate and prevent discrimination”<sup>6</sup>. In spite of these comprehensive measures discrimination problems still exist and are even caused by legislation and the authorities.<sup>7</sup> Like their parents who are often discriminated in various areas of social life, such as in jobs, shops, housing and healthcare,<sup>8</sup> especially children with a migrant background are being discriminated regarding their religion, ethnical origin and sex<sup>9</sup>. In particular, ethnic discrimination in education is a problem, as a survey from 2010 among 1,000 adults of Turkish origin living in North Rhine-Westphalia showed: 81 % of the respondents claimed to have been victims of ethnic discrimination, with rates of 60.3 % in schools and universities.<sup>10</sup> Also the situation of Roma minorities has caught the eye of legislation:<sup>11</sup> in a research on the educational situation of Roma in Germany that was conducted between 2007 and 2011 by the Centre for Culture, Education, and Antiziganism Research, 81.2 % of the 275 interviewed Roma reported personal experiences of discrimination<sup>12</sup>. These “experiences in school are to a great

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<sup>6</sup> Federal Anti-Discrimination Agency, 2012, 17/09/2012, [http://www.antidiskriminierungsstelle.de/EN/AboutUs/Tasks/Research/research\\_node.html](http://www.antidiskriminierungsstelle.de/EN/AboutUs/Tasks/Research/research_node.html).

<sup>7</sup> M. Schlaab, ‘Realität der Diskriminierung in Deutschland - Vermutung und Fakten’, *Rassismus & Diskriminierung in Deutschland - Dossier*, Heinrich Böll Stiftung, Berlin, April 2010, 18/09/2012, [http://www.migration-boell.de/downloads/diversity/Dossier\\_Rassismus\\_und\\_Diskriminierung.pdf](http://www.migration-boell.de/downloads/diversity/Dossier_Rassismus_und_Diskriminierung.pdf), p. 28ff.

<sup>8</sup> Some victims with migrant background also reported they have been discriminated by German authorities such as employment agencies, job centres, foreigners’ registration offices and even police stations. - M. Schlaab, *op. cit.*, p. 30.

<sup>9</sup> Federal Anti-Discrimination Agency, *Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages*, Federal Anti-Discrimination Agency, December 2010, 18/09/2012, [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/gemeinsamer\\_bericht\\_ads\\_.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/gemeinsamer_bericht_ads_.pdf?__blob=publicationFile), p. 63f.

<sup>10</sup> European Union Agency for Fundamental Rights, *The Annual Report 2011 – Fundamental rights: challenges and achievements in 2011*, Publications Office of the European Union, 2012, 17/09/2012, [http://fra.europa.eu/fraWebsite/attachments/FRA-2012\\_Annual-Report-2011\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA-2012_Annual-Report-2011_EN.pdf), p. 164.; see also: M. Sauer, *Teilhabe und Orientierungen türkeistämmiger Migrantinnen und Migranten in Nordrhein-Westfalen – Ergebnisse der zehnten Mehrthemenbefragung 2009*, Stiftung Zentrum für Türkeistudien, Essen, 2009, <http://www.zfti.de>, p. 146ff.

<sup>11</sup> German Bundestag, *Diskriminierung von Sinti und Roma entgegengetreten*, 2011, 18/09/2012, [http://www.bundestag.de/dokumente/textarchiv/2011/33855136\\_kw12\\_de\\_sinti\\_roma/index.html](http://www.bundestag.de/dokumente/textarchiv/2011/33855136_kw12_de_sinti_roma/index.html); Bundestag document No. 17/5191 of 21 March 2011, 21/03/2011, 18/09/2012, <http://dipbt.bundestag.de/dip21/btd/17/051/1705191.pdf>.

<sup>12</sup> D. Strauß [ed.], *Study on the Current Educational Situation of German Sinti and Roma - Documentation and Research Report*, RomnoKher - Centre for Culture, Education, and Antiziganism Research (RomnoKher - Ein Haus für Kultur, Bildung und Antiziganismusforschung) 2011, 18/09/2012, [http://www.antiziganismus.de/resources/2011\\_Strauss\\_German\\_SintiRoma\\_Summary.pdf](http://www.antiziganismus.de/resources/2011_Strauss_German_SintiRoma_Summary.pdf), p. 7.

extent affected by overt and covert discrimination in the form of everyday antiziganistic name-calling and prejudices on the part of individual pupils”<sup>13</sup>. Another discrimination problem concerning migrants is the situation of refugee children in Germany, especially the treatment of unaccompanied refugee children in asylum proceedings, as explained in more detail below (*see Chapter I., 1., iv.*). Apart from foreigners, children from German low-income families are affected by discrimination as well.<sup>14</sup> The chance of attending grammar school and therefore getting access to higher education depends, as a recent study has shown, less on the academic achievements of those children than on the socioeconomic background of their parents.<sup>15</sup> A positive development, however, is the general awareness of legislation regarding discrimination of homosexual youths,<sup>16</sup> which is - despite of a growing acceptance - still an issue within society.<sup>17</sup> Even though these examples cannot possibly represent all difficulties regarding discrimination, they nevertheless illustrate at least two important aspects: on one hand the fact that there are social groups affected by discrimination in Germany but also on the other hand the general awareness of this issue within society as well as Germany’s serious attempt not to turn a blind eye to those problems but to overcome them.

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<sup>13</sup> *ibid.*

<sup>14</sup> German Children’s Fund (Deutsches Kinderhilfswerk e. V.), *Für mehr Bildungsgerechtigkeit – Deutsches Kinderhilfswerk fordert Chancengleichheit im Bildungswesen und längeres gemeinsames Lernen in der Schule*, Deutsches Kinderhilfswerk e. V., 2012, 18/09/2012, <http://www.dkhw.de/cms/themen-projekte/kinderpolitik/aktuelles-kinderpolitik/648-fuer-mehr-bildungsgerechtigkeit-deutsches-kinderhilfswerk-fordert-chancengleichheit-im-bildungswesen-und-laengeres-gemeinsames-lernen-in-der-schule>; UNICEF Germany (UNICEF Deutschland), *UNICEF-Vergleichsstudie 2012: Reiche Länder - arme Kinder - Neuartige Analyse zu Kinderarmut - Ergebnis für Deutschland enttäuschend*, UNICEF Deutschland, 29/05/2012, 18/09/2012, <http://www.unicef.de/presse/2012/vergleichsstudie-kinderarmut/>.

<sup>15</sup> J. Uhlig/ H. Solga/ J. Schupp, *Ungleiche Bildungschancen: Welche Rolle spielen Underachievement und Persönlichkeitsstruktur dabei?*, Social Science Research Center Berlin (Wissenschaftszentrum Berlin für Sozialforschung), April 2009, 18/09/2012, <http://bibliothek.wzb.eu/pdf/2009/i09-503.pdf>, p. 11f.

<sup>16</sup> German Bundestag, *Im Bundestag notiert: Situation homosexueller Jugendlicher*, 26/07/2010, 18/09/2012, [http://www.bundestag.de/presse/hib/2010\\_07/2010\\_258/06.html](http://www.bundestag.de/presse/hib/2010_07/2010_258/06.html); Bundestag document No. 17/2348 of 29 June 2010, 29/06/2010, 18/09/2012, <http://dip21.bundestag.de/dip21/btd/17/023/1702348.pdf>, p. 1.

<sup>17</sup> According to a study of the Federal Anti-Discrimination Agency a large number of children is affected by discrimination regarding their sexual orientation at school. - Federal Anti-Discrimination Agency, *Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages*, Federal Anti-Discrimination Agency, December 2010, 18/09/2012, [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/gemeinsamer\\_bericht\\_ads\\_.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/gemeinsamer_bericht_ads_.pdf?__blob=publicationFile), p. 63f.

*Family Protection*

- xv. According to Article 6(1) of the Basic Law for the Federal Republic of Germany (*German Constitution*) “marriage and the family shall enjoy the special protection of the state”<sup>18</sup>. The case-law of the Federal Constitutional Court of Germany has consistently defined the term *family* as

“a community of parents with children. In this connection it is not significant whether the children are the children by birth of the parents and whether they are legitimate or illegitimate [...]. Family is the actual long-term and upbringing relationship between children and parents who are responsible for the children. If the child lives together with both parents, they form a family together. If this is not the case, but both parents in fact bear responsibility for the child, the child has two families [...]: the family with the mother and the family with the father [...]”<sup>19</sup>

The definition also covers the relationship between parents and their grownup children as well as relationships of homosexual parents, who live in a registered civil partnership, and their children.<sup>20</sup> In addition it must be said that, particularly with regard to the jurisdiction of the European Court of Human Rights, the term *family* may not be restricted to that of a *nuclear family*, even though the Federal Constitutional Court of Germany has constantly taken the opposite view.<sup>21</sup>

Regarding the constitutional right of marriage Article 6(1) protects “the union of a man and a woman meaning a long-term relationship formed by their free decision involving national authorities”<sup>22</sup>, particularly marriage registrars<sup>23</sup>. Marriages that are

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<sup>18</sup> Basic Law for the Federal Republic of Germany (in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 21 July 2010 (Federal Law Gazette I p. 944)) translated by Professor Christian Tomuschat and Professor David P. Currie in cooperation with the Language Service of the German Bundestag, Juris GmBH, 2012, 12/09/2012, [http://www.gesetze-iminternet.de/englisch\\_gg/englisch\\_gg.html](http://www.gesetze-iminternet.de/englisch_gg/englisch_gg.html).

<sup>19</sup> Federal Constitutional Court of Germany, Order of the First Senate of 9 April 2003, 12/09/2012: BVerfG, 1 BvR 1493/96 of 09/04/2003, paragraphs no. 90, [http://www.bverfg.de/entscheidungen/rs20030409\\_1bvr149396en.html](http://www.bverfg.de/entscheidungen/rs20030409_1bvr149396en.html).

<sup>20</sup> H. D. Jarass, *GG - Grundgesetz für die Bundesrepublik Deutschland - Kommentar*, C. H. Beck, München, 2012, p. 243, marginal no. 9.

<sup>21</sup> Jarass, *op. cit.*, p. 243, marginal no. 10.

<sup>22</sup> *cf.*, Federal Constitutional Court of Germany, Order of the First Senate of 6 December 2005, 13/09/2012: BVerfG, 1 BvL 3/03 of 06/12/2005, paragraphs no. 60, [http://www.bverfg.de/entscheidungen/l20051206\\_1bvl000303.html](http://www.bverfg.de/entscheidungen/l20051206_1bvl000303.html).

<sup>23</sup> Jarass, *op. cit.*, p. 242, marginal no. 4.

celebrated abroad or under a foreign legal system are protected as well.<sup>24</sup> Same-sex unions, so-called registered partnerships, however, as well as cohabitations, are excluded from the protection provided by Article 6(1).<sup>25</sup> Besides, only monogamy is protected whereas polygamy is illegal.<sup>26</sup> According to the Federal Statistical Office of Germany in 2010 the average marital age of men is 33.2 years, of women 30.3 years.<sup>27</sup> Arising from its constitutional obligation to protect marriage and the family as anchored in Article 6(1) the state is obliged not only to take appropriate measures of protection but also measures of support.<sup>28</sup> Such measures are tax benefits, public provision of childcare, child benefit or orphans pension, to name just a few.<sup>29</sup> Besides there are other basic rights and state duties anchored in Article 6, such as the care and upbringing of children as a natural right and duty of parents, which is secured by the constitutional obligation of the state to “watch over them in the performance of [their] duty”,<sup>30</sup> or the right of every mother to protection and care of the community<sup>31</sup>. Furthermore, Article 6(4) states that children “may be separated from their families against the will of their parents or guardians only pursuant to a law and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect”<sup>32</sup>. The last paragraph of Article 6 contains the right of illegitimate children to be provided by legislation with the same opportunities for physical and mental development and position in society as enjoyed by those born within marriage.

### *Child Protection*

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<sup>24</sup> *ibid.*

<sup>25</sup> *cf.*, Federal Constitutional Court of Germany, Order of the First Senate of 17 July 2002, 13/09/2012: BVerfG, 1 BvF 1/01 of 17/07/2002, paragraphs no. 20, [http://www.bverfg.de/entscheidungen/fs20020717\\_1bvf000101en.html](http://www.bverfg.de/entscheidungen/fs20020717_1bvf000101en.html); *cf.*, Federal Constitutional Court of Germany, Order of the First Senate of 9 November 2004, 13/09/2012: BVerfG, 1 BvR 684/98 of 09/11/2004, paragraphs no. 48, [http://www.bverfg.de/entscheidungen/rs20041109\\_1bvr068498.html](http://www.bverfg.de/entscheidungen/rs20041109_1bvr068498.html).

<sup>26</sup> *cf.*, Federal Constitutional Court of Germany, Order of the First Senate of 30 November 1982, BVerfG, 1 BvR 818/81 of 30/11/1982, *see* BVerfGE 62, 323/330.

<sup>27</sup> The Federal Statistical Office, 2012, 12/09/2012, [https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/Eheschliessungen/Tabellen/Ehe\\_schliessungenScheidungen.html](https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/Eheschliessungen/Tabellen/Ehe_schliessungenScheidungen.html).

<sup>28</sup> *cf.*, Federal Constitutional Court of Germany, Order of the First Senate of 17 July 2002, 13/09/2012: BVerfG, 1 BvF 1/01 of 17/07/2002, paragraphs no. 90, [http://www.bverfg.de/entscheidungen/fs20020717\\_1bvf000101en.html](http://www.bverfg.de/entscheidungen/fs20020717_1bvf000101en.html).

<sup>29</sup> Jarass, *op. cit.*, p. 245f.

<sup>30</sup> Article 6(2) Basic Law for the Federal Republic of Germany.

<sup>31</sup> Article 6(4) Basic Law for the Federal Republic of Germany.

<sup>32</sup> Article 6(3) Basic Law for the Federal Republic of Germany.



xvi. Even though children's rights are not explicitly part of the German Constitution - a fact that is constantly criticised<sup>33</sup> - they are widely acknowledged in legislation and by the German authorities. The Federal Republic of Germany is a party to several international Conventions aiming to protect children's rights (*see I. 1. iv./v. and I. 2.*). Therefore many steps in national legislation have been taken to honour the international commitments, for example the so-called *National Action Plan for a Germany fit for children 2005-2010* which includes numerous measures to secure e. g. a non-violent upbringing, equal opportunities through education, an adequate standard of living and healthy environmental conditions for all children.<sup>34</sup> In 2010 Germany was shocked by a scandal involving especially catholic institutions and private schools in cases of sexual abuse and violation of children which occurred primarily in the 1980s and 1990s, causing a huge public discussion throughout society, politics and the media about children's rights and their protection from sexual violence.<sup>35</sup> In consequence, the German Government instituted the *Runden Tisch gegen Kindesmissbrauch* (The round table against child abuse), a council consisting of three ministers, politicians, jurists, physicians, and representatives of the churches and other institutions, to improve the protection of children and teenagers from sexual violence.<sup>36</sup> The council's final statement<sup>37</sup> resulted in the *Action Plan 2011 of the Federal Government on the protection of children*<sup>38</sup> in which a general concept was developed, and

<sup>33</sup> Bundestag document No. 17/6920 of 6 September 2011, 06/09/2011, 16/09/2012, <http://dipbt.bundestag.de/dip21/btd/17/069/1706920.pdf>; Bundestag document No. 17/7644 of 9 November 2011, 09/11/2011, 16/09/2012, <http://dipbt.bundestag.de/dip21/btd/17/076/1707644.pdf>.

<sup>34</sup> Federal Government of Germany, *National Action Plan for a Germany fit for children 2005-2010*, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, January 2005, 16/09/2012, [http://www.national-coalition.de/pdf/nap-Germany05\\_englischpdf.pdf](http://www.national-coalition.de/pdf/nap-Germany05_englischpdf.pdf).

<sup>35</sup> T. Schultz, *Sexueller Missbrauch an der Odenwaldschule - Hier war alles erlaubt*, Süddeutsche.de, 27/09/2011, 16/09/2012, <http://www.sueddeutsche.de/kultur/sexueller-missbrauch-an-der-odenwaldschule-hier-war-alles-erlaubt-1.1149680>; M. Küpper/ M. K. Wagner, *Vorwürfe gegen Jesuiten-Pater – Missbrauchsskandal weitet sich aus*, Frankfurter Allgemeine Zeitung, 01/02/2010, 16/09/2012, <http://www.faz.net/aktuell/gesellschaft/kriminalitaet/vorwuerte-gegen-jesuiten-pater-missbrauchsskandal-weitet-sich-aus-1912846.html>.

<sup>36</sup> Federal Government of Germany, *Runder Tisch Sexueller Kindesmissbrauch in Abhängigkeits- und Machtverhältnissen in privaten und öffentlichen Einrichtungen und im familiären Bereich*, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, December 2011, 16/09/2012, <http://www.rundertisch-kindesmissbrauch.de/documents/111130AbschlussberichtRTKM111213.pdf>, p. 2ff.

<sup>37</sup> Bundestag document No. 17/8117 of 9 December 2011, 09/12/2011, 16/09/2012, <http://dip21.bundestag.de/dip21/btd/17/081/1708117.pdf>.

<sup>38</sup> Federal Government of Germany, *Aktionsplan 2011 der Bundesregierung zum Schutz von Kindern und Jugendlichen vor sexueller Gewalt und Ausbeutung*, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, September 2011, 16/09/2012, <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/aktionsplan-2011,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>.

concrete actions were defined<sup>39</sup> focusing on the fields of prevention, intervention, communication, education and international cooperation<sup>40</sup>. In addition to that, a working group of experts was appointed to monitor implementation and correct undesirable developments.<sup>41</sup> Furthermore, a *Federal Law on Child Protection* (Bundeskinderschutzgesetz) was passed which came into effect on 1 January 2012.<sup>42</sup>

### *International Obligations*

- xvii. Referring to Article 25 of the Basic Law, “the general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory”<sup>43</sup>. Even though it might seem as if the German legal system is monistic, the opposite is the case.<sup>44</sup> After a long academic discussion concerning the relationship between state law and international law the current prevailing view in German jurisdiction and experts’ literature distinguishes strictly between both legal systems, even though they overlap in many cases.<sup>45</sup> Therefore, it is spoken of a *moderate dualism*.<sup>46</sup> In consequence, an order is needed, which decrees that the international law should be applicable in domestic law.<sup>47</sup> Article 25 of the Basic Law, however, orders to apply to “general rules of international law”. According to the unanimous view of the judges of the Federal Constitutional Court of Germany, *general rules of international law* within the meaning of Article 25 are “rules of universally applicable customary international law, supplemented by the traditional general legal principles of national legal orders.”<sup>48</sup>

<sup>39</sup> Federal Government of Germany, *Kinder und Jugendliche besser schützen*, Federal Government of Germany, 27/09/2011, 16/09/2012, <http://www.bundesregierung.de/Content/DE/Artikel/2011/09/2011-09-27-kabinett-aktionsplan-2011.html>.

<sup>40</sup> Federal Government of Germany, *Aktionsplan 2011 der Bundesregierung zum Schutz von Kindern und Jugendlichen vor sexueller Gewalt und Ausbeutung*, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, September 2011, 16/09/2012, <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/aktionsplan-2011,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>, p. 3.

<sup>41</sup> Federal Government of Germany, *Kinder und Jugendliche besser schützen*, Federal Government of Germany, 27/09/2011, 16/09/2012, <http://www.bundesregierung.de/Content/DE/Artikel/2011/09/2011-09-27-kabinett-aktionsplan-2011.html>.

<sup>42</sup> Federal Law Gazette Part I, classification number 70, as last amended by the Act of 22 December 2011 (Federal Law Gazette I p. 2975).

<sup>43</sup> Basic Law for the Federal Republic of Germany, *op. cit.*, 13/09/2012, [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html).

<sup>44</sup> M. Herdegen, *Völkerrecht*, C. H. Beck, München, 2012, p. 164.

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.*

<sup>47</sup> M. Herdegen, *op. cit.*, p. 165.

<sup>48</sup> Federal Constitutional Court of Germany, Order of the Second Senate of 8 May 2007, 13/09/2012:

According to the Court's decision such a rule is regarded as being *general* "if it is recognised by the vast majority of states"<sup>49</sup>. Those rules of international law covered by Article 25 are directly applicable. On the other hand, Article 25 "does not relate to provisions that are contained in international agreements."<sup>50</sup> For treaties under international law, Article 59(2) of the Basic Law is considered *lex specialis* in terms of implementation: international treaties must be transposed into the national law by an approval law or legal decree.<sup>51</sup> Following the dualistic approach described above, after its transposition an international treaty has the rank of its act of transposition, usually that of a national law under the German constitution (*Basic Law*), whereas the general rules of international law within the meaning of Article 25 take precedence over the national laws.<sup>52</sup> Even though international law in Germany does not have the same rank as the constitution, the Federal Constitutional Court of Germany has constantly emphasized the Basic Law's commitment to international law (*Völkerrechtsfreundlichkeit*):

"the Basic Law encourages both the exercise of state sovereignty through the law of international agreements and international cooperation, and the incorporation of the general rules of public international law, and therefore is, if possible, to be interpreted in such a way that no conflict arises with duties of the Federal Republic of Germany under public international law."<sup>53</sup>

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BVerfG, 2 BvM 1/03 of 08/05/2007, paragraphs no. 34,  
[http://www.bverfg.de/entscheidungen/ms20070508\\_2bvm000103en.html](http://www.bverfg.de/entscheidungen/ms20070508_2bvm000103en.html).

<sup>49</sup> Federal Constitutional Court of Germany, *op. cit.*, paragraphs no. 34.

<sup>50</sup> *ibid.*

<sup>51</sup> "The law of international agreements applies on the domestic level only when it has been incorporated into the domestic legal system in the proper form and in conformity with substantive constitutional law." - Federal Constitutional Court of Germany, Order of the Second Senate of 14 October 2004, 14/09/2012: BVerfG, 2 BvR 1481/04 of 14/10/2004, paragraphs no. 36,  
[http://www.bverfg.de/entscheidungen/rs20041014\\_2bvr148104.en.html](http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.en.html).

<sup>52</sup> "The Basic Law has granted the general rules of public international law priority over ordinary statute law (Article 25 sentence 2 of the Basic Law) and has integrated the law of international agreements, by Article 59.2 of the Basic Law, into the system of the separation of powers." - Federal Constitutional Court of Germany, Order of the Second Senate of 14 October 2004, 14/09/2012: BVerfG, 2 BvR 1481/04 of 14/10/2004, paragraphs no. 33, [http://www.bverfg.de/entscheidungen/rs20041014\\_2bvr148104.en.html](http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.en.html). M. Herdegen, *op. cit.*, p. 168.

<sup>53</sup> *ibid.*; for further information see: Federal Constitutional Court - Press office, press release no. 92/2004 of 19. October 2004 on the order of 14. October 2004 - 2 BvR 1481/04, 14/09/2012,  
<http://www.bundesverfassungsgericht.net/en/press/bvg04-092en.html>.

On this theoretical basis it is therefore not surprising that the Federal Republic of Germany declared upon ratification of the *United Nations Convention on Rights of the Child* (UNCRC) on 6 March 1992<sup>54</sup> the following:

“The Federal Republic of Germany [...] declares that domestically the Convention does not apply directly. It establishes state obligations under international law that the Federal Republic of Germany fulfils in accordance with its national law, which conforms with the Convention.”<sup>55</sup>

Despite of this declaration the Federal Republic of Germany made another reservation to the UNCRC regarding its right “to pass laws and regulations concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens.”<sup>56</sup> This reservation was widely criticised for its discriminatory effects especially on children of refugees and migrants.<sup>57</sup> However on 3 May 2010, the Government of the Federal Republic of Germany decided to withdraw its reservations made upon ratification,<sup>58</sup> and notified its decision to the United Nations on 15 July 2010<sup>59</sup>. Nevertheless, the unconditional recognition of the UNCRC itself does not mean its implementation is completed.<sup>60</sup> In particular the treatment of unaccompanied refugee children in Germany is still causing huge

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<sup>54</sup> UN Treaty Collection, 14/09/2012, 14/09/2012, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY& mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY& mtdsg_no=IV-11&chapter=4&lang=en).

<sup>55</sup> UN Treaty Collection, 14/09/2012, 14/09/2012, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY& mtdsg\\_no=IV-11&chapter=4&lang=en#32](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY& mtdsg_no=IV-11&chapter=4&lang=en#32).

<sup>56</sup> UN Treaty Collection, 14/09/2012, 14/09/2012, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY& mtdsg\\_no=IV-11&chapter=4&lang=en#30](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY& mtdsg_no=IV-11&chapter=4&lang=en#30).

<sup>57</sup> UNICEF Deutschland, *Deutschland und die UN-Kinderrechtskonvention*, UNICEF Deutschland, 2012, 14/09/2012, <http://www.unicef.de/aktionen/kinderrechte20/kinderrechte-in-deutschland/>.

<sup>58</sup> Press Office of the German Federal Ministry of Justice, *Pressemitteilung: Großer Tag für Kinderrechte*, German Federal Ministry of Justice, 03/05/2010, 11/09/2012, [http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2010/20100503\\_Großer\\_Tag\\_fuer\\_die\\_Kinderrechte.html](http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2010/20100503_Großer_Tag_fuer_die_Kinderrechte.html).

<sup>59</sup> UN Treaty Collection, 12/09/2012, 12/09/2012, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY& mtdsg\\_no=IV-11&chapter=4&lang=en#30](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY& mtdsg_no=IV-11&chapter=4&lang=en#30); *q. v.* Press Office of the German Federal Ministry of Justice, *Pressemitteilung: UN-Kinderrechtskonvention - Rücknahme des Vorbehalts rechtswirksam*, 15/07/2010, 12/09/2012, [http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2010/20100715\\_UN\\_Kinderrechtskonvention\\_Ruecknahme\\_des\\_Vorbehalts\\_rechtswirksam.html](http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2010/20100715_UN_Kinderrechtskonvention_Ruecknahme_des_Vorbehalts_rechtswirksam.html).

<sup>60</sup> German Bundestag - Committee on Human Rights and Hummanitarian Aid, *Opposition: Rechtliche Konsequenzen aus Rücknahme des Vorbehalts zur Kinderrechtskonvention notwendig*, German Bundestag, 02/12/2010, 14/12/2012, [http://www.bundestag.de/presse/hib/2010\\_12/2010\\_401/02.html](http://www.bundestag.de/presse/hib/2010_12/2010_401/02.html).

difficulties.<sup>61</sup> In opinion of the UN Committee on the Rights of the Child most of them are not awarded adequate protection especially in asylum proceedings and, moreover, have “insufficient access to specialised professionals, who can provide multidisciplinary assistance for their physical and psychological recovery and social reintegration in Germany.”<sup>62</sup> These conditions have been repeatedly and heavily criticised by opposition and human rights organisations.<sup>63</sup> On the other hand, there are many positive aspects regarding the implementation of the UNCRC in Germany which should be mentioned: as a result of the Second Special Session of the UN General Assembly on Children 2002 the German Government initiated the *National Action Plan for a Germany fit for children 2005-2010* which should secure the implementation of the UNCRC by supporting the situation of children and their rights in all areas of life<sup>64</sup>. To monitor the implementation procedures an alliance was formed in May 1995, which followed the example of other states and consists of more than 110 organisations and associations at present.<sup>65</sup> This so-called *National Coalition for Implementation of the UNCRC in Germany* promotes the realisation of children’s rights, highlights the shortcomings in implementing the UNCRC and most importantly submits ‘shadow reports’ - a supplementary report on the reports of the Federal Republic of Germany to the United Nations<sup>66,67</sup>. As it seems there is also a

<sup>61</sup> German Bundestag - Committee on Family Affairs, Senior Citizens, Women and Youth, *Kritik an mangelnder Umsetzung der UN-Kinderrechtskonvention in Deutschland*, German Bundestag, 08/02/2012, 14/09/2012, [http://www.bundestag.de/presse/hib/2012\\_02/2012\\_072/02.html](http://www.bundestag.de/presse/hib/2012_02/2012_072/02.html).

<sup>62</sup> UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict : concluding observations : Germany*, UN Committee on the Rights of the Child, 13/02/2008, 14/09/2012, <http://www.unhcr.org/refworld/publisher,CRC,CONC/OBSERVATIONS,DEU,47bc38a72,0.html>, p. 4.

<sup>63</sup> German Bundestag - Committee on Family Affairs, Senior Citizens, Women and Youth, *Kritik an mangelnder Umsetzung der UN-Kinderrechtskonvention in Deutschland*, German Bundestag, 08/02/2012, 14/09/2012, [http://www.bundestag.de/presse/hib/2012\\_02/2012\\_072/02.html](http://www.bundestag.de/presse/hib/2012_02/2012_072/02.html).

<sup>64</sup> Federal Government of Germany, *National Action Plan for a Germany fit for children 2005-2010*, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, January 2005, 16/09/2012, [http://www.national-coalition.de/pdf/nap-Germany05\\_englischpdf.pdf](http://www.national-coalition.de/pdf/nap-Germany05_englischpdf.pdf).

<sup>65</sup> J. Huland/C. Kittel/K. Schweder, *National Coalition for Implementation of the UN Convention on the Rights of the Child in Germany*, National Coalition for Implementation of the UN Convention on the Rights of the Child in Germany, Berlin 2012, 16/09/2012, [http://www.national-coalition.de/pdf/Selbstdarstellung\\_2012\\_ENG.pdf](http://www.national-coalition.de/pdf/Selbstdarstellung_2012_ENG.pdf), p. 5.

<sup>66</sup> National Coalition for Implementation of the UN Convention on the Rights of the Child in Germany, *Supplementary Report of the National Coalition - On the Second Report of the Federal Republic of Germany to the United Nations in accordance with Article 44, paragraph 1, letter (b) of the Convention on the Rights of the Child*, National Coalition, June 2002, 16/09/2012, <http://www.national-coalition.de/pdf/SuplReportNationalCoalitionGermany.pdf>.

<sup>67</sup> J. Huland/C. Kittel/K. Schweder, *op. cit.*, p. 8.

new awareness of this matter in German Parliament: the Social Democratic Party of Germany recently presented a draft law amending German residence and asylum law.<sup>68</sup> In conclusion it can be said that although huge efforts have been made to fully implement the UNCRC it is most likely that it will still take some time until the implementation procedures are finally completed.

### *European Obligations*

- xviii. As all members of the European Union the Federal Republic of Germany has to implement the Directive 2011/92/EU of the European Parliament and the European Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography. The responsibility for the implementation is carried by the German Federal Ministry of Justice, which is currently involved in the internal coordination and preparation of the further process of implementation.<sup>69</sup> The Directive 2011/92/EU has to be implemented in national law until 18 December 2013.<sup>70</sup>

## 2 THE LANZAROTE CONVENTION

Apart from its commitment as a member of the European Union the Federal Republic of Germany also honours its obligations as a member of the Council of Europe.

- xix. Therefore, the Federal Republic of Germany signed the *European Convention on Human Rights* on 4 November 1950. Its ratification followed on 5 December 1952.<sup>71</sup>
- xx. Germany is also a party to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (*Lanzarote Convention*), which

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<sup>68</sup> German Bundestag - Committee on Internal Affairs, *SPD will Situation Minderjähriger im Aufenthalts- und Asylverfahren verbessern*, German Bundestag, 18/04/2012, 14/09/2012, [http://www.bundestag.de/presse/hib/2012\\_04/2012\\_187/01.html](http://www.bundestag.de/presse/hib/2012_04/2012_187/01.html); Bundestag document No. 17/9187 of 28 May 2012, 28/03/2012, 14/09/2012, <http://dipbt.bundestag.de/dip21/btd/17/091/1709187.pdf>.

<sup>69</sup> According to information provided by email by the German Federal Ministry of Justice - EU coordination on 18 September 2012.

<sup>70</sup> *ibid.*

<sup>71</sup> European Court of Human Rights - Public Relation Unit, *Country Fact Sheets 1959 – 2010*, Council of Europe, 11/2011, 12/09/2012, [http://human-rights-convention.org/wp-content/uploads/2011/09/Germany\\_en.pdf](http://human-rights-convention.org/wp-content/uploads/2011/09/Germany_en.pdf).

was signed on 25 October 2007<sup>72</sup> without any reservations, declarations or objections made upon signature.<sup>73</sup>

- xxi. In contrast to 23 European signatory countries the Federal Republic of Germany has not ratified the Lanzarote Convention yet.<sup>74</sup> Even though the ratification can assuredly be expected, it is impossible to say when this process will be terminated. A petition of the Social Democratic Party,<sup>75</sup> which was submitted in November 2011 and requested the German Government to ratify the Lanzarote Convention, has probably failed:<sup>76</sup> the Bundestag referred the petition<sup>77</sup> to the Committee on Family Affairs, Senior Citizens, Women and Youth which recommended its rejection<sup>78</sup>. Although the Committee alternatively suggested an acceptance, no further information was given explaining its decision.<sup>79</sup> Therefore, it can hardly be foreseen how the German Parliament will finally decide. In case of rejection it is most likely that similar petitions will be submitted in future until the Parliament will finally decide to ratify the Lanzarote Convention.
- xxii. As explained in Chapter I, 1, iv. the rank of the Lanzarote Convention depends on the rank of its act of transposition. It is most likely the Convention will be transposed by approval law, therefore it would rank as a national law under German Constitution.

## II NATIONAL LEGISLATION

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<sup>72</sup> Council of Europe - Treaty Office, Council of Europe, 12/09/2012, 12/09/2012, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=1&DF=&CL=ENG>.

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*

<sup>75</sup> Bundestag document No. 17/7807 of 22 November 2011, 22/11/2011, 16/09/2012, <http://dipbt.bundestag.de/dip21/btd/17/078/1707807.pdf>.

<sup>76</sup> Bundestag document No. 17/8392 of 19 January 2012, 19/01/2012, 16/09/2012, <http://dipbt.bundestag.de/dip21/btd/17/083/1708392.pdf>.

<sup>77</sup> German Bundestag - Plenary protocol of the parliamentary session of 24 November 2011 No. 17/143, p. 17155(B) ff., 24/11/2011, 16/09/2012, <http://dipbt.bundestag.de/dip21/btp/17/17143.pdf#P.17155>.

<sup>78</sup> Bundestag document No. 17/8392, *op. cit.*

<sup>79</sup> *ibid.*

## 1 GENERAL PRINCIPLES OF THE JURISDICTION

- vi. After Germany had declared its surrender at the end of the Second World War, the Allied Forces decided to create occupational administrations for Germany at the Jalta Conference in February 1945.<sup>80</sup> At the beginning there were four occupational zones one each for France, Great Britain, USSR and the US. France, Great Britain and the US then decided to merge their zones into one. Shortly afterward Germany was split into an Eastern and Western zone. The western zone being controlled by the Western Allies and the eastern zone controlled by the USSR. From that point on there were two “Germanys” developing in opposite directions. The German Democratic Republic (GDR), which ultimately failed in 1990 stood under the strong influence of the USSR and thus developed into a communist state<sup>81</sup>. On the other hand the Federal Republic of Germany (FRG), which stood under the influence of the Western Allies, developed into a social market economy. Tensions between the two states built in the times of the Cold War but were reduced by Willy Brandt’s new politics, which aimed at cooperation between the two states.<sup>82</sup> During the whole time many eastern Germans tried to flee to Western Germany, which on the one hand led to the Building of the Berlin Wall and on the other hand led to the final downfall of the GDR. In 1990 the division was finally ended with the ‘Two plus Four Treaty’<sup>83</sup> and the subsequent reunification of Eastern and Western Germany. The German Democratic Republic joined the Federal Republic of Germany so that the constitution of the Federal Republic (*Basic Law*) is still in force. It forms Germany as a democratic republic (Article 20 of the Basic Law) and as a reaction to the experiences made in the twentieth century it gives the head of state a relatively weak position, limiting them to mostly representative activities. At the moment a coalition of the Christian Democratic Union and the Free Democratic Party rules Germany with Angela Merkel as Chancellor of Germany.

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<sup>80</sup> R. Gmür/ A. Roth, *Grundriss der deutschen Rechtsgeschichte*, Carl Heymanns Verlag, Köln, 2008, p. 194, Annotation: 488.

<sup>81</sup> D. Willoweit, *Deutsche Verfassungsgeschichte, Vom Frankenreich bis zur Wiedervereinigung Deutschlands*, Verlag C.H. Beck München, 2009, p. 380.

<sup>82</sup> D. Willoweit, *Deutsche Verfassungsgeschichte, Vom Frankenreich bis zur Wiedervereinigung Deutschlands*, Verlag C.H. Beck München, 2009, p. 401.

<sup>83</sup> D. Willoweit, *Deutsche Verfassungsgeschichte, Vom Frankenreich bis zur Wiedervereinigung Deutschlands*, Verlag C.H. Beck München, 2009, p. 408.



vii. Generally human rights are found at the beginning of the *Basic Law for the Federal Republic of Germany* (German Constitution, so-called *Grundgesetz*) in the Articles 1 to 19 underlining their importance. Apart from the human rights laid out in the Articles 1 to 19, there are others scattered throughout the constitution (e.g. Articles 101, 103, 104). However Germany is also actively involved in international organisations concerned with human rights. This has led to many contracts binding Germany.<sup>84</sup> The importance of human rights is further enhanced by being part of the core of the constitution. They could only be eliminated in their core value if the German population voted for a new constitution.<sup>85</sup> The current German Constitution went into power on the 23.05.1949 for Western Germany. Eastern Germany followed suit after the Reunification and thus the Constitution went into power for the whole of Germany on the 03.10.1990. The original Constitution was drafted by the Parliamentary Council in the time between the 01.09.1948 and the 08.05.1949.<sup>86</sup>

At the beginning of the constitution in Article 6 certain principles regarding the treatment of families and children are laid out. Specifically it guarantees that children born out of wedlock are treated equally to other children.<sup>87</sup> Furthermore it sets certain conditions, which have to be met before a child can be separated from its family.<sup>88</sup>

viii. There is the Federal Constitutional Court of Germany, situated in Karlsruhe. Furthermore nearly every “Land” (Germany is divided into sixteen so-called *Länder*) has another constitutional court guaranteeing the fundamental rights laid down in the constitution of every respective “Land” which often go further than the ones laid down in the constitution for the whole of Germany.

The Constitutional Court of Germany has as one of its main tasks to ensure the implementation of the national human rights laid out in the Basic Law.<sup>89</sup> Human

<sup>84</sup> e.g. International Covenant on Civil and Political Rights, European Convention on Human Rights.

<sup>85</sup> H. D. Jarass/ B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland Kommentar*, Verlag C.H. Beck München, 2011, Art. 79, marginal no. 10.

<sup>86</sup> D. Willoweit, *Deutsche Verfassungsgeschichte, Vom Frankenreich bis zur Wiedervereinigung Deutschlands*, Verlag C.H. Beck Munich, 2009, p. 340 – 341.

<sup>87</sup> Article 6 (5) Basic Law.

<sup>88</sup> Article 6 (3) Basic Law.

<sup>89</sup> <http://www.bundesverfassungsgericht.de/organisation/aufgaben.html>, last visited on the 18.10.2012 at

rights, laid down in international contracts, are ensured on the one hand by the European Court of Human Rights regarding the human rights laid down in the European Convention on Human Rights, and on the other hand by the Court of Justice of the European Union regarding the human rights laid down in the Charter of Fundamental Rights of the European Union.

Individuals can claim their constitutional rights directly in front of the Federal Constitutional Court of Germany in the procedural context of a constitutional complaint (*Verfassungsbeschwerde*). Before applying though they need to have gone through the instances previously to avoid flooding the constitutional court with cases.

It is possible to apply individually. However certain requirements need to be fulfilled, for once one cannot go directly to the constitutional court, but rather has to have sought justice using “ordinary” courts.<sup>90</sup> To apply individually one further has to show that there is a possibility that one has been injured in one’s constitutional rights. Also it is necessary to be represented by a lawyer or equally qualified person.<sup>91</sup> Other possibilities include going to the European Court for human rights in Strasbourg or the European Court of Justice of the European Union in Luxembourg.

Regarding § 23 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) the process starts with a written application containing the justification for the case. Then one judge (so-called *Berichterstatter*) prepares the case for decision and recommends a course of action. To be accepted for decision various criteria need to be fulfilled regarding the claimant, the subject of the case and so on. Depending on the case oral proceedings take place or not, a decision is made and the judgment pronounced.

- ix. There is a criminal supreme court in Germany called *Bundesgerichtshof*. In some cases the highest court for criminal affairs however is the *Oberlandesgericht* (Higher Regional Court). The criminal procedure in Germany is split into five procedures.<sup>92</sup> It begins

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<sup>90</sup> § 90 (2) 1 of the Federal Constitutional Court Act („Bundesverfassungsgerichtsgesetz“).

<sup>91</sup> § 22 (1) of the Federal Constitutional Court Act.

<sup>92</sup> W. Beulke, *Strafprozessrecht*, Heidelberg, 2010, p. 2, marginal no 2.

with the investigation proceedings (*Ermittlungsverfahren*) in which the prosecution with the help of the police investigates the crime. It should be emphasised though that the prosecution does not only collect evidence proving the guilt of the accused but also evidence that shows his innocence. After the investigation procedure is finished the interlocutory proceedings begin in which the court decides whether or not the main proceedings (*Hauptverfahren*) against the accused will take place. The main proceedings follow directly after the interlocutory proceedings and are there to decide on the actual case, so basically if the accused is guilty or not. After the main proceedings are finished, review proceedings can take place. When the accused is found guilty it continues with the enforcement procedure (*Vollstreckungsverfahren*), in which the punishment decided by the court is enforced.<sup>93</sup>

- x. The minimum age for criminal liability is 14 years as defined in § 19 of the German Criminal Code. For adolescents aged between 14 and 21 there are additional regulations in the Juvenile Court Act (*Jugendgerichtsgesetz*). The Federal Statistical Office of Germany (*Statistisches Bundesamt*) has published a statistic listing the number of prisoners categorized by age, sex and other criteria. After the statistic there were 587 prisoners aged between 14 and 18 years in Germany. Looking at the group of people aged between 18 and 21 there were 3110 prisoners.

## 2 SUBSTANTIVE CRIMINAL LAW

It is of fundamental relevance to get at least a detailed overview of how the different legal codes can and do play a role in cases of sexual abuse within the German Civil Law System. Certainly the most important legal code here is the *German Criminal Code* (*Strafgesetzbuch - StGB*). It contains all the substantive criminal law whereas the *German Code of Criminal Procedure* (*Strafprozessordnung - StPO*) determines formal standards concerning criminal cases. As the German Criminal Code plays the main role within cases of sexual abuse, it is necessary to first understand its structure before having an actual look at the relevant norms. It is divided into two parts: a general part consisting of five segments dealing with general

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<sup>93</sup> *op. cit.*, p. 2, marginal no. 2.

requirements for culpability and legal consequences and a special part with thirty segments covering the different types of statutory offences.<sup>94</sup> As the fewest forms of sexual violence against children involve a manslaughter or homicide, segment thirteen of the German Criminal Code certainly covers the most important criminal offences here: the ones against the sexual self-determination.

## 2.1 Sexual Abuse

xxxii. The term “sexual activities” that is now playing the key role within segment thirteen of the Criminal Code, was first introduced with the fourth legislation governing the Criminal Code in 1973 (*4. Gesetz zur Reform des Strafrechts = 4. StrRG*). Back then it was felt that this neutral description was preferable to the terms “fornication” or “bawdy action”. What the German legislator however did not do is define the term within the Criminal Code itself.

Defining the term “sexual activities” in general is controversial. “Narrow” definitions subsume only such acts under the term, which involve clear sexual body contact between the victim and the perpetrator. “Wider” definitions on the other hand comprise any harmful sexual act forasmuch not only the ones with, but also such without or with only indirect body contact.<sup>95</sup> Those could be non-consensually penetration of the vulva or anus with the penis or forcing people to: bear lascivious glimpses and expressions, give tongue kisses, show their naked body and let the perpetrator grab them, see the offender naked and touch him, masturbate him, perform oral intercourse, watch pornography or participate in pornography.<sup>96</sup>

The definition underlying the Criminal Code contains any conduct (or omission by way of exemption) that, from an objective point of view, conduces the gratification of sexual needs.<sup>97</sup> The code therefore takes into account the activity’s outward

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<sup>94</sup> V. Krey/ R. Esser, *Deutsches Strafrecht Allgemeiner Teil*, Verlag W. Kohlhammer, Stuttgart, 2011., marginal no. 32 ff.

<sup>95</sup> Federal Government of Germany, Final Report Federal Government of Germany, *Runder Tisch Sexueller Kindesmissbrauch in Abhängigkeits- und Machtverhältnissen in privaten und öffentlichen Einrichtungen und im familiären Bereich*, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, p. 11.

<sup>96</sup> G. Braun, *Gegen sexuellen Mißbrauch an Mädchen und Jungen - Ein Ratgeber für Mütter und Väter*, Hrsg. AJS NRW e.V., p. 8 f.

<sup>97</sup> M. Frommel, U. Kindhäuser/ U. Neumann/ H. Paeffgen (Hrsg.): *Strafgesetzbuch, Kommentar, Band 2: §§ 146 - 358 StGB*, Nomos Verlag, Heidelberg, 2010., § 184g, marginal no. 1; W. Perron/ J. Eisele, A. Schönte/ H.

appearance, which needs to show a sexual connection. The offender's perception remains irrelevant.<sup>98</sup> It may only play a role when it comes to his or her mens rea, not however concerning the actus reus of the crime, which the definition is a part of. Hence it is the "wide" definition that is applied within the German law as it can also be seen in the variety of criminal offences in segment thirteen. Whether with or without body contact, sexual activities with minors are penalised in different harshness in the §§ 174 to 184f of the German Criminal Code. Yet one cannot find this definition in the code itself; it is the result of supplementary interpretation and exercise by the jurisprudence and law academics.<sup>99</sup>

As a result of this basic principle of applying the wide definition the legislator however felt the need of narrowing down the applicability of the statements of facts in order to prevent an over-penalisation. § 184g no. 1 of the German Criminal Code states that for the purpose of the German Criminal Code sexual activities have to show a certain pertinence towards the legally protected good. Whether the level of materiality is exceeded is decided on the basis of the intensity, length and kind of sexual action as the relationship between the perpetrator and the victim. If according to these criteria the interference is unacceptable one can speak of a sexual activity for the purpose of the German Criminal Code.<sup>100</sup> That is always the case with actions that are capable of jeopardising the child's development.<sup>101</sup>

xxxiii. But beside the level of materiality that needs to be reached in order to be liable under segment thirteen of the German Criminal Code, any act also needs to be committed intentionally. This is the result of one of the main ideas of the German criminal system: you can only be liable for the things you do on purpose, as clearly stated in § 15 of the German Criminal Code. Only when negligence is explicitly named in the

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Schröder, *Strafgesetzbuch, Kommentar*, Verlag C.H.Beck, Munich, 2010 (zit.: Bearbeiter, in: Schönke/Schröder), § 184g, marginal no. 6.

<sup>98</sup> K. Lackner/ K. Kühl, *Strafgesetzbuch, Kommentar*, Verlag C.H.Beck, Munich, 2011, § 184g, marginal no 2; Ziegler, Theo, in Beck'scher Online-Kommentar, hrsg. v. Bernd von Heintschel-Heinegg, Verlag C.H.Beck, Munich, 2012 (zit.: Bearbeiter, in: BeckOK), § 184g, marginal no 3.

<sup>99</sup> T. Hörnle, W. Joecks/ K. Miebach (Hrsg.): *Münchener Kommentar zum Strafgesetzbuch, Band 3: §§ 80 - 184g* of the German Criminal Code, Verlag C.H.Beck, Munich, 2012, § 184g, marginal no 2.

<sup>100</sup> Perron/Eisele, Schönke/Schröder, § 184g, marginal no. 15a; Ziegler, BeckOK StGB, § 184g, marginal no. 5.

<sup>101</sup> Ziegler, BeckOK StGB, § 176, marginal no. 10.

code criminal liability would be applicable.<sup>102</sup> Nevertheless the Criminal Code again, as with the term “sexual activities“, fails to define the word “intention“, thus leaving it to the jurisdiction and the law academics to create criteria for demarcation. They nowadays all agree on the short version of the definition, intention being the knowledge about and the volition of the realisation of all the elements of the offence.<sup>103</sup>

There are three acknowledged forms of intention where the intellectual and the volutative component emerge in different intensity: *dolus directus* first order (one acts with the intention of fulfilling the offence), *dolus directus* second order (one may not want the offence to happen but knows it is going to) and *dolus eventualis* (one does not want the offence to happen but approves of it eventually).<sup>104</sup> Generally the lowest form of intention is enough to fulfil § 15 of the German Criminal Code. Only in exceptional cases the Criminal Code states that a higher form is required.

When all the facts of an offence of sexual abuse have been realised intentionally one can have a closer look at the criminal liability of such cases. At this stage it is of major significance to understand the basic structure of the German Criminal Code. It lists all kinds of offences that are punished with the vigour of the law. Some of them however only constitute a qualification of others, meaning that they contain all the facts of the basic offence and add to that certain requirements such as different forms of violence used, the manner of commitment or certain intentions that justify a higher sentence as they implement a greater injustice.<sup>105</sup> If a qualification is fulfilled the basic offence is subsidiary and always stands back; the criminal liability is drawn upon the qualification.

There are also rules for aggravating the sentence in eminently more serious cases or mitigating in less strongly cases. Those rules however do not constitute qualifications but rather rules of assessment of punishment.<sup>106</sup>

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<sup>102</sup> G. Duttge, W. Joecks/ K. Miebach (Hrsg.): *Münchener Kommentar zum Strafgesetzbuch*, Band 1: §§ 1 - 37, 2011, § 15, marginal no. 30.

<sup>103</sup> Federal Supreme Court of Germany concerning criminal affairs, volume 36, p. 1, p. 9f.; H. Kudich, BeckOK StGB, § 15, marginal no. 2 f.; Krey/Esser, *Deutsches Strafrecht AT*, marginal no 377.

<sup>104</sup> Krey/Esser, *Deutsches Strafrecht AT*, marginal no. 377 ff..

<sup>105</sup> Krey/Esser, *Deutsches Strafrecht AT*, marginal no. 232.

<sup>106</sup> Krey/Esser, *Deutsches Strafrecht AT*, marginal no. 235.

Furthermore there is a special form of qualifications, so called *Erfolgsqualifikationen*, qualifications that are tied to a special “success“, the result of the offence.<sup>107</sup> In those cases it is a certain danger that is linked to the basic offence that is realised, which justifies a higher sentence.<sup>108</sup> According to § 18 of the German Criminal Code the offender needs to at least act negligently concerning the occurrence of the severe consequence and intentionally regarding the basic offence.<sup>109</sup>

The most important “basic offence” within segment thirteen doubtlessly is § 176 (1) of the German Criminal Code. It criminalises the sexual abuse of children in general. Contrary to the perception of the United Nations that a child means “every human being below the age of eighteen years“<sup>110</sup>, this paragraph states that children within the German criminal law are considered being below the age of fourteen years. Furthermore the term “sexual activity” is narrowed down to only the ones with body contact (narrow definition) for the purpose of this section.<sup>111</sup> When all the facts of the offence are fulfilled intentionally by the defendant, the criminal liability amounts to a prison sentence from between 6 months and 10 years. This means that § 176 (1) of the German Criminal Code, the sexual abuse of a child, is not considered a felony in Germany, as felonies are only such crimes with a minimum sentence of 1 year (stated in § 12 (1) of the German Criminal Code). It is a delinquency. The status quo was created by the fourth legislation governing the Criminal Code from 1973 and is still contested today.<sup>112</sup> When the legislator reformed segment thirteen of the Criminal Code in 2003<sup>113</sup>, it was highly disputed whether or not to transform the offence into a felony again. The result was a balancing act: as an offset to the offence staying a delinquency the legislator introduced an elusive differentiation of the range of sentences.<sup>114</sup> Concerning the sexual abuse of a child in general, the sentence remained from between 6 months and 10 years of prison. Only in eminently more serious cases

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<sup>107</sup> Krey/Esser, *Deutsches Strafrecht AT*, marginal no. 204.

<sup>108</sup> Krey/Esser, *Deutsches Strafrecht AT*, marginal no. 211.

<sup>109</sup> Duttge, MüKo, § 15, marginal no. 21.

<sup>110</sup> Article 1 of the Convention on the Rights of the Child.

<sup>111</sup> Perron/Eisele, Schönke/Schröder, § 176, marginal no. 2; Renzikowski, MüKo, § 176, marginal no. 23.

<sup>112</sup> Renzikowski, MüKo, § 176, marginal no. 12.

<sup>113</sup> “*Gesetz zur Änderung der Vorschriften über die Straftaten gegen die sexuelle Selbstbestimmung*“ - provision changing the regulations about offences against the sexual self-determination.

<sup>114</sup> Renzikowski, MüKo, § 176, marginal no. 16.

does the minimum sentence amount to 1 year, making the offence a felony (§ 176 (3) of the German Criminal Code). When to speak of such a case is decided by the judges in an ad hoc evaluation.<sup>115</sup> As § 176 (1) of the German Criminal Code means to protect the sexual development of children, an operative consent is not possible for this offence. There is no possibility of disposal of this legally protected good.<sup>116</sup>

The offender, as seen above, needs at least to consider it possible for the victim to be younger than 14 years.<sup>117</sup> When erroneously misjudging the age, he lacks of intention in pursuance of § 16 (1) 1 of the German Criminal Code. His factual mistake however does not necessarily mean he is not subject to prosecution. If he or she wrongly assumes circumstances fulfilling a milder offence, his or her culpability for this offence remains pristine.<sup>118</sup>

When he or she estimates the victim being older than thirteen but younger than 18 years, § 182 of the German Criminal Code comes to effect.<sup>119</sup> In cases of section 1, the offender needs to be at least of the age of criminal responsibility, which in Germany is 14 years as states § 19 of the German Criminal Code. He must use a predicament to perform sexual activities with body contact (no. 1) or determine the victim to do so with a third person (no. 2). Such a predicament exists when the victim finds him- or herself in a serious personal or economical affliction that precisely restricts the possibility to decide freely about his or her sexual attitude.<sup>120</sup> The provision especially embraces cases of adolescent drug addicts or adolescents that ran away from home.<sup>121</sup> When this section is intentionally fulfilled, the criminal liability amounts up to 5 years of prison or a fine. The same sentence range is provided by section 2 of the paragraph criminalising personal sexual activities with body contact by a person older than 17 years who abuses the victim by supplying compensation for it. The payment must be causal for the adolescent's decision.<sup>122</sup> Section 3 at last penalises sexual activities with body contact between an adolescent of less than 16 years and a person of 21 years or

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<sup>115</sup> Lackner/Kühl, § 176, marginal no. 3.

<sup>116</sup> Renzikowski, Joachim in MüKo, § 176, marginal no. 3.

<sup>117</sup> Ziegler in BeckOK StGB, § 176, marginal no. 35.

<sup>118</sup> Renzikowski, MüKo, § 176, marginal no. 30.

<sup>119</sup> Federal Supreme Court of Germany concerning criminal affairs, volume 42, p. 51, p. 55; Lackner/Kühl, § 176, marginal no. 7; Ziegler in BeckOK, § 182, marginal no. 3.

<sup>120</sup> Ziegler in BeckOK, § 182, marginal no. 5 f.

<sup>121</sup> Federal Supreme Court of Germany concerning criminal affairs, volume 42, p. 399.

<sup>122</sup> Ziegler, BeckOK, § 182, marginal no. 8.



older (no. 1) or the determining to perform such activities with a third person by somebody who is 21 years old or older (no. 2). The adult must abuse the victim's missing ability to self-determine him- or herself sexually, meaning his or her age-related sexual immaturity.<sup>123</sup> Then the sentence range amounts up to 3 years of prison or a fine. An exemption from punishment is possible in all the cases according to § 182 (6) of the German Criminal Code if the injustice arising from the deed is small. This however is ruled by the court in an ad hoc decision.<sup>124</sup>

xxxiv. As seen above the German Criminal Code does not facilitate the disposal of a child's sexual self-determination.<sup>125</sup> Quite the contrary: it criminalises any sexual activity with a person below the age of 14 years. The disparity of force in sexual contacts between minors and adults makes them despicable and unacceptable.<sup>126</sup> This imbalance of power as the reason for penalisation however declines more and more with the victim's growing age. From 14 years on the code supposes the ability to freely consent in sexual actions. Adolescents are not inferior to adults in a way where they could not express their own will.<sup>127</sup> Therefore the legal age for engaging in sexual activities is 14 years. Only when special circumstances join in or when there is no consent at all, the liability according to other paragraphs of segment thirteen of the Criminal Code such as § 182 or § 177 of the German Criminal Code remains.<sup>128</sup>

There is however a problem. The German legislator did not think of when creating the stiff and absolute age limit in segment thirteen of the Criminal Code. The disparity of force in relationships between children and their sex partners depends significantly on the age difference between them.<sup>129</sup> Acquiring sexual experiences with almost even-aged is part of a normal development every child passes through when growing up. Yet, § 176 of the German Criminal Code includes such sexual contacts. A 15 year old boy would hence be liable under § 176 of the German Criminal Code for petting, hugging and kissing a 13 year old girl. Even though the provision within § 176 of the

<sup>123</sup> Ziegler, BeckOK, § 182, marginal no. 9 ff..

<sup>124</sup> Ziegler, BeckOK, § 182, marginal no. 18.

<sup>125</sup> J. Renzikowski, MüKo, § 176, marginal no. 3.

<sup>126</sup> Renzikowski, MüKo, Vorb. §§ 174 ff., marginal no. 26.

<sup>127</sup> Renzikowski, MüKo, Vorb. §§ 174 ff., marginal no. 26.

<sup>128</sup> For those circumstances see remarks on §§ 177 and 182 of the criminal code.

<sup>129</sup> Renzikowski, MüKo, Vorb. §§ 174 ff., marginal no. 27.

German Criminal Code for less strongly cases has been abolished and replaced with the regulation concerning particularly hard cases in § 176 (3) of the German Criminal Code with the reform of 2003, one therefore still needs to take into consideration the lower degree of wrongdoing when it comes to the assessment of punishment in such cases.<sup>130</sup> Criminal liability however can only be avoided by means of provisions of the German Code of Criminal Procedure concerning the disregard of sentence by virtue of insignificance (§§ 153 ff. of the German Code of Criminal Procedure) or invoking the principle of proportionality.<sup>131</sup>

When it comes to consensual sexual activities between children, which in Germany are persons below the age of 14 years<sup>132</sup>, § 19 of the German Criminal Code takes effect on how to deal with those cases legally: children are *doli incapax*; even if committing a crime intentionally, there are no criminal consequences due to their lack of criminal capacity.<sup>133</sup> The paragraph establishes a bar of trial to their actions.<sup>134</sup>

xxxv. After having had a closer look at the basic paragraph within segment thirteen of the Criminal Code, § 176 (1) of the German Criminal Code, one might go on contemplating its qualifications and other offences in this segment that regulate the use of force, taking advantage of disability or threat in regards to sexual crimes. Those are all elements that increase the range of sentences in Germany.

§ 176a of the German Criminal Code lists a variety of qualification that are all considered felonies, since the minimum sentence always exceeds one year.<sup>135</sup> When it comes to using force whilst sexually abusing a child, § 176a (2) no. 3 or (5) of the German Criminal Code might be applicable. § 176 (2) no. 3 of the German Criminal Code penalises the sexual abuse of a child that constitutes the danger of a major health damage or a substantial injury to the victim's physical or mental development with a custodial sentence of at least 2 years that can only be reduced to a minimum sentence of one year when a less strongly case has been proven according to § 176a (4) of the

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<sup>130</sup> Lackner/Kühl, § 176, marginal no. 9.

<sup>131</sup> Frommel, Kindhäuser/Neumann/Paeffgen, § 176, marginal no. 29.

<sup>132</sup> See above.

<sup>133</sup> B von Heintschel-Heinegg, BeckOK StGB, § 19, marginal no. 13.

<sup>134</sup> Lackner/Kühl, § 19, marginal no. 2; Heintschel-Heinegg, BeckOK StGB, § 19, marginal no. 18.

<sup>135</sup> Lackner/Kühl, § 176a, marginal no. 1.

German Criminal Code.<sup>136</sup> A major health damage can be any physical or mental medical condition that incisively and lastingly impairs the victim's health, whereas a substantial injury to the victim's physical or mental development encompasses cases where the abuse creates the concrete danger of a considerable divergence of the child's expected normal development.<sup>137</sup> In none of these cases the health damage needs to actually arise, a concrete danger is sufficient.<sup>138</sup> The likeliness of a developmental disorder increases with the victim's declining age, the offender being a representative and the amount of force or threat used.<sup>139</sup> Of course some would argue that any sexual abuse results in mental and physical health problems and thereby the qualification needed to be reduced to only those cases where major traumatisation has been specifically proven.<sup>140</sup> This however contradicts the provision's spirit and purpose. If anything it is the basic offence (§ 176 (1) of the German Criminal Code) that serves as a catch-all element when for example the perpetrator is still a minor, the child being abused has almost reached the age limit or the actions are less aggravating and realised consensually.<sup>141</sup> Otherwise any perpetrator is able to assume that his actions create a concrete danger for the child's health, thus a restrictive statutory interpretation is not necessary. Yet the offender needs to act intentionally regarding all the elements that constitute the concrete danger.<sup>142</sup> When fulfilling § 176 (1), (2) or (3) of the German Criminal Code and thereby creating a mortal danger or severely abusing the victim physically, § 176a (5) of the German Criminal Code provides a minimum penalty of 5 years that cannot be reduced.<sup>143</sup> The mortal danger must be specific and caused by the deed. All attributable consequences that evoke such a danger - even if long-term - suffice.<sup>144</sup> A severe physical abuse on the other hand covers those cases where the perpetrator brings major or lengthy pains on the victim especially by fiercely hitting him or her or using harmful objects.<sup>145</sup> Crucial here is the physical mistreatment's

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<sup>136</sup> Frommel, Kindhäuser/Neumann/Paeffgen, § 176a, marginal no. 17.

<sup>137</sup> Renzikowski, MüKo, § 176a, marginal no. 25, 26.

<sup>138</sup> Renzikowski, MüKo, § 176a, marginal no. 28.

<sup>139</sup> Frommel, Kindhäuser/Neumann/Paeffgen, § 176a, marginal no. 13.

<sup>140</sup> Renzikowski, MüKo, § 176a, marginal no. 25 ff.

<sup>141</sup> Frommel, Kindhäuser/Neumann/Paeffgen, § 176a, marginal no. 6, 8.

<sup>142</sup> Ziegler, BeckOK StGB, § 176a, marginal no. 21; Frommel, Kindhäuser/Neumann/Paeffgen, § 176a, marginal no. 16.

<sup>143</sup> Frommel, Kindhäuser/Neumann/Paeffgen, § 176a, marginal no. 17.

<sup>144</sup> Renzikowski, MüKo, § 176a, marginal no. 36; Ziegler, BeckOK StGB, § 176a, marginal no. 20.

<sup>145</sup> New Journal of Criminal Law (Neue Zeitschrift für Strafrecht, NSStZ), Verlag C.H.Beck, 1998, p. 461 =

severity, not the admission of severe health damages. The physical abuse needs to occur with the offence, either the sexual action itself or its enforcement, thus showing a straight spacio-temporal cohesion to the offence.<sup>146</sup> Furthermore the perpetrator's intention must bear upon all the elements establishing the mortal danger or severe physical abuse.<sup>147</sup> If the mortal danger is realised and the victim dies, § 176b of the German Criminal Code - sexual abuse resulting in death - is fulfilled and the penalty amounts to 10 years or life imprisonment.<sup>148</sup> As this offence however is an *Erfolgsqualifikation*, it suffices if the offender causes the child's death by recklessness according to §§ 18, 176b of the German Criminal Code.

Another important paragraph concerning the use of force, threat or taking advantage of disability is § 177 of the German Criminal Code, criminalising sexual assault and rape against all persons, whether children or adults. Section 1 of the paragraph cites the basic offence: sexual assault. It presumes that another person is coerced to tolerate or carry out sexual actions with the offender or a third person. The term "compulsion" presupposes the overcoming of the victim's opposing will with means of coercion that can be the use of violence, threat with a present danger for the victim's life or health or taking advantage of a situation where the victim is at the mercy of the perpetrator's actions.<sup>149</sup> For the purpose of this section, violence means physical operating coercion by the expansion of force or any other physical impact that may influence or suppress the freedom of exerting one's will.<sup>150</sup> When it comes to § 177 (1) of the German Criminal Code however, only violence against a person creates a mean of coercion.<sup>151</sup> Threat on the other hand means holding out the prospect of a delicate future evil where the offender attributes himself such influence growing into effect.<sup>152</sup> The future evil needs to be targeted towards the victim's health

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Federal Supreme Court of Germany concerning criminal affairs, file reference 5 StR 216/98.

<sup>146</sup> Perron/Eisele, Schönke/Schröder, § 176a, marginal no. 14; Ziegler, BeckOK StGB, § 176a, marginal no. 19.

<sup>147</sup> Lackner/Kühl, § 176a, marginal no. 5, § 177, marginal no. 12; Ziegler, BeckOK StGB, § 176a, marginal no. 21.

<sup>148</sup> Ziegler, BeckOK StGB, § 176a, marginal no. 20.

<sup>149</sup> Perron/Eisele, Schönke/Schröder, § 177, marginal no. 4.

<sup>150</sup> W. Joecks, *Strafgesetzbuch, Studienkommentar*, Verlag C.H.Beck, München, 2009, § 240, marginal no. 12; T. Fischer, *Strafgesetzbuch und Nebengesetze, Kommentar*, Verlag C.H.Beck, München, 2012, § 240, marginal no. 8; F. Toepel, Kindhäuser/Neumann/Paeffgen, StGB, § 240, marginal no. 35f; J. Wessels/ M. Hettinger, *Strafrecht Besonderer Teil/ 1, Straftaten gegen Persönlichkeits- und Gemeinschaftswerte*, C.F.Müller Verlag, Heidelberg, 2011, marginal no. 383.

<sup>151</sup> Perron/Eisele, Schönke/Schröder, § 177, marginal no. 5.

<sup>152</sup> Joecks, § 240 marginal no. 21, 26; Fischer, § 240, marginal no. 31, 32a; W. Küper, *Strafrecht Besonderer Teil*,

or life.<sup>153</sup> The third coercive named in § 177 (1) no. 3 of the German Criminal Code is the taking advantage of a defenceless situation where the victim is at the mercy of the perpetrator's actions. That is the case when the victim for example is substantially constrained in his or her defence and the perpetrator uses this situation to commit the sexual act.<sup>154</sup> The scope of § 177 (1) no. 3 of the German Criminal Code however is reduced by § 179 of the German Criminal Code (see below).<sup>155</sup>

Furthermore there needs to be a causal link between the compulsion and the sexual act.<sup>156</sup> The offender's intention must contain the application of the coercion to overcome any expected or actually offered resistance.<sup>157</sup> § 177 (1) of the German Criminal Code is then fulfilled and the minimum sentence amounts to one year. In eminently more serious cases it even amounts to a minimum sentence of two years as § 177 (2) of the German Criminal Code states. One example for such a case is rape, when the offender performs the copulation with the victim or other acts, that involve penetration (§ 177 (2) no. 1 of the German Criminal Code) or commits the offence with others collaboratively (§ 177 (2) no. 2 of the German Criminal Code).

When the sexual assault constitutes the danger of a major health damage or a substantial injury to the victim's physical or mental development (§ 177 (3) no. 3), as when the offender is armed while committing the deed to suppress any resistance (§ 177 (3) no. 1 and 2) the minimum sentence amounts to three years.<sup>158</sup>

An even higher qualification is constituted in § 177 (4) of the German Criminal Code: when using a weapon or dangerous tool (even if just to gain power over the victim by threatening him or her with it) (§ 177 (4) no. 1) or creating a mortal danger or severely abusing the victim physically (§ 177 (4) no. 2 a and b) during the sexual assault, the minimum sentence comes to 5 years of prison.<sup>159</sup>

If the mortal danger is realised and the victim dies, § 178 of the German Criminal Code - sexual assault and rape resulting in death - is fulfilled and the penalty is 10

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*Definitionen mit Erläuterungen*, C.F.Müller Verlag, Heidelberg, 2007, S. 105.

<sup>153</sup> Perron/Eisele, Schönke/Schröder, § 177, marginal no. 7.

<sup>154</sup> Federal Supreme Court of Germany concerning criminal affairs, volume 51, p. 280; Lackner/Kühl, § 177, marginal no. 6.

<sup>155</sup> Perron/Eisele, Schönke/Schröder, § 177, marginal no. 8.

<sup>156</sup> Perron/Eisele, Schönke/Schröder, § 177, marginal no. 4.

<sup>157</sup> Lackner/Kühl, § 177, marginal no. 10.

<sup>158</sup> For special requirements concerning no. 3 see remarks on § 176a (2) no. 3.

<sup>159</sup> Frommel, Kindhäuser/Neumann/Paeffgen, § 177, marginal no. 73; for special requirements concerning no. 2a and b see remarks on § 176a (5) of the German Criminal Code.

years or life imprisonment. The death must be caused by the act of compulsion or the sexual act itself.<sup>160</sup> As this offence however is an *Erfolgsqualifikation* it suffices if the offender causes the child's death by recklessness according to §§ 18, 178 of the German Criminal Code. If unanimously the killing though enforced the sexual act, there can be coincidence with the §§ 211, 212 of the German Criminal Code, murder and manslaughter.<sup>161</sup>

When it comes to the offender taking advantage of disability in order to perform sexual actions, § 179 of the German Criminal Code comes to effect. It protects all persons with a mental or emotional disorder including addiction or a pervasive disturbance of consciousness (§ 179 (1) no. 1) or who are physically unable to offer resistance (§ 179 (1) no. 2). If the offender is taking advantage of the disability and this causally facilitates the sexual actions, he or she has to expect a sentence between 6 months and 10 years according to § 179 (1) of the German Criminal Code.<sup>162</sup> Section 2 treats the sexual contact between victim and perpetrator or a third person as equals when the perpetrator determined the victim for the sexual acts between him or her and a third person.<sup>163</sup> The minimum sentence amounts to 1 year in eminently more serious cases according to section 3 and to 2 years when the qualification of section 5 is fulfilled. The latter can be reduced to a sentence between 1 and 10 years when a less strongly case has been proven according to section 6. As the qualification of section 5 corresponds to § 176a (2) of the German Criminal Code, it is fulfilled when the sexual actions involve penetration (no. 1), are committed with others collaboratively (no. 2) or cause the danger of a major health damage or a substantial injury to the victim's physical or mental development (no. 3).<sup>164</sup> Section 7 points at §§ 177 (4) no. 2, 178 of the German Criminal Code that are applied respectively.<sup>165</sup>

In general there is the possibility of coincidence, meaning the commission of two or more offences in one act, between § 179 of the German Criminal Code and the §§ 173

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<sup>160</sup> Frommel, Kindhäuser/Neumann/Paeffgen, § 178, marginal no. 1.

<sup>161</sup> Frommel, Kindhäuser/Neumann/Paeffgen, § 178, marginal no. 3.

<sup>162</sup> Lackner/Kühl, § 179, marginal no. 7; Frommel, Kindhäuser/Neumann/Paeffgen, § 179, marginal no. 28.

<sup>163</sup> Lackner/Kühl, § 179, marginal no. 9; Frommel, Kindhäuser/Neumann/Paeffgen, § 179, marginal no. 30.

<sup>164</sup> Renzikowski, MüKo, § 179, marginal no. 48ff.; Frommel, Kindhäuser/Neumann/Paeffgen, § 179, marginal no. 36.

<sup>165</sup> Frommel, Kindhäuser/Neumann/Paeffgen, § 179, marginal no. 37.

to 177 of the German Criminal Code.<sup>166</sup>

Admitting that all those paragraphs and sections might be confusing at first, the most important thing to realise is that within the German Criminal Code the use of force, taking advantage of disability or threat is always considered as aggravating circumstance. The general sentence range for the sexual abuse of a child rests with between 6 months and 10 years according to § 176 (1) of the German Criminal Code. Depending on the aggravating circumstances that of course have to be proven in court, it can increase up to 10 years as minimum sentences when the child (§ 176b of the German Criminal Code - or in cases of § 178 of the German Criminal Code the victim) dies as a result of the created danger or health damages while the sexual act or its enforcement.

- xxxvi. Up until here the sexual actions were never consensual. Those kinds however are not excluded from criminal liability in Germany. In segment 12 of the Criminal Code, which legally protects the marital status, matrimony and family, § 173 of the German Criminal Code penalises the copulation between biological relatives. Copulation signifies the female sexual organ's penetration with the penis suitable for conception. As soon as the penetration has started, one can accept criminal liability for the offence as stated in § 173 of the German Criminal Code.<sup>167</sup> When performing sexual intercourse with a biological descendant the criminal liability amounts up to 3 years or a fine (§ 173 (1) of the German Criminal Code); in such cases coincidence is possible especially with § 174 (1) no. 3 of the German Criminal Code as it criminalises sexual actions with biological or adopted minors, with §§ 176a (2) no. 1, 177 (2) of the German Criminal Code as they involve penetration and with § 182 of the German Criminal Code as it involves sexual abuse of minors below the age of 18 years.<sup>168</sup> When having copulation with a biological ascendant or sibling the sentence amounts up to 2 years or a fine (§ 173 (2) of the German Criminal Code). The Federal Constitutional Court dealt with this section's constitutionality in 2008 and declared the

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<sup>166</sup> Renzikowski, MüKo, § 179, marginal no. 68ff.; Frommel, Kindhäuser/Neumann/Paeffgen, § 179, marginal no. 38.

<sup>167</sup> Lenckner/Bosch, Schönke/Schröder, § 173, marginal no. 3; Lackner/Kühl, § 173, marginal no. 3.

<sup>168</sup> Lackner/Kühl, § 173, marginal no. 8.

penalisation of sexual intercourse between siblings compatible with the German constitution, thus ending a long dispute about it.<sup>169</sup> According to its view a plausible family damaging impact arises due to those actions that comes within the ambit of section 12 of the Criminal Code.<sup>170</sup> In all the cases the intention must bear upon all the elements of the crime, including the biological relation.<sup>171</sup> Only descendants and siblings below the age of 18 years are exempted from criminal liability according to § 173 (3) of the German Criminal Code, which embodies a personal legal reason for exemption from punishment.<sup>172</sup>

- xxxvii. There are four other paragraphs that play an important role when it comes to the offender taking advantage of school and educational settings, care and justice institutions, the work-place and the community. Those are §§ 174, 174a, 174b and 174c of the German Criminal Code. They all target at keeping certain relationships of dependencies free from sexual motives and relations.

Concerning the sexual abuse of children, it certainly is § 174 of the German Criminal Code that plays the most important role out of those four paragraphs. It protects children and adolescents under 16, partially under 18 years.<sup>173</sup> Section 1 states that carrying out sexual activities with body contact with one's ward is punishable by imprisonment between 3 months and 5 years. A ward for the purpose of this section is a person below the age of 16 years that is in the offender's care (no. 1), a person below the age of 18 years that is in the offender's care or in the context of an employment relationship if the perpetrator abuses the dependency that comes with it (no. 2) or a biological or adopted child under 18 years (no. 3).

The delinquent's care can concern the upbringing, apprenticeship or the looking after the lifestyle.<sup>174</sup> In order to come under the section's number 2 he or she furthermore needs to abuse the dependency that comes with the victim being under his or her care or their employment relationship which is especially the case when the perpetrator

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<sup>169</sup> BVerfG 2 BvR 392/07 = BVerfGE 120, 224.

<sup>170</sup> Lackner/Kühl, § 173, marginal no. 1; *other opinion*: Ritscher, MüKo, § 173, marginal no. 6.

<sup>171</sup> T. Lenckner/ N. Bosch, Schönke/Schröder, § 173, marginal no. 6.

<sup>172</sup> Lackner/Kühl, § 173, marginal no. 7; Ziegler, BeckOK StGB, § 173, marginal no. 4.

<sup>173</sup> Ziegler, BeckOK StGB, § 174, marginal no. 2, 3.

<sup>174</sup> Ziegler, BeckOK StGB, § 174, marginal no. 6.



uses pressure situations to bend the victim's will.<sup>175</sup>

Sexual activities without body contact in these kinds of relationships are also penalised in section 2 with an imprisonment up to 3 years or with a fine. The culprit needs to either perform sexual activities with his own body or a third person in front of the ward, or determine the ward to do so for sexual arousal.<sup>176</sup>

In all the cases the offender needs to act intentionally, particularly concerning the ward's age and their special relationship. For section 2 he or she furthermore needs to act with the intention (*dolus directus* first degree) of arousing sexually.<sup>177</sup>

An exemption from punishment is possible according to § 174 (4) of the German Criminal Code, but only in cases in accordance with § 174 (1) no. 1 of the German Criminal Code. The exemption therefore never comes into consideration when the offender abuses a dependency (no. 2) or his own child (no. 3), but for example in cases of real love affairs or when the ward starts the actions.<sup>178</sup>

The next paragraph, § 174a of the German Criminal Code, protects people in public or private institutions from indecencies with body contact of their guardians.<sup>179</sup> Section 1 concerns cases where prisoners or regulatory detained persons are sexually abused by persons to whom they are specifically confided - concerning the upbringing, apprenticeship, supervision or care. Those can be all kinds of persons who work within the institution: doctors, nurses, tutors, community workers etc.<sup>180</sup> When they abuse their position to undertake indecencies (which is fulfilled even if the position merely gives them the opportunity to do so) they are liable under § 174a (1) of the German Criminal Code.<sup>181</sup> Section 2 on the other hand protects people in need of care including invalids and objectively healthy people that are in a medical institution. As in section one, they need to be confided to the offender because of their need of care. He or she needs to take advantage of their weakened strength.<sup>182</sup> Both sections require intentional acting especially concerning the connection between the dependency and

<sup>175</sup> Federal Supreme Court of Germany concerning criminal affairs, volume 28, p. 365, p. 367; Ziegler, BeckOK StGB, § 174, marginal no. 8.

<sup>176</sup> Renzikowski, MüKo, § 174, marginal no. 36ff.; Ziegler, BeckOK StGB, § 174, marginal no. 10 ff.

<sup>177</sup> Frommel, Kindhäuser/Neumann/Paeffgen, § 174, marginal no. 23, 24; Ziegler, BeckOK StGB, § 174, marginal no. 13.

<sup>178</sup> Lackner/Kühl, § 174, marginal no. 16; Ziegler, BeckOK StGB, § 174, marginal no. 22.

<sup>179</sup> Ziegler, BeckOK, § 174a, marginal no. 3, 4.

<sup>180</sup> Ziegler, BeckOK, § 174a, marginal no. 6, 7.

<sup>181</sup> Renzikowski, MüKo, § 174a, marginal no. 15ff.; Ziegler, BeckOK, § 174a, marginal no. 8.

<sup>182</sup> Renzikowski, MüKo, § 174a, marginal no. 28; Ziegler, BeckOK, § 174a, marginal no. 9 ff.

the sexual activity.<sup>183</sup> When all elements of the offence have been proven the sentence ranges from 3 months to 5 years. Furthermore the ordinance of an employment ban according to § 70 of the German Criminal Code is possible.

When it comes to sexual abuse in judicial institutions, § 174b of the German Criminal Code is also applicable. It aims at offenders who are office holders in certain official proceedings (particularly police officers, prosecutors, judges, doctors that give medical opinions etc.) that can lead to the affected person's imprisonment or regulatory detention, who exploit their position and the victim's dependency on them in the specific proceeding to perform sexual activities with body contact.<sup>184</sup> Consensual activities do not necessarily preclude culpability, however the element of the "position's abuse" needs to be specifically examined in those cases. As with § 174 of the German Criminal Code, an abuse generally does not come to consideration in cases of real love affairs.<sup>185</sup> When all the elements of the offence have been fulfilled intentionally, the sentence range is between 3 months and 5 years and an ordinance of an employment ban according to § 70 of the German Criminal Code is possible.<sup>186</sup>

The same sentence range can be found within § 174c of the German Criminal Code that protects a certain group of people from sexual activities with body contact. This category of persons encompasses all mental or emotional invalids including addicts, all persons suffering from a physical illness or disability and all persons being in a psychotherapeutic treatment.<sup>187</sup> Here, too, the offender needs to take advantage of a relationship of dependency resulting from the specific illness in order to perform sexual activities.<sup>188</sup>

## 2.2 Child Prostitution

- xxxviii. Germany signed the Council of Europe Convention on Action against Trafficking in Human Beings on 17 November 2005. The Convention contains provisions in the

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<sup>183</sup> Ziegler, BeckOK, § 174a, marginal no. 13.

<sup>184</sup> Perron/Eisele in Schönke/Schröder, § 174b, marginal no. 3f., 7; Ziegler, BeckOK, § 174b, marginal no. 3 ff.

<sup>185</sup> New Legal Weekly (Neue Juristische Wochenschrift - NJW), Verlag C.H.Beck, 2011, p. 1891, p. 1893; Ziegler, BeckOK, § 174b, marginal no. 7; see remarks on § 174 of the German Criminal Code.

<sup>186</sup> Ziegler, BeckOK, § 174b, marginal no. 13.

<sup>187</sup> Ziegler, BeckOK, § 174c, marginal no. 4 ff.

<sup>188</sup> Ziegler, BeckOK, § 174c, marginal no. 7, 8.

areas of victim support and protection, residence rights, criminal law and criminal procedure law, international cooperation and an independent surveillance mechanism. At present a draft treaty law, which is required for accession to the convention, is being coordinated in the Ministries.<sup>189</sup>

Germany has continued to make eminent efforts to improve its legislation against Commercial Sexual Exploitation of Children, CSEC.<sup>190</sup> Apart from ratifying all the relevant international and regional instruments addressing those issues, a law was passed in November 2008<sup>191</sup> to impose the framework decision of the Council of the European Union on combating sexual exploitation of children and child pornography, which had been in effect since 2004.<sup>192</sup> Following the enactment of this law, a number of amendments to the German Criminal Code have been introduced that strengthen legislation on child trafficking and child pornography and raise the age of protection from sexual abuse and exploitation.<sup>193</sup>

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**Article 19 (2) of the Lanzarote Convention:**

"For the purpose of the present article, the term "child prostitution" shall mean the fact of using a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment, regardless if this payment, promise or consideration is made to the child or to a third person."<sup>194</sup>

Although German legislation does not explicitly define child prostitution, it punishes activities connected to child prostitution. Recent reforms of the German Criminal

<sup>189</sup> Accessed Sept. 2012: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=&CL=ENG>.

<sup>190</sup> CSEC = the commercial sexual exploitation of children consists of criminal practises that demean, degrade and threaten the physical and psychosocial integrity of children. There are three primary and interrelated forms of commercial sexual exploitation of children: prostitution, pornography and trafficking for sexual purposes. Commercial sexual exploitation of children comprises sexual abuse by the adult and remuneration in cash or in kind to the child or a third person or persons.

<sup>191</sup> Accessed in Sept. 2012: <http://dejure.org/gesetze/StGB/176.html>.

<sup>192</sup> Act amending the Provision on Criminal Offences against Sexual Self-Determination and amending other Provisions, which entered into force on 1 April 2004.

<sup>193</sup> Status Report on the Plan of Action of the Government of the Federal Republic of Germany for the Protection of Children and Young People from Sexual Violence and Exploitation. Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, Berlin, November 2008, accessed Sept. 2012 from: [http://www.bmfsfj.de/Redaktion BMFSFJ/Broschuerenstelle/PdfAnlagen/Sachstandsbericht-RIOenglisch.property=pdf,bereich=bmfsfj,sprache= de,rwb=true.pdf](http://www.bmfsfj.de/Redaktion%20BMFSFJ/Broschuerenstelle/PdfAnlagen/Sachstandsbericht-RIOenglisch.property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf).

<sup>194</sup> See text of Lanzarote Convention: <http://conventions.coe.int/Treaty/EN/treaties/html/201.htm>.

Code have risen the age of protection for sexual abuse by making it punishable to abuse a person of less than 18 years of age by taking advantage of an exploitative situation.<sup>195</sup>

The German law prohibits actions related to the prostitution of children, as well as a number of general sexual offences. The Criminal Code prohibits inducing a person under 18 years of age to engage in sexual acts with or in the presence of a third person for financial reward or allow sexual acts to be committed on a person under 18 years of age by a third person.<sup>196</sup> However, this provision focuses on financial reward and does not cover other forms of consideration, such as in-kind reward. Violators may be punished with up to five years of imprisonment or a fine.<sup>197</sup>

The same punishment applies to inducing a child under 18 years of age in one's care for purposes of upbringing, education, or employment to commit sexual acts with or in the presence of a third person or allowing sexual acts to be committed upon the child.<sup>198</sup> Attempting these offences is also punishable.<sup>199</sup> With the amendment of the Criminal Code in 2008, Germany raised the age of protection for sexual abuse of young people from 16 to 18.<sup>200</sup>

Moreover, the Criminal Code criminalises several other sexual offence crimes including child sexual abuse, which applies to a variety of acts, such as engaging in sexual activity with someone below 14 years of age.<sup>201</sup> The Criminal Code also contains provisions prohibiting sexual assault crimes and rape.<sup>202</sup> In defining the term *child*, § 176 (1) of the Criminal Code<sup>203</sup> stipulates that the minimum age of sexual consent in Germany is 14 years<sup>204</sup>.

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<sup>195</sup> <http://www.bmfsfj.de/RedaktionBMFSFJ/Broschuerenstelle/PdfAnlagen/Sachstandsbericht-RIO-englisch,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>.

<sup>196</sup> German Criminal Code, § 180(2), translated, accessed Sept. 2012 from the Federal Ministry of Justice: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>197</sup> German Criminal Code, translated, accessed Sept. 2012 from the Federal Ministry of Justice: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>198</sup> § 180(3): [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>199</sup> § 180(4): [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>200</sup> <http://www.bmfsfj.de/RedaktionBMFSFJ/Broschuerenstelle/PdfAnlagen/Sachstandsbericht-RIO-englisch,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>.

<sup>201</sup> §§ 176, 176a and 176b: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>202</sup> §§ 177, 178, 179: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>203</sup> *ibid.*

<sup>204</sup> § 176(1): [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

To sum up, Germany has a strong national legal framework against child trafficking that incorporates all relevant international and regional legal instruments on child trafficking.

- xl. The current § 182 of the German Criminal Code prohibits abusing a person under 18 years through taking advantage of an exploitable situation by either engaging in sexual activity or inducing her or him to engage in sexual activity with a third party.<sup>205</sup> The punishment is imprisonment not exceeding five years.<sup>206</sup> Attempting this offence is also punishable.<sup>207</sup>

With respect to prostitution, the German Criminal Code criminalises: managing a prostitution business, where persons are held in personal or financial dependency; providing a place for a person below 18 years to conduct prostitution; and encouraging another person, for whom a place has been provided for prostitution, to engage in prostitution or exploiting that person for prostitution. Violators of these offences may be punished with up to three years of imprisonment or a fine.<sup>208</sup> The Criminal Code also bans *pimping* and makes it illegal to exploit another person engaged in prostitution or, for material gain, to supervise another person's prostitution, including preventing a person from leaving prostitution. Punishment for these offences may be between six months' and five years' imprisonment. This law also criminalises professionally promoting another person's prostitution by procuring clients; punishment may be up to three years' imprisonment or a fine.<sup>209</sup> Those who act as intermediaries are also punishable.<sup>210</sup>

## 2.3 Child Pornography

### *Child Pornography in General*

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<sup>205</sup> German Criminal Code, § 182: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>206</sup> *ibid.*

<sup>207</sup> *ibid.*

<sup>208</sup> German Criminal Code, § 180a: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>209</sup> § 181a: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>210</sup> *ibid.*

- xli. The Council of Europe Convention on Cybercrime of 23 November 2001 was signed by Germany on the day on which it was opened for signature. It was then ratified on 9 March 2009 and entered into effect on 1 July 2009.<sup>211</sup> The penal provisions regarding child pornography are now more severe so a more effective action can be taken against the increasing spread of child pornography particularly on the Internet.
- xlii. Article 20(2) of the Lanzarote Convention defines the term *child pornography* as "any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes."<sup>212</sup> Although German law does not contain a distinct definition of child pornography, the Criminal Code does cover virtual child pornography.<sup>213</sup> With the recent introduction of the offences of "distribution, acquisition and possession" of juvenile pornography, Germany has extended protection from exploitation in pornography to all children under 18 years of age.<sup>214</sup>

With regard to pornographic materials § 11(3) of the Criminal Code reveals:

#### § 11- Definitions

(3) Audiovisual media, data storage media, illustrations and other depictions shall be equivalent to written material in the provisions which refer to this subsection.<sup>215</sup>

The German jurisdiction defined the term *pornography* in the so-called "Fanny Hill-Decision" of the *Federal Court of Justice* (BGH, *Bundesgerichtshof*),<sup>216</sup> which refers to "obscene scriptures/material".<sup>217</sup> Pornographic are those scriptures and materials which "with disregard to other human references are sexual actions in a rough

<sup>211</sup> Accessed Sept. 2012: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG>.

<sup>212</sup> Text of Convention: <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>.

<sup>213</sup> German Criminal Code, §§ 184b, 184c & 11(3); accessed in September 2012 from the Federal Ministry of Justice: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>214</sup> German Criminal Code, § 184b: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>215</sup> Accessed in Sept 2012: [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p0073](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0073).

<sup>216</sup> Decision of the German Federal Court of Justice, BGHSt 23, 40; see also: <http://www.whiteit.de/downloads/Studie020511.pdf>.

<sup>217</sup> Decision of the Higher Regional Court of Duesseldorf, OLG Düsseldorf NJW 1974, 1474 (1475).

intrusive, attention-grabbing manner which push to the foreground and exclusively or predominantly are targeted on the excitement of sexual impulses“.<sup>218</sup> To such a degree, nude images solely do neither constitute yet pornography, nor child pornography.<sup>219</sup> A significant<sup>220</sup> sexual connotation has to come along, whereas for sexual actions with children a lower level is to be determined than for sexual actions of adults.

- xliii. Germany has extended protection from exploitation in pornography to all children under 18, with the recent introduction of the offences of “distribution, acquisition and possession” of juvenile pornography<sup>221</sup>:

**§ 184b - Distribution, acquisition and possession of child pornography**

(1) Whosoever

1. disseminates;
2. publicly displays, presents, or otherwise makes accessible; or
3. produces, obtains, supplies, stocks, offers, announces, commends, or undertakes to import or export in order to use them or copies made from them within the meaning of No. 1 or 2 above or facilitates such use by another pornographic written materials (§ 11 (3)) related to sexual activities performed by, on or in the presence of children (§ 176 (1)) (child pornography)

shall be liable to imprisonment from three months to five years.

(2) Whosoever undertakes to obtain possession for another of child pornography reproducing an actual or realistic activity shall incur the same penalty.

(3) In cases under subsection (1) or subsection (2) above the penalty shall be imprisonment of six months to ten years if the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences and the child pornography reproduces an actual or realistic activity.

<sup>218</sup> Decision of the Federal Court of Justice, Criminal Department, BGHSt 37, 55 (59f); *see also* decision of the Federal Administrative Court, BVerwG (NJW 2002, 2966).

<sup>219</sup> Differentiating: Higher Regional Court of Koblenz, OLG Koblenz NJW1979, 1467.

<sup>220</sup> *See*: MüKo-Hörnle § 184 German Criminal Code marginal no. 15 with further details.; also decision of the Federal Court of Justice, Criminal Department, BGHSt 43, 366 (368): *„Spreizen der Beine, um die unbedeckten Genitalien offen zur Schau zu stellen.“*

<sup>221</sup> German Criminal Code, § 184b: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

(4) Whosoever undertakes to obtain possession of child pornography reproducing an actual or realistic activity shall be liable to imprisonment not exceeding two years or a fine. Whosoever possesses the written materials set forth in the 1st sentence shall incur the same penalty.<sup>222</sup>

§§ 184b and 184c of the German Criminal Code criminalise the distribution, acquisition and possession of pornography involving children (under 14 years of age) and juveniles (between 14 and 18), respectively.<sup>223</sup> Although these paragraphs technically rank among “written materials”, the definition of written materials also encompasses audio-visual media, data storage media, illustrations and other depictions.<sup>224</sup> In addition it is worth pointing out that §§ 184b and 184c punish not only materials produced as a result of actual sexual abuse, but also realistic representations of sexual activities, such as virtual child pornography (see below).<sup>225 226</sup>

§ 184b is now to be interpreted to cover the provocative exhibition of children’s sexual organs, but it is unclear whether this interpretation is legally authoritative or discretionary.<sup>227</sup>

Under §§ 184b and 184c, it is punishable to, among other actions, disseminate, publicly display, produce, obtain, supply, offer, import or export, such material<sup>228</sup>; this is on the lines of Article 20(1.a) to (1.e) of the Lanzarote Convention. The punishment for these activities under the German Criminal Code is imprisonment for three months to five years for child pornography and up to three years or a fine for juvenile pornography. Possession of child pornography is also punishable,<sup>229</sup> while possession of juvenile pornography is punishable unless the materials were produced by persons below 18 years of age and with consent (see below).<sup>230</sup>

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<sup>222</sup> [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1620](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1620).

<sup>223</sup> German Criminal Code, §§ 184b and 184c: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>224</sup> *ibid.*

<sup>225</sup> German Criminal Code, §§ 184b and 184c: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>226</sup> Accessed Oct 2012: <http://www.mediendelikte.de/bt184b.htm>.

<sup>227</sup> Polizeiliche Kriminalprävention der Länder und des Bundes, 2012, 28/10/2012, <http://www.polizei-beratung.de/themen-und-tipps/sexualdelikte/kinderpornografie/rechtliche-grundlagen.html>.

<sup>228</sup> German Criminal Code, §§ 184b and 184c: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>229</sup> § 184b: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>230</sup> § 184c(4): [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).



Article 20(1.f) related to § 184b (1) no. 1-3 and § 11 (3) of the German Criminal Code plus § 184d which refers also to § 184b. According to § 184b any person is punished that *distributes* child pornographic material *through the media, information and communication technologies*.

Furthermore, if the offender acts on a commercial basis or as a member of a gang, punishment is increased from six months to 10 years' imprisonment for child pornography and three months to five years for juvenile pornography.<sup>231</sup>

- xliv. An advance control/check-up of pornographic Internet offerings can be conducted by the providers' youth protection officers to be appointed by law or by voluntary self-monitoring institutions.

In March 1999, the *Central Office for Spontaneous Research in Data Networks* (*Zentralstelle fuer anlassunabhaengige Recherchen in Datennetzen* - ZaRD)<sup>232</sup> has started its work. The ZaRD is part of the *Technical Service Centre for Information and Communication Technology* within the *Federal Office for Criminal Investigation* (*Bundeskriminalamt* - BKA), which especially provides technical support in criminal investigations on the Internet. Officers at the ZaRD search all services on the Internet, even at night and at weekends. The ZaRD has already been successful.<sup>233</sup>

Furthermore, the *Federal Office for Criminal Investigation* cooperates closely with the *Länder* within the context of the *Central Office for Child Pornography* there. Information is exchanged with the help of a computer-assisted evaluation system. The *Federal Office for Criminal Investigation* organises annual clerical conferences. Another measure is the *Federal Office of Criminal Investigation's* concept for combating the production of and trade in child pornography that entails a harmonised, strategic procedure by the Federal and the *Länder* police. In this connection, the *Federal Office for Criminal Investigation* organises an annual specialist seminar on child pornography.<sup>234</sup>

<sup>231</sup> § 184b(3) and 184c(3): [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

<sup>232</sup> ZaRD, Bundeskriminalamt BKA= Federal Office for Criminal Investigation:

[http://www.bka.de/nn\\_206376/](http://www.bka.de/nn_206376/)

DE/DasBKA/Aufgaben/Zentralstellen/ZaRD/zard\_\_node.html?\_\_nnn=true.

<sup>233</sup> Federal Office for Criminal Investigation, 2012, 29/10/2012,

[http://www.bka.de/nn\\_204456/DE/DasBKA/](http://www.bka.de/nn_204456/DE/DasBKA/Aufgaben/Zentralstellen/ZaRD/zard__node.html?__nnn=true#doc204436bodyText5)

[Aufgaben/Zentralstellen/ZaRD/zard\\_\\_node.html?\\_\\_nnn=true#doc204436bodyText5](http://www.bka.de/nn_204456/DE/DasBKA/Aufgaben/Zentralstellen/ZaRD/zard__node.html?__nnn=true#doc204436bodyText5).

<sup>234</sup> Federal Office for Criminal Investigation, 2012, 29/10/2012, [http://www.bka.de/DE/ThemenABisZ/Deliktsbereiche/Kinderpornographie/kinderpornographie\\_\\_node.html?\\_\\_nnn=true](http://www.bka.de/DE/ThemenABisZ/Deliktsbereiche/Kinderpornographie/kinderpornographie__node.html?__nnn=true).

Germany signed the Convention of the Council of Europe on the Protection of Children against Sexual Exploitation and Sexual Abuse on 25 October 2007 when it was opened for signature.<sup>235</sup> The Convention contains requirements for dealing with criminal offences, beyond the commercial sexual exploitation of children to sexual abuse without a commercial motive jurisdiction, the responsibility of legal entities, law on criminal proceedings, storage of data on sentenced sexual offenders, international cooperation and preventive measures.<sup>236</sup>

Depending on the extent to which use is made of the reservation options, this will call for legislative action in the area of criminal law. This has already been partly covered by the law transposing the framework decision of the Council of the European Union on combating the sexual exploitation of children and child pornography.

The ratification of the Council of Europe Convention is on its way.

Germany did not make use of the reservation right that was given in the Lanzarote Convention Article 20(3): §§ 184b and 184c of the German Criminal Code punish not only materials produced as a result of actual sexual abuse, but realistic representations of sexual activities, such as virtual child pornography, too.<sup>237</sup> Possession of child pornography is also punishable,<sup>238</sup> while possession of juvenile pornography is punishable unless the materials were produced by persons under 18 years and with consent.<sup>239</sup>

Regarding Article 20(4) of the Lanzarote Convention, § 184d of the German Criminal Code criminalises actions on the lines of Article 20(1.f) of the Lanzarote Convention, which are “knowingly obtaining access, through information and communication technologies, to child pornography”.<sup>240</sup> There is also no use of reservation right to be found here.

### *Participation of a Child in Pornographic Performances*

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<sup>235</sup> Status as of Oct. 2012:

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=8&DF=14/10/2012&CL=ENG>.

<sup>236</sup> *ibid.*

<sup>237</sup> §§ 184b and 184c: [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1620](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1620).

<sup>238</sup> § 184b: [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1620](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1620).

<sup>239</sup> § 184c(4): [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1620](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1620).

<sup>240</sup> Text of the Lanzarote Convention: <http://conventions.coe.int/Treaty/EN/treaties/html/201.htm>.

**Article 21 of the Lanzarote Convention – Offences concerning the participation of a child in pornographic performances**

(1) Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

- (a) recruiting a child into participating in pornographic performances or causing a child to participate in such performances
- (b) coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes
- (c) knowingly attending pornographic performances involving the participation of children<sup>241</sup>

**§ 184b of the German Criminal Code - Distribution, acquisition and possession of child pornography**

(1) Whosoever

- 1. disseminates;
- 2. publicly displays, presents, or otherwise makes accessible; or
- 3. *produces*, obtains, supplies, stocks, offers, announces, commends, or undertakes to import or export in order to use them or copies made from them within the meaning of Nos 1 or 2 above or facilitates such use by another pornographic written materials (§ 11 (3)) related to sexual activities performed by, on or in the presence of children (§ 176 (1)) (child pornography)

shall be liable to imprisonment from three months to five years. ...<sup>242</sup>

The legal situation regarding “making a child participate in pornographic performances” and “recruiting” or “coercing” children in this area can be qualified as unclear and unsystematical: Partially, preliminary actions for the production of child pornography are covered by § 176(4) no. 3 of the German Criminal Code; actual actions of abuse for the purpose of the production of child pornographic material are not only covered by § 176a (3) but generally also by § 184b(1) no. 3 of the German Criminal Code.<sup>243</sup>

As every other offence, § 184 of the German Criminal Code requires intention. The offender has to act knowingly and deliberately in causing the result.<sup>244</sup>

<sup>241</sup> *ibid.*

<sup>242</sup> § 184b: [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1620](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1620).

<sup>243</sup> Accessed in Oct 2012: <http://www.whiteit.de/downloads/Studie020511.pdf>.

<sup>244</sup> Accessed in Sept 2012: <http://www.gegen-missbrauch.de/gesetzeslage>.

Thus, German penal law makes it illegal for one or more persons to engage in sexual intercourse or other sexual acts with a child with the intent to produce pornographic material to be disseminated or publicly displayed.<sup>245</sup> Perpetrators of this crime face punishments of not less than two years' imprisonment.<sup>246</sup>

§§ 176, 176a, 177 and 180 of the Criminal Code must also be taken into consideration: As mentioned above § 176 covers the one part of the crime concerned with the abuse of a child; § 177 contains the offence of sexual assault by use of force or threats; in this way coercing a person to engage in sexual activity by force or threat.<sup>247</sup>

§ 180 furthermore criminalises causing minors to engage in sexual activity as well as inducing of children.<sup>248</sup> According to the German Criminal Code it is illegal to groom a child by using publications to influence the child to engage in sexual activities with an adult.<sup>249</sup> *Grooming*, describes the recruitment of children and tempering them onto sexual abuse *for the purpose* of producing child pornography.<sup>250</sup>

This provision also criminalises offering, demonstrating or promising a child to someone else for purposes of sexual abuse or conspiring with another person to sexually abuse a child.<sup>251</sup>

German legislation has not made use of the reservation right stated in Article 21(2) of the Lanzarote Convention.<sup>252</sup>

## 2.4 Corruption of Children

xlvi. When applying the wide definition of the term “sexual activities“ as it is the case within the German Criminal Code, there are statements of facts that concern sexual abuse with no body contact. There is however not one main paragraph penalising all

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<sup>245</sup> Accessed Sept. 2012:

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=185&CM=&DF=&CL=ENG&VL=1>.

<sup>246</sup> *ibid.*

<sup>247</sup> § 177: [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1517](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1517).

<sup>248</sup> § 180: [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1552](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1552).

<sup>249</sup> § 176: [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1493](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1493).

<sup>250</sup> Accessed Oct 2012: <http://www.whiteit.de/downloads/Studie020511.pdf>.

<sup>251</sup> [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1620](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1620).

<sup>252</sup> List of declarations, reservations and other communications with regard to treaty No. 201:

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=201&CM=8&DF=14/10/2012&CL=ENG&VL=1>.

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=201&CM=8&DF=14/10/2012&CL=ENG&VL=1>.

the possible cases. One rather has to have a closer look at certain sections or subsections to find applicable provisions. § 183 of the German Criminal Code regulating exhibitionism is the only paragraph that solely deals with sexual activities without body contact. It criminalises the intentional causing of a person (in general a woman or minor) to witness exhibitionistic activities of a man and thus harassing him or her. Hence only men can be suitable offenders for section 1. “Exhibitionistic activities” for the purpose of this paragraph are all sorts of sexual activities with the meaning of § 184g no. 2 of the German Criminal Code that focus on showing the other person one’s genital for sexual arousal. The witnessing of these activities need to harass the victim, meaning that it is objectively suited to impair the victim’s psychic wellbeing and subjectively does so.<sup>253</sup> The exhibitionistic activity needs to occur intentionally (at least *dolus directus* second degree) whereas *dolus eventualis* suffices concerning the thereby induced harassment.<sup>254</sup> The sentence range then amounts up to 1 year of prison or a fine. As section 2 however states the deed is only pursued when somebody instituted criminal proceedings. The Prosecution only takes actions *per curiam* if it thinks them necessary for the public interest.<sup>255</sup>

Performing sexual activities in front of a child however may also fulfil § 176 (4) or § 174 (2) of the German Criminal Code. § 176 (4) of the German Criminal Code criminalises 4 different actions without body contact with a sentence from 3 months to 5 years. Those actions are: performing sexual activities in front of a child (no. 1) either alone or with a third person; determining a child to perform sexual activities that are not criminalised by section 1 or 2 of the paragraph, which especially targets at sexual posing (no. 2); or influencing a child by showing publications to achieve sexual actions (no. 3) or by showing pornographic devices (no. 4). The child needs to perceive the events, not however to understand the sexual context.<sup>256</sup>

§ 174 (2) of the German Criminal Code on the other hand has a sentence range up to 3 years of prison or a fine and penalises all sexual activities in front of one’s ward (no. 1) or the determining of one’s ward to perform such activities (no. 2). Determining for this purpose means any actual influence on the child that leads to the accomplishment

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<sup>253</sup> Perron/Eisele in Schönke/Schröder, § 183, marginal no. 4; Lackner/Kühl, § 183, marginal no. 1a ff.

<sup>254</sup> Lackner/Kühl, § 183, marginal no. 4.

<sup>255</sup> Lackner/Kühl, § 183, marginal no. 6.

<sup>256</sup> Frommel in Kindhäuser/Neumann/Paeffgen, § 176, marginal no. 17 - 23.

of the deed.<sup>257</sup>

Sexual activities in front of someone always need to be spatially perceived by the other person according to § 184g no. 2 of the German Criminal Code. The victim however does not need to understand its sexual meaning.<sup>258</sup> The German Criminal Code does not define the term “causing“. If the offender intentionally fulfils the elements of a crime, here being the performance of sexual activities in front of a child for sexual arousal, he or she might be liable under § 174 (2) (if the child is his or her ward) or under § 176 (4) no. 1 of the German Criminal Code. As the child only needs to notice the actions there is no requirement for a constituent fact of “causing” the child to witness those actions.

## 2.5 Solicitation of Children for Sexual Purposes

xlvi. In general, the State criminalises the intentional sexual gratification through information and communication technologies. Especially mentionable are the legal norms paragraph 176 (sexual abuse) and 184b (pornographic content) of the German Criminal Code. In this passage a closer look will be taken at § 176 of the German Criminal Code.

In the last 10 years § 176 of the German Criminal Code experienced three changes. One, by the *Sexual Offences Amendment Act* (SexualdelÄndG) of December 2003, another by the law implementing European Council directive 2004/68/JI into national law<sup>259</sup> and the third one by the law transforming the framework decision of October 2008 by the EU-Council into German Law.

There is a distinction made by § 176 of the German Criminal Code between actions with and those without any physical contact. Section one is the statutory basis, on which those can be punished, who engage in any sexual activity with a child which includes closeness. Whether an action, for example grabbing a child between the legs, must be seen as such a sexual engagement, has to be considered individually in each case.<sup>260</sup> It is not required that the child recognises the sexuality of an act as such. It is also not required that the perpetrator (adult) takes the initiative to engage in sexual

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<sup>257</sup> Frommel in Kindhäuser/Neumann/Paeffgen, § 174, marginal no. 21 f.

<sup>258</sup> Lackner/Kühl, § 184 g, marginal no. 8.

<sup>259</sup> Fischer, *op. cit.*, p. 1140.

<sup>260</sup> Fischer, *op. cit.*, p. 1141.

activity. An adult can also be punished if he simply does not stop any sexual behaviour subject to section one.

There is no liability according to § 176 (1) of the German Criminal Code when there is no physical contact between the perpetrator and the child. On the other hand it has been argued that even acts where there is no direct contact with a child can be harmful to the development of a child as it is growing up.

Therefore, § 176 (4) of the German Criminal Code protects children (under the age of 14) from sexual abuse even when the behaviour does not involve any physical contact: § 176 (4) no. 1 states: Liable to imprisonment from three months up to five years shall be "whosoever" engages in sexual activity in the presence of a child. It criminalises any sexual behaviour in front of a child. It is required that the child recognises the sexual behaviour, but it is not required that there is physical closeness. Therefore the conditions of no. 1 are met when a child witnesses such sexual behaviour instantaneously through a computer screen, according to a decision of the Federal Court of Justice (BGH) in 2009.<sup>261</sup> Hence it can be said that any case of live monitoring over the internet can be subject to § 176 (4) no. 1 if the witnessed act itself fits the other requirements for liability.

§ 176 (4) no. 2 opens the possibility for conviction of someone who induces the child to engage in sexual activity, unless the act is punishable under subsection 1 or subsection 2 above - This includes all kinds of sexual activity, for example when the perpetrator makes the child expose itself (including posing for pornographic images).<sup>262</sup> Here again, the child does not have to recognise the sexual character of its act. This passage is especially important in the context of sexual abuse through information and communication devices, because physical closeness is not required. Now anybody can be convicted who only gets notice of the sexual activity over a webcam or through acoustic devices. This wider range of liability (introduced by the German legislator in 2008) strengthens the protection of children. Because spatial closeness is not required, inducing a child subject to no. 2 can be punishable even when the actual behaviour of the child is not recognised right away.

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<sup>261</sup> BGH 53, 283.

<sup>262</sup> Fischer, *op. cit.*, p. 1142.

Besides no. 1 and 2, it is also punishable to present a child with written material to induce him to engage in sexual activity with or in the presence of the offender or a third person or allow the offender or a third person to engage in sexual activity with him. Different from the other numbers of section 4 no. 3 punishes actions, which do not already constitute an abuse as they are only acts of preparation.<sup>263</sup> That is rather unusual within German law, because preparation is very hard to prosecute and it is also difficult to say when such an action is made with malicious intent.

"Written material" in the German Criminal Code, means more than the ordinary understanding of the word. If writings only included those in written form on paper, mere Internet contact between the perpetrator and the potential child victim would not be illegal. § 11 (3) of the German Criminal Code - (referred to by § 176 (4) no. 3 of the German Criminal Code) says: Audio-visual media, data storage media, illustrations and other depictions shall be equivalent to written material. While it is accepted that § 11 (3) of the German Criminal Code includes in writings any e-mails or chat room messages, as long as they temporarily use computer memory, there is a non settled dispute whether real-time chat room broadcasting is also included in this definition. The problem is that most chat rooms do not use the temporary computer memory and it is said that it could technically not be seen as data and therefore not as "writings" in the sense of § 176 (4) no. 3 of the German Criminal Code, even though there are actual letters.<sup>264</sup>

Any verbal infringement for example over the phone does not fulfil the requirements of § 176 (4) no. 3 of the German Criminal Code.

Till today, the legal uncertainty about whether cases, in which the perpetrator tries to arrange a meeting with the child for sexual contact through internet forums, chat rooms or social networks, the so called grooming, can be prosecuted has not been dissolved by the legislator. The fact is, that the perpetrator does not have to meet with the child in order to be accused of sexual abuse. Also it is not stated that the writings themselves necessarily have to be sexual, only the perpetrator has to think of them as being qualified to influence the child in the intended way.

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<sup>263</sup> Renzikowski, *op. cit.*, p. 1321.

<sup>264</sup> Renzikowski, *op. cit.*, p. 1321; see also: M. Gercke, *EU: Verabschiedung der Richtlinie gegen Kinderpornographie*.



### Aiding and abetting

In the German Criminal Code the question of whether aiding and abetting to a special felony is criminalised, has to be decided in accordance with the general rules in the code. According to §§ 26 and 27 (1) of the German Criminal Code a person aiding and abetting any crime is always liable to prosecution when there is an intentional aided or abetted primary offence. Aiding and abetting / inciting always require an unlawful primary offence. Without a primary offence there can be no conviction for aiding and abetting.<sup>265</sup> The attempt to participate in the form of aiding or abetting / inciting also carries criminal liability.<sup>266</sup>

The German Criminal Code makes a clear distinction between perpetrator and participant. Participation would be participation to someone else's crime, whereas the offender commits his own crime. To understand the rules of aiding and abetting one has to know that the joint undertaking of a crime by people who see themselves and must be seen objectively as equal partners in the fulfilling of the crime are both principal offenders.<sup>267</sup> It can be difficult to make a difference between principal and participant. The question whether someone is perpetrator or participant is mainly a question of intent.

There are different theories as to the distinction between perpetrator and participant, but it can be said that basically the perpetrator sees the crime as his own, whereas the participant sees it as someone else's (see above). In addition the perpetrator is the person that has the power over the commission of the crime.

Inciting (in German: *anstiften*) requires two intentions: first the intent to “instigate someone else to commit an intentionally unlawful offence”.<sup>268</sup> Instigate in this context means to evoke in some other person the intent to commit the crime. Second an intent towards the fulfilling of the main offence.

Aiding is generally any physical and psychological support of the primary offence.<sup>269</sup> There is the question whether the aiding has to be causal to the primary offence in order to be prosecuted. The Federal Court of Justice's position is that no causality is

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<sup>265</sup> N. Foster & S. Sule, *op. cit.*, p. 375.

<sup>266</sup> § 30 of the German Criminal Code.

<sup>267</sup> Wessels/ Beulke, *op. cit.*, p. 196.

<sup>268</sup> N. Foster, *op. cit.*, p. 375 instigate (in German: *bestimmen*) cannot be precisely translated in this context.

<sup>269</sup> N. Forster, *op. cit.*, p. 376.

needed for the participant to be guilty of participation in an offence. Aiding also requires the double intent - intent to aid and intent towards the fulfilling of the main offence.<sup>270</sup>

These rules of participation are generally applicable for any criminal offence. There can be a few exceptions.

Special rules apply for sexual abuse of a child, § 176 (4) no. 3 and (5) of the German Criminal Code. Both provisions state that liability already arises in a stadium that only constitutes preparation of the sexual abuse of a child. Examples are: making contact over the internet or trying to meet the child, acts that can't be seen as the actual attempt to sexually abuse the child. The act of preparing an offence is usually not punishable, because it is too early to speak of culpability (see above). Participation on the other hand can only be prosecuted if there is a primary offence. § 176 (4) no. 3 and (5) open a gate to prosecution of acts of preparation for sexual abuse. This early stadium of liability is very contradictory to the general legislation. Therefore it is said, that participation is illegal concerning those sections but for the said reasons should not be prosecuted.<sup>271</sup>

A strong opinion claims, that participants (as aiders or abettors) of the offence of publishing pornographic content of adults under 18 (§ 184 of the German Criminal Code) who logically are a necessary element of the offence, can't be liable to prosecution. It is said that consuming such content is not a strong enough offence. This can be understood up to the point where the participant actively takes a step further than just taking advantage of an opportunity.<sup>272</sup> In any case of possession or attempt to possess pornographic content featuring a child (under 14), § 184b of the German Criminal Code gives reason to prosecute according to the general rules of participation (see above).

### **Attempt**

There are five different stages of a crime recognised by German criminal law:

1. The decision by the would-be-offender to commit a crime;
2. its preparation;

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<sup>270</sup> Wessels/ Beulke, *op. cit.*, 41st ed., p. 220 – 222.

<sup>271</sup> Renzikowski, *op. cit.*, marginal no. 56-58.

<sup>272</sup> Hörnle, *Münchener Kommentar zum StGB*, Munich, 2012, marginal no. 103-104.

3. the beginning of the accomplishment;
4. the accomplishing the constituent elements of the act;
5. completion.<sup>273</sup>

The decision by the would-be-offender is no criminal attempt. For the different offences the point in time at which mere preparation turns into a criminal attempt varies.

Generally the law defines when an offence is already illegal when attempted. § 23 of the German Criminal Code defines: Any attempt to commit a felony entails criminal liability; this applies to attempted misdemeanours only if expressly provided by the law. § 12 of the German Criminal Code defines felonies (*Verbrechen*) and misdemeanours (*Vergehen*):

1. Felonies are unlawful acts punishable by a minimum sentence of one year's imprisonment,
2. misdemeanours are unlawful acts punishable by a lesser minimum term of imprisonment or by fine.

Attempting actual sexual abuse of a child is a criminal act. Sexual abuse is an offence and therefore the legal norms contain a clause that its attempt also entails criminal liability.

## 2.6 Corporate Liability

xlix. In Germany corporate liability, in the sense that corporations and companies can be held liable to prosecution for any action, does not exist.<sup>274</sup>

- i. The reason is that German Law considers that generally legal persons (*juristische Personen*) cannot act like natural persons (*natürliche Personen*), because they are no human beings. Organs of a company, like a manager or chief executive officer, can be held liable as individuals, but not the company itself.<sup>275</sup>
- li. Not having the possibility to punish corporations is certainly a topic of controversy.<sup>276</sup> There is a Commercial Criminal Law, but it doesn't include any regulation about the liability for actions like sexual abuse, beating, etc.

<sup>273</sup> N. Foster, *op. cit.*, p. 366.

<sup>274</sup> K. Leipold, *Strafbarkeit von Unternehmen*, NJW Spezial 2008, p. 216.

<sup>275</sup> Gruhl, *Juristische Personen als Strafbare Subjekte?*

<sup>276</sup> K. Leipold, *Strafbarkeit von Unternehmen*, NJW Spezial 2008, p. 216.

## 2.7 Aggravating Circumstances

- lii. A crime of sexual abuse of a child is very harmful itself. Certain circumstances, like causing physical harm or death, can add to the wrong of the sexual abuse and the culpability of the perpetrator. The German Criminal Code accepts these aggravating circumstances and threatens an even greater punishment.

Aggravating circumstances that give reason for longer terms of imprisonment than simple sexual abuse, are:

- h. The offender by the offence places the child in danger of serious injury or substantial impairment of his physical or emotional development (§ 176a (2) no. 3 of the German Criminal Code)
- i. The offence is committed jointly by more than one person (§ 176a (2) no. 2 of the German Criminal Code)
- j. A person over eighteen years of age performs sexual intercourse or similar sexual acts with the child which include a penetration of the body, or allows them to be performed on himself by the child (§ 176a (2) no. 1 of the German Criminal Code)
- k. The crime is committed with the intent of making the act the object of a pornographic medium (§ 176a (3) of the German Criminal Code)

These are punishable with imprisonment of not less than two years. Who seriously physically abuses a child or places it in the danger of death is liable to imprisonment of not less than five years. The greatest aggravating circumstance, which makes the offender liable for at least ten years up to life-long imprisonment (which in Germany actually isn't necessarily life-long)<sup>277</sup> is causing the death of the abused child (§ 176b of the German Criminal Code). This liability may arise even though the death has been caused by negligence.

If the circumstances of the case do not already fulfil the element of aggravated sexual abuse, § 176 (3) of the German Criminal Code names “especially serious cases” which also open the possibility for stronger punishment. Such circumstances can be those,

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<sup>277</sup> In German law the life long punishment actually means that after 15 years in prison the offender is set free on probation. see: *Was bedeutet in Deutschland Lebenslänglich?*, Hamburger Abendblatt, <http://www.abendblatt.de/politik/deutschland/article956833/Was-bedeutet-in-Deutschland-lebenslaenglich.html>, last visited october 25th 2012.

which are especially degrading or cases in which the perpetrator takes advantage of the child's fear or uses violence.<sup>278</sup>

## 2.8 Sanctions and Measures

- liii. Sexual Abuse in general is regulated in the German Criminal Code in the §§ 174 to 184g. In there various sanctions for sexual abuse of children are laid out. The lowest sanction is a monetary fine, however only in very mild cases. Normally the sanction will consist in a deprivation of liberty, which ranges from three months to ten years. If the culprit however causes the death of its victim, then the sanction is either a life sentence or at least the deprivation of liberty for ten years.

The other crimes mentioned above fall into the German Category of sexual abuse and are as such regulated as part of these regulations. The sanctions vary depending on multiple factors some being: the age of the child, the intensity of the abuse, actual physical harm to the child and others. Apart from the fact that the production of Child Pornography is sanctioned under German law<sup>279</sup>, the possession and distribution of pornographic material involving children is as well.

Extradition is regulated partially in the Basic Law but mostly in the law for the international legal help in criminal affairs (*Gesetz über die internationale Rechtshilfe in Strafsachen*). This law however is only applicable when there are no bilateral or multilateral contracts between the involved countries. The constitution forbids extradition of German nationals only excepting the extradition to other member states of the European Union or to an international court.<sup>280</sup>

- liv. Evaluating sanction for crimes is always a very difficult project. Crimes against children and crimes involving sexual abuse are aside from murder or inflicting serious physical danger without question the worst crimes. As such it is necessary that the sanctions for these crimes reflect the seriousness of these crimes. However what is more difficult to ascertain is whether or not the punishment is too high. Many people when asked about sexual abuse especially sexual abuse involving children find that really no punishment exists that is harsh enough for what has been done. However when one looks at why certain behaviour needs to be punished in general, one has to

<sup>278</sup> Fischer, *op. cit.*, p. 1148, see also part II. 2. a above.

<sup>279</sup> §§ 184 b; 184 c of the German Criminal Code.

<sup>280</sup> Article 16 (2) Basic Law.

take a different point of view. Sanctions in general do not only serve the purpose of retribution, although retribution is one of many criteria to be considered. They also aim to change the culprits' behaviour and reintegrate him or her into society. In that case a lower punishment, especially a sanction that doesn't involve removing the culprit from its social background can be more effective. On the other hand in some cases it is necessary to remove the culprit from its normal habitat to allow him to escape bad influences. Criminals committing crimes against children especially sexual abuse of children often suffer from a psychological condition and thus require special treatment. In these cases it can be quite practical to remove these for a longer period of time from society for a therapy. There the focus should be on the therapy though. To find a balance between these varying aspects is a difficult task. The sanctions laid out in the German Criminal Code seem to be a good solution to the problem. They allow enough room to differentiate between the various degrees of seriousness of a crime and thus ensure fair and just treatment of all parties involved.

- lv. Legal persons are not sanctioned by the German Criminal Code. However the natural persons behind the legal persons are held accountable for their actions.
- lvi. The seizure and confiscation of materials and others is regulated in the German Code of Criminal Procedure in the paragraphs including following § 94 of the German Code of Criminal Procedure. It allows the seizure and confiscation of objects that could be relevant for the investigation of a crime that also includes objects belonging to other people and other objects that were gained from or used for a crime<sup>281</sup>.

Germany protects witnesses and other bona fide third parties using various measures. Depending on the seriousness of the threat, measures can include allowing witnesses to hide their address and instead only disclose their work address<sup>282</sup>. In more serious cases the witness can have the right not to have to disclose any information regarding his or her identity<sup>283</sup>. If necessary witnesses are taken into a witness protection program and get a different identity for a while.<sup>284</sup> No special fund exists for financing prevention or intervention programmes. Programmes like the *Early Aid for Parents and*

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<sup>281</sup> § 111b of the German Code of Criminal Procedure, §§ 73, 74 of the German Criminal Code.

<sup>282</sup> § 68 (2) 1 of the German Code of Criminal Procedure.

<sup>283</sup> § 68 (3) 1 of the German Code of Criminal Procedure.

<sup>284</sup> § 5 Law on the Harmonisation of witness protection („Zeugenschutzharmonisierungsgesetz“).

*Children and social early warning systems* (Frühe Hilfen für Eltern und Kinder und soziale Frühwarnsysteme) are financed by the state<sup>285</sup>.

- lvii. In general the law for sexual abuse of children is stricter for people who have a special relation to a child. That means especially the parents or the legal guardians of a child are more likely to be punished. However in 2011 the German Government published a plan for the protection against sexual abuse and extortion of children and adolescents.<sup>286</sup> The plan is a reaction to various scandals of sexual abuse of children in institutions in the whole of Germany. It focuses on improving help for parents, supplying them with more information and enabling them to strengthen their children to react to sexual abuse. Furthermore an aim is to further educate the professional groups that mostly work with children.

Apart from the plan for the protection against sexual abuse of children in institutions for children and adolescents, the state reacts to sexual abuse depending on the gravity of the crime. In very mild cases the parents are simply supported and educated by the child protective services. However in more serious cases measures can include a “go-order” (the offender has to leave the common residence) or the withdrawal of the parental care.<sup>287</sup>

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

- ix. The investigation previous to the court proceedings usually starts with an interrogation of the victim.<sup>288</sup> The child has a right to bring a relative or a lawyer to the interrogation. In some cases, especially in cases of sexual abuse, the court can order a lawyer to come to the child’s aid. In such cases it even has the right to claim for lawyer support without further expenses.<sup>289</sup>

<sup>285</sup> <http://www.bmfsfj.de/BMFSFJ/kinder-und-jugend,did=119200.html>, last visited on the 19.10.2012 at 00:17.

<sup>286</sup> <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/aktionsplan-2011,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>, last visited on the 18.10.2012 at 22:54.

<sup>287</sup> [http://www.familienhandbuch.de/cms/Rechtsfragen\\_Schweikert-Gewalt.pdf](http://www.familienhandbuch.de/cms/Rechtsfragen_Schweikert-Gewalt.pdf), last visited on the 18.10.2012 at 22:54; §§ 1666 ff. BGB.

<sup>288</sup> “*What happens during the Investigation Procedure?*“, 28/10/2012, 28/10/2012, <http://www.missbrauch-opfereratgeber.de/ermittlungsverfahren.html>.

<sup>289</sup> “*What happens during the Investigation Pricedure?*“, *op. cit.*

In court proceedings not only the offenders, but also the witnesses have to be questioned in order to detect the true events. For children who had to suffer sexual abuse it can be a psychological harmful experience to recall the events of the sexual abuse in front of the offender and others.

Therefore the literature on this topic highlights the significance of creating an atmosphere for the child in which it can feel comfortable. It must have to be given the possibility to freely speak about the offence.<sup>290</sup> In each individual case it can be considered that the child has a representative on his side, for example a parent or a professional victim lawyer. In some cases the attendance of relatives, (in most cases mothers), can make the situation worse.<sup>291</sup>

Generally the accused and his lawyer have a right not only to stay in the courtroom when the victim is being questioned but also to ask questions themselves (§ 168c II of the German Code of Criminal Procedure).<sup>292</sup> For psychological reasons, children (under 18) may only be questioned by the judge (§ 241a of the German Code of Criminal Procedure).<sup>293</sup> It is also possible that interrogation by the judge is done via picture-and-sound-technique (“audio-vision-interrogation“).<sup>294</sup> According to § 255a of the German Code of Criminal Procedure only audio-vision material may be used in the main trial, instead of the actual interrogation in the court room, which contains the interrogation by the judge, according to the rules of the Code of Criminal Procedure, and the accused and his defence lawyer had a chance to contribute to the interrogation as for example, to have certain questions asked.<sup>295</sup>

A representation of the principle of “the best interest of the child“ is laid down in § 168e of the German Code of Criminal Procedure which gives the judge the right to do any questioning necessary during the main trial, without the persons present, when their presence can cause danger to the wellbeing of the child.<sup>296</sup> The interrogation then

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<sup>290</sup> Herrmann, in Roggenwallner/ Herrmann/ Jansen, *Straftaten gegen die Sexuelle Selbstbestimmung*, ZAP Verlag, Münster, 2011, p. 190.

<sup>291</sup> *ibid.*

<sup>292</sup> Herrmann, *op. cit.*, p. 215.

<sup>293</sup> Meyer-Goßler, StPO, C.H. Beck, München, 2012, p. 980.

<sup>294</sup> Herrmann, *op. cit.*, p. 215.

<sup>295</sup> Meyer-Goßler, *op. cit.*, p. 1076.

<sup>296</sup> German Federal Ministry of Justice, “*Bundeseinheitliche Handreichung zum Schutz kindlicher (Opfer) Zeugen im Strafverfahren*“, 2012, 29/10/2012, [http://www.bmj.de/SharedDocs/Downloads/DE/Fachuntersuchungen/Bundeseinheitliche\\_Handreichung\\_zum\\_Schutz\\_kindlicher\\_Opfer\\_Zeugen\\_im\\_Strafverfahren.pdf?\\_\\_blob=publicationFile](http://www.bmj.de/SharedDocs/Downloads/DE/Fachuntersuchungen/Bundeseinheitliche_Handreichung_zum_Schutz_kindlicher_Opfer_Zeugen_im_Strafverfahren.pdf?__blob=publicationFile).



takes place in a special interrogation room and is transmitted to the courtroom through one-way broadcasting.

Another possibility to find an equal solution of protection of the child from further traumatic experience and the punishment of the offender is the victim-offender-settlement (*Täter-Opfer-Ausgleich*). In this off-court procedure, both parties can come together at free will to settle the „dispute“. <sup>297</sup> One of the aims is that the offender takes responsibility for his action and confesses in court. He can in return be sentenced with a mitigated penalty. This is especially important for the child's benefit, because often a prompt confession can save it from further suffering due to long court procedures. <sup>298</sup>

In reliance on the principle of „the best interest of the child“, the Federal Ministry of Justice published in 2010 a paper, addressing organs of the justice, social groups, the police and others. It contains information and guidelines concerning matters of the protection of child (victim) witnesses in the Federal Republic of Germany. <sup>299</sup> The Federal Ministry of Justice warns not only to pay attention to punish the offender but to realise that in the foreground of any investigation stands the wellbeing of the child which suffered from the sexual abuse. It emphasises the importance not to expose the child to unnecessary often and long interviews. <sup>300</sup>

The round table on „Sexual abuse of children“ - „*Runder Tisch, Sexueller Missbrauch von Kindern*“ <sup>301</sup> agreed to develop better education for judges and members of the judiciary in matters of victim treatment. Also multiple interrogations should be avoided more strongly than before. All victims shall have a victim lawyer. The right to have information shall be enlarged. The stresses and strains of children and juveniles have

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<sup>297</sup> Herrmann, *op. cit.*, p. 230.

<sup>298</sup> Herrmann, *op. cit.*, p. 231.

<sup>299</sup> German Federal Ministry of Justice, 2012, 28/10/2012, [http://www.bmj.de/SharedDocs/Downloads/DE/Fachuntersuchungen/Bundeseinheitliche\\_Handreichung\\_zum\\_Schutz\\_kindlicher\\_Opfer\\_Zeugen\\_im\\_Strafverfahren.html](http://www.bmj.de/SharedDocs/Downloads/DE/Fachuntersuchungen/Bundeseinheitliche_Handreichung_zum_Schutz_kindlicher_Opfer_Zeugen_im_Strafverfahren.html).

<sup>300</sup> German Federal Ministry of Justice, „*Bundeseinheitliche Handreichung zum Schutz kindlicher (Opfer) Zeugen im Strafverfahren*“, *op. cit.*

<sup>301</sup> see *Child Protection iii.*; German Federal Ministry of Justice, 11/2011, 28/10/2012, [http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Abschlussbericht\\_RunderTisch.pdf?\\_\\_blob=publicationFile](http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Abschlussbericht_RunderTisch.pdf?__blob=publicationFile).

been taken into consideration more seriously, when deciding about excluding the public from the court procedure.<sup>302</sup>

- x. There can be special units investigating certain crimes within the police force or the public body of prosecution.<sup>303</sup> Methods of these task forces for example are, searching video material for pornographic images<sup>304</sup>, or executing search warrants<sup>305</sup>. Bigger operations to catch a great amount of suspects were for example operation “Mikado”<sup>306</sup> in 2003, operation “Marcy”<sup>307</sup> in 2007, which was one of the greatest preliminary proceeding in world history at that time, or operation “Himmel” (heaven) in year 2007.<sup>308</sup> The significance is that all of these operations work according to a similar pattern. When one suspect is caught, the investigation forces search their computers and data memories for names or faces of other possible offenders. This includes watching pornographic material. Then, house searches are done to safe evidence and arrest a large amount of suspects at one time. Those operations are done secretly, because when information goes public, offenders could hide evidence at the last moment and inform accomplices.<sup>309</sup>
- xi. It is not required that a crime as mentioned above is reported in order to be prosecuted, because the prosecution authorities have the obligation to prosecute any offence on their own motion.<sup>310</sup> They are obliged to investigate, as soon as they get notice of a suspicion. After investigation the prosecution authorities can decide

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<sup>302</sup> German Federal Ministry of Justice, “Opferschutz im Ermittlungs- und Strafverfahren”, 11/2011, 28/10/2012, [http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Abschlussbericht\\_RunderTisch.pdf?\\_\\_blob=publicationFile](http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Abschlussbericht_RunderTisch.pdf?__blob=publicationFile).

<sup>303</sup> e. g.: department LKA 13 of the Land Office of Criminal Investigation, 2012, 28/10/2012, <https://www.berlin.de/polizei/kriminalitaet/sexualdelikte.html>.

<sup>304</sup> J. Schneider, “Fahndung am Bildschirm”, Süddeutsche Zeitung online, 28/10/2012, <http://www.sueddeutsche.de/panorama/kinderpornographie-fahndung-am-bildschirm-1.922770>.

<sup>305</sup> J. Todt, “Fahnder überprüfen erstmals alle deutschen Kreditkarten”, Spiegel online, 09/2012, 28/10/2012, <http://www.spiegel.de/panorama/justiz/kinderpornografie-im-internet-fahnder-ueberpruefen-erstmals-alle-deutschen-kreditkarten-a-457844.html>; (*The house searches, including private houses and offices, were followed by a credit card check of every owner who had transferred a certain amount of money to a suspicious bank account*).

<sup>306</sup> J. Todt, *op. cit.*

<sup>307</sup> Spiegel Online, “Polizei lässt Kinderporno-Ringe hochgehen”, Spiegel Online, 09/2003, 29/10/2012, <http://www.spiegel.de/netzwelt/web/operation-marcy-polizei-laesst-kinderporno-ringe-hochgehen-a-267225.html>.

<sup>308</sup> Focus Online, “Fahnder sorgen sich um Beweismaterial”, Focus online, 12/2007, 29/10/2012, [http://www.focus.de/panorama/welt/kinderpornografie-skandal\\_aid\\_230672.html](http://www.focus.de/panorama/welt/kinderpornografie-skandal_aid_230672.html).

<sup>309</sup> see the case of operation “Himmel”: Spiegel Online, “Polizei lässt Kinderporno-Ringe hochgehen”, *op. cit.*

<sup>310</sup> Herrmann, *op. cit.*, p. 155f; German Federal Ministry of Justice, 11/2011, 28/10/2012, [http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/RunderTisch\\_Leitlinien\\_zur\\_Einschaltung\\_der\\_Strafverfolgungsbehoerden.pdf?\\_\\_blob=publicationFile](http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/RunderTisch_Leitlinien_zur_Einschaltung_der_Strafverfolgungsbehoerden.pdf?__blob=publicationFile).

whether suspicion is strong enough to bring an action against the suspect or to drop further investigation.

Besides investigation on own motion every victim of child abuse has the right to report any crime to the authorities (which can be police, prosecution or the court).<sup>311</sup> They have also the specific right to file a demand for prosecution on which behalf, the prosecution authorities have to validate if indication is given for suspicion. A criminal complaint can be made by anybody else as well.<sup>312</sup>

More importantly, there can be cases, in which children which suffered from sexual abuse does not want to have further investigation, because they are afraid of further suffering due to difficult criminal procedures or they are ashamed of what happened to them.<sup>313</sup> The question is: Can an investigation procedure by the prosecution authorities be stopped, once the authorities got notice?

There can be an exception of the duty on some authorities like social groups or doctors to refer cases of sexual abuse to the prosecution authorities, but once the prosecution started investigating, there is no possibility to bring the investigation to halt, even when the person reporting a crime withdraws from its statements.<sup>314</sup>

- xii. The limitation of sexual abuse of juveniles is five, in some exceptions three years. Sexual abuse of a child is limited to ten years, in especially serious cases twenty years or even thirty years. The limitation period starts when the abused victim turns to the age of eighteen. The only offence without a limitation is murder.<sup>315</sup> This limitation ruling has been strongly criticised, especially since the events in which priests sexually abused children and some of the offenders could not be punished because of the

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<sup>311</sup> Unabhängiger Beauftragter für Fragen des sexuellen Kindesmissbrauchs (*Independent commissioner for questions concerning sexual abuse of children*), Opferrecht, 2012, 29/10/2012, <http://beauftragter-missbrauch.de/course/view.php?id=90>.

<sup>312</sup> Polizeiliche Kriminalprävention der Länder und des Bundes, 2012, 28/10/2012, [http://www.polizei-beratung.de/opferinformationen/sexueller-missbrauch-von-kindern/ablauf-des-strafverfahrens.html#section\\_2](http://www.polizei-beratung.de/opferinformationen/sexueller-missbrauch-von-kindern/ablauf-des-strafverfahrens.html#section_2).

<sup>313</sup> C. Bergmann, “*Abschlussbericht der unabhängigen Beauftragten zur Aufarbeitung des sexuellen Kindesmissbrauchs*“, 04/2011, p. 187.

<sup>314</sup> Polizeiliche Kriminalprävention der Länder und des Bundes, 2012, 28/12/2012, [http://www.polizei-beratung.de/opferinformationen/sexueller-missbrauch-von-kindern/ablauf-des-strafverfahrens.html#section\\_2](http://www.polizei-beratung.de/opferinformationen/sexueller-missbrauch-von-kindern/ablauf-des-strafverfahrens.html#section_2); German Federal Ministry of Justice, 11/2011, 28/10/2012, [http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/RunderTisch\\_Leitlinien\\_zur\\_Einschaltung\\_der\\_Strafverfolgungsbehoerden.pdf?\\_\\_blob=publicationFile](http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/RunderTisch_Leitlinien_zur_Einschaltung_der_Strafverfolgungsbehoerden.pdf?__blob=publicationFile).

<sup>315</sup> C. Bergmann, *op. cit.*, p. 164.

limitation.<sup>316</sup> In cases of sexual abuse of children, the victims very often need a long time and often therapy, until they talk about the abuse and an even longer time period until they feel ready to report the crime. Until then many cases are already protected from prosecution.<sup>317</sup> The legislator has not passed any legislation on this topic till today, but some change can be expected.

- xiii. During research no case could be found in which the age of the victim was not certain. Regarding § 176 (1) of the German Criminal Code child abuse requires an age of less than 14 years. Usually it is possible to determine the victim's identity and therefore its age. If this is not the case a first step would probably be to identify the victim. A different problem arises in cases in which the offender does not know that the victim is under the age of 14. As described earlier under the German Criminal Law an offender must act at least with indirect intent, meaning that - in the case of § 176 of the German Criminal Code - he or she must at least consider it possible that the victim is under 14 years of age and must approve it eventually.<sup>318</sup> If the offender does not even think about the age of the victim, he or she does not act with indirect intent and therefore is not liable to prosecution under § 176 (1).<sup>319</sup>
- xiv. Article 37 of the Lanzarote Convention stipulates that every state has to take legislative and other measures to record and store national data on convicted sexual offenders – data relating to the identity and the genetic profile (DNA) - for the purpose of prevention and prosecution of child exploitation and child abuse.<sup>320</sup> The §§ 81e to 81g of the German Code of Criminal Procedure have proved of value and are an effective measure to the clarification of facts and criminal offences. With the law to change the provisions on crimes against sexual self-determination and to change other provisions of 27th December 2003,<sup>321</sup> the offences under § 81g (1) of the

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<sup>316</sup> C. Gesellensetter, “*Zwischen Verjährung und Vergeltung*“ (Between limitation and retaliation), Focus online, 2012, 29/10/2012, [http://www.focus.de/panorama/welt/missbrauchsskandal/sexueller-missbrauch-zwischen-verjaehrung-und-vergeltung\\_aid\\_488404.html](http://www.focus.de/panorama/welt/missbrauchsskandal/sexueller-missbrauch-zwischen-verjaehrung-und-vergeltung_aid_488404.html).

<sup>317</sup> C. Bergmann, *op. cit.*, p.164.

<sup>318</sup> A. Schönke/ H. Schröder, *Strafgesetzbuch: StGB*, C. H. Beck, München, 2010, § 176, marginal no. 10.

<sup>319</sup> *ibid.*

<sup>320</sup> Art. 37 Lanzarote Convention, accessed from: <http://conventions.coe.int/Treaty/EN/treaties/html/201.htm>.

<sup>321</sup> Federal Law Gazette Part I, classification number 67 of 30 December 2003 (Federal Law Gazette I p. 3007), 2003, 28/10/2012, [http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger\\_BGBI&start=%2F%2F%5B%40attr\\_id%3D%27bgl103s3007.pdf%5D&wc=1&skin=WC](http://www.bgbl.de/Xaver/text.xav?bk=Bundesanzeiger_BGBI&start=%2F%2F%5B%40attr_id%3D%27bgl103s3007.pdf%5D&wc=1&skin=WC).

German Code of Criminal Procedure<sup>322</sup> allowing the collecting and storing of DNA identification samples of the accused when there is suspicion of a criminal act were extended to all crimes against sexual self-determination, so that the DNA analysis was made easier for the purposes of future criminal prosecution. Since then, criminal prosecutors no longer need to wait until a sexual offender has committed massive crimes in order to make a DNA analysis or storage.

Under § 81g (1) 2 of the German Code of Criminal Procedure the repeated committing of other wrongful acts can be seen to be equivalent to one criminal act of considerable significance and thereby permit the collection and storage of DNA identification samples. This also has an effect on the combating of offences against sexual self-determination.

Studies of the Federal Criminal Police Office<sup>323</sup> and of the central criminological unit show that there is already considerable police data against aggressive sexual offenders in other areas of offence, including crimes against property or physical integrity, which now make it possible to proceed to examine the ordering of a DNA analysis as a preventive measure (BT-Drs. 15/5674 p. 7).<sup>324</sup> Likewise the express legal provision of mass genetic tests in § 81h of the German Code of Criminal Procedure<sup>325</sup> contributes to a more effective prosecution of crimes against sexual self-determination.

According to § 483 of the German Code of Criminal Procedure<sup>326</sup>, personal data can be stored by courts, law enforcement authorities and agencies, public prosecution offices and other judicial authorities.

Furthermore Art. 38 of the Lanzarote Convention provides principles and measures for international co-operation in preventing and combating sexual exploitation and abuse of children and bringing investigations and proceedings concerning those offences. Countries shall ensure mutual legal assistance with regard to this kind of criminal matters and provide beneficiary information to third states. § 487 of the

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<sup>322</sup> § 81 g of the German Code of Criminal Procedure, accessed from: [http://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p0364](http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0364).

<sup>323</sup> Bundeskriminalamt (*Federal Criminal Police Office*), 2012, 29/10/2012, [http://www.bka.de/EN/Home/homepage\\_\\_node.html?\\_\\_nnn=true](http://www.bka.de/EN/Home/homepage__node.html?__nnn=true).

<sup>324</sup> Bundestag document No. 15/5674 of 14 June 2005, 14/06/2005, 28/10/2012, <http://dip21.bundestag.de/dip21/btd/15/056/1505674.pdf>.

<sup>325</sup> § 81 h of the German Code of Criminal Procedure, 21/07/2012, 28/10/2012, [http://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p0380](http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0380).

<sup>326</sup> § 483 of the German Code of Criminal Procedure, 21/07/2012, 28/10/2012, [http://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p2808](http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p2808).



limited possibilities of the criminal court to reject a decision on the right to compensation.

- xvi. The serious impact of domestic violence on the development of children up to adulthood is obvious. Offenders are often current or former partners of the women or male members of the family.<sup>332</sup>

Children who have been victims of sexual abuse are protected during court proceedings by having them questioned by the judge, without anybody else present. The child can have a victim lawyer or relative with it for support. The times of interrogation and number of questions are held as low as possible.<sup>333</sup>

## 4 COMPLEMENTARY MEASURES

### *Preventive Measures*

- xiii. In Germany child protective services are only allowed to hire people working with children when they fulfil the requirements of § 72 of the German Social Code, Book VIII<sup>334</sup>. It requires that the person has a suitable personality and that has received adequate education for the given task. Alternatively a person can be qualified if specific experiences with social work exist that enable the person to complete the given tasks.

Additionally § 72a of the German Social Code, Book VIII<sup>335</sup> requires that a person has not been convicted for a number of specific crimes (§§ 171, 174 – 174c, 176 – 180a, 181a, 182 – 184f, 225, 232 – 233a, 234, 235, 236 of the German Criminal Code). All these crimes relate to the abuse of children in various forms.

Furthermore the child protective services have to ensure that its workers receive further training and counselling, § 72 (3) of the German Social Code, Book VIII<sup>336</sup>.

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<sup>332</sup> Federal Ministry for Family Affairs, Senior Citizens, Woman and Youth, 2012, 29/10/2012, <http://www.bmfsfj.de/RedaktionBMFSFJ/Broschuerenstelle/Pdf-Anlagen/Sachstandsbericht-RIO-englisch,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>.

<sup>333</sup> *ibid.*

<sup>334</sup> German Federal Ministry of Justice, 27/10/2012, 27/10/2012, [http://www.gesetze-im-internet.de/sgb\\_8/\\_72.html](http://www.gesetze-im-internet.de/sgb_8/_72.html).

<sup>335</sup> German Federal Ministry of Justice, 27/10/2012, 27/10/2012, [http://www.gesetze-im-internet.de/sgb\\_8/\\_72a.html](http://www.gesetze-im-internet.de/sgb_8/_72a.html).

<sup>336</sup> German Federal Ministry of Justice, 27/10/2012, 27/10/2012, [http://www.gesetze-im-internet.de/sgb\\_8/\\_72.html](http://www.gesetze-im-internet.de/sgb_8/_72.html).

- xiv. At the beginning of 2013 a campaign called “*Kein Raum für Missbrauch*” (No space for abuse) starts which aims to inform the general public with regard to sexual abuse of children. It is originated to keep potential abusers away from facilities and to strengthen the position of people working with children.<sup>337</sup>
- xv. There is a programme called “*Kein Täter werden*” (Not becoming an offender),<sup>338</sup> which offers therapy in various locations all around Germany for paedophiles. The therapy is free and aims to prevent sexual abuse and other crimes. The programme guarantees absolute confidentiality to all participants and involves group therapy as well as individual counselling.<sup>339</sup>

#### *Protective Measures and Assistance to Victims*

- xvi. There is a programme called “*Sprechen hilft*”<sup>340</sup> (“Speaking helps”), which is an initiative by the “*Unabhängiger Beauftragter für Fragen des sexuellen Kindesmissbrauchs*” (Independent Agent for questions concerning the sexual abuse of children) and aims to encourage victims of sexual abuse to speak out and get help.<sup>341</sup> Financial compensation is also given in the scope of the *Opferentschädigungsgesetz* (Law on the compensation of victims).
- xvii. There are various service lines for victims. Most child protective services<sup>342</sup> offer one as well as the “*Unabhängiger Beauftragter für Fragen des sexuellen Kindesmissbrauchs*”.<sup>343</sup> The helplines are staffed with trained personal and act as first contact to victims as well as

<sup>337</sup> Geschäftsstelle des Unabhängigen Beauftragten für Fragen des sexuellen Kindesmissbrauchs (*Office of the Independent Agent for questions concerning the sexual abuse of children*), 2012, 27/10/2012, <http://beauftragter-missbrauch.de/course/view.php?id=188>.

<sup>338</sup> Institut für Sexualwissenschaft und Sexualmedizin am Universitätsklinikum Charité, Zentrum für Human- und Gesundheitswissenschaften Universitätsklinikum Charité Campus Mitte - Freie und Humboldt-Universität zu Berlin, 27/10/2012, 27/10/2012, <http://www.kein-taeter-werden.de/>.

<sup>339</sup> Institut für Sexualwissenschaft und Sexualmedizin am Universitätsklinikum Charité, Zentrum für Human- und Gesundheitswissenschaften Universitätsklinikum Charité Campus Mitte - Freie und Humboldt-Universität zu Berlin, 27/10/2012, 27/10/2012, <http://www.kein-taeter-werden.de/story/38/3838.html>.

<sup>340</sup> Geschäftsstelle des Unabhängigen Beauftragten für Fragen des sexuellen Kindesmissbrauchs (*Office of the Independent Agent for questions concerning the sexual abuse of children*), 2010, 27/10/2012, <http://www.sprechen-hilft.de/>.

<sup>341</sup> Geschäftsstelle des Unabhängigen Beauftragten für Fragen des sexuellen Kindesmissbrauchs (*Office of the Independent Agent for questions concerning the sexual abuse of children*), 2010, 27/10/2012, <http://www.sprechen-hilft.de/kampagne.html>.

<sup>342</sup> Further information: 27/10/2012, <http://www.hamburg.de/kinderschutz-hotline/>; <http://www.berlin.de/ba-mitte/org/jugendamt/kinderschutz.html>; <http://www.muenchen.de/rathaus/Stadtverwaltung/Sozialreferat/Jugendamt/Kinderschutz.html>.

<sup>343</sup> Geschäftsstelle des Unabhängigen Beauftragten für Fragen des sexuellen Kindesmissbrauchs (*Office of the Independent Agent for questions concerning the sexual abuse of children*), 2012, 27/10/2012, <http://beauftragter-missbrauch.de/course/view.php?id=35>.



relatives of victims. Callers receive information and support in finding a local therapist or help facilities. Confidentiality is guaranteed as well as anonymity.<sup>344</sup>

- xviii. As mentioned above there is a programme called “*Sprechen hilft*”, which tries to get victims to use the helpline of the Independent agent for questions of sexual abuse of children and to be directed towards receiving professional counselling. Extensive information is given regarding the various treatments to the victims, which can then decide whether they want to use the information and start a therapy or not. The intervention programme is coordinated by people experienced in the field of sexual abuse of children, which are aware of behavioural problems caused due to abuse.<sup>345</sup> Further the state offers financial support for victims as has been regulated in the *Opferentschädigungsgesetz*<sup>346</sup> (Law on the compensation for victims).

### III NATIONAL POLICY REGARDING CHILDREN

- vii. In recent years, the debate on sexual child abuse has become omnipresent. An increased number of child pornography deliveries via internet has been noticed<sup>347</sup>. Moreover, cases of sexual child abuse committed by paedophile clerics hit the headlines in January 2010<sup>348</sup>. Numerous instances of sexual exploitation of school children between 1970 and 1980 at the Canisius-College of Jesuits in Berlin became public<sup>349</sup>. Furthermore, hundreds of cases of sexual child abuse of school children between 1960 and 2010 at the so-called Odenwaldschule - a country boarding school - came to light<sup>350</sup>. In response thereto, the German bishop’s conference established the new office of the nationwide responsible commissioner for cases of (sexual) abuse<sup>351</sup>.

<sup>344</sup> Geschäftsstelle des Unabhängigen Beauftragten für Fragen des sexuellen Kindesmissbrauchs (*Office of the Independent Agent for questions concerning the sexual abuse of children*), 2012, 27/10/2012, <http://beauftragter-missbrauch.de/course/view.php?id=35>.

<sup>345</sup> Geschäftsstelle des Unabhängigen Beauftragten für Fragen des sexuellen Kindesmissbrauchs (*Office of the Independent Agent for questions concerning the sexual abuse of children*), 2012, 27/10/2012, <http://beauftragter-missbrauch.de/course/view.php?id=35>.

<sup>346</sup> German Federal Ministry of Justice, 27/10/2012, 27/10/2012, <http://www.gesetze-im-internet.de/oeg/index.html>.

<sup>347</sup> [http://www.focus.de/politik/deutschland/erschreckende-zahlen-sexueller-missbrauch-von-kindern-steigt-an\\_aid\\_752263.html](http://www.focus.de/politik/deutschland/erschreckende-zahlen-sexueller-missbrauch-von-kindern-steigt-an_aid_752263.html).

<sup>348</sup> <http://www.gegen-missbrauch.de/kirche>.

<sup>349</sup> [http://www.jesuiten.org/fileadmin/Redaktion/Downloads/Bericht\\_27\\_05\\_2010\\_aktuell.pdf](http://www.jesuiten.org/fileadmin/Redaktion/Downloads/Bericht_27_05_2010_aktuell.pdf).

<sup>350</sup> <http://www2.ibw.uni-heidelberg.de/~gerstner/120430-Odenwaldschule-Abschlussbericht.pdf>.

<sup>351</sup> <http://www.spiegel.de/panorama/gesellschaft/nach-dem-skandal-bischoefe-bestimmen-missbrauchsbeauftragten-a-680336.html>.

Many priests have been forced to leave their jobs<sup>352</sup>. The investigations have not yet been completed.

Due to the fact of separation of church and state in Germany, there is no obligation for the Catholic Church for cooperation with the state<sup>353</sup>. According to Article 140 of the Basic Law (German Constitution) and Article 137 (2) WRV (Weimar Constitution), the church regulates internal affairs independently. Therefore, resolving cases of sexual child abuse became problematic. It is very controversial whether canon law is an adequate base for an effective system of sanctioning such cases<sup>354</sup>. In response thereto, the Roman Congregation published new rules<sup>355</sup> on church penal law concerning serious criminal offences in July 2010<sup>356</sup>. Among other things, the limitation period has been extended to twenty years<sup>357</sup>. Moreover, the possession, delivery and distribution of child pornography by clerics became a specific offence<sup>358</sup>. In 2010, the German bishop's conference adopted and published a revised version of "Guiding principles for dealing with sexual child abuse"<sup>359</sup>. It is the central basis for all communities of the German Conference of Superiors of Religious Orders (DOK).<sup>360</sup> Furthermore, the German federal cabinet established the "round table sexual child abuse in relationship of dependency and power in private and public bodies and family environment" in 2010.<sup>361</sup> The round table was founded to ensure an effective preventative action against sexual abuse<sup>362</sup>.

Joint chairmen were the Federal Minister for Family Affairs Kristina Schröder, MP; Federal Minister of Justice Sabine Leutheusser-Schnarrenberger, MP; and Federal Education Minister Annette Schavan, MdB. Meetings of the round table were

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<sup>352</sup> <http://www.spiegel.de/panorama/gesellschaft/trier-bischof-ackermann-entlaesst-priester-wegen-sexuellen-missbrauchs-a-844315.html>.

<sup>353</sup> <http://www.lto.de/recht/hintergruende/h/sexueller-missbrauch-durch-kleriker-keine-pflicht-der-kirche-zur-zusammenarbeit-mit-dem-staat/>.

<sup>354</sup> <http://www.lto.de/recht/hintergruende/h/sexueller-missbrauch-durch-kleriker-das-kirchenrecht-als-taugliche-grundlage-angemessener-sanktionierung/>.

<sup>355</sup> <http://www.lto.de/recht/hintergruende/h/sexueller-missbrauch-durch-kleriker-neuregelungen-im-kirchlichen-strafrecht/>.

<sup>356</sup> [http://www.dbk.de/fileadmin/redaktion/diverse\\_downloads/Dossiers/2010-07-15\\_VAT-dt\\_Normae-de-gravioribus-delictis.pdf](http://www.dbk.de/fileadmin/redaktion/diverse_downloads/Dossiers/2010-07-15_VAT-dt_Normae-de-gravioribus-delictis.pdf).

<sup>357</sup> <http://www.lto.de/recht/hintergruende/h/sexueller-missbrauch-durch-kleriker-neuregelungen-im-kirchlichen-strafrecht/>.

<sup>358</sup> [http://www.orden.de/dokumente/2010.10.07\\_leitlinien\\_dok\\_b.pdf](http://www.orden.de/dokumente/2010.10.07_leitlinien_dok_b.pdf).

<sup>359</sup> [http://www.orden.de/dokumente/2010.10.07\\_leitlinien\\_dok\\_b.pdf](http://www.orden.de/dokumente/2010.10.07_leitlinien_dok_b.pdf).

<sup>360</sup> [http://www.orden.de/dokumente/2010.10.07\\_leitlinien\\_dok\\_b.pdf](http://www.orden.de/dokumente/2010.10.07_leitlinien_dok_b.pdf).

<sup>361</sup> <http://www.rundertisch-kindesmissbrauch.de/>.

<sup>362</sup> <http://www.rundertisch-kindesmissbrauch.de/>.

attended by representatives of the politics, church, science, justice and child and victim protection NGOs<sup>363</sup>.

viii.

### **Commitment by NGOs**

The awareness within the society regarding sexual child abuse and exploitation has been raised by committed NGOs by supporting the broadcasting of television reports and advertising campaigns pointing out that sexual abuse occurs in everyday life and is not only an exception. Moreover, counselling services provide information for abused victims and give advice to parents on how to protect children against sexual abuse in day-to-day life and the Internet.

### **Commitment by the State<sup>364</sup>**

The commitment by the State is based on providing crucial information on sexual child abuse to the population. By this means, the society is encouraged to civil courage and to increase willingness to report cases of abuse to the police. The State initiates different reports with media campaigns by television broadcast focusing on the status quo of sexual abuse of children in Germany<sup>365</sup>. Furthermore, the federal government has established a national hotline for abused victims in 2010.<sup>366</sup> The “round table of sexual child abuse” has appointed an independent officer for cases of sexual child abuse.<sup>367</sup> This office is personally and financially linked to the German Ministry of Family Affairs.<sup>368</sup> The officer is the contact partner for abused victims; and his task also is to implement guidelines of the round table. Another obligation is to encourage the exchange of information and to increase public awareness of sexual child abuse by initiating media campaigns<sup>369</sup>.

The German Ministry of Education and Research established, in cooperation with NGOs<sup>370</sup>, an “Action Plan 2011 for the protection of children and juveniles against

<sup>363</sup><http://www.rundertisch-kindesmissbrauch.de/mitglieder.htm>.

<sup>364</sup> [http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/Germany\\_Plan\\_of\\_Action\\_of\\_the\\_Federal\\_Government\\_for\\_the\\_protection\\_of\\_children.pdf](http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/Germany_Plan_of_Action_of_the_Federal_Government_for_the_protection_of_children.pdf).

<sup>365</sup> [http://www.regenbogenwald.de/themen/misstand\\_opferschutz/index.htm](http://www.regenbogenwald.de/themen/misstand_opferschutz/index.htm).

<sup>366</sup> <http://www.kathweb.at/content/site/nachrichten/database/32892.html>.

<sup>367</sup> [http://www.rundertisch-kindesmissbrauch.de/ziele\\_aufgaben.htm](http://www.rundertisch-kindesmissbrauch.de/ziele_aufgaben.htm).

<sup>368</sup> [http://www.rundertisch-kindesmissbrauch.de/ziele\\_aufgaben.htm](http://www.rundertisch-kindesmissbrauch.de/ziele_aufgaben.htm).

<sup>369</sup> <http://beauftragter-missbrauch.de/>.

<sup>370</sup> Federal Ministry for Family Affairs, Senior Citizens, Woman and Youth, 2012, 29/10/2012, <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/aktionsplan-2011,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>.

sexual violence and exploitation”.<sup>371</sup> By using the contact network,<sup>372</sup> the plan provides the increase of public awareness by provision of training courses among parents and a wide range of professions in order to handle problems of sexual abuse.<sup>373</sup> In addition thereto, the State provides information brochures and established secure homepages<sup>374</sup> for children<sup>375</sup> and online platforms for parents as an indication for secure use of online media and services.<sup>376</sup>

- ix. In the following, the annual police crime statistics from 2008 to 2011 are presented. Only reported cases are displayed.

### **2008/2009**

12052 cases of sexual child abuse were reported in 2008. In 2009 the number of cases was 11319<sup>377</sup>.

The clearance rate has increased from 82,1 % in 2008 to 83,5 % in 2009<sup>378</sup>.

There are 6707 reported cases of possession and delivery of child pornography in 2008.

In 2009, only 3823 cases were registered<sup>379</sup>. Furthermore, 2755 cases of distribution of child pornography were reported. The number has increased in 2009 to 3145 cases.<sup>380</sup>

### **2010/2011**

11867 cases of sexual child abuse were reported in 2010 with a clearance rate of 83,9 %.

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<sup>371</sup> [http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/Germany\\_Plan\\_of\\_Action\\_of\\_the\\_Federal\\_Government\\_for\\_the\\_protection\\_of\\_children.pdf](http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/Germany_Plan_of_Action_of_the_Federal_Government_for_the_protection_of_children.pdf).

<sup>372</sup> [www.hinsehen-handeln-helfen.de](http://www.hinsehen-handeln-helfen.de).

<sup>373</sup> Federal Ministry for Family Affairs, Senior Citizens, Woman and Youth, 2012, 29/10/2012, <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/aktionsplan-2011,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>, p. 24, 25.

<sup>374</sup> Federal Ministry for Family Affairs, Senior Citizens, Woman and Youth, 2012, 29/10/2012, <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/aktionsplan-2011,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>, p. 85.

<sup>375</sup> [www.surfen-ohne-risiko.net](http://www.surfen-ohne-risiko.net).

<sup>376</sup> [www.schau-hin.info](http://www.schau-hin.info).

<sup>377</sup> <http://www.bmi.bund.de/cae/servlet/contentblob/1069004/publicationFile/65239/PKS2009.pdf>, p. 37.

<sup>378</sup> Federal Ministry of the Interior, 2012, 25/10/2012, <http://www.bmi.bund.de/cae/servlet/contentblob/1069004/publicationFile/65239/PKS2009.pdf>, p. 37.

<sup>379</sup> *ibid.*, <http://www.bmi.bund.de/cae/servlet/contentblob/1069004/publicationFile/65239/PKS2009.pdf>, p. 38.

<sup>380</sup> *ibid.*, <http://www.bmi.bund.de/cae/servlet/contentblob/1069004/publicationFile/65239/PKS2009.pdf>, p. 38.

However, in 2011 the police reported 12444 cases and the clearance rate increased to 85,1 %.

There are 2687 reported cases on distribution of child pornography in 2010. 2376 reported cases were registered in 2011.<sup>381</sup> In addition, 3160 cases of possession and delivery of child pornography were reported in 2010. In 2011, already 3896 cases were registered. This is an increase of 23,3 % compared to 2010.<sup>382</sup>

Overall, this statistics show that there is a huge increase in the number of reported cases of children's sexual exploitation from 2008 to 2011. On this background a much higher number of unreported cases has to be supposed that surpasses by far the 12444 registered cases in 2011.

- x. In Germany, many promotional campaigns are supported in order to increase the willingness of victims and witnesses to report abuse cases by providing information for parents and children about the threats on the internet and the dissemination of a code of conduct for children via internet and advertising. The following campaigns are used as examples:

NGOs such as *Gegen Missbrauch e.V.* (Against Abuse) offer lectures and workshops at schools for children, teachers, parents and educators about sexual abuse and the support for the realization of prevention measures. Moreover, assistance with visits to government offices are offered to victims.<sup>383</sup>

*Innocence in danger e.V.* initiated the campaign "finally protect our children"<sup>384</sup>, which informs about threats on the internet. Another campaign is "Smart User Peer 2 Peer Prevention"<sup>385</sup>.

Juveniles receive special training by association staff regarding the sexualized violence in the media, and how they can protect themselves against sexual contact with potential sex offenders by potential sex offenders.

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<sup>381</sup> *ibid.*,

[http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2012/PKS2011.pdf?\\_\\_blob=publication](http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2012/PKS2011.pdf?__blob=publication)

File, p. 47.

<sup>382</sup> *ibid.*, [http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2012/PKS2011.pdf?\\_\\_blob=publicationFile](http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2012/PKS2011.pdf?__blob=publicationFile), p. 48.

<sup>383</sup> <http://www.gegen-missbrauch.de/projektuebersicht>.

<sup>384</sup> <http://www.innocenceindanger.de/projekte/schuetzt-endlich-unsere-kinder/>.

<sup>385</sup> <http://www.innocenceindanger.de/projekte/smart-user-peer2peer-praevention/>.

Afterwards children under 18 may pass on this information and give advice in working groups or lectures to children held at their schools.

Another campaign is the research project for undetected offenders “Präventionsprojekt Dunkelfeld” (Prevention Project Dunkelfeld).<sup>386</sup> This project started in 2004 and was initiated by the Institute of Sexology and Sexual Medicine at the Charité University Clinic in Berlin. Since 2008, the project has been financed by Federal funds.<sup>387</sup>

The intent is the therapeutical prevention of sexual child abuse. Potential paedophile sex offenders, who are not known to the judicial authorities, get a preventive treatment, which is subject to medical confidentiality and free of charge, in order to avoid active sexual child abuse and the consumption of child pornography.<sup>388</sup>

By practicing this kind of preventive therapy, a reduction of the amount of cases of sexual abuse committed by undetected potential perpetrators may be possible.

Furthermore, the independent commissioner has launched the nationwide campaign “*Das Schweigen brechen – Wer das Schweigen bricht, bricht die Macht der Täter*” (Breaking the silence – Who breaks the silence, breaks the power of perpetrators) since 2010.<sup>389</sup>

It calls for victims of sexual abuse to stop breaking the silence because of fear of their perpetrators; and, instead, to talk about the incidents of the past<sup>390</sup>.

xi.

### **Criminal sanctions**

In general, in German criminal law, according to §§ 176, 176a, 176b of the German Criminal Code), sexual child abuse is penalized by prison of up to ten years. At the initiative of the government’s working group of the “round table sexual child abuse”, the victim’s rights have been consolidated 2011 by facilitating criminal proceedings and investigation.<sup>391</sup> It is guaranteed that institutions may advice the authorities responsible immediately in case of suspected sexual abuse of children without taking

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<sup>386</sup> <http://www.kein-taeter-werden.de/documents/000/000/021/projektdarstellung-und-e2009.pdf>, p. 6.

<sup>387</sup> <http://www.kein-taeter-werden.de/documents/000/000/021/projektdarstellung-und-e2009.pdf>, p. 6.

<sup>388</sup> <http://www.kein-taeter-werden.de/story/27/3827.html>.

<sup>389</sup> [http://sprechen-hilft.de/kampagne\\_visuelle\\_umsetzung.html](http://sprechen-hilft.de/kampagne_visuelle_umsetzung.html).

<sup>390</sup> <http://sprechen-hilft.de/kampagne.html>.

<sup>391</sup>

[http://www.bundesregierung.de/statisch/jahresbericht2011/Webs/Breg/jahresbericht2011/DE/In\\_\\_Freiheit\\_\\_fuereinander\\_\\_einstehen/Rechtspolitik/rechtspolitik.html](http://www.bundesregierung.de/statisch/jahresbericht2011/Webs/Breg/jahresbericht2011/DE/In__Freiheit__fuereinander__einstehen/Rechtspolitik/rechtspolitik.html).

own vested interests into account<sup>392</sup>. Furthermore, it will ensure that the principles of the rule of law concerning the dealing with the defendant will not be violated. Moreover, by introducing official video recordings of the judge's cross-examination in the main trial, victims should not be interviewed several times anymore<sup>393</sup>. In addition, victims are eligible for legal advice free of charge<sup>394</sup>. Judges and prosecutors to receive better training on the victims' concrete needs<sup>395</sup>.

Moreover, victims get better information and advice on their rights. With regard to the principles of bringing a case to court, victims can bring a lawsuit to the district court<sup>396</sup>, so that they do not have to be interviewed several times.<sup>397</sup>

### **Civil consequences**

So far it has been the case that victim's legal claims expired after a limitation period of three years. However, in most cases, victims of child sexual abuse do not immediately initiate legal proceedings against the suspect of the crime. Due to psychological reasons, it sometimes takes them several years.<sup>398</sup> Therefore, the limitation period has been extended up to thirty years so that victims may much easier assert claims for compensation and damages<sup>399</sup>.

### **Federal Act on Child Protection**

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<sup>392</sup> Federal Ministry for Family Affairs, Senior Citizens, Woman and Youth, 2012, 29/10/2012, [http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110310\\_Runder\\_Tisch\\_Leitlinien\\_zur\\_Einschaltung\\_der\\_Strafverfolgungsbehoerden.html?nn=1468700](http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110310_Runder_Tisch_Leitlinien_zur_Einschaltung_der_Strafverfolgungsbehoerden.html?nn=1468700).

<sup>393</sup> *ibid.*, [http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110323\\_Rechte\\_von\\_Opfer\\_sexueller\\_Gewalt\\_werden\\_gestaerkt.html?nn=1465600](http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110323_Rechte_von_Opfer_sexueller_Gewalt_werden_gestaerkt.html?nn=1465600).

<sup>394</sup> *ibid.*, [http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110323\\_Rechte\\_von\\_Opfer\\_sexueller\\_Gewalt\\_werden\\_gestaerkt.html?nn=1465600](http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110323_Rechte_von_Opfer_sexueller_Gewalt_werden_gestaerkt.html?nn=1465600).

<sup>395</sup> *ibid.*, [http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110323\\_Rechte\\_von\\_Opfer\\_sexueller\\_Gewalt\\_werden\\_gestaerkt.html?nn=1465600](http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110323_Rechte_von_Opfer_sexueller_Gewalt_werden_gestaerkt.html?nn=1465600).

<sup>396</sup> *ibid.*, [http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110323\\_Rechte\\_von\\_Opfer\\_sexueller\\_Gewalt\\_werden\\_gestaerkt.html?nn=1465600](http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110323_Rechte_von_Opfer_sexueller_Gewalt_werden_gestaerkt.html?nn=1465600).

<sup>397</sup> *ibid.*, [http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110323\\_Rechte\\_von\\_Opfer\\_sexueller\\_Gewalt\\_werden\\_gestaerkt.html?nn=1465600](http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110323_Rechte_von_Opfer_sexueller_Gewalt_werden_gestaerkt.html?nn=1465600).

<sup>398</sup> *ibid.*, [http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110323\\_Rechte\\_von\\_Opfer\\_sexueller\\_Gewalt\\_werden\\_gestaerkt.html?nn=1465600](http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2011/20110323_Rechte_von_Opfer_sexueller_Gewalt_werden_gestaerkt.html?nn=1465600).

<sup>399</sup> <http://www.merkur-online.de/nachrichten/politik/laengere-verjaehrungsfrist-missbrauch-840985.html>.

On January 1<sup>st</sup> 2012, the new Federal Act on Child Protection<sup>400</sup> for the improvement of active protection of children by ensuring more legal certainty entered into force. As a consequence, all staff members of private and state youth welfare services are obliged to provide a criminal record document<sup>401</sup>. Furthermore, the new federal law provides regular checks in institutions of state and private youth welfare services to guarantee an effective protection against sexual child abuse<sup>402</sup>.

- xii. One of the main national Non-Governmental Organisations working on the topic of children's rights are the following: Gegen Missbrauch e.V.<sup>403</sup>; Kindernothilfe e.V.<sup>404</sup>; ECPAT Deutschland e.V.<sup>405</sup>; Deutsche Kinderhilfe e.V.<sup>406</sup>; Deutscher Kinderschutzbund e.V.<sup>407</sup>; Deutsches Kinderhilfswerk e.V.<sup>408</sup>; Innocence in danger e.V.<sup>409</sup>; Kinderschutzziftung Hansel+Grätel<sup>410,411</sup>; Verband Entwicklungspolitik deutscher Nichtregierungsorganisationen (VENRO) e.V.<sup>412</sup>. Due to the fact, that all laws are enacted in the Bundestag, the State does not officially regulate the involvement of NGOs in the law making process. By cooperating with different representatives of politics and justice, NGOs still have a possibility to ensure the involvement of their work indirectly in the law making process.

For example, the Ministry for Economic Cooperation and Development (BMZ) maintains regularly a dialogue with the most important representative of interests of all NGOs registered in Germany, VENRO e.V.<sup>413</sup>. Its mission is especially the full implementation of the rights of children and the improvement of participation and

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<sup>400</sup> Federal Ministry for Family Affairs, Senior Citizens, Woman and Youth, 2012, 29/10/2012, <http://www.bmfsfj.de/BMFSFJ/kinder-und-jugend,did=119832.html>.

<sup>401</sup> *ibid.*, <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/bundeskinderschutzgesetz-in-kuerze,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>.

<sup>402</sup> *ibid.*, <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/bundeskinderschutzgesetz-in-kuerze,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>.

<sup>403</sup> <http://www.gegen-missbrauch.de>.

<sup>404</sup> <http://www.kindernothilfe.de>.

<sup>405</sup> <http://www.ecpat.de>.

<sup>406</sup> <https://www.kinderhilfe.de>.

<sup>407</sup> <http://www.dksb.de/content/start.aspx>.

<sup>408</sup> <http://www.dkhw.de>.

<sup>409</sup> <http://www.innocenceindanger.de>.

<sup>410</sup> <http://www.haensel-gretel.de>.

<sup>411</sup> <http://www.haensel-gretel.de>.

<sup>412</sup> Association of German Development Non-Governmental Organizations.

<sup>413</sup> Federal Ministry for Family Affairs, Senior Citizens, Woman and Youth, 2012, 29/10/2012, <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/aktionsplan-2011,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>, p. 64.



support of young people in non-governmental development cooperation.<sup>414</sup> In 2007, VENRO has already taken decisive action, for example, the adoption of the “VENRO-Code of children rights<sup>415</sup>: protection of children from abuse and exploitation in development cooperation and humanitarian assistance”<sup>416</sup> in 2007. Finally, NGOs may also derive specific recommendations for action against sexual child abuse to the government by participating in working groups at the round table sexual child abuse.

## IV OTHER

There are no other legal or political issues that might be relevant to mention, which are not already mentioned above.

## V CONCLUSION

“How does legislation protect child victims from sexual violence in the national legal framework in Germany?” It is this question that underlies the previous essay. To sum up this very complex topic and have one last general look at the situation in Germany, a few things need to be stressed.

First of all it is necessary to admit that the problem of sexual abuse of children does exist in Germany. In the year of 2011 there were 47 078 cases of crimes against the sexual self-determination (chapter thirteen of the German Criminal Code), including attempts of such crimes, according to the police crime statistics.<sup>417</sup> Regarding offences against children, namely sexual violence (§§ 176, 176a, 176b of the German Criminal Code), the statistics enumerates 12 444 cases (including attempts of those offences).<sup>418</sup> Those statistics speak for themselves and with no doubt it is one of the great challenges for the German society and legislation to reduce this number of crimes as far as possible.

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<sup>414</sup> <http://www.venro.org/kindesschutz0.html>.

<sup>415</sup> <http://www.venro.org/venro-kodizes.html?&L=0>.

<sup>416</sup> [http://www.venro.org/fileadmin/redaktion/dokumente/Dokumente-2011/Januar\\_2011/Kodex\\_Kinderrechte\\_v06.pdf](http://www.venro.org/fileadmin/redaktion/dokumente/Dokumente-2011/Januar_2011/Kodex_Kinderrechte_v06.pdf).

<sup>417</sup> Federal Ministry of the Interior, 2012, 07/11/2012, [http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2012/PKS2011.pdf?\\_\\_blob=publicationFile](http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2012/PKS2011.pdf?__blob=publicationFile), p. 45.

<sup>418</sup> *ibid.*

This is what nowadays a lot of different, governmental and non-governmental organisations put themselves out for in Germany. Most importantly here (and therefore) needs to be named is the *Round Table - Child abuse in relationships of dependency and power in private and public bodies and family environment*, established in 2010 by the German Government after revelation of the scandals of cases of sexual abuse involving Catholic school institutions. Its aim is to effectively prevent cases of sexual violence against children. Furthermore it serves as a contact partner for victims and their families of such offences.

Furthermore there are several non-governmental organisations as well that play an important part when it comes to preventative measures in Germany. Besides, NGOs may derive specific recommendations for actions against sexual child abuse and exploitation to the government by participating in working groups at the round table for instance. They are thereby trying to influence the law making process within the German Parliament, the *Bundestag*. Their involvement however is not regulated by the State.

To include the children's perspective in the law making process, the new *Federal Act on Child Protection* entered into force in 2012, which is to improve the active protection of children by ensuring more legal certainty. As a consequence, all staff members of private and state youth welfare services are obliged to provide a criminal record document. Furthermore, the new federal law provides regular supervisions in these institutions to guarantee an effective protection against sexual child abuse.

When all preventative measures have failed and a child has been sexually abused, a criminal procedure according to the German Code of Criminal Procedure begins in which the German criminal law - as set in the German Criminal Code - is applied.

Children under the age of 14 years are not criminal liable.<sup>419</sup> For people aged above 14 years, the criminal procedure is divided into 5 parts, beginning with investigative proceedings, followed by interlocutory proceedings. Then the main proceedings take place in which the guilt is determined. These can be followed by review proceedings or if the accused is found guilty and does not appeal by the enforcement procedure.

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<sup>419</sup> § 19 of the German Criminal Code.

Once a prosecution authority has got notice from a case of sexual abuse of a child, it has to investigate. The withdrawal from its statements by the victim cannot stop the investigation. To reduce the strains a trial and even the offender's prosecution can constitute for the victim there are several rules within the German Code of Criminal Procedure trying to make the procedure as easy as possible for the child. Examples are the supply of a child lawyer or the limitation of the times for interrogation. As in the past many offenders could not be prosecuted because victims of sexual abuse need a lot of time until they can open up and even tell about the sexual abuse, it is being discussed nowadays to pass different legislation concerning prescription. Today limitation can be between 3 years up to 20 or 30 years.

If the case has not prescribed, the perpetrator will be judged according to the German criminal law. In cases of sexual abuse it is chapter thirteen of the German Criminal Code that plays the most important role concerning cases of sexual abuse, as it is the segment about offences against the sexual self-determination.

The term *sexual activities* is not defined in the German Criminal Code; but after interpretation by the jurisprudence and law academics, the Code encompasses the wide definition and thus takes into consideration all acts with or even without body contact. The general sentence range for the sexual abuse of a child rests with between 6 months and 10 years according to § 176 (1) of the German Criminal Code. This paragraph of the Criminal Code further enumerates a lot of different aggravating circumstances such as the use of force, taking advantage of disability or threat. They (once proven in court) can increase the sentence range up to 10 years as minimum sentences when the child (§ 176b of the German Criminal Code - or in cases of § 178 of the German Criminal Code the victim) dies as a result of the created danger or health damages caused by the sexual act or its enforcement. There are also specific provisions regulating offenders that take advantage of school and educational settings, care and justice institutions, the work-place or the community as well, targeting at keeping certain relationships of dependencies free from sexual motives and relations.

When it comes to sexual gratification through information and communication technology, there is a very strict legislation to be found in chapter thirteen of the German Criminal Code. With respect to child prostitution, it criminalises actions such as managing a prostitution business, where persons are held in personal or financial dependency; or providing a place for a person below 18 years to conduct prostitution.

Moreover, the German Criminal Code criminalises the distribution, acquisition and possession of pornography involving children (under 14 years of age) and juveniles (between the age of 14 and 18 years).<sup>420</sup> Continuing efforts are made to improve the legislation against Commercial Sexual Exploitation of Children. Only the question whether grooming is punishable in German criminal law, is still not clear, because there is no dissolving law given by the legislator yet.

Even the intentional causing of a child to witness sexual activities or sexual abuse without necessarily having to participate is criminalised within the German Criminal Code. There is however not one paragraph that deals with all the possible constellations. One rather has to have a closer look at certain sections or subsections to find applicable provisions. As the child only has to perceive the activity spatially but not to understand its sexual meaning according to § 184 g no. 2 of the German Criminal Code the German legislator did not see the need to define the term *causing* within the Code itself. Furthermore liability arises in most cases of attempting, aiding or abetting an offence of sexual abuse of a child, but there are different arrangements when exactly liability arises.

All the cases, whether with or without body contact, whether attempted or fulfilled, whether concerning prostitution, pornography, sexual abuse, corruption or solicitation of children, need to be committed intentionally. This is a fundamental principle to the German Criminal Law and stated in § 15 of the Code.

It thus can be seen that in Germany there is a strong national legal framework against child abuse that even incorporates relevant international and regional legal instruments on child trafficking and child prostitution. All those paragraphs, sections and subsections might seem confusing at first. They do however provide an effective legal system concerning the cases of sexual abuse. The defendants, that are always natural persons as there is no corporate liability in Germany, are faced with monetary fines in very mild cases up to life imprisonment in the harshest ones. The sanctions laid out in the German Criminal Code are efficient as they allow enough room to differentiate

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<sup>420</sup> German Criminal Code, § 184b and § 184c: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).

between the various degrees of seriousness of a crime and hence ensure a fair and equal treatment of all parties involved.

However the civil law system does not only provide a broad protection regarding offences against children's sexual self-determination by supplying profound dispositions in the German Criminal Code and in the Code of Criminal Procedure. More globally everybody's fundamental rights are ensured as well. They are right at the beginning of the German Basic Law, Articles 1 to 19 and considered being part of the core of the constitution. After its experiences with fundamental rights' breach during the Third Reich, Germany has been actively involved in improving human rights around the globe and guaranteeing these. To ensure that they are guaranteed in Germany, the Federal Constitutional Court has been established, to which one might apply to as an individual if one's fundamental rights are affected.<sup>421</sup> Moreover, Germany participates in various international contracts guaranteeing human rights, for instance the European Convention of Human Rights, giving people the possibility to apply to the European Court of Human Rights in addition to the German Constitutional Court.<sup>422</sup> In general, as part of the Basic Law, the fundamental rights are at the top of the hierarchy of German law and as such they have to be considered by all national courts in their judgments.

Children's rights specifically however are not part of the German Basic Law. Therefore, several acts have been passed as international treaties signed to prevent discrimination, assure children's rights in general and more specifically to fight against sexual violence against minors. A few examples are the *Child Protection Act* (Kinderschutzgesetz), which came into force in 2012, or the *General Equal Treatment Act* with its *Federal Anti-Discrimination Agency*, established to overcome any discrimination problems in Germany.

In addition to the numerous conducts within national legislation, Germany is also a party to several European and international treaties such as the United Nations Convention on the Rights of the Child (UNCRC) or the Lanzarote Convention. As a member of the European Union it also has to implement the Directive 2011/92/EU.

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<sup>421</sup> Article 92 of the Basic Law.

<sup>422</sup> Council of Europe - Treaty Office, <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG>.

The UNCRC is fully recognised by Germany and its implementation to be expected, such as with the directive, where the implementation is in process. As to the Lanzarote Convention, its ratification can be expected as well. On this international scale too, Germany tries to combat the violation of children's rights and at the same time secure them.

All in all it seems that our country, with all possible means such as constantly developing national legislation on the subject, establishing governmental organisations or providing coherent dispositions in its codes, tries to protect society from offences of sexual abuse, prevents and punishes them to the best of its conscience. All the more is it burdening to notice that over the past few years the number of reported cases of sexual child abuse have slightly but steadily increased to 12 444 cases (including attempts) in 2011 (compared to 11 867 in 2010, which marks an increase of 4.9%).<sup>423</sup> However, the police crime statistics only provides an insight into the bright field of the cases, as it is based on the number of cases known to the police. The inclination towards an increase of those figures could thus also be interpreted in a way where society's awareness has successfully been raised over the past years, leading to more complains to the police. As a matter of fact, the Federal Ministry of Education and Research charged the *Criminological Research Institution of Lower Saxony* (Kriminologisches Forschungsinstitut Niedersachsen - KFN) with further investigations concerning the dark field. A sample, consisting of 11 428 persons and containing a face to face interview enquiring sociodemographic information and two extra-familial experiences of victimisation and a drop-off questionnaire on the very personal topic of intra-familial sexual and physical violence to be filled out alone, was accomplished.<sup>424</sup> A first interim report of October 2011 has supplied new numbers, showing that there has been a decline of sexual violence against children, especially within their families. This is in fact traced to the increasing willingness of reporting those crimes to the police. In the 1980s only one out of twelve perpetrators had to expect criminal procedures. Nowadays it is every third one, which seems to inhibit

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<sup>423</sup> Federal Ministry of the Interior, 2012, 07/11/2012, [http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2012/PKS2011.pdf?\\_\\_blob=publicationFile](http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2012/PKS2011.pdf?__blob=publicationFile), p. 45.

<sup>424</sup> Kriminologisches Forschungsinstitut Niedersachsen e. V., 2012, 08/11/2012, <http://www.kfn.de/versions/kfn/assets/fb1semisbr2011.pdf>.

some of them.<sup>425</sup> This shows that society is an indispensable participant to the fight against sexual abuse of minors. As a result it remains ineffably important to continue raising awareness of the problem and putting effort in preventative measures. The German legal framework can be considered as sufficient, covering all possible cases and providing differentiable sentences. What now needs to be achieved is that this exact legal framework becomes more and more irrelevant as preventative operations show their success. Preventing cases of sexual abuse of minors however is a goal the legislation can impossibly reach on its own. It is of crucial importance to continue increasing social awareness regarding the problems of child abuse and discrimination and therefore start to act within society against those offences.

We truly hope that by writing this report we could contribute to the raising of awareness of those specific problems in society and thus preventing them more efficiently in the future. Even in a country like Germany, that has a well working legal system and an intact legal framework, there are too many cases of sexual abuse annually and every single case needs to be inhibited at any price. Children are after all meekly exposed to many dangers and we as a society cannot sit back turning a blind eye to offences against them. Children are every society's future and need to be protected by all means. However, Germany operates effectively to prevent such cases and we take into positive consideration that many projects have been formed over the past few years to encounter sexual violence and discrimination against minors. We sincerely hope that all of them, as for the project *One in Five* as well, will bear fruit in the near future.

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<sup>425</sup> *ibid.*

## ELSA GREECE

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**National Researchers:**

Kotsi Despoina

Mavromati Chrysoula

Panagos Konstantinos

Paschou Marianna

Skriapa Melpomeni

Stroungi Melina

Stoikou Stefania

Tritaki Anastasia

Tsouvali Maria

Chytiri Spyridoula

**Academic Advisor:**

Kioupis Dimitrios

**National Coordinator:**

Karachristou Eirini

*“Here, then, is a great mystery. For you who also love the little prince, and for me, nothing in the universe can be the same if somewhere, we do not know where, a sheep that we never saw has-- yes or no?-- eaten a rose...*

*Look up at the sky. Ask yourselves: is it yes or no? Has the sheep eaten the flower? And you will see how everything changes...*

*And no grown-up will ever understand that this is a matter of so much importance!”*

**The little prince,**— Antoine de Saint-Exupéry

## I INTRODUCTION

### 1 GENERAL

i. The Greek Constitution contains a rich list of provisions devoted to the protection and respect of personal, social and political rights. More precisely, among others, the Constitution protects the value of human being (A. 2§1), equality (A. 4), the free development of the personality and the participation in the social, economic and political life of the country (A. 5§1), health and the genetic identity (A. 5§5), private and family life (A. 9§1), personal data (A. 9A), freedom of religious conscience (A. 13) as well as freedom of expression (A. 14). Furthermore, it provides for the protection of family, marriage, maternity, childhood and disabled persons (A. 21), the equality of all workers, irrespective of sex or other distinctions and their right to equal pay for work of equal value, while at the same time it demands the adoption of positive measures by the state for the elimination of any discriminatory treatment to the detriment of women. The constitutional principles and rights above form a protective net that covers conceptually all categories of vulnerable groups that are mentioned in the Directives 2000/43/EC and 2000/78/EC, providing a sufficient protection in case of absence of any special national legislation.<sup>1</sup>

However, it was only when the Law 3304/2005 was legislated that the principle of non-discrimination enjoyed a more substantial protection, with the incorporation of the above mentioned Directives, since the generality of the constitutional provisions and the absence of any relative executive laws deprived citizens of significant protection<sup>2</sup>. It also contributed to the establishment of special institutes, councils and committees that are entrusted with the advancement and monitoring of the compliance with the principle by the state and its citizens<sup>3</sup>. The legislative progress is certainly a positive step towards the fuller protection of human rights in national level. The Law 3304/2005 has undoubtedly equipped citizens with an efficient weapon in the battle against any discriminatory practices. However, these

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<sup>1</sup> N.Sarris, "Research Project" Establishment of Anti-Discrimination Observatory "- The institutional discrimination» in Greek Social Data Bank of the National Centre for Social Research, viewed on 29 August 2012, [http://www.gsdb.gr/ocd/resources/ekke/framework/Framework\\_el.pdf](http://www.gsdb.gr/ocd/resources/ekke/framework/Framework_el.pdf) p. 7-8.

<sup>2</sup> Ibid., p.8

<sup>3</sup> The article 19 of the Law 3304/2005 delegates the promotion of the non-discrimination principle to three specialized agencies a) the Ombudsman b) the Labour Inspectorate and c) the Committee for Equal Treatment. A significant role is also attributed by the Law to the Economic and Social Council (Economic and Social Committee).

initiatives do not necessarily reflect the tolerance and the openness of Greek society, but rather the result of the European obligations from which Greece cannot abstain.

The Greek society is moving in a very slow pace towards the adoption and full implementation of the principle of non-discrimination. This is because of its relatively conservative structure in comparison to its European counterparts, which is easily explained by its historical, religious, geographical, social and political background. Greece used to be since the middle of the 20th century a country that exported immigrants. However, in the early 90's it became an immigrants' host country. The immigration flow in Greece was initially a by-product of the developments in Eastern Europe and the overthrow of communist regimes. However, nowadays is largely associated with the poverty and the unstable political conditions or war conflicts that take place in countries relatively closer to Greece than to other European countries. Key feature of the modern phenomenon of immigration is that it is not as organized as it used to be in earlier times. In the meanwhile, the number of immigrants is increasing due to their illegal entry into the Greek territory. Greece owes this great immigration influx to the fact that it constitutes a geographical hub. The geographical position of Greece plays an important role in the choice of it as either the country of final destination, or as an intermediate - "transitive" - country.

The latest illegal migratory waves from Asian and African countries have rattled the foundations of Greek society, which has been proved to be unprepared both in terms of mentality and infrastructure to host these huge moving populations. Even in the 90's when the first economic refugees started to arrive from countries such as Albania and USSR the reaction was less excessive and more tolerance. The economic crisis has reduced people's tolerance and susceptibility dramatically.

The findings above are further bolstered by a number of surveys and official reports distributed by National or International Institutions and NGOs. It is also reflected in the daily news record. The indicative reference to the contained numbers and results verifies our suggestion. The Eurobarometer on Discrimination in European Union that was held in 2008 under the title "Perception and Experience of Discrimination" provides us with some very useful information<sup>4</sup>. A general overview of the collected data reveals that all types of

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<sup>4</sup> "Discrimination in the European Union 2008, Results for Greece, in European Commission, viewed on 27 August 2012, <[http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_296\\_sheet\\_el.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_296_sheet_el.pdf)>

discrimination are perceived as commonly-encountered by a higher share of Greeks than the Europeans. Moreover, the forms of discrimination that is considered to be the most widespread and regular are these on the basis of ethnic origin and sexual orientation. More precisely, over 3 out of 4 Greeks believe that discrimination on the basis of ethnic origin and sexual orientation is widespread in Greece. At least 8 out of 10 Greeks declare that they feel comfortable with having a disabled person, a person of different religion or belief or of a different ethnic origin as their neighbour, but the same doesn't apply to the case of having a homosexual neighbour, where the Greek respondents seem to be less tolerant than the average of the Europeans. Moreover, they are proved unfamiliar with the idea of having a homosexual or a person from a minority ethnic group in the highest elected political positions in relation to their European counterparts but also in absolute numbers too (5.5 and 4.7 out of 10 respectively). As far as the social circle of Greeks is concerned, this seems to be less diverse than the one of a typical European. With the exception of having a friend with a different ethnic origin, the results for Greece are significantly lower than the corresponding EU averages concerning the friendship with people of different religious beliefs, disabled, homosexual or Roma.

It is necessary to refer to a special minority group that faces certain discrimination in the framework of the Greek society, the Roma. According to the results of the European Union Minorities and Discrimination Survey<sup>5</sup> which was released by the European Union Agency for Fundamental Rights in 2009 and in which seven member states were surveyed (Bulgaria, Czech Republic, Hungary, Greece, Poland, Romania, Slovakia) one in two of Roma interviewed in Greece reported that they were victims of discrimination based on their ethnicity during the last 12 months. This percentage in relative terms is situated somewhere in the middle. Furthermore, they also reported the highest levels of overall victimisation compared to the other surveyed countries. Greece also stands out as having a high percentage of Roma people who consider their encounters with the police to be discriminatory. What is even more concerning is the matter of Roma's education. More specifically, only 4% of them reported schooling with duration of at least ten years, i.e. primary education at most while, 35% of the respondent Roma were illiterate.

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<sup>5</sup> "European Union Minorities and Discrimination Survey" held by European Union Agency for Fundamental Rights, released in 2009, viewed in 30 August 2012, [http://fra.europa.eu/sites/default/files/fra\\_uploads/413-EU-MIDIS\\_ROMA\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/413-EU-MIDIS_ROMA_EN.pdf)

ii. Article 21§1 of the Greek Constitution sets the family under the protection of the state<sup>6</sup>. Emphasis should be given on the emotional words of the definition, according to which family is “the cornerstone of the reservation and the advancement of the Nation”<sup>7</sup>. Family was always considered as a fundamental element of the Greek society, this is why the Constitutional Legislator maintained the above mentioned wording. The definition of family under the Greek Constitution refers to the community of parents and their children, physical or adopted, independently on whether or not they are born in wedlock. Hence, it covers the family under a narrow definition, or, the so-called, “nuclear” family. Spouses without children are not considered as a family under the constitutional provision, since the marriage receives separate constitutional protection<sup>8</sup>.

The same provision also applies to the protection of the marriage. According to the Constitution’s definition, “marriage” is the permanent coexistence of two people, of different gender, that is covered by the freedom of contracting it, its recognition by the legal order and the equal position of the spouses. Both family and marriage are considered to be an “institutional guarantee” which has a double interpretation, negative and positive<sup>9</sup>; according to the negative aspect, the contracting of a marriage or the creation of a family cannot inflict negative legal consequences to those people and further, spouses and the other members of the family should not be prevented of being recognized legally as such and not be deprived of the right to cultivate interpersonal relations and familiarity inter se. For example, in the terms of fiscal law, it is prohibited for the Legislator to treat less favourably the married people vis-à-vis the non-married people. On the other hand, the positive aspect of this “institutional guarantee” defines that the Legislator is obliged to enact all the appropriate regulations for the preservation and enhancement of the family and marriage. Apart from the other conditions<sup>10</sup> that should be fulfilled for a valid marriage, the couple should be more than 18 years old. However, the Court is entitled to permit derogation from the legal marital age only after the audition of the couple and of the persons that exercise the

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<sup>6</sup> L. Ganis, "Citizenship and the Constitution, Civil and Social Rights", Ant. N. Sakkoulas, Athens, 2004, p. 87

<sup>7</sup> K. Chrysogonos, "Individual and Social Rights", Law Library, Thessaloniki, Third Revised Edition, 2006, p.535

<sup>8</sup> Ibid. p.535

<sup>9</sup> Ibid. p.536

<sup>10</sup> We distinguish between positive and negative conditions: The positive conditions are: 1) Sex difference, 2) Legal marital age, 3) Legal capacity. The negative conditions are: 1) lack of another marriage, 2) lack of blood kinship, 3) lack of affinity 4) None of the spouses has been adopted by the other spouse.

minor's custody, and always under the condition that the contracting of marriage is due to a significant reason (A. 1350§2 Civil Code). This is how marriage is regulated since 1983, thanks to a new legislation that reformed the pre-existent anachronistic marital regime<sup>11</sup>.

A Report published in 2009 by the *Demographic Laboratory* and Social Analyses of University of Thessaly<sup>12</sup> that records women's trend in marriage provides us with accurate statistical data on the average marital age of women over the years as well as with consequent analysis of the impact of the marital age volatility on the typical form of the Greek family. More precisely, it is noted that the average age of marriage followed a downward trend for 20 years (women born in 1935 married on average for the first time at the age of 25, while those born in 1955 at the age of 22.5 years). However, over the years (i.e. the generations born between 1955 and 1970), the percentage of women who remain unmarried was decreasing more and more. This trend was also accompanied by the rise in the average age of the first marriage (about 25 years for those born in 1970). The marriage behaviour of Greek female population, therefore, started gradually to resemble women's marriage behaviour in Western Europe. At the same time, marriages started to decrease, the average marital age started to increase, marriages became even more fragile and out-of-wedlock births increased rapidly. It is obvious, that younger generations tend to adopt different behaviours from those of their parents. Consumer standards, as a result of globalization, have converged between Greek youth and that of the most developed countries of Europe, when at the same time the influence of the religion has slacked. Thus, the new social, cultural and institutional conditions have gradually led to the emergence of new types of family, while the advancing European integration provides a favourable framework for the convergence of positions, decisions, and behaviours in the countries of Unified Europe.

These changes are also reflected in the population of children. Demographic developments of the last 40 years have changed the profile of Greek society. Rising standards of living, improving the position of women and her integration into the labour market have led to less birth and hence the number of children, who is constantly decreasing since 1961, accounted for 1/3 of the total population is now at 17%. According to a report drafted by the National

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<sup>11</sup> E. Kounougeri-Manoledaki, "Family Law", Issue Ia, Fourth Edition, Sakkoulas, Thessaloniki, 2009, p.62-63

<sup>12</sup> B. Kotzamanis Sofianopoulou K., "The marriage of women in Greece: the institution of marriage in crisis; Laboratory of Demographic and Social Analyses, 2010, viewed on 29 August 2012, <[http://www.demography-lab.prd.uth.gr / DemoNews% 20No3\\_A4.pdf](http://www.demography-lab.prd.uth.gr / DemoNews% 20No3_A4.pdf)>

Greek Committee of UNICEF in 2012 under the title “Children in Greece”<sup>13</sup>, children (aged up to 18 years), according to the census of 2001 was 2,080,866 and accounted for 19% of the total population. From predictions for 2010 their number has decreased to 1,959,895 and account for 17.4% of the population.

**iii.** The protection of childhood is a well-recognized constitutional right in the Greek legal order. The aforementioned protection is specialized through a number of provisions of the domestic law such as the relationships between parents and children in the Civil Code, or the lenient treatment of juvenile perpetrators of criminal offenses in the Penal Code. This lenient treatment is a constitutional requirement, in contrast to the adoption of specific crimes against minors, where there is no constitutional basis, despite the multitude of articles in the Penal Code<sup>14</sup>. Furthermore, the legal framework of child protection is also reinforced by the implementation of international and European texts (usually conventions, treaties)<sup>15</sup>.

In Greece there are many institutions that are associated with implementing the rights of children. At parliamentary level the instrument is the Advanced Standing Commission for Gender, Youth and Human Rights as the material responsible UN body, the Greek National Committee for UNICEF, Children's Rights Ombudsman, and the NGO Network for Monitoring the Implementation of the International Convention for the Rights of the Child. However, as it is explained in the above-mentioned UNICEF Report<sup>16</sup>, all of these entities shall not be expected to operate autonomously in order to establish an efficient plan of action for the rights of child without the assistance of the state. The implementation of children's rights is matter of national policy and should be based on sound structures, which require centralized planning and state initiative. It is stressed out that it is important to ensure and promote the implementation of an integrated, systematic and horizontal National Action Plan on Children's Rights, which will cover the entire rights and all sectors of social life of the child. The formulation of a national policy shall be designed and implemented based on specific research data and evidence and after having previously ensured inter

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<sup>13</sup> Bougioukos G., B. Fasoulis, "The situation of children in Greece," Greek National Committee for UNICEF, Athens, March 2012, viewed on 2 September 2012, [http://unicef.gr/pdfs/Children\\_in\\_Greece\\_2012.pdf](http://unicef.gr/pdfs/Children_in_Greece_2012.pdf)

<sup>14</sup> Chrysogonos, op. cit., p. 547

<sup>15</sup> The Smile of the Child "Action Plan for horizontal networking and coordinating services and agencies social solidarity are reconciled to the child," Special Service Management OP "Health and Welfare», submitted on 24 February 2009, viewed on 19 August 2012, [http://www.ygeia-pronoia.gr/uploads/meletes/meleti\\_orizontia\\_diadiktiosh.pdf](http://www.ygeia-pronoia.gr/uploads/meletes/meleti_orizontia_diadiktiosh.pdf)

<sup>16</sup> Bougioukos-Fasoulis, op.cit



ministerial coordination and the relative budget. However, the lack of an integrated policy for the child is reflected to the impossibility of determining the exact amount spent in the state budget solely for political and related to the children actions. Under the new structure of local government and the allocation of responsibilities to local administrative entities there is a demand for specific budget for the child not only in a central government level but in the municipal level too. This is a major issue that should be taken seriously into account by the state.

Moreover, the Greek Helsinki Monitor and Minority Rights Group Report on Greece's compliance with the UN Convention on the Rights of Child<sup>17</sup> had pointed out that despite the existence of a sufficient legal framework, what undermines its efficiency is the lack of implementation and enforcement of these laws. Simultaneously, it was reported that there is a failure to comply with certain obligations contained in international conventions. It is significant that the Greek government submitted to the UN Committee on the Rights of the Child a report five years later after the original deadline that is envisaged in under Article 44 of the Convention.

Finally, this lack of enforcement and implementation of law is notably observed in the framework of the economic crisis. The consequential changes in the structure of the society have negatively affected the status quo of children in Greece. The data provided by the UNICEF Report is raising great concern regarding the actions undertaken by the state<sup>18</sup>. According to this data, children in Greece live in a more violent environment. From 2008 to 2010, the crime rate in the country increased by over 40%, while the bullying has increased 74% from 2002 to 2010. Simultaneously, there has been an increase in crime and delinquency.

Moreover, stress, is likely to lead to the manifestation of various psychosomatic symptoms, affecting the whole family. This consequential psychological instability in the family may lead to indifference, neglect or even more violent reactions from parents and psychosomatic cause harm to children and reactive behaviours. These conditions occur in poor households affected by unemployment and reduced incomes. Outbreaks of students fainting from

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<sup>17</sup> Greek Helsinki Monitor/Minority Rights Group-Greece (2001) *Parallel Report on Greece's compliance with the UN Convention on the Rights of the Child*, August 2001, Athens, viewed on 16 August 2012, [http://www.law.yale.edu/rcw/rcw/jurisdictions/euros/greece/Greece\\_Helsinki\\_Monitor\\_Report\\_2001.pdf](http://www.law.yale.edu/rcw/rcw/jurisdictions/euros/greece/Greece_Helsinki_Monitor_Report_2001.pdf)

<sup>18</sup> Bougioukos-Fasoulis, op.cit

malnutrition which led to free snacks in some schools, is a symptom of extreme poverty experienced by some children. Obviously, children belonging to the most vulnerable groups are more likely to experience extreme poverty. The psychological instability in the family directly also affects the psychology and behaviour of children in all social groups. The violation of children's rights rings the bell of the threat that is about to break.

**iv.** The cornerstone of national legislation regarding the implementation of international treaties is the article 28 par.1 of the Greek Constitution<sup>19</sup>, according to which the primacy of international law is recognized over national law, right after treaties' ratification by law. It is clear that not only international contract law, but also international customary law, as well supersedes over national law. In spite of this general hierarchical rule, international treaties can't override the Greek Constitution. In case of conflict between constitutional provision and provision of international treaty Greek Courts should apply the first provision sidetracking the second. This opinion is supported in the majority of case law of the Council of the State by its decisions, such as the decision 2960/1983 and by the Supreme Special Court, which has jurisdiction according to article 86 of the Greek Constitution, such as the decision 69/1992.

Two are the basic steps for the implementation of international treaties in Greece, ratification of the treaty and its publication on Official Government's Newspaper. The ratification system in Greece being into force is the mixed competence system, which means that the legislative body should give its consent for the treaty making power and the President of Greek Democracy should proceed with the ratification of international treaties. Ratification can take place by three ways, namely by law, ordinance or decision and that's depends on the object of the treaty and need of priorities of Greek Law. The first way is the most common. The President of Greek Democracy has responsibility to represent the State internationally regarding the signature of international treaties. According to article 35 par.1 of the Greek Constitution, there are two more preconditions for treaty's signature: the signature of the international treaty by the responsible minister and its publication in the official State Gazette. Under extraordinary circumstances of urgent and unforeseen need, the President has the right to conclude international treaties (namely to issue ordinances and go

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<sup>19</sup> <http://www.hri.org/docs/syntagma/>

on with treaties' ratification) without Parliament's consent, but after the proposal of cabinet. This right is based on article 44 par.1 of the Greek Constitution<sup>20</sup>.

Moreover it is crucial to describe the procedure of how we reach at the final ratifying law. Firstly, the responsible minister and the Ministry of Foreign Affair introduce the international treaty in a draft law. The approval of Report General Accounting for corresponding costs and credits is necessary, as well. Then, this draft law passes to the Secretariat of Cabinet and after that to the Central Legislative Committee which gives its opinion. On continue, it is sent to the Parliament.

International treaties after their ratification are an integral part of national law. International law and national law cannot be divided and examined apart one from another, as legal commitments of the state constitute a single process and the two different facets of the same function should not be divided.

As regards Greece's ratification of United Nations Convention on Rights of the Child<sup>21</sup> which has vested for the first time human rights and especially children's rights systematically and expressly, it took place in brief time after the signature of the Convention by law 2101/1992 (published in the Official State Gazette 192/2.12.1992)<sup>22</sup>. In the first article of law 2101/1992 the ratification and the put into force of United Nations Convention on Rights of the Child is noted. The procedure of put into force of a convention is described in article 28 par. 1 of the Greek Constitution. According to the second article of the law 2101/1992, the ratifying law of the considered treaty is in force after its publication in the Official State's Newspaper on 2.12.1992 right after the fulfilment of all the prerequisites of the article 49 of United Nations Convention on Rights of the Child<sup>23</sup>. It should be mentioned that United Nations Convention on Rights of the Child has a distinguished status in Greek law compared to treaties with other content, as international Conventions for human rights after their ratification by law and their put into force have a

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<sup>20</sup> Chrysogonos K., "Constitutional Law II (Special Part), Sakkoulas 2008

<sup>21</sup> "Implementation Handbook for the Convention on the Rights of the Child", UNICEF (United Nations children's fund), 1998

<sup>22</sup> Pitsela A., "The UN Convention on the Rights of the Child and the Administration of Juvenile Justice," International Criminal Movement

<sup>23</sup> Naskou-Perraki P., K. Chrysogonos, Anthopoulos C. (preface, editor) "The International Convention on the Rights of the Child and the national legal order," Interpretation in article, Center for International Law and European Economic Law Ant. N. Sakkoulas, 2002

distinguished status. It is important to refer that Greek Government has expressed no reservation in the ratifying law.

This Convention is an integral part of Greek law and prevails over any contrary provision of national law. Therefore, in case that a subsequent law is contrary to the international Convention, it will not be applied by Greek courts. It should be mentioned that review of constitutionality of law is widespread and incidental and it should be done ex officio by judge, according to the general principle “*iura novit curia*”<sup>24</sup>. Furthermore, the United Nations Convention on Rights of the Child being a multilateral convention for the protection of human rights and as a result being *ius cogens*, which establishes *erga omnes* obligations has implementation for citizens of other countries sidetracking reciprocity condition described in article 18 par. 1 subpar. b of the Greek Constitution.

Although Greek Constitutional provisions are elliptical in contrast to the detailed ones of the United Nations Convention on Rights of the Child, they have a conceptual link, as the constitutional articles are in compliance with the requirements of the Convention. More specifically, the articles of the Greek Constitution, namely 2 par.1, 5 par.1, 21 par.3 and 3 and 96 par.3 are the most basic for the protection and the respect of human value, the right of free expression of personality and participation at the social, economic and political life of the country, the protection of family and childhood, the protection of children’s health care and provision for juvenile court. To conclude, Greece has fully and totally complied with its international commitments regarding United Nations’ Convention on Rights of the Child and implements it exactly as it is needed.

v. Greece as an EU member state has the obligation to implement the Directive 2011/92/EU of the European Parliament and the European Council. Every EU member state is obliged only to comply with the Directive’s aims and has discretion to decide by which national instruments it will incorporate the complying Act and which context and form this procedure will have<sup>25</sup>. The Directive 2011/92/EU of the European Parliament and the European Council of 13 December 2011 regarding combating sexual abuse and sexual exploitation of children and childhood pornography has replaced Framework Decision 2004/68/JHA of the Council. This Directive is recent and has stated 18.12.2013 as deadline

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<sup>24</sup> Manitakis A., “Greek Constitutional Law”, Sakkoulas 2004

<sup>25</sup> Sahpekidou E. , «European Law”, Sakkoulas 2011

of its incorporation to the national law of the member states<sup>26</sup>. Greece has not taken action yet. To be more specific, neither a Legislative Committee has been constituted, nor have any relevant procedures started. Most provisions of the Directive 2011/92/EU, which should be a part of national criminal law, already exist in our Penal Code and Code of Criminal Procedure and in many cases Greek Penal Law faces the crime stricter than the Directive requires<sup>27</sup>.

It is interesting to cite some examples, in which is clear that Greek Criminal System regarding children's protection against sexual abuse and sexual exploitation is very advanced. Although Framework Decision 2004/68/JHA has not a definition for age of sexual contest and Directive 2011/92/EU just states that this age should be defined by each member state, the Greek Penal Code describes under which circumstances a child can engage in sexual activities at article 339 par. 1. So that Greece has nothing to change about those provisions, as Greek Law has already cared for it. Furthermore, the Greek Penal Code has already included sexual crimes against children when the offence was committed by a member of the child's family, a person cohabiting with the child or a person who has abused a recognized position of trust or authority by articles 342, 345 and 346 of Greek Penal Code, long before the Directive was issued. Besides, Greek Criminal Law includes appropriate measures against advertising abuse opportunities and child sex tourism, namely in articles 323B and 348 of Greek Penal Code. Consequently, it is obvious that the Greek Criminal Law is complied with its European Obligations of the Directive mainly those regarding suppressive measures.

To conclude, Greece will incorporate adequately the crucial Directive on time. In any case, the goal is the protection of fundamental rights of children in national and supranational framework, while ensuring fundamental principles of criminal law and criminal procedure law of member states. Children are the future and we have to protect them by every possible way.

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<sup>26</sup> <http://antiproedros.gov.gr/>

<sup>27</sup> Kaiafa-Gmbanti M., "European Penal Law & the Lisbon Treaty", Sakkoulas 2011

## 2 THE LANZAROTE CONVENTION

- i. Greece became member of the Council of Europe on 9 August 1949 and ratified the Convention for the Protection of Human Rights and Fundamental Freedoms on 28 November 1974<sup>28</sup>.
- ii. The Greek state is a party to the Lanzarote Convention. The state, represented by the Minister of Justice Sotirios Hatzigakis, signed the Convention on 25 October 2007 and ratified it on 10 March 2009 without making any reservations or opts out of any part. On 24 June 2010 the Permanent Representative of Greece submitted a declaration at the Secretariat General, designating “*The Ministry of Citizen Protection, Hellenic Police Headquarters, Forensic Science Division (F.S.D.)*” as the National Authority referred to in Article 37 of the Convention.<sup>29</sup>
- v. The Lanzarote Convention was ratified by the Law 3727/2008 Government Gazette A 257/18.12.2008 and entered into force on 1 July 2010. Through this legislation it became an integral part of the domestic Greek law and gained supra-statutory force in accordance with Article 28(1) of the Constitution of Greece.<sup>30</sup> Therefore, the Lanzarote Convention occupies a position in Greece’s legal order above that of the laws adopted by the Greek Parliament and is subordinate only to the Constitution of Greece.

According to the first Article of the Law 3727/2008:

«The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which was adopted by the Committee of Ministers of the Council of Europe at its 1002nd meeting held at its Deputies’ level on 12 July 2007 and was

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<sup>28</sup> Greece-Member State Data- Council of Europe:

<http://hub.coe.int/country/greece>

<sup>29</sup> Council of Europe, List of declarations made with respect to Treaty No. 201:

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=201&CM=1&DF=&CL=ENG&VL=1>

<sup>30</sup> *Minors as Victims in the Age of Information and Communication Technologies: The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and its Implementation in Greece*, by Emmanouil Billis LL.M. and Panagiotis Gkaniatsos, LL.M., IV. Implementation of the Convention in Greece, Introduction to the special issue on European law and the most recent developments, *The art of crime*, Center for Penal and Criminological Research: <http://www.theartofcrime.gr/eng/printit.php?aid=1327849844&lang=gr>

opened for signature in Lanzarote (Spain) on 25 October 2007, is being ratified and has the force that article 28 of the Constitution of Greece defines».<sup>31</sup>

According to Article 28(1), which belongs to “Part Three Organization and Functions of the State”, of the Constitution<sup>32</sup> of Greece:

« The generally recognized rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.

\*\* Interpretative clause:

Article 28 constitutes the foundation for the participation of the Country in the European Integration process. »

**vi.** The main purposes of the Lanzarote Convention are to prevent and combat sexual exploitation and sexual abuse of children, to protect the rights of child victims of such an exploitation or abuse and to promote national and international cooperation against these illegal acts.

The integration of these aims into the Greek legal order was fulfilled with the passing of the Law 3727/2008 from the Greek Parliament and specifically with its first eight articles. This implementation resulted to a number of important changes regarding the protection of the rights of children at different levels. According to the 21st National Report on the implementation of the European Social Charter submitted by the Government of Greece to the Council of Europe on 7 February 2011:

«This law enforced the provisions of the Penal Code on sexual exploitation and abuse of minors, minors pornography and on the care and assistance to minors who are victims of the above acts. All parameters regarding the use of new technologies and of communication in committing the illegal acts have also been taken into consideration».<sup>33</sup>

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<sup>31</sup> Law 3727/2008 Government Gazette A 257/18.12.2008:

[http://www.dsanet.gr/Epikairothta/Nomothesia/n3727\\_08.htm](http://www.dsanet.gr/Epikairothta/Nomothesia/n3727_08.htm)

<sup>32</sup> Constitution of Greece, Hellenic Parliament : <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>

<sup>33</sup> European Social Charter, 21st National Report on the implementation of the European Social Charter submitted by the Government of Greece, 07/02/2011, Council of Europe:

As far as the prevention of victimization is concerned, the Greek state integrated the provisions of the Lanzarote Convention within the first two articles of the ratifying law, succeeding to address the majority of the important issues within the Convention. More specifically, it prohibits adults who have been irrevocably convicted of or are being prosecuted for actions of sexual exploitation or child abuse to exercise any profession related to children, both in public and private sector.

In addition, the Law 3727/2008 provides for the possibility to design informational and educational programs of both public and private agents and associations, on the protection of children's rights aiming, on the one side, at the awareness-raising and the information of the children and of the people whose profession entails the contact with children. On the other side, these programs aim at the evaluation of the danger of victimization and at the immediate diagnosis of a sexual exploitation and abuse. According to Article 1(2d) of the Law 3727/2008, the support and the cooperation of the civil society, the media as well as of the private sector are of high importance to the development and implementation of these programs. At the same time, the Article 2(1) of the Law 3727/2008 introduces the implementation of educational programs to children at the level of primary and secondary education regarding sexual freedom and the danger of a sexual abuse.

Among the basic provisions of the law is the possibility of professionals such as doctors, nurses, psychologists and lawyers to report, despite their professional secrecy, to the services responsible for child protection, any situation where they have reasonable grounds for believing that a child is victim of sexual exploitation or sexual abuse. This is considered particularly important for Greece, especially for close societies in small cities, where cases of sexual exploitation or abuse are rarely reported and investigated effectively.

Furthermore, the Law 3727/2008 transferred into the Greek domestic law the advanced assistance offered to child victims, expanding the existing one. In line with Article 14 of the Lanzarote Convention, it introduced in Article 2(2) the assistance in both, long and short, term in their physical and psycho- social recovery.

It is worth mentioning the provision of Article 2(4c) of the Law 3727/2008 for the establishment of a mechanism for data collection, in order to observe and evaluate the



phenomenon of sexual exploitation and abuse of children. The Greek state has also set up a helpline through telephone to provide advice and help for children, parents and professionals.

As far as the substantive criminal law is concerned, the ratification of the Lanzarote Convention resulted to a number of changes within the Greek criminal law, which led to an important expansion of the existing legislation on the protection of children against sexual exploitation and sexual abuse.

The 19th Chapter of the Greek Penal Code<sup>34</sup> entitled “*Crimes against the sexual freedom, sexual exploitation and abuse, rape*”, Articles 336- 353, regulates the crimes related to sexual exploitation and abuse, also for children.

The implementation of the Lanzarote Convention had as a result the imposition of heavier sentences, when the victim is a child, as well as the introduction of new articles in the Greek Penal Code. It imposed higher penalties for the crimes of sexual exploitation of children, insult of sexual dignity of minors, seduction of children, and abuse of minors in sexual indecent acts, child pornography and pandering.<sup>35 36</sup>

The Greek state set the age of fifteen (15) as the legal age for sexual activities, having as base the Article 18(2) of the Lanzarote Convention. More specifically, it introduced the imposition of the penalty of imprisonment for at least two years on adults who, with the use of internet or other communication means, gain contact to a child who has not completed the fifteenth year of age and who through lewd gestures insults the minor’s dignity within the context of his/her sexual life.

The ratification of the Lanzarote Convention affected also the procedural criminal law and a number of changes were introduced, in order to protect the children as victims. The most basic changes refer to the protection of the children as witnesses during penal procedures as

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<sup>34</sup> Greek Penal Code, Ministry of Justice, Hellenic Republic :

<http://www.ministryofjustice.gr/site/kodikis/%CE%95%CF%85%CF%81%CE%B5%CF%84%CE%AE%CF%81%CE%B9%CE%BF/%CE%A0%CE%9F%CE%99%CE%9D%CE%99%CE%9A%CE%9F%CE%A3%CE%9A%CE%A9%CE%94%CE%99%CE%9A%CE%91%CE%A3/tabid/432/language/el-GR/Default.aspx>

<sup>35</sup> E-notes, European NGOs Observatory on Trafficking, Exploitation and Slavery, Legislation-Greece, Translation in English of main provisions of legislation on human trafficking and related crimes: <http://www.e-notes-observatory.org/legislation/greece/>

<sup>36</sup> Some provisions of the Greek Penal Code to be found in English at: «Sexual Exploitation of Children, Children’s rights-Greece, The Law Library of Congress», <http://www.loc.gov/law/help/child-rights/greece.php#SexualExploitationofChildren>

well as the acceleration of the procedure, in order to help the child with its psycho- social recovery.

Finally, the Law 3727/2008 foresees the presence of specialized professionals, doctors, psychologists and child psychiatrists during the procedures who will try to alleviate the hard situation which the children have to face.

Consequently, it is made clear that the Greek state with the ratification of the Lanzarote Convention improved its legislation on the protection of the rights of children and developed new policies for preventing the victimization and combating these crimes. It's the duty of the state, the civil society, the media and every specialized professional to implement all these provisions and raise the awareness regarding the great number of children that are victims of sexual exploitation and abuse and to promote the campaign against these crimes.

## **II NATIONAL LEGISLATION**

### **1 GENERAL PRINCIPLES OF THE JURISDICTION**

i. Greece declared independence from the Ottoman Empire in 1822 and the greek modern state was finally established in 1830, when Greece achieved independence, after the Greek War of Independence (1821-1829) and its sovereignty was recognised under the London Protocol. The first Governor was Ioannis Capodistrias, for a period of four years (1828-1832), who was chosen unanimously by the 3rd National Assembly in 1827. Although Capodistrias was assisted by a collective advisory body, he completely exercised governance, given that the nascent state was not stable yet. Many alternations concerning the governmental regimes, followed the next years, so as we could say that the modern Greek state has a short life, but a rich political history.

During the years 1832-1843 King Otto ruled Greece as an absolute monarchy. This period was followed by the Constitutional Monarchy between years 1843-1862. King Otto's absolutism fed an uprising social disappointment, which led into a revolt in 1862. Otto was obliged to leave Greece. The Glücksburg dynasty took his place and the crown. The Constitution of 1864 inaugurated the first period of Crowned Democracy (1864- 1909). It is noteworthy that during the transition period (October 1862- October 1863) the system of

governance was that of a governing parliament, which was in operation for the first and the last time in the constitutional history of the country.<sup>37</sup> The Constitution of 1864 did not change until 1911. The 20th century brought significant socio political changes and from this agitated environment, Eleftherios Venizelos, a gifted political figure and the leader of the Liberal Party, emerged. During his premiership, the old Constitution of 1864 was revised by focusing on an enhanced protection of human rights, the reinforcement of the rule of law and on an institutional modernization. Nevertheless, a period of consecutive turbulences followed. Various reasons in a domestic and international level, such as the conflict between the crown and the political leadership, the Balkan Wars, the First World War, the catastrophic events in Asia Minor and the geopolitical transformation in South East Europe, provoked a revolt in 1922. That was the end of the second period of Crowned Democracy and a Republic Democracy was declared. During the transition period until the adoption of a new Constitution, the political situation was unstable again and two dictatorships followed during years 1925-1926. Eventually, after the fall of the dictatorship, the "Parliament of the First Term" was elected and the Constitution of 1927 was adopted.

This Constitution is of special importance both with regard to social rights provisions and with regard to the introduction of new political institutions. More specifically, the Constitution of 1927 guaranteed further protection of certain individual rights (e.g. the freedom of the press) while it consolidated certain social rights (protection of work, protection of the family, etc.). Under the pressure of an unsure social and economic environment, this Constitution lasted merely 8 years. Dictatorships, World War II, German Occupation and a protracted civil war retarded the progress of parliamentarianism. Only in 1952, a new Constitution was adopted, a conservative though. That was the beginning of the third period of Crowned Democracy (1952 – 1967). In 1967, a group of military officers seized power, establishing a military dictatorship for a period of seven years, when many political liberties were suspended. The king was forced to flee the country. In 1974, democratic elections and a referendum were held. The Constitution of 1975 (article 2) created a Presidential Parliamentary Republic and abolished the monarchy.

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<sup>37</sup> The Parliament: The political System, "Constitutional History" in Hellenic Parliament website, viewed on 7 September 2012, <http://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagmatiki-Istoria/>

Since then, Greece is a Presidential Parliamentary Republic (Hellenic Republic). The president is elected by the Parliament for a five-year term and is the head of the state, but his role is formal without any significant powers. According to the Constitution (article 26) there is a separation of powers into executive, legislative and judicial branches. The executive power is exercised by the President of the Republic and the government whose head is the Prime Minister. Greece is unitary state. The administration of the state is exercised by a central government and by local government agencies, according to the principle of decentralization provided by article 101 of the Constitution. Specifically, according to article 101§3: “*Regional State officers shall have general decisive authority on matters of their district, while the central services shall have, in addition to special powers, the general guidance, coordination and supervision of the regional officers, as specified by law*”.

ii. The Constitution of 1975 is in force until today. In its second part (articles 4-25), it provides the protection of individual and social rights, which has been reinforced through the 1986's and 2001's revisions. One more revision, in 2008, was held, but it is not essential as far as concerns individual rights. The second one, in 2001, was the most extensive in an atmosphere of consensus. In addition, this revision was of great importance concerning individual rights. New individual rights, such as the protection of genetic identity and data were introduced.

Generally speaking, the reinforcement of fundamental rights with regard to their content as well as to their judicial protection, characterizes the Constitution of 1975 with its revisions. Articles 4-25 of the Constitution is the Greek “Bill of Rights”, we would say. As it is deduced, there is no special list of civil and political rights, but the fundamental rights are secured as fundamental principles, under the above mentioned provisions of the Constitution. Additionally, the articles safeguarding some fundamental rights, as well as the articles that determine the form of government as a Parliamentary Republic cannot be revised according to article 110§1, a fact that enriches their prestige and legal force.

Considering children rights, only article 21 protects childhood in a direct and specific way, as well as family, marriage and motherhood. A general protection can be provided of course, by the articles safeguarding the value of the human being (art.2§1), equality (art.4) and free development of personality (art.5). More specifically, regarding the protection of children against sexual exploitation and sexual abuse, article 7§2, that prohibits torture and general confiscation, would be regarded as of special interest. Last but not least, article 96§3, that provides juvenile courts, should be taken into account.

Furthermore, laws regulate fundamental rights in a more specific way, while the Constitution sets the context. The national legislation of human rights follows the normal legislative process (articles 84-88 of the Constitution and 93-107 of the Standing Orders of the Parliament). Legislative powers are exercised by a 300-member elective unicameral Parliament and the President of the Republic. The legislation initiative lies in the government and the Parliament. Laws are voted by the Parliament in a plenary session or by standing parliamentary committees. The competence between them is regulated by article 72 of the Constitution. Bills and law proposals regarding the protection of individual rights belong to the exclusive competence of the Plenum. Statutes passed by the Parliament are promulgated by the President of the Republic and become laws of the State.

Given the fact that the protection of human rights in international level is wide and always in progress, we should briefly refer to the status of international law and international conventions in the Greek rule of law. Article 28§1 of the Constitution is the gate for international law to enter into the Greek legal system. *“The generally recognised rules of international law, as well as international conventions as of the time they are sanctioned by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law.”*

iii. The above mentioned analysis indicates that in Greece, fundamental rights enjoy constitutional as well as domestic law’s force, including the international conventions that bind the Greek State. Their status points to their judicial protection.

Courts check the conformity or not of a legal provision with the Constitution. According to articles 87§2 and 93§4, every court is competent to ascertain the constitutionality or not of a statute. This judicial right constitutes the so- called “diffused” control of constitutionality. Therefore, it is evident that there is no “concentrated” control exercised by a Constitutional Court, although an ardent debate on the necessity of a Constitutional Court is taking place among legal society. As a consequence, after the constitutional amendment of 2011, Supreme Courts can decide on the constitutionality of a legal provision only in plenary session. A Special Highest Court established by the article 100 of the Constitution is competent to take an irrevocable decision, when contradictory decisions of the Supreme Courts, concerning the true meaning or the constitutionality of a legal provision, are issued. In addition, Law 3900/10 provides a process that resembles to the one in a Constitutional Court. The Council of the State which is the Supreme Administrative Court of Greece can decide upon an administrative’s court judgment in case of breach of the Constitution or any

other superior legal provision, such as the European Convention on Human Rights, after an individual's complaint.

The Constitution secures the right to legal protection, in article 20 and entitles every person to receive legal protection by the courts where he can plead his views concerning his rights or interests specified by law. According to the Constitution (art.93), Courts are distinguished into administrative, civil and criminal. The supreme court of the civil and penal justice is the Court of Cassation, while the supreme court of the administrative justice is the Council of State.

Hence, there are two branches in the Greek Judicial System. There is also, a third Supreme Court, the Court of Auditors which is an administrative organ and a Supreme Court with special jurisdiction due to article 98 of the Constitution. Cases are judged at first and then at second instance. On the top of hierarchy of each branch, the Supreme Court judges on matters of legality of the case.

Individuals can claim their rights based on statutes and on the Constitution, before each of them depending on the nature of the case. At this point it should be clarified that not all of the constitutional rights have direct effect. The basic distinction is between individual and social rights. First ones can be presented directly before a court, whereas the others, as long as their scope refers to provisions on behalf of the State, need a statute to activate the constitutional provisions and to play the role of a conduit. Moreover, we should point out that first of all, constitutional rights oblige all agents of the State (legislative, executive and judicial agents).

Also, according to article 25§1 of the Constitution, these rights apply to the relations between individuals to which they are appropriate. This is the so-called theory of "Drittwirkung der Grundrechte", stemming from the German legal community and jurisprudence. As a result, not all individual rights can be claimed against individuals.

**iv.** Criminal Courts in Greece are organized due to the triple division of offences to Petty Offences Court, Misdemeanor Courts and Courts that handle serious crimes, which may be either Mixed Criminal Courts, composed of judges and jurors or Courts of Appeal hearing the case in first instance and composed of judges. Serious crimes such as rape and sexual abuse of children are heard by Mixed Criminal Courts. On the top of penal justice is Areios Pagos that hear appeals on points of law against final decisions of lower criminal courts.

The criminal procedure is based on the Greek Code of Criminal Procedure (GCCP) complemented by provisions of the Constitution, the European Convention on Human Rights and its Protocols and the International Covenant on Civil and Political Rights. The Public Prosecutor at the court of misdemeanours, after receiving a *notitia criminis* initiates criminal proceedings. The Greek criminal procedure is governed by the principle of mandatory prosecution (or legality principle). Prosecution is carried out *in rem*. The role of the Public Prosecutor is crucial throughout the criminal proceedings since the Judicial Office executes the right to prosecute in the name of the State and no judgment is valid without prior hearing of the Public Prosecutor. The other important factors of the criminal procedure are the Judge and the defendant. The Greek Code of Criminal Procedure provides another important party, the civil claimant. A person can participate as a civil party if he has suffered material or moral damage resulting directly from the alleged criminal offence.

The criminal process comprises two basic stages: pre-trial and trial proceedings. Pre-trial stage is carried out due to the inquisitorial system and trial proceedings more due to the accusatorial system.

After receiving a “*notitia criminis*” the Public Prosecutor either orders a summary investigation either an ordinary investigation or refers the case directly to trial before the Court. Conduct a preliminary inquiry is obligatory for felonies. The pre-trial stage is shorter in misdemeanour cases. The aim of the investigation process is to collect all necessary evidence for the Judicial Council to decide if a person has to stand a trial. The Judicial Council’s process is the so- called “intermediary” process, intermediary because it takes place between pre-trial and trial proceedings. After, trial proceedings follow. The inquiry in Court is public, oral and moderately adversarial except when the Court decides that publicity would be detrimental to public morals or the personal or family life of the parties. In case of serious crimes, legal assistance is mandatory. The Greek Code of Criminal Procedure combined with the provisions of the Greek Constitution and the European Convention of Human Rights and its Protocols as well as the International Covenant on Civil and Political Rights which provides a well developed system of defendant’s rights at the pre-trial as well as at the trial stage. The presumption of innocence is a fundamental principle. In the Greek system, the burden of proof lies with the prosecution and the defendant is not under an obligation to disclose his evidence before trial. Investigating authorities and Courts as well have a duty to search for the factual truth being entitled to initiate any investigating act with

respect to any evidence considered necessary to reveal the truth. Procedural law does not entail rules concerning the probative value of the various means of proof and all lawfully acquired evidence is in principle subject to the Court's free evaluation.

The next stage comprises legal remedies. The defendant as well as the Prosecutor enjoys the right to exercise a legal remedy. There are legal remedies against the decisions of judicial councils as well as against decisions of lower penal courts. At second instance the Court of Appeal has the power to quash, amend or confirm the decision. An appeal in way of cassation is also provided before Areios Pagos (The Greek Court of Cassation). Areios Pagos decides upon only errors of law mentioned exclusively in the Greek Code of Criminal Procedure. Areios Pagos quashes the appealed decision and depending on the error of law will refer the case for a new trial before the competent Court, terminate the proceedings or acquit the appellant.

v. Within the Greek Penal Law, children enjoy a special status of protection. The Greek Penal Code, before the 2003 amendment, provided different age limits and consequently different penal treatment. According to the previous system, Penal Code distinguished between minors (7-12 years old) who are not criminally responsible and educational measures could be imposed upon them and adolescents (12-17 years old) who are considered as criminally responsible and may be sentenced to a special sanction. The Greek Penal Code, trying to keep up with the International Convention on the Rights of the Child and the legal status recognized in other EU states, repealed the above mentioned distinction and equated penal with civil liability. As a consequence, the age of criminal liability is 18 years. Specifically, article 121§1 of the penal code provides that persons between 8 and 18 years old are considered as minors. They are under the jurisdiction of juvenile courts, provided by article 96§3 of the Constitution. The behaviour of persons younger than 8 years is not assessed at all. It is noteworthy that according to article 133 of the penal code, despite the fact that young adults between 18 and 20 years old are subjected to adult criminal law, the courts are allowed discretion to impose a lenient sentence.

According to the statistics<sup>38</sup> of the Ministry of Justice, Transparency and Human Rights the number of the children prisoners is as follows:

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<sup>38</sup> The Ministry of Justice, Penal System, General Board of Statistics concerning prisoners and penalties (2003-2010), viewed on 23 September 2012



2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
449	543	445	420	376	446	520	510	568	587

The total population of Greece as of May 2011 is estimated by the National Statistical Service of Greece: 9.903.268. Data considering population aged over 10-14 and 15-19 years old from the most recent census (May 2011) are not published yet. Due to the previous census (2001), the above mentioned age groups were estimated 587.802 and 728.918 respectively, while the total population was estimated 10.964.020<sup>39</sup>.

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. As an outcome derived from the close approach to the letter of the law, the national penal legislator is defining the term of “sexual activities” in a broader sense including every integrated acting from the part of perpetrator efficient to provoke hedonism, while at the same time he is excluding sex – related actions not leading sufficiently to sexual violation of the child ( 342 § 2 PC ).

According to the Report on Draft for a Bill for “Confrontation of Domestic Violence” of the A’ Office of Scientific Studies Parliamentary Sector on Legal Vetting of Bills:

<http://www.ministryofjustice.gr/site/el/%CE%A3%CE%A9%CE%A6%CE%A1%CE%9F%CE%9D%CE%99%CE%A3%CE%A4%CE%99%CE%9A%CE%9F%CE%A3%CE%A5%CE%A3%CE%A4%CE%97%CE%9C%CE%91/%CE%A3%CE%84%CE%B1%CE%84%CE%B9%CE%83%CE%84%CE%B9%CE%BA%CE%AC%CE%83%CE%84%CE%BF%CE%B9%CE%87%CE%B5%CE%AF%CE%B1%CE%BA%CE%81%CE%B1%CE%84%CE%BF%CE%85%CE%BC%CE%AD%CE%BD%CE%89%CE%BD/%CE%93%CE%95%CE%9D%CE%99%CE%9A%CE%9F%CE%A3%CE%A3%CE%A4%CE%91%CE%A4%CE%99%CE%A3%CE%A4%CE%99%CE%9A%CE%9F%CE%A3%CE%A0%CE%99%CE%9D%CE%91%CE%9A%CE%91%CE%A3%CE%9A%CE%A1%CE%91%CE%A4%CE%9F%CE%A5%CE%9C%CE%95%CE%9D%CE%A9%CE%9D%CE%A0%CE%9F%CE%99%CE%9D%CE%A9%CE%9D.aspx>

<sup>39</sup> Hellenic Statistical Authority (EL.STAT.), Statistical Themes, Population, De Facto Population, Demographic Data, viewed on 23 September 2012, [http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A1604/Other/A1604\\_SAP03\\_TB\\_DC\\_00\\_2001\\_01\\_F\\_GR.pdf](http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A1604/Other/A1604_SAP03_TB_DC_00_2001_01_F_GR.pdf)

“The central evaluative notion, that the whole chapter of Crimes against Sexual Integrity was constructed on, is that of “sexual activity”, which includes different forms of behaviour of varying degree constituting all, as of their external attributes, expressions of sexual life. The latter are designed to hedonism and under specific circumstances, they also assault the sexual morality of the victim. On the contrary, simple recounting of acts relating to sexual life or displaying of photos picturing sexual activity do not constitute in their external nature expressions of sexual life and for that reason the above-mentioned types of comportment do not stand for the criminalized term of “sexual activity.”

Moreover, the meaning of a profligate action, as it is applied in the Penal Code (article 353, includes the activity through which the perpetrator pursued to signify something clearly connected to sexual living. The punishment of acts – like the recounting, presentation of actions regarding to sexual life and offending the decency of the underage – when committed by an adult to whom the supervision and the guarding on the minor have been confided is provided in Article 24, paragraph 3 of the under adoption Bill. Therefore, these forms of conduct do not reside in the conceptual core of (profligate) sexual activity.”

In addition, both articles 337 § 1 and 338 § 1 of the Penal Code offer an interpretative tool, so we can export meaningful conclusions for the range of legal district occupied by the criminalized concept of “sexual activities”. In fact, article 338 § 1 of the Penal Code dissociates fornication from other (profligate) sexual activity, which automatically means not only fornication makes up for sexual activity, but other forms as well. And this conclusion holds absolutely consequent upon the broad definition we gave to the term in the beginning. On the other hand, article 337 § 1 is making clear reference to “profligate gesticulation or suggestions concerning profligate sexual activities” and as a result we can assume that the objective elements of a “sexual activity” are being met in real time by the moment perpetrator invades child’s wide corporeal area.

**ii.** Interpretation or even citation of the word “intentionally” is detected within the Penal Code’s texts referring to the crime of “sexual abuse”. Absence means that criminal liability stands for the fulfilment of every sexual violation considered.

Therefore, criminal liability for the committed crimes of “sexual abuse”<sup>40</sup> is particularly structured as follows:

‘Seduction of minors’, Article 339 of the Greek Penal Code;

1. Whoever commits an indecent act with a person under fifteen (15) years of age, or causes this person to commit or undergo such an act through deception if no heavier punishment is provided under the article 351A<sup>41</sup>, is punished as follows:

- a) if the victim is under twelve (12) years of age, with at least ten years’ confinement.
- b) if the victim has completed twelve (12) years of age, but is under fourteen (14) years of age, with confinement of up to ten years.
- c) if the victim has completed fourteen (14) years of age and up to fifteen (15) years of age, with at least two years’ imprisonment.

2. If marriage was performed between the perpetrator and the victim, no criminal prosecution will be exercised and if such has been instituted, it is declared inadmissible.

‘Abuse of minors’, Article 342 of the Greek Penal Code;

1. The adult who commits an indecent<sup>42</sup> act upon a minor entrusted to his supervision or guardianship, even temporarily, is punished as follows:

- a) if the victim is under fourteen (14) years of age, with at least ten years’ confinement
- b) if the victim has completed fourteen (14) years of age, but is under eighteen (18) years of age, with confinement.

‘Insult of sexual dignity’, Article 337 of the Greek Penal Code;

1. One who insults gravely the dignity<sup>43</sup> of a person concerning his sexual life, with the perpetration of unchaste gravely or with proposals regarding unchaste acts, shall be punished with imprisonment of not more than one (1) year or with a fine.

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<sup>40</sup> International Criminal Police Organization – INTERPOL, National Laws, Legislation of Interpol member states on sexual offences against children, Greece - Grèce – Grecia, Athens, <https://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaGreece.pdf>

<sup>41</sup> Global Resource of Information Directory, Greece – Country Profile, <http://www.fosigrid.org/europe/greece>

<sup>42</sup> Global Resource of Information Directory, Greece – Country Profile, <http://www.fosigrid.org/europe/greece>

<sup>43</sup> Global Resource of Information Directory, Greece – Country Profile,

2. The act described in the above-mentioned paragraph is punished with imprisonment from three (3) months to two (2) years if the victim is younger than twelve (12) years of age.

The article also states that any adult who, through the Internet or other means of communication, obtains contact with a minor under fifteen years of age and uses lewd gestures or suggestive behavior to offend the sexual dignity of the child, is liable to imprisonment for at least two years. Where the offensive act is committed habitually or repeatedly in subsequent meetings, the offender is liable to an increased sentence of at least three years' imprisonment. The article also states that where the adult offender obtains through the Internet or other means of communication contact with a person appearing to be less than fifteen years of age, the crime is punishable with at least one year's imprisonment and, in the case of habitual or repeat offenses, an increased minimum sentence of imprisonment of at least three years.

'Sodomy', Article 347 of the Greek Penal Code;

This provision defines the crime of committing sexual acts between males by abusing a relationship of dependency based upon employment. The offense is punishable by imprisonment for at least three months. The same penalty applies to any adult committing sodomy as the result of seducing a person under seventeen years of age, or if the act is committed for financial gain.

**iii.** As it gets clear from the article 339 § 2 in relation with § 1 , The legal age of consent for sexual activity is fifteen (15) years<sup>44</sup>.

Following the declaration of article 339§2 also , sexual activities between minors under the age of fifteen are not subject to any punishment , except for the fact of an existing age gap of three years , when only reformatory or curative measures are being imposed.

The national legislator does not refer in paragraph 2 of article 339 to sexual activities between minors under the accurate determination of "consensual".

**iv.** In article 338 § 1 as well as § 2, the abuse of insanity or incapability of any cause is being regulated. In paragraph 1 , where abuse leads to sexual intercourse with the victim or any

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<http://www.fosigrid.org/europe/greece>

<sup>44</sup> International Criminal Police Organization – INTERPOL , National Laws , Legislation of Interpol member states on sexual offences against children , Greece - Grèce – Grecia , Athens , <https://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaGreece.pdf>

other “ sexual activity ” – see definition above in a ) i - , the crime is punishable with at least ten years imprisonment. In paragraph 2, where abuse leads to the insult of sexual dignity, then there is an imprisonment up to ten years.

**v. ‘Incest’, Article 345 of the Greek Penal Code**

1. Sexual intercourse with blood-relatives of an ascendant is punished a) with confinement for at least ten (10) years if the descendant had not completed fifteen years of age , while with confinement of at least five years if the descendant had completed fifteen but not eighteen years of age b) with blood-relatives of a descendant, with imprisonment for up to two (2) years c) between brothers and sisters or half-brothers and half-sisters, sexual intercourse is punished with imprisonment for up to two (2) years.

2. Lineal blood descendants or siblings may be absolved from punishment if at the time of the commission of the act; they had not reached eighteen (18) years of age. The criminal prosecution is exercised *ex officio*.<sup>45</sup>

**vi.** In article 342 § 2<sup>45</sup>, the criminal legislator introduces all the aggravating circumstances concerning the abuse of minors. In particular, paragraph 2 clearly refers to:

- a) members of the family
- b) a person of the minor’s domestic environment as well as one who is familiar with that
- c) teacher, educator, trainer or any kind of tutor that delivers lessons to the child
- d) person that is receiving child’s services
- e) cleric who is holding a spiritual relationship with the minor
- f) psychologist, doctor, nurse or any other relevant scientist, who is providing services to the minor

At the same time, article 343 provides imprisonment for at least one year for a) public servants who commit sexual abuse of dependents, as well as for b) the ones working in prison or other penitentiary establishment, schools, educational institutions, hospitals, clinics or other sanitariums and do perform sexual activities with persons being under their custody.

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<sup>45</sup> Global Resource of Information Directory , Greece – Country Profile,  
<http://www.fosigrid.org/europe/greece>

## 2.2 Child Prostitution

**vii.** Greece has signed but has not yet ratified the 2005 Council of Europe Convention on Action against Trafficking in Human Beings. (Date of Signature : 17/11/2005 ) State is recently seriously oriented to a series of administrative reforms as well as it is highly concerned to meet up European standards of judicial operation. As a result, ratification of the Convention is on the top of the agenda.

**viii.** “Child prostitution” is basically interpreted in article 351 § 6 of the Greek Penal Code<sup>46</sup>. According to the grammatical definition, child prostitution is the “sexual exploitation consisting of attempting any lewd acts out of speculation or consisting of the out of profit utilization of the body, voice or image of the person aiming to real or pretended attempt of a lewd act, or even the provision of operation or services aiming to sexual stimulation”. As long as the criterion of profit is present within both Greek Penal Code and the Lanzarote Convention, we can assume with safety that national legislation is absolutely compatible with the legal wording of Convention - article 19.

**ix.** Operation of the recruiter is being criminalized as deduced from below:

Article 349, Penal Code. Pandering;

This section states that whoever induces, urges, procures or facilitates the prostitution or lewd<sup>47</sup> acts of minors with the intent to facilitate another’s debauchery, will be punished by confinement between five and ten years and fined between €10,000 and €50,000.

A penalty of confinement between five and twenty and a fine from €50,000 up to € 100.000 will be imposed where the offense is committed under one of the following circumstances:

a) where the victim is under fifteen years of age; b) by fraudulent means c) where the perpetrator is a relation (through blood or marriage) or a foster parent, spouse, guardian, or any other person to whom the minor is entrusted for rearing, education, supervision or custody, even temporarily; d) by servant , who commits or participates under any way to the above-mentioned activity taking benefit of his capacity or even during his duties e) where

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<sup>46</sup> International Criminal Police Organization – INTERPOL , National Laws , Legislation of Interpol member states on sexual offences against children , Greece - Grèce – Grecia , Athens ,  
<https://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaGreece.pdf>

<sup>47</sup> Global Resource of Information Directory , Greece – Country Profile,  
<http://www.fosigrid.org/europe/greece>

the offender used electronic media or f) where the offender offered or promised monetary or any other form of payment.

Article 348B, Penal Code. Attracting Children for Sexual Purposes;

Defines the crime<sup>48</sup> of an adult using information and communications technology to entice a child under fifteen years of age to meet in person in order to commit offenses as specified in Articles 339 and 348A. Where the initial proposal was followed by further similar acts which resulted in one of the offenses specified above, the offender is liable to imprisonment for at least two years and a fine of between €50,000 and €200,000.

Article 348 § 3, Penal Code. Facilitating Debauchery of Others;

Whoever attempts to facilitate either out of profession or out of profit, even when those acts are not conducted explicitly, actions of lewdness with an underage in the way of publishing advertisement, picture, phone number or transmitting electronic mails, or via any other means, is liable to imprisonment and a fine of between €10,000 and €100,000.

Article 351, Penal Code. Trafficking in Prostitution;

Defines the offense of engaging or influencing a person for the purpose of prostitution, even with consent, with a view to facilitate another's debauchery. The offense is punishable by confinement up to ten years, and a fine of between €10,000 and €50,000.

The offender is liable to an increased sentence of at least ten years' confinement where the offense is committed against minors (§4.a).

Actions committed by the offender are being criminalized as follows:

Article 351A, Penal Code. Lewd Acts against Minors;

States that adult who commit lewd acts against minors in exchange for money or other material exchange, or adults who cause lewd acts among minors committed before other people have committed a criminal offense under this section. The offense is punishable by imprisonment of at least ten years and a fine of between €100,000 and 500,000 where the victim is less than ten years old. The article also states that where the victim is between ten and fifteen years of age, the offender is liable to imprisonment for up to ten years and a fine

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<sup>48</sup> Global Resource of Information Directory , Greece – Country Profile ,  
<http://www.fosigrid.org/europe/greece>

of between €50,000 and 100,000. Where the victim is over fifteen years of age, the sentence is imprisonment for at least one year and a fine of between €10,000 and 50,000. The offense is punishable by imprisonment for life where it causes the death of the victim.

### 2.3 Child Pornography

**x.** Greece has signed but has not yet ratified the Council of Europe Convention on Cyber Crime. (Date of Signature : 23/11/2001)

State is recently seriously oriented to a series of administrative reforms as well as it is highly concerned to meet up European standards of judicial operation. As a result, ratification of the Convention is on the top of the agenda.

**xi.** According to the provisions of Article 348A<sup>49</sup> of the Greek Penal Code, Pornographic material constitutes every depiction, real or figurative imprinting, on electronic carrier or any material of a minor's body, intended for sexual excitement, as well as the recording or imprinting, on electronic carrier on any material, of a real, simulated or fictitious indecent assault acted for the same purpose by or with a minor. As a consequence, the compatibility of the national article with Lanzarote Convention's provision is more than obvious, if 348A<sup>50</sup> of Greek Penal Code is not wider. More precisely, while article 20§2 of the Lanzarote Convention is referring only to the depicting of genitals as punishable, national legislation criminalizes depicting of any part of the minor's body efficient to lead to sexual stimulation.

**xii.** Whoever<sup>51</sup> prepares, possesses, puts by any means into circulation pornographic material, coming under the definition of the preceding paragraph, is sentenced to at least one year imprisonment plus a monetary penalty, while pornographic material distribution associated with the exploitation of need, of mental or intellectual weakness, of corporeal incompetence of minors due to an organic disease or with the performance of physical violence against a minor, constitutes an aggravated circumstance punishable as a felony.

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<sup>49</sup> Global Resource of Information Directory, Greece – Country Profile,  
<http://www.fosigrid.org/europe/greece>

<sup>50</sup> Global Resource of Information Directory, Greece – Country Profile,  
<http://www.fosigrid.org/europe/greece>

<sup>51</sup> International Criminal Police Organization – INTERPOL, National Laws, Legislation of Interpol member states on sexual offences against children, Greece - Grèce – Grecia, Athens,  
<https://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaGreece.pdf>



Moreover, this article was amended in 2007 to include the use of the Internet or electronic means as a means to disseminate child pornography. The 2007 amendments and the inclusion of the Internet as a means to disseminate material led to the introduction of use of the Internet to commit a crime being deemed an aggravating form of the offense. This section states that pornographic material constitutes every depiction, real or simulated, in any format, of a minor's body, intended for sexual excitement, as well as the recording or imprinting, in any format, of a real, simulated or fictitious indecent assault acted for the same purpose by or with a minor. The article states that it is an offense to manufacture, offer, provide, possess, or sell such pornographic material for profit. As a result, article 348A<sup>52</sup> is fully compatible with provisions (20)1.a and 1.f as mentioned in text of the Convention. However, provision of article (20)1.f refers to the *possession of access* to pornographic material via technology, informatics or communication means. This is a citation differentiated from the *possession* of pornographic material itself through a computer system or use of the Internet, stated in article 348A<sup>53</sup> §2 of the Greek Penal Code.

**xiii.** Policing of the Internet as well as Control mechanism for pornographic materials is a difficult discussion, as it hits over issues of the constitutionally protected freedom of speech and the confidential character of communication. Hellenic Police has established the Sector for the Prosecution of Cybercrime in 2004 acknowledging the problem of security on the Internet. During the recent years, several cases of promoting illegal activities on the Internet have been unravelled by this Police Sector. This specific Office is co-operating with Europol, Interpol, FBI and the US department of homeland Security. In Greece, there is also Safeline, that is joining forces with other agencies of provision of Internet services, EDET (=National Net of Research & Technology) & PSD (=Panhellenic School Net), Institutions of Research & Culture, Unions of Consumers and Greek Police in order to limit flow of illegal content on the Internet. The program is being supported by the "Action Plan for Safer Use of the Internet", launched by the E.U. and is being operated by SAFENET, collective organization of Internet Services Providers in Greece. Operation of SafeLine is based upon articles 10 and 12 of Greek Constitution, which provide the right of reference to citizens and legitimization for them to establish unions and non – profit corporations aiming

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<sup>52</sup> Global Resource of Information Directory, Greece – Country Profile,  
<http://www.fosigrid.org/europe/greece>

<sup>53</sup> Law Library of Congress, <http://www.loc.gov/law/help/child-rights/greece.php>

to protect individual and social rights in return. SafeLine is receiving complaints concerning Internet sites or newsgroups, where users have detected pictures of children being maltreated anywhere in the world. State being party to the Lanzarote Convention, didn't use the reservation right as mentioned in article 20§3 of the Convention, since all the forms of pornography cited are criminalized by the national legislator and included in the letter of law (article 348A). On the other hand, the State seems not to have penalized intentional access to porn material via technology as provided in paragraph 1.f of article 20. Therefore, we can maintain that it made use of its reservation right, as long as the national legislator still criminalizes only the "possession" (article<sup>54</sup> 348 A par.2 of the Greek Penal Code) of pornographic material but not the "possession of access" (article 20 par. 1 of the Lanzarote Convention) to it. As a result, simple on-line watching or surfing on pornographic material without the process of downloading from related websites does not constitute a crime according to national legislation. In this case, there is no stable incorporation of data into electronic or other carrier and subsequently no such real dominating over the pornographic material as to justify "possession".

**xiv. Article 348B, Penal Code. Attracting Children for Sexual Purposes;**

This article defines the crime of an adult using information and communications technology to entice a child under fifteen years of age to meet in person in order to commit offenses as specified in Articles 339 and 348A<sup>55</sup>. Where the initial proposal was followed by further similar acts which resulted in one of the offenses specified above, the offender is liable to imprisonment for at least two years and a fine of between €50,000 and €200,000.

As regards to the discrimination between "recruitment" and "coercion", the terminology used to describe the above – mentioned criminalized activity is that of "enticement", which apparently seems conceptually closer to the notion of "recruitment".

As it can be seen through the examination of Greek Penal Code, the national legislator does not criminalize the attendance of pornographic performances involving the participation of

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<sup>54</sup> Global Resource of Information Directory, Greece – Country Profile,  
<http://www.fosigrid.org/europe/greece>

<sup>55</sup> Global Resource of Information Directory, Greece – Country Profile,  
<http://www.fosigrid.org/europe/greece>

children at all and as a consequence , national legislation ends up incompatible with provision in article 21 § 1.c of the Lanzarote Convention.<sup>56</sup>

## **2.4 Corruption of Children**

**xv.** Article 339, Penal Code. Seduction of Minors § 4;

The article also states that it is an offense to entice a minor under fifteen years of age to participate in lewd acts, even if the offender does not participate himself. This offense is punishable by imprisonment for at least two years.

Also , article<sup>57</sup> 342 § 3 P.C. declares as offensive of minor's decency the gesticulation , suggestion or recounting , depicting or presentation of actions related to sexual life committed by an adult to whom the supervision and the guarding on the minor have been confided, even temporarily. As a result, the perpetrator is punished by imprisonment for at least six months, and if the activity is habitually being committed by imprisonment for at least two years.

## **2.5 Solicitation of Children for Sexual Purposes**

**xvi.** The article 23 of the Council of Europe Convention on the Protection of Children against sexual violence and sexual abuse (the Convention) provides that:

“Each Party shall take the necessary legislative or other measures to criminalize the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age set in application of Article 18, paragraph 2, for the purpose of committing any of the offences established in accordance with Article 18, paragraph 1.a, or Article 20, paragraph 1.a, against him or her, where this proposal has been followed by material acts leading to such a meeting.”

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<sup>56</sup> However, it should be noted that attendance of pornographic performances is a criminal act, according to a special law “about indecent publications” (Law 5060/1931)

<sup>57</sup> Global Resource of Information Directory , Greece – Country Profile ,  
<http://www.fosigrid.org/europe/greece>

Article 4 of Law 3727/2008, under which Greece ratified the Convention, introduced a new article to Greek Penal Code in conformity with article 23 of the Convention. The article 348B provides that:

“Whoever intentionally proposes, through information and communication technologies, to an adult to meet a child who has not reached the age of 15, for the purpose of committing any of the offences established under paragraphs 1 and 2 of articles 339 [Sexual Abuse] and 348A [Child Pornography] , against him or her, where this proposal has been followed by material acts leading to the commitment of these offences, is subject to minimum two years imprisonment, as well as financial penalty waging from 50.000 € to 200.000 €”.

If read carefully, article 348B is differentiated from the respective article 23 of the Convention in two points: firstly, it criminalizes a diverse conduct and secondly, it requires additional material acts to those required by the text of the Convention.

According to the Convention, States shall criminalize the intentional sexual gratification of an adult towards a child through information and communication technologies. However, article 348B refers to the intentional proposal of an adult towards another adult to meet a child for the purpose of committing sexual abuse or child pornography acts; therefore, what is criminalized under article 348B, is the incitement to solicitation of children for sexual purposes, and not the main act of “grooming” itself! It may sound absurd, but this differentiation resulted from a translation error: the proposal “of” an adult was converted to the proposal “to” an adult<sup>58</sup>. This error has already been depicted by the Hellenic Parliament Scientific Service and reform of article 348B has already been suggested<sup>59</sup>.

Furthermore, the Convention requires that material acts leading to the meeting take place, while the Greek Penal Code refers to material acts leading to the commitment of sexual abuse or child pornography. Thus, Greek criminal legislation requires that the adult actually begins to commit the offences of sexual abuse or child pornography<sup>60</sup>, in order to criminalize his/her “proposal” and consider it as a “solicitation of children for sexual

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<sup>58</sup> *Sexual Offences*, N. Paraskevopoulos- E. Fitrakis, Sakkoulas Editions 2011, p. 315.

<sup>59</sup> 59Hellenic Parliament Scientific Service Report (by Athanassia Dionissopoulou), as can be found in *PoinChr*2009, 94 forwards [95].

<sup>60</sup> *Sexual Offences*, N. Paraskevopoulos- E. Fitrakis, Sakkoulas Editions 2011, p. 317.

purposes". In this point, protection ascribed to the child victim is apparently weaker than the protection Convention meant to provide.

Solicitation of children for sexual purposes may finally be punished under article 337§3 of Greek Penal Code which provides for the criminalization of the adult, who gets in contact with a minor under fifteen years old, using the Internet or other means of communication and offends his/ her sexual dignity by gestures or improper proposals. Penalty provided is imprisonment up to two years. Compliance of this provision with article 23 of the Convention is pointed out by the Explanatory Report of Law 3727/2008<sup>61</sup>.

**xvi.** Attempting and aiding or abetting to the activities mentioned under a, b, c, d, and e (sexual abuse, child prostitution, child pornography, corruption of children and solicitation of children for sexual purposes) are criminalized under the general provisions of Greek Penal Code regulating attempt and aid or abet to offences (articles 42-44 and 45-49). Attempt crimes are generally subject to less severe penalties than the accomplished crimes. As regards aid or abet, Greek criminal legislation classifies as follows: if the defendant is an accessory, he/ she is subject to a lesser penalty than the main perpetrator. If the defendant is an accomplice (abettor), he/ she has the same degree of guilt as the person he/ she is assisting, is subject to prosecution for the same crime, and faces the same criminal penalties.

## 2.6 Corporate Liability

**xviii.** Would it be possible for legal/moral persons to be held liable for the offences provided by the Convention, when an action has been performed on their behalf by a person in a position at their entity. As an introductory remark, it should be mentioned that cases in which legal persons may take liability under Greek criminal legislation are very limited.

**xix.** The Greek legal system does not recognize criminal liability of legal persons as such. Therefore, corporate liability may only be administrative and/ or civil.

Child pornography, child prostitution and child trafficking are the offences provided by the Convention where administrative liability of legal persons may be held. A criminal conviction for any of these offences committed within an establishment is communicated within a month from its publication to the District General Secretary by the Prosecution

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<sup>61</sup> Article 3 of Explanatory Report of Law 3727/2008.

Office. Then, the District General Secretary may order temporary closure (for a period between one and three years) of the establishment where the offences took place<sup>62</sup>; temporary closure may be ordered even at the beginning of the prosecution, under the same conditions and procedure. Considering all circumstances, the District General Secretary may also order permanent closure or permanent disqualification from the practice of commercial activities for the establishment<sup>63</sup>.

Companies and associations may also be liable from a civil standpoint for any offence when an action has been committed on their behalf by a person in a position at their entity. Under Greek criminal legislation, the victim of an offence is entitled to bring civil claims against the defendant (for restitution and moral harm) to the Criminal Court<sup>64</sup>. In the case of the defendant being a leading person or an employee in a legal person, these civil claims can be brought directly against the legal person. This option seems advantageous for the victim, since companies/ associations are more likely to possess sufficient funds. The procedure of bringing civil claims against a legal person is regulated by Greek Civil Code<sup>65</sup>, and applies at civil claims brought before Criminal Courts as well.

**xx.** Obviously, administrative and civil liabilities of legal persons do not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the offences. Corporate liability does not exclude personal criminal liability.

## 2.7 Aggravating Circumstances

**xxi.** Greek Criminal Code provides aggravating circumstances for some of the offences examined above. These aggravating circumstances vary depending on the offence:

Sexual abuse offences against children (a):

Article 336§1 of Penal Code criminalises the general conduct of forcing someone to engage in sexual activities by the use of physical force, coercion or threat. The penalty for the offence of article 336§1 is “imprisonment”, while article 336§2 provides that if offence was committed by two or more people acting together, the penalty imposed is imprisonment of

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<sup>62</sup> Within a month from the acknowledgement of the appeal criminal conviction.

<sup>63</sup> Par. 6 of article 11, of Law 3064/2002.

<sup>64</sup> Articles 63-64 of Greek Criminal Procedure Code.

<sup>65</sup> Articles 71, 922, 927, 932 of Greek Civil Code.

minimum ten years. If sexual offence committed by use of force, coercion or threats resulted in the death of the victim, life imprisonment is imposed<sup>66</sup>.

Offenders of engaging in sexual activities with a child and offenders of sexual abuse against a particularly vulnerable child (due to its physical/ mental disability) are also subject to life imprisonment if actions resulted in the death of the victim<sup>67</sup>.

Offences concerning child prostitution:

Child prostitution is criminalised under article 351A of Greek Penal Code. Habitual offenders of this crime are treated more severely. Moreover, if child prostitution acts lead to the death of the child, life imprisonment is imposed. The latter applies for victims of child trafficking as well, according to the general provisions criminalising human trafficking<sup>68</sup>.

Offences concerning child pornography:

Committing child pornography offences habitually or by profession is considered as aggravating circumstance under Greek criminal legislation. Perpetrators of child pornography committed: a) by using force, coercion or threat, b) against a child younger than 15 years old, and finally c) against a particularly vulnerable child, by abuse of its situation of dependence or physical/ mental disability, are subject to more severe punishment. In these three cases, if acts resulted in serious physical damage or death of the victim, perpetrators face even more harsh penalties (imprisonment of minimum of ten years and financial penalty in case of serious physical damage and life imprisonment in case of death of the victim).

Offences concerning corruption of children

Paragraph 4 of article 339 criminalises intentional causing, for sexual purposes, of a minor under 15 years old, to witness sexual abuse or sexual activities, even without having to participate. If this conduct resulted in the death of the child, life imprisonment is imposed<sup>69</sup>.

Offences concerning solicitation of children for sexual purposes

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<sup>66</sup> Article 340 of Greek Penal Code.

<sup>67</sup> Article 340 of Greek Penal Code.

<sup>68</sup> Article 351 of Greek Penal Code.

<sup>69</sup> Article 340 of Greek Penal Code.

In case of application of article 337§3<sup>70</sup>, and if the act is committed habitually or a subsequent meeting takes place, the perpetrator is subject to a minimum of three years imprisonment.

## 2.8 Sanctions and Measures

**xxii.** Sanctions for the offences under a, b, c, d, e include mainly deprivation of liberty and in some cases additional financial penalties.

The State has also instituted additional measures due to the particularity of sexual offences against children. First of all, anyone prosecuted or convicted for crimes against sexual freedom of children and the economic exploitation of sexual life of children is not allowed to exercise a profession involving contact with children in the public or private sector. Anyone convicted for these offences, may also be subject to obligatory psychological treatment, taking place during the imprisonment or at any other time<sup>71</sup>. For child prostitution and child trafficking offenders, the court may order mandatory community service, residence prohibition or extradition (under the aliens' legislation) as well<sup>72</sup>.

Extradition issues between Greece and other EU Member States are regulated by the European Arrest Warrant mechanism<sup>73</sup>. As regards surrender procedures with the member states of the Council of Europe, the European Convention on Extradition (1957) applies<sup>74</sup>. Finally, bilateral extradition treaties between Greece and other states may be relevant.

**xxiii.** Latest reforms in criminal legislation regarding sexual offences against children aimed at meeting the standards of protection ascribed by the Council of Europe and EU legislation. Even if the goal was not achieved completely yet, penalties introduced are considered proportionate, effective and dissuasive. What should be enforced is the application of psychotherapeutic measures provided for sexual offenders, since they hold a key role in their rehabilitation.

**xxiv.** As it was already mentioned [under (f)] sanctions for legal persons/moral entities include mainly administrative penalties, such as temporary closure, or even permanent

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<sup>70</sup> See above under (e).

<sup>71</sup> Par. 2 of article 352A of the Greek Penal Code.

<sup>72</sup> Articles 352, 72 and 75 of the Greek Penal Code.

<sup>73</sup> Council Framework Decisions 2002/584/JHA. Incorporated under Law 3251/2004.

<sup>74</sup> As ratified by Law 4165/1961.



closure and permanent disqualification from the practice of commercial activities. These penalties are imposed by the General Secretary of the District of the establishment, not by the Criminal Court.

**xxv.** Materials and instruments used in order to commit sexual offences against children are confiscated under the general rules of Greek Penal Code. According to article 76, objects that are products of an intended felony or misdemeanor, their fruits, and those acquired through them, as well as articles used or assigned to the performance of such an act, may be confiscated if they belong to the perpetrator or to any of the accomplices/ accessories. If these items present a danger to public order, confiscation takes place against whoever possesses them, even before or without the court sentencing decision for the offence committed. Therefore, confiscation may be imposed as an complementary penalty or as a safety measure.

**xxvi.** In the special case of products of human trafficking (incl. child trafficking), confiscation of materials and instruments is obligatory and is ordered by the court convicting decision<sup>75</sup>. In this case, confiscation is ordered even if the property belongs to a third party, under the condition that he/she was aware of the criminal activity at the time of acquisition of the property<sup>76</sup>. If this property no longer exists or is yet to be found, a financial penalty compensating the value of the property is imposed.

There is currently no legislative regulation for creating a special fund using the properties confiscated for sexual offences against children in the scope of financing relevant prevention or intervention programs.

**xxvi.** When sexual abuse or sexual violence against a child is committed within the family, the Law 3500/2006 for Domestic Violence applies<sup>77</sup>. Prosecution in cases of domestic sexual abuse and sexual violence takes place *ex officio*. In these cases, the defendant may be ordered to quit the family house or his/her relocation; moreover, he/she may be not be allowed to approach the victim's place of residence or work, the close relative's house and children's schools and guesthouses in order to protect the physical and mental health of the victim. These security measures may be ordered by the competent criminal court or the competent

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<sup>75</sup> Law 3691/2008

<sup>76</sup> Article 46 of Law 3691/2008

<sup>77</sup> Articles 1 and 8 of Law 3500/2006 establish explicitly sexual abuse or rape within a family as forms of domestic violence.

magistrate or a judicial council and for as long as is necessary. They remain valid until the finals' court judgment or the order of the public prosecutor filing the case due to criminal mediation<sup>78</sup>.

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

i. According to the Greek Code of Criminal Procedure (article 329), each hearing is public. However, the following article (330) introduces an exception from the aforementioned rule and provides the judges the chance to exclude from public hearing the cases of sexual crimes, mainly where the victim is a minor. Furthermore, in 2002, Greece adopted the first Anti-trafficking Law (Law 3064 of 2002), which amended the Criminal Code and provided for the punishment of the criminal acts of trafficking, as defined in international and regional instruments protecting human rights. In December of 2007 Greece also ratified the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography amending accordingly the provisions of the national legislation. As a result, the treatment of trafficked children by the national courts fulfils the standards set by the international texts. Later, in 2003, Greece has adopted the legislative framework that ensures to the victims of trafficking protection and assistance and, in 2005 transposed the Directive for the issuance of residence permits to the victims of trafficking. The Greek legislation (Law 3064/2002 as amended, and Presidential Decree 233/2005) provides the protection and safeguards of victims of child trafficking, such as accommodation, medical and psychological support, interpretation services as well as free access to the legal aid system. The anti-trafficking legislation provides explicitly for a reflection period of at least thirty (30) days for all victims of trafficking, and permits for a one-month extension in cases of trafficked children. Moreover, the legislation guarantees the right of trafficked children to be granted a residence permit in cases where they cooperate with the police and prosecuting authorities. Trafficked children who do not complain about the offenders are entitled to residence permit on humanitarian grounds, only when they are accommodated in protection centers by order of the Prosecutor.

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<sup>78</sup> Article 18 of Law 3500/2006. Criminal litigation for domestic violence offences is also provided by Law 3500/2006.

In 2006, the Greek Parliament voted the Law 3500 for combating the phenomenon of domestic violence. According to its 18th article, the investigator, the judicial council, and the court may impose the restrictive condition of removal of the offender from the house where he lives with his relatives. Furthermore, the victims receive material and psychological support by public social agencies (article 22). The child victims have also the right not to testify in the court, except of the cases that their testimony is extremely necessary for the elucidation of the case. Subsequently, the Law 3625 of 2007 introduced the article 226 A in the Greek Code of Criminal Procedure. The latter permits the videotaping of the minor's testimony at the stage of preliminary procedure (pre-trial) in cases related to sexual victimization of children, such as rape, sexual trafficking, incest, and child pornography. According to the aforementioned article, a psychologist specialized in children is appointed by the Public Prosecutor, in order to provide support to the victim for the witnessing procedure, and also accompanies him/her during the procedure. In the following, the child is not obliged to attend the hearing as a witness, since the videotaped material is considered as main evidence. Finally, according to Law 3727 of 2008 (article 226 A par. 2 of the Code of Criminal Procedure), the minor may be accompanied by his/her legal representative during the pre-trial proceeding, except of the cases that the latter has participated in commission of the investigated criminal offense.

**ii.** Within the frame of the Greek Police, there is the Directorate against the Organized Crime, under the authorization of which operates a special Department on human trafficking cases. In the same frame, operates a specialized Department on cybercrime, which investigates and analyzes child pornography material. Furthermore, in big urban areas, such as Athens and Thessaloniki, a specialized Prosecutor is responsible for cases of children's victimization, as well as human trafficking.

**iii.** As a rule, according to the Greek Code of Criminal Procedure, the Public Prosecutor presses charges "ex officio". In other words, the Public Prosecutor must press charges whenever he/she believes that the commission of a criminal offence has taken place, regardless of the statements of the victims and the participants in the offence in general. However, there are some exceptions to the aforementioned rule. As far as the sexual abuse of children is concerned in particular, according to the article 344 of the Greek Criminal Code, the prosecutor has the possibility to refrain from pressing charges in cases that the victim of rape or his/her relatives declare that the hearing will lead to his/her psychological damage.

iv. The Law 3625 of 2007 introduced some important changes in the article 113 of the Greek Penal Code in relation to the statute of limitation and its suspension. In cases of sexual crimes against children, the statute of limitation is suspended until the victim becomes an adult and the suspension lasts till after one year in cases of misdemeanours and after three years in cases of felonies.

v. An unaccompanied child in the Greek territory is registered as a minor or an adult according to his/her declaration on the age without any further investigation. In case an age assessment is needed or there are doubts about the age, there are not specific provisions regulating the implementation of a certain age assessment procedure. In the context of the Memorandum of cooperation for combating trafficking in human beings and providing support to victims between the Special anti-trafficking committee, the Secretaries General of twelve NGOs and the Office of IOM in Athens (November 29th, 2005)<sup>79</sup> it is declared that in case a person claims that he/she is a minor and there are serious doubts about the age, while the precise age is not possible to be identified, the person should be considered and treated as a minor and be entitled to special protection (benefit of a doubt). Though, this provision is not enshrined on legislative level. Provisions for medical examinations to determine age are included only in the context of the examination of the asylum applications of unaccompanied minors. The use of the examinations should be in line with the respect of certain guidelines provided in law, and safeguarding the best interests of the child, such as the requirement for the child's consent, the provision of information to the minor prior to examination, as well as the treatment of the person as a minor until the completion of the examination<sup>80</sup>.

vi. In Greece, police authorities are responsible for collecting data of people who have been arrested by policemen, and prosecuting authorities are responsible for collecting data of convicted offenders. Convictions are regarded by the Greek legislation as 'sensitive data', and for this reason are specially protected (Law 3625/2007). Prosecutions and convictions in the case of child sexual abuse are still considered as "sensitive", but they may be published after a special permission by the Public Prosecutor. This law has been implemented in

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<sup>79</sup> [http://www.arsis.gr/traf\\_eng\\_4.pdf](http://www.arsis.gr/traf_eng_4.pdf)

<sup>80</sup> Article 12 of the Presidential Decree 90/2008 transposing Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

Greece for mainly child pornography offenders, and poses a lot of serious legal questions, such as the protection of the presumption of innocence.

### 3.2 Complaint Procedure

**vii.** The automatic of pressing charges by each Public Prosecutor constitutes the general rule in the Greek Criminal Procedure. Each child has the possibility to propose informally his/her complaints to the Prosecutor directly or through the police, that has then the opportunity to investigate the case, and press charges. Additionally, each citizen has the right to file a complaint against any other citizen in front of the police authorities or the Prosecutor. The legal representatives of children have the right to do the aforementioned act on behalf of them.

**viii.** According to the Greek Code of Criminal Procedure, children are able to participate in the criminal procedure accompanied by their legal representatives, asking for compensation for the harm caused by the crime and the defendant's conviction. The aforementioned Code refers to the Code of Civil Procedure for more details. According to the latter, each child aged more than sixteen year old has the possibility to participate in the civil procedure related to his personal status. In these cases, the Court has to invite also his/her legal representative (article 742). There is not any specific provision for the case that a child complaints against his/her parents for sexual abuse, even in the special Law for the confrontation of domestic violence (3500 of 2006). However, this Law allows the appointment of a legal guardian in cases of corporal violence against children (article 4).

According to the Greek Code of Deontology for Reporters (article 2), each reporter has to keep the personal data of rape survivals secret from the public. Furthermore, the National and Kapodistrian University of Athens (Department of Communication and Media) has adopted a deontological Code for the protection of children from their exposure to the Media. The aforementioned Code prohibits the revealing of minor victims' identity by reporters. As far as the Greek legal order is concerned, the Act 3625 of 2007 introduced the article 352 B in the Greek Penal Code, entitled "Protection of private life of minor victim". The publication of the personal data of the victim constitutes a punishable act, as well as any data which is possible to reveal the identity of the latter. According to this article, the publication of the personal data of the victim, or any data which may reveal the identity of the victim, constitutes a misdemeanour.

## 4 COMPLEMENTARY MEASURES

i. One of the main educational instruments in Greece, as far as sexual abuse is concerned, is an academic program titled “Sociology of both Genders” and “Sexual Education”, that is being taught to students at the Education Faculties. Also the Greek Institute of Sexology in cooperation with the Ministry of Education in Greece provides several times a year on the grounds of the Institute professional courses from 8 to 30 hours with Sexual education and participation of teachers, doctors, psychologists and sociologists, as well as smaller seminars based on this issue.

Also seminars are organized in other cities with the cooperation of local authorities and other local agencies. Furthermore, the State informs school teachers about these seminars during the year through newsletters, which are being sent by the Greek Ministry of Education.

There are also some sporadic sessions organized by the Regional Training Centers and some two-day seminars for the professors.

ii. Greece is one of the few European countries that do not have a specific policy on sexual abuse. The Course of Sexual Education is not part of the schools' schedule. On the outskirts of some courses (Biology, Anthropology, Religion) there is some hints at the topic. Occasionally, informational brochures are published about these issues by the Ministry of Education.

Moreover, some courses based on Sexual Education (and abuse) may be provided by professionals from the field of health sector. The number of children involved is limited because of the financial difficulties of the Greek State. Hence, the training of the staff to carry out these programs is also limited.

Some support is also offered through seminars based on Sexual Health and Education. These seminars involve not only teachers but also postgraduate students and social workers and are organized by the “Institute of Psychosocial health of Children and Teenagers”. The seminars in general aim to educate health professionals on mental health over the processes of patients and their impact on the family. By attending the seminar these participants have the opportunity to gain skills in how to interfere through a psycho dynamic approach and treatment of clinical cases and the clinical experience of the trainer.

In Greece parents are involved in the educational process through their Associations that exist in every school in Greece. Furthermore, these associations organize courses and seminars for parents in order to educate them and inform them about sexual abuse and how to protect their children. These associations consist of parents and they work together with the teachers and every school administration in order to achieve a better school education for themselves and their children. For example, a Municipality in Athens (Municipality of Marousi) is organizing for the fourth year seminars of seven classes titled "Parental Guidance" and "School-Family Relations". These programs aim to inform parents about sexual education of their children- together with other important issues that are being discussed- in order to inform them also in the same framework about sexual exploitation and how to protect their children from that hateful social phenomenon.

**iii.** The Greek State does not provide intervention programs for people, who are afraid that they may commit a crime. However these people can find support and help from professional psychologists and social workers.

**iv.** The need of reintegration of the child victim in Greek society is a very sensitive issue that has to be treated specially in the case of sexual exploitation. Minor who are victims of sexual exploitation are subjected to special examination of their mental and physical condition (Article 352A of the Penal Code), and it provides protection of life, health and sexual freedom to victims of crimes such as trafficking and sexual abuse.

Moreover for as long as it is necessary, the assistance that is offered from the State has to do with housing, food, living, health care, psychological support as well as providing legal counsel and interpreter (in some cases).

Protection is provided for as long as there is a risk to victim's life, health, personal and sexual freedom and the assistance that is necessary, is offered by the Services and Units of protection and assistance of the Greek State, which are complemented by non-profit NGOs. At the legislative level adequate measures have been taken to protect children from child abuse and to reintegrate them as victims. This fact is recognized by the Committee of the Rights of the Child since 2002, which expressed its concern regarding the limitation of the social, medical and other services mainly to Athens and Thessaloniki and the insufficient financial resources.

One of the main social programs working in Greece is since 1977 is organized by the Department of Mental Health and Social Welfare (former Department of Family Relations

of Greece) and concerns research, research-action and education professionals providing specialized services to the study of domestic violence (active and passive) in relation to children and the prevention of victimization. Due to its specialty, this Directorate operates since 1988 as a Center for the Study and Prevention of Abuse and Neglect of Children under the No 2350/14-11-88 Decision of Deputy Minister of Health and Welfare. The Division focuses on children, who suffer from violent behaviors in their family environment and conducts quantitative and qualitative research with emphasis on primary, secondary and tertiary prevention. Programs of primary, secondary and tertiary prevention. Education and awareness-raising professionals in the 'frontline'. It also develops a program - framework for the promotion of children's rights in Greece and Europe, including many actions by Greece, in collaboration with primary level teachers and European collaborations involving mobilization through political lobby in order to strengthen the position of children. Finally, the main task of the Institute is diagnosis, treatment and rehabilitation of all forms of child abuse and neglect. Entity acting in this field is "The Ombudsman of Children". The Ombudsman is following reports, mediates society in specific cases of violation of children's rights, and is also seeking to protect and restore these rights. When necessary, in cases of serious violations, it is acting *ex officio*. It also undertakes initiatives to monitor and promote the implementation of international conventions and the rest of the national legislation on children's rights, public information. It exchanges views with representatives of bodies, puts forward proposals to the state. The Ombudsman investigates incidents which are reported and, if it finds that a violation of children's rights from public service has occurred, and suggests ways to stop this violation and solve the problems.

When the petition is directed against private persons or private companies it takes all appropriate action and proposes, if necessary, actions to protect the rights of the child. To investigate and resolve identified problems and protect children's rights, the Ombudsman may request the cooperation of public authorities or other bodies (welfare, mental health institutions etc.) or the intervention of a competent judicial authority. For the protection of children's rights, the Ombudsman may request a specific document mentioned in the petition or other documents in the case. The characterization of these data as confidential cannot be enforced against the Ombudsman. The Ombudsman is obliged in this case to guarantee the personal and professional secrets of individuals and not to publish evidence which make it possible to identify them. If an individual refuses to provide the above information, the Ombudsman may ask the public services, professional associations or



organizations and the prosecutor for their assistance. Finally, in Greece there is "The Daphne III" program, which aims to contribute to the protection of children, young people and women against all forms of violence and attain a high level of health protection, well-being and social cohesion. Its specific objective is to contribute to the prevention of, and the fight against all forms of violence occurring in the public or the private domain, including sexual exploitation and trafficking of human beings. It aims to take preventive measures and provide support and protection for victims and groups at risk.

The European Parliament and the Council adopted a Decision establishing the specific programme Daphne III as part of the General Programme "Fundamental Rights and Justice" and Greece adopted it as well.

v. There are many services aware of these issues which keep the privacy and confidentiality as required in these situations. The helplines that exist are:

- SERVICES curators underage NS
- Protection Company underage N Athens (CPC)
- Athens Police underage N S
- PROSECUTORS underage Athens

Municipal Social Services:

- These services operate the most of the Greek territory
- Services: Counseling families and children, referrals to specialist services and professionals
- Services and offices PIKPA
- Addresses Social Welfare in each District
- National Welfare (FBS)
- Family Cares Centers and Child
- Underwriting services- Residential Care
- Services and offices AOC operate in Greece

In those telephone help-lines the persons answering are psychologists, social workers and volunteers. They listen to the concerns of children on a 24 hours a day basis and receive complaints of child abuse or exploitation.

We have to add in this point, that confidentiality is one of the main issues that these help-lines want to achieve together with the help that has been provided to the victims. For example, the most known help line is the one provided by "The Smile of the Child". It exists since 1997 and has developed a wide range of activities for children and their families to protect and uphold the rights of children in all areas, including the protection of sexual abused children. The social services and counseling provided by social workers and psychologists aims to decisive contribution to the support and encouragement of the child and family in order to solve the problems that might arise. Their target is the mobilization and sensitization of the public and stakeholders in order to mitigate the problems of children but with confidentiality kept. This means those names, age, or other facts of the victims case is not being revealed in public. Social and counseling support from those help-lines is provided centrally and in other parts of Greece (but not in every part of the country), such as Athens Thessaloniki, Patras, Pyrgos, Tripoli Corinth, Corfu and Chalkida.

**vi.** It must be added, that the intervention programs, are aware of the possibility that these children-victims could have difficulties in their sexual behavior in the future. This is a further aspect of the fact that they have been abused. In most of the cases, children who are abused suffer more psychologically than physically. A child, who is abused, can become depressed, suicidal or violent. An older child may use narcotics or alcohol, or express tendencies to molest others. As an adult, he may develop interpersonal and sexual difficulties, depression or suicidal behavior. These problems are dealt with by psychologists that the State provides to the victims during their stay to the hospitals. Such an example is that of the biggest Greek hospital for Children "Saint Sofia". It provides the children with protection through psychologists and social workers, who work together with them. Psychologists working in this hospital (and in most of the children's hospitals) belong to the scientific personnel of the University Clinic of Child Psychiatry and they actively participate as members of the interdisciplinary team in the entire network of clinical services in the country. The duties and responsibilities of the work of psychologists expressly defined by the existing legal framework (Law 991/1979, "for the profession of psychology in Greece") and are as follows: "The psychologist in the practice is evaluating the personality and human behavior and works with established principles and methods of his science with the aim of exploiting and improving them, so that problems in the sexual behavior are avoided in the future. Because of the current financial problems all those programs and the psychological

support that is offered by the State to the victims attracts little publicity and is not widely known.”

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### III NATIONAL POLICY REGARDING CHILDREN

i. The issue that has been currently under political consideration in Greece is the phenomenon of “bullying” in schools, which has also been a current issue within the EU. The Network against Violence in School<sup>81</sup> has defined bullying as “a situation during which intentional, unprovoked, systematic and repeated violence and aggressive behavior take place aiming at enforcement, oppression and causing bodily and mental pain to students from fellow students in and out of school”<sup>82</sup>.

<sup>81</sup> The Network against Violence in School is a group governmental and non-governmental institutions and institutes aiming to prevent and face violence in school <http://www.antibullyingnetwork.gr/>

<sup>82</sup> Available at [http://www.antibullyingnetwork.gr/page.aspx?id=104&footer\\_menu=297&parent\\_id=268](http://www.antibullyingnetwork.gr/page.aspx?id=104&footer_menu=297&parent_id=268) (last visited 21/9/2012) Translation by the author

According to a research conducted by VPRC during 13-29 February 2012 among 700 students in primary and junior high schools in Greece, bullying is mainly verbal. 88% is expressed by insults, 67% by spread of negative comments or rumors, but only 11% of children admitted that they have been involved in bullying as victimizers<sup>83</sup>.

Several initiatives have been launched for the solution of this problem either by governmental or non-governmental and independent institutes. The Ombudsman of the Child after a series of discussions with teachers and students aiming at collecting good practices from primary and junior high schools on the prevention and facing of bullying has suggested to the Ministry of Education relevant measures. Acting upon to these suggestions the Ministry of Government issued a circular in February 2011 addressing units of secondary education.

In this circular the Ministry of Education presented the factors that can contribute to the reduction of school violence and asked school authorities to abide by them. Good school communication environment of dialogue and trust between parents and children, development of schools council as a means for students to be heard, monitoring and protection of school community from any threat of violence/ or acts of violence, informing students about school community's rights are indicated as effective measures against bullying. In addition, establishment of hearing procedures when violence incidents occur and appointment of teachers-counselors, sanctions after hearing, enforcement of students' role in conflicts resolution process and organization of team activities between students are also recommended as good practices against school violence. Finally, periodical communication with parents aiming at their awareness and cooperation among the school community can bear fruits in the battle against school violence<sup>84</sup>.

The Ministry of Education is also planning the establishment of Observatory of School violence whose goals will be to accept reports and record incidents of school violence, enabling this way the coordination of education institutions regarding the confrontation of bullying<sup>85</sup>.

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<sup>83</sup> "7 out of 10 students have experienced phenomena of violence" available at <http://www.newsbeast.gr/greece/arthro/314035/fainomena-vias-ehoun-vioseis-7-stous-10-mathites/> (last visited 21/9/2012)

<sup>84</sup> Ministry of Education, Circular ΑΔΑ:4ΑΛΘ9-5Ζ, 14/2/2011, Marousi

<sup>85</sup> "The Ministry of Education prepares an Observatory for School violence", *Kathimerini*, 21/9/2012

Finally, the Network against Violence in School should be particularly mentioned in this section. It was founded in 2010 by state and non-governmental institutions. To name but a few, the Association for the Psychosocial Health of Children and Adolescents, the Ministry of Education, the General Secretariat, the Ombudsman of the Child, the Marangopoulos Foundation of Human Rights, the University of Athens Primary Education Faculty and others. The Network seeks, among other goals, to prevent and confront school violence, to promote scientific research on this topic, to inform children, parents and the whole society on bullying and to educate teachers and other professionals that are involved with children and adolescents<sup>86</sup>.

ii. Non-governmental organizations and the State have tried to raise public's awareness of children's sexual abuse and exploitation using several methods. Campaigns, which are mostly used by NGOs, and seminars addressing mainly the school society are some of the awareness tools.

As for the State, its campaign is either launched by ministries or by the local authorities. Greece participates in the Parliamentary dimension of the campaign of the Council of Europe (CoE) titled "ONE in FIVE", which aims at the strengthening of the cooperation between national parliaments and the Parliamentary Assembly of the CoE in their battle against children's sexual violence.

For instance, the municipality of Heraklion in Crete organized in September, 5th 2012 a day-conference to inform teachers and officers of civil services about these issues. In particular participants had the opportunity to learn practices about how to raise sensitivity on these issues and how to deal with them<sup>87</sup>.

Another state body, the National Secretariat of Youth, founded in 2001 the National Observatory for Child's Rights whose field of act is quite wide as it concerns in general the protection of the child. The National Observatory, which now has suspended its function, visited schools in 2008 in order to inform children about sexual education.

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available at [http://www.kathimerini.gr/4dcgi/\\_w\\_articles\\_kathremote\\_1\\_17/09/2012\\_461644](http://www.kathimerini.gr/4dcgi/_w_articles_kathremote_1_17/09/2012_461644) (last visited 21/9/2012)

<sup>86</sup> [http://www.antibullyingnetwork.gr/page.aspx?id=97&main\\_menu=289&parent\\_id=161](http://www.antibullyingnetwork.gr/page.aspx?id=97&main_menu=289&parent_id=161)

<sup>87</sup> Greek Republic, Heraklion, Municipality of Heraklion, Deputy Mayor for Social Welfare Policy and Solidarity, Serial No.: 135009 / 12.08.22, Heraklion, 08.20.2012

To sum up, in the process of raising public's awareness state and non-state institutions are involved but non-governmental institutions seem to be more active addressing a wider public. Not only do they seek to inform the public in general but their actions are especially targeted to the school society in order to be more efficient.

iii. Statistics on sexual exploitation of children would be very enlightening on the situation in Greece, if they were available. Unfortunately, as Greece admitted in its 2nd and 3rd reports submitted combined to the Committee on the Rights of Child in 2009 "there are no reliable statistical data regarding the percentage of cases of abuse-neglect of children in the Greek family" due to the lack of a national report system<sup>88</sup>. Law n. 2909/2001 created the National Observatory on the Rights of Children, which was supposed among others to collect data about issues concerning children and their rights<sup>89</sup>. Its implementation law was issued in 2005 and it took some action in 2008. Nevertheless, its function stagnated and efforts for the Observatory to be reactivated were taken no earlier than May 2012<sup>90</sup>.

Stefanos Alevizos, a psychologist working for the NGO the Child's Smile has elaborated on the reasons why sexual abuse is not being reported<sup>91</sup>. According to him, children's sexual abuse has been a taboo issue and the offender usually belongs to the close family of the victim and therefore the incident is not being reported. The family also chooses not to report sexual abuse so as the child not be stigmatized. Another reason for sexual abuse not being reported is that the family prefers to forget the incident considering it as a therapy method. Only extreme incidents and those that end up in hospitals are being reported, as Mr. Alevizos mentioned.

However, statistics gathered by *The Child's Smile* can give the reader a hint but hardly can they be considered as indicative of the situation in Greece<sup>92</sup>. These data have been collected by the several services that the Child's Smile provides.

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<sup>88</sup> CRC/C/GRC/2-3, Second and third periodic reports of State parties due in 2000, Greece, §234

<sup>89</sup> Law 2909/2001 art.4 §1a

<sup>90</sup> <http://www.e-dimosio.gr/agora-ergasias/%CF%83%CF%84%CE%B5%CE%BB%CE%AD%CF%87%CF%89%CF%83%CE%B7-%CF%84%CE%BF%CF%85-%CE%B5%CE%B8%CE%BD%CE%B9%CE%BA%CE%BF%CF%8D-%CF%80%CE%B1%CF%81%CE%B1%CF%84%CE%B7%CF%81%CE%B7%CF%84%CE%B7%CF%81%CE%AF/> (Last visited 10/9/2012)

<sup>91</sup> Information taken after interview with the psychologist in September 2012, 3rd

<sup>92</sup> These statistics were provided by the Child's Smile after interview with the psychologist Stefanos Alevizos. However some of them can be found on the internet and footnotes have been inserted to point out so.

The Child's Smile has been operating since 1997 a telephone helpline (1056), which receives reports of children's abuse and provides counseling to children, parents and teenagers.

2007

According to the statistics gathered by this service, in 2007 there were abuse reports concerning 1380 children. 32 concerned sexual abuse of children (2%), out of which 23 girls and 9 boys were specified as victims.

Table 1

Kind of Abuse	Boys	Girls	Unidentified Sex	Total
Body abuse	234	189	91	494(36%)
Sexual abuse	9	23		32(2%)
Neglect/abandonment	298	275	155	728(53%)
Coercion to begging	13	19	12	44(3%)
Coercion to prostitution (people under 18 years old)		16		16(1%)
Psychological/Sentimental abuse	29	31	6	66(5%)
Total	538(42%)	553(40%)	244(18%)	1337 (100%)

Figure 1

2008

In 2008 there was a small increase in reports of sexual abuse. In fact the total of children's sexual abuse was doubled to 4%, out of which 11 children were boys, 41 girls, while there were 5 incidents reported where child's sex was not specified.

Table 2

Kind of Abuse	Boys	Girls	Unidentified Sex	Total
Body Abuse	292	211	75	578(43%)
Sexual Abuse	11	41	5	57(4%)
Neglect/Abandonment	261	224	108	593(44%)
Coercion to begging	13	22		35(3%)
Coercion to prostitution (people under 18 years old)		25	3	28(2%)
Psychological/Sentimental abuse	23	21	2	46(4%)
Total	600(45%)	544(40%)	193(18%)	1337(100%)

Figure 2

2009

In 2009 the total of children's sexual abuse dropped to 2007 level, namely to 2%. 8 boys and 17 girls were sexually abused in 2009.

Table 3<sup>93</sup>

Kind of Abuse	Boys	Girls	Unidentified Sex	Total
Body abuse	245	208	74	527(43%)
Sexual Abuse	8	17		25 (2%)
Neglect/Abandonment	255	214	141	610(50%)

<sup>93</sup> [http://www.hamogelo.gr/files/PDF/statistika\\_2009/kataggelies2009.pdf](http://www.hamogelo.gr/files/PDF/statistika_2009/kataggelies2009.pdf) , p.2 (last visited 8/9/2012)



Coercion to begging	5	2	8	15(1%)
Coercion to prostitution (people under 18 years old)	1	15	5	21(2%)
Psychological/Sentimental abuse	1	16	4	21(2%)
Total	515(42%)	472 (39%)	232(19%)	1219(100%)

Figure 3

2010

In 2010 the telephone helpline received calls about 912 children reporting their abuse, of which 31 related to sexual abuse, representing 3% in total.

Table 4<sup>94</sup>

Kind of Abuse	Boys	Girls	Unidentified Sex	Total
Body abuse	200	146	43	389(43%)
Sexual abuse	15	16		31 (3%)
Neglect/Abandonment	187	163	95	445(49%)
Coercion to begging	8	8	11	27(3%)
Coercion to prostitution (people under 18 years old)		3		3(0%)

<sup>94</sup> [http://www.hamogelo.gr/files/PDF/statistika\\_2011/kataggelies2011.pdf](http://www.hamogelo.gr/files/PDF/statistika_2011/kataggelies2011.pdf) , p.3 (last visited 8/9/2012)

Psychological/ Sentimental abuse	7	10		17(2%)
Total	417(46%)	346(38%)	149(16%)	912(100%)

Figure 4

2011

In 2011 the total of children's sexual abuse was decreased in half reaching 1,5%. 4 boys and 11 girls were victims of sexual abuse that year.

Table 5<sup>95</sup>

Kind of Abuse	Boys	Girls	Unidentified Sex	Total
Body abuse	185	183	63	431(51%)
Sexual abuse	4	11		15 (1.5%)
Neglect/Abandonment	145	135	74	354(42%)
Coercion to begging	11	14	1	26(3%)
Coercion to prostitution (people under 18 years old)		2		2(0.5%)
Psychological/ Sentimental abuse	7	9		16(2%)
Total	352(42%)	354(42%)	138(16%)	844(100%)

Figure 5

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<sup>95</sup> In 2011 the total of children's sexual abuse was decreased in half reaching 1,5%. 4 boys and 11 girls were victims of sexual abuse that year.

2012

As for 2012 statistics are available only for the first half of the year, namely from 1/1/2012 to 30/6/2012. Reports made to the telephone helpline of the NGO concerned 362 children, of which 3 were sexually abused.

Table 6<sup>96</sup>

Kind of Abuse	Boys	Girls	Unidentified Sex	Total
Body Abuse	65	55	19	139(38%)
Sexual Abuse		3		3(1%)
Neglect/ Abandonment	83	69	37	189(52%)
Coercion to begging	2	6	5	13(4%)
Coercion to prostitution (people under 18 years old)		2		2(0.5%)
Psychological/ Sentimental abuse	3	13		16(4.5%)
Total	153(42%)	148(41%)	61(17%)	362(100%)

Figure 6

The Child's Smile also operates a counseling service which supports, kids, parents and teachers in crucial periods of their lifetime. According to the problems for which people have addressed the counseling service the follow data have been collected.

2007

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<sup>96</sup> [http://www.hamogelo.gr/files/PDF/statistika\\_2012/kataggelies2012a.pdf](http://www.hamogelo.gr/files/PDF/statistika_2012/kataggelies2012a.pdf) , p.3 (last visited 8/9/2012)

In 2007 1836 people addressed the counseling service and the problems they faced are as presented in the following table. Among the incidents reported only 5%, namely 92 incidents, had to do with sexual harassment or abuse of people aged less than 18 years old.

Problems	Incidents
Relations in the family	377 (21%)
Relations in peers	123 (7%)
Death in the family	72 (4%)
Divorce in the family	86 (5%)
School problems/school adaptation	115 (6%)
Behavioral problems	471 (26%)
Problems of sexual harassment-abuse of people aged less than 18 years old	92 (5%)
Raise problems	45 (2%)
Health problems	40 (2%)
Psychological problems	45 (2%)
Other	370 (20%)
Total	1836

2008

In 2008 the percentage of incidents related to sexual harassment remained stable.

Problem	Incidents
Relations in the family	571 (29%)
Relations with peers	133 (7%)
Death in the family	114 (6%)

Divorce in the family	115 (6%)
School problems/ School adaptation	115 (6%)
Behavioral problems	421 (21%)
Problems of sexual harassment-abuse of people aged less than 18 years old	94 (5%)
Suicidal Ideation	8 (1%)
Disorders	59 (3%)
Internet use	15 (1%)
Other	321 (15%)
Total	1966

2009

The percentage remained the same for 2009 as well (5%), but the number of victims in absolute number increased.

Table 9<sup>97</sup>

Problem	Incidents
Relations in the family	1327(40%)
Relations with peers	217 (7%)
Death in the family	166 (5%)
Divorce in the family	336 (10%)
School problems/ School adaptation	192 (6%)
Behavioral problems	396 (12%)
Problems of sexual harassment-abuse of people aged less than 18 years old	164 (5%)

<sup>97</sup> [http://www.hamogelo.gr/files/PDF/statistika\\_2009/symvouleftiki2009.pdf](http://www.hamogelo.gr/files/PDF/statistika_2009/symvouleftiki2009.pdf) (last visited 10/9/2012)

Suicidal Ideation	29 (1%)
Disorders	89 (3%)
Internet use	223 (7%)
Other	139 (4%)
Total	3278

2010

Incidents of sexual harassment/abuse were slightly increased by 2% reaching 7% of the incidents reported.

Table 10<sup>98</sup>

Problems	Incidents
Relations in the family	1286 (42%)
Relations with peers	169 (5%)
Death in the family	199 (6%)
Divorce in the family	372 (12%)
School problems/School adaptation	91 (3%)
Behavioral problems	190 (6%)
Problems of sexual harassment-abuse of people aged less than 18 years old	270 (7%)
Suicidal Ideation	23 (1%)
Disorders	163 (3%)

<sup>98</sup> [http://www.hamogelo.gr/files/PDF/statistika\\_2010/symvouleftiki2010.pdf](http://www.hamogelo.gr/files/PDF/statistika_2010/symvouleftiki2010.pdf) (last visited 10/9/2012)

Internet use	33 (1%)
Other	316 (11%)
Total	3112

2011

In 2011 the number of incidents related to sexual harassment/ abuse was doubled to 10%.

Table 11<sup>99</sup>

Problem	Incidents
Relations in the family	845 (32%)
Relations with peers	179 (7%)
Dealing with loss (death-divorce in the family)	412 (15%)
School adaptation	107 (4%)
Behavioral problems	460 (17%)
Problems of sexual harassment-abuse of people aged less than 18 years old	261 (10%)
Suicidal Ideation	33 (1%)
Disorders	148 (6%)
Internet use	43 (1%)
Other	192 (7%)
Total	2680

2012

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<sup>99</sup> [http://www.hamogelo.gr/files/PDF/statistika\\_2011/symvouleftiki2011.pdf](http://www.hamogelo.gr/files/PDF/statistika_2011/symvouleftiki2011.pdf) (last visited 10/9/2012)

In 2012 8,5% of incidents reported concerned sexual harassment/abuse but it should be borne in mind that this percentage refers only to the first half of 2012.

Table 12<sup>100</sup>

Problem	Incidents
Relations in the family	431 (37%)
Relations with peers	120 (10%)
Dealing with loss (death-divorce in the family)	154 (13%)
School adaptation	26 (2%)
Behavioral problems	112 (9,5%)
Problems of sexual harassment-abuse of people aged less than 18 years old	102 (8,5%)
Suicidal Ideation	45 (4%)
Disorders	81 (7%)
Internet use	30 (2,5%)
Other	75 (6,5%)
Total	1176

Finally, the NGO The Child's Smile has shelters where children whose family environment has been considered by the authorities inappropriate to be raised in, are accommodated. Sexual abuse is one reason for which children have been taken away from their families.

2007

In 2007 there were 220 children hosted in the NGO's shelters and only 1% of them were hosted for reasons of sexual abuse. In absolute numbers only one boy was victim of sexual abuse and for this reason taken away from his family. It should be mentioned that 3% (6

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<sup>100</sup> [http://www.hamogelo.gr/files/PDF/statistika\\_2012/symvouleftiki2012a.pdf](http://www.hamogelo.gr/files/PDF/statistika_2012/symvouleftiki2012a.pdf) (last visited 10/9/2012)



children) of the children hosted in the shelters aged more than 18 years old, but the age of the victim of sexual abuse cannot be specified by the data provided.

Table 13

Reasons for children being hosted	Boys	Girls	Total
Child's Body abuse	10	12	22(10%)
Child's sexual abuse	1		1 (1%)
Neglect/ Abandonment	64	43	107(49%)
Social reasons	43	29	72(32%)
Other	10	8	18(8%)
Total	128(58%)	92(42%)	220

Figure 7

2008

In 2008 270 children in total were accommodated at the NGO's shelters. 4% of them aged more than 18 years old. The number of children victims of sexual abuse was doubled to 2%. 5 children, one boy and 4 girls faced sexual abuse.

Table 14

Reasons for children being hosted	Boys	Girls	Total
Child's body abuse	16	14	30(11%)
Child's sexual abuse	1	4	5(2%)
Neglect/ Abandonment	109	76	185(68%)

Social Reasons	18	13	31(11%)
Trafficking	1	1	2(1%)
Other	11	6	17(7%)
Total	156(58%)	114(42%)	270

Figure 8

2009

In 2009 the percentage of children victims of sexual abuse was the same as in 2008, 2%. In absolute numbers 6 children (all of them girls) out of 299 hosted in the shelters were sexually abused. 5%, namely 16, of the children hosted aged more than 18 years old.

Table 15<sup>101</sup>

Reasons for children being hosted	Boys	Girls	Total
Child's body abuse	16	14	30(10%)
Child's sexual abuse		6	6 (2%)
Neglect/ Abandonment	112	80	192(64%)
Social Reasons	29	22	51(17%)
Other	12	8	20(7%)
Total	169(57%)	130(43%)	299

Figure 9

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<sup>101</sup> [http://www.hamogelo.gr/files/PDF/statistika\\_2009/filoksenia2009.pdf](http://www.hamogelo.gr/files/PDF/statistika_2009/filoksenia2009.pdf) , p.2-3(last visited 10/9/2012)

2010

During 2010 there were 267 children being hosted in the shelters, out of which 16 aged more than 18 years old. The percentage of children-victims of sexual abuse remained stable at 2%. 6 children in total, 1 boy and 5 girls were sexually abused.

Table 16<sup>102</sup>

Reasons for children being hosted	Boys	Girls	Total
Child's body abuse	19	10	29(11%)
Child's sexual abuse	1	5	6(2%)
Neglect/ Abandonment	99	76	175(66%)
Social Reasons	24	17	41(15%)
Other	7	9	16(6%)
Total	150(56%)	117(44%)	267

Figure 10

2011

In 2011 the number of children hosted in the shelters of the Child's Smile was slightly decreased to 261. 7% of them aged more than 18 years old, while the percentage of children victims of sexual abuse rose slightly up to 3%.

Table 17<sup>103</sup>

<sup>102</sup> [http://www.hamogelo.gr/files/PDF/statistika\\_2010/filoksenia2010.pdf](http://www.hamogelo.gr/files/PDF/statistika_2010/filoksenia2010.pdf) , p.2-3(last visited 10/9/2012)

<sup>103</sup> [http://www.hamogelo.gr/files/PDF/statistika\\_2011/filoksenia2011.pdf](http://www.hamogelo.gr/files/PDF/statistika_2011/filoksenia2011.pdf) , p.2(last visited 10/9/2012)

Reasons for children being hosted	Boys	Girls	Total
Child's body abuse	15	12	27(10%)
Child's sexual abuse		6	6 (3%)
Neglect/ Abandonment	109	79	118(72%)
Social Reasons	10	11	21(8%)
Other	12	7	19(7%)
Total	146(56%)	115(44%)	261

Figure 11

2012

The data about 2012 refer only to the first half of the year (1/1/2012-30/6/2012). During this period 263 children were accommodated in the shelters, out of which 24 aged above 18 years old. Among them there were only 6 girls-victims of sexual abuse.

Table 18<sup>104</sup>

Reasons for children being hosted	Boys	Girls	Total
Child's body	17	11	28(11%)

<sup>104</sup> [http://www.hamogelo.gr/files/PDF/statistika\\_2012/filoksenia2012a.pdf](http://www.hamogelo.gr/files/PDF/statistika_2012/filoksenia2012a.pdf) , p.2(last visited 10/9/2012)

abuse			
Child's sexual abuse		6	6 (2%)
Neglect/ Abandonment	102	80	182(69%)
Social Reasons	19	10	29(11%)
Other	11	7	18(7%)
Total	149(57%)	114(43%)	263

Figure 12

The following figure depicts the fluctuation of sexual abuse from 2007 until the first half of 2012 as a reason for children being hosted in the shelters of the Child's Smile. As it can be seen this reason fluctuates between 1% in 2007 and 3% in 2011, when it reached its peak. A stable increase of sexual abuse by 1% percent per year can also be noticed.

**Figure 13**

There are also data about children's sexual abuse gathered by the Institute of Child's Health<sup>105</sup> for a research project titled Balkan Epidemiological Study on Child Abuse and Neglect (B.E.C.A.N). This project, funded by the European Union, seeks to collect information and data about issues concerning violence within the family and abuse and neglect of children in the Balkans. The data collected so far were presented in a colloquium in Athens in September, 13-14th 2012. As far as Greece is concerned, researchers gathered data from children in the last grade of primary school, in the first class of junior high school and high schools and from their parents. The research concerned schools in Attica, Thessaloniki and Crete. Children's participation reached 67%, 71% and 79%, while parents' participation reached 79%, 66% and 52% in every class respectively. 1 out of 10 children has

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<sup>105</sup> The Institute of Child's Health was founded in 1965 and provides specialized prevention and public health action. It also conducts research and organizes educational events concerning children's health. For more information visit <http://www.ich.gr/el/>

been victim of sexual abuse during the last year, while this percentage increases during their whole childhood. It should be mentioned that the research confirmed once again the low rate of reports to the authorities of incidents of sexual or body abuse against children<sup>106</sup>.

**iv.** Private companies have taken several initiatives but NGOs are the main actor in the awareness campaign. In 2008 the NGO Umbrella participated in the campaign “Stop sex trafficking of children and young people” launched by the network ECPAT (End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes) in 2008. The campaign was sponsored by the Body Shop. On the occasion of this campaign The Body Shop in Greece organized in 2010 an event where lectures on the confrontation of children’s sexual abuse were given.

The Institute of Child’s Health has been quite active both researching issues regarding children and organizing seminars and other events to sensitize people about children’s problems. In January 12, 2012 it organized with an association from the countryside a day-conference whose topic was “Children’s Protection from Sexual Abuse and Exploitation”. This event was organized on the occasion of the CoE’s campaign ONE in FIVE.

Moreover, the Institute has been conducting a research about children’s sexual abuse in Balkans (Balkan Epidemiological Study on Child Abuse and Neglect -B.E.C.A.N) since 2009. The project is funded by the European Union and concerns violence within the family and abuse and neglect of children in the Balkans. Some results of this research were presented in an international colloquium organized by the Institute in September 13-14, 2012 in Athens. The exact title of the colloquium was “Inquiring child abuse and neglect in the Balkan and the world during crisis” Evidence-based Practice and Practice-based Evidence”.

Finally, the NGO The Child’s Smile take actions to raise people’s awareness of children’s sexual abuse but it addresses mainly the school society. In 2009 it established the Department of Information of Children, Parents and Teachers which organizes speeches to students, parents and teachers. Speeches, which involve interaction, take place in collaboration with the Ministry of Education and after invitation from the school society.

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<sup>106</sup> <http://ygeia.tanea.gr/default.asp?pid=8&ct=85&articleID=15512&la=1> (last visited 20/9/2012)

The range of topics is quite wide and as for abuse it covers not only sexual abuse but every kind of it.

v. Children can be represented in the law making process through several ways, either direct or indirect. Children are represented indirectly through NGOs, independent authorities or social services.

The Ombudsman of the Child<sup>107</sup> was created in 2003 as a special department of the Ombudsman of the Citizen, originally founded in 1998. The Ombudsman of the Child has set as goals the promotion and protection of children's rights. In this context it intervenes, most of the times after reports about children's rights violation, to protect children and restore the former situation. It monitors the application of international and national legislation regarding children, it informs people and discuss with other institutions. It also submits reports and suggestions related to children issues to state authorities.

It is through these reports that children are represented in the law making process. The Ombudsman of the Child after having discussed with children, received reports on their rights' violation and conducted research on these topics submits reports to the authorities suggesting changes or improvements in the national legislation and measures to confront risen problems. Sometimes, the Ombudsman is even invited to the incumbent commission of the Parliament in order to state their opinion on legislative issues about children.

For instance, in 2010 the Ombudsman of the Child handed to the Ministry of Education a report suggesting good practices for the confrontation of school violence, which were further incorporated in a circular of the Ministry to schools addressing secondary schools.

Additionally, the Ombudsman of the Child in an effort to approach children even more established in 2008 the Adolescent Consultants Team of the Ombudsman of the Child. It consists of 30 adolescents aged between 13 and 17 years and coming from all around Greece with 2-years tenure. There is also the Society of Adolescent Consultants consisting of the Team and other children that could not participate in the Team.

Another way via which children can express themselves in the law-making process is the notes that NGOs submit to the Parliament. NGOs also present their opinions to the responsible legislative committee after invitation. In 2010 the Network of the Child's Rights

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<sup>107</sup> More info can be found at <http://www.0-18.gr/>

and Parental Equality submitted to the Parliamentary Committee for Equality and Rights a memorandum about violence against children<sup>108</sup>. The memorandum pointed out deficiencies and gaps in the existent legislation about violence against children and therefore suggested measures so as violence within the family be combatted.

However, children can directly express themselves through two ways. The first one is the Adolescents Parliament and the other one the open government procedures. With regard to the first one, it is an educational program of the Parliament organized once a year since 1995. Students in the second class of the secondary education up to 20 years old from schools in Greece, Cyprus and Greek schools around the world are qualified as participants. The number of participants is 300 people, which equals the number of deputies in the National Parliament. Even though its main objective is the initiation and awareness of children with parliamentary and democratic principles, children can present both problems that their fellows face and problems in their prefectures.

Lastly, open government procedures have recently entered Greek political life and gave citizens the opportunity to state their opinions on legislative drafts and other policy initiatives as well as on assignments of public servants. Almost all draft legislative pieces are entered into an online platform prior to their submission in the Parliament and thus citizens have the opportunity to comment on them, suggest or even criticize them.

vi. The last few years active citizenship and NGOs have experienced a rapid growth in Greek society. A considerable number of NGOs is committed to children rights, the most important among them being: The Child's Smile, Umbrella, The Foundation for the Child and Family, the Network for Children's Rights and the NGOs Network for monitoring the application of the International Convention on the Child Rights. The action of most of them is not limited to issues related to children's sexual abuse and violation. It is also extended to other fields such as children's education and development, disappearances, poverty and health.

*The Child's Smile* (<http://www.hamogelo.gr/>), founded in 1995, has developed so far a wide network of actions to protect children. It provides shelter to children whose families have

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<sup>108</sup> The full text of the memorandum can be read in Greek here

[http://gonis.gr/index.php?pN=%CE%95%CE%BD%CE%B4%CE%BF%CE%BF%CE%B9%CE%BA%CE%BF%CE%B3%CE%B5%CE%BD%CE%B9%CE%B1%CE%BA%CE%AE\\_%CE%B2%CE%AF%CE%B1&txtWebPageID=51](http://gonis.gr/index.php?pN=%CE%95%CE%BD%CE%B4%CE%BF%CE%BF%CE%B9%CE%BA%CE%BF%CE%B3%CE%B5%CE%BD%CE%B9%CE%B1%CE%BA%CE%AE_%CE%B2%CE%AF%CE%B1&txtWebPageID=51)



considered inappropriate by the state for any reason to raise them and it supports materially and psychologically families who suffer from social and financial problems. It also acts in the health sector, helping children with health problems, while it has created mobile health units. Furthermore, it operates several helplines, one of them for disappeared children and another one for reporting incidents of violence against children. As for the disappeared children and children-victims of exploitation, the Child's Smile has created a specialized centre which cooperates with the authorities investigating disappearances and it offers psychological support to both parents and children.

*Umbrella* (<http://obrela.gr/>) is another NGO which specializes in issues of sexual abuse in general not only of children. Psychiatrists, psychologists, sociologists, legal practitioners and other scientists research and organize seminars on sexual abuse and mental problems.

*The Foundation for the Child and Family* (<http://www.childfamily.gr/en/>) was founded in 1997 by Marianna Vardinoyannis. It is an NGO with a Special Consultative Status at the Economic and Social Council of the United Nations. It acts exclusively to protect children's rights. More specifically, its activities are focused on a) the gradual reduction of the number of children-victims of abuse, deprivation, injustice, b) the development and strengthening of the family and social bonds aiming at the prosperity of children and families and c) the creation of ever-increasing opportunities for the multifaceted development of children and youth in the contemporary world<sup>109</sup>.

It also fights to combat human trafficking and illiteracy as well as it pursues to spread the culture of peace.

*The Network for Children's Rights* (<http://www.ddp.org.gr/>) was founded in 2004 having as its primordial object to promote children's rights both in Greece and in Europe. In particular, it pursues to spread the UN Convention for the Child's Rights and struggles for its implementation. It fights against children's discrimination and seeks to inform children for their rights and to raise society's awareness of these issues. Finally, it promotes access to education of ethnically or socially marginalized groups<sup>110</sup>.

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<sup>109</sup> [http://www.childfamily.gr/en/who\\_we\\_are.cfm](http://www.childfamily.gr/en/who_we_are.cfm)

<sup>110</sup> <http://www.ddp.org.gr/%CF%80%CE%BF%CE%B9%CE%BF%CE%B9-%CE%B5%CE%B9%CE%BC%CE%B1%CF%83%CF%84%CE%B5/%CF%80%CE%BF%CE%B9%CE%BF%CE%B9-%CE%B5%CE%AF%CE%BC%CE%B1%CF%83%CF%84%CE%B5/>

Finally, the *NGOs Network for monitoring the application of the International Convention on the Child Rights* was founded in 2009 to monitor the application of the CRC in Greece. As for instruments of national legislation on children's rights, the Network also monitors whether they have been put into force and suggests measures to the State for a more effective application of the relevant legislation<sup>111</sup>.

## IV OTHER

Two are the main issues that currently torment Greece: the renowned economic crisis and the illegal immigrants pouring into the borders. These issues not only have social and economic impacts, but also legal and political ones, sometimes deterring the implementation of a legal framework which could effectively protect children against sexual abuse.

Although one might argue with the view that economic crisis has actually played a role in the production of sufficient legislative work - thus blocking the effective protection of sensitive groups of population, as are the unemployed mothers, elder people and minors -, one would eventually be surprised to see how the crisis has started to destroy the social fabric.

Greece has been hit by the economic crisis in a really harsh way. The damage which has been caused, and which is about to be caused, has irreversible consequences. One of the social groups which are in the forefront is the youngsters. Young people may seek other ways to express their rage for the situation, using drugs, pick pocking, or even getting drunk and committing violent crimes.

Families which have been hit by the crisis are no longer in position of providing a safe environment for the proper raise of a child, not mentioning that sometimes it is the family itself which pushes its children to find financial solutions of a dubious nature; even if this means that the latter have to sexually dispose their bodies for a few Euros.

In some countries, like India, trafficking is initiated by the parents themselves (especially the father, who may act as a pimp for his own daughter). This phenomenon, unfortunately, although not so common in Greece, it has nevertheless started to rise in some degraded areas and has worsened due to the crisis.

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<sup>111</sup> NGOs network for children's rights, Eleftherotypia (Greek newspaper), 5/11/2009, <http://www.enet.gr/?i=news.el.article&id=98762>

Economic problems may also result in the increase of domestic violence.

As the standard of living gets worse, families belonging to the lower social layers will deal with problems of drugs, alcoholism, and lack of education. They may sometimes misbehave and abuse their children physically, or even sexually.

The other main issue which troubles Greek society, and is also related to the economic crisis, is the problem of illegal immigration. This problem has taken huge dimensions in Greece. Leaking borders give access to hordes of desperate immigrants, who seek either a better future, or a way to resort to illegal activities which will bring them money.

Again the problem of trafficking arises, this time in combination with prostitution and fake passports and/or identities for minors.

Depending on the goal he wants to achieve an illegal immigrant will enter the country appearing to be older or younger than he actually is. In the case of the pimp who wants to import young girls in the country, he will make sure to equip them with forged passports in which they will appear over 18 years old, when they actually are around 16 or even 14-15. On the contrary, in the case of the delinquent who wants to engage in illegal activities, the latter will try to appear younger to his documentation, in order to be tried –if ever arrested – at the juvenile criminal courts.

An interesting observation regarding the relation between illegal immigration and criminality is the following:

In the past, the majority of rape incidents, promoting prostitution incidents, and human trafficking incidents, were attributable to foreigners, and mostly illegal immigrants. Nowadays, it seems that an important number of Greeks involved in such activities has started to make its appearance.

Furthermore, economic crisis has so much affected the social fabric that criminality has also changed form. Most illegal immigrants will not rape a girl, they would rather rob her. It is not longer a matter of sexual pleasure; it is a matter of pure survival. The form of abuse has slightly changed, and the criminal focus has moved from the sex industry to the drug and weapons industry (people do not have money to buy sexual pleasure). On the contrary pornography industry flourishes, and many children have been abused and depicted in sexual and violent scenes.

Internet is free and this allows to the industry to earn a lot of money with a minimum cost.

Last but not least, economic crisis along with the illegal immigration phenomenon and the general increase of criminality has resulted in a rising number of children been kidnapped, mostly for organ or human trafficking.

All the aforementioned issues are in fact a matter of national policy and have both legal and political aspects. Being focused on the economic side of things Greece is still trying to set its priorities. With people dying and a clear threat of bankruptcy to deal with, the matter of children's abuse appears to have moved to the background. Nevertheless, that does not mean that the problem of minors been abused is ignored or neglected. As it has already been elaborated, Greece has taken important steps towards the improvement of the legal protection of children against sexual abuse. It has still; however, a mountain to climb and the present political background does not make this work easy.

## V CONCLUSION

It has become clear that Greece is definitely among the Council of Europe members who are trying to comply with the European directives and international regulations - even if not always successfully. It also happens to have a self-standing national legislation which sometimes appears to provide children with an even broader protection.

We saw how the system of legal protection is structured. Briefly reminding:

There are some European obligations deriving from certain European Directives that Greece needs to respect, like the Directive 2011/92/EU which combats sexual abuse; then there are the Constitutional provisions which protect childhood in general (article 21, 96 §3); international obligations arising from international conventions come next (see Lanzarote Convention).

National laws are the last piece of the puzzle which completes the overall legal protection of minors. In specific, as far as the substantive law is concerned, the Greek Penal Code includes a series of provisions that in some cases protect children from sexual abuse even more effectively than the international conventions do. E.g the article 348A of the Penal Code offers a wider protection, i.e. a wider scope, than the Lanzarote Convention.

Regarding the procedural law, the system of criminal procedure in Greece appears particularly favorable for minors. We saw through several examples (eg. exception from public hearing for minors, benefit of doubt, experts accompanying the child, prosecutor's

choice not to press charges in case this is to the detriment of the child, etc.) that the whole system of justice takes into very serious account child's sensitive psychology.

It is true that Greece has still a long way to go, since it has not ratified all the international conventions and has not conformed completely to some of its European obligations. But, this is hopefully not at the expense of the child, since its national laws may protect even under stricter terms children against sexual exploitation (systematic interpretation of the articles 339,342, 337, 347, 345, 351§ 6, 349, 348 B, 351§ 4, 348A of the Greek Penal Code).

Last, but not least, and rather the most important of all, Greece may appear slower than other countries regarding procedural matters, but makes important efforts to ameliorate its present system, and usually implements soon enough most of the international and European directions. Additionally, its national policy takes even a step further, by promoting campaigns in order to raise public awareness. An utmost relevant example is the active participation of Greece to the Council of Europe "ONE IN FIVE" campaign. Nongovernmental organizations are, also, there to support the overall efforts, visiting schools and trying to fight against sexual abuse.

One factor that sadly gets in the way of the effective protection of children is the fact that sexual abuse in Greece is a taboo issue. Therefore, as it has already been explained, there are not a lot of recorded incidents and this does not help the fight against these detestable crimes. The real number of children's sexual abuse is unknown, and this becomes apparent if someone resorts to the Help Lines' records or the internet forums. There we will come across a lot of unrecorded and "buried" incidents, the majority of which, unfortunately, are incidents of sexual abuse inside the family (a drunken uncle, a family's friend, someone who has destroyed once and for all the childhood innocence, and has not been punished for his actions).

We have to overcome this taboo if we want to build a safe future for children. We have to be firm; crimes against children have always a double cost, because they occur at the point where the child shapes its character, and for this reason they have a traumatic effect in child's sensitive psychology, which in most cases will never go away.

European countries should gather their forces towards this important mission, and bear always in mind that the enemy is common; only with concerted and long-term efforts we will stand a chance to defeat this enemy, only with patience and persistence we will have the chance to give children a better future.

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**National Researchers:**

Theodora Castan

Niamh Collins

Niamh Cross

Miranda Egan Langley

Claire Finnegan

Christina O'Byrne

Katharina O'Cathaoir

Niamh O'Connell

**National Advisers:**

Catherine McGauran

Saoirse Molloy

**National Academic Adviser:**

Patricia Brazil

**National Coordinator:**

Áine Groogan

## I INTRODUCTION

### 1 GENERAL

#### *Equal Rights*

i. Article 40.1 of the Irish Constitution provides for equality before the law. It states that, “All citizens shall, as human persons, be held equal before the law.” After this main equality provision, there are two distinct pieces of legislation in place in Ireland that specifically prohibit discrimination when it occurs. These are the Employment Equality Acts 1998-2011<sup>1</sup> and the Equal Status Acts 2000-2011<sup>2</sup>, which outlaw discrimination in employment, vocational training, advertising, collective agreements, and the provision of goods and services. Under the equality legislation discrimination based on any one of 9 grounds is unlawful, which are as follows:

- Gender
- Civil status
- Family status
- Sexual orientation
- Religion
- Age (does not apply to a person under 16)
- Disability
- Race
- Membership of the Traveller community.<sup>3</sup>

Analysis of the *QNHs* Equality Module entitled ‘The Experience of Discrimination in Ireland’ states that ‘discrimination takes place when one person or a group of persons are treated less favourably than others because of their gender, marital status, family status, age, disability, ‘race’ – skin colour or ethnic group, sexual orientation, religious belief, and/or membership of the Traveller community.’<sup>4</sup> In examining the presence of discrimination in

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<sup>1</sup> <http://www.irishstatutebook.ie/1998/en/act/pub/0021/index.html>, accessed on the 07/July 2012

<sup>2</sup> <http://www.irishstatutebook.ie/2000/en/act/pub/0008/index.html>, accessed on the 07/July/2012

<sup>3</sup> <http://www.irishstatutebook.ie>, retrieved on the 07/July 2012

<sup>4</sup> HELEN RUSSELL, EMMA QUINN, REBECCA KING O’RIAIN and FRANCES MCGINNITY, 2008



Ireland, it is necessary to assess the current position of individuals being treated less favourably due to their association with each of these groups.

## Gender

In Ireland, according to recent research,<sup>5</sup> women are more likely than men to feel they have been discriminated against at work. These results are consistent with analyses of working conditions and labour market experiences which show that women are disadvantaged relative to men in relation to pay<sup>6</sup> and occupational positions.<sup>7</sup>

While overall, there is no difference in the proportion of women and men reporting discrimination, women were much more likely to report discrimination on marital and family status grounds and, to a lesser extent, on the gender ground. In general, women will be more likely to say they have experienced work-related discrimination than men.<sup>8</sup>

## Civil status

Research shows that the highly educated are more likely to report experiencing discrimination.<sup>9</sup> In terms of looking for work, it is the low educated who have the highest raw rate of discrimination, at 8.5 per cent, in accordance with the fact that those with a low education will have greater difficulties in accessing employment and therefore, a higher unemployment rate.<sup>10</sup>

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Analysis of the QNHS Equality Module carried out by, entitled **'The Experience of Discrimination in Ireland'** Copyright is jointly held by The Equality Authority and The Economic and Social Research Institute, Dublin ISBN: 0 7070 0264 8

<sup>5</sup> O'CONNOR, P., 1996. "Organisational Culture as a Barrier to Women's Promotion", *The Economic and Social Review*, Vol. 27, No. 3; FAHEY, T., H. RUSSELL and E. SMYTH, 2000. "Gender Equality, Fertility Decline and Labour Market Patterns among Women in Ireland" in B. Nolan, P.J. O'Connell and C.T. Whelan (eds.), *From Bust to Boom?: The Irish Experience of Growth and Inequality*, Dublin: IPA/ESRI.

<sup>6</sup> BARRETT, A., T. CALLAN, A. DORIS, D. O'NEILL, H. RUSSELL, O. SWEETMAN and J. McBRIDE, 2000. *How Unequal? Men and Women in the Irish Labour Market*, Dublin: Oaktree Press in association with The Economic and Social Research Institute.

RUSSELL, H. and B. GANNON, 2002. "The Gender Wage Gap in Ireland", *Impact Evaluation of the European Employment Strategy in Ireland*, Dublin: Department of Enterprise, Trade and Employment.

<sup>7</sup> O'CONNOR, P., 1996. "Organisational Culture as a Barrier to Women's Promotion", *The Economic and Social Review*, Vol. 27, No. 3; FAHEY, T., H. RUSSELL and E. SMYTH, 2000. "Gender Equality, Fertility Decline and Labour Market Patterns among Women in Ireland" in B. Nolan, P.J. O'Connell and C.T. Whelan (eds.), *From Bust to Boom?: The Irish Experience of Growth and Inequality*, Dublin: IPA/ESRI.

<sup>8</sup> 'The Experience of Discrimination in Ireland' *et al*, 2008

<sup>9</sup> IBID

<sup>10</sup> O'CONNELL, P.J. and H. RUSSELL, 2005. *Equality at Work? Workplace Equality Policies, Flexible Working Arrangements and the Quality of Work*, Equality Research Series, Dublin: The Equality Authority.

## The Unemployed

The unemployed are not currently covered by equality legislation but they emerge clearly from a 2008 study, as a group particularly vulnerable to discrimination, showing that 29 per cent had experienced some form of discrimination in the previous two years.<sup>11</sup>

### Family status

Lone parents face a risk of discrimination which is particularly concentrated within the services domain, with housing/accommodation, transport and other public services standing out as contexts in which lone parents are most likely to experience discrimination.<sup>12</sup>

Separated people perceive the highest raw risk of any discrimination among the marital status group. Almost one-third of those who experienced discrimination among this group reported that the experience had a serious impact on them. Married people are less likely to experience discrimination in shops/pubs/restaurants, financial services and housing than single people.<sup>13</sup>

### Sexual orientation

Same-sex sexual activity was decriminalised in 1993.<sup>14</sup> Discrimination on the basis of sexual orientation is outlawed by the Employment Equality Act, 1999, and the Equal Status Act, 2000. The Prohibition of Incitement to Hatred Act, 1989<sup>15</sup> outlaws incitement to hatred based on sexual orientation. Section 37 of the Employment Equality Act, does however allow religious organisations, medical institutions or educational institutions an exemption

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<sup>11</sup> RUSSEL *et al*, 2008, 'The Experience of Discrimination in Ireland'.

<sup>12</sup> IBID

<sup>13</sup> IBID

<sup>14</sup> This was the result of a campaign by Senator David Norris and the Campaign for Homosexual Law Reform which led to a ruling in 1988 that Irish laws prohibiting homosexual activities were in contravention of the European Convention on Human Rights. In 1983 David Norris took a case to the Supreme Court seeking to challenge the constitutionality of these laws but was unsuccessful. In its judgement (delivered by a 3–2 majority) the court referred to the "Christian and democratic nature of the Irish State" and argued that criminalisation served public health and the institution of marriage. In 1988 Norris took a case to the European Court of Human Rights to argue that Irish law was incompatible with the European Convention on Human Rights. The court, in the case of Norris v. Ireland,<sup>14</sup> ruled that the criminalisation of homosexuality in the Republic violated Article 8 of the Convention, which guarantees the right to privacy in personal affairs. The Oireachtas (Irish parliament) decriminalised homosexuality five years later.

<sup>15</sup> "Prohibition of Incitement to Hatred Act, 1989". Irishstatutebook.ie, accessed on the 07/July 2012

on employment grounds.<sup>16</sup> Groups such as the Irish Congress of Trade Unions, the Irish National Teachers Organisation and the Irish Labour Party want to abolish section 37.

Ireland does not allow same-sex marriage. Marriage in Ireland is currently regulated by the Civil Registration Act 2004.<sup>17</sup> Section 2 restates the Common Law definition of marriage and according to section 2(2)(e) a marriage would be invalid if both parties to a marriage are of the same sex. However, a 2012 survey showed that 73% of Irish people agreed that "same sex marriage should be allowed in the Constitution".<sup>18</sup>

In July 2010, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010<sup>19</sup>, was passed, recognising civil partnerships between same-sex couples. One major criticism states that the legislation effectively enshrines discrimination in law.<sup>20</sup> In particular, the denial of the right to apply to adopt a child has been cited as particularly discriminatory.<sup>21</sup> Furthermore, the Act of 2010 essentially makes no provision for civil partners who have had a child, whether through Assisted Human Reproduction, foreign adoption or otherwise. A civil partner who is not the biological parent of the child does not exercise parental rights, as guardianship rights have not been extended to civil partners. Furthermore, in the event of relationship break down between civil partners there is no legal requirement placed on the courts to take the needs of dependent children into account.<sup>22</sup>

## Religion

Religion is also associated with the perception of discrimination in the workplace. Recent statistics evidence that there are 3,525,573 Roman Catholics living in Ireland today. Whereas, the second most common religion in Ireland, followers of the Church of Ireland, account

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<sup>16</sup> <http://www.irishstatutebook.ie/1998/en/act/pub/0021/sec0037.html>, accessed on the 07/July 2012

<sup>17</sup> "ACTS04\$\$U3" (PDF). Retrieved 06 July 2012

<sup>18</sup> McEnroe, Juno (23 February 2012). "Poll: 73% of public back allowing same-sex marriage in Constitution". *Irish Examiner*. accessed 14 March 2012.

<sup>19</sup> <http://www.irishstatutebook.ie/2010/en/act/pub/0024/index.html>, retrieved on the 07/July 2012

<sup>20</sup> Marriage Equality "Missing Pieces: A comparison of the rights and responsibilities gained from civil partnership compared to the rights and responsibilities gained through civil marriage in Ireland" (2011) available at <http://www.marriagequality.ie/getinformed/justlove/missingpieces.html>

<sup>21</sup> "Civil partnership expected to fail lesbian and gay community » News » Marriage quality – Civil Marriage for Gay and Lesbian People in Ireland". *Marriagequality.ie*. 24 June 2008. Retrieved 07 July 2012

<sup>22</sup> Marriage Equality "Missing Pieces: A comparison of the rights and responsibilities gained from civil partnership compared to the rights and responsibilities gained through civil marriage in Ireland" (2011) available at <http://www.marriagequality.ie/getinformed/justlove/missingpieces.html>

for only 93,056 of the population. Muslims account for just 18, 223 of the total population and the rest of the population is comprised of other minority religions.<sup>23</sup>

While Church of Ireland followers do not differ from the majority (Catholics), research shows that followers of “other Christian”, ‘other’ religion and no religion were all significantly more likely than Roman Catholics to report experience of discrimination at work.<sup>24</sup> According to research, those of no religion emerged as more likely to perceive discrimination in shops and pubs, financial and housing sectors.<sup>25</sup>

## Age

Age was the one most frequently reported for discrimination in 2008, accounting for 19 per cent of all grounds reported.<sup>26</sup> Ageism is frequently cited as a problem in the labour market. This may partly stem from their relatively low level of knowledge about their rights under Irish equality law compared to younger age groups.

Claims of discrimination on the grounds of age more commonly come from respondent’s aged under 25 years than those aged over 65. Indeed young people account for the majority of age-related discrimination in the survey. Young people are particularly likely to have experienced discrimination while using services such as pubs/clubs/restaurants/shops, banks/insurance and housing, but are no more likely than other age groups to report work-related discrimination.<sup>27</sup>

## Disability

Disabled people are much more likely to report work-related discrimination than nondisabled people. This is consistent with previous Irish research, which found that people with disabilities are significantly disadvantaged in the labour market. Gannon and Nolan (2004) found that people with disabilities were more likely to be unemployed or outside the

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<sup>23</sup> Central Statistics Office, “This is Ireland- Highlights from Census 2011 Part 1” available at <http://www.cso.ie/en/media/csoie/census/documents/census2011pdr/Census%202011%20Highlights%20Part%201%20web%2072dpi.pdf>

<sup>24</sup> RUSSEL *et al*, 2008, ‘The Experience of Discrimination in Ireland’.

<sup>25</sup> IBID

<sup>26</sup> RUSSEL *et al*, 2008, ‘The Experience of Discrimination in Ireland’.

<sup>27</sup> IBID

labour market.<sup>28</sup> Disability has the strongest effect in the health domain and in transport services, where disabled respondents are over five times more likely to perceive problems of discrimination. In shops/pubs, financial services, housing and other public services this group are over twice as likely to perceive discrimination as people without disabilities.<sup>29</sup>

## Race

Analysis of the *QNHS* Equality Module<sup>30</sup> showed that non-Irish nationals are more than twice as likely as Irish respondents to report discrimination in the work place. The fact that non-Irish nationals experience more discrimination than Irish nationals is not accounted for by socio-demographic or job characteristics. This is broadly in line with the findings of McGinnity *et al.* (2006), in their study of racism and discrimination among recent migrants, who found that over 30 per cent of the sample experienced insults or other forms of harassment at work.<sup>31</sup>

In 2008, 24 per cent one non Irish nationals reported being discriminated against just over twice the rate for Irish nationals.<sup>32</sup> The higher likelihood of discrimination among non-Irish nationals persists in both of the work and four of the service domains (housing, shops/pubs/restaurants, financial services and transport), but are particularly pronounced in relation to job search, where immigrants are two and a half times more likely to report discrimination than Irish job seekers, even when ethnicity and religion are already taken into account. Those of Black ethnicity have the highest “raw” risk of discrimination among the ethnic groups with 40 per cent of those surveyed having experienced discrimination. This compares to 12 per cent of White respondents and 25 per cent of the Asian group.<sup>33</sup>

## Membership of the Traveller community.

The Traveller community in Ireland experiences social exclusion and discrimination at all levels of society. The government does not currently recognise Irish Travellers as a distinct

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<sup>28</sup> GANNON, B. and B. NOLAN, 2004. “Inter-industry Wage Differentials in Ireland, *The Economic and Social Review*, Vol. 35, No. 2.

<sup>29</sup> RUSSEL *et al*, 2008, ‘The Experience of Discrimination in Ireland’.

<sup>30</sup> *Ibid*.

<sup>31</sup> MCGINNITY, F., P. O’CONNELL, E. QUINN and J. WILLIAMS, 2006.

*Migrants’ Experience of Racism and Discrimination in Ireland*. Dublin: Economic and Social Research Institute.

<sup>32</sup> RUSSEL *et al*, 2008, ‘The Experience of Discrimination in Ireland’.

<sup>33</sup> *IBID*

ethnic minority in Irish society. At Irelands hearing for the UN Universal Periodic Review of Human Rights on 7 October, however, the Minister for Justice, Equality and Law Reform announced that the Government was ‘seriously considering’ conferring recognition of Irish Travellers as an ethnic minority group. As this is recognition that many Travellers have called upon for some time, this would be a much welcomed decision.<sup>34</sup>

According to reports such as the Commission on Itinerancy 1963, Travellers were equated with vagrants, social misfits and deviant or saw them as an impoverished underclass in need of rehabilitation.<sup>35</sup> More recent reports such as the Task Force Report on the Travelling Community (1995)<sup>36</sup> seek to acknowledge Traveller culture and identity in a positive light and to address Traveller issues from a human rights perspective. The casework of the Equality Authority also demonstrates the high level of discrimination against members of the Traveller community. Refusal of service in licensed premises accounts for a large proportion of the Equal Status cases on the Traveller ground.<sup>37</sup> In 2003 the Equality Authority dealt with 9 employment equality cases on the Traveller ground, while there were 327 cases under the equal status casework activity.<sup>38</sup> In a public attitudes survey published by the governments 'Know Racism' campaign in February 2004, 72% of respondents agreed that the settled community do not want members of the Traveller community living amongst them, while 48% disagreed that Travellers make a positive contribution to Irish society.<sup>39</sup>

### Family Protection

ii. The definition of family is contained in the Irish Constitution – Article 41:

41. 1.1°: The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

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<sup>34</sup> Pavee Point Travellers Centre, “Why recognise Travellers as an ethnic group?” Available at <http://paveepoint.ie/2011/10/briefing-why-recognise-travellers-as-an-ethnic-group/>.

<sup>35</sup> O’ CONNELL, JOHN, ‘Policy issues in Ireland’, <http://www.ucc.ie/publications/heeu/Minority/oconnell.htm>, accessed 07/July/2012

<sup>36</sup> ‘Case Study: The task forces on the Travelling Community’, NCCR1/Equality Authority, Ireland NFP, April 2003. [http://www.nccri.ie/pdf/ireland\\_case\\_study2.pdf](http://www.nccri.ie/pdf/ireland_case_study2.pdf) accessed 07/July 2012.

<sup>37</sup> The Equality Tribunal, Legal Review 2003.

<sup>38</sup> Equality Authority, Annual Report 2003.

<sup>39</sup> Pavee Point fact sheets on the Traveller community, available on [www.paveepoint.ie](http://www.paveepoint.ie) and the Citizens Information Database on [www.cidb.ie](http://www.cidb.ie), accessed 07/July 2012

41. 1.2°: The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

This definition of Marriage was inserted into the Irish Constitution in 1937; the definition is largely influenced by the Roman Catholic ethos in Ireland. Since 1937, the Roman Catholic influence of Society has been diluted somewhat due to a wide variety of circumstances including the acceptance of contraceptives, divorce, same-sex couples, different nationalities and the numbers of females working in the workplace.

In the case of *The State (Nicolaou) v An Bord Uchtála*, the Supreme Court reinforced the idea that “family” is based upon marriage. Walsh J stated, “that the family referred to in [Article 41] is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the laws for the time being in force in the State.”

Article 41.3.1° supports this view, as the State pledges to guard the institution of marriage with a special level of care and to protect the institution of family from attack. It is for this reason that divorce was not permitted in Ireland until 1995. This definition excluded single-parent families and co-habiting couples. However, since the case of *G v An Bord Uchtála*<sup>40</sup>, Article 42 of the Constitution has extended the rights of an unmarried mother and of children of unmarried parents; such rights are to be considered personal rights which stem from the family relationships and therefore the State is obliged to protect under Article 40.3. However, unmarried fathers are considered to not have any personal rights in relation to his children. The Law Reform Commission has recommended that changes be introduced in order to achieve equality between parents regardless of marital status or gender. The Law Reform Commission have looked towards the European Convention of Human Rights and the European Court of Human Rights to extend the alter the definition of “family” within the meaning of Article 8 to be based more on close personal ties as opposed to marriage. In its 2010 Report on the Legal Aspects of Family Relationships it recommended that

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<sup>40</sup> In this case, an unmarried father sought to challenge provisions of the Adoption Act 1952 which allowed his child to be adopted without his permission.

legislation be enacted that provides automatic joint parental responsibility of both the mother and father of any child.<sup>41</sup>

The family unit in Ireland is in a constant state of change. Statistics from the CSO evidence that of the 1.18 million families living in Ireland in 2011, 143,600 were comprised of cohabiting couples. Moreover, there were 215,300 families headed by lone parents with children, 87 percent of which were lone mothers.<sup>42</sup> The family unit has developed from one being based purely on marriage to include cohabitating couples, lone parents and same-sex couples. Marriage rates in Ireland have been declining with more families choosing to cohabit and rear children outside of marriage. Sexual relationships, child-bearing and cohabitation outside of marriage have become the norm in Ireland. The importance of marriage has somewhat declined due to a multitude of factors including : increased women in the workplace, changing sexual relations, single parenthood and social acceptance of cohabitating and same-sex couples. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 highlights Ireland's acceptance of different types of family units. Under this provision, certain rights that have previously only belonged to married couples have been extended to same sex couples who enter civil partnership but their status still remains below that of marriage, something that is necessitated by Articles 41 and 42 of the Constitution. However, the Constitution and Legislation in Ireland is not adopting at a quick enough pace to deal with the changes in Society. The Law Reform Commission has highlighted eleven areas which need to be addressed; most notably the need to strengthen the rights of unmarried fathers. Irish law does not afford automatic guardianship rights to unmarried fathers, who can be appointed as guardian only with the consent of the child's mother or by court order. This has led some groups to complain that fathers are disadvantaged, for example in the context of custody disputes<sup>43</sup>

Divorce in Ireland was introduced in 1996 by the Fifteenth Amendment of the Constitution Act, 1995<sup>44</sup>. Recent statistics published by the Central Statistics Office show that there were 87, 800 divorced people living in Ireland in 2011. This figure evidences a sharp increase

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<sup>41</sup> Law Reform Commission, "The Legal Aspects of Family Relationships" (2010) available at <http://www.lawreform.ie>

<sup>42</sup> Central Statistics Office, "This is Ireland- Highlights from Census 2011 Part 1" (2011) available at [www.cso.ie](http://www.cso.ie)

<sup>43</sup> Law Reform Commission, "The Legal Aspects of Family Relationships" (2010) available at <http://www.lawreform.ie>

<sup>44</sup> FAMILY LAW (DIVORCE) ACT, 1996



from the figure of 35,100 divorced individuals living in Ireland in 2002.<sup>45</sup> The number of divorces in has continually increased since the introduction of divorce in Ireland.

The Irish Courts offer a variety of legal resolutions for marital breakdown which can be used by Irish Couples including mediation, divorce and nullity. These services are relatively new to Ireland and as a result may be inadequate to deal with the multitude of problems which occur. Another striking feature of the changing Irish family is the changing family sizes. In the present society, Irish families are more likely to have one or two children today than in the past where families contained large numbers of children.

The average marital age in Ireland has increased dramatically throughout the generations. The increasing marital age can be attributed to the social acceptance of non-marital parents rearing children. The average age of grooms rose from 30.2 years in 1996 to 33.4 years in 2007. Similarly, brides are also marrying at a later stage in their lives. The average age increased to 31.7 years in 2008 from 28.4 years in 1996.

#### *Child Protection*

iii. The cultural and legal status of children in the Republic of Ireland has been traditionally viewed in light of the Irish Constitution, *Bunreacht na hÉireann*. The evolution of the legal status of the child from property of the father, to property of the marital family, to the modern concept of the child as an individual in their own right, possessing unique and peculiar rights of their own, has been slow and still poses “a challenge to the legal systems of many societies.”<sup>46</sup> The Irish Republic is no different. “Both historically and constitutionally,”<sup>47</sup> <sup>48</sup> the family has been afforded a pre-eminent position in Ireland’s legal framework and social hierarchy; recognised by the State as “the primary and fundamental unit group of Society... possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.”<sup>49</sup> Children had previously been viewed “only within this perimeter,”<sup>50</sup> as a member and product of the family unit, rather than as an individual. There

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<sup>45</sup> Central Statistics Office, “This is Ireland- Highlights from Census 2011 Part 1” (2011) available at [www.cso.ie](http://www.cso.ie)

<sup>46</sup> Blake, Teresa, “*The United Nations Convention on the Rights of the Child*,” Irish Law Times. 9 ILT 114 (1991).

<sup>47</sup> Horgan, Rosemary N., “*The United Nations Convention On The Rights of The Child and Irish Family Law*,” Irish Law Times. 9 ILT 161 (1991).

<sup>48</sup> See also Ireland’s First Report to the UN Committee on the Rights of the Child (1996)

<sup>49</sup> Art. 41.1.1°, *Bunreacht na hÉireann* - Constitution of Ireland.

<sup>50</sup> Horgan, Rosemary N., “*The United Nations Convention On The Rights of The Child and Irish Family Law*,” Irish Law Times. 9 ILT 161 (1991).

is no recognition of the child “as a ‘person’ with individual rights to which separate consideration must be given.”<sup>51</sup> This view has been perpetuated not only by the pre-eminent position occupied by the Family in the Irish Constitution, but by the context in which that document was written. As Senator Jillian van Turnhout of the Irish Senate notes, “the Constitution largely reflects the time it was first written in 1937, when children were seen and not heard.”<sup>52</sup> As the Law Society notes, the relative invisibility of children remains “a notable feature of the Irish family law system.”<sup>53</sup>

This Constitutional arrangement has resulted in a number of legal anomalies that have prevented the growth of a child-friendly culture in Ireland.<sup>54</sup> “The silence of Article 41 in relation to children”<sup>55</sup> has fostered a protectionist culture towards the issue of children and children’s rights. Without explicit recognition of their own rights, children’s interests are vested in another party, thereby failing to empower children “to be active participants and decision-makers in their own lives, communities and society at large.”<sup>56</sup> Without a mechanism to participate in the processes that affect them, or an ability to effectively exercise their rights, children are placed in a uniquely vulnerable position;<sup>57</sup> bereft of adequate Constitutional protection.

Just as the child has been historically and culturally viewed in light of his/her position within the family; the issue of children’s rights has been similarly viewed within this limited context. Though children are afforded unique and unenumerated rights by Articles 41 and 42 of the Constitution,<sup>58</sup> these rights are gifted to them by virtue of their place within the family unit; not to the child as an independent entity.<sup>59</sup> However, that is not to say that children do not

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<sup>51</sup> Ibid.

<sup>52</sup> Jewell, Lisa “*Children's Rights - Interview with Jillian van Turnhout*,” Woman's Way, November 21, 2011 - p. 30.

<sup>53</sup> Tenth Progress Report: The Family, The All-Party Oireachtas Committee on the Constitution, Dublin, Stationery Office, 2006 - p. 91.

<sup>54</sup> See Carolan, Eoin, “*The Constitutional Consequences of Reform*,” Children's Rights and the Constitution, A Conference on Recent Developments and Future Reforms, Wednesday 21 February 2007 at p. 1 - “The Constitution’s traditional approach has led to decisions which arguably did not best serve the welfare of the child.”

<sup>55</sup> Tenth Progress Report: The Family, The All-Party Oireachtas Committee on the Constitution, Dublin, Stationery Office, 2006 - p. 88.

<sup>56</sup> Children Rights Alliance, “*From Rhetoric to Rights*,” Children’s Rights Alliance, Dublin (2006) - p. 5.

<sup>57</sup> Tenth Progress Report: The Family, The All-Party Oireachtas Committee on the Constitution, Dublin, Stationery Office, 2006 - p. 91.

<sup>58</sup> Art. 41.1.1° of Bunreacht na hÉireann refers to the “inalienable and imprescriptible” rights of the family. Art. 42.5 refers to the “natural and imprescriptible rights of the child.”

<sup>59</sup> See *Murray v Ireland* [1985] IR 532, particularly the judgment of Costello J.: “The rights in Article 41.1.1° are those which can properly be said to belong to the institution [of the family] itself, as distinct from the

possess any rights of their own under the Irish Constitution. The Irish judiciary has contributed significantly to the development of children's rights within the Republic by 'uncovering' unenumerated rights within the broadly worded text of the Irish Constitution. As natural and legal persons within the State, the Courts have held that children are afforded the same set of personal and unenumerated rights as all citizens, under Art. 40.<sup>60</sup> <sup>61</sup> Children also possess certain natural rights as human beings. These natural rights include "a constitutional right to bodily integrity," and "an unenumerated right to an opportunity to be reared with due regard to her religious, moral, intellectual, physical and social welfare."<sup>62</sup>

Though the judiciary's application of the doctrine of unenumerated rights has paved the way "for the development of constitutional jurisprudence on the rights of the child,"<sup>63</sup> such a radical judicial movement has not yet taken place. In fact, such a development remains very unlikely, due in no small part to the Constitutional supremacy afforded to the Family unit. The State's explicit acknowledgement of the family as a unit "antecedent and superior to all positive law," coupled with the absence of a similar statement in relation to children, effectively subordinates the rights of children to those of the marital family unit.<sup>64</sup>

This arrangement has significant repercussions for children in cases where their welfare is at the heart of the matter.<sup>65</sup> The antecedent legal position of the family "may allow a child to be exposed to harmful conduct on the part of its parents where that behaviour is not so damaging as to justify its removal from the family entirely,"<sup>66</sup> and has thus made it very difficult for the State to intervene in cases where the child is being abused within his or her own family.<sup>67</sup> Moreover, 'the Constitutional supremacy of the family inadvertently curtails

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personal rights which each individual member might enjoy by virtue of membership of the family."

<sup>60</sup> Department of Children and Youth Affairs, "Briefing Note on Proposed Amendment to the Constitution in Relation to the Rights of Children."

<sup>61</sup> See *Re: Article 26 and the Adoption (No 2) Bill 1987* [1989] IR 656: "the rights of a child who is a member of a family are rights referred to in Articles 40, 43 and 44 in addition to Articles 41 and 42."

<sup>62</sup> *G. v. An Bord Uchtála* [1980] IR 32 at 44.

<sup>63</sup> Kilkelly, Ursula, & O'Mahony, Connor, "The Proposed Children's Rights Amendment: Running to Stand Still?", *Irish Journal of Family Law* 10(2) 19, (2007).

<sup>64</sup> See Tenth Progress Report: The Family, The All-Party Oireachtas Committee on the Constitution, Dublin, Stationery Office, 2006 at p. 88: "The silence of Article 41 in relation to children means that the rights of the family are effectively exercised by the parents and that the rights of children may not be given due weight within the family."

<sup>65</sup> See *Re: J.H., an infant* [1985] IR 375 and *North Western Health Board v. H.W.* [2001] 3 IR 622.

<sup>66</sup> Eoin Carolan, "The Constitutional Consequences of Reform," Children's Rights and the Constitution, A Conference on Recent Developments and Future Reforms, Wednesday 21 February 2007 - p. 5.

<sup>67</sup> O'Brien, Carl, "Minister insists children's rights referendum to go ahead next year," *The Irish Times* - Monday, December 19, 2011

the scope of child-friendly law,<sup>68</sup> while rendering progressive judicial judgments ineffective (as discussed above). These legal anomalies have led to consensus “that the current system offers inadequate protection to the position of children,”<sup>69 70</sup> and calls for a Constitutional Amendment on the Rights of the Child.

On November 10<sup>th</sup> the people of Ireland were asked to vote on a proposal to change the Constitution of Ireland. The proposed changes to the Constitution were to insert the new Article 42A to the Constitution and delete the existing Article 42.5. The new Article 42A under the heading Children will be the thirty-first amendment to the Irish Constitution and will be the first time that children’s rights are enumerated in the Irish Constitution in a standalone provision. It seeks to protect children, support families, remove inequalities in adoption and recognize children in their own right.

The bolstering of rights and welfare-based approaches to child protection within the Irish legal system has been further prioritised by the increase in high profile instances of child abuse in recent years.<sup>71</sup> The Ferns (2005), Ryan (2009), Murphy (2009) and Cloyne (2011) Reports were perhaps the most notable efforts by the Irish Government to investigate serious abuses of children’s rights by members of the Catholic Church. The Reports “were the result of inquiries into the abuse of children who resided in residential institutions managed by religious orders on behalf of the State,”<sup>72</sup> and revealed a significant failure in Government systems of oversight and governance;<sup>73</sup> as well as numerous “shortcomings in relevant laws and regulations” that allowed abuse to go unpunished. Each report concluded with recommendations as to how these shortcomings could be remedied.<sup>74</sup> Indeed, the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable

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<sup>68</sup> Children Rights Alliance, “*From Rhetoric to Rights*,” Children’s Rights Alliance, Dublin (2006) - p. 7.

<sup>69</sup> Eoin Carolan, “*The Constitutional Consequences of Reform*,” Children’s Rights and the Constitution, A Conference on Recent Developments and Future Reforms, Wednesday 21 February 2007 - p. 1.

<sup>70</sup> Amnesty International Ireland, “*Children’s Rights and the Constitution - Piece by Emily Logan for In Plain Sight*.” Available online at: <http://www.oco.ie/assets/files/publications/ChildrensRightsandtheConstitution.pdf>. Retrieved 16th July 2012.

<sup>71</sup> Jewell, Lisa “*Children’s Rights - Interview with Jillian van Turnhout*,” Woman’s Way, November 21, 2011.

<sup>72</sup> Holohan, Carole, “*In Plain Sight - Responding to the Ferns, Ryan, Murphy and Cloyne Reports*,” Amnesty International Ireland, September 2011 - p. 17.

<sup>73</sup> See Chapter 6 of the Ryan Report, at 6.06; (“The system of inspection by the Department of Education was fundamentally flawed and incapable of being effective”), and 6.13: “Complaints by parents and others made to the Department were not properly investigated. Punishments outside the permitted guidelines were ignored and even condoned by the Department of Education.”

<sup>74</sup> Holohan, Carole, “*In Plain Sight - Responding to the Ferns, Ryan, Murphy and Cloyne Reports*,” Amnesty International Ireland, September 2011 - p. 17.

Persons) Act is perhaps the most notable product of the Reports' recommendations.<sup>75</sup> The Act, which came into effect on 1<sup>st</sup> August 2012<sup>76</sup>, makes it an offence to withhold information that could result in an arrest for a serious offence committed against a child. From an NGO perspective, Amnesty International Ireland's "*In Plain Sight*" examined the systemic failures within the Irish political system, and indeed, Irish society, that enabled the abuses detailed in the Government reports; cataloguing "a history of unspeakable abuse against the most vulnerable in our society."<sup>77</sup> Colm O'Gorman (Executive Director of Amnesty International Ireland) maintained that the abuse represented "the greatest human rights failure in the history of the state," and claimed that "much of the abuse described in the Ryan Report meets the legal definition of torture under international human rights law."<sup>78</sup> O'Gorman's comments, together with An Taoiseach Enda Kenny's remarks following the publication of the Cloyne report,<sup>79</sup> remain the more significant responses to violations of children's rights that have attracted media attention.<sup>80</sup>

iv. The Republic of Ireland is a dualist State. The Irish Constitution, *Bunreacht na hÉireann*, governs the implementation of international treaties into State law. The Constitution states that 'no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'<sup>81</sup>.<sup>82</sup> Also, Article 29.5.1<sup>o</sup> of the Constitution states that 'every international agreement to which the State becomes a party shall be laid before Dáil Éireann'.<sup>83</sup>

In order to be effective, provisions of international treaties and Conventions must be introduced into national legislation. In order to draft legislation in Ireland permission must

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<sup>75</sup> Minister for Children & Youth Affairs Frances Fitzgerald TD, Launch of 'In Plain Sight' - Report by Amnesty International Ireland, Monday 26 September, 2011.

<sup>76</sup> 'Legislation recently enacted: Criminal Law 2012', The Department of Justice and Equality. [http://www.justice.ie/en/JELR/Pages/Criminal\\_law](http://www.justice.ie/en/JELR/Pages/Criminal_law) (accessed 05/11/12).

<sup>77</sup> Minister for Children & Youth Affairs Frances Fitzgerald TD, Launch of 'In Plain Sight' - Report by Amnesty International Ireland, Monday 26 September, 2011.

<sup>78</sup> "Abuse of Children in Irish Institutions Amounted to Torture," Amnesty International Ireland, 26 September 2011. Available online: <http://www.amnesty.ie/news/abuse-children-irish-institutions-amounted-torture>. Retrieved 26 September 2011.

<sup>79</sup> Motion on the Commission of Investigation Report in the Catholic Diocese of Cloyne, Dáil Éireann, 20 July 2011.

<sup>80</sup> See Patsy McGarry, "Abuse was 'human rights failure,'" The Irish Times, September 26, 2011, and Patsy McGarry, "Abuse in institutions amounted to 'torture,'" The Irish Times, September 27, 2011.

<sup>81</sup> The Oireachtas (National Parliament) consists of the President and two Houses: Dáil Éireann (the House of Representatives) and Seanad Éireann (the Senate).

<sup>82</sup> Article 29.6 of *Bunreacht na hÉireann*.

<sup>83</sup> Article 29.5.1<sup>o</sup> of *Bunreacht na hÉireann*.

be sought by a Minister in either House of the Oireachtas to introduce the Bill. If granted, the Bill is printed and circulated to members. An Order is made by the Dáil for its second reading. At the second stage a debate is held where the general principles of the Bill are considered. This may result in amendments or improvements. When these are agreed an Order is made for the Bill to be considered in committee (third) stage. During the committee stage the Bill is considered in great detail. The fourth stage (report stage) consists of a review of changes made at the committee stage. The Bill is finally considered before it is passed. A Bill amended by the Seanad is sent back to the Dáil for its agreement. Finally when the Bill is passed by both Houses, it goes to the President for her/his signature and is declared law. A Bill becomes law on the day it is signed by the President and, unless the contrary intention appears, comes into operation on that day.

Alternatively, international agreements may be inserted into the Constitution. This has been done with the treaties of the European Union, such as the Maastricht Treaty. This process involves inserting a section into the Constitution which formally ratifies the treaty in question. This method was considered when Ireland was ratifying the European Convention on Human Rights, however, it was decided that an Act of the Oireachtas was more appropriate. The European Convention was given effect to in Irish law by the European Convention on Human Rights Act 2003.

Ireland ratified the United Nations Convention on the Rights of the Child, without reservation, on the 21<sup>st</sup> of September 1992. However, Ireland has not fully incorporated the Convention into domestic law, as required by the Constitution, if it is to have domestic effect. After its first observation for Ireland in 1998, the UN Committee on the Rights of the Child suggested that the Irish Government take all measures necessary to

... take further steps to ensure that the Convention is fully incorporated as part of the domestic law, taking due account of its general principles as defined in Article 2 (non-discrimination), Article 3 (best interests of the child), Article 6 (right to life, survival and development) and Article 12 (respect for the views of the child).<sup>84</sup>

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<sup>84</sup> UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations: Ireland, 4 February 1998, CRC/C/15/Add.85, available at: <http://www.unhcr.org/refworld/docid/3ae6aec924.html> [accessed 9 July 2012]

Once again, in 2006, the UN Committee advised the Irish Government to take measures to ensure that the best interests' principle is 'applied in all political, judicial and administrative decisions'<sup>85</sup> and that it

... strengthens its efforts to ensure, including through Constitutional provisions, that children have the right to express their views in all matters affecting them and to have those views given due weight in particular in families, schools and other educational institutions, the health sector and in communities.<sup>86</sup>

The Constitution of Ireland and much of the legislation regarding children in Ireland makes reference to the 'welfare' of the child, as opposed to the 'best interests' of the child. The welfare of the child is defined as the moral, intellectual, physical, religious and social wellbeing of the child.<sup>87</sup> However, in *Southern Health Board v CH*<sup>88</sup> the terms 'welfare' and 'best interests' were used interchangeably. The best interests of the child is clearly enshrined in the Child Care Act 1991<sup>89</sup> which places a statutory duty on Health Boards to promote the welfare of children who are not receiving adequate care and protection. Also, all court proceedings which involve the custody of a child are governed by the Guardianship of Infants Act 1964 where the best interests principle is the paramount consideration in deciding matters of this nature.<sup>90</sup>

In January 2006, the need for Constitutional change was recognised by the All Party Oireachtas Committee on the Constitution. It recommended that a new section be inserted into Article 41 of the Constitution as follows; "In the resolution of all disputes concerning the guardianship, adoption, custody, care or upbringing of a child, the welfare and best interests of the child shall be first and paramount consideration."<sup>91</sup> The final report of the Joint Committee on the Constitutional Amendment on Children was issued in 2010, which makes 5 key recommendations, as follows;<sup>92</sup>

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<sup>85</sup>UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Ireland, 29 September 2006, CRC/C/IRL/CO/2, available at: <http://www.unhcr.org/refworld/docid/45c30bd80.html> [accessed 9 July 2012]

<sup>86</sup> *ibid*

<sup>87</sup> <http://www.irishstatutebook.ie/1964/en/act/pub/0007/index.html> [accessed 11<sup>th</sup> July 2012]

<sup>88</sup> [1996] 1 IR 219

<sup>89</sup> <http://www.irishstatutebook.ie/2001/en/act/pub/0024/index.html> [accessed 11<sup>th</sup> July 2012]

<sup>90</sup> <http://www.irishstatutebook.ie/1964/en/act/pub/0007/index.html> [accessed 11<sup>th</sup> July 2012]

<sup>91</sup> All-Party Oireachtas Committee on the Constitution, 10<sup>th</sup> Progress Report: 2006, available at: <http://www.constitution.ie/reports/10th-Report-Family.pdf> [accessed 9th July 2012]

<sup>92</sup> Joint Committee on the Constitutional Amendment on Children, Third Report on the Twenty-eighth

- Amending the Constitution to enshrine and enhance the protection of the rights of children.
- Specifically acknowledging the child's welfare and best interests as a natural and imprescriptible right of paramount consideration.
- Include the child's right to be heard, subject to age and maturity, in cases involving their welfare.
- Bringing laws and services for children in line with the State's obligations under the Convention on the Rights of the Child.
- Amend Article 42 of the Constitution in order to implement these recommendations.

There are no plans at the time of writing to incorporate the Convention on the Rights of the Child, as a whole, into Irish law.

#### v. Nature of Directives

The directive lays down an implementation deadline of the 18<sup>th</sup> of December 2013 which applies to all member states including Ireland<sup>93</sup>. The Minister for Justice and Equality, Deputy Alan Shatter, has said, when called upon to implement this directive, that it is the opinion of the Government that much of the Directive 2011/93/EU is already covered by domestic legislation but that it is the intention of his Department to put forward new legislation this year on Sexual Offences that will include some of the provisions that will come under the scope of this Directive, such as increasing the maximum penalties for child pornography offences.<sup>94</sup> Despite statements of his commitment to these issues in this debate, no such legislative proposals have been brought forward as of November 2012. It is clear from Article 249 EC that national authorities have autonomy over the 'choice of form and methods' invoked to achieve the result sought by a directive within their member state. However, member states have strictly been forced to implement directives in a manner

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Amendment of the Constitution Bill 2007, February 2010, available at [http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports\\_2008/FinalReport2010.pdf](http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports_2008/FinalReport2010.pdf) [accessed 9th July 2012]

<sup>93</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:335:0001:0014:EN:PDF> accessed on the 12/July 2012

<sup>94</sup> Speech by Alan Shatter, T.D., Minister for Justice and Equality at the Seanad Private Member Motion on Child Abuse Material on the Internet- Wednesday 29 February 2012. <http://debates.oireachtas.ie/seanad/2012/02/29/00009.asp>.



which gives effect to the result sought. Thus, the principle of national procedural autonomy has been limited by the twin duties of effectiveness and equivalence<sup>95</sup>. As laid down in Article 27 of the directive member states must communicate to the Commission the provisions they shall use to transpose the directive into national law<sup>96</sup>. Equally, Member states must reference the directive when they implement it<sup>97</sup>.

The process of implementation of Directive 2011/93/EU is aided by the doctrines of direct effect, consistent interpretation and the principle of state liability. Such doctrines enhance the authority and binding nature of directives. This binding nature will allow directive 2011/93/EU to effectively protect children's rights against sexual abuse and sexual exploitation.

The principle of direct effect was established in *Van Gend En Loos v Nederlandse Administratie der Belastingen*<sup>98</sup>. In this case the European Court of Justice defined direct effect as the ability of nationals of member states to lay claim to rights laid out in EU law which national courts must protect<sup>99</sup>. *Van Duyn v Home Office* was a case concerning an EU national who was refused entry into the UK on the basis on her personal conduct<sup>100</sup>. In this case the Court of Justice ruled that in certain circumstances directives can have direct effect. However, this case only grants directives vertical direct effect<sup>101</sup>. In *Marshall v Southampton and South West Hampshire Area Health Authority*, a case of sex discrimination against a woman by a British health authority, the European Court of Justice confirmed that directives do not have horizontal direct effect<sup>102</sup>. This principle limits the effectiveness of Directive 2011/93/EU and emphasises the need for member states substantive implementation of the sought results of the directive. However, this principle also generates an incentive for member state governments to fully implement this directive. The convergence in the legal position of directives regarding vertical and horizontal direct effect has generated a 'two-tier legal system' which offers greater protection for individuals against public bodies as opposed to

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<sup>95</sup> Damian Chalmers and others, *European Union Law: Text and Materials* (Cambridge University Press 2006) p.391

<sup>96</sup> European Parliament and European Council directive 2011/93/EU of 13 December 2011 Article 27

<sup>97</sup> Ibid (n 4)

<sup>98</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1

<sup>99</sup> Ibid (n 8)

<sup>100</sup> Case 41/74 *Van Duyn v Home Office* [1974] ECR 1

<sup>101</sup> Ibid (n 58)

<sup>102</sup> Case C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367

private bodies<sup>103</sup>. However, directives can have ‘incidental horizontal direct effect’, allowing there invocation by private parties’ to a dispute as a shield, under the law laid down in *Unilever Italia PsA v Central Food SpA*<sup>104</sup>. In practical terms the effect ‘incidental horizontal direct effect’ will have on the implementation of Directive 2011/93 will be extremely limited and in *Unilever* the court restated that Directives do not have horizontal direct effect<sup>105</sup>.

In keeping with the Court of Justice’s development of the principle of effectiveness of judicial protection the duty of consistent interpretation has been established<sup>106</sup>. Since *Marleasing SA v Las Commercial Internacional de Alimentacion SA* it is clear that this principle applies to all areas of EU law and thus, will be used by national courts against national governments, promoting the correct implementation of Directive 2011/93<sup>107</sup>. Indeed, the case of *Marleasing* concerned two private parties and so it seems that directives can create a horizontal duty of consistent interpretation. However, in *Marleasing* the directive was used a shield as opposed to a sword and this duty does not extend horizontally indefinitely<sup>108</sup>. However, the Court of Justice has been slow to allow the use on the duty of consistent interpretation in the context of criminal trials, such trials will be the main case law of this directive. Therefore, the duty of consistent interpretation may not play a significant role in encouraging member states to implement directive 2011/93.

State liability may be the most important incentive for member states to implement Directive 2011/93. It is clear that this directive fulfils the conditions for state liability required by the *Francovich and Bonifaci v Italy* ruling concerning Italy’s failure to implement a Directive aimed at guaranteeing employees protection in the event of insolvency of their employer<sup>109</sup>. First, Directive 2011/93 grants rights upon individuals in that it lays down that sexual abuse and the sexual exploitation of children constitutes serious violations of fundamental rights<sup>110</sup>. Second, the context of these rights is clear from the directive, it formalises EU policy to the standard of the Lanzarote Convention of October 2007 as it introduces specific provisions to protect children such as those aimed at combating child sex

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<sup>103</sup> Ibid (n 3) p.375

<sup>104</sup> Case C-443/98 *Unilever Italia PsA v Central Food SpA* [2000] ECR I-2201

<sup>105</sup> Ibid (n 13)

<sup>106</sup> Ibid (n 3) p.383

<sup>107</sup> Case C-106/89 *Marleasing SA v Las Commercial Internacional de Alimentacion SA* [1990]

<sup>108</sup> Ibid (n 17)

<sup>109</sup> Joined Cases C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357

<sup>110</sup> Ibid (n 4)

tourism<sup>111</sup>. The causal link between the State's breach of their duty and the damage suffered by the injured party may be the most difficult condition to prove<sup>112</sup>. However, the directive is highly specific, such as Article 25 measures against websites containing child abuse<sup>113</sup>. Such specificity enhances the causative link between the Directive and damage suffered.

Directive 2011/93 enhances basic protection for children from sexual abuse and sexual exploitation; this is a necessary step for Ireland and so should be fully implemented. However, Ireland's record of implementing directives combined with a number of failed attempts to enhance protection for children casts doubt on the impact this Directive may have on children's rights in Ireland. Ireland has an average transposition delay of below thirty weeks<sup>114</sup>. Moreover, while the government has taken initiatives to improve protection offered to children, such as the Ryan Report, in practise little substantive improvement has been made.

## 2 THE LANZAROTE CONVENTION

- i. Ireland ratified the European Convention on Human Rights on February 25 1953.
- ii. Ireland signed the Lanzarote Convention on October 25 2007 but has not yet ratified the treaty.
- iii. Ireland has no immediate plans to ratify the convention. A motion on child abuse was heard in Seanad Éireann (The Senate) on February 29 2012 and Senator Jillian van Turnhout called on the Minister for Justice and Equality, Alan Shatter, to commit to bring forward a proposal to Government to ratify the Lanzarote Convention.<sup>115</sup> The Minister informed the Seanad that he expected to bring legislative proposals to the Government within the coming months in the form of a Sexual Offences Bill. He said "these will include measures to enhance the protection of children against sexual abuse and sexual exploitation, including exploitation through prostitution and child pornography."<sup>116</sup> The Minister seemed to hint towards there being no need for a ratification of the Convention when he stressed that "many of the criminal law provisions of... the Lanzarote Convention are already

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<sup>111</sup> Ibid (n 4) Article 17 and 21

<sup>112</sup> Ibid (n 19)

<sup>113</sup> Ibid (n 4) Article 25

<sup>114</sup> [http://www.eipa.eu/files/repository/eipascope/20080313162050\\_MKA\\_SCOPE2007-3\\_Internet-4.pdf](http://www.eipa.eu/files/repository/eipascope/20080313162050_MKA_SCOPE2007-3_Internet-4.pdf) accessed on July 12/2012

<sup>115</sup> Speech by Alan Shatter, T.D., Minister for Justice and Equality, note 92.

<sup>116</sup> Ibid.

covered by the Child Trafficking and Pornography Act 1998 and the Criminal Law (Sexual Offences) Act 2006.”

iv. As the Lanzarote Convention was adopted by the Council of Europe, it’s ranking in the national legal system would be similar to that of normal legislation if, as the Irish Constitution dictates, it was implemented by Dáil Eireann by an Act, or alternatively it would take on constitutionally-protected status if it was implemented by an amendment to Bunreacht na hEireann.<sup>117</sup>

## II NATIONAL LEGISLATION

### 1 GENERAL PRINCIPLES OF THE JURISDICTION

i. The Republic of Ireland is a liberal-democratic society, founded as a Constitutional republic by the Constitution of Ireland, *Bunreacht na hÉireann*, in 1937. It is governed as a bicameral, parliamentary democracy with a President as head of State; though the President has no executive power and operates in a largely ceremonial role.

For much of its history, the island of Ireland had been ruled by monarchs and the successive governments of Great Britain. In 1922, following the Irish War of Independence (or the Anglo-Irish War) and the signing of the Anglo-Irish Treaty, the Irish Free State was established and Ireland became a constitutional monarchy that remained a dominion of the British Commonwealth, and over which the British monarch still reigned. It was from this dominion status that the outline of the contemporary Irish State began to emerge.

On December 8<sup>th</sup> 1922, the province of Northern Ireland<sup>118</sup> exercised its right to leave the Irish Free State area and remain in the United Kingdom. This partition remains in effect to this day. Furthermore, the Constitution of the Irish Free State gave effect to a bicameral parliament, the *Oireachtas*, which is comprised of *Dáil Éireann* (House of Representatives, the lower house) and *Seanad Éireann* (the Senate, the upper house). This original bicameral structure resembles the bicameral parliament present in the modern Republic. Today, the

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<sup>117</sup> *Infra* at 15-17.

<sup>118</sup> The Northern Irish State was envisioned as a solution to the tensions between those with nationalist aspirations (who were in the majority in the other regions of Ireland) and those who wished to remain in the United Kingdom (who were in the majority in Northern Ireland). Ireland was partitioned by the Government of Ireland Act, 1920, thereby giving effect to Northern Ireland as an entity distinct from ‘Ireland,’ but in union with the United Kingdom.

Oireachtas bears the sole and exclusive power to legislate (subject to the Republic's obligations to obey and adopt laws legislated by the European Community), a power which remained limited under the Irish Free State.

Following the ratification of the Statute of Westminster in 1931,<sup>119</sup> the government of the Irish Free State made several unfettered amendments to the original Constitution of the Free State. These amendments necessitated its replacement in 1937 by the Constitution of Ireland, *Bunreacht na hÉireann*, which established the office of the President, the central legislative, executive and judicial organs of the contemporary Republic, and replaced the head of Government with a more powerful *Taoiseach*, or Prime Minister. The new Constitution also provided for the position of *Tánaiste*, the second-most senior position in the Irish Government. Though *Bunreacht na hÉireann* is today the nation's "supreme legal authority,"<sup>120</sup> the newly-christened Ireland, or *Éire*,<sup>121</sup> did not officially become a Republic until 1949, with the passing of the *Republic of Ireland Act*. Following the Act, the Irish Republic became the independent State that it remains to this day.

ii. Though Irish citizens are afforded Human Rights through instruments of European and International Law (e.g., the European Convention on Human Rights and the International Covenant on Civil and Political Rights), the Irish Constitution is the principal vehicle through which rights are domestically legislated. The Irish Republic does not guarantee a 'Bill of Rights' as such. Instead, Articles 40 - 44 of *Bunreacht na hÉireann* (inclusive) set out the 'Fundamental Rights' of citizens. These include the right to equality before the law (Art. 40.1), the right to life (Art. 40.3), the right to liberty (Art. 40.4), the sanctity of the household (Art. 40.5) and the right to freedom of expression, assembly and association (Art. 40.6.1). Art. 43 acknowledges the citizen's right to the ownership of private property, while Art. 44.2 guarantees freedom of profession and practice of religion. Art. 41 recognises the Family as 'a fundamental unit group of society,' 'antecedent and superior to all positive law,' possessing inalienable and imprescriptible rights.' Similarly, Art. 42.5 acknowledges 'the natural and imprescriptible rights of the child.' While, Art. 40.3.1 provides that the State has a positive

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<sup>119</sup> Under the Statute of Westminster, States holding dominion status within the British Empire were granted legislative equality with Great Britain.

<sup>120</sup> Furlong, John, "Ireland - the Name of the State," Legal Information Management, Vol. 6, (2006), pp. 297 - 301 - p. 298.

<sup>121</sup> The Irish Constitution of 1937 changed the name of the country from the Irish Free State to Ireland. As per Art. 4; "The name of the State is *Éire*, or, in the English language, *Ireland*."

obligation ‘to respect and, as far as practicable, ... defend and vindicate the rights of the citizen,’ Art. 43.2.2 provides that the State may ‘delimit by law the exercise of the said rights’ in accordance with the common good.

Over the course of the Republic’s short history, the Irish Judiciary have interpreted the provisions of *Bunreacht na hÉireann* as including other human rights that are not explicitly stated within the text of the Constitution,<sup>122</sup> thereby expanding upon the range of rights afforded to citizens. In doing so, the judiciary have relied on a varied range of sources, such as; “...natural law; the Christian and democratic nature of the State; the Preamble, in particular, references to prudence, justice and charity, the dignity and freedom of the individual and the common good.”<sup>123</sup> The judiciary have found “as many as twenty ‘unenumerated’ personal rights” implicit in these features of Irish society,<sup>124</sup> including the right to bodily integrity,<sup>125</sup> the right to be reared with due regard to religious, moral, intellectual and physical welfare,<sup>126</sup> the right to marital privacy<sup>127</sup> and the right to earn a living,<sup>128</sup> among others. The novel application of the doctrine of unenumerated rights by the Irish judiciary remains “one of the most innovative features” of Irish Constitutional law.<sup>129</sup>

*Bunreacht na hÉireann* was created in 1937 and largely reflects the time and social context in which it was written. For example, Art. 42.1 acknowledges the “life of the women within the home.” The same can be said of the provisions regarding Children’s rights, which largely reflect a time “when children were seen and not heard.”<sup>130</sup> Indeed, while Art. 42.5 refers to the “natural and imprescriptible rights of the child,” Art. 41, which pertains to the family, contains no explicit reference to the child. The Irish Constitutional Review Group has interpreted this silence as meaning “that the rights of the family are effectively exercised by the parents and that the rights of children may not be given due weight within the family.”<sup>131</sup>

<sup>122</sup> See Brian Doolan, “*Constitutional Law and Constitutional Right in Ireland*,” Gill & MacMillan (Dublin, 1994), p. 156 - “[t]he courts have been inventive and flexible by interpreting the Constitution in such a way as to acknowledge the existence of other constitutional rights which are not expressly enumerated.”

<sup>123</sup> Mullally, Siobhán, “*Searching for Foundations in Irish Constitutional Law*,” *The Irish Jurist*, (1998) Vol. 33 Issue 1, p. 333.

<sup>124</sup> *Ibid.*

<sup>125</sup> See *Ryan v. Attorney General* [1965] I.R. 294.

<sup>126</sup> See *G. v An Bord Uchtála* [1980] IR 32.

<sup>127</sup> See *McGee v Attorney General* [1974] IR 284.

<sup>128</sup> See *Murphy v Stewart* [1973] IR 97.

<sup>129</sup> Brian Doolan, “*Constitutional Law and Constitutional Right in Ireland*,” Gill & MacMillan (Dublin, 1994), p. 156.

<sup>130</sup> Jewell, Lisa “*Children's Rights - Interview with Jillian van Turnhout*,” *Woman's Way*, November 21, 2011 - p. 30.

<sup>131</sup> Tenth Progress Report: The Family, The All-Party Oireachtas Committee on the Constitution, Dublin, Stationery Office, 2006 - p. 88

The child is, however, afforded the Fundamental Rights bestowed unto all citizens under the Constitution (Articles 40-44),<sup>132</sup> as well as those rights which have been unenumerated by the judiciary.<sup>133</sup> The child is gifted further fundamental rights by virtue of the right to life that every human being enjoys.<sup>134</sup> Nevertheless, there appears to be a consensus that the absence of an explicit provision on the rights that are unique and peculiar to a child's vulnerable status and way of life is having a negative effect on their welfare.<sup>135</sup> This has led to demands for the provision of a 'Bill of Rights' for children, within the Constitution.<sup>136 137</sup> This demand was addressed on Saturday, 10<sup>th</sup> November with the Children's Referendum, which inserted an amendment to the Constitution to provide legal protection for the natural and imprescriptible rights of all children.<sup>138</sup>

iii. Though the Irish judiciary has been labeled "unreceptive" in its efforts to implement international human rights instruments in the past,<sup>139</sup> Ireland's Higher and Supreme Court are Constitutionally-enabled to monitor the implementation of national and international human rights instruments. The High Court has full jurisdiction in all matters of law or fact; in both civil and criminal proceedings.<sup>140</sup> Its jurisdiction also extends to the question of the validity of any domestic law having regard to the Constitution and the international

<sup>132</sup> See The Constitution Review Group, "*Report of the Constitution Review Group*," Dublin, Stationery Office, 1996 - "A child is, of course, a person, and therefore the general constitutional rights shared by adults, such as the right to bodily integrity, will be protected elsewhere in the Constitution."

<sup>133</sup> See *Re: Article 26 and the Adoption (No 2) Bill 1987* [1989] IR 656.

<sup>134</sup> See the judgment of Walsh J. in *G. v. An Bord Uchtála* [1980] IR 32. At p. 44; "The child's natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience. The right to life necessarily implies the right to be born, the right to preserve and defend (and have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation."

<sup>135</sup> O'Brien, Carl, "Minister insists children's rights referendum to go ahead next year," *The Irish Times* - Monday, December 19, 2011.

<sup>136</sup> The Constitution Review Group, "*Report of the Constitution Review Group*," Dublin, Stationery Office, 1996 - "Article 41 should contain an express guarantee of those rights of a child which are not guaranteed elsewhere and are peculiar to children, such as the right to be reared with due regard for his or her welfare."

<sup>137</sup> The All-Party Oireachtas Committee on the Constitution, "*Tenth Progress Report: The Family*," Dublin, Stationery Office, (2006).

<sup>138</sup> [www.childrensreferendum.ie](http://www.childrensreferendum.ie) 5<sup>th</sup> Nov 2012

<sup>139</sup> See Egan, Suzanne, "*The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation*," *Dublin University Law Journal* (2003) 10(1) 230 - "For many years, the Irish courts were equally unreceptive to attempts by litigants to rely on the [ECHR] Convention's provisions in domestic proceedings."

<sup>140</sup> See Art. 34.3.1 of *Bunreacht na hÉireann*. "The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."

agreements to which the State is a party.<sup>141</sup> Further, Art. 34.4.4 of *Bunreacht na hÉireann* provides that: “No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involved questions as to the validity of any law having regard to the provisions of this Constitution.” This provision establishes the Supreme Court as the State’s Constitutional Court, as well as the “final and conclusive” arbiter in interpretation of the Irish Constitution.<sup>142</sup> Under Art. 34.4.4, the Higher and Supreme Courts are equipped with “a system of judicial review of legislation which confers on them far-reaching powers of review.”<sup>143</sup> Thus, if a citizen believes that an act of the legislature infringes upon the rights bestowed unto him/her by the Constitution (or an international human rights instrument), or is repugnant to the principles of the Constitution, that citizen may invoke his/her right directly before the Courts. If the Court is satisfied that the law in question infringes upon said right, the High and Supreme Courts have the power, under Art. 34.4.4, to declare that law invalid. Rights enshrined within national and international instruments are thereby buttressed by this “robust power” of the Irish Courts.<sup>144</sup>

Where a right has been violated or infringed upon, citizens are entitled to apply individually for relief from the Supreme Court. The Supreme Court can only hear appeals, however, as it does not have original jurisdiction the applicant must demonstrate that they have the sufficient legal standing, or *locus standi*, to bring proceedings before the Court. There must be evidence that the applicant will be directly affected/harmed by the law in question. The applicant may then contact a Solicitor who, in turn, will brief a Barrister who will prepare the relevant documents for the proceedings, though it is possible for a litigant to represent themselves in court. The State’s Attorney General must then be served notice of the intended proceedings. Under Art. 26.2.1, it is the Attorney General who will argue that the legislation in question does not infringe upon the principles of the Constitution. Finally, though the Supreme Court is the final authority on the Constitution under Art. 34.4.4, proceedings must be brought before the High Court in the first instance. Upon the High

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<sup>141</sup> See Art. 34.3.2 of *Bunreacht na hÉireann*: “The jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution.”

<sup>142</sup> See Art. 34.4.6 of *Bunreacht na hÉireann*.

<sup>143</sup> McDermott, Paul A., & Murphy Mark W., “No Revolution: The Impact of the ECHR Act 2003 on Irish Criminal Law,” *Dublin University Law Journal*, Vol. 15, Issue 1, (2008) 1.

<sup>144</sup> See Egan, Suzanne, “The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation,” *Dublin University Law Journal* (2003) 10(1) 230.



Court's judgment, an appeal may be lodged with the Supreme Court, whose decision is 'final and conclusive.'

iv. Criminal offences in Ireland are divided into two categories; summary offences and indictable offences. Summary offences are heard before the regional District Court; where the maximum sentence may not exceed 12 months. Indictable offences may also be brought before the District Court subject to the same stipulation. For the most part, however, indictable offences are heard before the Circuit Criminal Court, although some more serious criminal cases (like those involving murder, manslaughter and rape) are heard by the Central Criminal Court. There is also a Special Criminal Court, though this is usually only used for cases involving terrorism and major drug crimes. An appeal of the decision of these courts may be sought from the Court of Criminal Appeal, which is comprised of a Judge from the Supreme Court and two Judges from the High Court.<sup>145</sup>

No general right exists by which the decision of the Court of Criminal Appeal may be appealed to the Supreme Court. However, the Supreme Court may act as the Criminal Court of final appeal where the Attorney-General, or the Court of Criminal Appeal itself, determines that the case in question involves a point of law of exceptional public importance.<sup>146</sup> This provision is on certificate from the Attorney General or the CCA only and it may then be deemed necessary in the public interest to grant an appeal to the Supreme Court.

Criminal procedure in Ireland is governed by the presumption that the accused is innocent until proven guilty. Upon arrest, the suspect must be informed of the crime for which they are being arrested, unless the individual is arrested under sec. 30 of the *Offences Against the State Act, 1939*. While being detained by *An Garda Síochána* (the Irish police force), the suspect must be informed of their right to consult a Solicitor. When a suspect is charged with an offence, they first must make an appearance in the District Court, where they can make an application for bail unless the prosecution can show a reason as to why bail should be refused, e.g. if there's a risk of interference with evidence or witnesses, a risk of absconding or a risk of re-offending. There is a right to appeal if bail is refused. Under the

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<sup>145</sup> Courts Service Website-  
<http://www.courts.ie/courts.ie/Library3.nsf/pagecurrent/10646F81427562D480256DA9004139B7>  
(Accessed 05/11/2012).

<sup>146</sup> S29 Courts of Justice act 1924

*Criminal Justice (Legal Aid) Act, 1962*, the accused is also entitled to free legal aid on the State's behalf where the means of the accused "are insufficient to enable him to obtain legal aid," or where "by reason of the gravity of the charge or of exceptional circumstances it is essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence."<sup>147</sup> If a summary offence, it will proceed to the District Court or if indictable, to the Circuit Court.

v. Section 52 of the *Children Act, 2001*, as amended by s.129 of the Criminal Justice Act 2006, provides that the age of criminal responsibility is 12 years of age. Further, where a child under the age of 14 is charged with an offence, no proceedings may be initiated without the prior consent of the Director of Public Prosecutions (DPP). However, the age of criminal responsibility may be lowered to 10 years of age where the child has committed an act of murder, manslaughter, rape or aggravated sexual assault.

Statistics regarding the detention of children in Ireland are available from the Irish Youth Justice Service, the Irish Prisons Service and the Central Statistics Office. Sec. 3 of the *Children's Act, 2001* defines a child as a person under the age of 18 years. While under the age of 18 years, there are two principal institutions in which a child may be detained: children detention schools and places of detention. Only boys under the age of 16 and girls under the age of 18 at the time of being committed by the Courts may be remanded in children's detention schools. As of 2007, "the proportion of children given detention as an outcome by the Courts has not shown any increase since 2004," when the child was detained in 18% of cases brought before the Courts.<sup>148</sup> In 2006, this figure dropped to 16.7%.<sup>149</sup> Furthermore, a downward trend in the number of children being detained at any one time emerged in 2007, "The average number detained fell from 134 in 2004 to 116 in 2007. The maximum of 154 children detained in 2004 has not been exceeded since."<sup>150</sup>

Children between the ages of 16 and 18 are sent to places of detention instead of prison. There are two principal places of detention in Ireland; St. Patrick's Institution and the Children Detention Schools at Oberstown, Lusk, Co. Dublin. In April 2002 the Minister for Children and Youth Affairs, Ms. Frances Fitzgerald T.D., announced that they would be

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<sup>147</sup> *Criminal Justice (Legal Aid) Act, 1962*, sec. 2.

<sup>148</sup> Irish Youth Justice Service, "Expert Group on Children Detention Schools - Final Report," December 2007 - p. 7.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

ending the practice of detaining 16 and 17 year old boys in St. Patrick's Institution within a timeframe of 2 years by improving the facilities at Oberstown.<sup>151</sup> In 2011, 231 children were under the remit of the Irish Prisons Service, accounting for 1.6% of the imprisoned population.<sup>152</sup> This is a decrease from the 247 (2.5%) children under the remit of the Prisons Service in 2007 and the 242 (2.2%) in 2008.<sup>153</sup>

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

- i. Ireland ratified the United Nations Convention on the Rights of the Child in 1992,<sup>154</sup> hence under Article 19, engaging itself to protect children from sexual abuse., however, as the Convention has yet to be incorporated into domestic law, it cannot be relied upon in Irish law. Furthermore, under Directive 2011/93/EU, Ireland is committed to implement at least the minimum standard required by the European legislation. Article 3 of the instrument criminalises engaging in sexual activities with a child not having reached the age of sexual consent and causing it to witness sexual abuse and sexual activities. It also condemns certain behavior which causes a child to engage into sexual activities with a third party.<sup>155</sup> Finally, the Lanzarote Convention demands special protection for children who have not reached the legal age of sexual consent by criminalising those who enter into sexual activities with them,<sup>156</sup> although as already noted Ireland has not ratified this as of yet. Although the international instruments specify the minimum standard of behavior which should be criminalised, it is up to the States to define what constitutes sexual activities.

The Criminal Law (Sexual Offences) Act 2006 <sup>157</sup> is one of the major legal instrument specifying what constitutes sexual activities involving children under Irish Law. The 2006 Act deals with the sexual offences of defilement of a child under 15 years of age, and of

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<sup>151</sup> Department of Children and Youth Affairs, "Child Detention Schools."- <http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/YouthJustice/detentionmenu.htm&mn=irik&nID=6> (Accessed 05/11/12).

<sup>152</sup> Irish Prisons Service, "*Age and Gender of persons committed to prison by year from 2007 to 2011.*" Available online at <http://www.irishprisons.ie/images/pdf/yearagegender.pdf>. Retrieved 7 August 2012.

<sup>153</sup> Ibid.

<sup>154</sup> <http://www2.ohchr.org/english/law/crc.htm> accessed 10 August 2012.

<sup>155</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0093:EN:HTML> accessed 10 August 2012.

<sup>156</sup> <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm> accessed 10 August 2012.

<sup>157</sup> <http://www.irishstatutebook.ie/pdf/2006/en.act.2006.0015.pdf> accessed 10 August 2012. Hereafter referred to as 2006 Act.

defilement of a child under 17 years of age. Hence, it is one of the fundamental pieces of Irish legislation intended to protect children from sexual abuse. For the purposes of the Act, s.1 specifies that sexual activities are considered to be sexual intercourse or buggery between persons who are not married to each other and acts described in s.3(1) and s.4(1) of the Criminal Law (Rape) (Amendment) Act 1990.<sup>158</sup> The latter are respectively the offences of aggravated sexual assault, that is, a sexual assault involving serious violence or threat of it or is such as to cause injury, humiliation, degradation of a grave nature to the person assaulted, and rape. Although the 2006 Act distinguishes between categories of age, it makes no distinction as to whether the sexual offence is committed against a boy or a girl, thus according them equal protection.

Apart from the 2006 Act, there are further statutory instruments which render illicit certain sexual activities against children. More specifically, sexual assault against children under 15, that is, any form of sexual touching, is governed by the Criminal Law (Amendment) Act 1935<sup>159</sup> and the Criminal Law (Rape) (Amendment) Act 1990.<sup>160</sup>

Leahy<sup>161</sup> has criticised the fact that the definition of sexual activities under Irish legislation is not broad enough as it does not include for instance the act of inciting or forcing a child to arouse someone else. This is a major flaw in the legislation because causing a child to arouse another person may amount to a substantial proportion of the cases of sexual abuse as the SAVI Report suggests.<sup>162</sup> In fact, such complaint is not new. The Law Reform Commission Report on Child Sexual Abuse had proposed in 1990 to create an offence of child sexual abuse to replace the present offence of indecent assault. This new offence would have criminalised the touching of the body of a child for sexual gratification, the intentional masturbation in the presence of a child, the intentional exposure of sexual organs or performance of a sexual act in front of a child for the purpose of sexual gratification, and requiring, allowing or permitting a child to engage in prostitution or any other sexual act.<sup>163</sup> Unfortunately, this broader offence of child sexual abuse was not adopted by Irish

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<sup>158</sup> <http://www.irishstatutebook.ie/1990/en/act/pub/0032/index.html> accessed 10 August 2012.

<sup>159</sup> <http://www.irishstatutebook.ie/1935/en/act/pub/0006/index.html> accessed 10 August 2012.

<sup>160</sup> Criminal Law (Rape) (Amendment) Act 1990, note 6.

<sup>161</sup> S Leahy, 'Hard Cases and Bad Law: An Overview of the Criminal Law (Sexual Offences) Act 2006' (2008) 26 *ILT* 38-45.

<sup>162</sup> H McGee and others, note 4.

<sup>163</sup> Law Reform Commission, 'Report on Child Sexual Abuse' (1990).

legislation. Despite this, in the *Minister for Justice and Equality v Liam Dominic Adams*,<sup>164</sup> the Court stated that even though s.246 of the Children Act 2001 concerning cruelty toward children did not apply in this case, it had the potential to encompass in subsequent cases behavior constituting sexual abuse. It further remarked that inducing a child to touch the offender for sexual gratification was included in the concept of sexual abuse, even if the offender did not use force or threats against the child. Thus, the offence of sexual abuse, although not expressly codified, is present in an implicit form under other statutory instruments. The Heads of the Children First Bill,<sup>165</sup> has adopted a broad definition of child sexual abuse in which the concept includes, among others, using a child for sexual gratification. This can encompass a broader range of sexual conduct than the expressly codified and it evidences the general consensus that the statutory considerations of what constitutes sexual activities are not exclusive. This Bill, concerning the duty to report child sexual abuse, however, is still only at the drafting stage but is expected over the coming months.<sup>166</sup>

- ii. Intention is a major component of the concept of *mens rea*, which determines whether a person is guilty of a crime by looking at his state of mind at the time of the offence. However, Irish law has only limitedly elaborated what is meant by intention. In fact, the word “intentional” is neither used in the 2006 Act, nor in the 1935 Act, nor in the Children First Bill 2012. The major Irish cases which have attempted to define the concept of intention deal with murder and capital murder. In both cases, that is *People v Murray*<sup>167</sup> and *People v Douglas and Hayes*,<sup>168</sup> the consensus is that intention is to mean willing the consequences of one's act, foresight of them not being enough to establish intention.

Although the word intention is not expressly used, intention to defile a child operates in the defence against the charge in the form of honest mistake as to age. If the offender can prove that he/she honestly mistook the age of the victim, then intention operates in the defence because it shows that the accused did not will to commit the sexual offence against a child. The 2006 Act codifies this defence and specifies that the Court shall consider the absence or

<sup>164</sup> *The Minister for Justice and Equality v Liam Dominic Adams* [2011] IEHC 366.

<sup>165</sup> [http://www.dcy.gov.ie/documents/publications/CF\\_Heads\\_and\\_General\\_Scheme.pdf](http://www.dcy.gov.ie/documents/publications/CF_Heads_and_General_Scheme.pdf) accessed 10 August 2012.

<sup>166</sup> *Ibid.*

<sup>167</sup> *People v Murray* [1997] IR 360.

<sup>168</sup> *People v Douglas and Hayes* [1985] ILRM 25.

presence of reasonable grounds for the defendant so believing.<sup>169</sup> Hence, because the defence contains the subjective element of honest mistake and the objective element of reasonable grounds for so holding, it can be argued that intention to defile a child comes halfway between willing the consequences of one's act, that is, to perform a sexual activity with a child, and foresight of the possibility that the partner may be a child. In the event that it is found that the defendant did not honestly mistake the age of the victim, the liability of his/her actions may be the full penalty for his/her offence.

- iii. In Ireland, the age of consent for penetrative sexual activities is placed at 17 years and for sexual activities which would constitute sexual assault at 15 years. Recently, there have been some parliamentary discussions on lowering the age of consent for penetrative sexual activities to 16.<sup>170</sup>

There are two provisions in the 2006 Act which intend to regulate consensual activities between minors and distinguish them from abusive sexual activities. Under s.3(9), no proceedings for the offence of defilement of a child under 17 but over 15 shall be brought against a child under 17 years except by, or with the consent of the Director of Public Prosecutions.<sup>171</sup> Furthermore, under s.3(10), a person who is convicted of an offence of defilement of a child under 17 but over 15 and who is not more 24 months older than the child under 17 with whom he/she attempted to engage in a sexual act with, shall not be subject to the provisions of the Sex Offenders Act 2001.<sup>172</sup> The two latter provisions are only available for the offence of defilement of a child under 17 but over 15, and not for defilement of a child under 15. There is a final provision, s.5 of the 2006 Act, which further regulates activities between minors. It holds that a girl under 17 will not be guilty of an offence under this Act by reason only of her engaging in an act of sexual intercourse.<sup>173</sup> This latter provision was adopted to avoid criminalising young girls who become pregnant as a result of the sexual intercourse. Despite this laudable aim, this section has generated a lot of controversy due to the difference in treatment it establishes between boys and girls, resulting in more protection from liability for girls. In fact, under the 2006 Act, a boy under 15 who engages in sexual intercourse with a girl under 15 could be found liable of the offence of

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<sup>169</sup> Criminal Law (Sexual Offences) Act 2006, note 5.

<sup>170</sup> G Carbery, 'Proposals soon on age of consent', in *Irish Times*. 2012, viewed on 10 August 2012, <http://www.irishtimes.com/newspaper/ireland/2012/0601/1224317059529.html>.

<sup>171</sup> Criminal Law (Sexual Offences) 2006 Act, note 5.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

defilement, while the girl would not face any charges, regardless of her part of responsibility in the commission of the act. Although s.5 of the 2006 Act has been challenged in *M.D. (Minor) v Ireland AG & DPP*<sup>174</sup> on the grounds that it breached Article 40.1 of the Constitution, the Supreme Court has preferred to uphold the High Court judgment, reasoning that a difference in treatment was justifiable here because girls were subject to more risks than boys when they engaged in sexual intercourse. Nonetheless, the Irish regulations of consensual activities between minors are still strongly criticised because teenagers exploring their sexuality can be as liable as paedophiles under the 2006 Act of an offence as the distinction between consensual and exploitative sexual activities is weak and depends in a large part on the discretion of the DPP.<sup>175</sup> To remedy these inadequacies, Leahy has, among others, proposed for a proximity provision according to which there should be a rebuttable presumption of innocence for under age sexual activities where there is no more than two years difference between the parties.<sup>176</sup> However, the former Director of Public Prosecutions, James Hamilton, has manifested his reticence for this type of measures as defilement can be used to prosecute cases involving rape and sexual assault,<sup>177</sup> which can happen between minors. In fact, the SAVI Report survey indicated that a quarter of the sexual abusers were 17 or younger.<sup>178</sup> Thus, given the widespread nature of the offence perpetrated by a minor and its seriousness, caution must be expressed in regards to provisions which could have the effect of weakening the protection afforded to children by making these offences harder to prosecute.

- iv. The Lanzarote Convention makes clear that States party to it should penalise sexual activities with a child where use is made of force, coercion, or threats, or where abuse is made of a particularly vulnerable position of the child, like a mental or physical disability or a situation of dependence.<sup>179</sup> Directive 2011/93/EU establishes a similar standard, and stresses at paragraph 22 that incapacities to not be taken advantage of include the influence of alcohol or drugs.<sup>180</sup> It further indicates that the protection from being taken advantage of,

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<sup>174</sup> *M.D. (Minor) v Ireland AG & DPP* [2012] IESC 10.

<sup>175</sup> S Leahy, note 9.

<sup>176</sup> S Leahy, note 9.

<sup>177</sup> J Hamilton (DPP), 'Prosecutions under the Criminal Law (Sexual Offences) Act 2006' (2009).

<sup>178</sup> H McGee and others, note 4.

<sup>179</sup> Lanzarote Convention, note 3.

<sup>180</sup> Directive 2011/93/EU, note 2.

or having forced used upon, or being threatened, should apply to all children under 18 regardless of the age of consent, although the sanctions may vary relative to age.<sup>181</sup>

Section 3(1) of the Criminal Law (Rape) (Amendment) Act 1990<sup>182</sup> codifies the offence of aggravated sexual assault, which is an assault using force or threats. Furthermore, s.246 of the Children Act 2001<sup>183</sup> which deals with the offence of cruelty toward children, includes situations where a child would have force used upon or be threatened by any person who has custody, charge, or care of the child. In any event, the use of force or threats in sexual offences will be taken as an aggravating factor by the Courts.

It is to be remarked that although s.246 of the Children Act 2001 and s.176(2) of the Criminal Justice Act 2006 protect children under 18, s.3(1) of the Criminal Law (Rape) (Amendment) Act 1990 as referenced in the 2006 Act contains no express provision for children which are above the age of consent, but are not yet adults. This legal lacuna has the potential to provide less protection to children in that year gap because they will not be considered children for the purposes of that offence. Thus, the standard is lower than the one required by the European Directive.

Section 5 of the Criminal Law (Sexual Offences) Act 1993<sup>184</sup> establishes the offence of attempting/having sexual intercourse/buggery with a person who is mentally impaired and condemns gross indecency between males when one of them has a mental disability. For the purpose of this provision, mentally impaired is to mean suffering from a disorder of the mind, whether a handicap or an illness, which renders a person incapable of living an independent life or being able to protect itself from exploitation.<sup>185</sup> More specifically, the criminal provisions regarding sexual offences which involve taking advantage of a disability only concern disabilities of the mind. There is no codification for sexual offences involving taking advantage of a physical disability or a situation of dependence. Equally, there are no specific provisions concerning taking advantage from a child under the influence of alcohol or drugs. Thus, the Irish legal standard is lower than the one established by the international obligations. Nonetheless, the Criminal Justice (Withholding of Information on Offences

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<sup>181</sup> *Ibid.*

<sup>182</sup> Criminal Law (Rape) (Amendment) Act 1990, note 6.

<sup>183</sup> <http://www.irishstatutebook.ie/2001/en/act/pub/0024/index.html> accessed 10 August 2012.

<sup>184</sup> <http://www.irishstatutebook.ie/1993/en/act/pub/0020/index.html> accessed 10 August 2012.

<sup>185</sup> *Ibid.*



Against Children and Vulnerable Persons) Act 2012<sup>186</sup> includes in disabilities enduring physical impairment, indicating that the general consensus is that disabilities can be both mental and physical. This may lead to some new provisions further protecting individuals with a physical disability from sexual offences.

Finally, it is to be remarked that the provisions concerning sexual activities with people with a disability only encompass a minimal range of sexual acts. For instance, there are no specific provisions dealing with sexual assault against a person with a disability. This substantially diminishes the protection of the vulnerable.

- v. The Punishment of Incest Act 1908<sup>187</sup> defines the concept of incest as a sexual intercourse between two close relatives, that is, between the person's grandparent, parent, or sibling and that said person. Although sexual assault and other types of sexual abuse by relatives are not included in the concept of incest, they can nonetheless be sanctioned through the sections concerning sexual activities between children and persons in authority. Similarly, stepparents and foster care parents are not encompassed by the term close relatives. Nonetheless, they face liability through the provisions on sexual activities between children and persons in authority.

Males can be found guilty of the crime of incest from the time they have reached the age of criminal responsibility, that is, under s.129 of the Criminal Justice Act 2006,<sup>188</sup> 12, and in cases of rape and aggravated sexual assault, 10 or 11. On the other hand, females cannot be guilty of the crime of incest till they have reached 16.<sup>189</sup> This means that in cases of incest between minors under 16, only the male will be found guilty of this offence, thus providing more security from liability for a female.

- vi. Although Ireland is not yet bound by the section of The Lanzarote Convention that mentions that there should be adequate provisions to protect children from sexual abuse by persons in authority, trust, or influence,<sup>190</sup> it is bound by a similar provision in Directive 2011/93/EU, which sets the minimum standard to penalise persons in authority, trust, or

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<sup>186</sup> <http://www.oireachtas.ie/documents/bills28/bills/2012/3212/b3212s.pdf> accessed 10 August 2012.

<sup>187</sup> Punishment of Incest Act 1908, section 1.

<sup>188</sup> Criminal Justice Act 2006, note 32.

<sup>189</sup> Punishment of Incest Act 1908, note 36.

<sup>190</sup> Lanzarote Convention, note 3.

influence who engage in sexual activities with a child under the age of consent and over in Article 3(5)(i).<sup>191</sup>

The SAVI Report outlined that of the persons who were asked in the national survey, 22,1% of males and 16,3 % of females had suffered from sexual abuse committed by a person in authority not belonging to the family, which includes babysitters, religious ministers, teachers, coaches and other figures, and 7,3% of males and 20,7% of females had been sexually abused by a figure of authority within the family, that is, biological parents, stepparents, grandparents, uncles, and brothers).<sup>192</sup>

The 2006 Act defines person in authority as a parent, stepparent, guardian, uncle, aunt, or grandparent of the victim, or any person who is for the time being in loco parentis to the victim, or any person who is for the time being responsible for the education, supervision, or welfare of the victim.<sup>193</sup> However, this provision only applies to children under 17, leaving children between 17 and 18 without special protection.

On the other hand, s.246 of the Children Act 2001, which creates the offence of cruelty toward children under 18, criminalises persons in care, custody or charge of the child who assault or ill-treat the child.<sup>194</sup> Consequently, the child is specially protected from persons in authority for sexual activities such as inciting the child to arouse someone or acts which amount to sexual assault, thus meeting the standard imposed by the Directive. Notwithstanding this substantial protection, s.249 of the Children Act 2001 will only condemn those persons having the custody, charge or care of the child who cause or encourage sexual intercourse, buggery or sexual assault on a child if it is under 17.<sup>195</sup> However, it is to be considered whether this provision should not apply to all children till 18 given the substantial influence that a person in custody of a child has over it, vitiating the consent of the child in respect of the sexual activity. In fact, the Directive provides for a penalty for a person who can cause through threats, force, or coercion sexual activities between a child and a third party, regardless of the age of consent of the child. Nonetheless, the potential negative impacts of s.249 of the Children Act 2001 may be contained by s.176 of the Criminal Justice Act 2006 whereby a person can be found guilty of reckless

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<sup>191</sup> Directive 2011/93/EU, note 2.

<sup>192</sup> H McGee and others, note 4.

<sup>193</sup> Criminal Law (Sexual Offences) Act 2006, note 5.

<sup>194</sup> Children Act 2001, note 31.

<sup>195</sup> *Ibid.*

endangerment of a child under 18 if he/she has caused any child to be placed or left in a situation involving a substantial risk of sexual abuse for the child, or if he/she has not taken reasonable steps to protect the child from that risk.<sup>196</sup>

There are two further upcoming sets of regulations, relevant under this section, which relate to the obligations of organisations where children attend without their parents and clarify the responsibilities of the community at large. These provisions will create new offences for persons involved in educational settings, care and justice institutions, and in the workplace and the community and who fail to disclose information related to child abuse. More specifically, under the Children First Bill 2012,<sup>197</sup> any organisation where children under 18 attend without their parents will have to report any concerns on child abuse. This duty is extended to the community at large with the Criminal Justice (Withholding Information Against Children and Vulnerable Adults) Act 2012 whereby a person can be guilty of an offence if he/she fails to disclose to the Garda his/her knowledge or belief about a sexual offence committed against a child under 18 and does not provide information which may be important to the apprehension, prosecution, and conviction of the perpetrator.<sup>198</sup> Since children are much less likely to report that they have been sexually abused than adults,<sup>199</sup> both the Bill and the Act are expected to reinforce the protection of children against sexual offences and to ameliorate the apprehension and prosecution of sexual abusers.

## 2.2 Child Prostitution

- vii. Ireland signed the Convention on Action against Human Trafficking (the Warsaw Convention) on the 13<sup>th</sup> of April 2007, ratified the Convention on the 13<sup>th</sup> of July 2010 and entered it into force on the 1<sup>st</sup> of November 2010. This was done by enacting the Criminal Law (Human Trafficking) Act 2008.<sup>200</sup> This Act ensures the complete transposition of the Convention into domestic Irish law.

- viii. Child prostitution is defined in Article 19(2) of the Lanzarote Convention as:

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<sup>196</sup> Criminal Justice Act 2006, note 32.

<sup>197</sup> Children First Bill 2012, note 14.

<sup>198</sup> Criminal Justice (Withholding of Information Against Children and Vulnerable Adults) Bill 2012, note 35.

<sup>199</sup> H McGee and others, note 4.

<sup>200</sup> <http://www.irishstatutebook.ie/2008/en/act/pub/0008/index.html> [accessed 19/07/12]

the fact of using a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment, regardless if this payment, promise or consideration is made to the child or to a third person.<sup>201</sup>

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to the Convention on the Rights of the Child<sup>202</sup> states that child prostitution is the practice whereby a child sells his or her body for sexual activities in return for remuneration or any other form of consideration. The remuneration or other consideration could be provided to the prostitute or to another person. The countries who are parties to the Optional Protocol undertake to prohibit child prostitution.

In Ireland it is not an offence to sell sex and there is no legal definition for ‘prostitution’, although related behaviour such as soliciting and loitering are criminalised.<sup>203</sup> The rationale regarding criminal legislation and prostitution in Ireland is the protection of society from a nuisance and to protect prostitutes from exploitation.<sup>204</sup> It was not until 1997 that legislation was produced to criminalise prostitution, specifically child prostitution.<sup>205</sup> The Children Act 1997 was amended by the Criminal Law (Sexual Offences) (Amendment) Act 2007<sup>206</sup> which was put in place to specifically address the issue of child prostitution. However, neither Act offers a definition for ‘prostitution’. The offence of prostitution is also mentioned amid the definition of sexual exploitation contained in the Child Trafficking and Pornography Act 1998<sup>207</sup> and in the Criminal Law (Human Trafficking) Act 2008<sup>208</sup>, yet not defined.

The definition of ‘prostitution’ in Ireland is not compatible with the definition provided by the Lanzarote Convention, in fact, Ireland does not define ‘prostitution’. The author notes that Ireland, when ratifying the Warsaw Convention, completed the legislative process within 12 months. The legislation was entered into force within 3 years from the time of

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<sup>201</sup> <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm> [accessed 19/07/12]

<sup>202</sup> <http://www2.ohchr.org/english/law/crc-sale.htm> [accessed 19/07/12]

<sup>203</sup> The Criminal Law (Sexual Offences) Act 1993

<sup>204</sup> <http://cdn.thejournal.ie/media/2012/06/Discussion-Document-on-Future-Direction-of-Prostitution-Legislation.pdf> [accessed 17/07/12]

<sup>205</sup> Children Act 1997 available at:

<http://www.irishstatutebook.ie/1997/en/act/pub/0040/index.html> [accessed 19/07/12]

<sup>206</sup> <http://www.irishstatutebook.ie/2007/en/act/pub/0006/index.html> [accessed 19/07/12]

<sup>207</sup> <http://www.irishstatutebook.ie/1998/en/act/pub/0022/index.html> [accessed 24/07/12]

<sup>208</sup> <http://www.irishstatutebook.ie/2008/en/act/pub/0008/index.html> [accessed 19/07/12]

signature. One must, therefore, question Ireland's inability to ratify other Conventions, most notably the Lanzarote Convention, which was signed in the same year.

The UN Committee on the Rights of the Child expressed concerns at the lack of information concerning child victims of prostitution and child pornography in Ireland.<sup>209</sup> However, a 2007 study found that half of the 22 Dublin women interviewed were less than 18 years of age when they first became involved in prostitution<sup>210</sup>. There are a handful of legislative provisions regarding child prostitution in the Irish statute books however there is no legislative definition of the term 'prostitution'.

ix. The Child Trafficking and Pornography Act 1998 is the earliest Act to include the offence of child prostitution in Ireland. However, the offence falls under the heading of sexual exploitation as opposed to an act in itself. Section 3(3) of the Act defines sexual exploitation as:

- a) Inducing or coercing a child to engage in prostitution or the production of child pornography
- b) Using the child for prostitution or the production of child pornography
- c) Inducing or coercing the child to participate in any sexual activity which is an offence under any enactment
- d) The commission of any such offence against the child<sup>211</sup>

This Act (amended by the Criminal Law (Human Trafficking) Act 2008<sup>212</sup>) creates two offences relating to child sexual exploitation in section 3. The first offence is that of knowingly facilitating the trafficking of a child or housing a trafficked child for the purpose of sexual exploitation. We can see that this offence places liability on the recruiter.

The second offence under this Act criminalises, among other offences, the use of a trafficked child for the purpose of sexual exploitation. This offence places liability on the user of the service. A person who causes either of these offences will also be liable under the Act.

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<sup>209</sup> UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations: Ireland, 4 February 1998, CRC/C/15/Add.85, available at: <http://www.unhcr.org/refworld/docid/3ae6aec924.html> [accessed 09/07/12]

<sup>210</sup> Quinlan Cooke, Siobhan (2007) Prostitution in Dublin, presentation at Children's Acts Advisory Board conference 23rd October 2007

<sup>211</sup> <http://www.irishstatutebook.ie/1998/en/act/pub/0022/index.html> [accessed 19/07/12]

<sup>212</sup> <http://www.irishstatutebook.ie/2008/en/act/pub/0008/index.html> [accessed 24/07/12]

The UN Optional Protocol on the Sale of Children, Prostitution and Child Pornography 2000 was signed by Ireland in the same year. This Protocol obliges the State to criminalise the ‘offering, obtaining, procuring or providing a child for child prostitution.’<sup>213</sup> Prostitution is defined by the Protocol as the ‘use of a child in a sexual activity for remuneration or any other form of consideration’.<sup>214</sup> Ireland has not, at the time of writing, ratified this Protocol.

Section 249(1) of the Childrens Act 2001 creates an offence of causing or encouraging unlawful sexual intercourse or buggery with the child or the sexual seduction or prostitution of or sexual assault on the child by a person who has custody, charge or care of the child.<sup>215</sup> For the purposes of this Act any person who is the parent or guardian of a child shall be presumed to have the custody of the child, any person to whose charge a child is committed by any person who has the custody of the child shall be presumed to have charge of the child, and any person exercising authority over or having actual control of a child shall be presumed to have care of the child

The 2001 Act also creates the offence of soliciting a minor, whether or not for the purpose of prostitution.<sup>216</sup> The offence of solicitation is defined under the Criminal Law (Sexual Offences) Act 1993<sup>217</sup> as:

- a) Offering his or her services as a prostitute to another person,
- b) Soliciting or importuning another person for the purpose of obtaining that other person’s services as a prostitute, or
- c) Soliciting or importuning another person on behalf of a person for the purposes of prostitution.

All parties to the offence of prostitution may be found guilty of an offence under this section. This may be the prostitute themselves the recruiter for sole use (user) or the recruiter for a third party (recruiter).

Until a Supreme Court judgment in 2006, the issue of child prostitution (specifically of girls under 15) was also legislated against, though not expressly, under the umbrella of statutory rape. Statutory rape was an offence under s1(1) of the Criminal Law (Amendment) Act

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<sup>213</sup> <http://www2.ohchr.org/english/law/crc-sale.htm> [accessed 19/07/12]

<sup>214</sup> <http://www2.ohchr.org/english/law/crc-sale.htm> [accessed 19/07/12]

<sup>215</sup> <http://www.irishstatutebook.ie/2001/en/act/pub/0024/index.html> [accessed 19/07/12]

<sup>216</sup> <http://www.irishstatutebook.ie/2001/en/act/pub/0024/index.html> [accessed 19/07/12]

<sup>217</sup> <http://www.irishstatutebook.ie/1993/en/act/pub/0020/index.html> [accessed 23/07/12]

1935. The terms of s.1(1) of the 1935 Act were as follows, “Any person who unlawfully and carnally knows any girl under the age of fifteen years shall be guilty of a felony”.<sup>218</sup> The rationale behind this was the idea that a girl under the age of 15 did not have the capacity to consent to this act. However, in the case of *CC v Ireland & Others*<sup>219</sup>, C.C. (‘the applicant’) was charged with four offences under s1 of the Act 1935. He admitted having consensual intercourse with the person named in the charges. However, she had told him that she was sixteen years of age and initiated the contact. The applicant sought relief by way of judicial review. CC argued that:

- a) A declaration that a reasonable belief on the part of a defendant that the alleged injured party was over the statutory age constituted a defence to a charge under s.1(1) of the Act.
- b) A declaration, in the alternative, that the exclusion of the defence of mistake as to age is repugnant to the Constitution and that if the offence created by s.1(1) of the Act of 1935 is an offence of strict liability, that provision is inconsistent with the Constitution.

The Supreme Court allowed the appeal and granted a declaration that s.1(1) of the Criminal Law (Amendment) Act 1935 was inconsistent with the provisions of the Constitution. Thus, the Supreme Court abolished the strict liability offence of statutory rape. As a result of this judgment the Joint Oireachtas Committee on Child Protection was set up to review the law surrounding the case. The result of this was the Criminal Law (Sexual Offences) Act 2006 which creates a new defence of reasonable belief to the offence of defilement of a child under 15 as follows:

It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years ... the court shall have regard to

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<sup>218</sup> <http://www.irishstatutebook.ie/1935/en/act/pub/0006/index.html> [accessed 23/07/12] The distinction between felonies and other crimes has been abolished by s.3(1) of the Criminal Law Act, 1997, which can be found at <http://www.irishstatutebook.ie/1997/en/act/pub/0014/index.html> [accessed 23/07/12]

<sup>219</sup> [2006] IESC 33

the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances.<sup>220</sup>

The 2006 Act creates two offences relating to the act of sexual intercourse or buggery to children. First, it is an offence to engage or attempt to engage in a sexual act with a child under 15 years of age. As discussed above, the defence of reasonable belief applies to this offence. This offence places criminal liability on the user of the service, not the recruiter.

The second offence created by this section applies to those who engage or attempt to engage in a sexual act with a child under 17 years of age. This offence again criminalises the user of the service and not the recruiter. The severity of the liability is dependent on whether the person merely attempted the sexual act or actually committed the sexual act. It should be noted that a female under the age of 17 will not be found guilty under this Act for engaging in an act of sexual intercourse only.

Section 176 of the Criminal Justice Act 2006<sup>221</sup> also creates an offence to cause or permit any child to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse, or to fail to take reasonable steps to protect the child from such a risk while knowing that the child is in such a situation. This offence places liability on the recruiter. The Criminal Law (Sexual Offences) (Amendment) Act 2007<sup>222</sup> also creates the offence of meeting a child for the purpose of sexual exploitation.

### 2.3 Child Pornography

#### *Child Pornography in General:*

- x. Ireland signed the Budapest Treaty on the 28<sup>th</sup> of February 2002, but has yet to ratify it.<sup>223</sup> As of the 24-9-12 Ireland has not ratified the convention, Irish computer law is being updated with the suggestion by Paul C Dwyer that the convention being close to ratification.<sup>224</sup>

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<sup>220</sup> <http://www.irishstatutebook.ie/2006/en/act/pub/0015/print.html> [accessed 19/07/12]

<sup>221</sup> <http://www.irishstatutebook.ie/2006/en/act/pub/0026/index.html> [accessed 24/07/12]

<sup>222</sup> <http://www.irishstatutebook.ie/2007/en/act/pub/0006/sec0006.html#sec6> [accessed 24/07/12]

<sup>223</sup> <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CL=ENG> Accessed on 24-09-2012

<sup>224</sup> <http://www.icctf.org/blogs/2/6/computer-crime-legislation-in-ir?PHPSESSID=28ac8f6e095115194efa2e590f3c4c28>



xi. Article 20(2) of the Lanzarote Convention defines “child pornography” as any material depicting children in real or simulated explicit sexual conduct, or any depiction of sexual organs for sexual purposes. The Child Trafficking and Pornography Act, 1998, Section 2 defines the child as any person under the age of 17. This is compatible with Article 18 (2) of the Convention. Child Pornography is defined in Section 2 (a)(1) of the Act as any visual representation of a child engaged in explicit sexual activity and (a)(2) any depiction of the genital or anal region of the child for sexual purposes. Section 2 (b) includes audio representation as child pornography, while section 2 (d) also accounts for any representation, description or information produced by computer-graphics or electronic or mechanical means which imply a child is available for the purpose of sexual exploitation.<sup>225</sup> Therefore, the national legislation is compatible with the Lanzarote Convention as it clearly prohibits all forms of Child Pornography as indicated in the Convention.

xii. The Lanzarote Convention Article 20(1.a) to (1.f) requires the state to criminalize, the production, offer, distribution and transmission, procuring of child pornography and the knowledgeable access to child pornography.

The Child Trafficking and Pornography Act, 1998 criminalises the organisation and facilitation of sexual exploitation of children, which Section 3 (a-b) includes the production of child pornography. Section 5 of the act criminalizes any person who knowingly engages in the production, distribution, publication, import or export, advertisement or possession of child pornography.

Therefore, it is concluded that the national legislation is sufficiently thorough and is compatible with the level of criminalization required by the convention.

xiii. Ireland signed the convention on the 25<sup>th</sup> of October 2007, but to date has not ratified the convention.<sup>226</sup> Therefore as the state has not ratified the convention no known reservations are yet to be made. However, given the extent of the protection in The Child Trafficking and Pornography Act, 1998, it would seem unlikely for such reservations to be made to the production and possession of pornographic material, Article 20(3) or knowingly accessing child porn, Article 20(4).

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<sup>225</sup> <http://www.irishstatutebook.ie/1998/en/act/pub/0022/print.html#sec1>

<sup>226</sup> <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=1&DF=&CL=ENG>

The Act, however in Section 6(2)(a) allows for the possession of child pornography for the censorship of films, publications and video recordings. Section 6(2)(b) allows for the possession of child pornography for the prevention, investigation and prosecution of offenses under the Act. Section 6(3) allows for the possession of child pornography for bona fide research.<sup>227</sup> Therefore, it could be predicted that such reservations may be made upon ratification of the Convention.

The control mechanisms for pornographic material are largely a self-regulating framework where internet service providers operating within the state are obliged to remove pornographic materials. Any user may report such content to Garda Síochána via their hotline address<sup>228</sup>. If the material is outside the jurisdiction it is notified to the hotline in that jurisdiction or their relevant enforcement agencies, which aims to remove all illegal content.<sup>229</sup>

*Participation of a Child in Pornographic Performances:*

- xiv. The Child Trafficking and Pornography Act, 1998, Section 4 (1) criminalizes any person who has custody, care or charge of a child and allows the child be used for pornographic purposes. Therefore, the participation of children in pornography is criminalized.

Section 3 (3) defines sexual exploitation as inducing or coercing the child to engage in the prohibited activity, there is no differentiation between coercing and recruitment. “Recruitment” is not explicably mentioned in the Act.

The attendance of pornographic performances involving children is prohibited, Section 2 (a)(2) defines child pornography as to include, “a person who is depicted as being a child and who is or is depicted as witnessing any such activity.”

The State is not a party to the convention, it would be predicted no reservation would be made to limit the application of Article 21 1.c.

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<sup>227</sup> <http://www.irishstatutebook.ie/1998/en/act/pub/0022/print.html#sec1>

<sup>228</sup> [www.hotline.ie](http://www.hotline.ie)

<sup>229</sup> Speech by Alan Shatter, T.D., Minister for Justice, Equality and Defence at the Seanad Private Members Motion On Child Abuse Material on the Internet - Wednesday 29 February 2012  
<http://www.justice.ie/en/JELR/Pages/SP12000038>

## 2.4 Corruption of Children

- xv. The definition from the Lanzarote Convention states under Article 22, which deals with corruption of children, that each Party shall take the necessary legislative or other measures to criminalise the intentional causing, for sexual purposes, of a child who has not reached the age set in application of Article 18, paragraph 2, to witness sexual abuse or sexual activities, even without having to participate.

There is no specific offence in law of child sex abuse, particularly in relation to the intentional causing of a child to witness sexual abuse or sexual activities. However a person may be charged with rape, sexual assault, aggravated sexual assault or with one of the specific offences relating to children. There are specific statutory instruments which deal with issue of protection of children in relation to sexual abuse, such as the Children's Act 2001,<sup>230</sup> Criminal Law (Sex Offences) Act 2006,<sup>231</sup> Criminal Justice Act 2006,<sup>232</sup> and the Child Trafficking and Pornography Act 1998.<sup>233</sup>

The first question which inquires as to whether the State criminalizes the intentional causing of a child to witness sexual abuse or sexual activities, without necessarily having to participate, can be dealt with in the provisions surrounding reckless endangerment and also having a child in a brothel.

The Criminal Justice Act 2006 provides for a new offence of reckless endangerment of children. This came into effect on 1 August 2006. Section 176 (2) states that 'a person, having authority or control over a child or abuser, who intentionally or recklessly endangers a child by:

- (a) causing or permitting any child to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse, or
- (b) failing to take reasonable steps to protect a child from such a risk while knowing that the child is in such a situation is guilty of an offence.<sup>234</sup>

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<sup>230</sup> <http://www.irishstatutebook.ie/2001/en/act/pub/0024/index.html> accessed 23/07/2012

<sup>231</sup> <http://www.irishstatutebook.ie/2006/en/act/pub/0015/index.html> accessed 23/07/2012

<sup>232</sup> <http://www.irishstatutebook.ie/2006/en/act/pub/0026/index.html> accessed 23/07/2012

<sup>233</sup> <http://www.irishstatutebook.ie/1998/en/act/pub/0022/index.html> accessed 23/07/2012

<sup>234</sup> <http://www.irishstatutebook.ie/2006/en/act/pub/0026/sec0176.html> accessed 23/07/12

This offence may be committed by a person who has authority or control over a child or an abuser and who intentionally or recklessly endangers a child by:

- Causing or permitting any child to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse or
- Failing to take reasonable steps to protect a child from such a risk while knowing that the child is in such a situation.<sup>235</sup>
- The Children's Act 2001 deals with the offence of causing or encouraging a sexual offence upon a child. Section 249 states that 'A person is guilty of an offence if, having the custody, charge or care of a child, he or she causes or encourages unlawful sexual intercourse or buggery with the child or causes or encourages the seduction or prostitution of, or a sexual assault on, the child.'<sup>236</sup>
- The legislation clarifies that a person shall be deemed to have caused or encouraged, unlawful sexual intercourse or buggery with any child, or the seduction or prostitution of a child who has been seduced or become a prostitute or a sexual assault on a child who has been sexually assaulted, if the person has *knowingly* allowed the child to consort with, or to enter or continue in the employment of, any prostitute or keeper of a brothel. It is ambiguous as to whether in knowingly allowing the child to be sexually assaulted or consorting with the sex trade, specifically involves forcing, inducement, and promise, however it is clear that the key element in causing is the knowledge.

Section 248 of the Children Act 2001 deals with the issue of allowing a child (under 18 years of age) to be in a brothel. This legislation is not gender specific. The power of Arrest is under Section 254 Children Act 2001 (also includes power of search of premises for purpose of arrest); however there is no power of detention for proper investigation of offence.<sup>237</sup>

The definition of 'causing' seems to have a wider scope than just child sex abuse legislation alone and can be predominantly identified in criminal legislation. Causing or encouraging sexual offence upon child (less than 17 years of age) is governed by Section 249 of the Children Act 2001. It states that a person having custody, charge, care of a child causes or

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<sup>235</sup> *ibid*

<sup>236</sup> <http://www.irishstatutebook.ie/2001/en/act/pub/0024/sec0249.html> accessed 23/07/12

<sup>237</sup> Garda Síochána Policy on the Investigation of Sexual Crimes against Children Child Welfare 2010

encourages sexual intercourse or buggery, seduction of a child, prostitution of a child, or sexual Assault on a child, is deemed to be causing or encouraging where sexual intercourse, buggery, seduction, prostitution or sexual assault has taken place and offender knowingly allows child to consort with or enter/continue employment with a prostitute or keeper of a brothel. This offence is not gender specific (except for sexual intercourse – female victim).<sup>238</sup> Section 249 of the Children Act 2001 deems it to be an offence for a person in a position of authority to a child to knowingly cause or encourage that child to engage in sexual activities. Ireland therefore, has taken the necessary legislative or other measures to criminalise the intentional causing, for sexual purposes, of a child who has not reached the age set in application of Article 18, paragraph 2, to witness sexual abuse or sexual activities. However there may be discrepancies in this legislation with Article 22 which also includes measures to protect those who have only witnessed these events.

Similar discrepancies require clarification as to what is meant by; Procuring Defilement by Threats, Intimidation or False Pretences as governed by Section 3 Criminal Law Amendment Act, 1885 as amended (sub-section (3) repealed by section 31 Non-Fatal Offences Against the Person Act from 19<sup>th</sup> August, 1997). This entails procuring a woman or girl for unlawful carnal connection by threats, intimidation or false pretences.<sup>239</sup>

Soliciting or Importuning for Purpose of Committing a Sexual Offence is governed by Section 6, Criminal Law (Sexual Offences) Act, 1993 as amended. It states that it is an offence to solicit or importune persons for purpose of committing sexual offences below:

- Buggery with persons under 17 years
- Gross Indecency with male under 17 years
- Defilement of girl under 15 years
- Defilement of girl under age of 17 years
- Defilement of child under 17 years
- Defilement of child under 15 years
- Sexual Assault of child (under 17 years of age)
- Person who is mentally impaired for purpose of sexual intercourse, buggery, gross indecency (with male)

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<sup>238</sup> Garda Síochána Policy on the Investigation of Sexual Crimes against Children Child Welfare 2010

<sup>239</sup> Garda Síochána Policy on the Investigation of Sexual Crimes against Children Child Welfare 2010

This offence is not gender specific as it depends on the intended offence. It is unclear as to how these offences might be caused and whether causing is inclusive of forcing, inducement and promise.

All of the above legislation indicates that the State does criminalize the intentional causing of a child to witness sexual abuse or sexual activities however there is no specific offence that involves the sexual abuse of a child without that child necessarily having to participate. The reckless endangerment offence indicates that there is an attempt to protect children in situations where they themselves may not actually be involved however this is somewhat ambiguous.

## 2.5 Solicitation of Children for Sexual Purposes

- xvi. The digital age has presented a huge danger to the protection of the children from sexual violence. According to Barnardos, 1 in 10 children who met up with someone they had met online have been abused by that person, who were all adults that portrayed themselves as a child in their previous communications on the internet.<sup>240</sup>

The Criminal Law (Sexual Offences) (Amendment) Act 2007, section 6 makes it an offence to intentionally meet or to travel to meet a child for the purpose of sexually exploiting them after “having met or communicated with that child on 2 or more previous occasions”.<sup>241</sup> To date, however, there is no specific offence of grooming in Irish law, taking into consideration the new communication technologies that often facilitate such actions.<sup>242</sup>

- xvii. The Criminal Law (Sexual Offences) Act 2006 criminalises attempting to commit a sexual offence with a minor, as well as committing the act itself.<sup>243</sup> A distinct offence of aiding and abetting is not specified in Irish legislation, however, a number of other provisions do exist on the statute book that criminalise offences akin to aiding and abetting. The *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012* creates an offence if:

<sup>240</sup> Barnardos, “Children and Homelessness: Information Sheet,” February 2008, p2. Available at: [http://www.barnardos.ie/assets/files/publications/free/ADVO\\_homelessness.pdf](http://www.barnardos.ie/assets/files/publications/free/ADVO_homelessness.pdf).

<sup>241</sup> The Criminal Law (Sexual Offences) (Amendment) Act 2007, section 6.

<sup>242</sup> Barnardos, “Paper on Child Prostitution,” July 2010. Available at: <http://www.google.ie/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CDgQFjAE&url=http%3A%2F%2Fwww.barnardos.ie%2Fassets%2Ffiles%2Fcampaigns%2Fchild-abuse%2FBarnardos%2520paper%2520on%2520child%2520prostitution.doc&ei=NtmbUKDwL8-ThgfdS4HQA&usg=AFQjCNGxTtPIdycdf2wrkqwZXnDOPympEQ>.

<sup>243</sup> Criminal Law Sexual Offences) Act 2006, section 2(2).

(a) He or she knows or believes that an offence, that is an arrestable offence, has been committed by another person against a child, and

(b) he or she has information which he or she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of that other person for that offence, and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána.<sup>244</sup>

It is hoped that this procedure will help the Gardaí and HSE with the investigation and prosecution of child sexual abuse and promote the welfare of the child.

Similarly, s.176(2) of the Criminal Justice Act 2006<sup>245</sup> creates the offence of reckless endangerment of a child whereby a person in authority or control of a child can be found guilty of an offence if he/she causes or permits the child to be in a situation with a risk of serious harm or sexual abuse or fails to take steps to protect the child from this situation he/she knows the child is in.

## 2.6 Corporate Liability

xviii. The area of corporate liability is complex and multi-faceted. Broadly speaking Irish law can hold moral and legal persons or entities such as commercial companies and associations liable when an action has been performed on their behalf by a person in a position in their entity. Leading persons in certain circumstances are held liable for general acts of the company or association while regular employees are liable for their individual acts that breach their duty of care.

In relation to child abuse the most likely institutions to be involved in cases of corporate liability are schools, hospitals and churches as within these institutions employees are in positions of authority over children.<sup>246</sup> It is these institutions that owe children a duty of care, breach of such a duty is the foundation of a cause of action for corporate liability.<sup>247</sup>

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<sup>244</sup> The Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Bill 2012, available at <http://www.oireachtas.ie/documents/bills28/bills/2012/3212/b3212s.pdf> [accessed 03/08/12]

<sup>245</sup> <http://www.irishstatutebook.ie/2006/en/act/pub/0026/index.html> accessed 10 August 2012.

<sup>246</sup> Jessica Lynch 1992, *A Matter of Trust: Institutional Employer Liability for Acts of Child Abuse by Employee*, p.4

<sup>247</sup> *Ibid*, p.7

Corporate liability in this context can take the form of vicarious liability. Vicarious liability is defined as ‘the legal liability of one person for the actions of another’.<sup>248</sup> The rationale behind the imposition of vicarious liability was explained in *Majrowski -v- Guy’s and St Thomas’ NHS Trust* [2006] as follows:<sup>249</sup>

- The employer is in control of the employee’s actions
- The employee would not have been in a position to commit the wrongdoing but for the fact that s/he was carrying out the employer’s activities
- The employer is usually in a better position to absorb the financial loss of a civil claim (e.g. liability insurance, ability to increase prices to absorb loss)
- Vicarious liability ensures that employers promote good practice and train employees properly in terms of working practices and health and safety.

The basic components of vicarious liability are as follows:

- Agent of the corporation commits a crime
- Crime is committed while the individual is acting within the scope of their employment
- Crime is committed with intent to benefit the corporation

Thus, the imposition of vicarious liability is limited as an employer is only liable for the wrongdoings of an employee where it is established that such wrong doings were carried out in the course of employment. The case of *Delahunty -v- S.E Health Board* was one in which an employee of an industrial school had assaulted a boy who was visiting a friend at the school. In *Delahunty* the Irish High Court held that the school was not liable as the employee had no duty to this boy.<sup>250</sup> This case was followed by *O’Keeffe v Hickey* [2008] IEHC 72, currently before the European Convention of Human Rights.<sup>251</sup>

The imposition of vicarious liability in cases of child abuse is particularly topical in Ireland in relation to allegations of such abuse by members of the dominant churches. The question has arisen as to whether senior members of such organisations can be held vicariously liable for acts of child abuse by their junior colleagues. In the case of *JGE -v- Trustees of Portsmouth Roman Catholic Diocesan Trust* (July 2012) an English court decided the relationship between a

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<sup>248</sup> Conor Hanly, *An Introduction to Irish Criminal Law* (Gill and MacMillan 1999) p. 73

<sup>249</sup> **Majrowski -v- Guy’s and St Thomas’ NHS Trust** [2006] U.K.H.L. 34, [2006] I.R.L.R. 695

<sup>250</sup> **Delahunty -v- S.E Health Board** [2003] 4 IR 361

<sup>251</sup> *O’Keeffe v. Ireland* (application no. 35810/09)



Bishop and a Priest is sufficiently close to that of an employer-employee to render the Bishop vicariously liable for that Priest's actions.<sup>252</sup> In his judgment, Lord Justice Ward made clear that the law relating to vicarious liability has moved on from that pertaining to a contract of service.<sup>253</sup>

- xix. In addition, to corporate liability in Ireland taking the form of vicarious liability criminal liability may be imposed on the corporation. Corporate criminal liability in Ireland follows the Anglo-Australian approach and relies on the identification doctrine.<sup>254</sup> Through this approach Irish corporations can bear criminal liability under a system of 'derivative' corporate liability.<sup>255</sup> However, in cases of corporate criminal liability there is a clear distinction between leading persons and regular employees. Through 'derivative' corporate liability it is directors and senior managers who are the corporations 'directing mind and will', as such only their conduct and state of mind is the conduct and state of mind of the corporation itself.<sup>256</sup>

Thus, Irish law allows for the imposition of corporate liability in the form of administrative, civil or criminal liability. This form is dependent on the duty of care which is breached as well as the distinction between leading persons and regular employees. Importantly, the imposition of criminal liability on the corporation itself as opposed to the regular employee whose actions have breached the company's duty of care is more difficult to establish than civil or administrative liability. This follows the rules regarding the burden of proof in criminal proceedings as guilt must be proved beyond reasonable doubt. Irish law does not prevent the imposition of individual liability when corporate liability has been established. Thus, children may be offered a double protection. Notwithstanding the theoretical existence of corporate liability in Ireland, evidence of enforcement in the Irish courts is sparse. Corporate liability is difficult to establish in both forms of vicarious liability and the 'identification approach'. Vicarious liability is enveloped by the vagueness of concepts such as 'in the scope of employment'. Meanwhile, criminal liability poses greater problems, which is reflected in calls for a new corporate manslaughter bill. The 'identification' approach to corporate criminal liability in Ireland is often criticised as contrary to the principle of legality

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<sup>252</sup> **JGE -v- Trustees of Portsmouth Roman Catholic Diocesan Trust** (*EWCA Civ 938*)

<sup>253</sup> *Ibid*

<sup>254</sup> <http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf> accessed on August 9th

<sup>255</sup> *Ibid*, p.6

<sup>256</sup> *Ibid*

enshrined in the Constitution due to its unpredictability.<sup>257</sup> Perhaps, the English court's decision in the *Trustees of Portsmouth Roman Catholic Diocesan Trust* case may encourage Irish courts to enhance the law of vicarious liability, amidst public outrage at a wave of child abuse claims by church figures. Such a development is to be encouraged and welcomed as a means through which children's rights against child abuse are vindicated.

- xx. Irish law does not always exclude the possibility of individual liability when corporate liability is imposed. Only leading persons may be held vicariously liable for acts of employees under Irish law and either civil or administrative liability may be imposed. However, as the institution may be found civically liable for its breach of the duty of care while the employee is held criminally liable for their abusive action,<sup>258</sup> Irish law does not exclude individual liability when corporate liability is imposed.

## 2.7 Aggravating Circumstances

- xxi. Legislation makes no specific reference to aggravating circumstances which may be applicable in cases of this nature. However, the *Criminal Law (Sexual Offences) Act 2006* states in sections 3(3) and 3(4) that if a person has previously been convicted under 3(1) or 3(2) – whereby the person had engaged, or attempted to engage, in a sexual act with a child who is under the age of 17 – and reoffends under the same section, the subsequent sanction will increase.

## 2.8 Sanctions and Measures

- xxii. Deprivation of liberty tends to be the most common sanction for the above mentioned crimes. In cases of statutory rape under the Criminal Law (Amendment) Act 1935, the defendant “shall be liable on conviction thereof to penal servitude for life or for any term not less than three years or to imprisonment for any term not exceeding two years.”<sup>259</sup> Following the *CC* Case, the Criminal Law (Sexual Offences) Act 2006 made it an offence to engage or to attempt to engage in a sexual act with an under 15 with life imprisonment being set as the maximum punishment.<sup>260</sup> A person who is found guilty of committing the same act but with a child under 17 may be imprisoned for a term not exceeding 5 years, or for a

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<sup>257</sup> Ibid (n 9) p.54

<sup>258</sup> Ibid (n 1) p.10

<sup>259</sup> The Criminal Law (Amendment) Act 1935.

<sup>260</sup> The Criminal Law (Sexual Offences) Act 2006, section 2(1).

person in authority a term not exceeding 10 years. A person found guilty of attempting to commit the same offence may be imprisoned for a term not exceeding 2 years, or for a person in authority a term not exceeding 4 years.<sup>261</sup> In the event that a defendant claiming honest mistake of the age of the victim, has falsely claimed this, the liability of his/her actions may be the full penalty for his/her offence.<sup>262</sup>

Although someone who is a maximum of 24 months older may be found guilty of defilement of a child between the ages of 15 and 17, consideration is given to these circumstances in sanctioning the crime in the way that he/she does not have to be registered as a sex offender.<sup>263</sup>

While men face life imprisonment under the Criminal Law (Incest Proceedings) Act 1995,<sup>264</sup> the sanction for women for the same offence is a maximum of 7 years.<sup>265</sup> This discrepancy is however to be eliminated in the years to come with the Criminal Law (Incest) (Amendment) Bill 2012.<sup>266</sup> It will provide the same penalty for men and women which can amount to life imprisonment.

Contrary to Directive 2011/93/EU, there is no mention of a higher penalty for those who commit sexual abuse while they are in a position of authority. Thus, the standard provided by Irish law in this respect is lower than the one required by the Directive.<sup>267</sup>

If found guilty of the offence of causing, permitting or failing to protect a child to be in a situation where they are in danger of being subject to serious harm or sexual abuse, a defendant is liable for a fine and/or imprisonment for no more than 10 years.<sup>268</sup>

A person with control or authority over a child who is found guilty of causing or encouraging sexual intercourse, buggery, seduction, prostitution or sexual assault or knowingly allows the child to be involved with prostitution is subject to a penalty of 10 years Imprisonment.<sup>269</sup>

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<sup>261</sup> *Ibid*, at section 3.

<sup>262</sup> The Criminal Law (Sexual Offences) Act 2006.

<sup>263</sup> *Ibid*.

<sup>264</sup> <http://www.irishstatutebook.ie/1995/en/act/pub/0012/print.html> accessed 10 August 2012.

<sup>265</sup> Punishment of Incest Act 1908, section 2.

<sup>266</sup> <http://www.oireachtas.ie/viewdoc.asp?DocID=21074&&CatID=59> accessed 10 August 2012.

<sup>267</sup> *Ibid*.

<sup>268</sup> The Criminal Justice Act 2006, section 176.

<sup>269</sup> The Children Act 2001, section 249.

Anyone in a position of authority or control over a child who is convicted of causing or encouraging sexual assault or prostitution of a child is subject to a fine and/or imprisonment for up to 10 years.<sup>270</sup> Whereas someone convicted under the Criminal Law (Sexual Offences) Act 1993 for offences related to prostitution- soliciting, or even the prostitute themselves, can face a fine and/or imprisonment of up to 12 months.<sup>271</sup>

A fine up to £25,000 or imprisonment for up to 14 years is the penalty for being convicted of allowing a child in your care to be used in the production of child pornography.<sup>272</sup> For a summary conviction for publishing, importing, distributing, exporting, printing, selling, showing or possessing pornography for these purposes the sanction is a fine up to £1500 and/or imprisonment up to 12 months. For a conviction on indictment for these offences, the sanction is a fine and/or imprisonment for up to 14 years.<sup>273</sup> A conviction for possession of pornography is sanctionable by a fine up to £1500 and/or imprisonment up to 12 months on a summary conviction, or a fine up to £5000 and/or imprisonment up to 5 years on indictment.<sup>274</sup>

Life imprisonment is also the sanction for child trafficking for both the user and the recruiter.<sup>275</sup>

A person found guilty of the offence of meeting a child to sexually exploit them will be sentenced to imprisonment for no longer than 14 years.<sup>276</sup>

In Ireland extradition is governed by the Extradition Act 1965. Extradition between Ireland and EU Member States is governed by the European Arrest Warrant which replaces extradition procedures between the EU Member States. Instead, any national judicial authority can issue an arrest warrant for any offence which carries a penalty of four months or greater. <sup>277</sup> It is important to note that the European Arrest Warrant can only be used when a person is being charged with an offence and not merely being investigated in

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<sup>270</sup> The Childrens Act 2001, section 249 (1).

<sup>271</sup> The Criminal Law (Sexual Offences) Act 1992.

<sup>272</sup> The Child Trafficking and Pornography Act 1998 (as amended by the Criminal Law (Human Trafficking) Act 2008), section 4(1).

<sup>273</sup> *Ibid* at section 5.

<sup>274</sup> *Ibid* at section 6.

<sup>275</sup> *Ibid* at section 3.

<sup>276</sup> The Criminal Law (Sexual Offences) (Amendment) Act 2007, section 6.

<sup>277</sup>

connection with an offence. <sup>278</sup>Furthermore, ‘dual criminality’ is not a required element for a number of offences which include child pornography and the sexual exploitation of children. <sup>279</sup> Part 2 of the Extradition Act 1965<sup>280</sup> provides for extradition between Ireland and countries other than the UK. Dual Criminality is required in cases of extradition between Ireland and non-EU Member States. Dual Criminality means that the offence must exist in Ireland as well as the country seeking the extradition of a person from Ireland.

- xxiii. Aside from custodial sentences and the Sex Offenders Register; there are no other sanctions available in Ireland. In other countries such as the UK, there are options for paedophiles to undergo voluntary sterilisation. In relation to the Sex Offenders ‘register’, this does not actual exists in Ireland. Rather, those who have been convicted are obliged to inform Garda of their address and other essential pieces of information on their whereabouts. However, this does not provide any safety net for children. For example, parents cannot see if there is a convicted sex offender living in their area.

There are often stories in the news that highlight the disproportionate sentences that convicted sex offenders have received and this is simply not acceptable. In Ireland, the reconviction by sex offenders is lower than for most criminal offenders, “in conformity with the international picture sex offenders released from Irish prisons were significantly less likely to be re-imprisoned than other types of offenders at least in the short term.”<sup>281</sup> However, as noted in the 2009 report from the Department of Justice regarding the management of sex offenders, it was emphasised that approximately 100 out of 300 sex offenders in prison in Ireland are over 50 years of age and they have been prosecuted for a number of offences that usually occurred in past decades. These offenders are also less likely to re-offend on release because of their age. <sup>282</sup>

- xxiv. As discussed in Chapter 2, section 1(f), the state can impose administrative, civil and criminal liability on legal persons/moral entities, as well as on natural persons, and as such they are subject to the same sanctions. This is of particular significance in Ireland with the

<sup>278</sup> Extradition Act, 1965, Part 2 S 10 (2) (1)

<sup>279</sup> European Arrest Warrant Act 2003, Article 2 (2)

<sup>280</sup> Extradition Act, 1965, Part 2, S 8 (1)

<sup>281</sup> O'Donnell, I., E.P. Bauer and N. Hughes (2008) ‘Recidivism in the Republic of Ireland’ *Criminology and Criminal Justice* 2008: 8:123) (18% of sex offenders imprisoned within 3 years of release compared to 45% of persons who committed a violent or property offence).

<sup>282</sup> Justice.ie (2009) The management of Sex Offenders, A Discussion Document. Available at : <http://www.justice.ie/en/JELR/FINAL%20REPORT.pdf/Files/FINAL%20REPORT.pdf>

incidents of child sexual abuse in institutions and at the hands of the religious orders. The Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 was introduced largely in response to a number of inquiries and allegations of child sex abuse in these circumstances,<sup>283</sup> and sets out that anyone summarily convicted under the legislation is liable to a class A fine and/or imprisonment up to 12 months or, if convicted on indictment, imprisonment of up to 10 years and a minimum of 3 years, depending on the severity of the crime that information was withheld about.<sup>284</sup> The Irish state also has tried to impose 50/50 liability between them and the Church authorities for the compensation to be paid to victims of child abuse, although they have had difficulties in recovering this, it shows that the state has taken steps to impose both financial and penal sanctions on legal persons/moral entities.<sup>285</sup>

- xxv. In order to seize property deemed evidence in any crime in Ireland, the Gardaí can do so at the time of arrest or on foot of a valid search warrant.<sup>286</sup> This applies equally in cases of sexual assault or sexual violence against children. Computers, pornographic material etc. can be seized and kept as evidence. The accused can however, enjoy the constitutional right to privacy and inviolability of their dwelling and evidence obtained in breach of these rights can be excluded as inadmissible.<sup>287</sup> The State provides protection for bone fide third parties in the form of the Protections for Persons Reporting child Abuse Act 1998.<sup>288</sup> The State also provides funding for crime prevention in the form of Garda Sexual assault Units and education programs.<sup>289</sup>
- xxvi. In Ireland, the Children's First Bill has been introduced in response to the abuse scandals in the Catholic Church and many State run child care homes in the past. The Children First Bill states that all staff – who work in any institution or organisation that children frequently attend- must be educated about child abuse and child protection.

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<sup>283</sup> Ursula Kilkelly, "Learning Lessons from the Past: Legal Issues Arising from Ireland's Child Abuse Reports," [2012] 12(1) *Irish Journal of Applied Social Studies* 7.

<sup>284</sup> The Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012, section 7.

<sup>285</sup> Carl O'Brien, "Cost of State redress for abused up to nearly €1.5bn," 04/05/12. Available at: <http://www.irishtimes.com/newspaper/ireland/2012/0504/1224315592539.html>.

<sup>286</sup> [http://www.citizensinformation.ie/en/justice/evidence/evidence\\_introduction.html](http://www.citizensinformation.ie/en/justice/evidence/evidence_introduction.html) (accessed 10/11/12)

<sup>287</sup> Charlton.P McDermott P.A. and Bolger M. (1999) reprinted 2008. Criminal Law. Tottle Publishing Dublin 2. at 140

<sup>288</sup> <http://www.irishstatutebook.ie/1998/en/act/pub/0049/index.html> (accessed 10/11/12)

<sup>289</sup> <http://www.garda.ie/Controller.aspx?Page=8000&Lang=1> (accessed 10/11/12)

Once a crime has been committed within the family or the child environment; there are a number of procedures that can be invoked. Section 3 of the *Criminal Law (Sex Offences) Act 2006* as amended by Section 5 of the *Criminal Law (Sexual Offences) (Amendment) Act 2007* makes it a criminal offence to engage or attempt to engage in a sexual act with a child less than 17 years. The maximum sentence is five years, ten years if the accused is a person in authority.

When a crime against a child has been committed within the family, the State has the power to remove the child from the home under Section 12 of the Child Care Act<sup>290</sup>. Any member of the Gardaí may remove the child when there is a risk to the child with or without a warrant. The child or children should then be placed in the care of the HSE who should apply to the District Court for an emergency care order.

Furthermore, Ireland has passed a referendum that increases the powers of the State and increases the Rights of the Child in Ireland. The 31st Amendment of the Constitution (Children's Rights) Bill repeals Article 42.5 of the Constitution and inserts a replacement that expressly recognises children in their own right. It also strengthens protection of children in the Constitution.

The introduction of this amendment means that the Constitution recognises and affirms that children have natural and imprescriptible rights and emphasises that the State has an obligation to ensure that those rights are being vindicated. Where a child is subjected to abuse in the home; the state now has the power to take 'proportionate means'.

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

- i. It is noted in a report by An Garda Síochána Inspectorate that, in Ireland, the focus at all times when dealing with child sexual abuse is on the child's welfare and protection, not the number of prosecutions which are made.<sup>291</sup> There is no statute of limitations in Ireland for cases involving child sexual offences. It is noted by the Inspectorate that allegations of abuse

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<sup>290</sup> Child Care Act, 1991

<sup>291</sup> Garda Inspectorate Report on Responding to Child Sexual Abuse, available at <http://www.inis.gov.ie/en/JELR/Garda%20Inspectorate%20Report%20-%20Responding%20to%20child%20sexual%20abuse.pdf/Files/Garda%20Inspectorate%20Report%20-%20Responding%20to%20child%20sexual%20abuse.pdf> [accessed 03/08/12]

come to An Garda Síochána (Gardaí) in three ways; a report from the victim or a relative/friend of the victim, a report from a victims' organisation and lastly a report from church delegates. The Gardaí have also set up a telephone helpline for the reporting of child sexual abuse. Provisions for the investigation of such offences in Ireland include a sexual crime management unit<sup>292</sup>. Special training is given to Gardaí for interviewing victims and also a special relationship between the Gardaí and the Health Service Executive (HSE) has been created.<sup>293</sup>

The Children First National Guidelines for the Protection and Welfare of Children were first published in 1999 and revised in 2009.<sup>294</sup> At the time the Guidelines were the first comprehensive public document addressing the issue of the investigation of child sexual abuse in Ireland. These guidelines have been adopted as Garda policy for the welfare and protection of children, though the guidelines have no statutory footing. The primary aim of the Guidelines is to ensure healthy communication between the HSE and the Gardaí as the two key agencies empowered to investigate suspected child abuse. According to the Guidelines the HSE and Gardaí should co-ordinate in order to ensure the welfare of the child is protected. In order to achieve this it is required that where either party has concerns about a child but is unable to establish sufficient grounds for formal notification they should consult informally in order to protect the welfare of the child.

As part of An Garda Síochána response capability to deal with victims of serious crime a number of selected Garda personnel have undergone intensive training and are deemed competent to deal with all victims of serious crime occurrences including under 14 year olds and persons with intellectual disabilities. According to the Children First Guidelines and the policy of An Garda Síochána while interviewing a child the Gardaí should ensure that the statement is obtained in a manner least likely to cause stress to the child. Furthermore, the Criminal Evidence Act 1992 states that a video recording of statements by a child under the age of 14 shall be admissible as evidence in court.<sup>295</sup> In the case of a video recording of a

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<sup>292</sup> [www.justice.ie/en/jelr/response20%20of%20Sexual%20Crime%20Crimes%20Against%20Children%20Children%20Welfare.pdf](http://www.justice.ie/en/jelr/response20%20of%20Sexual%20Crime%20Crimes%20Against%20Children%20Children%20Welfare.pdf) [accessed 05/11/12]

<sup>293</sup> <http://www.hse.ie/eng/services/News/newsarchive/2011archive/sept2011/childprotectionandwelfarepracticehandbooklaunched.html> [accessed 06/11/12]

<sup>294</sup> Childrens First Guidelines, available at <http://www.dcy.gov.ie/documents/childcare/ChildrenFirst.pdf> [accessed 03/08/12]

<sup>295</sup> Garda Protocol on the Investigation of Sexual Crime Against Children, available at <http://www.garda.ie/Documents/User/WEB%20Investigation%20of%20Sexual%20Crime%20Crimes%20Against%20Children%20Children%20Welfare.pdf> [accessed 03/08/12]



statement, the person who made it must be available for cross-examination at the trial, and in all cases the court retains the discretion to exclude the evidence where it is of the opinion that, in the interests of justice, the recording should not be admitted.<sup>296</sup>

In 2006 the Joint Oireachtas Committee for the Protection of Children recommended the development, as an urgent priority, of a Child Witness Support Service.<sup>297</sup> The Committee recommended that the research necessary to design and implement such a service be carried out as soon as possible and that whatever resources are necessary be made available.

In July 2012 the Minister for Children and Youth Affairs announced that she had received Government approval for the drafting of Heads and a General Scheme of a Bill to establish the Child and Family Support Agency. The General Scheme of a Bill will now be drafted by her officials.<sup>298</sup> The Minister said:

The development of the Heads and General Scheme of a Bill to establish a Child and Family Support Agency will provide for the implementation of the commitment in the Programme for Government to fundamentally reform the delivery of child protection services by removing child welfare and protection from the HSE and creating a dedicated Child Welfare and Support Agency.<sup>299</sup>

It is settled jurisprudence in Ireland to refer to the welfare of the child rather than the best interests of the child, however some judges have used these terms interchangeably.<sup>300</sup> The welfare principle, as contained in the *Guardianship of Infants Act 1964*<sup>301</sup>, includes the child's physical, intellectual, moral religious and social welfare<sup>302</sup>. This Act states that the welfare of the child should be the first and paramount consideration of the court in cases concerning the custody, guardianship or upbringing of a child. The Convention on the Rights of the Child, which Ireland has signed but not incorporated into domestic law, also makes

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<sup>296</sup> Joint Oireachtas Committee Report on Child Protection, available at [http://www.oireachtas.ie/documents/committees29thdail/committeereport2006/Child\\_Protection\\_Report.pdf](http://www.oireachtas.ie/documents/committees29thdail/committeereport2006/Child_Protection_Report.pdf) [accessed 03/08/12]

<sup>297</sup> Joint Oireachtas Committee Report on Child Protection, available at [http://www.oireachtas.ie/documents/committees29thdail/committeereport2006/Child\\_Protection\\_Report.pdf](http://www.oireachtas.ie/documents/committees29thdail/committeereport2006/Child_Protection_Report.pdf) [accessed 03/08/12]

<sup>298</sup> <http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/press/20120717.htm> [accessed 03/08/12]

<sup>299</sup> <http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/press/20120717.htm> [accessed 03/08/12]

<sup>300</sup> *Southern Health Board v CH* [1996] 1 IR 219

<sup>301</sup> *Guardianship of Infants Act 1964*, available at <http://www.irishstatutebook.ie/1964/en/act/pub/0007/index.html> [accessed 03/08/12]

<sup>302</sup> *ibid*

provisions for the best interests of the child as a primary consideration in all proceedings concerning children. Procedure in Ireland has made attempts to apply this principle during the investigation of crimes and through to court proceedings.

The Irish Constitution allows, in ‘special and limited cases’ a private sitting of the court.<sup>303</sup> The term for such procedure is the ‘in camera rule’. The *Criminal Law (Rape) (Amendment) Act 1990*<sup>304</sup> makes provisions for the exclusion of the public from hearing regarding sexual offences. Emily Logan, the Ombudsman for Children has raised issues with the in camera rule in child abuse cases, stating that it enables such issues to remain invisible. She said that the application of the rule “remains problematic”, adding that for as long as this is permitted the childcare system “will remain as invisible” as it is now.<sup>305</sup>

The report of the Law Reform Commission on Child Sexual Abuse made extensive recommendations for the purpose of “Making It Easier for Children to Give Evidence”.<sup>306</sup> These recommendations substantially formed the basis the *Criminal Evidence Act 1992*<sup>307</sup> which makes special provisions in relation to the use of an audio-visual link in the case of sexual offences. These special provisions include:

- Permitting the giving of evidence by live television link by a witness under the age of 17 unless the court sees good reason to the contrary and, in any other case, with the leave of the court. Where the television link is used, wigs and gowns are not permitted to be worn.
- Where a person under 17 is giving evidence by television link, permitting the court to direct that the witness be questioned through an intermediary, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put in that way..

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<sup>303</sup> Bunreacht na hEireann

<sup>304</sup> Criminal Law (Rape) (Amendment) Act 1990, available at <http://www.irishstatutebook.ie/1990/en/act/pub/0032/index.html> [accessed 03/08/12]

<sup>305</sup> <http://www.thejournal.ie/children-care-deaths-emily-logan-childrens-ombudsman-health-hse-498144-Jun2012/> [accessed 03/08/12]

<sup>306</sup> Law Reform Commission Report on Child Sex Abuse, available at [http://www.lawreform.ie/\\_fileupload/Reports/rChildSexAbuse.pdf](http://www.lawreform.ie/_fileupload/Reports/rChildSexAbuse.pdf) [accessed 03/08/12]

<sup>307</sup> Criminal Evidence Act 1992, available at <http://www.irishstatutebook.ie/1992/en/act/pub/0012/index.html> [accessed 03/08/12]

- Permitting the admission in evidence of a video recording made of any evidence given on deposition by a person under the age of 17 through a live television link

A guardian ad litem may be appointed in Ireland in private or public law proceedings, although currently only the public provisions dealing with instances in respect of alleged child sex abuse where the child is in the care of the State. Under s26 of the *Child Care Act 1991*<sup>308</sup> the court may appoint a guardian ad litem if it is in the interests of the child and in the interests of justice to do so. The primary function of a guardian ad litem is to make recommendations in relation to a child's best interests which may differ from the wishes of the child.<sup>309</sup> Guardians are expected to meet regularly with the child, inquire into all aspects of the child's life, liaise with legal representatives and at the end of the case produce a written report for the court which will contain recommendations to any unresolved difficulties.<sup>310</sup>

Research has found that approximately 60% of children who may require the services of a guardian ad litem were unlikely to have one appointed.<sup>311</sup> In Ireland, guardians ad litem may be employed by non-statutory agencies or be self-employed. There are no provisions in Ireland for a national guardian service.

- ii. The Domestic Violence and Sexual Assault Investigation Unit (DVSAIU) is the national unit providing expertise to other Garda units in the investigation of crimes of a sexual nature, including child abuse and exploitation, and domestic violence. It must be noted that this unit merely provides support and expertise to the regional Garda services throughout Ireland.

The DVSAIU has the following responsibilities:

- Coordinating and providing assistance in the investigation of sexual crimes which are of a particularly serious, complex and/or sensitive nature.
- Providing assistance in the areas of training and policy implementation
- Promotion of best practice within An Garda Síochána in the investigation of sexual crime.

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<sup>308</sup> Childcare Act 1991, available at <http://www.irishstatutebook.ie/1991/en/act/pub/0017/index.html> [accessed 03/08/12]

<sup>309</sup> McWilliams and Hamilton, 'There isn't Anything like a GAL': The Guardian ad litem Service in Ireland [1998] 10(1) Irish Journal of Applied Social Studies 5

<sup>310</sup> *ibid*

<sup>311</sup> Kilkelly, *Children's Rights in Ireland* (2008, Tottel; Dublin)

- Providing advice and assistance to other Garda units.
- Liaison with governmental and non-governmental agencies involved in this area of work
- Acting as a central point of contact for religious orders and the Health Service Executive.<sup>312</sup>

The function of the Sexual Crime Management Unit within the DVSAIU is to evaluate and monitor, in conjunction with the investigating member and senior management, a number of investigations each year of child sexual abuse, child neglect and other selected sexual offences. The Joint Oireachtas Committee on the Protection of Children recommend the establishment of regional specialist units within the Gardaí which should take responsibility for the investigation from the outset.<sup>313</sup>

The *Criminal Justice (Surveillance) Act 2009*<sup>314</sup> applies to surveillance carried out by An Garda Síochána, the Defence Forces and officers of the Revenue Commissioners. In the case of An Garda Síochána the surveillance powers relate to the investigation of arrestable offences, which are offences for which a person can be punished by imprisonment for a term of five years or more (including most sexual offences against children on the Irish statute books). Under the Act a superior officer of An Garda Síochána may apply to a judge for an authorisation where he or she has reasonable grounds for believing that:

- (a) as part of an operation or investigation being conducted by the Garda Síochána concerning an arrestable offence, the surveillance being sought to be authorised is necessary for the purposes of obtaining information as to whether the offence has been committed or as to the circumstances relating to the commission of the offence, or obtaining evidence for the purposes of proceedings in relation to the offence,
- (b) the surveillance being sought to be authorised is necessary for the purpose of preventing the commission of arrestable offences, or

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<sup>312</sup> Garda Protocol on the Investigation of Sexual Crime Against Children, available at <http://www.garda.ie/Documents/User/WEB%20Investigation%20of%20Sexual%20Crime%20Crimes%20Against%20Children%20Children%20Welfare.pdf> [accessed 03/08/12]

<sup>313</sup> Joint Oireachtas Committee Report on Child Protection, available at [http://www.oireachtas.ie/documents/committees29thdail/committeereport2006/Child\\_Protection\\_Report.pdf](http://www.oireachtas.ie/documents/committees29thdail/committeereport2006/Child_Protection_Report.pdf) [accessed 03/08/12]

<sup>314</sup> Criminal Justice (Surveillance) Act 2009, available at <http://www.irishstatutebook.ie/2009/en/act/pub/0019/index.html> [accessed 03/08/12]

(c) the surveillance being sought to be authorised is necessary for the purpose of maintaining the security of the State.

In urgent circumstances a superior officer of An Garda Síochána may approve the carrying out of surveillance without the authorisation of a judge. A superior officer must be satisfied that there are reasonable grounds for believing that a judge would issue authorisation but a condition of urgency exists. A written record must be prepared for approval no later than 8 hours after the surveillance has been approved.<sup>315</sup> Any decisions regarding the investigation of complaints of child sexual abuse such as a decision to maintain surveillance on a suspected perpetrator is a matter for the officer in charge of each investigation who is usually the local District Officer. There is no generally applicable rule and each case should be judged on its own merits by the local investigation team who are most suitably placed to make decisions regarding the investigation.<sup>316</sup> It is noted by the Children First Guidelines that the investigation of organised abuse may involve a higher degree of secrecy and surveillance work than normally expected.<sup>317</sup>

iii. In Ireland, 32% of cases of child sexual abuse were found to have involved the withdrawal of a formal complaint.<sup>318</sup> It is common practice that where a case is withdrawn and there is no obvious child protection issue the Gardaí often close the file and refer the case to the HSE.

In all cases where a complainant has made a written statement of complaint regarding a crime of a sexual nature and subsequently withdraws the complaint, while still maintaining that the conduct complained of in fact took place, a file on the matter should be forwarded to the Director of Public Prosecutions (DPP) for directions. Where a complaint is withdrawn, the DPP has advised as follows on the question as to whether or not any suspected offender should be interviewed prior to submitting a file for directions:

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<sup>315</sup> Criminal Justice (Surveillance) Act 2009, available at <http://www.irishstatutebook.ie/2009/en/act/pub/0019/index.html> [accessed 03/08/12]

<sup>316</sup> Garda Protocol on the Investigation of Sexual Crimes Against Children, available at <http://www.garda.ie/Documents/User/WEB%20Investigation%20of%20Sexual%20Crime%20Crimes%20Against%20Children%20Children%20Welfare.pdf> [accessed 03/08/12]

<sup>317</sup> Children's First Guidelines, available at <http://www.dcy.gov.ie/documents/childcare/ChildrenFirst.pdf> [accessed 03/08/12]

<sup>318</sup> Garda Inspectorate Report on Responding to Child Sexual Abuse, available at <http://www.inis.gov.ie/en/JELR/Garda%20Inspectorate%20Report%20-%20Responding%20to%20child%20sexual%20abuse.pdf/Files/Garda%20Inspectorate%20Report%20-%20Responding%20to%20child%20sexual%20abuse.pdf> [accessed 03/08/12]

It is difficult to give a general answer to the question as to whether the suspect should be interviewed, where the complainant withdraws her/his complaint before such interview takes place. Perhaps the Gardaí should postpone any attempt to interview the (suspected offender), where the withdrawal of the complaint is clear and of the complainant's own free will, until a file is submitted to this office for directions.<sup>319</sup>

- iv. The current Irish law on limitations is embodied in the Statute of Limitations, 1957, as amended by the Statute of Limitations (Amendment) Act, 1991 and the Statute of Limitations (Amendment) Act, 2000.<sup>320</sup> Cases of child abuse constitute cases under tort. The law at present under the 1957 Act provides that normal limitation rules are postponed during a person's minority so that in effect time does not run until a person has attained their majority (i.e. reached 18 years of age).<sup>321</sup> Thus, Irish law allows for the suspension of the statute of limitations in child abuse cases. Yet, despite this, victims of child abuse can find themselves statute barred. This problem is particularly relevant for cases of sexual abuse as the individual may suffer from conditions such as post-traumatic stress disorder, repressed memory syndrome or psychological incapacity.<sup>322</sup> The Law Reform Commission have recommended the abolition of statute of limitations for cases of non-sexual abuse of children.<sup>323</sup>
- v. As under the statute of limitations time does not start running until the child reaches the age of majority it is clear that Irish law proceeds as normal when the age of the child is uncertain.
- vi. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse in force from 1 July 2010 lays down procedure for the recording and storing of data on convicted sex offenders.<sup>324</sup> The Irish Data Protection Acts

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<sup>319</sup> Garda Protocol on the Investigation of Sexual Crimes Against Children, available at <http://www.garda.ie/Documents/User/WEB%20Investigation%20of%20Sexual%20Crime%20Crimes%20Against%20Children%20Children%20Welfare.pdf> [accessed 03/08/12]

<sup>320</sup> [http://www.lawreform.ie/\\_fileupload/consultation%20papers/cpNonSexAbuse.htm](http://www.lawreform.ie/_fileupload/consultation%20papers/cpNonSexAbuse.htm)

<sup>321</sup> Age of Majority Act, 1985, s.2.

<sup>322</sup> [http://www.lawreform.ie/\\_fileupload/consultation%20papers/cpNonSexAbuse.htm](http://www.lawreform.ie/_fileupload/consultation%20papers/cpNonSexAbuse.htm)

<sup>323</sup> Ibid

<sup>324</sup>

[http://eurojust.europa.eu/doclibrary/corporate/newsletter/Eurojust%20News%20Issue%205%20\(December%202011\)%20on%20the%20fight%20against%20child%20abuse/EurojustNews\\_Issue5\\_2011-12-EN.pdf](http://eurojust.europa.eu/doclibrary/corporate/newsletter/Eurojust%20News%20Issue%205%20(December%202011)%20on%20the%20fight%20against%20child%20abuse/EurojustNews_Issue5_2011-12-EN.pdf)

1988 and 2000 confer rights on individuals as well as responsibilities on those persons handling, processing, managing and controlling personal data.<sup>325</sup> A Data Processor is a person who processes personal information on behalf of a data. The Data Controller for the purpose of these Acts is the Commissioner of An Garda Síochána.<sup>326</sup> An Garda Síochána is legally entitled to obtain and process personal data, without the consent of the data subject in circumstances where personal data is obtained or kept for the purposes of preventing, detecting, or investigating offences, or apprehending or prosecuting offenders, where the seeking of such consent would be likely to prejudice these purposes.<sup>327</sup>

The Sexual Offenders Act 2001 stipulates the provision of the offender to An Garda Síochána of their name and address and whereabouts of the offender and this information is forwarded to the Garda Domestic Violence and Sexual Assault Unit.<sup>328</sup>

In certain circumstances the Irish authorities may transmit data to other competent authorities within the state and beyond Irish borders. Information held by An Garda Síochána may be disclosed to Law Officers and other Law Enforcement Agencies for the investigation, prevention and detection of offences, on the basis of Mutual Assistance Agreements, Interpol, and Europol. Data may be disclosed to the Health Service Executive in respect of Child Welfare issues or to the Courts Service and other agencies with a statutory investigative or enforcement role.<sup>329</sup> Disclosure of personal data outside the EU is more restricted. One of the following conditions must be met when transferring data outside the EU to a country that does not have an EU approved level of data protection law:

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- Consented to by the data subject
- Required or authorised under an enactment, convention or other instrument imposing an international obligation on this State, examples: Europol Act 1997, Schengen Agreement 1999 and the European Convention for Mutual Assistance in Criminal Matters 1959, as amended
- Necessary for the purpose of obtaining legal advice
- Necessary to urgently prevent injury or damage to the health of a data subject

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<sup>325</sup> <http://www.garda.ie/Controller.aspx?Page=136&Lang=1>

<sup>326</sup> Ibid

<sup>327</sup> Ibid

<sup>328</sup> [http://www.citizensinformation.ie/en/justice/criminal\\_law/criminal\\_trial/sex\\_offenders\\_register.html](http://www.citizensinformation.ie/en/justice/criminal_law/criminal_trial/sex_offenders_register.html)

<sup>329</sup> Ibid

<sup>330</sup> Ibid

- Part of the personal data held on a public register
- Authorised by the Data Protection Commissioner, which is normally the approval of a contract which is based on an EU model
- Transfer is necessary for reasons of substantial Public Interest

In Ireland regulations are in place to ensure that the authorities respect protection of personal data rules. In all cases the identity of the recipient of the disclosure should be established along with the specific purpose of the disclosure and the legal basis/power to disclose the relevant data. A record of all disclosures should be maintained. In cases where there is any doubt as to disclosure, or the status of the data concerned, a file should be submitted to Assistant Commissioner, Crime and Security for directions.<sup>331</sup> The standard of security expected of all employees of An Garda Síochána includes the following:<sup>332</sup>

- Access to the information restricted to authorised staff on a "need-to- know" basis in accordance with a defined policy
- Computer systems password protected
- Information on computer screens and manual files kept hidden from callers to offices
- Back-up procedures in operation for computer held data, including off-site back-up
- All waste papers, printouts, etc. disposed of carefully by shredding
- All employees must log off from PULSE and other computers on each occasion when they leave the workstation
- Personal security passwords must not be disclosed to any other employee of An Garda Síochána
- All Garda premises to be secure when unoccupied
- A designated person will be responsible for all the above within An Garda Síochána with periodic reviews of the measures and practices in place

Employees found in breach of the Data Protection Rules may be found to be committing an offence under the Data Protection Acts 1988 and 2003; the Garda Síochána Act 2005; the Garda Complaints Act 1986 and An Garda Síochána Discipline Regulations. Furthermore

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<sup>331</sup> Ibid

<sup>332</sup> Ibid



such members may be exposing themselves and the organisation to litigation from an injured party.<sup>333</sup> The Act establishes the independent office of Data Protection Commissioner. The Data Protection Commissioner is appointed by Government and is independent in the performance of his functions. The Data Protection Commissioner's function is to ensure that those who keep personal data in respect of individuals comply with the provisions of the Data Protection Acts.<sup>334</sup> The Data Protection Commissioner has a wide range of enforcement powers to assist him in ensuring that the principles of Data Protection are being observed. These powers include the serving of legal notices compelling a data controller to provide information needed to assist his enquiries, or compelling a data controller to implement a provision of the Act.<sup>335</sup>

### 3.2 Complaint Procedure

vii. Reports of crimes of a sexual nature and suspected child abuse should be investigated promptly.<sup>336</sup> Investigations are conducted under the supervision of the District Officer by a member(s) experienced in the investigation of such crimes.<sup>337</sup> The Garda Síochána Policy on the Investigation of Sexual Crimes against Children Child Welfare, states that the attitude of the interviewers should always be one of sympathy and understanding; however, the importance of obtaining a full and consistent statement must be pointed out to the victim. To this end, the first member to respond and investigating members should take note of the following:

- Time and date of complaint.
- Full particulars of the complaint.
- The general state of the victim - signs of mental shock or distress, state of hair, etc.
- Any evidence of injury or marks, intoxication or drugs.
- The state of clothing - torn or disarranged; buttons or jewellery missing; stains of mud, earth, blood or semen on clothing.

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<sup>333</sup> Ibid

<sup>334</sup> Ibid

<sup>335</sup> Ibid

<sup>336</sup> <http://www.childwelfare.gov/responding/reporting.cfm>

<sup>337</sup> Garda Síochána Policy on the Investigation of Sexual Crimes against Children Child Welfare 2010 viewed at <http://www.garda.ie/Documents/User/web%20investigation%20of%20sexual%20crime%20crimes%20against%20children%20children%20welfare.pdf> on 14/08/12

- Detailed description of the scene.<sup>338</sup>

It is Garda Policy that the member dealing with the victim should not have physical contact with any suspect prior to forensic samples, clothing and any other items being taken from the victim or suspect for fear of cross contamination of vital forensic evidence.<sup>339</sup>

If a complaint is made to the Gardai that identifies the child or young person as a victim of, or witness to, a crime the officer then interviews the child. Children under 14 years of age and persons with an intellectual disability who have been the subject of a sexual offence, an offence involving violence or the threat of violence to a person or an offence consisting of attempting or conspiring to commit or of aiding, abetting, counselling, procuring or inciting the commission of any of these offences will be interviewed by trained Specialist Victim Interviewers.<sup>340</sup> From the beginning, the investigating member will keep in mind the emotional and physical pain the victim may be suffering, while ensuring that all available evidence regarding any reported offence is obtained. Members should be mindful at an early stage of our obligations outlined in the Children First Guidelines which state:

the welfare of children is of paramount importance;

- a proper balance must be struck between protecting children and respecting the rights and needs of parents/carers and families; but where there is conflict, the child's welfare must come first;
- children have a right to be heard and taken seriously. Taking account of their age and level of understanding, they should be consulted and involved in relation to all matters and decisions that affect their lives;
- early intervention and support should be available to promote the welfare of children and families, particularly where they are vulnerable or at risk of not receiving adequate care or protection;

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<sup>338</sup> Garda Sióchana Policy on the Investigation of Sexual Crimes against Children Child Welfare 2010 viewed at

<http://www.garda.ie/Documents/User/web%20investigation%20of%20sexual%20crime%20crimes%20against%20children%20children%20welfare.pdf> on 14/08/12

<sup>339</sup> Garda Sióchana Policy on the Investigation of Sexual Crimes against Children Child Welfare 2010 viewed at <http://www.garda.ie/Documents/User/web%20investigation%20of%20sexual%20crime%20crimes%20against%20children%20children%20welfare.pdf> on 14/08/12

<sup>340</sup> Garda Sióchana Policy on the Investigation of Sexual Crimes against Children Child Welfare 2010 viewed at <http://www.garda.ie/Documents/User/web%20investigation%20of%20sexual%20crime%20crimes%20against%20children%20children%20welfare.pdf> on 14/08/12

- parents/carers have a right to respect and should be consulted and involved in matters which concern their family;
- actions taken to protect a child, including assessment, should not in themselves be abusive or cause the child unnecessary distress. Every action and procedure should consider the overall needs of the child;
- intervention should not deal with the child in isolation; the child must be seen in a family setting;
- the criminal dimension of any action cannot be ignored;
- children should only be separated from parents/carers when all alternative means of protecting them have been exhausted. Re-union should always be considered;
- agencies or individuals taking protective action should consider factors such as the child's gender, age, stage of development, religion, culture or race;
- effective prevention, detection and treatment of child abuse require a co-ordinated multi-disciplinary approach to child care work and effective inter-agency management of individual cases. All agencies and disciplines concerned with the protection and welfare of children must work cooperatively in the best interests of children and their families;
- in practice, effective child protection requires compulsory training and clarity of responsibility for personnel involved in organisations working with children.<sup>341</sup>

Garda policy outlines that the investigating/interviewing Gardaí must explain to the complainant, in positive language and at an early stage before the making of any statements, the necessity to give a full and frank account of what happened.<sup>342</sup> A detailed record should be made of anything said by the complainant. Where they arise, the necessity to address any omissions or inconsistencies must be explained to the complainant in positive language before continuing to ask further questions.<sup>343</sup>

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<sup>341</sup> Children First Summary, National Guidelines for the Protection and Welfare of Children, Department of Health and Children, 2004, Viewed at [http://www.dohc.ie/publications/pdf/children\\_sum.pdf?direct=1](http://www.dohc.ie/publications/pdf/children_sum.pdf?direct=1) on 14/08/12.

<sup>342</sup> Garda Síochána Policy on the Investigation of Sexual Crimes against Children Child Welfare 2010 viewed at <http://www.garda.ie/Documents/User/web%20investigation%20of%20sexual%20crime%20crimes%20against%20children%20children%20welfare.pdf> on 14/08/12

<sup>343</sup> Garda Síochána Policy on the Investigation of Sexual Crimes against Children Child Welfare 2010 viewed at

The victim's statement is the most important evidence in every investigation as it decides the extent of the crime and the gravity of the suspected offence. The fullest and most detailed statement that the victim is capable of making should always be obtained even if this has to be done over a long period of time or several periods of time.<sup>344</sup> A full description should also be taken of the perpetrator, if not identified by the victim, and this description should immediately be circulated as deemed appropriate.<sup>345</sup> Complainants of rape or sexual assault should be interviewed as soon as possible after the occurrence. Whether the interviewers are male or female should be decided by the victim unless, in the circumstances, this is not practicable. It is important that the victim should not be interviewed in the company of any potential witnesses.

As well as taking note of the above, the investigating member will also seize and retain any physical evidence, which could be used to support a prosecution. Members should arrange for the provision of immediate medical attention where required and the victims removal to hospital if deemed necessary.<sup>346</sup>

In the investigation of crimes of a sexual nature and suspected child abuse members of the Garda Síochána should be aware of the powers available under section 5 of the Criminal Justice Act 2006 that provides for the designation of a crime scene by a Superintendent, which automatically authorises members of the Garda Síochána to search for and collect evidence at the crime scene.<sup>347</sup>

- viii. Representation by a guardian *ad litem* and by a solicitor is the two most commonly recognised forms of representation for children. In addition, children's interests may be represented by social reports and expert evidence. Usually trained in social work or child development, a guardian *ad litem* must not only represent the child's wishes, but also take a

<http://www.garda.ie/Documents/User/web%20investigation%20of%20sexual%20crime%20crimes%20against%20children%20children%20welfare.pdf> on 14/08/12

<sup>344</sup> Garda Síochána Policy on the Investigation of Sexual Crimes against Children Child Welfare 2010 viewed at <http://www.garda.ie/Documents/User/web%20investigation%20of%20sexual%20crime%20crimes%20against%20children%20children%20welfare.pdf> on 14/08/12

<sup>345</sup> Garda Síochána Policy on the Investigation of Sexual Crimes against Children Child Welfare 2010 viewed at <http://www.garda.ie/Documents/User/web%20investigation%20of%20sexual%20crime%20crimes%20against%20children%20children%20welfare.pdf> on 14/08/12

<sup>346</sup> Complainants of rape or sexual assault should be interviewed as soon as possible after the occurrence. Whether the interviewers are male or female should be decided by the victim unless, in the circumstances, this is not practicable. It is important that the victim should not be interviewed in the company of any potential witnesses.

<sup>347</sup> <http://www.irishstatutebook.ie/2006/en/act/pub/0026/index.html> Viewed on 14/08/12.

view as to the child's best interests, and advise the court accordingly, particularly in cases where the complaint by the child incriminates their parents. In contrast, a solicitor must explain his appointment, his duties and the procedure of the case to his client, taking into account the client's age and understanding. A solicitor must follow his client's instructions and work towards his clients best interests, regardless of age.<sup>348</sup>

Solicitors recognise the limited nature of the representation they can offer in cases where the wishes of the child client do not coincide with the child's best interests. Among non-lawyers there is a common perception that one kind of representation for a child is as good as another, equating legal representation with representation by a guardian *ad litem*. This perception is reinforced by a statutory provision which dispenses with a guardian *ad litem* in the event that a child is joined as a party to proceedings.<sup>349</sup> The Child Care Act 1991<sup>350</sup> lays down no criteria governing the type of person who may be appointed as a guardian *ad litem*. However it is usually expected that the guardian *ad litem* should be a social worker, or some other child care professional with expertise in dealing with children. In the criminal context, An Garda Síochána has published a comprehensive policy on the investigation of sexual crime.<sup>351</sup> In the contest of child complainants, special training has been given to all Gardaí in the taking of complaints and statements.<sup>352</sup> The Sexual Crime Management unit is equipped to address the particular concerns for child victims of sexual crime.<sup>353</sup>

The lawyer who represents the child directly has a task which is quite different to the guardian *ad litem*. The lawyer is obliged to follow the instructions of his or her client, even against what the lawyer may perceive to be his or her client's better interests. The lawyer has a duty to advise the child client that the courts' paramount consideration will be the welfare of the child.<sup>354</sup>

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<sup>348</sup> A Guide to Professional Conduct of Solicitors in Ireland, <http://www.liamog.com/PDF%20Downloads/Professional%20Conduct%20of%20Solicitors%20in%20Ireland%20A.pdf> Viewed on 18/08/12

<sup>349</sup> Fortin, *Children's Rights and the Developing Law*, (Lexis Nexis UK 2003), p. 233. See also Murch & Keehan, *The Voice of the Child in Private Family Law Proceedings*, Cardiff Law School, Nov 2002.

<sup>350</sup> <http://www.irishstatutebook.ie/1991/en/act/pub/0017/index.html> Viewed on 18/08/12

<sup>351</sup> [http://www.garda.ie/Documents/User/2copy%20of%20garda\\_english\\_2010\\_fl\\_lowres.pdf](http://www.garda.ie/Documents/User/2copy%20of%20garda_english_2010_fl_lowres.pdf)

<sup>352</sup> <http://www.justice.ie/en/JELR/Response%20to%20Garda%20Inspectorate%20Report%20-%201%20Feb%202012.pdf/Files/Response%20to%20Garda%20Inspectorate%20Report%20-%201%20Feb%202012.pdf> (accessed 08/11/2012)

<sup>353</sup> Ibid

<sup>354</sup> The Solicitors Family Law Association in England and Wales in its *Guide to Good Practice* provides that the

It is important for the lawyer to ascertain whether the child client is capable of giving instructions. If the child is severely emotionally disturbed he or she may not be capable of giving instructions.<sup>355</sup> If there are already child mental health professionals involved the lawyer may consult them. The direction of the court can be sought in such circumstances. It is important to explain to the young client the nature of the proceedings in question in simple and straightforward terms.<sup>356</sup> The client should be made aware of the fact that the court will make decisions about his or her future and that, by law; it must consider his or her views and wishes.<sup>357</sup>

The child has the same right to be kept informed about the progress of the proceedings as an adult client. The direction of the court may be obtained where the child client wishes to access a confidential report which may be inappropriate for the child client to see or have a copy of.<sup>358</sup> In practice it can arise that solicitors are expected to assume the role of guardian's *ad litem*, and there can be a lack of clarity about what the role of the solicitor representing a young client should be.<sup>359</sup>

Cases at which children and young people can give evidence can be heard in the District Court, the Circuit Court or the Central Criminal Court. If a witness is 14 years of age or over, he/she will be required to give evidence on oath or affirmation. Children under 14 years are not required to swear an oath or make an affirmation before giving evidence. Until very recently the Irish courts were not permitted to accept the unsworn testimony of children in civil cases. This was the conclusion in *Mapp v. Gilbooley*.<sup>360</sup> Now s. 28 of the Children Act 1997,<sup>361</sup> provides that the trial judge 'may' accept the unsworn testimony of children under 14 in any civil proceedings, where the judge is satisfied that the child provide

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solicitor should not normally delegate the preparation, supervision, conduct or presentation of the case, but should deal with it personally. In each case the solicitor must consider whether it is in the best interests of the child to instruct another advocate and then advice on whom should be instructed.

<sup>355</sup> See *Re H. (A Minor) (Care Proceedings: Child's Wishes)* [1993] 1 F.L.R. 440 where Thorpe J. pointed out that a child had to have sufficient understanding and must be rational. This may not be so where the child is severely emotionally disturbed. If there is any doubt on this matter, expert opinion must be obtained.

<sup>356</sup> The Lord Chancellors Department Leaflet No. 2, available at [www.offsol.demon.co.uk/leaf2tfr.htm](http://www.offsol.demon.co.uk/leaf2tfr.htm), can be very usefully adapted for this purpose.

<sup>357</sup> See s. 24 of the Child Care Act 1991 and s. 25 of the Guardianship of Infants Act 1964.

<sup>358</sup> See *Re C (Expert Evidence: disclosure practice)* [1995] 1 F.L.R. 204; *Re M (Minors) (Care Proceedings: child's wishes)* [1994] 1 F.L.R. 794; *Re T and E (Proceedings: conflicting interests)* [1995] 1 F.L.R. 581.

<sup>359</sup> Rights-based Child Law: The case for reform, A report by the Law Society's Law Reform Committee, March 2006 Viewed at <http://www.lawsociety.ie/documents/committees/lawreform/childreport06.pdf> on 14/08/12

<sup>360</sup> Unreported, Supreme Court, 23 April 1991.

<sup>361</sup> <http://www.irishstatutebook.ie/pdf/1997/en.act.1997.0040.pdf> Viewed 20/08/12

the court with an accurate account. Where the child is very young the trial judge will normally be required to conduct a specific enquiry into their competence under *voir dire*.

The prosecution can apply to the court for the witness to give evidence from a separate room using a video link. This means that the witness does not have to go into the courtroom or see the defendant, particularly in cases involving a sexual offence or an offence involving violence. In cases such as these the judge can also decide that members of the public should not be allowed in court.<sup>362</sup>

The Child Care Act 1991, S. 31 states that no matter that is likely to lead members of the public to identify a child who is or has been the subject of proceedings under *Part III, IV* or *VI* shall be published in a written publication available to the public or be broadcast:<sup>363</sup>

(2) Without prejudice to *subsection (1)*, the court may, in any case if satisfied that it is appropriate to do so in the interests of the child, by order dispense with the prohibitions of that subsection in relation to him to such extent as may be specified in the order.

(3) If any matter is published or broadcast in contravention of *subsection (1)*, each of the following persons, namely-

(a) In the case of publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical,

(b) In the case of any other publication, the person who publishes it, and

(c) in the case of a broadcast, anybody corporate who transmits or provides the programme in which the broadcast is made and any person having functions in relation to the programme corresponding to those of an editor of a newspaper, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 12 months or both.<sup>364</sup>

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<sup>362</sup> [http://www.citizensinformation.ie/en/justice/witnesses/witnesses\\_under\\_17\\_years.html](http://www.citizensinformation.ie/en/justice/witnesses/witnesses_under_17_years.html) Viewed on 17/08/12

<sup>363</sup> <http://www.irishstatutebook.ie/1991/en/act/pub/0017/index.html> Viewed on 18/08/12

<sup>364</sup> <http://www.irishstatutebook.ie/1991/en/act/pub/0017/index.html> Viewed on 18/08/12

## 4 COMPLEMENTARY MEASURES

### *Preventive Measures*

- i. In 1999 the Office of the Minister for Children published *Children First: the National Guidelines for the Protection and Welfare of Children* as an aid to identifying and reporting child abuse and neglect. Following this the Health Service Executive (HSE) established a network of personnel to provide training, information and advice on how best to implement *Children First*. In 2011, the Health Service Executive (HSE) released *Children First: National Guidance for the Protection and Welfare of Children*, providing greater clarity and guidance.

Section 10 of the *Children First* guidelines is of great importance as it focuses on the necessity of training in child protection and welfare. It dictates that all relevant staff and organizations should be trained in the recognition of signs of abuse and what immediate action to take.

The Children First Guidelines states that child protection training aims to promote the effective interventions in the care and protection of children. It provides that effective child protection depends on the skills, knowledge and values of personnel working with children and families as well as inter agency and intra agency co-operation. Importantly, for the purposes of this section it states that “relevant training and education is an essential pre-requisite to achieving this.”<sup>365</sup> Furthermore, it states that agencies involved with children should ensure that such training is available on an on-going basis. The Children First Guidelines details the training and education necessary from agencies working with children.

Currently, the government is committed to introducing legislation which will place the *Children First Guidelines* on a statutory basis. The draft heads of the Children First Bill provides that organizations whose employees or volunteers have access to children, or work directly with children, and where a child can attend without a parent or guardian<sup>366</sup> come within the ambit of this Bill.

The draft heads of the Bill provides that an organisation is required to provide training for employees and volunteers who have access to children in accordance with guidance and standards set down by the HSE under the Safeguarding Guidance for Organisations from

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<sup>365</sup> Children First 14.1.2

<sup>366</sup> *Children First Bill 2012*, Heads and General Scheme (DRAFT)



which the organisation is required to develop its own Keeping Children Safe Plan, appropriate to the services provided by that organisation.

Head 7 of the Bill places an onus on organizations that come within the ambit of the Bill to provide training to employees or volunteers.<sup>367</sup>

- ii. The draft heads of this Bill also places an obligation on organizations which come within the ambit of the Bill to “actively promote to parents and children awareness of, and best practice in, child welfare and protection, including making available to parents and children information on the procedure for reporting a concern or allegation of child abuse to the Designated Officer, or to the HSE which comes to a parent’s or a child’s attention in the course of availing of services provided by the organization.”<sup>368</sup>

Thus, the proposed legislation is very positive from a child protection standpoint in so far as it sets out clear child protection obligations on all those working with children, including the training and education of those working with children. Moreover, the legislation if implemented would place a statutory obligation on organizations to educate children and their parents on the process.

- iii. There does not appear to be a system for preventative intervention for child sexual abuse in Ireland for those who have at present not committed the crime, however fear that they may be at risk of committing the crime in the future. There are, however, a number of interventions currently in place for sentenced sex offenders whilst they are in prison.

The Department of Justice in their 2009 Management of Sex Offenders: A Discussion Document highlighted the potential of intervention to prevent re-offending. The Discussion Documents provides that it is the objective of the Irish Prison Service to ensure that all appropriate efforts are made to work with sex offenders while in prison to bring about changes in their lives that reduce the risk of re-<sup>369</sup>offending and enhance public protection to the greatest extent possible.

*Protective Measures and Assistance to Victims*

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<sup>367</sup> Head 7 (11).

<sup>368</sup> Head 7 (10.)

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iv. There is no available data on “social programmes” provided by the State. Currently this service is offered through non-Government Organisations such as “One in Four”<sup>370</sup> and CARI<sup>371</sup>.

v. There is no helpline provided by the State specifically for child victims of sexual abuse or exploitation. However, a number of voluntary non-governmental organisations run help lines for children and victims of sexual abuse or exploitation.

The national rape crisis centre runs a 24-hour helpline geared towards victims of sexual abuse aged over 14 years.<sup>372</sup> The Irish Society for the Prevention of Cruelty of Children (ISPCC), under the auspices of Childline, operates a 24-hour helpline for children.<sup>373</sup> Both services are confidential: they do not ask names or keep caller ID.

For those caring for victims of child sex abuse, either in a professional or guardianship capacity, separate advice and help is available through CARI who also provide a helpline.<sup>374</sup>

vi. The Health Service Executive (HSE) and An Garda Síochána (the police force) have the statutory responsibility for the protection of children.<sup>375</sup> The Health Service Executive (HSE) recommends referrals to Children and Family Services where there are fears of child abuse.<sup>376</sup> The HSE operates a helpline and standard form that can be used to report concerns regarding a child.<sup>377</sup>

The Children’s Act 2001 introduces family welfare conferences. These conferences “offer families and professionals the opportunity to meet together in an equitable manner, sharing responsibility in planning and decision-making in the best interest of the welfare and protection of children and in support of families in need.”<sup>378</sup>

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<sup>370</sup> [www.oneinfour.ie](http://www.oneinfour.ie)

<sup>371</sup> [www.cari.ie](http://www.cari.ie)

<sup>372</sup> Rape Crisis Network Ireland, available at: [www.rcni.ie/child-sexual-abuse.aspx](http://www.rcni.ie/child-sexual-abuse.aspx) (accessed August 2012).

<sup>373</sup> Childline, available at: [www.childline.ie](http://www.childline.ie)

<sup>374</sup> [www.cari.ie](http://www.cari.ie)

<sup>375</sup> The Department of Children and Youth Affairs, ‘Children First: National Guidance for the Protection and Welfare of Children’, 2009.

<sup>376</sup> The Health Service Executive, National Review of Sexual Abuse Services for Children and Young People Final Report, June 2011, p.30.

<sup>377</sup> The Health Service Executive, available at: [www.hse.ie/go/childrenfirst](http://www.hse.ie/go/childrenfirst) (accessed August 2012).

<sup>378</sup> P. 21.

The (HSE) provides certain “Family Supports” with specialised services for child abuse victims. They offer services such as therapeutic work, parent education programmes, and home-based parent and family support programmes.<sup>379</sup>

Another family support initiative is Springboard whose functions include “provid[ing] a direct service through a structured package of care, intervention, support and counselling to the targeted families and children, and to families within the wider community.”

Children First guidelines recommend a multiagency strategy meeting be convened by the social work team at any point in the process when it is most appropriate. The suggested functions are:

- Share available information;
- Consider whether immediate action should be taken to protect the child and other children in the same situation;
- Consider available legal options;
- Plan early intervention;
- Identify possible sources of protection and support for the child;
- Identify sources of further information to facilitate the enquiry and assessment;
- Allocate responsibility for further enquiry; and
- Agree with An Garda Síochána how the remainder of the enquiry will be conducted.<sup>380</sup>

St. Clare’s and St. Louise’s units in Dublin offer specialised regionalised treatment to children of the area. They are the only centres of this type in the country that combine therapy and examination.<sup>381</sup> Under Irish law the parents and guardians give consent on behalf of their children aged under 16 years.<sup>382</sup> Where a child is subject to a care order the Health Service Executive can consent.

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<sup>379</sup> The Health Service Executive, ‘Family Support’, [www.hse.ie/eng/services/Find\\_a\\_Service/Children\\_and\\_Family\\_Services/Family\\_Support](http://www.hse.ie/eng/services/Find_a_Service/Children_and_Family_Services/Family_Support) (accessed August 2012).P.22

<sup>380</sup> The Health Service Executive, Child Protection and Welfare Practice Handbook, 2011.

<sup>381</sup> The Health Service Executive, National Review of Sexual Abuse Services for Children and Young People Final Report, June 2011, p.22.

<sup>382</sup> Section 16 of the Non-Fatal Offences against the Person Act 1997.

The North side Inter-Agency Project (NIAP) seeks to provide treatment for individuals aged 12 to 18 years who have sexually abused. They acknowledge that there is a lack of treatment to child offender's at this point due to an absence of resources. They contacted St. Clare's Assessment and Treatment Service for information on cases of sexual behaviour but did not receive a response.<sup>383</sup>

### III NATIONAL POLICY REGARDING CHILDREN

- i. On November 10<sup>th</sup> the Children's Referendum took place in Ireland, the referendum has been described as a "once in a generation opportunity" to strengthen protections for children in Ireland.<sup>384</sup> There was a national "Yes for Children" campaign being promoted by Barnardos, the Children's Rights Alliance, the ISPCC and Campaign for Children.<sup>385</sup> The referendum sought to make fundamental changes to the Irish Constitution regarding the position of the child in Irish Law.
- ii. NGO's use a range of mediums to promote awareness of child exploitation and abuse, public awareness campaigns using billboards, surveys and websites calling for public support are widely used. The media, meetings with political parties and government committees are also used to help influence policies for the benefit and protection of children.<sup>386</sup>

The Commission to inquire into Child Abuse submitted its final report, "The Ryan Report," on the 20<sup>th</sup> of May 2009,<sup>387</sup> which reported on the extensive child abuse committed in state institutions from before the 1940's to present day, covering physical, sexual and emotional abuse and neglect.<sup>388</sup>

The Report by Commission of Investigation into Catholic Diocese of Cloyne, reported on the handling by the church and state of allegations and suspicions of child sex abuse in the

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<sup>383</sup> Northside Inter-Agency Project, Annual Report 2009.

<sup>384</sup> <http://www.barnardos.ie/what-we-do/campaign-and-lobby/referendum-on-childrens-rights-10-nov-2012.html>

<sup>385</sup> <http://www.barnardos.ie/what-we-do/campaign-and-lobby/referendum-on-childrens-rights-10-nov-2012.html>

<sup>386</sup> <http://www.barnardos.ie/what-we-do/campaign-and-lobby/how-we-do-our-work.html?gclid=CP6V086l6LICFVRc4QodOi4A6A>

<sup>387</sup> <http://www.childabusecommission.ie/publications/index.html>

<sup>388</sup> <http://www.childabusecommission.ie/about/index.html>

Diocese,<sup>389</sup> in the period of January 1996 to February 2009.<sup>390</sup> The report revealed that child protection practices were inadequate and at times dangerous.<sup>391</sup>

The publication of these long awaited reports has heightened public awareness of child sexual abuse in Ireland, and has prompted the current move to enhance children's rights on a Constitutional footing.

- iii. There has been limited statistics and reports done by state and regulatory bodies in Ireland, and have been taking place in an ad-hoc and irregular manner, greater consolidation and consistency is needed in reports and publications on children's sexual exploitation in the State.

Certain NGO's conduct their own research and offer a slight insight to the current extent of sexual exploitation of children in Ireland. The Children at risk in Ireland Foundation, CARI, in 2011 reports that there was a 1% increase in calls to its helpline from 2010, the primary concerns of sexualised behaviour in children had a 57% increase on 2010, while rape and sexual assault had a 20% decrease.<sup>392</sup> CARI's 2010 report showed a 17% increase in rape/sexual assault concerns on 2009 figures, also that sexualised behaviour concerns rose by 38% on the previous year.<sup>393</sup> The 2009 report showed also that rape/sexual assault concerns rose from 98 in 2008 to 103, while sexualised behaviour rose from 50 the previous year to 76.<sup>394</sup> The foundation's report indicates a steady increase in sexual exploitation concerns in Ireland year on year.

- iv. In August 2012 a billboard campaign was launched urging the criminalisation of prostitution. It centres of the trafficking and prostitution of a 14 year old girl.<sup>395</sup>

The Dublin Archdiocese Commission of Investigation was commissioned by the Irish government to examine the handling of allegations of child sexual abuse at the hands of Catholic priests between 1975 and 2004. As part of the Cloyne investigation:

Advertisements were placed in many local newspapers and a number of national papers together with many local radio stations and RTE Radio 1. Information was

<sup>389</sup> [http://www.justice.ie/en/JELR/Pages/Cloyne\\_Rpt](http://www.justice.ie/en/JELR/Pages/Cloyne_Rpt)

<sup>390</sup> [http://www.justice.ie/en/JELR/Cloyne\\_Rpt.pdf/Files/Cloyne\\_Rpt.pdf](http://www.justice.ie/en/JELR/Cloyne_Rpt.pdf/Files/Cloyne_Rpt.pdf)

<sup>391</sup> <http://www.rte.ie/news/2011/0713/cloynetracker.html>

<sup>392</sup> <http://www.cari.ie/images/uploads/pictures/CARI-Annual-Report-2011-lo-res.pdf>

<sup>393</sup> [http://www.cari.ie/images/uploads/pictures/CARI\\_Annual\\_Report\\_2010.pdf](http://www.cari.ie/images/uploads/pictures/CARI_Annual_Report_2010.pdf)

<sup>394</sup> <http://www.cari.ie/images/uploads/pictures/CARI-Annual-Report-2008-2009.pdf>

<sup>395</sup> Evening Echo, 'Anti-Prostitution Billboard Campaign launched', available at: [www.eveningecho.ie/2012/08/17/anti-prostitution-billboard-campaign-launched](http://www.eveningecho.ie/2012/08/17/anti-prostitution-billboard-campaign-launched).

also circulated through churches, doctors' surgeries and information centres in order to encourage complainants and those who had relevant information to come forward to assist the Commission.<sup>396</sup>

- v. Generally there is a consultation process prior to the contents of a Bill being approved by the government. This may involve NGOs, lobby groups and members of the public.<sup>397</sup> This is one stage of the process of law making and does not guarantee the child's perspective. However, it can allow for the inclusion of the children's perspective. On the other hand, presentations to the Dáil are by invitation only and not guaranteed.

The Department of Children and Youth Affairs conducts consultations with young people in an attempt to include their views in its policies and relevant legislation. It released 'Life as a Child and Young Person in Ireland: Report of a National Consultation' in November 2012. This incorporated a consultation with almost 67,000 young people in Ireland. Young people aged between seven and 17 in every school and youth centre in Ireland were offered the opportunity to complete a short questionnaire on "what's good, what's not good and what should be changed to improve the lives of children and young people in Ireland". The Minister for Children and Youth Affairs stated that she planned to use their views when compiling the Children and Young People's Policy Framework.<sup>398</sup>

Further consultations conducted by the Department with young people include: 'Listen to our voices! - Hearing children and young people living in the care of the state' (2011), 'Consultations with children and young people for the Forum on Patronage and Pluralism in Primary Schools' (2011), 'Consultations with children and young people on the new National Children's Strategy 2012-2017' (2011), 'Consultations with young people on reform of Junior Cycle in second-level schools' (Nov 2010), 'Consultation with young people on the White Paper on Crime' (2010), 'Consultations with children and young people in the care of the state' (2010), 'Consultations on the National Paediatric Hospital' (2009), 'Mental health consultations with teenagers' (2008), 'The misuse of alcohol among young people' (2007),

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<sup>396</sup> Commission of Investigation, "Report into the Catholic Diocese of Cloyne December 2010" p. 28.

<sup>397</sup> Page updated: 8 December 2012, viewed November 2012, available at: [www.citizensinformation.ie/en/government\\_in\\_ireland/national\\_government/houses\\_of\\_the\\_oireachtas/legislation.html](http://www.citizensinformation.ie/en/government_in_ireland/national_government/houses_of_the_oireachtas/legislation.html).

<sup>398</sup> The Department of Children and Youth Affairs, 'Life as a Child and Young Person in Ireland: Report of a National Consultation' [www.dcy.gov.ie/documents/chilyouthparticipation/life\\_a\\_child\\_in\\_ireland/Life-as-a-child-in-ireland.pdf](http://www.dcy.gov.ie/documents/chilyouthparticipation/life_a_child_in_ireland/Life-as-a-child-in-ireland.pdf).

‘The development of the Irish Youth Justice Strategy’ (2007), ‘The age of consent for sexual activity’ (2006), ‘The development of the Taskforce on Active Citizenship’ (2006), ‘Development of a national set of child wellbeing indicators’ (2005), ‘The development of the National Recreation Policy’ (2005) and ‘The development of the Children’s Code of Advertising’ (2004).<sup>399</sup>

Furthermore, the National Children's Advisory Council advises the Department of Children and Youth Affairs. It is made up of representatives of the statutory agencies, voluntary sector, research community, parents and young people.<sup>400</sup>

- vi. Barnardos, the Cari Foundation, The Children’s Rights Alliance and The Irish Society for the Prevention of Cruelty to Children (ISPCC).<sup>401</sup> Before a Bill is introduced, there will be consultation meetings and discussions with the Government Departments and groups likely to be affected by the Bill. Sometimes the Government will publish a Green Paper. This is a discussion document which sets out the Government’s ideas and invites comment and views from individuals and relevant organisations.<sup>402</sup>

## IV OTHER

As has been mentioned throughout this report, Ireland voted on an amendment to the Constitution on 10/11/12. It was passed with a majority of 58% to 42%, though there was a very low turnout of 33.53%.<sup>403</sup> It will have a significant effect on the status of children under Irish law. The new Article 42A reads:

1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

<sup>399</sup> The Department of Children and Youth Affairs, viewed November 2012, available at: [www.dcy.gov.ie/viewdoc.asp?fn=%2Fdocuments%2FChildYouthParticipation%2FNational\\_Consultation.s.htm&mn=chic&nID=4](http://www.dcy.gov.ie/viewdoc.asp?fn=%2Fdocuments%2FChildYouthParticipation%2FNational_Consultation.s.htm&mn=chic&nID=4).

<sup>400</sup> The Department of Children and Youth Affairs, viewed November 2012, available at: [www.dcy.gov.ie/viewdoc.asp?fn=%2Fdocuments%2FNational\\_Childrens\\_Advisory\\_Council\\_.htm&mn=polz&nID=4](http://www.dcy.gov.ie/viewdoc.asp?fn=%2Fdocuments%2FNational_Childrens_Advisory_Council_.htm&mn=polz&nID=4).

<sup>401</sup> Office for the Promotion of Migrant Integration, [www.integration.ie/website/omi/omiwebv6.nsf/page/usefullinks-irish-NonGovernmentalOrganisations-en](http://www.integration.ie/website/omi/omiwebv6.nsf/page/usefullinks-irish-NonGovernmentalOrganisations-en)

<sup>402</sup> Houses of the Oireachtas, ‘A Brief Guide to How your Parliament Works’, p. 17.

<sup>403</sup> RTÉ, ‘Children’s Referendum amendment passed by 58% of voters,’ 11/11/12. Available at: <http://www.rte.ie/news/2012/1111/counting-of-childrens-referendum-votes-begins.html>.

2 1°In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2°Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4 1 Provision shall be made by law that in the resolution of all proceedings –

brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.<sup>404</sup>

It will also delete the current Article 42.5, which states:

In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.<sup>405</sup>

The referendum has received cross-party political support and was backed by many of the major NGOs<sup>406</sup>, with only a small and disorganised ‘No’ campaign. It is hoped that

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<sup>404</sup> The Referendum Commission’s Independent Guide 2012, “Proposed Changes”.  
<http://www.referendum2012.ie/proposed-article/>

<sup>405</sup> Article 42.5, Bunreacht na hÉireann-Constitution of Ireland, 1937.

<sup>406</sup> RTE, “Children’s Referendum a Chance to leave behind ‘legacy of failure,’” 20/09/12. Available at:



the referendum, although falls short of full implementation of the UN Convention on the Rights of the Child, will ensure that children have separate and concrete rights, will remove the current anomaly between the ability of children to be fostered with married or unmarried parents, that children's best interests are taken into proper consideration in judicial and administrative proceedings and that they are listened to and that the state will be in a position to take appropriate actions to vindicate the rights of the child.<sup>407</sup>

## V CONCLUSION

Sexual violence against children is a repugnant and unacceptable crime. The vulnerability of the child and their inability to express or understand the nature of this abuse results in deep psychological scarring that has far reaching consequences for the resulting adult, their family and society. The nature of the abuse suffered by Irish victims has been described as meeting the legal definition of torture under European and International Law.<sup>408</sup>

We have seen the difficulties faced by the brave who challenge the perpetrator and those who claimed to have a responsibility as the ill equipped legal system fumbles on issues of statute of limitation,<sup>409</sup> vicarious liability, remoteness, and the duty of care.<sup>410</sup>

These laws pre-date laws that have addressed issues such as; rape within marriage,<sup>411</sup> divorce,<sup>412</sup> the introduction of barring orders against a spouse,<sup>413</sup> contraception, and data protection to name but a few. The trend suggests that the original belief in the institution of marriage as a safe environment to be protected for the betterment of society has exceptions that the very laws made to protect it render it impermeable especially to children. The status of children has progressed from being the property of the father, to property of the marital family to the child as an individual in their own right and we have now passed a referendum to give legal status to these rights in the Irish Constitution.

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<http://www.rte.ie/news/2012/0919/wording-children-referendum.html>.

<sup>407</sup> Ombudsman for Children, Emily Logan, "Opinion Piece: Ombudsman for Children Emily Logan on the upcoming Referendum," 18/09/12. Available at: <http://www.oco.ie/whats-new/media/statements-and-articles/opinion-piece-ombudsman-for-children-emily-logan-on-the-upcoming-referendum.html>.

<sup>408</sup> "Abuse of Children in Irish Institutions Amounted to Torture," Amnesty International Ireland, 26 September 2011. <http://www.amnesty.ie/news/abuse-children-irish-institutions-amounted-torture>. (accessed 26/09/2011)

<sup>409</sup> O'Keeffe v Hickey [2008] IESC 72

<sup>410</sup> Ibid

<sup>411</sup> Criminal Law (Rape) Act 1981

<sup>412</sup> Family Law (Divorce) Act 1986

<sup>413</sup> Domestic Violence Act 1996

Children have historically been exempt from the protection offered by Irish law because of their legal status within the family. The Equal Status Acts of 2000-2011<sup>414</sup> expressly exclude under 16year olds from discrimination based on age. This leaves children particularly vulnerable in the eyes of the law as childhood does not feature as a potential factor for discrimination.

Children are not invisible but are powerless without equal status and protection under the Constitution. The superior status of the family with the assumption that the family unit is in the best interest of the child provides a legal loophole that many children have fallen into.

The ratification of the United Nations Convention on the Rights of the Child in Ireland on 21<sup>st</sup> September 1992 did little to change the status of children in Ireland or to put to put the welfare of the child on an equal legal footing with the family as the Constitution remains superior law in Ireland. The most effective way to ensure that children in Ireland enjoy the right to equality, welfare and the right to expressing their views is to enshrine these rights within the Constitution.

Sexual violence thrives on ignorance, subordination and the fear or knowledge of the victim that they will not be heard and even if they were, they would not be understood. The knowledge that they are powerless within their own family perpetuates the abuse and creates an environment that favours the abuser.

Government and non-Government agencies have been working together to address the outlined issues but legal recognition of the rights to the tools of empowerment will create an environment of transparency to give foundation to a system that puts child welfare first.

On 10<sup>th</sup> November 2012 a referendum was held to give Constitutional protection to the rights of the child with consideration to the natural and imprescriptible rights of all children. The child will be heard, the child will be understood and the child will be equal.

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<sup>414</sup> <http://www.irishstatutebook.ie/2000/en/act/pub/0008/index.html>. (accessed 08/11/2012)



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**National Researchers:**

Beatrice La Porta

Cristina Maggioni

Silvia Piccione

Michele Sessa

Laura Stefani

Lorena Suster

**National Academic Advisors:**

Prof. Giuseppe Di Chiara

Gabriella Rappa

**National Coordinator:**

Marzia Carla Iosini

**List of Abbreviations:**

Cass.	Cassazione (Supreme Court)
Cass. Civ.	Cassazione civile (Civil section of the Supreme Court)
Cass. Pen.	Cassazione penale (Criminal section of the Supreme Court)
c.c.	Codice civile (Civil code)
c.p.	Codice penale (Criminal code)
c.p.c.	Code of civil procedure
c.p.p.	Code of Criminal procedure
D.lgs.	Decreto legislativo (once converted, it has the same power as an act of law)
G.U.	Gazzetta Ufficiale (Italian acts of law are officially published here)
Legge	Legge (act of law)
R.D.	Regio Decreto (act of law entered into force when Italy was a monarchy)
par.	Paragraph (comma)

## I INTRODUCTION

### 1 GENERAL

i. Italian social and legal system rests on the foundations of the principle of equality. In order to locate the exact notion of this term, one has to bear in mind that the concept of non-discrimination shall not be confused with the principle of equal treatment, of which the first one can be considered a method of implementation: reference legislation in this matter, in fact, defines the principle of equal treatment as "treatment without any discrimination". More specifically, it is stated by art. 3 par. 1 of the Italian Constitution that all citizens have equal social dignity and are equal before the law, without any distinctions regarding sex, race, language, religion, political views, personal and social conditions. However, looking back at the reality, it has to be noticed that discriminating episodes take place every day and most at any level of the society. Discriminations regarding sex, race, color, language, religion, political opinions, national or social origin, sexual orientation, state of health and disability or other status of men and women are unfortunately part of the ordinary life of many people: as an example, though Italian Labour Law provides many guarantees, Italian working women suffer from a silent discrimination, once they decide to build a family of their own and they quit temporarily their job.

The discriminating episodes which generally catch the attention of the media are those related to immigration: one of the main reason is perhaps that this issue is quite new to the Italian society and therefore able to generate interest, curiosity or fear. In this regard, sometimes episodes of intolerance culminate in events shown by the media, as recently happened in Rome, where a Bengali Muslim person was attacked during the Ramadan by a group of persons<sup>1</sup>. In the background of such kind of events there could be frequently found racist reasons and, more in general, the difficulty of persons coming from other countries to integrate themselves in the country of destination and to be considered "equal" as those already living there. Moreover, apart from specific episodes of racism, as the one mentioned above, it has to be noticed that Italian country itself has been dealing with immigration in a very peculiar way: differently from countries that already experienced the

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<sup>1</sup> "Repubblica Roma", 26<sup>th</sup> July 2012.

immigration in the past, Italy used to be a country of emigration and just in the last decades turned out to be a country of immigration<sup>2</sup>. This big social change has not been accompanied by adequate social and economic instruments and therefore immigrants are very vulnerable individuals that sometimes end up experiencing emargination and exploitation. In this regard, a painful case that has caught the media attention was the one concerning South-Africa immigrants forced to work under unacceptable conditions in agricultural areas nearby the city of Rosarno, who then revolted against the whole population of the city in 2010. This episode showed how dangerous race discrimination could be, since exasperated immigrants, forced because of their status to work under unacceptable working conditions by few persons, revolted against the inhabitants of the whole city, with the dangerous effect of generating other racism intolerance against themselves.

Furthermore, it has to be noticed that in the last years it has become not rare hearing some political speeches referring to individuals living and working in Italy differently according to their country of origin: this kind of speeches, that normally reflects discussions can generate other racism and intolerance, since they are performed through mass media and therefore can reach quickly people direct inside their houses, making them feeling upset, scared and alone. In particular, the work of eight Italian associations<sup>3</sup> has highlighted very alarming data on the rise of such incitement to racial rate in the country. In this respect, according to the UNAR (the National Office for Anti-discrimination), in 2010 the cases encountered were 96, whereas in 2009 they were 56 (it should be reflected on the fact that such cases have duplicated within one year). Other data to be reckoned with are those related to the xenophobia on Internet, and particularly in the use social networks and blogs: the UNAR, in collaboration with the postal police, has succeeded in closing about 200 among Internet sites and blogs pushing racial hate and homophobia, as well as more than 90 Facebook pages having the same goal. This numbers reflect the last tendency that sees especially social networks, with Facebook in the lead, as the most widely used vehicles for transmitting racial hate, from which the most affected individuals are Jews and Muslims. On the other hand,

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<sup>2</sup> However, emigration still exists in Italy, especially that of young graduates.

<sup>3</sup> “Archivio delle Memorie Migranti”; “Osservatorio sulle discriminazioni”; “Associazione Studi Giuridici sull’ Immigrazione”; “Associazione 21 Luglio”; “Associazione Carta di Roma”; “Borderline Sicilia Onlus”; “Lunaria”; “Unione forense per la tutela dei diritti umani”.



positive data come from the schools, where the number of racial episodes went down from 5.3 cases in 2009 to 3.3 cases in 2010. This means that children are being educated in an environment that seeks mutual respect of diversity more and more.

Considering discriminatory treatments taking place at workplace, it has to be said that this issue is set to grow further as a result of *Legge* n. 92/2012: a worker fired for discriminatory reasons is now protected with the strongest form of protection, namely with reintegration in the workplace and full compensation of the damage. For this reason, it will be increasingly important to ensure that behind a formal notice of dismissal for objective reasons given by the worker are not hidden discriminatory reasons. As an example of this kind of situations, it shall be reported that with an Order of 3<sup>th</sup> March 2012, a Judge of the Court of Milan declared the discriminatory nature of the conduct held by Extrabanca Ltd., a bank specifically created for migrant citizens in Italy, in relation to acts undertaken by its Chairman and other executives against one of their employees, which have been recognized by the Court as forms of harassment with ethnic-racial background and therefore sanctioned by the d. Lgs. n. 215/2003 (the act of law that implemented in Italy the European directive no. 2000/43 against ethno-racial discrimination). In the course of the investigations that led to the Ordinance, the Court considered satisfactory the evidence made by the applicant according to which the President of the Bank branch and other executives had used offensive expressions against the appellant and another employee referring to skin color and African origin of both, with the objective consequence of having created an offensive and humiliating climate in the workplace. The order of the Court of Milan is particularly important and innovative, not only because it constitutes one of the first judicial pronouncements that sanctions cases of racial harassment, but also because it is one of the few decisions that recognizes the principle of compensation for non patrimonial damages from objective facts of discrimination in itself, as a violation of personal dignity.

More in general as regards the work conditions, the Italian labour market, in such a rapidly evolving times and in such a big economic crisis, can sometimes ending up being quite a "lack of civility" environment, especially for the relationships between employer and employee, as well as among employees themselves, often accompanied by forms of underhand and terrible discrimination that are detrimental to the dignity of the whole working community.

As concerns equality between men and women, the Italian performance is not positive. Having regard to the Global Gender Gap Index of the World Economic Forum, a study

based on four dimensions, namely the labour market (employment, remuneration, career), education, health and politics which annually measures the levels of participation in social life of men and women in their countries, Italy is at the 74<sup>th</sup> place in the world among 134 countries taken into consideration. The most striking indicator of this situation is represented by the female employment rate, stuck at 46.1.

In conclusion, despite the noble words of art. 3 par. 1 of the Italian Constitution, episodes of discrimination are still quite frequent: sometimes they have a big impact on the population, since they reach the attention of mass media, and these are mainly the cases of racial discriminations, but sometimes they are frequent and silent episodes that end up being considered as usual, like the discriminations at the workplace, among which the one between men and women still cover an important role. A positive signal comes from the young generations: the relationships among Italian teenagers and peers of foreign origins living in Italy are oft close and direct: they are companions in sport or recreation and, what is most important, they are friends. This happens because Italian teenagers usually consider peers with an immigration background as an integral part of society, even though they oft live in situations of hardship.

It is obvious that something needs to be changed within our everyday system and the hope is that a "wind of change" is apparently finally blowing.

ii. The definition of the term "family" is changing within the time. In fact, in the past the core of the family was the figure of the father-husband and only to legitimate sons could be transmitted last name and heritage, since all children born outside of marriage were excluded from the notion of family. This interpretation has now been modified and adapted to modern society. Nowadays, family is no more considered as a group of persons of common ancestry, as it was the parental family. Instead, the modern idea of family is provided by articles 29, 30 and 31 of the Italian Constitution. In particular, art. 29 states that "The Republic recognizes the rights of the family as a natural society founded on marriage"<sup>4</sup>: the role of the modern family is inherited from natural law and according to some Scholars, this definition is the result of the fusion of the catholic with the communist ideology.<sup>5</sup> Whereas it is by few commentators claimed that a legal structure is granted by the State only to

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<sup>4</sup> BIFULCO R., CELOTTO A., OLIVETTI M., *Commentario sulla costituzione*, Utet giuridica, Torino, 2008, 611ss.

<sup>5</sup> ASPREA S., *La famiglia di fatto in Italia e in Europa*, Giuffrè, Milano, 2003, 12-15.

legitimate families, namely those founded on marriage<sup>6</sup>, according to other authors this rule does not express a static definition of the family, being this one a definition that needs to be tailored into the historical moment in which the rule itself is intended to operate (this is the so-called “rule blank”)<sup>7</sup>. In fact, nowadays it is emerging the tendency to emphasize the union of a family, regardless of the existence of the marriage<sup>8</sup>: the main idea this tendency is built on is to be found in art. 2 of the Constitution, according to which “the Republic recognizes and guarantees the inviolable rights of man, as an individual, and in the social groups where human personality”<sup>9</sup>.

The second paragraph of the above mentioned art. 29 foresees an equal role of the spouses within their family, which is also known as the equal status of marriage: “Marriage is based on the moral and legal equality of spouses within the limits established by law to guarantee the unity of the family”<sup>10</sup>. This modern provision is due to the fact that the figure of the father has lost his centrality and supremacy, with the consequence that now the relationship between him and her spouse is based on moral and legal equality. This new interpretation is confirmed by art. 30 of the Constitution, according to which “It is the duty and right of parents to support and educate their children, even if born outside marriage”<sup>11</sup>. Not only this rule assigns the same rights and obligations to both parents, but it also equalises the legal position of children born inside and outside marriage: since the new definition of family is built on the central role of the children, the child is valued and the parental obligations are provided also in regard to children born outside marriage. Moreover, the third paragraph of the same article establishes that the law ensures to children born outside marriage every legal and social protection compatible with the rights of the members of the legitimate family. In the view of a part of the doctrine, it is here implicitly accepted the notion of family that can be deduced by the Civil Code and special laws<sup>12</sup>, namely that of an entity based on the

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<sup>6</sup> TRABUCCHI A., *Natura, diritto, famiglia*, in Riv. dir. civ., 1977; STELLA RICHTER G., *Aspetti di diritto civile sul concubinato* in Riv. trim. dir. proc. civ., 1975, 1123; GIACOBBE G., *Che famiglia?*, in Iustitia, 2006; RESCIGNO P., **Famiglia e diritto a vent'anni** dalla riforma, in Riv. dir. civ., 1998.

<sup>7</sup> MANCINI D., **Uguaglianza tra coniugi e società naturale** nell'art. 29 della Costituzione, in Riv. dir. civ., 1963, 225.

<sup>8</sup> FERRANDO G., *Convivere senza matrimonio*, Rapporti personali e patrimoniali nella famiglia di fatto, Milano, in Fam.dir, 1998, 183; DOGLIOTTI M., *Famiglia di fatto*, in Dig. disc. priv., sez. civ., VIII, Torino, 1992, 189.

<sup>9</sup> CRISAFULLI V., PALADIN L., *Breve commentario sulla Costituzione*, Padova, Cedam, 1990, 9.

<sup>10</sup> BIFULCO R., CELOTTO A., OLIVETTI M., cit., 611 ss.

<sup>11</sup> BIFULCO R., CELOTTO A., OLIVETTI M., cit., 622.

<sup>12</sup> BARCELLONA P., *Famiglia (Diritto Privato)*, in Enc. Dir., XVI, Milano, 1967, 778.

parental relationship aiming at the protection and development of the children born by those persons: “depending on the needs and interests taken into consideration by the law in the individual rules, the scope of family relationships that are important extends or narrows, resulting in a variety of figures or meanings”.<sup>13</sup> Indeed, art. 31 of the Constitution confirms the importance of the family institution by showing the so called “*favor familiae*”<sup>14</sup>, as well as by providing economic supports for the aim of family creation.

In order to discover the most common characteristics among people marrying in Italy, it is worth reading the ISTAT annual recognition on marriages<sup>15</sup>. This survey relates to all marriages celebrated in a specific year in the Country and analyzes the phenomenon of marriage in relation to socio-demographic characteristics of the couple. According to this survey, starting from the beginning of the seventies the number of marriages celebrated in Italy has seen a continuous decrease that lead from a number of 420,000 marriages celebrated in 1972 to less than 218,000 celebrated in 2010<sup>16</sup>. In specific regard to the marital age of the population, whereas in 2004 the average age of men contracting marriage amounted to 32.2 years and that of women to 29.5 years<sup>17</sup>, in 2005 they increased to 32.6 years for the men and 29.8 years for the women<sup>18</sup>; in 2006 to 32.6 years and to 29.4 years<sup>19</sup>; in 2007 to 32.8 years and to 29.7 years<sup>20</sup>; in 2008 to 33.0 years and to 29.9 years<sup>21</sup>; in 2009 to 33.1 years and to 30.1 years<sup>22</sup>. Finally, in 2010 the average age of men contracting marriage amounted to 33.4 years, whereas that of women to 30.4 years<sup>23</sup>.

In conclusion, the average age of men and women marrying in Italy has been constantly increasing and this phenomenon is mainly due to the big difficulties encountered by young generations in leaving the parental house for creating their own families: despite the words contained in the Constitutional provisions, Italian young generations have not been provided by the Country with enough social and economic instruments able to facilitating

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<sup>13</sup> BARCELLONA P., cit., 780.

<sup>14</sup> BIFULCO R., CELOTTO A., OLIVETTI M., cit., 640.

<sup>15</sup> The ISTAT *Rilevazione sui matrimoni di fonte Stato Civile* (i.e. recognition on marriages) was established in 1926.

<sup>16</sup> Istat, *Rilevazione* cit., in <http://www.demo.istat.it/altridati/matrimoni/>

<sup>17</sup> Istat, *Rilevazione* cit., Statistical Tables 2004, in <http://www.demo.istat.it/altridati/matrimoni/>

<sup>18</sup> Istat, *Rilevazione* cit., Statistical Tables 2005, in <http://www.demo.istat.it/altridati/matrimoni/>

<sup>19</sup> Istat, *Rilevazione* cit., Statistical Tables 2006, in <http://www.demo.istat.it/altridati/matrimoni/>

<sup>20</sup> Istat, *Rilevazione* cit., Statistical Tables 2007, in <http://www.demo.istat.it/altridati/matrimoni/>

<sup>21</sup> Istat, *Rilevazione* cit., Statistical Tables 2008, in <http://www.demo.istat.it/altridati/matrimoni/>

<sup>22</sup> Istat, *Rilevazione* cit., Statistical Tables 2009, in <http://www.demo.istat.it/altridati/matrimoni/>

<sup>23</sup> Istat, *Rilevazione* cit., Statistical Tables 2010, in <http://www.demo.istat.it/altridati/matrimoni/>

the building of new families. Moreover, in the very last years the average age of marring is increasing also because of the economic and social consequences of the economic crisis.

iii. The general status of children has changed a lot during the centuries, since there has been a deep evolution starting from the idea of children as parents' property until the idea of children as worthless values for the whole society. For this reason, during the twentieth century, child issues has been highly tackled in many fields, such as juridical, psychological, pedagogical, social, and others, in order to assure them more protection than the one provided in the past. As concerns Italian development of the general status of children, Italian legislation contains numerous provisions related to children and adolescents' protection. According to Italian Civil Code, whose fundamental principles are now enshrined also by Italian Constitution (art. 29-34), children have to be at the centre of parents' attention, who have the duty to maintain, form and educate their children taking into consideration their capacities, natural inclination and aspirations (art. 147 c.c.). From the point of view of the parents, the subsequent art. 148 c.c. states that each parent has to economically maintain the children, proportionally to his/her respective income; in case both parents are not economically able to afford this commitment, closer relatives have the duty to intervene in their aid, relieving this burden.

Moreover, in order to pursue child welfare, several civil legal institutes have been predisposed in relation to different aspects or decisions that can have any kind of consequences on children's life. Examples of institutes dealing with economic aspects on children's life are provided: the legal usufruct on children's goods (art. 324 c.c.); the possibility to constitute a kind of trust ("*fondo patrimoniale*") for the satisfaction of family needs (art. 167 c.c.). Examples of provisions ensuring children assistance are the legal guardianship (see chapter X of this report, *infra*); the decadence of *patria potestas* when parents commit serious in-observances of their duties, so that they put in danger children's education (art. 324 c.c.) or the removal of the parent convicted of familiar abuses (art. 342 *bis*, c.c. introduced by Italian *Legge* n. 154/2001); the judge's intervention when there are big discordances between parents in relation to the exercise of their *potestas* (art. 145 c.c.). Moreover, the consideration of children's point of view when dealing with important decisions to be taken, especially in case of dissolution of the marriage of the parents, has achieved a central role thanks to several law reforms. In fact, a child older than 12 years old or younger than that age but with a discreet capacity of discernment, can be heard by the

judge to make observations and express his/her preferences related to his/her custody (art. 155 *sexies* c.c.).

In this field, a strong innovation was brought with *Legge* n. 54/2006, which has profoundly changed the discipline of parents' divorce. In fact, it has introduced the so called “*affido condiviso*” (Italian definition that can be translated as “shared custody”) which has replaced as preferential regime for handling children in case of dissolution of marriage, yet not eliminated, the “*affido congiunto*”, (expression that can be rendered as “combined custody”)<sup>24</sup>. According to the *affido congiunto*, children are assigned to one parent, while the other parent has the right to visit them, and the *potestas* (i.e. the right to take decision upon children life and education) is exercised in necessary collaboration between both parents, ending up in conflicts in case of diverging opinions. Differently, according to the current legislation, children are mainly assigned to both parents, but for different periods of time, during which each of them can exercise his/her full *potestas*, independently from the other one. The main reason behind this law innovation is to privilege children's interest and wellness: in fact, according to art. 155 *bis* c.c., children have the right to maintain an equilibrate and continuative relation with both parents and to receive cure, education, formation from both of them. Moreover, the familiar habitation is assigned to the one who will live with them, in order to respect children's affections and habits (art.155 *quater* c.c.).

Among the most important juridical intervention about children protection in Italian legislations, it has to be mentioned the Law n. 151/1975, which has completely equalized legitimate sons (born inside a marriage) and natural ones (born outside a marriage, or from an adultery or an incest): the latter ones, now, have same rights towards their parents, such as economical attributions, education, formation, inheritance rights, regardless the factual relation between their parents<sup>25</sup>. In the field of Criminal law, the most important innovation regarding children protection has been achieved with *Leggi* n. 66/1996 and n. 269/1998

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<sup>24</sup> The *affido congiunto* regime, in turn, has replaced the “*affido esclusivo*”, the exclusive custody according to which only one parent could have the custody of his/her child and exercise the *potestas* upon him/her (except for important decisions in child's interest), while the other one could have only the right/duty to visit him/her in predetermined times.

<sup>25</sup> Only one difference remains: incestuous sons cannot be recognized by parents when they are both in *mala fides* (art. 251 c.c.).

which introduced a whole body of dispositions regarding criminal offenses against of children<sup>26</sup>.

Putting aside the discussion on Italian legislation, it can be underlined that many public and private entities act everyday for the protection of children and children rights issues. Within the Government, the Ministry of Youth is responsible for juvenile politics and projects and encourages the participation of young people in civil society. *Legge* n. 451/1997 instituted the Parliamentary Commission for Childhood and Adolescence, which aims to write proper legislation draft to be enacted by the Parliament, and the National Observatory for Childhood<sup>27</sup>, which constantly monitors children *status* and prepares official documents containing empirical results. Many NGOs promote children protection, *in primis* Italian sections of UNICEF and Save the Children which, in order to pursue their purposes, collaborate continuously with many subjects (as national and local institutions and associations, Governments, researches institutes, and the civil society as a whole).

In general, it can be said that in Italy the prevalent concern regarding children is to create a social and cultural order in which they can properly and safely grow and realize themselves and their personality in every field or aspect of their life, rather than having more laws, since the level of law protection is quite satisfactory. For this reason, media and legislators are not concentrated on specific violations but generally keep an eye open to the general situation of children, their issues and their protection. A recent case that caught the attention of the media is related to presumed abuses perpetrated during the school year 2005/2006 in a kindergarten by teachers against children they had to care about. The fact received a great attention by the general public, because the public opinion was forced to face the problem of the level of security of places where children (especially those born from working mothers) stay during the first years of their lives. The first instance decision issued in May 2012 stated the innocence of the teachers accused.<sup>28</sup>

**iv.** It can be said that Italy usually accepts internationality with favor and, consequently, accepts the process of international renovation and the approval of international reforms

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<sup>26</sup> A deeper analyses will be offered in Chapter II, part II concerning “substantive criminal law”.

<sup>27</sup> Disciplined by DPR n. 103/2007; chaired by Ministry for Labour and Social Politics and by the Under-Secretary of the State; composed by representatives of national/local public administrations, entities and associations, organization of volunteering, experts in the field of childhood and adolescence.

<sup>28</sup> Those facts are known as the presumed abuses occurred in the kindergarten “Olga Rovere” in Rignano Flaminio.

with the purpose of spreading a culture of respect for human beings and human rights; furthermore it fosters relations and collaboration within States, with the aim of increasing the quality of citizens' life.

The process of implementation of international treaties is not homogeneous: certain treaties are implemented more than others. This difference may depend on several factors, such as the specific object of the treaty, the age of the legislation on it, the necessity of updating it in relation to internal current events and affairs, the diverging awareness of civil society, higher or lower pressure coming from international community, difference of opinions inside public entities responsible for its implementation, etc. Here, we can say that international treaties related to children and children rights issues are generally taken into great consideration; in fact, Italian legislation on this topic is well-advanced if compared to other States of the world, also European ones.

The relationship between Italian law and international customary law is based on a monistic approach. In fact, art. 10 co. 1 of Italian Constitution states that the Italian legal system conforms to the generally recognized rules of international law. This constitutional norm sets an automatic and permanent reference to: customary norms, imperative norms of international general law, general principles of international law. Consequently, these dispositions, if self-executing, can be directly applied by Italian public administration and Italian courts. In this way, international customary norms are awarded constitutional ground and so they can prevail on ordinary Italian laws in case of conflict.

The Constitution does not mention about the relation between Italian law and international treaty law. Doctrine and jurisprudence, which recognize that art. 10 par. 1 is not applicable, talk about an “improper monistic approach”<sup>29</sup>: international legislation is not directly applied inside national territory, but national legislation has to be compatible with international dispositions. Therefore, in order to have an international treaty applicable inside Italian territory, it is necessary to emanate an internal act which prescribes the execution of the treaty inside Italian legal order: this act is called “order of execution” and is given before the ratification of the treaty, and so, before its entrance into force. For special treaties, as

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<sup>29</sup> Legal Doctrine: CONFORTI B., *Diritto internazionale*, Editoriale Scientifica, 2010. Jurisprudence: Constitutional Court, decisions n. 348/2007 and n. 349/2007.



indicated in art. 80 of the Constitution<sup>30</sup>, this order has to be contained in an ordinary law. The treaty is applicable inside Italian legal order when it enters into force at international level (not when the order is emanated) and its application stands until it is in force at international level. According to this situation, it could have been said that Italian law followed the dualistic approach when dealing with international treaty law, but this kind of statement has to be put in a different perspective considered the latest development of Italian legislation.

Before the entrance in force of *Legge* n. 3/2001<sup>31</sup>, doctrine and jurisprudence agreed that Italian law and international conventional norms had the same rank (equal-ordinated); as a consequence, according to the normal criteria for the resolution of conflict of law, the subsequent law would have abrogated the previous one and the special law (*ratione personarum* or *ratione materiae*) would have made an exception to the more general one. Art. 3 par. 1 of the indicated law has changed this relation between Italian law and international treaty, since currently, *ex* art. 117 par. 1 of Italian Constitution, national legislation has to be exercised in respect to all the international obligations; that is to say that is enshrined in Constitution that international law is superior to national law and, so, treaties' norms prevail on Italian ordinary law<sup>32</sup>. As consequence, an ordinary law that does not respect international treaties' norms is un-constitutional and, for that, can be abolished by Italian Constitutional Court<sup>33</sup>.

Italy signed the United Nations Convention on Rights of the Child on the 26th of January 1990; the order of execution was contained in *Legge* n. 176/1991; the ratification took place on the 5<sup>th</sup> September 1993, without any declaration and reservation. Moreover, Italy has continued to implement this Convention. In fact, the Optional Protocol on the Involvement of Children in armed conflict was signed on the 6<sup>th</sup> September 2000 and ratified on the 9<sup>th</sup> May 2002; also the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography was signed on 6<sup>th</sup> September 2000 and ratified on 9<sup>th</sup> May 2002. In the end, on

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<sup>30</sup> Art. 80: the Houses authorize by law the ratification of international treaties which are of a political nature, or which call for arbitration or legal settlements, or which entail changes to the national territory or financial burdens or changes to legislation.

<sup>31</sup> Which changed the asset of relations between public entities inside Italian territory (in particular, Chapter V, part II of the Constitution).

<sup>32</sup> Before this reform, the Constitutional Court arrived to affirm that, in front of an ordinary law, the norm of the treaty prevails only in the subjects indicated in articles 10 co. 2 and 11 of the Constitution (decision n. 120 of the 23rd of November 1967).

<sup>33</sup> Italian Constitutional Court, decision n. 397/2007.

28<sup>th</sup> February 2012, Italy also signed the Optional Protocol on a communications procedure, which now has to receive the order of execution.

v. Every European State is free to choose the most appropriate form for implementing a directive, since States are only bound to a result and not also to the kind of mean through which this result can be obtained. In regard to the Directive 2011/95/EU, its ratification has been expressly foreseen in the draft text of an act of law (called draft of the *Legge Comunitaria 2012*) that has currently been examined by the Parliament in order to enter into force (the draft has been approved on 3<sup>rd</sup> October 2012 by the *Camera* and now has to be examined by the *Senato*): on the one hand, this act of law includes changes into the national legislation law aiming to allow an easy process of adaptation of the domestic law to the European one and, on the other hand, it foresees the ratification of few recent European directives, such as the one mentioned above. The adaptation of this directive shall be made through a *Decreto legislativo*, meaning an act adopted by the Government upon a mandate from the Parliament, which have the same force as an act of law: this instrument allows a quicker entrance into force of the act compared to the longer process required by an act of law.

## 2 THE LANZAROTE CONVENTION

i. The European Convention on Human Rights (CEDU<sup>34</sup> is the Italian acronym) was ratified and came into force in Italy with Law n. 848/1955 enacted on 26<sup>th</sup> October 1955.

ii. Italy is a State party of the Lanzarote Convention, since the sign on 7<sup>th</sup> November 2007 that was made without any declarations of reservation. As a consequence, on March 23<sup>rd</sup> 2009, under the initiative of the Italian Government, the bill concerning the ratification and enforcement of Lanzarote Convention and the provisions for the adjustment of the domestic law<sup>35</sup> was brought to the *Camera dei Deputati* (i.e. Chamber of Deputies, one of the branches of Italian Parliament, together with the Senate). In accordance with the principle of perfect bicameralism, the text of the bill was intended to move from one Chamber to another, until reaching conform decision on the same text both in the Chamber of Deputies and the Senate. This occurred on 19<sup>th</sup> September 2012, after three years of discussions, voting and transferring of the bill from one Chamber to another, when the Senate in the last

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<sup>34</sup> I. e., “*Convenzione Europea dei Diritti dell’Uomo*”.

<sup>35</sup> Bill C.2326, when analyzed by the Chamber of Deputies; S.1969, when analyzed by the Senate.

resort unanimously approved the ratification of the Convention, that became law to all intents and purposes. That law is named “*Legge di Ratifica ed Esecuzione della Convenzione di Lanzarote nonché norme di adeguamento dell’ ordinamento interno*” (i.e. Law of Ratification and Implementation of the Lanzarote Convention as well as provisions for the adjustment of the domestic law), also known as *Legge* n. 172/2012, and entered into force on 23<sup>rd</sup> October 2012. Starting from this date, the Lanzarote Convention is granted with full execution in Italy.<sup>36</sup>

**iii. - iv.** Not applicable.

**v.** Firstly, it has to be considered that the issue regarding the status of international law in respect to national law is an extremely complex one and has been developed by legal scholars and courts decisions throughout the last decades. Generally, international treaties are provided with the same rank as well as the acts of law enacting those treaties into national law and in case of conflict of laws, rules concerning the hierarchy among sources of law apply. More specifically, art. 117 of the Italian Constitution – that was innovated by the constitutional *Legge* n. 3/2001 - establishes that the State law must be exercised in accordance with the international obligations, thus being enshrined the pre-eminence of international obligations, and therefore also of the obligations arising from treaties, on ordinary legislation. In this way, even if the adaptation of the international treaty into national law has been realized through ratification by an act of law– which happens in the cases specified by art. 80 of the Constitution - if the act of law does not meet the content of the treaty, it shall be deemed vitiated for constitutional illegitimacy, following to an indirect violation of the Constitution that can lead to a declaration of abolition by the national Constitutional Court.<sup>37</sup>

The Lanzarote Convention falls in one of the cases specified by Article 80 of the Italian Constitution, namely the case in which an international treaty has to be ratified by an act of law (see also part 1. General, par. iv. of the report), and therefore the ratification and

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<sup>36</sup> Art. 2 of *Legge* 172/2012: “piena ed intera esecuzione è data alla Convenzione, a decorrere dalla data della sua entrata in vigore, in conformità a quanto disposto dall’articolo 45 della Convenzione stessa”.

<sup>37</sup> Cass. 24.10.2007 n. 348 and n. 349; CONFORTI B., *Diritto internazionale*, editoriale Scientifica, Torino, 2012.

execution order were made through the ordinary adaptation process by *Legge* n. 172/2012, published in GU n. 235 of 8<sup>th</sup> October 2012.<sup>38</sup>

vi. As already mentioned in the previous paragraphs (ii. and v.), the Lanzarote Convention is fully entered into force into the Italian legal system through an ordinary procedure of adaptation and without any reservations: this implies that in order to describe how Italy has implemented the Convention, reference is to be made to an ordinary act of law, namely *Legge* n. 172/2012, which reproduces the content, the principles and the terminology used in the Convention, adapting it to the national law system. Furthermore, it has to be underlined that the act of law ratifying the Convention does not take into consideration the whole content of the “Lanzarote”, since the ratification law covers only the aspects mentioned in the Convention not yet covered by domestic law. The Italian adhesion to the Convention is only a small part of a bigger process that has led Italy to raise the attention for children protection in every single field of law. Before the beginning of negotiations leading to the adoption of the text of the Lanzarote Convention, the Italian legal system was certainly well equipped with an effective and cutting-edge system to protect minors.<sup>39</sup>

The original text of Article 519 of the Italian criminal code<sup>40</sup> punished the criminal offense of “*violenza sessuale*” (i.e. sexual assault), providing a specific example in case of sexual abuse on minors in paragraph 2. This discipline was totally reformed and expanded with the “Rules against sexual violence” law (n. 66 of 15<sup>th</sup> February 1996); further and most prominent innovations were achieved by *Legge* n. 269/1998 (and its subsequent modification made by *Legge* n. 38/2006), regarding provisions against the exploitation of prostitution, pornography, sexual tourism involving children, such as new forms of slavery which introduced into the criminal code the new offenses of exploitation of child prostitution, child pornography, possession of pornographical material, child sex tourism.

The new *Legge* n. 172/2012, which has finally ratified the Lanzarote Convention, is divided into two parts:

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<sup>38</sup> Text is available on: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:Legge:2012-10-01;172>. An English translation is not available.

<sup>39</sup> “Minor” without any indication of age is intended to be an individual younger than 18 years old, as stated both by the national legislation and the Lanzarote Convention.

<sup>40</sup> R.D. 19 ottobre 1930, n. 1398 or *Codice Penale*

- Chapter I (artt. 1-3): it contains the Ratification and the Execution Order of the Convention and entitles the *Ministero dell'Interno* (i.e. Home Office) as the authority responsible at a national level for collecting and storing empirical data on convicted sexual offenses, in respect to the content of the Treaty of Prum (ratified by Italy with the *Legge* n. 85/2009);
- Chapter II (artt. 4-9): it contains specific provisions which amend the criminal code, the code of criminal procedure and the penitentiary order and aim to make them compatible with new provisions deriving from the Lanzarote Convention.<sup>41</sup>

There many reasons why Italy has not been ratifying the Lanzarote Convention during last three years, which are mainly related to the absence of an immediate necessity to introduce the instruments of protection sanctioned under the Convention, since, as previously mentioned, the Italian legal system prior 2007 already provided institutions able to guarantee protection against sexual offences on children.

Furthermore, the late ratification of the Convention by Italy is related to the issue of the adaptation of the provisions of the Treaty to Italian national law, which has represented a main problem, finally resolved with the ratification of the Convention. Examples of the main point of the law on which the two branches of Italian Parliament have developed an animated debate are: (a) questions concerned prerequisites for application of the personal security measures; (b) questions directed to rationalize the activities of the prosecutors (especially it is ordered that the competence in this area is attributed not to the ordinary public Prosecutors, but to the anti-mafia district Prosecutors). Therefore, it should be clear that the Italian late ratification is not related to a different vision on the noble principles contained in the text prepared by the Council of Europe, being only due to the necessity to develop the best path to let international legislation come into Italian law system.

In any case, the ratification of the Lanzarote Convention has driven into the Italian law system many aspects of substantial innovation of the criminal justice system, aiming at building up a most effective legal system committed to the protection of children. In fact, beyond some minor adjustments to the discipline of the offences already covered by the

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<sup>41</sup> See also, Servizio Studi -Dipartimento Giustizia - Camera Dei Deputati, Dossier di documentazione, Ratifica della Convenzione di Lanzarote per la protezione dei minori contro lo sfruttamento e l'abuso sessuale, nonché norme di adeguamento interno, Serie: Progetti di *Legge*, Numero: 198, Progressivo: 1-2-3-4-5.

Italian criminal code (such as the confiscation of good related to the commission of the crime against children, the increased punishments for the offenders, the aggravating and additional circumstances), four types of new offences have been explicitly criminalized for the first time, even though they were already prosecuted in the past through an extensive interpretations of the existing provisions:

- letter b) of art. 4 of *Legge* n. 172/2012 introduces a new criminal offense, called *istigazione a pratiche di pedofilia e pedopornografia* (art. 414-bis c.p.) which prosecutes the person who makes incitement to pedophilia and child pornography practices;
- letter h) of art. 4 of *Legge* n. 172/2012 introduces a new criminal offense, which is added to the existing art. 600-ter c.p., dealing with child pornography; according to this provision, anyone who attends pornographic shows or performances where minors are involved is prosecuted and the expression “child pornography” is delineated;
- letter s) of article 4 of *Legge* n. 172/2012 widens the scope of art. 609 quinquies c.p., dealing with the crime of *corruzione di minorenne* (i. e corruption of children), which takes place when anyone makes a minor younger than 14 years old assisting to the commission of any kind of sexual acts or looking at pornographic show material in order to induce her/him to do or to suffer sexual offences; punishment is increased if the offender is a person which is closed to the child (e. g. parents, teachers, mentors, etc.);
- letter z) of art. 4 of *Legge* n. 172/2012 introduces the new crime of *adescamento di minori* (art.609-undecies c.p.), defining the conduct of a person who uses Internet or other media instruments in order to enter in contact with minors.

**vii- viii.** Not applicable

## II NATIONAL LEGISLATION

### 1 GENERAL PRINCIPLES OF THE JURISDICTION

**i.** From an institutional point of view, the Italian State was born in 1861, year in which the King of Sardegna, Vittorio Emanuele II acquired the title of King Of Italy. Moreover the Albertine Statute (conceded by Carlo Alberto of Savoia in 1948 came along as inheritance of the Sardinian realm), which resulted in becoming the first form of “Constitutional Chart” of the Kingdom of Italy. Even though initially the Statute outlined a Constitutional Monarchy

as form of government, its flexibility made it possible to introduce a Parliament-based monarchy.

With the rise of Fascism, as an extreme consequence of the Statute flexibility, the Kingdom of Italy was diverted in an authoritarian regime: this entailed a disruption not only at an institutional level (e.g.: elimination of the Deputy Chamber with the creation of *Camera dei Fasci e delle Corporazioni*) but also for the recognition of forms of public liberties. (e.g.: cancelation of the right to vote, suppression of rights such as press rights, assembly rights etc.). The liberties were restored following the end of the Second World War and the loss of power by Benito Mussolini. At the conclusion of 5 years of “transitory regime”, on June 2<sup>nd</sup> 1946, a referendum was announced in order to choose between the Monarchy and the Republic, where the latter gained the upper hand. Furthermore the vote occurred for the first time with a suffrage extended to women for the election of the members of Constituent Assembly. Following two years of intense work, on 1<sup>st</sup> January 1948, the Constitution of the Republic of Italy was introduced in substitution of the Albertine Statute.

In Italy, the existing form of government corresponds to a Parliamentary Republic. According to the Constitution, the Parliament is the institution which represents people’s voice: it is composed of two chambers (Deputy Chamber and Senate), and its members are elected every 5 years by people (art 55 ss.). The Parliament detains the power to nominate the President of the Republic (art 83), and the power of concession and repeal of the vote of confidence (art 94).

The political orientation of Italy is determined by both the Government and the Parliament.

The Government is composed by the President of the Ministers’ Council and the Ministers (art 92). The President of the Ministers’ Council, even if formally nominated by the President of the Republic (art. 92 par. 2), needs to present himself at the Chambers in order to receive their fiduciary vote (“*voto di fiducia*”): this means that politically the government becomes responsible of its actions in front of the Parliament, the only political body that has the power to provoke the obligatory resignation of the Government. The Parliament in every single moment can decide on a demotion of the Government.

The President of the Republic, which is the Commander in chief and represents the national unity (art. 87), is elected by the Parliament in a common hearing (art. 83) and holds his office for seven years (art. 85). He has the power to nominate the Government and to dismiss the Chambers (art. 88).

ii. The Italian Constitution was approved by the Constituent Assembly on 22nd December 1947, and entered in the force on 1st January 1948. The “Constituent fathers” beard the idea of fundamental human rights as a body of rights which pre-exists and is independent from the existence of the State, being this one the institution that simply recognizes those rights (but does not “assign” them) and has the duty to guarantee them in every possible way. In this context art. 2 of the Constitution states that the Republic recognizes and guarantees inviolable human rights, both as an individual, and in a social formation where personality is developed, and it requires the fulfilment of mandatory duties of political, social and economical solidarity. The Constituent Assembly decided to include in the text of the Constitution an ensemble of disposition able to guarantee the protection of human rights, being the Constitution the most important juridical tool of the Italian system of Law. This allows human rights to have pervading strength, thus penetrating every single corner of the legal order. This pre-eminence of the Constitution in front of ordinary law enacted by the Parliament entails that every Judge has the duty to apply the law, but has to keep always into deep consideration the ethical principles enshrined in the Constitution, which acquire a higher value in respect of general principle of the legal order. Everything revolves around the supreme value of human dignity: in the Italian legal order human rights are the limit and justification of every single aspect of the Italian regulations (whatever subject treated).<sup>42</sup>

It is important to underline the fact that in the Italian legal order a “Bill of rights” does not exist, but rather, in line with the choices of the constituent fathers, it is possible to identify rules spread in the Constitutional Chart, which protect inviolable human rights. Furthermore, there is no a *numerus clauses* list of such principles: this shows that the category handled is open to the acquisition of other rights, as society progressively recognizes them. Examples of dispositions that embody the rights protected by art. 2 of the Constitution are provided in articles 13, 16, 21, regarding, respectively, personal liberty, freedom of movement and mobility rights, liberty of expression etc. It is important to add that the first twelve articles of the Italian Constitution are considered “fundamental principles” of the legal order, and differently from the other constitutional rules, they are not modifiable, not even with a constitutional revision law.

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<sup>42</sup> MADDALENA P., La Dichiarazione Universale dei Diritti dell’ Uomo e la Costituzione della Repubblica Italiana; giudizio di equità ed identità tra equità e diritto, Riv. It. Scienze Pol., LXXIV, 3.



Italian Constitution contains many specific provisions regarding the protection of children. The first two have a general scope, therefore is possible to consider them also as a reference to the figure of the minor: art.2; art. 3 (see chapter 1: Introduction; part. 1: General, par. i.). The remaining rules address in a more specific way the figure of the “child”, considering him as weak subject to be granted with protection; the Constitution, anyway, does not take into consideration the point of view of “rights of the child”, but prefers to focus much more on those subjects who are bound to “duties to be fulfilled towards the child.” Specific articles may be provided:

- art. 30, according which it is at the same time a duty and right of parents to support, raise and educate their children, even if born out of wedlock. In case of incapacity of the parents, the State provides for the fulfilment of their duties. The law ensures to children born out of wedlock every form of legal and social protection that is compatible with the rights of members of the legitimate family. The law lays down the rules and limitations for the determination of paternity;
- art. 31, according to which the Italian Republic gives assistance to the formation of the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits. The Republic protects mothers, children and the young by adopting the necessary provisions;
- art. 34, according to which schools are open to everyone and primary education, which is imparted for at least eight years, is compulsory and free. Capable and deserving pupils, including those without adequate finances, have the right to attain the highest levels of education. The Republic renders this right effective through scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations;
- art. 37, according to which working women have the same rights and are entitled to equal pay for equal work. Working conditions must allow women to fulfil their essential role in the family and ensure special appropriate protection for the mother and child. The law establishes the minimum age for paid work and the Republic protects the work of minors by means of special provisions and guarantees them the right to equal pay for equal work.

**iii.** Within the Italian judicial system, there are judicial bodies organs that specifically control the implementation of national and international instruments aimed at the protection of human rights. Nonetheless, there is a significant number of organizations who have the task

of keeping constantly under control the actual adoption of those provisions and that, either on the initiative of the State itself or on the initiative of International Organizations, help to ensure human rights protection.

Regarding the Protection of Children topic, for example, *Legge* n. 451/1997 has established the *Osservatorio per l'infanzia e l'adolescenza*, (i.e. Observatory for children and adolescents) and the *Commissione Parlamentare per l'infanzia e l'adolescenza*, (i. e. Parliamentary Commission for Children and the teens) who have the task of drawing up reports and official documents in the matter for which they were created. Another example is the *Autorità per l'infanzia e l'adolescenza* (i. e. Authority of children and adolescence ) whose powers are embodied by an Ombudsman that encourages the Government, Regions and other local authorities to take appropriate actions to promote and protect the rights of individuals under age. The Ombudsman formulates proposals and observations and express opinions on draft laws and normative acts of the Government in the field of children protection. The task of the Ombudsman is not only to promote the respect of international treaty law and European law, but also to spread best practices and agreements protocols.

The Italian Constitution is made up of provisions that have a different nature; as a matter of fact, it is possible to distinguish two main categories: “programmatic norms” and “perceptive norms”. The first ones are rules having political nature and whose provisions are addressed to the State body as a whole, and especially to the legislator which has to give them practical implementation. Programmatic norms have no direct effect, but prescribe wide objectives that the legislator has to pursue, and may at least be challenged in front of the courts whenever the State obstacles their achievements rather than promoting it. On the other hand, perceptive norms are addressed to all the subjects of State order, and directly entitle the citizens with full rights that are to be protected without waiting concrete tools provided by the legislator.<sup>43</sup> If it's true that there is a Constitutional Court in Italy, nonetheless individuals cannot apply to it directly for the protection of their rights: even if dealing with an assault to a Constitutional right, this protection will be granted necessarily by ordinary Judges. The Constitutional Court's task, in fact, is limited to the verification of laws'

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<sup>43</sup> An example of the latter can be individuated in art. 21 of the Constitution which states that everyone has the right to freely express their thoughts through speech, writing or any other means of communication.

compatibility with Constitutional provisions and only when a judge has raised the question of unconstitutionality in a proceeding brought to his attention.

iv. The *Suprema Corte di Cassazione* is at the top of the Italian jurisdictional system and it's competent for both civil and criminal law. Art. 65 of the Rules on Judiciary system (*Legge* n. 12, enacted on 30<sup>th</sup> January 1941) establishes one of its main functions, i. e. to ensure the observance and the uniform interpretation of the Italian law, the unity of the national law, and supervises the respect of the limits of the various jurisdictions. One of the key features of its mission is the issue of a third degree judgment, following the decision of a Tribunal and the decision of a Court of Appeal; it has to be stressed, however, that according to Italian Law, our Supreme Court is not allowed to reconsider the facts underlying a previous decision, unless their knowledge is necessary in order to better evaluate the remedies available for the complainant.<sup>44</sup>

According to art. 111 of the Constitution, the appeal to the Supreme Court in criminal matters is always allowed against decisions and measures that restrict personal freedom and are issued by ordinary or special courts. The convicted person is allowed to apply to the Supreme Court against a decision of a Court of Appeal, only for reasons of legitimacy that are set by art. 606 c.p.p.: e.g. the appeal judge has failed or misunderstood the application of Criminal law, he did not comply with criminal procedural law, he failed to take decisive evidence for the decision on the trial, or has shown a manifest lack of logical reasoning in the decision.

When the Court finds one of the defects above mentioned, it has the power and the duty not only to set aside the decision of the Judge in the lower grade, but also to include the principle of law that the contested Judge must observe when reviewing the facts of the case. The principles laid down by the Supreme Court are not, however, binding for judges and do not constitute a binding precedent, but only a source of persuasive authority for future decisions on the same topic. In the *law in action*, however, reality, the judges of lower courts comply with decisions of the Supreme Court in the most cases.

The Supreme Court has also the task of solving conflicts of jurisdiction and conflicts in competence: in the first case, the Court has to indicate, when a conflict occurs between the

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<sup>44</sup> Art. 360 c.p.c.; art. 606 c.p.p.

ordinary courts and the special, Italian or foreign, who has the power to treat the proceeding; in the second case, the Court has to resolve a conflict between two lower courts.

v. Art. 85 c.p. sets out the requirements that must be fulfilled to assess someone's criminal liability, namely in his capacity of discernment to fully understand and will the crime. Many provisions set out also the cases that excluded criminal liability: artt. 87 - 88 describe the concept of a *minor age*. As already explained in the previous chapters, in the Italian system a "minor" is considered to be a person who is under eighteen years of age. From the point of view of criminal liability of the minor it is necessary to distinguish, however, two different levels:

- art. 97, according to which, criminal liability cannot be attributed, when at the time he/she committed the crime, he/she had not completed their fourteenth years of age;
- art. 98 according to which the minor is liable, if at the time he committed the crime, he/she was at least fourteen years old, but not yet eighteen, and if he/she had the will and the ability to understand the consequences of his crime; in this case, the punishment set by the law of the crime is reduced"

From these two provisions the discipline of juvenile criminal responsibility can be easily deduced: in the first case (art. 97 c.p.) there is an absolute presumption of lack of ability or will of the minor of 14 years. The child who had committed the crime, not being liable, will be acquitted and is not subject to penalty. The second case, however, provides two different scenarios: if the child had an age between fourteen and eighteen, the judge will have to determine in each case whether the person who committed the crime is capable or not to understand and take action, and thus being liable. If the judge considers non-existent the capacity of understanding and taking action, the minor will be acquitted, if, instead, the judge assesses the existent capacity of understanding and taking action the child, who has reached the age of fourteen, will be considered liable and penalties would be reduced.

Statistics on children prisoners are available, and these are constantly updated thanks to the work of the *Dipartimento di Giustizia Minorile*, i.e. the Department of Juvenile Justice, which is an agency of the Ministry of Justice. The last update refers to the 15<sup>th</sup> December 2011 and the statistics cover the period from 12/01/2010 to 30/11/2011. The statistics mention a

high percentage of children held for crimes against for robbery, assaults, and crimes related to drug dealing. Most of the minors in Juvenile Jails are male (94%) and Italian (67%)<sup>45</sup>.

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. After twenty years of parliamentary debates, the discipline of sexual crimes was changed with *Legge* n. 66/1996, which introduced a new general category of crime, namely the sexual violence, and collocated it not anymore in the part of the Italian criminal code concerning crimes against public morality and good behaviour, but in the chapter related to crimes against personal freedom. The intent was to consider sexuality not anymore as an indecorous and immoral way to give vent to luxuries (negative meaning), which offends common sense and morality, but as a free choice, a way to express individuality and personality (positive meaning).

For this reason, the offences of carnal conjunction and indecent violent acts were abrogated (former art. 519 and 521 c.p.) and substituted with the new crime of sexual violence (art. 609 *bis* c.p.). Carnal conjunction was violence or a threat through which an agent constrained someone to have a sexual intercourse with him/her (with penetration); indecent violent act was a violence or a threat through which an agent constrained someone to have a physical contact with him/her (not necessary with penetration). Now, sexual violence occurs when someone with violence [material or potential, able to coerce someone's will] or threat [psychical coercion] or abuse of authority [particular relation between the agent and the victim, e.g. kinship, employment, education,...] constricts another person to commit or be subjected to sexual acts or induces another person to commit or to be subjected to sexual acts. The concept of sexual act includes all the attitudes which, according to common sense and jurisprudence, express a sexual impulse of an agent that, through a violence, threat, abuse, deception or others, leads to a corresponding invasion of the sexual sphere of the passive subject<sup>46</sup>. Because of the fact that sexuality is a dynamic and complex reality which

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<sup>45</sup> Dipartimento Giustizia Minorile, Ufficio I del Capo Dipartimento, Servizio Statistica: *Istituti penali per i minorenni, anno 2011*.

<sup>46</sup> Cassazione Penale, section III, n. 35118/2004.

expresses itself at different levels (physical, psychological, moral, cultural), there is still an ongoing debate on it.

In doctrine, different trends wonder about the extent of this new concept that could be intended as wider, smaller or equal to the two previous ones:

- equal, in continuity with the previous, therefore as a synthesis of carnal conjunction and indecent violent act;<sup>47</sup>
- wider, because sexual activity is every conduct which has an erotic significance in the subjective sphere of the author or victim. It is a subjective notion which, therefore, does not necessary require the physical contact element (it can be, for example, be exhibitionism, voyeurism, self-erotism).<sup>48</sup>
- smaller, because it refers only to a physical act, according to the definition given by science and medicine. It is an objective notion which, therefore, excludes the cases of “bad touch”, “footie”, “pinch”, “cheek kiss”.<sup>49</sup>

Also in jurisprudence there is not a common vision:

- before 1966, every act of violation of someone's body was considered an indecent violent act if it was *able* to excite the agent, also in a non-complete or in a short way,

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<sup>47</sup> BELTRANI S. –MARINO R. , *Le nuove norme sulla violenza sessuale*, Esselibri-Simone, Milano, 1996.  
BORGOGNO R., *Il delitto di violenza sessuale*, in AA. VV., *I reati sessuali*, a cura di COPPI, Giappichelli, Torino, 2007. DEL CORSO, *Commento agli articoli 3 e 4 della Legge 15.2.1996*, in *Legislazione Penale*, 1996.

NAPPI A., *Commento alle nuove norme contro la violenza sessuale*, in *Gazzetta Giuridica*, n. 8, 1996.

PISA P., *Commento alle nuove norme contro la violenza sessuale*, in *Diritto Penale e Processo*, 1996.

ROMANO B., *Delitti contro la sfera sessuale della persona*, Giuffrè, Milano, 2007.

<sup>48</sup> AMBROSINI G., *Le nuove norme sulla violenza sessuale*, Utet, Torino, 1997.

ANTOLISEI F., *Manuale di diritto penale, parte speciale*, Giuffrè, Milano, 2007.

MARINI G., *Delitti contro la persona*, Giappichelli, Torino, 1996.

MULLIRI G., *La “nuova” fattispecie di violenza sessuale messa alla prova da un caso piuttosto singolare*, in *Giurisprudenza di Merito*, 2004, n. 2.

PECORARO ALBANI A., *Violenza sessuale e arbitrio del legislatore*, Jovene, Napoli, 1997.

VESSICHELLI M., *Con l'aumento del minimo edittale a cinque anni ora è più difficile il patteggiamento*, in *Guida al Diritto*, 1996, n. 9.

<sup>49</sup> BALBI G., voce *Violenza sessuale*, *Enciclopedia Giuridica Treccani VII*, Roma, 1999.

CADOPPI A., *Commento art. 609 bis c.p.*, in *Commentario delle norme contro la violenza sessuale e contro la pedofilia*, a cura di CADOPPI A., Cedam, Padova, 2006.

DAMINI P., *Sulla nozione di “atti sessuali” ex art. 609 bis c.p.: nuova Legge, vecchia giurisprudenza?*, in *Indice Penale*, 1998.

PALUMBIERI S. R. , *Introduzione e violenza sessuale*, in CADOPPI-CANESTRARI-PAPA, *I reati contro la persona*, Utet, Torino, 2006.

because it was irrelevant the real erotic satisfaction<sup>50</sup>. In this case, the kiss could have had criminal relevance;

- after 1966, it was valorised the subjective component of the sexual act, which necessary had to involve physical parts of the body able to excite the other, regardless of the concrete sexual satisfaction, considering the intent of the author<sup>51</sup>. In any case, the only sexual impulse was not sufficient to determine a crime<sup>52</sup>, because it was necessary to focus on the act itself and to value its ability to injure someone's sexual freedom;
- recently, the attention has been focused on the objective component of the sexual act, which necessary affects a zone of the body considered erogenous by medicine, science, psychology and, therefore, compromises someone's sexual determination<sup>53</sup>. In this case, exhibitionism, voyeurism and self-erotism are not considered sexual acts anymore, but a “cheek kiss” can still be (differently from what said by the doctrine).

Concluding, there is not a common opinion about the concept of sexual act. Notwithstanding, we can say that the attention is now focused on the act itself, which has to be invasive of someone's body and, therefore, personality. But, still, there is not a general definition of erogenous zone. For this reason, the judgment must necessary be relative, depending on the case analyzed and considering people involved, situation and social-cultural context<sup>54</sup>. Therefore, a “cheek kiss” could be considered a sexual act or not.

ii. According to art. 85 c.p., nobody can be punished for a fact set forth by law if, at the moment of the commission, he/she was not indictable. Someone is indictable if he/she is in full possession of his/her faculties (mentally capable). This is called imputability that is being psychologically mature and mentally sane (not deviated by other circumstances such as childhood, alcohol, drugs, etc).

According to art. 42 c.p., nobody can be punished for an action or an omission set forth by law as a crime, if he/she has not committed it with conscience and will. This is called

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<sup>50</sup> Cass. Pen., section III, 29/09/1986.

<sup>51</sup> Cass. Pen., section III, n. 1040/1996; Cass. Pen., section III, n. 1193/1997; Cass. Pen., section III, n. 34128/2006;

Cass. Pen., section V, 24/11/2000.

<sup>52</sup> Cass. Pen., section III, n. 37395/2004; Cass. Pen., section III, n. 15464/2004.

<sup>53</sup> Cass. Pen., section III, n. 21167/2006.

<sup>54</sup> Cass. Pen., section III, n. 28815/2008.

voluntariness or culpability, that is understanding the meaning of the committing/committed fact, being conscious of its possible verification<sup>55</sup>. Inside the psychological element of the crime, we can distinguish: intent, big negligence, involuntariness and objective liability. A crime is committed with intent, or according to intent, when the harmful or dangerous event, which is the result of the action or omission and at the same time the cause of the existence of the crime, is foreseen and wanted by the agent as consequence of his/her action or omission” (art. 43 co. 1 c.p.). When the agent has acted with intent, he/she has foreseen the event (in *all* its elements), has developed a judgement and then has acted according to it. Depending on its *intensity*<sup>56</sup>, we can distinguish among different situations:

- premeditated intent, when there is a lapse of time between the conception and the enactment of the crime, in which there can be a reinforcement of the criminal intent and a preparation of crime's modalities;
- direct intent, when the agent is aware of each element that constitutes the crime and foresees as sure and highly probable that his/her conduct will include them;
- wilful intent, when the agent is aware of the event which constitutes the crime and takes it as *purpose* of his/her action;
- indirect intent, when the agent acts knowing that the event is a sure consequence of his/her action or is highly probable and *accepts* this *risk*;
- eventual intent, when the agent is aware of the fact that his/her conduct *might* produce certain unlawful consequences and therefore acts accepting this risk.<sup>57</sup>

In the majority of the offences against children, they are sufficient a generic intent (the agent is conscious that his/her act is invasive and harmful of the other's sexual freedom) and an eventual intent.<sup>58</sup> Regarding international liability, art. 604 c.p. states<sup>59</sup> that the dispositions

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<sup>55</sup> Actually, the concepts just indicated are deeply and widely debated among doctrine and jurisprudence. There are entire manuals just on them so, this is not the right place to go inside their meaning, but it is sufficient to mention them.

<sup>56</sup> Basing on other criteria, we can distinguish it in: alternative/cumulative, of damage/of danger, generic/specific, concomitant/antecedent/subsequent.

<sup>57</sup> There is a wide jurisprudence and doctrine on the subtle difference between eventual intent and recklessness. We have the first when the agent, thus acting for another purpose, has accepted the risk that from his/her conduct can derive a criminal event, as consequence of it. We have the latter when the agent, thus foreseeing that the event could be a possible consequence of his/her conduct, acts hoping that it will not happen, so he/she does not accept the risk.

<sup>58</sup> Artt. 600 *bis*, *ter*, *quater*, *quater.1*, *quinquies*, art. 609 *bis*, *ter*, *quarter* c.p. with the exclusion of art. 609 *quinquies*



related to the offences against children are applied also when the fact is committed in a foreign country by an Italian citizen, or against an Italian citizen, or by a foreigner and an Italian citizen together.

iii. The legal age for engaging in sexual activities is 14 years old, as it can be understood by reading the dispositions regarding the protection of minors' sexuality, introduced by *Legge* n. 66/1996 (which have then been recently modified by the act of law ratifying the Lanzarote Convention): art. 609 *quater* c.p. (sexual activities with minors)<sup>60</sup>, 609 *quinquies* c.p. (child corruption), 609 *sexies* c.p. (ignorance of the age of the offended). At this time, a person acquires sexual freedom “in positive”, intended as freedom of having sexual activities with third parties; under this threshold, having sexual activities is forbidden, even if the minor is consenting, but the criminal sanction affects only the partner of the minor, as indicated in artt. 609 *quater* and 609 *quinquies* c.p. The *ratio* of these norms is to protect a regular process of evolution and development of the minor, who is intended to be under danger when a sexual intercourse intervenes if this process is not completed<sup>61</sup>. It could be assumed that there is here a sort of sexual intangibility, since the disvalue of the criminal conduct does not lie on the non-consensuality of the sexual act, but on its precocity itself<sup>62</sup>.

There are two exceptions for this threshold: art. 609 *quater* par. 1, n. 2 c.p. and art. 609 *quater* par. 3 c.p.. The first refers to the situation in which an agent, who is in a particular relation with a minor younger than 16 but older than 14, has a sexual act with him/her: in this case, the disvalue of the conduct lies on the particular relation between the parties. The second refers to the case of consensual sexual activities between minors: it is not punishable the minor who, except for the cases covered by art. 609 *bis* c.p., commits sexual activities with another minor who is yet thirteen, if the difference between the two is not more than three years.. It is a special cause of non-criminality<sup>63</sup> which recognises the legitimacy of affective relationships between coetaneous as long as both of them are older than 13 years old, with the older one being no more than three years older than the younger one<sup>64</sup>.

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c.p.

<sup>59</sup> Recently changed with *Legge* n. 172/2012.

<sup>60</sup> This article was reformed by *Legge* n. 38/2006.

<sup>61</sup> FIANDACA G. – MUSCO E., *Diritto penale, Parte speciale*, Zanichelli editore, Bologna, 2010.

<sup>62</sup> MANTOVANI F., *Diritto penale*, Cedam, Padova, 2011.

<sup>63</sup> Even if there are different opinions on the nature of this provision: cause of non-criminality, cause of justification, cause of liability's exclusion?

<sup>64</sup> This disposition partially differs from the Lanzarote Convention, which does not punish minors responsible

iv. Artt. 609 *bis* and 609 *quater* c.p. regulate abuses on minors and their sanctions; they need to be read in correlation within each others because they contemplate different situations: the first refers to the cases in which there is not the consensus of the minor, while the second implicitly requires it. In fact, art. 609 *bis* par. 1 c.p. contemplates the cases of abuse through coercion, for example with violence, material (use of force) or potential, while art. 609 *bis* par. 2 c.p. contemplates the cases of violence through induction, in which the agent: (1) *abuses* (takes advantages, exploits, uses) of physical or psychological inferiority (dependence) of the minor at the moment of the fact<sup>65</sup> or (2) *deceives* the minor by standing for someone else<sup>66</sup>. Therefore, there is a sort of co-participation of the victim which, for his/her particular vulnerability, is not able to resist to the induction or understand it (the capacity to consent is invalid)<sup>67</sup>.

v. According to art. 564 c.p., it is punished who commits incest in a way that generates public scandal with a descendent or forefather, a sister/brother or someone else closely related to him/her (the last one also known as “relative in direct line<sup>68</sup>”). The sanction is increased in the case of incestuous relationship, that is a continuous relationship of incest, and in case of incest/incestuous relationship committed by an adult on a minor. If the convicted is the father/mother, he/she is deprived of parental authority. Indeed, among family offences, there can be a formal concurrence of offences between the crime of incest and the one of sexual abuse. More in detail, public scandal, which is required by art. 564 c.p. for the perfection of the offence<sup>69</sup>, is a profound sense of perturbation/upset and disgust concerning the fact, spread among an undetermined number of persons external to the

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for sexual offences, because it retains that there may be more appropriate methods of dealing with them and that criminal prosecution should be a last resort.

<sup>65</sup> This inferiority can be also connected to pathologies, permanent or temporary, organic or functional or even due to ambient factors which can weigh on mental/physical capacity: Cass. Pen., section III, n. 15910/2009. With *Legge* n. 66/1996 there was a change of prospective, because it was eliminated the absolute presumption of invalidity of the consensus given by a person with a physical or psychical disability, in order to protect the right to sexual relationships also of persons with disabilities: Cass. Penale, section III, n. 12110/1999.

<sup>66</sup> We can have this hypothesis when the victim falls in error on the agent's identity (rare) or when the agent uses false name/status/qualification.

<sup>67</sup> Moreover, also in the cases *sub* 600 *ter* c.p. (child pornography), the sanction is increased if the fact is committed on a minor in state of infirmity or psychic disability, natural or induced.

<sup>68</sup> Kinship (forefathers-descendants): father/mother - son/daughter, grandfather/grandmother - nephew/niece. Relative in the so called “direct line” father in law - daughter in law, mother in law - son in law.

<sup>69</sup> The nature of the public incest is still discussed. Sometimes it is considered as an objective condition of punishment, independent from the agents' will (Cass. Pen., section I, n. 102756/1966), whereas sometimes it is considered as the event itself of the conduct.

parental group<sup>70</sup>. It is necessary linked to the behaviour of the lovers: it is not required that they directly manifest in public their relationship, but it is sufficient that they behave publicly or manifestly or incautiously<sup>71</sup>. However, public scandal does not need to be proved, because it is a normal effect in the case of incest<sup>72</sup>. Clearly, the norm aims to safeguard the sexual morality of the family, an institution that is deeply protected by Italian legislation<sup>73</sup>.

**vi.** According to art. 602 *ter* c.p., in the cases related both to child prostitution (art. 600 *bis* par.1) and to child pornography (art. 600 *ter* c.p. ), sanctions are increased if the fact is committed by a forefather, a parent (also adoptive), a person living together with the parent, a spouse, a relative closed to the minor, a guardian or any other person that for reasons of cure, education, instruction, vigilance, custody, health, labour or public office, such as a person with public mansions in the exercise of these functions, has to take care of or live with the minor. Therefore, in these cases, being in a particular relation or position with the minor, identifies an aggravating circumstance.<sup>74</sup>

Art. 609 *quater* c.p. extends to the cases of sexual abuses the punishments provided by art. 609 *bis* c.p. for the cases of sexual violence; this extension occurs when:

1) the minor is already 14 years old but younger than 16 and the offender is a forefather, parent (also adoptive), person who lives with the parent, guardian, any other person that for reasons of cure, education, instruction, vigilance, custody, health, has to take care of or live with the minor<sup>75</sup> (art. 609 *quater* par. 1 n. 2);

2) the minor is already 16 years old and the offender is in one of the particular relations just mentioned, and committed the crime abusing of the authority related to his/her position (art. 609 *quater* par. 2).<sup>76</sup>

Therefore, in these cases, we do not have an aggravating circumstance but an autonomous figure of crime.

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<sup>70</sup> Cass. Pen., section III, n. 2639/1976.

<sup>71</sup> Cass. Pen., section III, n. 2639/1976; Cass. Pen., section I, n. 102756/1966; Cass. Pen., section I, n. 101347/1966.

<sup>72</sup> Cass. Pen., section I, n. 105973/1967.

<sup>73</sup> In fact, marriage between consanguineous is forbidden and children born from an incest cannot be recognised if both the parents were in *mala fide* (art. 251 c.c.).

<sup>74</sup> This article has been recently introduced with *Legge* n. 172/2012.

<sup>75</sup> If there is not one of these kinds of relation between the agent and the minor, the offence is not configured (Cass. Pen., section III, n. 4761/1997).

<sup>76</sup> This par. has been partially modified by *Legge* n. 172/2012.

Art. 609 *quinquies* c.p., regarding child corruption, provides an increased sanction when the fact is committed by a forefather, parent (also adoptive), person who lives with the parent, guardian, any other person that for reasons of cure, education, instruction, vigilance, custody, health, has to take care of or live with the minor. Here, the fact of being in a particular relation or position with the minor identifies aggravating circumstances.<sup>77</sup>

## 2.2 Child Prostitution

**vii.** The Convention on Action against Human Trafficking was signed by Italy on 8<sup>th</sup> June 2005, without any reservations; it was then ratified on 29<sup>th</sup> January 2010 and made effective on 1<sup>st</sup> March 2011.

**viii.** According to art. 600 *bis* c.p.<sup>78</sup>, it is punishable for child prostitution who:

- recruits for prostitution someone younger than 18 years old (par. 1, n. 1)<sup>79</sup>;
- induces to prostitution someone younger than 18 years old (par. 1, n. 1);
- encourages the prostitution of someone younger than 18 years old (par. 1, n. 2);
- exploits the prostitution of someone younger than 18 years old (par. 1, n. 2);
- manages the prostitution of someone younger than 18 years old (par. 1, n. 2)<sup>80</sup>;
- organizes the prostitution of someone younger than 18 years old (par. 1, n. 2)<sup>81</sup>;
- controls the prostitution of someone younger than 18 years old (par. 1, n. 2);
- profits from prostitution of someone younger than 18 years old (par. 1, n. 2);
- commits sexual activities, for money or other economic utility, even if just promised, with a minor being already 14 years old (par. 2).

In order to allow an easy understanding of the legal provision, definitions of the terms used above are provided here:

- to recruit: to call upon minors in order to induce/encourage/exploit them;

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<sup>77</sup> Moreover, there is another disposition which is relevant, namely art. 572 c.p., which punishes abuses/mistreatment inside the family.

<sup>78</sup> Art. introduced by *Legge* n. 269/1998 and modified by *Legge* n. 38/2006. Also articles 600 *ter*, *quater*, *quater.1*, *quinquies* c.p. were introduced by this same act of law.

<sup>79</sup> This is a new hypothesis of child prostitution introduced with *Legge* n. 172/2012.

<sup>80</sup> This is a new hypothesis of child prostitution introduced with *Legge* n. 172/2012.

<sup>81</sup> This is a new hypothesis of child prostitution introduced with *Legge* n. 172/2012.

- to induce: to create in someone a will of self-prostituting, to make stronger an existing intention of self-prostituting, to make someone to desist from the idea of stopping this activity<sup>82</sup>. The crime is realised when the minor has been convinced and has concretely started the activity<sup>83</sup>;
- to encourage: to determine more favoured conditions for the exercise of child prostitution<sup>84</sup>;
- to exploit: to receive benefits from child prostitution;
- to manage: to coordinate the normal functioning of a group of child prostitution;
- to organize: to set up/to establish a group of child prostitution;
- to control: to have a general vision of the function/organization/etc of a group of child prostitution;
- to profit: to receive any utility derived from child prostitution.

The definition of child prostitution is compatible with the one in art. 19.2 of the Lanzarote Convention. Indeed, it has to be clarified that Italian criminal code punishes a wider range of circumstances. As an example, art. 600 *quinquies* c.p. concerning sexual tourism, punishes whoever organises or promote travels finalized to the fruition of prostitution activities damaging minors. In this case, it is required neither the concrete fruition of child sexual activities nor the concrete accomplishment of the travel: it is a so called crime of abstract or presumed danger.

**ix.** Italian law system protects the free psycho-physical development of the minor, which can be under danger with any commercialization of his/her body; for this reason, both the recruiter and the user are criminalized. Since it is sufficient just a generic intent, meaning that the agent has to have the representation of the typical elements of the fact (among those, the age under 18 of the person he/she is dealing with), the offender cannot use as an excuse the fact that he/she did not know that the victim was younger than a certain age. Before September 2012, according to art. 609 *sexies* c.p., the awareness of the age of the offended/victim was relevant only in the cases *sub* art. 609 *bis*, *ter*, *quater*, *octies* c.p. if the

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<sup>82</sup> Cass. Pen., section III, n. 7608/1998.

<sup>83</sup> If only the first condition is realised, we have just the attempt of the crime: Cass. Pen., section III, n. 42371/2007; Cass. Pen., section III, n. 21181/2009.

<sup>84</sup> Cass. Pen., section III, n. 10938/2001; Cass. Pen., section III, n. 7734/2000.

victim was younger than 14 years old. This provision has then been modified by *Legge* n. 152/2012: currently, the awareness of the age is relevant also: (1) in the case *sub* the new art. 609 *undecies* c.p.; (2) in all the mentioned cases if the victim is younger than 18 years old (not 14), except if the ignorance is unavoidable.<sup>85</sup> Moreover, another disposition has been introduced, art. 602 *quater* c.p. which is identical to art. 609 *sexies*, but refers to the crimes covered by artt. 600 *bis*, *ter*, *quater*, *quater.1*, *quinquies*, and 602 *ter* c.p.

### 2.3 Child Pornography

x. The Convention on Cybercrime was signed by Italy on the 23<sup>rd</sup> November 2001 (date of the opening of the signature), without any reservations; it was then ratified on 5<sup>th</sup> June 2008 and made effective on 1<sup>st</sup> October 2008<sup>86</sup>.

xi. The concept of pornography is still nebulous. In fact, even *Legge* n. 38/2006, which introduced the corresponding crime, does not give a definition, because it is difficult to define it without taking into consideration the single and specific context in which it can be found. For this reason, it is preferable to maintain it as an elastic element, adaptable from case to case.<sup>87</sup> Within the Italian legal order, it can be found a concept closed, but not coincident, to the one of pornography, namely that of obscene act: according to art. 529 c.p. this is an act or object which, in line with common sense, offends decencies, with the exclusion of what is considered an art or medical or science or similar work, unless it is offered on sale, sold, or procured for a minor, for purposes different from studies (that is, for primarily sexual purposes). A part of doctrine links pornography to the realization of sexual acts by/on a minor<sup>88</sup>. Another part, in accordance to jurisprudence, retains that pornography is every show/part of it consisting essentially in manifesting or soliciting the sexual instinct, through reproduction/representation/exhibition of genitals<sup>89</sup>. In any case, thank to the recent *Legge* n. 172/2012, art. 600 *ter* par. 6 c.p. provides now a legal definition of *child* pornography, which is any kind of representation, made through any kind of mean,

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<sup>85</sup> This is different from what provided by the Lanzarote Convention, which does not contain provisions regarding awareness or ignorance of the victim's age, in regard to the alleged perpetrator of the offence.

<sup>86</sup> Italy has also authority (A) on it.

<sup>87</sup> So it has a value of an extra-juridical concept, even if can raise difficulties in relation to the definition of the element of the crime itself.

<sup>88</sup> FIANDACA G. – MUSCO E., *Diritto penale, Parte speciale*, Zanichelli editore, Bologna, 2010; MANTOVANI F., *Diritto penale*, Cedam, Padova, 2011.

<sup>89</sup> ROMANO B., *Delitti contro la sfera sessuale della persona*, Giuffrè, Milano, 2007; Cass. Pen., section III, n. 25464/2004; Cass. Pen., section III, n. 5397/2001; Cass. Pen., section III, n. 10981/2010.

that visually depicts a minor engaged in a real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes. Clearly, this definition corresponds to the one given by art. 20 (2) of the Lanzarote Convention.

**xii.** The dispositions of the criminal code related to child pornography have been deeply changed by *Legge* n. 172/2012. For example, according to art. 600 *ter* c.p., it is punishable for child pornography who:

- realises pornographic exhibitions using minors (par. 1 n. 1), that is realizing private or public show, on air, for a plurality of audience (even if, by fact, there is only one person)<sup>90</sup>;
- produces pornographic materials using minors (par. 1), that is producing graphic/magnetic/electronic/visual supports which consent the indirect vision of pornographic exhibition, without requiring a lucrative purpose<sup>91</sup> (par. 1 n. 1);
- recruits minors for child pornography minors (par. 1 n. 2)<sup>92</sup>;
- induces minors to participate in pornographic exhibitions (par. 1 n. 2), that is to create in the minors the will of participate, with the concrete exhibition and production;
- profits from child pornography of minors, that is receiving any kind of utility (par. 1, n. 2)<sup>93</sup>;
- commercializes these pornographic materials (par. 2); this is different from the provision contained in par.. 1 because, in this case, there is an entrepreneurial activity (organization + lucrative purpose + destination for a plurality of consumers);
- distributes or divulges or spreads or publicizes these pornographic materials (par. 3), called pornographic proselytism; this is different from par. 2 and 4, because it is required neither the lucrative purpose nor a significant number of addressees (just three persons);
- distributes or divulges information (these information have to be neither new nor real, but they have to be specific)<sup>94</sup> finalized to sexual soliciting or exploitation of

<sup>90</sup> Cass. Pen., united section, n. 13/2000.

<sup>91</sup> With the concrete danger of diffusion: Cass. Pen., section III, n. 1814/2008.

<sup>92</sup> This is a new hypothesis of child pornography introduced by *Legge* n. 172/2012.

<sup>93</sup> This is a new hypothesis of child pornography introduced by *Legge* n. 172/2012.

<sup>94</sup> Cass. Pen., section III, n. 15927/2009.

minors, and this can be made by using any kind of means, i.e. through a chat line or a downloader software<sup>95</sup> (par. 3);

- offers or gives, also for free and also for just one occasion, these pornographic materials to a private and single person, i.e. through e-mail<sup>96</sup> (par. 4);
- attends to pornographic exhibitions in which minors are involved (par. 5).<sup>97</sup>

Moreover, article 600 *quater* c.p. punishes also the detention of child pornography material, since this provision aims at sanctioning the person who procures child pornography for himself/herself or another person or who possesses it, without requiring the effective use<sup>98</sup>. In this case is included also the conduct of downloading pornographic materials from a pay-website and saving it on a personal computer.<sup>99</sup>

In the end, article 600 *quater.1*, concerning virtual pornography, states that: the sanctions foreseen in artt. 600 *ter* and *quater* c.p. are applied also when pornographic materials represent virtual images realized using images or parts of images of minors (in this case the sanction is reduced of 1/3). Virtual images are images that are not associated, totally or partially, to a real situation, but that seem real thank to a graphic elaboration.

In conclusion, nowadays the attribution of criminal liability is fully compatible with the one contained in the Lanzarote Convention: artt. 600 *ter* and *quater.1* c.p. reflect art. 20 (1) lett. *a*, *b* and *c* and this is made even in a more specific way; art. 600 *quater* and *quater.1* reflect art. 20 (1) lett. *d* and *e*. A little difference can be found regarding art. 20 (1) lett. *f*. In fact, art. 600 *ter* criminalizes directly the conduct of the offer, not of the receiver, but then it is with an extensive interpretation of the article that the receiver is punished too; finally, art. 600 *quater* c.p. criminalizes the conduct of procuring and possessing pornographic materials and not the conduct of just obtaining access to it, which is not sanctioned (differently from the Lanzarote Convention).

**xiii.** Regarding artt. 20 (3) and 20 (4) of the Lanzarote Convention, we can notice that:

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<sup>95</sup> Cass. Pen., section III, n. 2842/2000; Cass. Pen., section III, n. 11169/2009; Cass. Pen., section III, n. 28524/2009. The crime is concrete when the material is on-line, without requiring a consequent download:

Cass. Pen., section III, n. 25232/2005.

<sup>96</sup> Cass. Pen., section III, n. 2421/2000; Cass. Pen., section III, n. 5397/2002.

<sup>97</sup> This is an important introduction that was deeply debated in the Parliament and which was the most controversial point of the ratification act of law. Before this, the mere attendance to child pornography was not punished.

<sup>98</sup> Cass. Pen., section V, n. 36094/2006.

<sup>99</sup> Cass. Pen., section III, n. 41570/2007; Cass. Pen., section III, n. 42100/2007.



- art. 600 *quater.1* c.p. does criminalize virtual pornography;
- art. 600 *ter* c.p. does not criminalize the conduct of realizing or producing or inducing pornography when this happens for affective or libidinous reasons, only for a private use, without any cession or commercialization or diffusion or exhibition to a third person<sup>100</sup>.
- art. 600 *quater* c.p. sanctions whoever procures or is in possess of pornographic materials for a period of time, also if it is just for personal utilization, even if he/she does not actually use it; however, just consulting or watching the material online is not sanctioned.

**xiv.** As mentioned above, art. 600 *ter* par. 1 c.p. criminalizes also whoever (even a minor) induces minors to participate in pornographic exhibitions. It does not highlight any difference between recruitment and coercion, but art. 602 *ter* c.p. indicates as aggravating circumstance the fact of inducing the minor to prostitution/pornography with violence or threat (coercion) or abusing of his/her state of necessity. The mere attendance is now criminalized (art. 600 *ter* par. 5), without using the reservation right stated in art. 21(2) of the Lanzarote Convention.

## 2.4 Corruption of Children

**xv.** Art. 609 *quinquies*<sup>101</sup> c.p. punishes whoever:

- commits sexual acts in presence of a minor younger than 14 years old, in order to make him/her witness it (par. 1);
- makes a minor younger than 14 years old witness sexual acts, in order to induce him/her to commit or be subjected to sexual acts (par. 2)<sup>102</sup>;
- shows a minor pornographic materials, in order to induce him/her to commit or be subjected to sexual acts (par. 2)<sup>103</sup>.

The purpose of the norm is to condemn deliberate exhibitionism. The agent does not have to commit sexual acts with the minor, but just to make them in front of him/her, alone or with another partner, or show to the minor pornographic material. The norm, before its modification, required the finalization of an act, so it was not sufficient just to show to the

<sup>100</sup> Cass. Pen., united section, n. 13/2000.

<sup>101</sup> Introduced by *Legge* n. 66/1996.

<sup>102</sup> This is a new hypothesis of child corruption introduced by *Legge* n. 172/2012.

<sup>103</sup> This is a new hypothesis of child corruption introduced by *Legge* n. 172/2012.

minor sexual images<sup>104</sup>. Currently, also this conduct is condemned: therefore, a strip-tease show in front of a minor can be punished. The presence of the minor is essential, also if only temporary<sup>105</sup>. The purpose of causing him/her to watch the act (that indicates a wilful and specific intent), brings the consequence that the minor has to be conscious of these acts (not sleeping or with closed eyes)<sup>106</sup>; in any case, this does not mean that he/she has to understand them or their meaning. It is indifferent the fact that the minor witnesses the acts after a constriction through violence, threat, abuse of authority or after an induction through abuse or deceive (differently from art. 609 *bis* c.p.).

## 2.5 Solicitation of Children for Sexual Purposes

**xvi.** Italian criminal juridical order, as recently modified, directly criminalizes sexual gratification through information and communication technologies. The new art. 609 *undecies* c.p. foresees the crime of grooming, or solicitation of minors, which punishes whoever, for the purpose of committing any of the offences *sub* artt. 600, 600 *bis*, 600 *ter*, 600 *quater*, 600 *quater.1*, 600 *quinquies*, 609 *bis*, 609 *quater*, 609 *quinquies*, 609 *octies* c.p., solicits a minor younger than 16 years old. Solicitation is any act directed to steal the confidence of the minor with tricks, flatteries, threats, also through internet or other networks or means of communication. The article does not specify that the perpetrator should also propose a meeting and come to the meeting place.

**xvii.** The new art. 414 *bis* c.p. provides the crime of aiding and abetting (with the title of paedophilia and cultural child pornography) which punishes: (1) whoever, with any mean, also telematic, and with any form of expression, commits publicly aiding of the commission of one or more offences *sub* artt. 600 *bis*, 600 *ter*, 600 *quater*, 600 *quater.1*, 600 *quinquies*, 609 *bis*, 609 *quater*, 609 *quinquies* c.p.; (2) whoever commits public abetting of one of more of the same offences. In this regard, it is not possible to use as an excuse reasons or purposed of art, literature, history, customs.

The attempt is configurable in regard to the following provisions:

- 600 *bis*, if there is not the concrete exercise of the prostitution activity;

<sup>104</sup> FIANDACA G. - MUSCO E., Diritto penale, Parte speciale, Zanichelli editore, Bologna, 2010. But if the adult shows videos or pictures and makes self-erotism or exhibitionism in presence of the minor, then we have the crime: Cass. Pen., section III, n. 15053/2009.

<sup>105</sup> Cass. Pen., section III, n. 9111/2008.

<sup>106</sup> Cass. Pen., section III, n. 15633/2008.

- 600 *ter* par. 1 n. 1, if there is not the concrete exhibition/production of the material;
- 600 *ter* par.. 3, if there is only the offer on sale;
- 600 *ter* par. 4, if the addressee does not receive the material;
- 609 *bis* c.p. depending on the thesis: if the consumption of the offence is realised with the sexual act, therefore the attempt is possible; if the consumption of the offence is realised when there is a potential invasion on the other's sphere, therefore the attempt is difficult;
- 609 *quater* c.p., if there is not the consensus of the minor<sup>107</sup>;
- 609 *quinquies* c.p., if the minor is not conscious.

## 2.6 Corporate Liability

**xviii.- ix.- xx.** Art. 27 of Italian Constitution states that criminal liability is personal; on the other hand, according to general criminal law, the purpose of the penalty is to re-educate the guilty. The sum of these two principles leads to a third principle: *societas delinquere non potest*. That is why, for many years, only physical persons could be indicted for criminal offences. As consequence, if someone in a position at one legal person or entity performed actions set by law as criminal offences on behalf of their company, only he/she could be punished. However, the increased number of such cases registered in the last years brought the Italian Legislator to introduce a new institute inside Italian juridical order, with the D.lgs. 231/2001: the administrative-criminal liability of legal entities for the crimes committed by subjects which operate inside them. It is not just an administrative liability, but it cannot be only a criminal liability, so individual liability cannot be excluded when there is a corporate liability. According to this act of law, for the commission of certain offences, respond: (1) the physical person who has concretely acted for the total or partial benefit or interest of the company and has committed an offence indicated by law, and (2) the company itself, that is liable also when the physical person is not recognised or imputable (art. 5 of the D.lgs.)<sup>108</sup>.

The physical person can be whoever is in a so called “organic relation” with the company:

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<sup>107</sup> However, in this case, it will be an attempt of sexual abuse, though *sub* art. 609 *bis* c.p.

<sup>108</sup> The company does not respond if the person has acted for his/her own interest or for that of third parties.

- a leading person, that has functions of representation, administration, direction of the company or of its organizational unit (with financial and functional autonomy) or that exercises, also by fact, management and control of it (art. 5 lett. a)<sup>109</sup>;
- a subordinated person, that is under direction or vigilance of a leading person (art. 5 lett. b)<sup>110</sup>.

The legal entity has to be: a private recognised legal person (foundation, association), an unincorporated partnership, a corporation, a public economic body, a not recognised association (art. 1). The sanctions can be: interdictive, pecuniary, a confiscation. The offences incriminated are: artt. 316 *bis*, 316 *ter*, 640 co. 2, 640 *bis*, 640 *ter*, 317, 318, 319, 319 *ter*, 320, 322 c.p.; the one *sub* art. 25 *bis*, the A-I *sub* art. 25 *ter* d.lgs 231/2001.

## 2.7 Aggravating Circumstances

**xxi.** First of all, it has to be born in mind that art. 61 c.p. lists a series of common aggravating circumstances that are applicable to every offence (under the condition that they are not already essential elements of the crime). Apart from these, there can also be special circumstances, applicable only to specific offences<sup>111</sup>. As concerns crimes against children, aggravating circumstances can be listed as it follows.

Art. 600, 600 *bis* co. 1 c.p., 600 *ter* c.p.: when the victim is a minor, the sanction is increased if the fact is committed by a forefather, a parent (also adoptive), a person who lives with the parent, a spouse, a relative closed to the minor, a guardian or any other person that for reasons of cure, education, instruction, vigilance, custody, health, labour or for being a public officer or a person with public mansions in the exercise of the functions, has to take care of or live with the minor<sup>112</sup> (according to art. 602 *ter* c.p.).

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<sup>109</sup> The company does not respond if it proves one of the hypothesis indicated in art. 6 par. 1 of the D.lgs. 231/2001.

<sup>110</sup> In this case, the company responds only in the hypothesis indicated in art. 7 of the D.lgs. 231/2001.

<sup>111</sup> Art. 600 *sexies* c.p., containing a series of special circumstances, has been abrogated with the ratification law of

Lanzarote Convention. Its dispositions has been inserted in the different articles mentioned so far.

<sup>112</sup> Art. 28(d) Lanzarote Convention.

Art. 600 *bis* co. 1 c.p., 600 *ter* c.p.: the sanction is increased when the fact is committed (1) taking advantages of the minor's psycho-physical disabilities<sup>113</sup>; (2) with constriction through violence or threat<sup>114</sup>.

Art. 609 *bis*: the sanction is increased when the fact is committed (1) on a minor younger than 14 years old; (2) with weapons, alcoholics, narcotics, drugs or any other means or substances gravely harmful for the health of the minor<sup>115</sup>; (3) by a disguised person or by a person who simulates the quality of public officer or in charge of a public office; (4) on a minor already under personal freedom limitations; (5) on a minor younger than 16 years old by his/her forefather, parent, guardian; (6) on a minor younger than 10 years old (according to art. 609 *ter*).

Art. 609 *quinquies* c.p.: the sanction is increased when the fact is committed by a forefather, a parent (also adoptive), a person who lives with the parent, a guardian, any other person that for reasons of cure, education, instruction, vigilance, custody, health, has to take care of or live with the minor.

Artt. 600 *bis*, *ter*, *quater*, *quater.1*, *quinquies*, 609 *bis* c.p. (on a minor), 609 *quater*, 609 *quinquies*, 609 *octies* c.p. (on a minor), 609 *undecies* c.p.: the sanction is increased when a criminal organization is direct to commit one of these crimes (according to art. 416 c.p.).

Differently from the Lanzarote Convention, the fact that one of these offences has been committed by several people acting together, is not an aggravating circumstance, but an autonomous criminal offence disciplined by art. 609 *octies* c.p.

## 2.8 Sanctions and Measures

**xxii.** The Italian criminal code pursues sexual offences against children in artt. from 600-bis to 600-octies, introduced by Legge n. 269/1998, and from art. 609-bis to art. 609-decies, introduced by Legge n. 66/1996. Now the ratification of the Lanzarote Convention, implemented in Italy on the 19 September 2012, has deeply modified the general status of the protection of children in Italian legal system.<sup>116</sup> The sanctions foreseen by artt. 600 bis,

<sup>113</sup> Art. 28(c) Lanzarote Convention.

<sup>114</sup> Art. 28(b) Lanzarote Convention.

<sup>115</sup> Art. 28(a) Lanzarote Convention.

<sup>116</sup> DDL - *Ratifica della Convenzione per la protezione dei minori contro lo sfruttamento sessuale*, Lanzarote il 25/10/2007, Relazione sito del Ministero della Giustizia

600-ter, 600-quarter, 600-quarter bis, are imprisonment from six to twelve years for crimes of child prostitution, child pornography, possession of pornographic material and virtual pornography, and the application of fines sanctions varying according to the age of the victim. Unless the fact constitutes a more serious offense, everyone who attends exhibitions or pornographic performances where minors are involved is punished with the imprisonment up to three years and with economic sanctions from 1.500 up to 6.000 Euro<sup>117</sup>.

Moreover, there are aggravating circumstances that need to be analyzed. Art. 600-ter c.p. establishes that penalties are increased by a third to an half in the following hypothesis of crimes: for the crimes under artt. 600, 601, 602 c.p. if those crimes have been committed against someone under the age of eighteen; if the facts are aimed to the exploitation of prostitution, or to subject the victim to organ transplantation, in case from this facts a serious danger to the physical or psychological integrity of the victim arises; if the facts provided by the criminal code in *Titolo VII, Capo III, Libro II*, are committed to realize or to facilitate the crimes of artt. 600, 601 and 602 c.p.; according to articles 600-bis, par.1 and 600-ter c.p., if the fact is committed with violence or threats; if the fact is committed taking advantage of a minor's necessity according to the provisions of artt. 600-bis, par. 1 and 2, 600-ter, par.1, and 600-quinquies c.p.. Moreover, the article 602 ter, par.5 c.p. establishes that in the cases provided by artt. 600-bis, par. 1 and 2, 600-ter and 600-quinquies, as well as by artt. 600, 601 and 602, the penalty is increased by an half to two third if the crime is committed to harm a minor of sixteen year, or by subministration of alcohol, narcotics, drugs or substances otherwise harmful to the physical or mental health of the child, or if it is committed against three or more people.

On the other hand, art. 600-septies, par. 1 c.p. identifies a mitigating circumstance, which is a penalty diminution, for the crimes disciplined in the second section. The penalty is reduced by a third to an half if the accused tries to prevent the criminal activity avoiding further negative consequences for the victim, by concretely helping the police or the judicial authority to gather decisive evidence for the reconstruction of the facts or to capture other offenders.

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<sup>117</sup> New parts and modification of Italian criminal code by the ratification of the Lanzarote Convention are based on a study to be referred to the Tribunal of Milano "*Convenzione di Lanzarote e modifiche dell'ordinamento*", by Andrea Conti starting by Italian Parliament law project number 1969.

With the ratification of the Lanzarote Convention, art. 414 *bis* c.p. was introduced (solicitation of children for sexual purposes): this provision sanctions with an imprisonment lasting from 18 months up to five years everyone who forces a child to prostitution or child pornography through any kind of means, also telematic, as well as who possesses paedopornographic material with the aim to commit sexual abuse or child corruption. The same sanction is provided also for those who praise such crimes in public.

To achieve a better understanding of the Italian legislation on this theme, our attention has to be focused on the combined provisions of artt. 600-*septies*, par. 2 and 609-*nonies* c.p., establishing accessory penalties and others related criminal effects: in particular, the conviction for any of the crimes provided by artt. 609-*bis*, 609-*ter*, 609-*quater*, 609-*quinquies*, 609-*octies* and 609-*undecies* c.p. and the offense referred to in art. 414-*bis* c.p. involve:

- loss of the parental power when the fact of being a parent is as a constitutive element of the crime or of its aggravating circumstance<sup>118</sup>;
- permanent exclusion from any office related to the protection, guardianship and administrative support;
- loss of the right to maintenance of the minor and exclusion from inheritance of the victim;
- temporary disqualification from public offices, meaning the disqualification from public offices for a period of five years following a sentence to imprisonment for three to five years;
- suspension of the exercise of a profession or an art;
- in any case the permanent exclusion from any activity related to the school, as well as from any kind of office or service in institutions or in other places having either private or public nature if they are mainly attended by children.

Furthermore, the sanctions for the crimes foreseen by artt. 600-*bis*, par.2, 609-*bis* c.p., in the aggravating hypothesis of artt. 609-*ter*, 609-*quater*, 609-*quinquies* and 609-*octies*, par. 3 c.p. establish the application of personal safety measures lasting at least for one year after executing the sentence. Such personal safety measures are:

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<sup>118</sup> With the expression “constitutive element”, we meant that in case of its absence, the crime or the aggravating circumstance do not exist.

- movements and circulation restriction, as well as no entry in the places where minors are used to go;
- prohibition to do a job that usually requires contact with children;
- duty to inform the police about own residence and its eventually change.

Everyone, who violates those law dispositions, is punished with the imprisonment up to three years.

Indeed, according to the last paragraph of the new art. 600-*septies*. 2 c.p., it shall be stopped any commercial activity aiming at the commission of crimes against minors, whereas licenses and broadcasting authorizations used for the same scope shall be revoked.

Finally, as already explained in chapter 2, part 2, letter e, par. xvi., within the ratification of the Lanzarote Convention it was introduced art. 609-*undecies* c.p. regarding child grooming: this could be considered as a closing rule, since it provides that everyone who grooms a minor younger than sixteen years old, is sanctioned with the imprisonment lasting from one to three years, under the condition that the crime itself has not to be treated as a more serious offense or made in order to commit other crimes, namely those covered by artt. 600, 600-*bis*, 600-*ter*, 600-*quater*, 600-*quater*.1, 600-*quinquies*, 609-*bis*, 609-*quater*, 609-*quinquies* and 609-*octies* c.p.

The regulation of extradition can be found in art. 112 of the Constitution, in art. 13 c.p., as well as in artt. 697 ff. c.p.p. The main principles in the application of extradition are the following ones: prevalence of international or conventional law rules on the national ones, that can be applied in subsidiary way; the “double criminality” principle, according to which if the fact the extradition is requested for is not foreseen as an offense by both the Italian and the foreign law, extradition is not permitted; “speciality” principle, according to which the extradition cannot operate for different reasons than those for which it has been granted; *ne bis in idem* principle, according to which who has already been tried in Italy cannot be tried again in another Country for the same fact. Furthermore, extradition can be active or passive: from our point of view, it is active when the Italian State requests it, passive when another State requests it from Italy. While the first one is regulated by the law of the State receiving the claim, the passive one is related to a particular process: the foreign Country asks the Italian Justice Minister for extradition; he/she can either reject the claim giving reasons for the denial, or forward the request to the General Attorney of the Court of



Appeal that orders the appearance of the accused for identification (art. 703. par. 2 c.p.p.). If the accused accepts the extradition, there is no need for a trial and the Minister can either accept the request within forty-five days (art. 708., par. 4 c.p.p.) or reject it or also remain silent (art. 708, par. 2 and 3 c.p.p.) revoking the provisional measure. On the other hand, if the accused does not accept the extradition, the Minister has to adopt the same decision within the same terms; then, after more investigations, the General Attorney issues an indictment within three months. After that, the President of the Court of Appeal fixes the date of the audience and informs the defender and the Authorities of the foreign country. Ten days later, the audience in full discussion with the parties takes place (art. 704 c.p.p.). In this situation, are taken in consideration any evidence showing any kind of guilt or respect for fundamental rights in the foreign country, as well as the absence of any persecution. The decision of the Court of Appeal can be brought before the Supreme Court, that can accept the request, with the consequence that provisional measures are ordered to apply.<sup>119</sup>

**xxiii.** As a saying coming from the ancient Greek tradition quote, it is believable that human law may be hardly sufficient to punish who violates natural law. Since also within the animal world the protection of "puppies" is a rule, the protection of human minors can be considered as a rule of natural law. The difficulty to punish crimes against minors, here therefore intended as crimes against the rules of natural law, lays not on the sanctions themselves, but on their effects. In fact, however our domestic law provides many provisions in this regard, still it seems that they are not able to fully punish those crimes, not because they are not strong enough, but because crimes against children are never fully punishable, since they disrupt the marvellous world of innocence of children or the natural process of growing up of teenagers, two categories of individuals that shall be mostly protected by each community, also just because of a matter of natural law. Having considered that, it is however possible to say that the ratification of the Lanzarote Convention has introduced significant progress and should therefore be considered an achievement, but not a final point, in regard to the protection of child victims against sexual abuse.<sup>120</sup>

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<sup>119</sup> TONINI P., *Lineamenti di diritto processuale penale*, 2009, Giuffrè Editore.

<sup>120</sup> LA MARCA S., "Abuso sessuale e maltrattamenti su minori", <http://www.centrostudiperizie.com/>.

**xxiv.** Criminal liability of legal persons was introduced by D.lgs. n. 231/2001, with the express prevision of sanctions and disqualifications for the crimes of sexual abuse, child prostitution, child pornography, making children participating in pornographic performances, corruption of children, solicitation of children for sexual purposes. Moreover, Italian system has adopted the provision of art. 26 of the Lanzarote Convention, which increases and specifies the concept of criminal liability of legal persons, considering liable who commit the crime to an own benefit, acting individually or like a part of an organ of a legal person, as well as covering a leading position within the legal person. Leading position is intended as power of representation of the legal person or authority to take decisions on behalf of the legal person or authority to exercise control within the legal person.

**xxv.** Confiscation is regulated by art. 600-*septies* c.p.: when condemning for crimes against children (artt. 600-*bis* – 600-*octies* c.p.), it can also be ordered by the Judge the confiscation of goods, of documents and of other instrumentalities used to offend, as well as of products, profits or prices originating from the crime. When this is not possible, the Judge orders the confiscation of goods of equivalent value to those being product, profit or price of the crime, upon the condition that the guilty has, directly or indirectly or through an intermediary, availability.

In regard to the *bona fide* third parties, it is protected by art. 600-*septies* c.p., that protects rights to refunds and compensation for damages from mandatory confiscation.

Art. 12-*sexies* of D.L. 306/1992, converted and amended by *Legge* n. 356/1992, provides special cases of confiscation: if it is pronounced the conviction for any of the crimes foreseen by artt. 600, 600-*bis*, par.1, 600-*ter*, par. 1 and 2, 600-*quater*.1, 600-*quinquies*, 601, 602 c.p., is always ordered the confiscation of money, goods and other benefits the offender cannot justify the origin of, despite the fact that he/she appears to be the owner or to have the availability in a measure that exceeds his level of income or his economic activity, as declared for income taxes purposes.

Moreover, art. 17, par. 2 of *Legge* n. 269/1998 institutes a special fund to be entered in the estimates of the Presidency of the Council of Ministers. This fund is originated from fines imposed, plus the amount of money confiscated and values arising from the sale of confiscated property pursuant to the same law. Principal destination of the fund is, in the measure of two thirds, the specific funding of preventive programs, assistance and recovery psychotherapy of children under the age of eighteen, victims of the crimes referred to artt. 600-*bis* to 600-*quinquies* c.p.; the remaining part of the fund is intended, within limits of

available resources, to the recovery of those who recognize themselves liable for the crimes referred to in artt. 600-*bis*, par.2, 600-*ter* and 600-*quater* c.p., if they make appropriate request.

**xxvi.** If the crime has been committed within the family or within any other close environment of the child, special forms of protection are provided. In particular, art. 602-*ter*, par. 6 c.p. refers to aggravating circumstances: the sanction is increased by an half to two third, if the crime is committed by an ancestor, by the adoptive parent, or their spouse or partner, spouse or relatives up to the second degree, relatives to the fourth degree collateral, by a guardian or other person whom the child is entrusted for reasons of care, upbringing, education, security, housing, work, or by public officials or public servants in the performance of their duties or even if it is committed against a child in a state of illness or mental handicap, natural or induced.

The punishment is increased by art. 609-*ter* c.p. that, considering the prevision of art. 609-*bis* c.p. on sexual abuse, prescribes the sanction of imprisonment between six and twelve years, in two cases: the first one occurs if the guilty for those crimes is an ancestor, a parent, also adoptive, or the guardian and if the facts is committed against somebody younger than 16 years old; the second one if the crime is consumed inside or in the immediate vicinity of educational or training institution attended by the victim. This last hypothesis was regulated after the *Legge* n. 94/2009 was enacted.

Art. 609-*quater* c.p. - sexual offences against children – states that beyond the hypothesis regulated by art. 609-*bis* c.p., every ancestor, parent, also adoptive and also his/her partner, or a guardian or another person whom a minor younger than 16 years old is entrusted for reasons of care, upbringing, education, security, housing, or everyone living with the minor, commits sexual acts exploiting his/her particular position with this minor is punished with imprisonment by five to ten years (three to six years if the minor is already 16). Furthermore if the relationship between victim and abuser is stable coexistence, the penalty is increased up of an half, as provided by art. 609 *quinquies*, par. 3 c.p.

## 3 CRIMINAL PROCEDURE

### 3.1 Investigation

**i.** For the time of the investigations concerning crimes involving children as victims, Italian law prescribes the application of certain rules that are meant to protect children, indeed pursuing their “best interest”.

According to art. 609- *decies* c.p., first introduced by *Legge* n. 66/1996 and then recently modified by the ratification of the Lanzarote Convention, Minors courts have to be informed by State prosecutors whenever a person is prosecuted because of a crime against a minor.<sup>121</sup> In particular, this provision applies whenever it takes place a proceed of the crime of making or keeping an individual in slavery status (art. 600 c.p.) if the individual is a minor; of the crime of minor prostitution (art. 600 *bis*); of crimes involving pornographic shows and material (art. 600- *ter* c.p.); of crimes related to organization and promotion of sexual tourism (art. 600- *quinqüies* c.p.); of crimes related to transferring minors from a country to another in order to commit one of the crimes against children (art. 601 c.p.); of crimes related to buying and selling minors reduced in slavery condition (art. 602 c.p.); of sexual abuse (art. 609- *bis* c.p.), indeed when committed under aggravating circumstances (609- *ter* c.p.); of committing sexual acts with minors younger than 16 years old in the cases foreseen by art. 609- *quater* c.p.; of minors corruption (art. 609- *quinqüies*); of sexual violence committed in damage of a minor by a group of persons (art. 609- *octies*); and of the new crime of grooming (introduced by *Legge* 172/2012 within the new art. 609- *undecies* c.p.)<sup>122</sup>

Furthermore, when proceeding for one the above mentioned crimes, the pursuing of the best interest of the minor is concretely realized through measures of affective and psychological assistance, namely the possibility that the minor is assisted in every stage and grade of the procedure by his/her parents and/or other persons indicated by the minor, as well as by experts of well known associations dealing with victims of crimes against minors. Indeed, according to art. 609- *decies*, par. 3 and 4 c.p., child victims are in any case granted the assistance of Juvenile services of the Justice Administration and local institutions<sup>123</sup>. As a consequence, it can be said that, on the one hand, Social services assist victims in their everyday life and, on the other hand, they are equal partners of the judicial proceeding (criminal and/or civil), so as that they are involved in every stage and level of the judicial procedure.

In regard to procedural aspects, Italian criminal procedure code also provides several rules with the aim to prevent children from having to give evidence in Court at the presence of

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<sup>121</sup> CRESPI A., ZUCCALA' G., FORTI G., *Commentario breve al Codice Penale*, Cedam, 2011, 2310.

<sup>122</sup> Already explained in Chapter II, part 2, lett. e, par. Xvi.

<sup>123</sup> CRESPI A., ZUCCALA' G., FORTI G., cit.

strangers and of the offender: In fact, making the children remembering facts related to the crime among strangers and offenders could hurt their psychological sphere.

More specifically, according to art. 398 par. 5-*bis* c.p.p.<sup>124</sup>, as modified by art. 14 of *Legge* n. 66/96 and also recently by *Legge* n. 172/2012, when a child has to give evidence during preliminary investigations, that is during the first part of a criminal procedure<sup>125</sup> concerning crimes against children, this shall be made in a way that does not hurt the psychology of the child. For example, he/she can be asked about the facts in a different place than the Court-even at his/her own home. Furthermore, answers given by children shall be recorded through audiovisual means, in order to be reproducible: important information can be delivered also by facial expressions and behaviours of children (silence, tears, nervous signs and drawings) when asked about facts, and therefore these registrations shall be analyzed by psychologists and other experts of child behaviours.

At this point, it is interesting considering the concrete meaning of the above mentioned provision. In this regard, a series of operations that shall be used during auditions of children has been identified by few commentators:

- Special setting: a room with one-way mirror and/or audiovisual loop connected to another room where there are lawyers, parents of the child and prosecutor. The environment should be friendly and should contain some toys according to the children's age;
- Times and methods of the interview: build a relationship with the child (create a friendly atmosphere); allow the child to stay with an adult at the beginning of the

<sup>124</sup> Art. 398, par. 5- *bis* c.p.p.: "In the case of investigations concerning offenses referred to in articles 600, 600-bis, 600-ter, 600-quater, 600-quinquies, 601, 602, 609-bis, 609-ter, 609-quater, 609-octies and 612-bis of Criminal code, the judge, if one of the people interested are child assumption of the test, with the ordinance referred to in paragraph 2, determine the place, time and detailed through which probative accident procedure, when the requirements for protection of people make it necessary or appropriate. The hearing can be held in a place other than the court, using the judge, if any, in special structures or, failing that, at the residence of the person concerned assumption the test. The witness statements must be fully documented by means of phonogram or audiovisual work. When there is a lack of recording equipment or technical staff, the judge use the expert report or technical advice", in GATTI G., MARINO R., PETRUCCI R., *Codice Penale e Codice di Procedura Penale* Simone, 2009, 398. It has to be added that with the ratification of the Lanzarote Convention these measures apply also in regard to the new crime of grooming, foreseen in the new art. 609- *undecies* c.p.

<sup>125</sup> The word "procedure" refers to what happens after a notice of crime is given until a judicial decision is taken, i.e. it refers also to the preliminary investigations phase, whereas the words "process" and "trial" (synonyms) refer only to what happens after closing the preliminary investigations, that is after the moment the Public Prosecutor exercises the so called "*azione penale*".

interview; ask the child to narrate the fact (during this step, the interviewer respects the narrative pauses); ask specific questions to the child (these questions are clear, simple, short and don't start with "who", "where" and "when")<sup>126</sup>.

Furthermore, the Charter of Noto – created in 1996 by judges, lawyers, psychologists, psychiatrists, child psychiatrists and criminologists of I.S.I.S.C. (Superior Institute of International Criminal Sciences) and updated in 2011 – identifies the means of taking child's testimony (art. 7)<sup>127</sup>, attributes significance to video recording (art. 10)<sup>128</sup>, provides that in case of intrafamilial abuse the investigations must be extended to family members (art. 10)<sup>129</sup>, provides that just symptoms of discomfort manifested by children cannot be considered as indicators of specific sexual abuses (art. 13)<sup>130</sup>, attributes importance to probative accident (art. 15)<sup>131</sup> and provides that psychological assistance to the child shall be entrusted to a specialist (art. 18)<sup>132</sup>. Moreover, the Venice's protocol created in 2007 by lawyers, psychologists, psychiatrists and child psychiatrists identifies the guidelines that should be used by experts in cases of collective sexual abuses, and recognizes the fundamental importance of acting in the best interest of the child during the judicial procedure (art. 4)<sup>133</sup>, as well as of protecting child's dignity and privacy in all the phases of the criminal proceeding (art. 7).<sup>134</sup>

<sup>126</sup> DE CATALDO NEUBURGER L., *La testimonianza del minore*, Cedam, 2005, 309 ss.

<sup>127</sup> Art. 7: "Interview procedures must conform, in the form and articulation of the questions to cognitive skills, in the ability to comprehend language, in the ability to identify the context in which the autobiographical event may have occurred, in the ability to discriminate between internal and external events and the level of psycho-affective maturity of the child", in *The Charter of Noto 2011*, in <http://www.psicologiagiuridica.eu/>

<sup>128</sup> Art. 10: "Acquisition activities of the statements and behavior of the child must be video recorded because the non-verbal aspects are important for the correct evaluation. Video recording reduces the auditions of the child. All video-recorded, in domestic and daily contexts on listening to children by significant caregivers, should be placed on the file", in *The Charter of Noto 2011*, in <http://www.psicologiagiuridica.eu/>

<sup>129</sup> Art. 10: "In case of intrafamily abuse the investigations must be extended to family members, including the person is attributed the factual and child's social context", in *The Charter of Noto 2011*, in <http://www.psicologiagiuridica.eu/>

<sup>130</sup> Art. 13 "Symptoms of discomfort that the child manifests cannot be considered as "indicators" of specific sexual abuse since they derive from family conflict or other causes, but their absence does not exclude the abuse", in *The Charter of Noto 2011*, in <http://www.psicologiagiuridica.eu/>

<sup>131</sup> Art. 15: "The probative accident is the privileged place of acquisition the declarations of the child during the proceedings. Should be conducted in order to ensure, in accordance with the evolving personality of the child, the right to evidence", in *The Charter of Noto 2011*, in <http://www.psicologiagiuridica.eu/>

<sup>132</sup> Art. 18: "Psychological assistance to the child shall be entrusted to a specialist who maintains the engagement in every stage and level of the Criminal proceedings", in *The Charter of Noto 2011*, in <http://www.psicologiagiuridica.eu/>

<sup>133</sup> Art. 4: "Lawyers and experts should follow the principles of the Strasbourg Convention. Intervention and

ii. In Italy the action against paedophilia is assigned to the *Dipartimento di Pubblica Sicurezza* (*i.e.* Department of Public Safety) that operates through the Minor-specialized sections of each police station<sup>135</sup> (set up under art. 17 of *Legge* n. 269/98), as well as through the Postal police which carries out an intensive investigation to fight against online paedophilia<sup>136</sup>. The Postal police analyzes children pornography episodes, is authorized to carry out covert operations, and seeks to identify abused children in collaboration with INTERPOL (International Criminal Police Organization); moreover, it also cooperates with the NGO “Save the Children”, with the aim to put an end to violence and to provide therapeutic assistance to the victims<sup>137</sup>.

iii. The judicial process is activated either by the communication to the Public prosecutor of the crime - *notitia criminis* -, or by a complaint to the Ordinary court (made for example from non-abuser parent), or also by a report to the Minors court, implemented by territorial services, or also by the school where the child is studying. Furthermore, artt. 361, 362 e 365 c.p.<sup>138</sup> and artt. 331 and 334 c.p.<sup>139</sup> include the obligation to report offenses that are prosecuted *ex officio* by public officials, civil servants and professionals performing health functions, when becoming aware of them while during their job. In those cases, operators must immediately inform the Public prosecutor sitting at the Ordinary court and/or at the Minors court. Art. 609-*septies* c.p. provides that the offenses referred to in artt. 609-*bis*, 609-*ter* and 609-*quater* c.p. are punishable on complaint of the victim, states that the period for bringing the complaint is six months, and identifies a series of cases in which it has to be proceeded *ex officio*<sup>140</sup>.

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treatment of the child by judicial system should not be manifestly contrary to the best interests of the child, with particular attention to effects on mental and physical health of completion and the continuation auditions”, in Venice’s Protocol 2007, in <http://www.psicologiagiuridica.eu/>

<sup>134</sup> Art. 7: “In all phases of the criminal proceedings must be protected and guaranteed the right of children to respect for their dignity and privacy in accordance with the Convention of New York”, in Venice’s Protocol 2007, <http://www.psicologiagiuridica.eu/>

<sup>135</sup> Art. 14 of *Legge* n. 269/98 established the specialized sections of the judicial police in the activity of contrast and prosecution of sexual crimes against children, in <http://www.camera.it/>

<sup>136</sup> Pedophilia and child abuse, in <http://www.interno.gov.it/>

<sup>137</sup> A Convention between the NGO “Save the Children” and the Postal police was signed, with the aim to implement their collaboration for the identification of victims of online pedophilia, in <http://www.savethechildren.it/>

<sup>138</sup> CRESPI A., ZUCCALA’ G., FORTI G., cit., 1438-1444.

<sup>139</sup> GATTI G., MARINO R., PETRUCCI R., cit., 613-615.

<sup>140</sup> Art. 609-*septies* c.p.: “The offenses referred to in articles 609-*bis*, 609-*ter* and 609-*quater* of Criminal code are punishable on complaint of the victim. Except as provided in article 597, third paragraph, of Criminal code, the period for bringing the complaint is six months. The complaint proposal is irrevocable. We

iv. As concerns the statute of limitation, art. 157 c.p. fixes the time that has to pass by in order for the offence to be prescribed<sup>141</sup>: in particular, it states that in general the limitation expires after a time corresponding to the maximum penalty established by the law for that particular crime; however, this period can never be less than six years in the case of main offense and less than four years in the case of a less serious offence, even if this is punished only with a pecuniary penalty<sup>142</sup>. As to the effect of the limitation, art. 158 c.p. distinguishes among completed offense, attempted offense, permanent or continuous offense and offenses punishable with complaint, petition or request<sup>143</sup>. As to the prescription's suspension, art. 159 c.p. indicates a series of cases where the prescription is suspended<sup>144</sup> and provides also that "the prescription starts from the day that is when the cause of the suspension".<sup>145</sup>

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proceed ex officio: 1) if the offense referred to in article 609-bis of Criminal code is committed against a person who at the time of the events has not reached the age of eighteen ; 2) if the offense is committed by the parent, also adoptive, or his partner, tutor or other person from whom the child, or by another person where the child is given for reason of care, education, supervision or custody or that has it with a cohabiting; 3) if the offense is committed by a public official or a person responsible for a public service in the exercise of its functions; 4) if the offense is connected with another offense for which you must proceed ex officio; 5) if the offense is committed in the case referred to in article 609-quater, final paragraph, of Criminal code", in CRESPI A., ZUCCALA' G., FORTI G., cit., 2304-2307.

<sup>141</sup> Art. 157 c.p.: "To determine the time required about the penalty prescribed by law for the completed or attempted offense, without taking into account the decrease of the mitigating circumstances and the increase for aggravating circumstances, except for the aggravating circumstances for which the law provides for a penalty of a different species from the ordinary and for those having a special effect, in which case we consider the maximum penalty provided for aggravating", in CRESPI A., ZUCCALA' G., FORTI G., cit., 769 ss.

<sup>142</sup> CRESPI A., ZUCCALA' G., FORTI G., cit., 769 ss.

<sup>143</sup> Art. 158 c.p.: "The term of prescription begins, for the completed offense, the date of consummation; for the offense attempted, the date on which it ceased operation of the offender, for the offense permanent or continued, the day on which it ceased the permanence or continuation. When the law does depend on the punishment of an offense by the occurrence of a condition, the end of the prescription begins from the date on which the condition occurred. However, in the offenses punishable with complaint, petition or request the end of prescription begins from the day the offense was committed", in CRESPI A., ZUCCALA' G., FORTI G., cit., 788 ss.

<sup>144</sup> Art. 159 c.p.: "The course of prescription is suspended in any case where a stay of proceedings or criminal proceedings or the terms of custody is imposed by a particular provision of the law, as well as in cases of: 1. authorization to proceed; 2. submission of the matter to other judgment; 3. suspension of proceedings or criminal proceedings for reasons of impediment of the parties and of the defenders or at the request of accused or his defenders. In case of suspension of the trial for obstruction of the parties or of the defenders, the hearing cannot be deferred beyond the sixtieth day after the expected removal of the cause, having regard, otherwise, at the time of the impediment increased by sixty days. In the case of authorization to proceed, the suspension of the prescription happens from the moment the public prosecutor submits the request and the prescription resumes the day on which the competent authority receives the request", in CRESPI A., ZUCCALA' G., FORTI G., cit., 800 ss.

<sup>145</sup> CRESPI A., ZUCCALA' G., FORTI G., cit., 800 ss.



v. When the age of the victim is not certain, the Judge – pursuant to art. 220 c.p.p. – allows the advice of an expert. This is admitted when it is necessary to investigate or acquire data or valuate special technical, scientific or artistic skills.<sup>146</sup>

vi. In Italy there is a database called “*Protocollo Sistema di Indagine*” (SDI)<sup>147</sup>, a survey system available in every office of the Public prosecutors in which are recorded facts and measures emitted by competent authorities against persons or objects involved in a particular crime or event. Individuals can be registered into the database as complainants, crime victims, offenders or persons suspected of having committed crimes together with their criminal records, reports and measures emitted by the competent authorities. The information contained in SID are available to all police forces and can be transmitted to other competent authorities in other States. However, in Italy it does not exist a public register containing the names of persons convicted for offenses against children, since the currently existing system is subject to the application of the Italian provisions regarding the privacy protection.

### 3.2 Complaint Procedure

vii. As a general rule, the complaint by a private citizen is optional: a person who assists in the commission of a crime does not have a legal obligation to submit a complaint (art. 333, par. 1 c.p.p.), except for few cases foreseen by the criminal code in which private citizens have the obligation to complain. On the other hand, both public officials (defined in art. 357 c.p.) and public service officers (defined in art. 358 c.p.) are bound to art. 331 c.p.p., according to which they are obliged to submit complaints regarding offences they become aware of, either during the performance of their duties/services or because of their duties/services. As an example, if a public school teacher becomes aware of crimes that were committed against his/her own pupils, either within the school context (that is, during the performance of his/her services), or even outside the school context in the cases he/she becomes aware of those crimes because of the fact that he/she is the teacher (that is, because of his/her services), he/she has an obligation to report them. On the contrary, if he/she becomes aware of crimes against his/her own pupils neither in the school nor for being the teacher – for example, he/she is talked about that by a friend of him/her not

<sup>146</sup> GATTI G., MARINO R., PETRUCCI R., cit., 535.

<sup>147</sup> Crimes report, in <http://www.interno.gov.it/>

aware of the fact that he/she is the teacher of those pupils– then, he/she is considered as a private individual and therefore is not obliged to present a complaint.

In regard to the form of the complaint, public officials and public service officers present the complaint under the form of a written *denuncia* (art. 331 c.p.p.).<sup>148</sup> This kind of complaint – *denuncia* - can be used also by private individuals, but they are free to make it in an oral or written form (art. 333 c.p.p.). The complaint has to be made either to the Public prosecutor or to the Judicial policy, so that a criminal procedure can start (in some cases the procedure starts without a complaint, namely when a Public prosecutor or the Judicial policy become themselves aware of a crime). In all cases – complaint made by a public official or public service officer or also a private person/ in written or oral form/ to a Public prosecutor or to Judicial policy – the complaint shall indicate the most relevant information concerning the crime, the date in which the complainer became aware of it and sources of evidence already available. It can also eventually indicate who the person is thought to be responsible, who is the victim and who can give more information. However, the complaint cannot be based on acts of investigation or inquiry, which could result in a so called “pollution evidence”, since the acquisition and evaluation of the reliability of sources of information is an exclusive competence of the Judicial authority.

Besides the above described *denuncia*, another form of complaint is the one named *querela*, which can be made only by victims of crimes punishable upon the condition that this complaint is made. That is, if one of those crimes occurs but the victim does not present the complaint in the form of a *querela*, that crime is not punishable. This happens because the *querela* is not only a communication to Authorities that a crime occurred – as the *denuncia* – but it is also the expression of the wish of the victim that the offender is prosecuted and punished. The content of the *querela* is like the one foreseen for the *denuncia* and also the *querela* can be made both in oral and written form. Even though normally the *querela* can be withdrawn, this cannot happen in the case of a sexual crime against a minor, with the consequence that even if the minor wishes to withdraw the *querela*, the judicial procedure has to continue.

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<sup>148</sup> A medical doctor being a public service officer – that is a doctor working in a public hospital – becoming aware of a crime while performing his/her duties – for example, by visiting an individual - is also obliged to report the crime within the form of a *referto* (art. 334 c.p.p.).

While few crimes against minors can be prosecuted without a *querela* of the victim (that is, only with a *denuncia* or even without it, if the Authorities become in other way aware of those crimes), others can be prosecuted only if the victim presents a *querela*. According to art. 609-*septies* c.p., examples of the first group are the followings ones:

- sexual violence (art. 609- *bis* c.p.) against minors;
- sexual violence or sexual abuse committed by a person closed to the minor or who has to care about the minor;
- sexual violence or sexual abuse committed by a public official or public services officer while performing his/her duties or services;
- sexual violence or sexual abuse committed together with another crime that has to be prosecuted without a *querela*;
- sexual acts with a minor younger than 10 years old (art. 609- *quarter*, last par.).

For the second group of cases, an individual complaint can be presented by minors older than 14 years old. If the victim is a minor younger than this, the lawsuit can be filed either by the parent exercising the parental rights or by a guardian. If there is a conflict of interests between parental rights and the minor who is not yet 14 years old, then the complaint may be filed by a special custodian. The appointment of this special custodian shall be made by the Judge for preliminary investigations upon request by the Public prosecutor and can be promoted by institutions that care, educate, house or assist minors. Moreover, the appointment request can be made also by the local Social services.

**viii.** The participation of the child, as injured party, to the trial in which he/she is involved must be done in accordance with the instruments of procedural representation (the applicable rules) entrusted to the holders of parental responsibility, that usually are his/her parents.

However, this rule cannot be applied whenever there is a conflict of interests between the minor and his/her legal representative: conventional law, and in particular the Strasbourg Convention, provides that where a conflict arises between the minor and the holders of parental responsibility, these are deprived of the right to represent the child and, if so, the child has the right to request and the Judge has the right to appoint a special representative in the proceedings concerning him/her (artt. 3 and 9).

Here reference to the conflict of interests must be understood in its broadest sense and not only as limited to purely financial issues, as would have meant by those believing that the

general rule on the appointment of a special curator of art. 78 c.p.c. is applicable only when the representative relationship is jeopardized by a conflict of interests due to financial issues.

Furthermore, the Constitutional Court has declared the doubts relating to legitimacy stated in art. 336 c.c. as inadmissible in so far as it does not provide for the appointment of a special custodian to take over the management of the case when a conflict between the minor and both his/her parents occurs: according to the Court, the Judge shall interpret the law in a manner that will protect the law itself from being contested or declared unconstitutional and it is the Court that sets out in art. 78 c.p.c. the norm to refer to.

However, not all doubts are removed and the norms allowing the minor to participate as the injured party in *de potestate* cases and expressly providing that he/she is present in court with legal assistance, are rather reticent in regulating the legal representation of minors who are unfit to plead for themselves.

Therefore, this leads to a certain confusion in the jurisprudence in the Minors courts: according to a recent survey, the appointment of a legal guardian *de potestate* in reviews takes place, usually, when the conflict is against both parents. However, a legal guardian can be appointed even when the abuse is consumed by only one parent, whereas in some cases there is only the appointment of legal representation and no legal guardian (and sometimes neither one): it should be pointed out that, almost always, the legal guardian is also a lawyer, often chosen, in the absence of other more specific lists, from the Legal Aid lists. Still, the legal guardian appointment rarely takes place automatically, which is possible under the Strasbourg Convention: in practice, it takes place at the request of the Public prosecutor.

Regarding the protection of children's privacy, any information concerning the participation of minors in legal proceedings shall be protected.

The dissemination of information, especially by the media, regarding minors being either victims or witnesses, can have dramatic effects on them. First, it can endanger their safety and may also provoke deep shame and humiliation, can discourage them from telling what happened and cause a severe emotional damage. The dissemination of information about minors who are either victims or witnesses can create tensions in their relationships with their family, their peers and the community, particularly in the cases of sexual abuse. In some cases, it may also lead to stigmatization by the community, thus exacerbating the secondary victimization of the child.

The first measure to protect the privacy of children who are victims or witnesses is to limit the disclosure of information that could lead to their identification in a judicial proceeding: preventing public disclosure of information regarding minors is guaranteed by provisions which prohibit both publication and radio or television broadcasting.

This ban may also derive from a specific order of the Court, which is obliged, upon application, to place a ban on the publication of information that might identify the minor victims or witnesses, in proceedings relating to specific sexual offences and violent crimes. However, the first option, the automatic ban, is more protective.

Finally, according to art. 472 c.p.p., the public is not allowed to assist at hearings – so called hearings behind door closed<sup>149</sup> – when proceeding for crimes foreseen in artt. 600 (making or keeping an individual in slavery status), 600- *bis* (crime of minor prostitution); 600- *ter* (crimes involving pornographic shows and material), 600- *quinqüies* (crimes related to organization and promotion of sexual tourism), 601 (crimes related to transferring minors from a country to another in order to commit one of the crimes against children), 602 (crimes related to buying and selling minors reduced in slavery condition), art. 609- *bis* (sexual abuse), 609- *ter* (the previous ones indeed when committed under aggravating circumstances), 609- *octies* c.p. (sexual violence committed in damage of a minor by a group of persons). It has to be noticed that art. 472 c.p.p. has not been modified by the ratification of the Lanzarote Convention and therefore the new crime of grooming is not in this list.

## 4 COMPLEMENTARY MEASURES

i. According to art. 5 of the Lanzarote Convention, each Party shall take the necessary legislative or other measures in order to pursue the following goals: to encourage awareness on the protection and rights of children among persons who have regular contacts with them in the education, health, social protection, judicial and law-enforcement sectors, as well as in areas related to sport, culture and leisure activities; to ensure that those persons have an adequate knowledge of sexual exploitation and sexual abuse of children, as well as of the means to identify them; to ensure that in order to accede to the professions whose exercise implies regular contacts with children, candidates have not been convicted of acts of sexual exploitation or sexual abuse against children.

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<sup>149</sup> The Italian expression is *dibattimenti a porte chiuse*.

Within the national legislation, art. 600-*septies*, par. 2 c.p and the new art. 609-*nonies*, par. 3 n. 2 c.p.<sup>150</sup>, establish permanent exclusion of persons convicted for sexual crimes against children from any school positions and from any office or service in institutions or in other public or private centers mainly attended by children.

ii. Despite the provision contained in art. 6 of the Lanzarote Convention, in Italy there is not yet any national compulsory program of education about sexual crimes dedicated to scholars. As a consequence, only few schools are currently providing courses regarding sexual crimes. In general, it can be said that the lack of information regarding sexual crimes in the schools is due to another lack, namely that of a proper education suited to minors about sexuality. As a consequence, children are aware about sexuality and sexual crimes only as long as these concepts are explained to them within the family.

Nevertheless, initiatives of information and education aimed at the prevention of all forms of sexual abuse of minors are constantly promoted by the Observatory for the contrast of pedophilia and child pornography, with the support of the Fund for Family Policies (Italian Finance Act 2008, article 2, paragraph 462). Among the existing programs, it should be interesting selecting those constituting best practices, so that a path would be tracked in order to succeed in the prevention of sexual crimes against minors: in this regard, it is interesting reading the provision contained in art. 4 of Sicilian regional law, Law Project number 371/2009 then converted in *Legge* in December 2011, establishing new preventive and informative initiatives.<sup>151</sup>

The importance of child education is confirmed by many researches: if children are made aware of the risks related to sexual crimes, as well as of all the judicial and social instruments foreseen for helping them in such situations, then it is predictable that less crimes will occur. Therefore, it is desirable not only a strong collaboration among Governmental bodies for the protection of young generations, but also between teachers and parents. Nowadays, the

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<sup>150</sup> Art. 609- *nonies*, par. 3, n. 2 c.p.: il divieto di svolgere lavori che prevedano un contatto abituale con minori.

<sup>151</sup> "The Region supports, in collaboration with municipalities, provinces, provincial health authorities, the hospitals and university hospitals, the provincial school boards and other public and refuges institutions in the area, projects for the development of prevention initiatives against gender-based violence and promotion, particularly in schools and families, education for respect in the relationship between the sexes in respect of sexual, religious and cultural, non-violence as a method of civil society. The Region promotes the widest possible dissemination, through specific information campaigns, activities under this Act, including through the creation of a dedicated portal or through the use of existing portals. (...)"

trend sees many families thinking that education on sexual crimes is a teacher's duty and, on the other hand, a school system that rarely provides such education. The optimal solution would be a joint collaboration between the two entities, namely family and school, for the benefit of the children.<sup>152</sup>

Associations defending children's rights, for example "*Telefono Azzurro*", put a lot of effort in explaining and claiming which is the better way to prevent and recognize children abuses. By reading informative papers related to this topic<sup>153</sup>, emerges that parents wishing to help children in understanding such issues should try to spend a lot of time with them, so that children feel free to talk to them about their sensations. As already written, exchanging of opinions between parents and teachers are very important, cause school is the laboratory where children's minds develop.

Finally, according to art. 9 of the Lanzarote Convention, children shall be involved in the development of the programs aiming at fighting sexual abuses: this issue is already taken into consideration by the Observatory for the Children and Adolescents.

**iii.** Italy has not yet created preventive intervention programmes dedicated to persons who fear that they may commit a crime against minors. Indeed, such kinds of programmes were not foreseen by the national legislation; they are foreseen by the Lanzarote Convention that has been only recently ratified. It is desirable that such programmes will be activated in the Country. This could mean creating a sort of figurative bridge between prevention of crimes, intended as pre- re-education of persons who are more probably to commit such crimes, and the re-education foreseen by art. 27 of the Constitution, according to which sanctions aim at the re-education of the convicted individuals.

**iv.** The high number of children and women suffering from abuses in the Italian Country pushed Governmental and private organizations to create social programmes to help and defend victims of sexual abuses. For this reason, Italian Government and European Social Fund (EFS) fund the realization of social programmes aimed to anticipate and put down

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<sup>152</sup> SCHAFFER H. R. , *Lo sviluppo sociale*, 1998, Milano, Raffaello Cortina Editore; CORSO D., LA ROSA M.,

VERRECCHIA F. (A cura di), Coordinatore Dott.ssa GENDUSO G., "*Gli insegnanti di fronte all'abuso*", Telefono Arcobaleno in collaborazione con la Regione Siciliana

<sup>153</sup> "*Come proteggere bambini e adolescenti dagli abusi sessuali - Quaderni*", edited by Telefono Azzurro ONLUS.

those criminal behaviours. Their purpose is mainly to protect young victims, but at the same time, re-educate criminals. Those social programmes operate at four different levels, within the main administrative bodies of government: State, Regions, Provinces and Cities.

In November 2010 Italian government created the Italian national programme against violence, to support victims of abuses and fight against violence, increasing cooperation between public and private organizations. In the GURI<sup>154</sup> of 9<sup>th</sup> May 2011, it was published the III Biennial plan about childhood and teenagers, a programme realized by the Italian *Dipartimento per la Pari Opportunità* (i. e. Department of Equal Opportunities), which is a body operating within the *Ministero del Lavoro e delle Politiche Sociali* (i.e. Ministry for Employment and Social Policies).

This Biennial Plan identifies also the main guidelines to set the minimum levels for the protection and education of children victims of sexual abuses, whose aims can be described as follows: creation of an on-line database with a complete collection of Government related acts; research and establishment of a common language, instruments and strategies against sexual abuse on minors; plan of cooperation between State and Regions in order to identify national minimum services to prevent abuses, to protect children abused, as well as to establish essential safeguard for children victims of sexual abuses and social distress; creation of checking programmes which follow the social and educational growing up of protected children implemented by the Italian National Health System.

Furthermore, coherently with this programme, in 2012, 10 million Euro were allocated to realize new anti-violence centres or fund the pre-existing ones.<sup>155</sup>

An important Department which is aimed to protect children against sexual abuses and children pornography is the *Osservatorio per il contrasto della pedofilia e della pornografia minorile* (i.e. Observatory to fight paedophilia and children pornography); it intends to guarantee children physical and intellectual goodness, and its core activity is the creation of a database containing a big number of data about acts of law which punish and prevent rape and social distress against children. Within the *Ministero del Lavoro e delle Politiche Sociali* it was also

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<sup>154</sup> *Gazzetta Ufficiale Repubblica Italiana*, the journal where Italian acts of law are officially published in order to be known by the community (which is very important because of the principle *ignorantia legis non excusat*).

<sup>155</sup> This is the last data of *Ministero del lavoro e delle politiche sociali*, showed during the 24.01.2012 meeting of the *Commissione Affari Costituzionali* a body within the Italian Parliament.



created the *Centro nazionale di documentazione e analisi per l'infanzia e l'adolescenza*: a special section of its Website is dedicated to papers regarding violence and distress against children.

On regional level, one of the first and best-practice social programme to help children victims of sexual abuse started in 1997 thank to the Health Service of the Abruzzo Region. The programme focuses on diagnosis, therapy and rehabilitation of children abused and it aims to give psychological support to victims and their families; at the same time, it informs, educates and organizes awareness campaigns for healthcare workers, school workers, families and children. Three teams work on this programme: one is the rehabilitation team, another is the defence team and the last one is the prevention team. Every team is composed by doctors, psychologists, psychotherapists and social workers dealing with activities of estimation, diagnosis and treatment of violence and social distress cases. They also implement health researching activities and organize social awareness campaigns. The Programme of Abruzzo Region has been recognized by Italian Parliament as example of good stewardship.<sup>156</sup>

In regard to Provinces, an example of social programmes to help children victims of sexual abuses is the one implemented by the Agrigento Province Administration, which created a website to inform how everyone can denounce cases of sexual violence and social distress against children: a good way to support children victims of abuses.

Finally, social programmes to provide support for victims are provided also by NGOs: in regard to those initiatives, it has to be said that they rarely achieve great attention by the general public and this happens not because they are not good initiatives, but because they are generally referable to limited geographical areas: this depends on the fact that in the Country there are many NGOs of little/medium dimensions, with a consequently difficulty in coordinating their projects (Italian situation differs from that of other countries, like England and France, where the presence of few big NGOs allows a coordination among many social programmes provided, like those in support for child victims, so that their performances are characterized by stronger outreaches than those normally registered for the performances of the most important Italian NGOs). The general impression is that child victims are not left alone, but the general public is not aware of these programmes. It is only when someone faces the problem, that becomes aware of such programmes.

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<sup>156</sup> See the “Second Report about application of Law n. 269/1998 against children sexual exploitation”.

An example of a social project providing support for victims is the two year lasting programme organized in 2010 by the NGO “*L’Isola che c’è*” in cooperation with the public hospital local structures and the judiciary services located in Bologna, the area where the NGO is also active. Here, the cooperative dimension could be considered as a valuable approach, since it makes it possible for the NGO not only to overcome its limited dimensions (horizontal performance), but also to provide assistance under an umbrella of different activities (vertical performance). The main task within the programme is that related to assisting minors by listening to them during the time the judicial procedure takes place: medical doctors, psychologists, teachers and other experienced persons spend time with them in order to achieve a better understanding of their feelings and behaviours; they also accompany the minors to the Court when it is necessary.<sup>157</sup> Listening to the minors is the core of the project and, despite what it could seem, is also a very difficult task, that can be realized properly only with a great balance of doing and not doing, asking and not asking. As it is written on the Website of the NGO, the difficulty lies in the ability to listen to children in exploitation, without exploiting the listening.<sup>158</sup> The programme shall end with the publication of informative material regarding the best practices collected.

v. There is a help line in service of the victims: this line is created by the already mentioned NGO *Telefono Azzurro* (see also: Chapter II, part 4, par. 2). The National Counselling Centre<sup>159</sup> is the heart of *Telefono Azzurro Onlus* and its offices are located in Milan and Palermo, both answering to two different line numbers: 1.96.96 is addressed to minors seeking to report facts causing uneasiness, situations of abuse and maltreatments, whereas 199.15.15.15 is addressed to reference adults or educators wishing to report similar situations involving children and minors. *Telefono Azzurro* call centre is active throughout the Country 24 hours a day, 365 days a year. Moreover, since 2003 *Telefono Azzurro* coordinates all the cases that need an immediate action with the 144 Childhood Emergency<sup>160</sup> free

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<sup>157</sup> According to art. 13 of the in Chapter II, part 3, par. viii. already mentioned Strasbourg Convention, it should be avoided any contact between minors and Judicial courts, except for the cases in which it is absolutely necessary: for those cases, it is desirable that the minor receives adequate information regarding the meaning of what is happening and that he/she is assisted by experts.

<sup>158</sup> “*Per favorire l’ascolto dell’abuso e per evitare l’abuso nell’ascolto*”, in <http://www.lisolache.it/progetti.htm>

<sup>159</sup> The National Counseling Centre, in <http://www.azzurro.it/>

<sup>160</sup> See: <http://www.114.it/>

number, created for the diagnosis and cure of child victims and their families: also this service is active 24 hour a day, 365 days a year. Finally, in 2010 the National Counselling Centre created *Telefono Azzurro* ch@t for helping children and adolescents: operators are available on chat 365 days a year, from 4.00 p.m. to 8.00 a.m.

*Telefono Azzurro* respects the will of the users to maintain their anonymity. Any personal data freely communicated shall be treated confidentially. Only in the event of a serious, imminent and irreparable danger to health or physical safety of the user, *Telefono Azzurro* forwards information given by the user to Police forces, Judicial offices, Health organizations and Social welfare institutions. More in general, help lines providing services in Italy are bound to national confidentiality rules, as stated by the *Codice in materia di protezione dei dati personali* or *D.lgs* n. 196/2003: art. 7 provides that the person whose the personal data are referred to can confirm the existence or otherwise of the data and that such data are made available to him/her in an intelligible form; made aware of the origin of the data and the logic and purposes upon which they are processed; cancel, transform into anonymous form or block the processing of data in violation of law and update, correct or integrate already collected data.

vi. When it comes to recovery, intervention programmes can be organized within three areas, namely the medical one, the socio-psychological one and the judicial one.

First of all, pediatric first aid can be involved if there is the suspect that a child has suffered abuse a few days before; then, doctors can carry out investigations and clinical examinations, designed to investigate the nature of any physical ailments experienced by the child. Secondly, social services, as those operating within the *Azienda sanitaria locale*, as well as Family planning centers are available in case there is a doubt over an abuse: in particular, social services make a psychosocial survey in order to collect detailed information. Thirdly, the Prosecutor at the Juvenile court deals with the protection of the minor and encourages the adoption of all measures necessary to reestablish familiar conditions tailored to his/her needs.

Even though the common impression is that the most State interventions are concentrated on the phase coming directly after the commission of the abuse, every program tries to provide minors with helpful assistance in order to start a new life: that is, programmes deal with a dynamic approach aimed at considering the possible evolution and development of the minor. However, it does seem neither that exist important State programmes for persons who experienced sexual violence a long time ago, nor that there is a significative level of

information about interventions programmes for these persons. In this regard, the general impression is that a determining role by helping in conducting a life without sexual behavior problems persons who experienced sexual violence in the juvenile phase is played by family, partner and friends.

### III NATIONAL POLICY REGARDING CHILDREN

i. In recent years, the political debate on children protection has been highly developed. As one of the main outcomes of the raising awareness on this delicate topic, *Legge* n. 41/2009, n. 41, led to the institution of the National Day against Child Abuse, due on 5<sup>th</sup> May of every year. This act of law also establishes that Regions, Provinces and Municipalities can promote special actions within the schools in coordination with local associations<sup>161</sup>. On May, 5<sup>th</sup> 2009, during the first day against paedophilia, it was held in Rome the show “*Parla con noi*”, (i.e. Talk to us) ; an opportunity to study paedophilia with the collaboration of politicians and people that every day work to protect children<sup>162</sup>.

The political debate led also to the creation of an Interministerial committee for coordinating the fight against paedophilia, which is called “*Ciclope*”<sup>163</sup> and brings together the representatives of 11 Ministries, collaborating with international organizations and local associations<sup>164</sup>. The *Ciclope* created the first national plan to contrast and prevent paedophilia in order to develop a common strategy to fight the phenomenon, also coordinating the actions being taken by each Government for the protection of children; moreover, it offers educational programmes for teachers, social workers and parents <sup>165</sup>.

The commitment of the Government and Parliament against sexual abuse of children has found its climax with the approval of *Legge* 38/2006, which tightens punishments for paedophilia and online child pornography and draws up a series of measures to tackle the phenomenon in a comprehensive manner, operating with actions on different levels. Furthermore, this act of law created, within the Presidency of the Council of Ministers, the

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<sup>161</sup> Legge 4 May 2009, n. 41, in GU n. 101, 4.05.2009

<sup>162</sup> <http://www.fondazioneelucabarbareschionlus.it/>

<sup>163</sup> <http://www.pariopportunita.gov.it/>

<sup>164</sup> [www.segretariatosociale.rai.it/codici/pedofilia/indice\\_pedofilia.html](http://www.segretariatosociale.rai.it/codici/pedofilia/indice_pedofilia.html)

<sup>165</sup> <http://www.pariopportunita.gov.it/>

Observatory against paedophilia and child pornography, that was already described in Chapter II, part 4, par. iv.

**ii- iii.** As concerns data about child abuses in Italy, from July 2000 to June 2001 the NGO *Telefono Azzurro* (for the activities of this NGO, see also Chapter II, part 4, par. v.) received 480,000 calls related to child abuses: 60% of those abuses against minors were committed within their home; furthermore, nearly two out of three cases involved sexual violence, for which fathers were responsible in 32% of the cases, mothers in 4.3%, relatives in 21.1% and friends in 21.2%<sup>166</sup>.

Then, during the first half of year 2002, the NGO *Telefono Azzurro* received 195,000 calls related to child abuses: 60% of violence against minors were committed within the home. 608 cases in the first half of the year involved sexual violence, physical or psychological abuse, and negligence; fathers were responsible in 45.6% of the cases; mothers in 37.2%, and relatives in 7%. In 57.8% of the cases, the victims were female and in 41% they were ages 10 or even younger. Moreover, in the first seven months of the year, judicial authorities registered 425 allegations of sexual abuses against minors<sup>167</sup>.

In the same year police registered 431 complaints, conducted 259 searches for Internet-based child pornography and arrested 23 persons<sup>168</sup>. The Direction of the Central Criminal Police declared that the category most involved was the one between 11 and 14 years old, which counted 233 victims. He also added that in the majority of the cases, children know the person harassing them<sup>169</sup>. A special police unit monitored 27,200 Websites in the first half of the year, investigated 769 persons and arrested 21 of them<sup>170</sup>.

In 2004 the Chief prosecutor of the Supreme Court reported that complaints of sexual violence and exploitation of children increased by 28% compared to the year 2003. In the first 6 months of 2004, Judicial authorities registered 349 allegations of sexual abuses against minors and accused 392 persons of abuse<sup>171</sup>. According to the Direction of the Central Criminal Police, the highest number of cases were recorded in the regions of Lombardy (168

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<sup>166</sup> Country Report on Human Rights Practices in Italy 2001, in <http://www.state.gov/>

<sup>167</sup> Country Report on Human Rights Practices in Italy 2003, in <http://www.state.gov/>

<sup>168</sup> Country Report on Human Rights Practices in Italy 2003, in <http://www.state.gov/>

<sup>169</sup> <http://www.poliziadistato.it/>

<sup>170</sup> Country Report on Human Rights Practices in Italy 2005, in <http://www.state.gov/>

<sup>171</sup> Country Report on Human Rights Practices in Italy 2005, in <http://www.state.gov/>

cases), Campania (111 cases) and Sicily (96 cases). Molise and Valle d'Aosta are the two regions where the phenomenon is less developed (there were no complaints)<sup>172</sup>

In 2005 the NGO *Telefono Azzurro* received 380,000 calls related to child abuses: 5% of them involved sexual abuses, 11% physical violence, and 8% psychological exploitations. In 60% of the cases, the victims were female and in 46% were 10 years old or even younger<sup>173</sup>. In the first six months of the same year, Judicial authorities registered 748 allegations of sexual abuses of minors and accused 276 persons of abuses<sup>174</sup>. Furthermore, a special police unit monitored 33,000 Websites, investigated 337 persons and arrested 16 of them<sup>175</sup>.

In 2006 Italian authorities registered 170 reports of sexual intercourses with minors, 290 reports of production of child pornography, and 180 reports of possession of child pornography<sup>176</sup>.

In 2007 over a total of 3,495 cases analyzed by *Telefono Azzurro* National Listening Centre, 923 calls were from children and adolescents victims of abuse and these 923 calls were identified in 1,155 different types of abuses: this means that some children were abused in more than one way. Most of the abuses reported to *Telefono Azzurro* were psychic (32.5%) and psychological (34.5%), but there are many cases of sexual abuses (12.2%) and severe negligences (20.8%)<sup>177</sup>.

In the first six months of 2009, *Telefono Azzurro* received 882 help requests: 5% of these involved sexual abuses, 12.5% physical violence, and 6% psychological abuses. In 53% of the cases, the victims were female; 62% of the victims were younger than 10 years old<sup>178</sup>. In the same year a special unit of the police monitored 26,600 Websites, investigated 1,155 person and arrested 51 of them, whereas *Telefono Arcobaleno*, between January and November, received 2,580 reports of online paedophilia. Those reports were made either by Internet users who came across child pornography online or by persons who reported suspected activity involving exploitation of minors<sup>179</sup>.

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<sup>172</sup> <http://www.poliziadistato.it/>

<sup>173</sup> Country Report on Human Rights Practices in Italy 2006, in <http://www.state.gov/>

<sup>174</sup> Country Report on Human Rights Practices in Italy 2006, in <http://www.state.gov/>

<sup>175</sup> Country Report on Human Rights Practices in Italy 2006, in <http://www.state.gov/>

<sup>176</sup> Country Report on Human Rights Practices in Italy 2010, in <http://www.state.gov/>

<sup>177</sup> Child abuse, in <http://www.azzurro.it/>

<sup>178</sup> Country Report on Human Rights Practices in Italy 2010, in <http://www.state.gov/>

<sup>179</sup> Country Report on Human Rights Practices in Italy 2010, in <http://www.state.gov/>

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Other statistics originate from the Help line 114. Between 1 January 2008 and 31 December 2010 this help line managed 5,161 emergency situations (206 cases of sexual abuses)<sup>183</sup>. Victims of sexual abuses were also children younger than 10 years. The number of victims decreases with increasing age: 0-10 years = 51.7%; 11-14 years = 27.8%; 15-18 years = 20.5%. The highest number of cases were recorded in Lombardy (35%), Campania (28%) and Lazio (25%)<sup>184</sup>. 114 help line highlights different types of sexual abuse: exhibitionism (9); forced to assist sexual acts (19); forced to watch pornography (6); verbal proposals (22); vaginal penetration (21); anal penetration (9); fellatio (9); forced to touch the genitals/breasts (20); be touched in the genitals/breasts (39); other sexual abuses (73)<sup>185</sup>. Sexual abuses are committed by father (30.2%), foreigner (14.8%), other parent (9.4%), mother or father partner (8.7%), friend (8.7%), mother (7.4%), grandparents (4.7%), other children/adolescent (4.0%), brother/sister (2.0%), priest (2.0%), mother or father new spouse (1.3%), teacher (1.3%), neighbour (0.7%), employer (0.7%), other (10.1%)<sup>186</sup>. The authorities involved are Carabinieri 112 (33.5%), Police force (29.3%), Social service (26.9%), Minor office (11.4%), Prosecutor at the Youth Court (7.8%), Prosecutor at the

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<sup>180</sup> UNHCR 2011 Country Reports on human Rights Practices-Italy in <http://www.unhcr.org/>

<sup>181</sup> UNHCR 2011 Country Reports on human Rights Practices-Italy in <http://www.unhcr.org/>

<sup>182</sup> UNHCR 2011 Country Reports on human Rights Practices-Italy in <http://www.unhcr.org/>

<sup>183</sup> [www.azzurro.it/materials/](http://www.azzurro.it/materials/)

<sup>184</sup> [www.azzurro.it/materials/](http://www.azzurro.it/materials/)

<sup>185</sup> Category "other sexual abuse" includes cases in which there are suspicions from physical signs or behavioral. This category includes kisses on the lips or neck, constrictions to undress and cases of online soliciting.

<sup>186</sup> [www.azzurro.it/materials/](http://www.azzurro.it/materials/)

Ordinary Court (5.4%), Police 113 (4.8%), ASL (4.2%), postal police (3.6%), Youth Court (1.2%), School (1.2%), Doctor (0.6%), Youth Justice Centre –USSM (0.6%), Other (0.6%)<sup>187</sup>.

In Italy the phenomenon of sexual abuse was finally analyzed by a group of doctor who have examined “the experience of over 200 children seen by the SVS (*“Soccorso Violenza Sessuale”*) Centre in Milan (...) This study is a retrospective study based on information contained in the files of children beneath the age of 14 seen at the SVS Centre between May 1996 and May 2003, who arrived with a suspicion of child sexual abuse. Over 80% of all cases fell within the normal-specific category according to Adam’s 2001 classification. The first Italian survey, though not based on substantiated cases but only on cases of suspected sexual abuse, supplies a perspective on a large northern European city such as Milan<sup>188</sup>.

iv. At the moment there are not significant promotional campaigns in the Country, except for the *One in Five Campaign*, jointly conducted by the Council of Europe and the Italian Ministry of Equal Opportunities. However, since the Lanzarote Convention has been recently ratified, it is foreseeable that few important campaigns will be launched in the next months.

v. The law making process is developing by considering children as individuals always more integrated within the society. In fact, while in the past years children were supposed to be in a safe place when being at home, nowadays the legislator is focusing his/her attention always more on what can happen behind house walls. More specifically, children are getting used to spend much time using new technology instruments and, in particular, Internet: such instruments can represent an actual risk for minors’ safety, since they could be end up interacting with unknown people. The new legal provisions, aiming at contrasting more effectively the crimes of pornography, detention and show of pornographic material, virtual pornography and the new crime of grooming, consider minors as individuals allowed to use those kind of instruments just to learn and legally interact with others. While children born in the last decades unlikely would run such a risk, now the legislator aims to avoid that those kind of interaction could become dangerous for children of the present.

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<sup>187</sup> [www.azzurro.it/materials](http://www.azzurro.it/materials)

<sup>188</sup> CATTANEO C., RUSPA M., MOTTA T., GENTILOMO A., SCAGNELLI C., Child sexual abuse: an Italian perspective, in *Am. J. Forensic Med. Pathol.*, 2007 Jun; 28 (2).



vi. Several main NGOs are working in Italy on the topic of children's rights. Sometimes, ONG also cooperate with Italian Government in the law-making process and in the administration of public services, but it is an optional involvement, not a mandatory one (see also Chapter II, part 4, par. iv). However, the Government listens to and welcomes the suggestions coming from Italian organizations very often.

Some Italian NGOs operate only in Italy: *Telefono Azzurro* and *Associazione per la Tutela del Minore* (ATM) are the main ones. Activities and statistics regarding the first one were already described (see, Chapter II, part 4, par. v. and Chapter III, par. ii.-iii.).

The *Associazione per la Tutela del Minore - ATM*<sup>189</sup> was created in Italy in the year 1991 and it focuses its action on the help and support of children, through the work of a team of specialists in childhood and teenagers, composed by psychologists, medical doctors, lawyers, welfare workers and sociologists, who offer their totally free advices to people. Moreover, ATM has created a calling line to give legal advices and counselling and a web page where people can lodge their complaint.

Furthermore, the NGO *Aiutare i bambini* is an organization created in Italy which has spread its work around the world, in order to defend children's rights. It has been created to help sick, poor, no schooling, socially excluded children and realizes several fund raising campaigns and a programme to guarantee an adequate number of day care centres in Italy.

Another group of NGOs is that comprised of international NGOs operating in many countries, such as *Unicef* and *Save the Children*. The United Nations programme provides long term humanitarian and developmental assistance to children and mothers in developing countries. The projects of *Unicef Italia* aim to defend children against abuses, violence and exploitation, organize campaigns on children's rights and create communities to protect children. *Save the children*, the biggest and most important World children organization, also operates in Italy with projects seeking to defend children's rights.<sup>190</sup> *Save the Children Italia* organizes campaigns for the diffusion of correct information about children's rights, fights against poorness in the Italian less developed areas, provides help in emergency situations<sup>191</sup>,

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<sup>189</sup> Website [www.tutelaminori.it](http://www.tutelaminori.it)

<sup>190</sup> In Italy, *Save the Children* is based in Rome and the Italian Website is [www.savethechildren.it](http://www.savethechildren.it)

<sup>191</sup> As an example, *Save the Children Italia* has implemented the project to support children victims of the 2009 earthquake in Abruzzo.

gives legal aid and counselling, and it has created a database concerning Italian and European legislation on this topic.

Finally, the *Gruppo di Lavoro per l'Adolescenza e l'Infanzia* - CRC group - ([www.gruppocrc.it](http://www.gruppocrc.it)), also connected with the NGO *Save the Children Italy*, is a research team established in the year 2000 with the intent to study the application of the Convention on the Rights of Child in Italy. The last report, namely that referred to the years 2011-2012 contains also recommendations to the Italian Government or other public authorities, in order to help them in the law making process.

## IV OTHER

On October, 23<sup>rd</sup> 2012, the provisions of the Lanzarote Convention entered into force within the Italian systems. At that moment, the researchers working at this report had already mostly completed their analysis of the domestic law provisions. Nevertheless, with tenacity and group spirit they reviewed their material and updated it according to the new changes introduced in the national legislation by the ratification of the Convention. The report is submitted to ELSA International on November, 11<sup>th</sup> 2012, when no relevant judiciary comments on the impact of the Convention into the national legislation have been published yet.

## V CONCLUSION

The report aimed at analyzing, on the one hand, the status of the protection of children within the Italian legislation and, on the other hand, the programmes provided by institutions and NGOs active in the Country in order to prevent children from sexual violence, as well as to assist those who experienced these terrible episodes.

From the legislative point of view, domestic criminal legislation provided significant rules for the protection of children even before the ratification of the Lanzarote Convention, which was made without any reservations, so that the text of the Convention is nowadays fully applicable within the Country. Then, with the ratification, Italian institutions recognized the necessity to fight against crimes on minors according to internationally shared rules. The importance given to crimes committed on the Internet is also a signal of the fact that the whole matter has to be updated according to the new behaviours of minors. Furthermore, from a more substantial point of view, the ratification has introduced for the first time the

word paedophile in the Italian criminal code (art. 444 c.p.), as well as the new crime of grooming (art. 609- *undecies* c.p.), and has also modified provisions both of the criminal code and of the code of criminal procedure.

From a social point of view, the analysis of the statistics concerning the work made by associations active in the protection of minors delivered us a signal that is not very positive: in fact, despite the many efforts made, it appears that too many minors become still victims, even in a so called “industrialized” Country, as Italy is supposed to be. Indeed, the easy access to technology instruments by minors increase the danger of crimes against them, and this is a new reality that coexists with that the dimension of crimes against minors perpetrated in problematic familiar or social contexts.

Finally, the report highlighted the absence of proper preventive programmes addressed to children, their families and teachers. The hope for the future is that more human resources and more money will be employed used in order to develop a collective awareness of the importance of prevention of crimes against minors: such a new consciousness can decrease the number of crimes against minors. Considering the problem as it is raise a public awareness about it, and not as a taboo, something not to talk about, is also a sign of the maturity of a society and allows us to evaluate its grade of development in the protection of children rights.

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**National Researchers:**

Jānis Rozenieks

Dita Dzērvīniece

Aleksandrs Potaičuks

Laura Valtere

**National Academic Advisors:**

Dr.iur Artūrs Kučs

**National Coordinator:**

Domenico Grazioso

## I INTRODUCTION

### 1 GENERAL

i. Legal system of Latvia is largely civil, as opposed to a common, law system, based on epitomes in the German and French systems. The Latvian legal system is grounded on the principles laid out in the Constitution of the Republic of Latvia and safeguarded by the Constitutional Court of the Republic of Latvia.

Since 1998 in the Republic of Latvia human rights and fundamental freedoms are guaranteed by the Constitution (Satversme), especially by Chapter VIII “Fundamental Human Rights”. From the case-law of the Constitutional Court follows, that the content of the norms of human rights, incorporated into the Constitution of the Republic of Latvia (Satversme) should be interpreted in compliance with the practice of application of international norms of human rights.<sup>1</sup> According to Article 91 of the Constitution of the Republic of Latvia (Satversme) all human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind.<sup>2</sup> Additionally, according to Administrative Procedure Law Article 6 in matters where there are identical factual and legal circumstances, institutions and courts shall adopt identical decisions (in matters where there are different factual or legal circumstances – different decisions) irrespective of the gender, age, race, skin colour, language, religious beliefs, political or other views, social origin, nationality, education, social and financial status, type of occupation or other circumstances of participants in the administrative proceedings.<sup>3</sup>

From 2008 to 2011 Latvia completed the takeover of a number of European Union anti-discrimination directives. The beginning of this process usually is regarded to the adoption of brand new Labour Law in 2001. A number of amendments were made after the ratification of the Convention on the Rights of Persons with Disabilities in January of 2010. Anti-discrimination norms are included in more than 30 legislative acts.<sup>4</sup> The list of

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<sup>1</sup> The conference of European Constitutional Courts “The Criteria of the Limitations of Human rights in the Practice of Constitutional justice”, the National Report of the Constitutional Court of the Republic of Latvia, 2005, p.2

<sup>2</sup> The Constitution of the Republic of Latvia, Art.91.

<sup>3</sup> Administrative Procedure Law, Art.6

<sup>4</sup> Latvijas Cilvēktiesību centrs, *Diskriminācijas novēršana Latvijā II*, Latvijas Cilvēktiesību centrs, 2011, p.5

prohibited discrimination forms in different legislation acts range from 4 to 18, and, moreover, sometimes is left open-listed.<sup>56</sup>

## Reports

Different reports reveal that Latvia has discrimination against women, incidents of violence against ethnic minorities, and societal violence and incidents of government discrimination against homosexuals.<sup>78</sup>

Amnesty International in 2009 reported racially motivated attacks against Romani people. Latvia lacks of comprehensive national legislation dealing with all forms of discrimination. Lesbian, gay, bisexual and transgender (LGBT) people have faced discrimination by verbal abuse. There were reported allegations of deliberate physical ill-treatment of detainees by prison staff.<sup>9</sup>

According to Human Right Report of United States Department of State, Latvia generally respects the human rights of citizens and the large resident noncitizen community. However there were problems with violence against women, incidents of violence against ethnic minorities, and societal violence and incidents of government discrimination against homosexuals.<sup>10</sup> The same problems were reported by the European Commission against Racism and Intolerance.<sup>11</sup>

Currently there is no specialized institution working only for discrimination related issues.<sup>12</sup> Ombudsman of the Republic of Latvia has revealed the written complaints of discrimination. See below.<sup>13</sup> The population of Latvia is 2.04 million.<sup>14</sup>

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<sup>5</sup> Ibid, p.5

<sup>6</sup> “open-listed” means that the list should not be considered as complete as there may be different discrimination forms which are not included in the list mentioned.

<sup>7</sup> United States Department of State, 2008 Human Rights Report: Latvia, viewed: 07.08.2012, <http://www.state.gov/j/drl/rls/hrrpt/2008/eur/119087.htm>

<sup>8</sup> Amnesty International, Amnesty International Report 2009, viewed: 07.08.2012, <http://report2009.amnesty.org/en/regions/europe-central-asia/latvia>

<sup>9</sup> Amnesty International, Amnesty International Report 2009, viewed: 07.08.2012, <http://report2009.amnesty.org/en/regions/europe-central-asia/latvia>

<sup>10</sup> United States Department of State, 2008 Human Rights Report: Latvia, viewed: 07.08.2012, <http://www.state.gov/j/drl/rls/hrrpt/2008/eur/119087.htm>

<sup>11</sup> European Commission Against Racism and Intolerance, ECRI report on Latvia (fourth monitoring cycle), viewed: 07.08.2012, <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Latvia/LVA-CbC-IV-2012-003-ENG.pdf>

<sup>12</sup> Ibid, p.13

<sup>13</sup> Latvijas Cilvēktiesību centrs, *Diskriminācijas novēršana Latvijā II*, Latvijas Cilvēktiesību centrs, 2011, p.17

<sup>14</sup> Central Statistical Bureau, <http://www.csb.gov.lv/en/dati/statistics-database-30501.html>

Form of discrimination	2007th	2008th	2009th	2010th	2011th <sup>15</sup>
Total	112	127	101	78	50
Discrimination on the basis of race or ethnicity	13	23	14	9	4
Discrimination based on gender	12	13	19	8	2
Discrimination on grounds of age	3	6	4	5	3
Discrimination on the basis of religion	11	1	0	0	1
Discrimination based on social origin, property status	3	4	1	0	0
Discrimination based on sexual orientation	2	2	2	2	0
Discrimination on the basis of health status	11	12	8	11	7
Discrimination based on political or other beliefs	6	0	0	1	1
Discrimination on other grounds	14	14	3	13	9
Principle of legal equality	20	32	36	25	21

### Opinion polls and surveys

The Republic of Latvia lacks comprehensive studies on discrimination on various grounds. Although the case law on discrimination issues develops, it is still to be considered insufficient. The number of applications and complaints to state institutions and non-governmental organizations regarding the discrimination on various grounds is considered rather small. This means that the society has a low level of awareness and lack of knowledge, which in turn does not allow people to recognize discrimination and assert their rights.<sup>16</sup>

According to the Eurobarometer survey in 2009<sup>th</sup> population considers that the most common discrimination form in Latvia is the discrimination on the ground of age (67%;

<sup>15</sup> Information on September 20, 2011

<sup>16</sup> Latvijas Cilvēktiesību centrs, *Diskriminācijas novēršana Latvijā II*, Latvijas Cilvēktiesību centrs, 2011, p.56



average in the European Union (hereinafter - EU) - 58%) and on the ground of disability (64%; average in EU - 53). A significant number of people believe that there is a discrimination on the basis of sexual orientation (40%, average in EU 47%), ethnical origin (34%; average in EU - 61%), gender (29%, average in EU - 40%).<sup>17</sup>

According to the survey of European Union Agency for Fundamental Rights conducted in 2009 5% of respondents revealed that they have faced multiple discrimination.<sup>18</sup>

According to survey conducted by SKDS “Treatment of sexual minorities” the question was asked – what would be your action if you revealed your colleague being homosexual? 47% answered that they would not changed their attitude towards the colleague, 33% respondents chose answers regarding the distancing themselves from a colleague. Moreover, 5% would force colleague to leave the job.<sup>19</sup>

The survey conducted by the Center for Education Initiatives “The Roma rights to education: situation of implementation in Latvia” revealed that key factors that make it difficult to Roma children to integrate into the education system are disdainful attitude of surroundings, stigma and mobbing at school as well as the adaptation and learning problems in school environment. In some cases, the training of Roma children was provided in separate classes with the correction status. There is observed a segregation of Roma children among the educational institutions, which advises the parents to send their children to so-called Roma schools – the schools where Roma children are more in number.<sup>20</sup>

ii. There is no legal definition for the term “family” in Latvia, but, however, there is definition for a marriage in Constitution – a union between a man and a woman.<sup>21</sup> But, however, in the narrow sense of the word “family”, it consists of the spouses and their children while they are still part of a common household.<sup>22</sup> It is considered that the understanding of the term “family” in Latvia is narrower than it is meant in international

<sup>17</sup> European Commission (November 2009 Discrimination in the EU in 2009. Special Eurobarometer 317. [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_317\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_317_en.pdf)

<sup>18</sup> European Union Agency for Fundamental Rights (2009) EU-MIDIS European Union Minorities and Discrimination Survey. Main Results Report: [http://www.eurofound.europa.eu/surveys/smt/ewcs/results\\_lv.htm](http://www.eurofound.europa.eu/surveys/smt/ewcs/results_lv.htm)

<sup>19</sup> Latvijas Cilvēktiesību centrs, *Diskriminācijas novēršana Latvijā II*, Latvijas Cilvēktiesību centrs, 2011, p.59

<sup>20</sup> Izglītības iniciatīvu centrs, *Romu tiesības uz izglītību: īstenošanas situācija Latvijā*. [http://www.iic.lv/lv/projekti/rti\\_petijums\\_isl.pdf](http://www.iic.lv/lv/projekti/rti_petijums_isl.pdf)

<sup>21</sup> The Constitution of the Republic of Latvia, Art.110

<sup>22</sup> The Civil Law of Latvia. Part One. Family Law, Art. 214

human right documents.<sup>23</sup> However, it must be emphasised that it is not because the court in general considers only married couples to constitute the family but rather because of legislators position.<sup>24</sup>

The Civil Law of Latvia has set the impediments to entering into marriage. According to the law, marriage before attaining eighteen years of age is prohibited.<sup>25</sup> By way of exception, a person who has attained sixteen years of age may marry with the consent of his or her parents or guardians if he or she marries a person of legal age.<sup>26</sup> A new marriage for a person who is already married is prohibited<sup>27</sup>, thus, Latvia protects monogamous marriage. Marriage between persons of the same sex is prohibited.<sup>28</sup> The Constitutional Court of Latvia has confirmed with its judgements that the law of State recognizes de jure family as well as de facto family.<sup>29</sup> Thus the Court has declared that the biological and social reality prevail over legal presumptions.<sup>30</sup>

As it was mentioned previously marriage is enshrined constitutionally. However, the constitution does not provide the content of the term. The real content follows from Civil Law. According to it, marriage is a union which shall be registered according to the Law, thus it creates particular rights and obligations.<sup>31</sup> Marriage creates an obligation on the part of husband and wife to be faithful to each other, to live together, to take care of each other and to jointly ensure the welfare of their family.<sup>32</sup>

Since 2000 the age in which the first marriage is registered has grown by 2.5 years. In 2010 males concluded their first marriage at the age of 29, but females at age of 27 years. The average age of the marrying persons was 34 years for males and 31 year for females.<sup>33</sup> In

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<sup>23</sup> K.Dupate, I.Reine, "110.Valsts aizsargā un atbalsta laulību – savienību starp vīrieti un sievieti, ģimeni, vecāku un bērna tiesības. Valsts īpaši palīdz bērniem invalīdiem, bērniem, kas palikuši bez vecāku gādības vai cietuši no vardarbības" in *Latvijas Republikas Satversmes komentāri. VII nodaļa Cilvēka pamattiesības*, R.Balodis (eds), Latvijas Vēstnesis, Rīga, 2011, p.590.

<sup>24</sup> Civil department of Supreme Court of Republic of Latvia, decision No.SKC-4/2012.

<sup>25</sup> The Civil Law of Latvia. Part One. Family Law, Art.32

<sup>26</sup> Ibid., Art.33

<sup>27</sup> Ibid., Art.38

<sup>28</sup> Ibid., Art.35

<sup>29</sup> Constitutional Court of Latvia. 2004-02-0106. 11.10.2004. Paragraph 14.

<sup>30</sup> The judgement of ECHR *Johnston and others v. Ireland*. 9697/82, 18.12.86

<sup>31</sup> K.Dupate, I.Reine, p.586

<sup>32</sup> The Civil Law of Latvia. Part One. Family Law, Art.84

<sup>33</sup> Central Statistical Bureau, *Changes of demographic situation in Latvia in 2010*, <<http://www.csb.gov.lv/en/notikumi/changes-demographic-situation-latvia-2010-31979.html>>

Latvia the number of single persons is high. 40% of males and 31% of females aged from 25 to 49 years are not legally married.<sup>34</sup>

iii. There is no law stating the general status of children within the cultural and historical background. However, Latvia has constitutionally declared that:

“State shall protect the rights of parents and rights of the child. The State shall provide special support to disabled children, children left without parental care or who have suffered from violence”.<sup>35</sup>

Protection of the rights of the child is an integral part of State policy. The State and municipalities shall organise and monitor the protection of the rights of the child throughout the territory of the State.<sup>36</sup>

In lawful relations that affect a child, the rights and best interests of the child shall take priority.<sup>37</sup> It means that the courts and institutions shall make its decisions respecting the interests of children as well as it is possible. The same refers to the Parliament of Latvia - it shall adopt or amend law respecting children interests as well as it possible.<sup>38</sup> The Constitutional Court has stated that the human rights protection in every society begins within the protection of children rights; providing them with the living conditions which helps them to develop their potential in order to be ready for the sufficient adult life.<sup>39</sup>

As regards a general concern regarding children or children rights there still occurs some cases of violence in schools and ineffectiveness of state authorities to limit it. Recently, there was a dissuasion of access to free educational materials in primary and secondary schools – according to Art. 112 of constitution of Republic of Latvia the State shall ensure that everyone may acquire primary and secondary education without charge. In practice many schools demanded students and their parents to buy some educational materials. Ombudsman of Republic of Latvia caused a massive campaign and forbade schools and the Ministry of Education to demand parents to buy education materials, thus emphasizing that

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<sup>34</sup> Ibid.

<sup>35</sup> The Constitution of the Republic of Latvia, Art.110

<sup>36</sup> Protection of the Rights of the Child Law, Art 2

<sup>37</sup> Ibid., Art.6

<sup>38</sup> Constitutional Court of Latvia. 2004-02-0106. 11.10.2004. Paragraph 10-11; K.Dupate, I.Reine, p.598

<sup>39</sup> Constitutional Court of Latvia. 2008-43-0106. 03.06.2009. Paragraph 9.2; K.Dupate, I.Reine, p.598

all the materials must be provided my schools and the state must ensure that primary and secondary education must be acquire without charge.

iv. According to the Law on International Agreements of Republic of Latvia the Cabinet of Ministers is responsible for the implementation of international contractual obligations.<sup>40</sup> If an international agreement approved by the Parliament of Latvia (Saeima) has different provisions than the legislation of Republic of Latvian, the provisions of international treaty shall be applied.<sup>41</sup> The classification of Latvia as a dualistic or monistic country remains unresolved.<sup>42</sup> But, however, the general opinion is that Latvia is moving to more monistic approach since the international treaties are recognized as the element of national legal system. It has been proven by the fact that acts of international law, if they have been passed under particular procedure, are recognized to be elements of the national system of laws. Besides, norms and principles of international law have priority of the norms of national law. It was already stipulated in the Declaration of 4 May 1990 “On Restoration of the Independence of the Independence of the Republic of Latvia” where Article 1 prescribed the dominance of fundamental principles of international law over national laws. Under Article 13 of the Law of 13 January 1994 “On International Agreements of Republic of Latvia”, provisions of an international agreements are applied if the international agreement that has been approved by the Parliament (Saeima) prescribes different provisions from those prescribed by legislative acts of Latvia. <sup>43</sup>

Historically, following the restoration of Latvia’s independence in 1990-1991 and as the result of the adoption of the State continuity doctrine, Latvia re-effected the 1922 Republic of Latvia Constitution. When adopting the Declaration on the Accession of the Republic of Latvia to International Instruments Relating to Human Rights the Supreme Council declared that it considers as binding more than 50 international instruments in the sphere of human rights, including the Universal Declaration on Human Rights and the “International Covenant on Economic, Social and Cultural Rights”. Acknowledging the role of the Council of Europe and the European Parliament in guaranteeing human rights, the Supreme Council

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<sup>40</sup> Law on International Agreements of Republic of Latvia, Art.12

<sup>41</sup> Ibid., Art.13

<sup>42</sup> M. Scheinin, *International Human Rights Norms in the Nordic and Baltic Countries*, The Hague : Nijhoff, cop. 1996, p.14

<sup>43</sup> The conference of European Constitutional Courts “The Criteria of the Limitations of Human rights in the Practice of Constitutional justice”, the National Report of the Constitutional Court of the Republic of Latvia, 2005, p.7

of the Republic of Latvia declared that it will be guided in its legislative activities by the documents relating to human rights adopted by these organizations.<sup>44</sup>

Specifically, the United Nations Convention on Rights of the Children was ratified in Latvia on the 4<sup>th</sup> of September 1991. Latvia did not make any reservation to the Convention.

The general status of implementation of the Convention follows from the actual action of the State and its reports on fulfilment of the 1989 United Nations Convention on Children Rights in the Republic of Latvia.

Just after Latvia recovered its independence in 1990, it has joined several international agreements regarding the protection of the children and its rights. The State launched a comprehensive legislative corpus to create modern child protection laws. The most important international agreements and legislation binding to Latvia are:

- United Nations Convention on the Rights of the Child;
- The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (or Hague Adoption Convention);
- European Convention on the Exercise of Children's Rights;
- The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

There have been major changes in national laws in order to adopt them to international obligations of Latvia.<sup>45</sup> In 2006 the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography entered into force.<sup>46</sup> In March 2004 Cabinet of Ministers approved the guidelines "Latvia Fit for

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<sup>44</sup> The conference of European Constitutional Courts "The Criteria of the Limitations of Human rights in the Practice of Constitutional justice", the National Report of the Constitutional Court of the Republic of Latvia, 2005, p.2

<sup>45</sup> Report on fulfilment of the 1989 United Nation Convention on the Children Rights in the Republic of Latvia from 2001 to 1 March 2004, viewed: 11.08.2012, [http://www.lm.gov.lv/upload/berns\\_gimene/bernu\\_tiesibas/ano\\_zinjojums.doc](http://www.lm.gov.lv/upload/berns_gimene/bernu_tiesibas/ano_zinjojums.doc)

<sup>46</sup> Legislation portal "*Latvijas Vēstnesis*", viewed: 11.08.2012, <http://www.likumi.lv/doc.php?id=131178&from=off>

Children", which is long-term policy planning document (from the 2004 until 2015), containing the basic principles of national policy, objectives and priorities for children's rights policy implementation.<sup>47</sup>

Currently Latvia has The State Inspectorate for Protection of Children's Rights which supervises and controls the observance of the Protection of the Rights of the Child Law and other regulatory enactments that regulate the protection of the rights of the child.<sup>48</sup> The Ministry of Welfare (1) organizes and coordinates the monitoring of compliance with laws and regulations for children's rights; (2) promotes children and family-friendly environments in the country; (3) coordinate the child adoption processes.<sup>49</sup> The Ombudsmen has a specific Department for Children Rights which secures, protects and promotes Children Rights.<sup>50</sup> Latvia has several non-governmental organizations working on children's rights.<sup>51</sup>

The Central Statistical Bureau collects statistical information on children's number, age structure, fertility, mortality, education, health, social protection, material deprivation and the risk of poverty for families with children, youth economic activity, the use of information technology, child abuse and children in conflict with the law.<sup>52</sup>

v. Latvia is the member state of European Union since 2004<sup>th</sup>. At the moment Latvia has established a working group in charge for the implementation of the Directive 2011/93/EU.<sup>53</sup> The working group has evaluated the regulation regarding criminal liability for the use of child prostitution and has declared that the current provisions of Criminal Law of Latvia are not sufficient and has agreed to initiate new amendments for the article 164 of Criminal Law of Latvia, thus including a new criminal offence – child prostitution.<sup>54</sup>

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<sup>47</sup> Report on fulfilment of the 1989 United Nation Convention on the Children Rights in the Republic of Latvia from 2001 to 1 March 2004, viewed: 11.08.2012, p.6

<sup>48</sup> Republic of Latvia Cabinet Regulation No 898 By-law of the State Inspectorate for Protection of Children's Rights

<sup>49</sup> Republic of Latvia Cabinet Regulation No 49 Regulation for Ministry of Welfare

<sup>50</sup> Regulations of the Ombudsman's Office, viewed: 11.08.2012, <http://www.tiesibsargs.lv/lv/tiesibsarga-biroja-nolikums>

<sup>51</sup> Report on fulfilment of the 1989 United Nation Convention on the Children Rights in the Republic of Latvia from 2001 to 1 March 2004, viewed: 11.08.2012, p.12

<sup>52</sup> Central Statistical Bureau, viewed: 11.08.2012, <http://www.csb.gov.lv/11014000>

<sup>53</sup> According to Corrigendum to Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA shall be read: '2011/93/EU'.

<sup>54</sup> [www.mk.gov.lv/doc/2005/TMInf\\_130712\\_prostit.761.doc](http://www.mk.gov.lv/doc/2005/TMInf_130712_prostit.761.doc)

## 2 THE LANZAROTE CONVENTION

i. The European Convention on Human Rights as well as protocol 1<sup>st</sup>, 4<sup>th</sup> and 7<sup>h</sup> were ratified in Latvia in 1997<sup>th</sup>.

ii. Latvia is not a party to Lanzarote Convention.

iii. According to the official response of Ministry of Foreign Affairs of the Republic of Latvia requested by the research team the possibility to sign the Convention in future is regarded as positive. Ministry explained that the signing of Convention is bound to several aspects. Firstly, in December 17, 2011 the regulation of Directive 2011/92/EU of The European Parliament and Council's of December 13, 2011 on combating the sexual abuse and sexual exploitation of children and child pornography (and replacing Council Framework Decision 2004/68/TI) came in force. In context of the Convention the Directive is important because it is based on the regulation of the Convention mentioned above. Thus a number of conditions will be taken over within the Directive. Secondly, at the moment there is no inadequacy between the regulation of Latvia and Convention in such matters as double criminality as a precondition for the realisation of the jurisdiction of Latvia over an offense committed in a foreign country or victim's application as a prerequisite for the initiation of criminal proceedings. Thirdly, after the transpose of the Directive it would be necessary to work out new amendments only regarding the Art.14(3) and Art.29 of the Convention. There are only a few amendments to make in order to reach the level of regulation of the Convention.

To conclude, as mentioned above, the possibility to sign and ratify the Convention in Latvia in future is regarded as positive, but no particular date stated the ratification being expected. The only obstacle hindering ratification stated is financial aspect.

iv. The hierarchy of the Latvian legal norms and the place of the international instruments in it are not clearly formulated in the text of the Constitution. At the moment it follows – even through indirectly – from Article 85 of the Constitution (Satversme), Article 16 of the Constitutional Court Law as well as from the Administrative Procedure Law.<sup>55</sup> Administrative Procedure Law Article 15 establishes that “the norms of international law,

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<sup>55</sup> The conference of European Constitutional Courts “The Criteria of the Limitations of Human rights in the Practice of Constitutional justice”, the National Report of the Constitutional Court of the Republic of Latvia, 2005, p.7

regardless of their origin, shall be approximated in accordance with their place in the hierarchy of the external legal force. If a discrepancy between the international legal norm and the Latvian legal norm of the same force is established then the international legal norm shall be applied”.<sup>56</sup> According to Official Publication Law State’s national order has 4 level normative acts:

- 1) Constitutional level
- 2) Law level
- 3) Regulation of Cabinet of Ministers
- 4) Local Municipalities binding rules

The Lanzarote Convention after ratification would reach the Law level rank.

## II NATIONAL LEGISLATION

### 1 GENERAL PRINCIPLES OF THE JURISDICTION

i. Latvia was founded in 1918 as a democratic republic with a plural party system. The social-democratic labourers were the most popular party. In the base of constitution of Latvia best principles from the constitutions of Weimar, Switzerland, France and others where taken. These constitutions were popular at the beginning of 20th century as democratic and modern constitutions. President is the head of the state of Latvia, but he has limited rights to be involved in executive processes. His power in executive processes is limited with contrasignation institution. His role is more for stabilizing processes; he acts as a linkman between powers. The principle for interpreting the constitution is to read it taking into account the spirit of the time when it was written and using all methods of interpretation because it is not enough with grammatical interpretation. But it is not enough with traditional interpretation methods also. In addition to those methods it is necessary to have one more criteria – the unity of constitution, practice compliance to constitution and

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<sup>56</sup> The conference of European Constitutional Courts “The Criteria of the Limitations of Human rights in the Practice of Constitutional justice”, the National Report of the Constitutional Court of the Republic of Latvia, 2005, p.8



functional adequacy.<sup>57</sup> Although rules of this constitution are laconic and abstract beyond these short sentences one can find general principles of law.

Latvia was a parliamentary democracy from 1918 to 1934. In 1934 K. Ulmanis, the prime minister of Latvia, carried out a *coup d'état* and overthrew the government. That was the beginning of the authoritative dictatorship regime in Latvia led by K. Ulmanis.

In 1940 Latvia was occupied and incorporated in the USSR.

In 1941 Latvia was occupied by Nazi Germany and incorporated into Reichskommissariat Ostland which was made and controlled by the Nazi regime. Later in 1944 Latvia was again occupied by USSR. USSR did not change the governmental regime only; all legal system was changed from democratic to socialistic. Latvia was a part of a totalitarian regime. Latvia was one of the subjects in the federal government system under a name of Latvian Soviet Socialist Republic. Although formally USSR represented itself as a Federal republic it was a huge united totalitarian power with centralized system with the main power of the state - Communist Party.

Latvia renewed independence in 1991. Also constitution of Latvia and many legal acts were renewed. Latvia renewed independence using continuity principle. Namely, Latvia is the same state which was founded in 1918 and whose de facto existence was interrupted by 50 years of occupation.

Latvia again became parliamentary democracy with central government and three separate, independent powers which mutually control each other.

ii. In the process of constitution's adoption there were numerous discussions about the chapter of human rights. When constitution of Latvia was adopted it was without any bill of rights. At the first independence period there were some few bills of rights which consisted of human rights. For example the first constitutional law (the first constitution – temporary constitution) in Latvia was The Political Platform of Nations Council. This document determines state's governmental base. Third part of this document consisted of human rights. It was surprising that in this document that was created in 1918 there were rules that regulated gender equality.

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<sup>57</sup> J. Pleps, E. Pastars, I. Plakane, *Konstitucionālās tiesības, Latvijas Vēstnesis*, Rīga, 2004, p. 60.

Provisional Rules of the State of Latvia (Latvijas valsts iekārtas pagaidu noteikumi<sup>58</sup>) was the second temporary constitution created in 1920. It also consisted of human rights rules, e.g., the press, speech, conscience, strike and assembly freedoms.

After restoration of independence, in 1998, chapter 8 - human rights - was included in constitution and entered into force as constitutional law. This chapter consisted of fundamental principles that reflected human rights protection in Latvia. But the constitution is not the only place where one can find human rights regulation.

In Administrative Law Act, judicial law and others there also are rules that provide human rights. The first rule of human rights chapter in the constitution determines that Latvia recognizes and protects human rights not only according to the constitutional law but also to those international treaties which are binding to Latvia.<sup>59</sup> Article 111 determines children protection. This rule means that state particularly helps disabled children and children without parents, and also it helps to those children who have suffered from violence.

**iii.** In Latvia there is a specific judicial body – Constitutional Court (Satversmes tiesa). Constitutional court is an independent judiciary body, which reviews cases that are in court's competence. Competence is determined in Constitutional court law and in constitution. In court competence there are cases regarding law conformity with Constitution, international contracts etc. And this also means monitoring the implementation of international and national human rights instruments. Individual claims can be submitted if an individual considers that the rule of law offends his rights which are protected by constitution or other law. Constitutional complaint can be submitted in court only after an individual has used all other opportunities to protect his rights with general remedies (a complaint to a higher body or official application to court of general jurisdiction). Only if there is not any other opportunity to protect rights generally or there is an emergency case or there is not an opportunity to avoid substantial damage, individual can bring a claim in Constitutional court directly<sup>60</sup>.

**iv.** In Latvia there is The Highest court. But there is not a separate Criminal Supreme Court. High court has chambers. That is the reason why in Latvia there is The Chamber of

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<sup>58</sup> 1920, 1 of June, Latvijas valsts iekārtas pagaidu noteikumi

<sup>59</sup> 1922, 15 of February, Satversme

<sup>60</sup> 1996, 5 of June Law of Constitutional Court, Latvijas Vēstnesis, Nr. 103(588), 14.06.1996.

Criminal Cases of High Court. This chamber deals with criminal cases in appeal procedure. Chamber of Criminal Cases of High Court competence has the following categories: 1) crimes against humanity, peace; 2) war crimes, genocide, crimes against state; 3) crimes under current articles of Criminal Law; 4) crimes against virtue, sexual with under age or minor; 5) crimes where have been procedural actions against witnesses; 6) crimes with state's secret.

There are two opportunities – the case can be examined in opened or closed order. The examination process is closed if it is necessarily to protect state's or adoption's secret and also if there is motivated request from one party. Judgment is declared avowedly, also if the procedure of examination had been closed (then declare public only introduction part and operative part). Court investigation and court debate is limited by extent and frames of claim's or protest's moat. Court trial can be in written or verbal order. The case can be examined in written trial if in proclaim are only request about commutation of the sentence or compensation for damage. Or in proclaim there are only indicated to circumstances which are in the base to cancel the judgment of the first instance. And it is possible to apply written trial only with prosecutor or person's with affected interests and rights permit.

Other crimes which District court considers to be accepted because of legal complications or security can also be examined in Chamber of Criminal Cases of High Court. This court also examines cases about persons' extradition abroad.

But according to 2012 1st of July amendments of Criminal Law further all criminal cases as in the first instance will be examined in Regional courts, all appeal cases will be examined in the District courts. Cassation's order will be used to appeal court's decision in The Supreme Court Senate as the court of cassation. Thus, there are plans to refuse from examination of cases in Chamber of Criminal Cases of High Court<sup>61</sup>.

v. In Latvia a person is criminally liable when they become 14 years old. Underage are persons younger than 14 years and these persons are not criminally liable.

“Children crime prevention and child protection against crimes program 2009-2011” (Bērnu noziedzības novēršanas un bērna aizsardzības prēt noziedzīgu nodarījumu programma 2009.

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<sup>61</sup> Kriminālietu tiesu palāta, 29.08.2009, available: <http://www.at.gov.lv/about/operation/judicial/criminal/>

– 2011. gadam ) entered into force on September 5, 2009 <sup>62</sup>. One of these program's tasks was to make a review about underage criminals` situation in Latvia. At this moment every one can get data with statistics about these crimes on the state police web site<sup>63</sup>.

In 2011 comparing with 2010 there are more registered crimes which is done by underage (14-18 years old) persons. In 2011 114 crimes more took place than in 2010. In 2011 underage persons have done 75 especially serious crimes and 420 serious crimes.

The most common underage crimes are thefts (694), damages of properties (114) and robberies (76).

But crimes done by underage persons are in latent criminality group that is why statistics data cannot reflect the real situation about registered underage offenses.<sup>64</sup>

## 2 SUBSTANTIVE CRIMINAL LAW

### DEFINITIONS FOR THE CHAPTER

Minor – in criminal law, a person under the age of eighteen, regardless if he or she has under special circumstances been declared by a civil court as being of age of majority or has entered into marriage

Underage person – a person under fourteen years of age

Criminal violation – a criminal offence for which the law provides for deprivation of liberty for a term not exceeding two years, or a lesser punishment

Less serious crime – an intentional criminal offence for which the law provides for deprivation of liberty for a term exceeding two years but not exceeding five years, or an offence, which has been committed through negligence and for which the law provides for deprivation of liberty for a term exceeding two years, but not exceeding ten years

Serious crime – an intentional criminal offence for which the law provides for deprivation of liberty for a term exceeding five years but not exceeding ten years, or an offence, which has

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<sup>62</sup> 03.09.2009. Order of Ministers of Cabinet Nr. 625. Bērnu noziedzības novēršanas un bērnu aizsardzības pret noziedzīgu nodarījumu programmas 2009.-2011.gadam

<sup>63</sup> <http://www.vp.gov.lv/?id=530&said=530>.

<sup>64</sup> Pārskats par nepilngadīgo noziedzību, cietušiem bērniem, stāvokli ceļus atīksmē un prevencijas jomā 2011.gada 12 mēnešos.Valstspolicijas Galvenās kārtības policijaspārvaldes Prevencijas pārvaldes Metodiskās vadības nodaļa. Available: [www.vp.gov.lv/faili/relizes/2011\\_PARSKATS.doc](http://www.vp.gov.lv/faili/relizes/2011_PARSKATS.doc).

been committed through negligence and for which the law provides for deprivation of liberty for a term exceeding ten years

Especially serious crime – an intentional criminal offence for which the law provides for deprivation of liberty for a term exceeding ten years or life imprisonment

LVL – Latvian lats, the national currency; all monetary amounts throughout the report are given in lats and converted to euros according to official exchange rate of Bank of Latvia as of November 2nd, 2012.

Minimum monthly wage – an instrument for expressing the amount of fines levied, since January 1, 2011 minimum monthly wage is 200 LVL (284.90 €)

## 2.1 Sexual Abuse

i. In national legislation there is no explicit definition of the term „sexual activities”. Whether some actions are considered as sexual or not depends on the particular offence under consideration. For example, Article 162 of the Criminal Law (leading to depravity, i.e., corruption of children) includes sexual activities that are aimed towards sexually satisfying the offender or stimulating sexual desire of the victim. Such activities can happen with or without physical contact, including over communication devices.<sup>65</sup> Of the acts listed in paragraph 143 of the Explanatory Report to the Lanzarote Convention,<sup>66</sup> all are included in the national understanding of the term “sexual activities”. Further explanation of various types of sexual activities and their legal consequences can be found in answers to questions iv, xi and xv of this chapter.

ii. The Criminal Law defines intent in Article 9:

*„A criminal offence shall be considered to have been committed deliberately (intentionally) if the person who has committed it has foreseen the consequences of the offence and has desired such (direct intent) or, even if such consequences have not been desired, nevertheless has knowingly allowed these to result (indirect intent).”*

Therefore, in cases of sexual abuse where the victim is a minor, the offender must have known that the victim is under the legal age for engaging in sexual activities or must have

<sup>65</sup> Uldis Krastiņš, Valentīna Liholaja & Aivars Niedre, *Krimināllikuma zinātniski praktiskais komentārs. Sevišķa daļa* (Riga, AFS 2007) p. 348.

<sup>66</sup> *Explanatory Report to Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* <<http://conventions.coe.int/Treaty/EN/Reports/Html/201.htm>> accessed 5 November 2012

foreseen such a possibility (*dolus eventualis*).<sup>67</sup> Criminal liability of an intentionally committed crime of sexual abuse varies depending on age of the offender, age of the victim, assent of the victim, degree and nature of violence used, type of sexual activities, etc. Sanctions always include deprivation of liberty (see further answer to question xxii of this chapter).

**iii.** The legal age for engaging in sexual activities (age of sexual consent, *dzimumpilngadības vecums* in Latvian) for both homosexual and heterosexual acts in Latvia is sixteen. However, if one of willing partners is between sixteen and eighteen years of age and the other partner is at least fourteen years of age, no criminal liability applies, unless the younger partner is in financial or other dependence on the offender.

Criminal liability applies to natural persons who, on the day of the commission of a criminal offence, have attained fourteen years of age (Article 11 of the Criminal Law). If both persons are underage, and both are willing, no coercive measures are prescribed. If a crime is committed by a person under the age of fourteen and over the age of eleven, either a court or a judge acting singly can apply a coercive measure, as listed in Law On Compulsory Measures of a Correctional Nature, Article 6, paragraph 1, starting from a warning and up to placing a child in an educational establishment for social correction.

**iv.** In national legislation contents and sanctions of the term sexual abuse, as defined in Article 18, paragraph 1 of Lanzarote Convention, can be found in five articles of the Criminal Law: Article 159 (rape), Article 160 (violent sexual assault), Article 161 (sexual connection, pederasty and lesbianism with a person who has not attained the age of sixteen years) and in some cases Article 162 (leading to depravity, i.e., corruption of children) and Article 162.<sup>1</sup> (encouraging to involve in sexual acts).<sup>68</sup>

Although Protection of the Rights of the Child Law in Article 1, clause 10, explicitly defines sexual abuse as involving of a child in sexual activities that the child does not understand or to which the child cannot knowingly give consent, such view differs from prevailing

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<sup>67</sup> Supreme Court of Republic of Latvia, *Court report on Article 160 and 162 of the Criminal Law* (in Latvian, 2007) p. 9.

<<http://www.at.gov.lv/files/docs/summaries/2007/kriminalietas%20pec%20kl%20160.%20un%20162.p.doc>> accessed 5 November 2012

<sup>68</sup> such a view is supported by *National Report on Violence against Children in Latvia* (in Latvian, 2010) p. 5-7.

<[http://www.bernskacietusais.lv/download.php?file=files/object\\_files/1317553668510\\_Bernu\\_viktimizacija\\_Latvija.pdf](http://www.bernskacietusais.lv/download.php?file=files/object_files/1317553668510_Bernu_viktimizacija_Latvija.pdf)> accessed 5 November 2012

understanding under criminal law. One example of such unfoundedly narrow understanding can be seen in an internal assessment of Lanzarote Convention carried out by the Cabinet of Ministers, which states that, according to the Ministry of Interior, sexual abuse includes only rape and violent sexual assault.<sup>69</sup> Such different understandings of the term “sexual abuse” necessitate separate deeper analysis of understanding of use of force and violence in cases of sexual abuse.

Rape is defined as an act of sexual intercourse by means of violence, threats or taking advantage of the state of helplessness of a victim. Sexual intercourse in cases of rape is only vaginal intercourse, other types of intercourse falling under violent sexual assault. Offence is complete on the moment when penis enters vagina. Violence in this context is only physical violence, with or without infliction of pain.<sup>70</sup> The element of physical violence with the aim of acquiring assent or stopping resistance, and physical or psychological suffering caused thereby, is essential. Threats need to be explicit threats of physical violence towards the victim or a person intimate to the victim; they must be real, immediate and believed by the victim.<sup>71</sup> Rape of a minor and rape of an underage person are sanctioned separately from rape. An underage person is considered to always be in a state of helplessness and any vaginal intercourse with them is rape. If the victim is over fourteen years of age all preconditions apply. If no explicit physical violence or restraint can be established, the offence is not rape but sexual connection with a person who has not attained the age of sixteen years (see further).

Violent sexual assault is defined as “pederastic or lesbian or other unnatural sexual acts of gratification”, if such acts have been committed using violence or threats or by taking advantage of the state of helplessness of a person. Violent sexual assault on a minor and violent sexual assault on an underage person is sanctioned separately from violent sexual assault. Criminal sanction for violent sexual assault was lower until October 2011, when both sanctions were equalized.

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<sup>69</sup> Ministry of Children and Family Affairs, *Explanatory Report on Project of Cabinet of Ministers Ordinance "On Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse"* (in Latvian, 23 October 2008) p. 7. <[http://www.mk.gov.lv/doc/2005/BMpask\\_231008\\_SexExplK.1836.doc](http://www.mk.gov.lv/doc/2005/BMpask_231008_SexExplK.1836.doc)> accessed 5 November 2012

<sup>70</sup> Uldis Krastiņš, Valentīna Liholaja & Aivars Niedre, *Krimināllikuma zīnātniski praktiskais komentārs 2. Svišķā daļa* (Riga, AFS 2007) p. 339.

<sup>71</sup> Dainis Mežulis, *Personas kriminalitātesiskā aizsardzība* (Riga, Zvaigzne ABC 2001) p. 314.

Any type of sexual connection with a person who has not attained the age of sixteen years and who is in financial or other dependence on the offender, or if such offence has been committed by a person who has attained the age of majority, is considered a separate crime. Consent of the victim is immaterial.

Corruption of children (leading to depravity) is defined as sexual activities against the will of the minor or if such have been committed by a person who has attained the age of majority. Such a definition has caused courts to have considerable difficulties separating violent sexual assault from corruption of children, since both are done against the will of the minor and differ mainly in the degree and nature of physical violence and degree of physical contact. It must be emphasized that many cases of sexual abuse fall under the national definition of corruption of children and full understanding of corruption of children is vital for acquiring a complete view of current legal situation regarding physical sexual abuse. Corruption of children is further explored in answer to question xv in this chapter. Encouraging to engage in sexual activities (grooming) is further explored in answer to question xvi of this chapter.

In conclusion, for an offence to be understood as rape or violent sexual assault, physical violence or threats of physical violence must be present and be essential for the commission of the crime. If threats or physical violence are used after the crime has been committed, the sexual activities in question are understood and sentenced as corruption of children and subsequent use of violence is a separate offence. If the will of the minor is overcome by, for example, the offender stripping and continued touching of the child after being asked to stop, such an act is not rape or violent sexual assault, because it lacks the element of explicit violence.

Understanding of taking advantage of a disability depends on whether the victim is in a state of helplessness when the offence starts being committed. State of helplessness exists when the victim experiences permanent or temporary psychological disturbances, is underage, is asleep, unconscious or under influence of alcohol or drugs to a degree that the victim can not adequately comprehend outside stimuli and respond to them. Such state of helplessness must be known to the offender and be used in commission of the crime. As such, the degree and nature of disability is important – if the person is physically incapable of showing



resistance, he or she is in a state of helplessness.<sup>72</sup> If the person is temporarily or permanently psychologically disturbed to a degree that can not adequately comprehend outside stimuli and respond to them, he or she is in a state of helplessness; however, if he or she can't resist because of individual psychological traits that are not psychological disturbances, such traits are irrelevant.<sup>73</sup> After a 2010 judgment of the Constitutional court requiring different degrees of legal capacity to act under civil law,<sup>74</sup> there is an ongoing re-examination and reform of the concept of legal capacity. What, if any, effect such reform will have on capability to consent in criminal law is unclear.

v. Incest is not regarded as a crime in Latvia and there is no explicit legal definition of incest. Marriage is prohibited between kin in a direct line (lineal ancestors and descendants), siblings, and half-siblings (Article 35 of the Civil Law), adopter and adoptee, except in cases where the legal relationship established by adoption has been terminated (Article 37 of the Civil Law), as well as guardian and his or her ward or trustee and the person under trusteeship, before the termination of the relations of guardianship or trusteeship (Article 38 of the Civil Law). Under the aforementioned reform of the concept of legal capacity (answer to question iv of this chapter), Parliament is planning to abolish the restrictions on marriage between trustee and person under trusteeship.<sup>75</sup>

vi. Article 48 of the Criminal Law lists aggravating circumstances of criminal offences, including taking advantage in bad faith of an official position or the trust of another person (Article 48, paragraph 1, clause 3) and the offender taking advantage of victim's official, financial or other dependence on the offender (Article 48, paragraph 1, clause 7). Both victim's trust and dependence are defined with enough flexibility to be applicable outside official subordination or duty of care.

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<sup>72</sup> Krastiņš, Liholaja & Niedre, *Kriminallikuma zinātniski praktiskais komentārs 2. Svišķā daļa* pp. 339-340.

<sup>73</sup> SKK – 47, Decision of Department of Criminal Cases of Senate of the Supreme Court of Republic of Latvia (in Latvian, 28 February 2002).

<sup>74</sup> *On Compliance of Sections 358 and 364 of the Civil Law, with Article 96 of the Satversme of the Republic of Latvia*, Judgement of Constitutional court of the Republic of Latvia in Case No. 2010-38-01 (27 December 2010) <[http://www.satv.tiesa.gov.lv/upload/spriedums\\_2010-38-01.htm](http://www.satv.tiesa.gov.lv/upload/spriedums_2010-38-01.htm)> accessed 5 November 2012

<sup>75</sup> Bill No. 90/TA-2755 (2011) Amendment to the Civil Law (15 November 2011). <<http://titania.saeima.lv/LIVS11/saeimalivs11.nsf/0/F81AEAE4B081B277C225794A00253F71?OpenDocument>> accessed 5 November 2012

The list of aggravating circumstances in Article 48 is not specific to sexual offences against minors and is applicable to any criminal offence where the circumstance is not already a constituent element of the crime. Recognizing a particular circumstance as aggravating or not falls under the discretion of the court and the court can consider them not to be aggravating in a particular case. The court has to give its reasons for recognizing a circumstance as aggravating or mitigating, but doesn't have to explain why a particular circumstance was not recognized as aggravating or mitigating.<sup>76</sup>

## 2.2 Child Prostitution

**vii.** Latvia is party to the Council of Europe Convention on Action against Trafficking in Human Beings. Latvia signed the Convention on the 19th of May 2006; it was ratified by the Parliament on the 13th of February 2008, and entered into force on the 1st of July 2008. In accordance with Article 31, paragraph 2, of the Convention, Latvia has reserved the right not to apply the jurisdiction rules laid down in paragraphs 1 (d) and (e) of Article 31 of the Convention.

**viii.** Prostitution is legal in Latvia. In national legislation there is no explicit definition of child prostitution. Article 164 of the Criminal Law (Involvement of a Person in Prostitution and Compelling Engaging in Prostitution) defines as a crime involving a person in prostitution regardless of age or consent of the victim. Article 164, paragraph 3 provides a separate sentence for inducing or compelling a person to engage in prostitution if the victim is under 18 years of age and paragraph 4 if the victim is underage. Living on the avails of prostitution (procuring) is a separate crime with separate sentences for living on the avails of prostitution of minors or underage persons (Article 165 of the Criminal Law).

Prostitution is defined in paragraph 1 of Regulation of the Cabinet of Ministers Regarding Restriction of Prostitution as “provision of sexual services for a fee”. “A fee” in this legal context includes any kind of material remuneration or promise of such, but is vague regarding considerations that have no monetary value. There have been no known criminal cases involving prostitution in Latvia where the benefit was of non-material nature. “Sexual services” include manipulation of client's genitals until he or she achieves sexual

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<sup>76</sup> SKK-129/2012, Decision of Department of Criminal Cases of Senate of the Supreme Court of Republic of Latvia (in Latvian, 26 March 2012) <<http://at.gov.lv/files/archive/departments2/2012/skk-12912.doc>> accessed 5 November 2012

gratification, no matter if its organizers call it “erotic massage”.<sup>77</sup> Whether erotic performances with a high degree of physical contact (lap dancing, etc.) would be considered prostitution under the current definition remains unclear. According to an evaluation carried out by the Ministry of Children and Family Affairs the definitions are compatible.<sup>78</sup>

**ix.** The Criminal Law recognizes as crimes both the recruiting children for prostitution and using child prostitutes (Article 164), but does not separate these offences. The formula used – “inducing or compelling a minor to engage in prostitution” – in this legal context is recognized to be vague and, if construed strictly, would not include paying to conduct sexual activities with children over the age of consent. However, users of child prostitutes have been successfully prosecuted under Article 164.<sup>79</sup>

### 2.3 Child Pornography

**x.** Latvia is party to the Council of Europe Convention on Cybercrime. Latvia signed the Convention on the 5<sup>th</sup> of May 2004; it was ratified by the Parliament on 27<sup>th</sup> of October 2006, and entered into force on the 1<sup>st</sup> of June 2007. In accordance with Article 29, paragraph 4, of the Convention, Latvia has reserved the right to refuse the request for preservation under this article in cases where it has reasons to believe that at the time of disclosure the condition of dual criminality cannot be fulfilled.

**xi.** In Latvian national legislation child pornography is defined in the Law on Pornography Restrictions, Article 1, paragraphs 1 and 2:

“1) **material of a pornographic nature** – composition, printed matter, image, computer programme, film, video or sound recording, television programme, or radio programme, other material in any form or type, that does not have publicly educational or informative, scientific or artistic value and in which directly, specifically and openly naturalistically:

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<sup>77</sup> SKK – 405, Decision of Department of Criminal Cases of Senate of the Supreme Court of Republic of Latvia (in Latvian, 27 October 2005)

<<http://www.at.gov.lv/files/archive/department2/2005/kd271005.doc>> accessed 5 November 2012

<sup>78</sup> referred to in *Explanatory Report on Project of Cabinet of Ministers Ordinance "On Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse"* p. 4.

<sup>79</sup> Ministry of Justice, *Informative Report „On Foreign Experience in Combating Prostitution and Recommendations on Allaying Prostitution in Latvia”* (in Latvian, 2 August 2012) p. 16.

<[http://www.mk.gov.lv/doc/2005/TMInf\\_130712\\_prostit.761.doc](http://www.mk.gov.lv/doc/2005/TMInf_130712_prostit.761.doc)> accessed 5 November 2012

a) genitals are completely or partially depicted, sexual acts of gratification by masturbation are depicted or described, as well as sexual acts or sexual acts of gratification in an unnatural way are described, including imitation of the specified activities,

b) sexual acts or sexual acts of gratification in an unnatural way are depicted, as well as imitation of the specified activities; or,

c) sexual acts of gratification in a violent manner, brutality in sexual activities (sadistic and masochistic activities), sexual acts of gratification with animals or necrophilia are depicted or described;

2) **child pornography** – material of a pornographic nature, in which a child is depicted or described, or any other material in which:

a) a child who is involved in sexual activities, a child completely or partially without clothing in a sexual pose or in clothing of an obscene nature is depicted or described, children's genitals or pubic region are depicted in a stimulating way,

b) a person having the appearance of a child who is involved in the activities specified in Sub-clause "a" of this Clause is depicted or described or presented in a manner specified in Sub-clause "a",

c) there are realistic images with an actually non-existent child who is involved in the activities specified in Sub-clause "a" of this Clause or presented in a manner specified in Sub-clause "a";”

“Sexual act” in this particular context signifies vaginal intercourse, while “sexual acts of gratification in an unnatural way” include other types of intercourse, including homosexual.

While paragraph 142 of the Explanatory Report to the Lanzarote Convention excludes material having artistic, medical, scientific or similar merit from the definition of child pornography, national legislation grants such exclusion only regarding pornographic material. Child pornography is explicitly separated from pornographic material in general and no “informative, scientific or artistic value” exceptions are applicable to the definition.<sup>80</sup> While Article 9 of the Law on Pornography Restrictions grants such exceptions to restrictions of circulation of child pornography for, *inter alia*, the process of education, for

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<sup>80</sup> Andra Reinfelde, *Bērnu pornogrāfija - kā noteikt tās robežas* (2008) Jurista Vārds No.7 (511), 19 February 2008.

scientific, research or medical purposes, such exemptions are applied after the material is already recognized as child pornography. Artistic material or material used for artistic purposes is not exempt. Together with the definition of child pornography referring to "any other material in which (...) a child who is involved in sexual activities (...) is depicted or described", it creates a potential for misapplication and a considerable need for interpretation.

The formula "for primarily sexual purposes" used in Lanzarote Convention and the formula "in a stimulating way" (*uzbudinoši* in Latvian) used in national legislation, are liable to different interpretations. Sexual purposes refer to an intent towards sexual stimulation (subjective state), while "a stimulating way" requires an objective element. It is currently unclear what test courts will apply in practice – opinion of the court, opinion of an average person, expert opinion, or subjective intent to sexually stimulate.

The term "sexual organs" (Lanzarote Convention) is considerably wider than "genitals or pubic region" (national law). Under national definition genitals (*dzimūmorgāni* in Latvian) and pubic region (*kaunums* in Latvian) are separated, thereby implying a strict and narrow understanding of the term "genitals". While previously described problems in the definition are mainly potential, understanding of the term "sexual organs" has already caused difficulties in practice. In 2008 several rulings of Riga Centre Region Court (*Rīgas pilsētas Centra rajona tiesa* in Latvian), after considerable research, in the context of erotic performances defined sexual organs as excluding legs, breasts and buttocks. The rulings created some controversy in the legal press.<sup>81</sup> There is no information on whether the proffered definition continues to be used; even if it is considered obsolete, it shows the practical consequences of a strict understanding of the national definition.

Article 20(3) of the Lanzarote Convention provides for Parties the right to not criminalize producing or possessing child pornography "consisting exclusively of simulated representations or realistic images of a non-existent child." Therefore simulated representations of a non-existent child are *a priori* included in the definition of child pornography in Lanzarote Convention. While no definition of simulated representations can be found in either the Lanzarote Convention or its explanatory report, *travaux préparatoires* of Directive 2011/93/EU of the European Parliament and of the Council of 13 December

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<sup>81</sup> Jānis Neimanis, *Koncentrēšanās uz detaļām aizņēno lietas būtību* (2009) Jurista Vārds No.16 (569), 21 April 2009.

2011 on combating the sexual abuse and sexual exploitation of children and child pornography understand simulated representations as “some comics, pictures, books or films (e.g. Lolita) if they refer to sexual activities with children, and which are produced without real images of existing children and are produced for private use and are not susceptible to further dissemination”.<sup>82</sup> As a result Directive 2011/93/EU as adopted must be interpreted so that “only realistic images of a child, for the production of which an existing child was originally misused, although its identity was later graphically modified, are (...) to be included in this provision”.<sup>83</sup> Similarly, Council of Europe Convention on Cybercrime Article 9, paragraph 2, clause c includes in child pornography “realistic images representing a minor engaged in sexually explicit conduct” thereby not including simulated representations. In conclusion, national definition of child pornography currently might not include simulated representations of a non-existent child, depending on the understanding of “material of a pornographic nature, in which a child is depicted or described” part of the national definition of child pornography.

It must be noted that “a person having the appearance of a child” in national definition can be interpreted as either a non-existing person as has been the case in the Netherlands,<sup>84</sup> or an existing person. The limits of interpretation have not been tested in courts.

In Latvia there has been a highly publicized case, called “*Princeses*” *lieta* in Latvian, where the pornographic material was a comic titled “Johnny the Mathematician” that was published in a pornographic magazine. It was drawn in *manga* (Japanese comics) style and depicted two persons of indeterminate age engaged in algebra homework, who subsequently engage in sexual activities. The comic was published in 2001, before the adoption of current national definition of child pornography. After confiscating the edition of the pornographic

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<sup>82</sup> Roberta Angelilli, Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, 2009 p.2-3.  
<[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/wd\\_child\\_sexual\\_abuse\\_angelilli/wd\\_child\\_sexual\\_abuse\\_angelilli\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/wd_child_sexual_abuse_angelilli/wd_child_sexual_abuse_angelilli_en.pdf)> accessed 5 November 2012

<sup>83</sup> Council of the European Union Working Party on Substantive Criminal Law, Interinstitutional File: 2009/0049 (CNS) (20/21 April 2009) Article 1, para. (b).  
<<http://register.consilium.europa.eu/pdf/en/09/st09/st09049.en09.pdf>> accessed 5 November 2012

<sup>84</sup> Bert-Jaap Koops, *Cybercrime Legislation in the Netherlands* (December 2010) Electronic Journal of Comparative Law vol. 14.3 p. 12. <<http://www.ejcl.org/143/art143-10.pdf>> accessed 5 November 2012

magazine<sup>85</sup> and beginning a criminal investigation,<sup>86</sup> no further action was taken by law enforcement authorities and the case never reached court.

It must be noted that, the relationship between Latvian law and international treaties being mostly monistic, and Latvia being a party to United Nations Convention on the Rights of the Child Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography as well as Convention on Cybercrime, definitions of child pornography given in aforementioned conventions are directly applicable.<sup>87</sup> If and when Latvia ratifies the Lanzarote Convention, the definition given in Article 20(2) will be directly applicable as well.

**xii.** Under Article 166, paragraph 2 of the Criminal Law liability applies to persons for:

„downloading, acquisition, importation, production, public demonstration, advertising or other distribution of such pornographic or erotic materials as relate or portray the sexual abuse of children, (...) or the keeping of such materials”

No special provisions exist regarding minors producing or distributing pornographic images. The prevalence among minors in Europe of so-called “sexting” – sending by mobile communication devices of erotic or pornographic images of oneself or others – exposes a potential problem. Under current legal circumstances a seventeen year old taking a pornographic picture of his or her consenting married partner can be sentenced to deprivation of liberty of up to two years (Article 65, paragraph 2 of the Criminal Law) and court would not be able to consider being a minor a mitigating circumstance.<sup>88</sup>

Acquisition is understood as acquiring into ownership, possession or use, not requiring will to acquire ownership, and is compatible with procuring such materials for oneself or another

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<sup>85</sup> „Policija konfiscē bērnu pornogrāfiju saturošo komiksu” (Delfi.lv, 18 October 2001).  
<<http://www.delfi.lv/news/national/criminal/policija-konfisce-bernu-pornografiju-saturoso-komiksu.d?id=1990314>> accessed 5 November 2012

<sup>86</sup> „Lūdz sākt kriminālvajāšanu ‘Princeses’ lietā” (Delfi.lv, 21 May 2002).  
<<http://www.delfi.lv/news/national/criminal/ludz-sakt-kriminalvajasanu-princeses-lieta.d?id=3218443>> accessed 5 November 2012

<sup>87</sup> Diāna Hamkova, *Vai bērnu pornogrāfija Latvijā nav sodāma* (2007) Jurista Vārds No.13 (466), 27 March 2007.

<sup>88</sup> Decision of Meeting of Judges of Criminal Department of Senate of Supreme Court of Republic of Latvia and Chamber of Criminal Cases of Supreme Court of Republic of Latvia on Recommendations Regarding Uniform Application of Sentencing Regulations (1 July 2008) para. 9.  
<[http://www.at.gov.lv/files/docs/conferences/paraugi/kl-01\[1\].07.08.doc](http://www.at.gov.lv/files/docs/conferences/paraugi/kl-01[1].07.08.doc)> accessed 5 November 2012

person.<sup>89</sup> Transmission also necessitates at least temporary keeping of such materials and therefore is included in the definition.

A potential problem can be seen in the difference between distribution (national definition) and making available (Lanzarote Convention Article 20 (1.b)). Distribution requires acquisition of the material by another person while making available is completed upon the material being potentially available to another person. Keeping such materials is not a necessary precondition to making them available, thus creating potential for complications in cases where materials are made available using communication technologies (peer-to-peer networks, torrent websites).<sup>90</sup> Whether such theoretical differences are grave enough to lay outside the bounds of interpretation of the norm in practice is unclear. Attribution of criminal liability for actions relating to child pornography is potentially compatible with the Lanzarote Convention, but such compatibility remains untested.

The “without right” exemption used in Article 20(1) of the Lanzarote Convention applies to the process of education, scientific, research or medical purposes, law enforcement institutions and courts (for the performance of duties thereof) and for a State or local government institution, in so far as is necessary for the performance of duties prescribed by law (Article 9 of the Law on Pornography Restrictions).

**xiii.** While the Law on Pornography Restrictions offers an explicit definition of pornographic materials, no such definition of erotic materials exists. Such a lack has been found to create difficulties in distinguishing between these categories.<sup>91</sup> The Law on Pornography Restrictions initially provided for an expert commission that, upon request by an investigative body, could evaluate potentially pornographic materials. Forming such a commission proved to be politically complicated and financially expensive, and provision for it was eliminated from the Law on Pornography Restrictions. Recently there have been calls to restore such a commission and expand its powers.<sup>92</sup> Therefore currently no centralized

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<sup>89</sup> Hamkova, *Vai bērnu pornogrāfija Latvijā nav sodāma*, referring to Decision of Plenum of Supreme Court of Republic of Latvia „On Practice in Criminal Cases Regarding Wrongful Acts with Arms, Munitions, Explosives and Special Resources” (2 June 1997) Latvijas Republikas Augstākās tiesas Plēnuma lēmumu krājums (Rīga, TNA 2002).

<sup>90</sup> see also *Explanatory Report to Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* para. 136.

<sup>91</sup> inter alia, Reinfelde, *Bērnu pornogrāfija - kā noteikt tās robežas*.

<sup>92</sup> *Informative Report „On Foreign Experience in Combating Prostitution and Recommendations on Allaying Prostitution in Latvia”* p. 22



system of control of pornographic material or expert body for evaluation of such material exists. In either administrative or criminal proceedings, both the investigative body and court can request an expert opinion on whether the materials under question are pornographic. No legal requirements for such experts exist.

Article 50 of Protection of Rights of Child Law states that it is prohibited to show, sell, give as a gift, rent or promote to a child toys and video recordings, computer games, newspapers, magazines and other types of publications, in which erotica and pornography are promoted and which pose a threat to the psychological development of a child. Such materials may not be accessible to the child, irrespective of the form of expression, devices for showing and location thereof. Sale, distribution or demonstration of pornographic materials requires a permit of the local municipal authority, such places being inaccessible to children and subject to municipal regulations. Advertising of material of a pornographic nature is prohibited. Restrictions do not apply to the process of education, scientific, research or medical purposes, specialized libraries, law enforcement institutions and courts (for the performance of duties thereof) and for State or local government institutions, in so far as is necessary for the performance of duties prescribed by law.

Depending on the form and usage of potentially pornographic materials, besides the Law on Pornography Restrictions, further and partly parallel restrictions exist in, *inter alia*, Law On the Press and Other Mass Media (Article 7), Electronic Media Law (Article 26), Advertising Law (Article 3, paragraph 2), Law On Information Society Services, Regulation of the Cabinet of Ministers on Restrictions of Entertainment of an Intimate Character, Regulation of the Cabinet of Ministers on Circulation of Computer Games, as well as further municipal regulations. Therefore, depending on the form and usage of such materials, there are several state institutions responsible for enforcement of the laws mentioned.

If pornographic materials are distributed to children with the aim of sexual gratification, such actions constitute either corruption of children (Article 162 of the Criminal Law) or encouraging to involve in sexual acts (Article 162.<sup>1</sup> of the Criminal Law), depending on the facts of the case. If there exists no aim of sexual gratification (e.g., selling a journal containing pornographic imagery to a person under eighteen years of age), violation of the requirements regarding the importation, manufacture, distribution, public demonstration or advertising of such materials carry an administrative sanction under Article 173.<sup>2</sup> of Latvian Administrative Violations Code. If the materials are erotic (undefined term), the sanction is a warning or a fine of 100 LVL (142.45 €) to a natural person or a fine of up to 1000 LVL

(1424.50 €) to a legal person, with or without confiscation of property. For pornographic materials the fine is 100-250 LVL (142.45-356.12 €) for natural persons and 1000-2500 LVL (1424.50-3561.25 €) for legal persons, with or without confiscation of property.

The State Police is empowered to draw up the initial administrative violation report. Administrative violation matters in cases of distribution of pornographic materials are examined by district (city) court judges. If the administrative violation has been committed in the area of electronic mass media, it falls under the jurisdiction of National Electronic Mass Media Council, except for cases, when the administrative violation report has been drawn up by another institution's officials, who are authorized to examine the relevant administrative violation matters. If the administrative violation has been committed in the area of public advertising, further measures can be applied by the Consumer Rights Protection Centre. Furthermore, if the mass medium has repeated violations of provisions regarding the circulation of pornographic materials within a one year period or published child pornography, the Prosecutor General of the Republic of Latvia, the Chief State Notary of the Enterprise Register and the Minister of Finance have the right to initiate legal proceedings in regard to termination of operation of a mass medium (Article 7 and Article 12 of Law on the Press and Other Mass Media).

If violation of provisions regarding the circulation of pornographic materials is repeated within a one year period, it carries a criminal sanction of deprivation of liberty for a term not exceeding one year, or custodial arrest, or community service, or a fine not exceeding 150 times the minimum monthly wage (Article 166, paragraph 1 of the Criminal Law).

**xiv.** Making a child participate in pornographic performances is not a separate offence. If such a performance is recorded, the offence is production of child pornography (Article 166, paragraph 3 of the Criminal Law). If the performance includes displaying the child naked or inappropriate physical contact and the offender is an adult or the child does not consent, the offence is corruption of children (Article 162 of the Criminal Law). Underage victims are incapable of consent. If the performance includes a higher degree of physical contact and is aimed at achieving sexual gratification and the child is under sixteen years of age or in financial or other dependence of the offender or offender is an adult, the offence is sexual connection with a person under sixteen years of age (Article 161 of the Criminal Law). If the child receives a fee for the performance, depending upon the degree and nature of contact, involving a child in such a performance could be involving a person in child prostitution or

living on the avails of prostitution regardless of age and consent of the child (Articles 164 and 165 of the Criminal Law).

It can be seen that the current legal situation, although inconsistent and vague, does consider making a child participate in pornographic performances an offence. Some theoretical exceptions can be imagined, e. g., a pornographic performance organized by a person between sixteen and eighteen years of age where the participant consents and is also between sixteen and eighteen years of age. Such exceptions remain purely theoretical. However, it is still strongly advisable to make causing or recruiting a child to participate in pornographic performances, as well as attending such performances, a separate offence, with differing sentences depending on nature of coercion and age of the child.

The difference between recruitment and coercion currently varies depending on the nature of coercion. If coercion is applied through physical violence or threats of such to the victim or person intimate to the victim, depending on the nature of the performance, the offence is rape or violent sexual assault. Nonviolent coercion is corruption of children (Article 162 of the Criminal Law). Recruitment without elements of coercion if the child is under sixteen years of age falls under solicitation of children for sexual purposes (Article 162.<sup>1</sup> of the Criminal Law). Recruitment of a child over sixteen years of age could be construed as attempted corruption of children if the recruiter is an adult and depending on the details of the particular case.

In an internal assessment carried out by the Cabinet of Ministers in 2008 it was found that knowingly attending pornographic performances involving the participation of children was not considered a crime under laws in effect at the time.<sup>93</sup> Although knowing attendance of such a performance could theoretically be understood as abetting (joint participation) – knowingly promoting the commission of a criminal offence, providing means, or removing impediments for the commission of such (Article 20, paragraph 4 of the Criminal Law) – and attendee could be held liable in accordance with the same article of the Criminal Law which provides for the liability of the perpetrator, such a possibility remains untested.

In the aforementioned internal assessment it was suggested that Latvia could use the reservation right stated in Article 21 paragraph 2 of Lanzarote convention not to apply

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<sup>93</sup> *Explanatory report on Project of Cabinet of Ministers Ordinance "On Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse"* p. 4.

Article 21 paragraph 1.c (knowingly attending pornographic performances involving the participation of children).<sup>94</sup>

## 2.4 Corruption of Children

xv. National definition of corruption of children (leading to depravity) is compatible with the definition given in Article 22 of the Lanzarote Convention. While it may be more appropriate to deal with some cases of corruption of children under the topic of sexual abuse, the same article of the Criminal Law deals with exceedingly different actions starting from intentional displays of nakedness around a minor and ending with performing oral sex on a minor against his or her will. Therefore it is necessary to examine understanding of the term sexual activities in this context and differences between rape or violent sexual assault and corruption of children.

Article 162 of the Criminal Law refers to leading to depravity of a minor against the will of the minor or if such have been committed by a person who has attained the age of majority and provides a separate sentence if the victim is underage. Text of the legal norm in Latvian refers to *netiklas darbības*, literally translated as “unvirtuous actions”. Such actions must be separated from any type of intercourse and “other unnatural sexual acts of gratification” as used in the definition of violent sexual assault. In 2007 Supreme court of Latvia compiled a court report<sup>95</sup> on separating violent sexual assault and corruption of children and attempted to stop the widespread miscategorization of such crimes. There has been no inquiry in whether the report succeeded in its aim.

The motive for both crimes is sexual gratification. Violent sexual assault is „pederastic or lesbian or other unnatural sexual acts of gratification”, while corruption of children is understood as deliberate actions that are aimed towards sexual gratification of the offender or causing sexual arousal in the victim.

On the non-physical side there are actions that correspond to the definition given in the Lanzarote Convention. Exhibitionism, public masturbation, showing pornographic images and providing inappropriate information on sexual matters is corruption of children, if the offender knew or suspected the age of the victims. If the victim is a minor he has to be

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<sup>94</sup> *Explanatory Report on Project of Cabinet of Ministers Ordinance "On Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse"* pp. 4-5.

<sup>95</sup> *Court Report on Article 160 and 162 of the Criminal Law*.

unwilling or the offender must be an adult. If the victim is underage his or her will is irrelevant.

The legal consequences of physical sexual activities are considerably more vague. For example, imitation of sexual intercourse (insertion of penis between legs, insertion of foreign objects in vagina) is violent sexual assault. Initiating oral-genital contact with the offender's genitals is violent sexual assault, but initiating oral-genital contact with the victim's genitals is corruption of children. However, if the offender only attempts to insert his penis into victim's mouth, the offence is corruption of children, if there is no prolonged contact or rubbing of penis on victim's body. Forcing one underage person into oral-genital contact with another is corruption of children, due to non-involvement of offender's genitals. Making an underage person massage the offender's penis until ejaculation is corruption of children. In courts' judgments there exists an abundance of such detailed examples. In practical application the distinction is focused on offender's genitals and whether they were inserted in an orifice or rubbed on victim's body, thereby imitating intercourse and achieving sexual gratification.

While such differences in the definitions of sexual activities can seem minor, they cause serious practical consequences – violent sexual assault on a minor carries a sentence of deprivation of liberty of five to fifteen years, while corruption of a minor up to three years.

Causing a child to witness or participate in such sexual activities is corruption of children under national law regardless of any element of coercion, either explicitly or implicitly violent. Causation in these cases is understood as the standard *sine qua non* causative relationship.

## 2.5 Solicitation of Children for Sexual Purposes

**xvi.** Article 162.<sup>1</sup> of the Criminal Law recognizes as criminal both encouraging a person who has not attained the age of sixteen to engage in sexual acts regardless of the way in which it is expressed, if such have been committed by a person who has attained the age of majority. There is no requirement for attempting to achieve or achieving sexual gratification through such encouragement, since such actions can be performed on behalf of the offender or another person. The law provides a separate sentence in cases where the victim was underage. Grooming (encouraging a person under sixteen years of age to meet with the aim to commit sexual acts or enter into a sexual relationship) is included in encouragement to engage in sexual acts and is not a separate offence.

The offence was separated from corruption of children (leading into depravity) by an amendment of the Criminal Law that came into effect on October 30, 2008. Before the amendment intentional sexual gratification through communication technologies could be considered a criminal offence in cases where, *inter alia*, offender displayed his genitals<sup>96</sup> or provided pornographic images and inappropriately informed the victim about sexual matters.<sup>97</sup> The exact boundaries were unclear.

**xvii.** Aiding and abetting in national law is understood as either participation or joint participation. Participation (joint commission) is knowing joint commission of an intentional criminal offence by two or more persons. Each of such persons is a participant (joint perpetrator) in the criminal offence (Article 19 of the Criminal Law). A participant is held liable in accordance with the same article of the Criminal Law which provides for the liability of the perpetrator.

Joint participation is knowing commission of an act or failure to act, by which a person (joint participant) has jointly with another person (perpetrator), participated in the commission of an intentional criminal offence, but he himself or she herself has not been the direct perpetrator of it. Organizers, instigators and abettors are joint participants in a criminal offence. A joint participant is held liable in accordance with the same article of the Criminal Law which provides for the liability of the perpetrator. However, the nature of the participation of each person and his or her role in the committed criminal offence is taken into account during sentencing. (Article 20 and Article 54 of the Criminal Law).

Attempting a crime is a conscious act or failure to act, which is directly dedicated to intentional commission of a crime, if the crime has not been completed for reasons independent of the will of the guilty party. Preparation for a crime is the locating of, or adaptation of, means or instrumentalities, or the intentional creation of circumstances conducive for the commission of an intentional offence, if, in addition, it has not been continued for reasons independent of the will of the guilty party (Article 15 of the Criminal Law). During sentencing for preparation for a crime or for an attempted crime, a court takes into account the nature of the acts committed by the offender and the harm caused by such,

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<sup>96</sup> Ilze Veitnere, *Bernu seksuāla izmantošana. Psiholoģiskie aspekti un izmeklēšanas īpatnības*, (Rīga, Latvijas Policijas Akadēmija 1997) p. 44.

<sup>97</sup> Decision of Collegium of Criminal Cases of Kurzeme District Court of Republic of Latvia No. K02-0009-06 (24 February 2006).

the degree of realization of the criminal intent and the reasons why the crime has not been completed (Article 53 of the Criminal Law).

Liability for preparation for a crime or an attempted crime applies in accordance with the same Article of the Criminal Law as sets out liability for a specific offence. A person is not held criminally liable for an attempt to commit a criminal violation (see definitions). Of the crimes under review only solicitation of children for sexual purposes, if the victim is over fourteen years of age, is a criminal violation. Criminal liability applies only for preparation for serious or especially serious crimes (see definitions in conjunction with Table 1 in answer to question xxii of this chapter).

## 2.6 Corporate Liability

**xviii.** Criminal sanctions can not be applied to legal entities for criminal offences committed on their behalf by a natural person because of a particular legal understanding of the concept of guilt and constitutionally protected presumption of innocence.<sup>98</sup> However, in cases where a criminal offence has been committed by a natural person acting as an individual or as a member of the collegial institution of the relevant legal person on the basis of a right to represent the legal person, to act on behalf of or to take decisions in the name of such legal person, or realising control within the scope of the legal person or while in the service of the legal person, coercive measures provided for in Chapter VIII.<sup>1</sup> of the Criminal Law may be applied by the court (Article 12 of the Criminal Law). Coercive measures for legal persons were introduced by an amendment of the Criminal Law that came into effect on October 1, 2005.

Article 70.<sup>8</sup>, paragraph 2, clause 2 of the Criminal Law states that a court in applying coercive measures to a legal person among other circumstances must take into account the status of the natural person in the institutions of the legal person, but does not elaborate. The status of the natural person, together with the nature of the criminal offence, the harm caused, actions of the legal person, the nature and consequences of such actions, the measures, which the legal person has performed in order to prevent the committing of a

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<sup>98</sup> Dana Rone, *Report to Ministry of Interior On Institute of Criminal Liability of Legal Entities in Eight Countries – Nordic Countries (Finland, Sweden, Norway, Iceland and Denmark) and Baltic Countries (Latvia, Lithuania and Estonia)* (15 March 2006) p. 37.  
[http://www.at.gov.lv/files/docs\\_en/LEGAL%20SCIENTIFIC%20RESEARCH.doc](http://www.at.gov.lv/files/docs_en/LEGAL%20SCIENTIFIC%20RESEARCH.doc) accessed 5 November 2012

new criminal offence, and the size, type of activities and financial circumstances of the legal person are considered together by the court in deciding whether it is necessary to apply a particular coercive measure.

In national criminal law there exists no explicit definition of a legal person. The term “legal entity” in Latvia is understood considerably wider than legal person. Several entities, such as law firms and other personal, limited or general partnerships, are legal entities, but not legal persons. Whether coercive measures can be applied to such entities is unclear and untested in courts.

**xix.** Criminal liability for legal persons is carried out through the means of coercive measures as described in answer to questions xviii and xxiv of this chapter. The state not being able to apply coercive measures to itself, such measures are inapplicable to public law legal persons (e.g., municipalities). Whether such measures could be applied to government-owned corporations or municipally owned corporations is unclear.<sup>99</sup> Administrative liability exists in cases of violation of regulations regarding circulation of pornographic materials, as further described in answer to question xiii of this chapter.

A person upon whom harm has been inflicted by a criminal offence has the right to claim compensation for inflicted harm, taking into account the moral injury, physical suffering, and financial loss thereof, within the bounds of criminal proceedings (Article 22 of Criminal Procedure Law). Article 353, paragraph 1, clause 3 of the Criminal Procedure Law attributes liability to a legal person:

“(…) if, in the case of such legal person, a natural person has been found guilty of committing a criminal offence and such natural person committed such offence acting individually, as a member of a collegial authority of the relevant legal person, or based on the right to represent the legal person, act under the assignment thereof, or take decisions on behalf of the legal person, or in actualising control within the framework of the legal person, or being in the service of the legal person.”

A strict grammatical reading of the legal norm implies employment relationship (being in the service of a legal person) is enough in and of itself to find the legal person liable for any criminal actions of natural person. However systemic interpretation in conjunction with

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<sup>99</sup> Rūta Rācene-Bērtule, *Juridiskām personām piemērojamie piespiedu ietekmēšanas līdzekļi* (2008) Jurista Vārds No.20 (254), 27 May 2008.



Article 70.<sup>8</sup>, paragraph 2, clause 2 of the Criminal Law as mentioned in answer to question xviii of this chapter, as well as taking into account *ejusdem generis*, leads to conclusion that “being in the service of the legal person” means carrying out the legal duties of an employee (volunteer, freelancer) with regards to the legal person during the commission of the offence. Whether there has to exist a causative relationship between the actions of the legal person (e.g., culpable negligence or direct order) and offence by the natural person is currently unclear due to infrequent application of the norm by the courts. National civil law standards are applied, insofar as they are in accord with applicable criminal law.

If a victim believes that the entire harm caused to him or her has not been compensated in criminal proceedings, he or she has the right to bring a civil suit without additional state fees (Article 350, paragraphs 3 and 4 of the Criminal Procedure Law). With respect to *res indicata*, adjudication in criminal proceedings regarding the guilt of a person is binding in the adjudication of the civil case (Article 350, paragraph 5 of the Criminal Procedure Law). Regarding the question whether a final adjudication of innocent is binding in civil proceedings Article 526 of the Criminal Procedure Law states both that:

“[t]he operative part of a judgment of acquittal shall indicate a court decision regarding the fact that an accused (...) has been found innocent in the prosecution pursued against him or her (...) and acquitted,”

and

“If a court renders a judgment of acquittal, such court shall leave without adjudication an application regarding the consideration of harm caused as a result of an offence. The leaving of an application without adjudication shall not be an impediment to the raising of a claim for compensation for harm in accordance with the procedures specified by the Civil Procedure Law.”

Therefore the Criminal Procedure Law does not entirely preclude a civil claim for compensation even in cases where the accused is found to be innocent.

Once civil proceedings have begun, slightly different standards of proof and culpable negligence apply. Extensive analysis of national civil law regarding compensation for damages and moral injury is outside the bounds of this report. In general, a legal person “(...) who fails to exercise due care in choosing servants or other employees and to previously satisfy himself or herself as to their abilities and suitability to perform the duties as may be imposed on them, shall be liable for losses they cause a third person thereby” (Article 1782

of the Civil Law). Therefore, at least an element of culpable ordinary negligence as defined in Article 1646 of the Civil Law – “lack of care and due diligence as must be observed by any reasonably prudent and careful manager” – must be established. It must be noted that in criminal or civil proceedings the person harmed enjoys a presumption of moral injury caused by certain crimes only since 2006, where previously moral injury had to be proven.<sup>100</sup>

**xx.** Legal entities not being capable of being in the state of guilt under national criminal law, any coercive measures applied to such entities have no impact regarding individual criminal liability. Administrative fine in cases of violation of regulations regarding circulation of pornographic materials must be applied to both the natural and legal person under consideration; such liability can not be separated.<sup>101</sup> In civil suits against legal persons in connection with a crime committed by a natural person in their service, regardless whether they are claims for compensation within criminal proceedings or a separate civil suit, both the natural and legal person can be held liable (Article 1638 and Article 1781 of the Civil Law). Some exceptions, such as the natural person being *non compos mentis* during commission of crime, apply and the legal person acquires direct civil liability.

## 2.7 Aggravating Circumstances

**xxi.** Article 48, paragraph 1 of the Criminal Law lists circumstances that may be considered aggravating:

- “1) the criminal offence was committed repeatedly or constitutes recidivism of criminal offences;
- 2) the criminal offence was committed while in a group of persons;
- 3) the criminal offence was committed, taking advantage in bad faith of an official position or the trust of another person;

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<sup>100</sup> Supreme Court of Republic of Latvia, *Court Report on Compensation Regarding Moral Injuries in Criminal Proceedings* (in Latvian 2010/2011) <<http://www.at.gov.lv/files/docs/petijumi/moralais%20kaitejums.pdf>> accessed 5 November 2012

<sup>101</sup> Edvīns Danovskis, *Administratīvās atbildības regulejuma konceptuālās problēmas* (2011) Jurista Vārds No. 20, 17 May 2011 p. 6. <[http://rln.lv/lv/pdf/Administrativas%20atbildibas%20regulejuma%20konceptualas%20problemas\\_Danovskis.pdf](http://rln.lv/lv/pdf/Administrativas%20atbildibas%20regulejuma%20konceptualas%20problemas_Danovskis.pdf)> accessed 5 November 2012, referring to SKA-19/2009, Judgement of Department of Administrative Cases of Supreme Court of Republic of Latvia in Case No. A42450305 (5 March 2009) p. 5-6, para. 13. <[http://www.tiesas.lv/files/AL/2009/03\\_2009/05\\_03\\_2009/AL\\_0503\\_AT\\_SKA-0019\\_09.pdf](http://www.tiesas.lv/files/AL/2009/03_2009/05_03_2009/AL_0503_AT_SKA-0019_09.pdf)> accessed 5 November 2012

- 4) the criminal offence has caused serious consequences;
- 5) the criminal offence was committed against a woman, knowing her to be pregnant;
- 6) the criminal offence was committed against a person who has not attained fifteen years of age or against a person taking advantage of his or her helpless condition or of infirmity due to old-age;
- 7) the criminal offence was committed against a person taking advantage of his or her official, financial or other dependence on the offender;
- 8) the criminal offence was committed with particular cruelty or with humiliation of the victim;
- 9) the criminal offence was committed taking advantage of the circumstances of a public disaster;
- 10) the criminal offence was committed employing weapons or explosives, or in some other generally dangerous way;
- 11) the criminal offence was committed out of a desire to acquire property;
- 12) the criminal offence was committed under the influence of alcohol, narcotic, psychotropic, toxic or other intoxicating substances;
- 13) the person committing the criminal offence, for purposes of having his or her punishment reduced, has knowingly provided false information regarding a criminal offence committed by another person;
- 14) the criminal offence was committed due to racist motives;
- 15) the criminal offence related to violence or threats of violence was committed against a person to whom the perpetrator is related in the first or the second degree of kinship, against the spouse or former spouse, or against a person with whom the perpetrator is or has been in unregistered marital relationship, or against a person with whom the perpetrator has a joint (single) household.”

As already mentioned in answer to question vi of this chapter, the list of aggravating circumstances is not specific to sexual offences against minors and is applicable to any criminal offence where the circumstance is not already a constituent element of the crime. Recognizing a particular circumstance as aggravating or not falls under the discretion of the court. Definition of the term “serious consequences” used in clause 4 is given under Table 1

in answer to question xxii of this chapter. The circumstances listed include all aggravating circumstances required by Article 28 of the Lanzarote Convention.

Previous convictions by another state are taken into account in sentencing; however, repetition of criminal offences is defined narrowly by Article 25, paragraph 1 of the Criminal Law as:

“the commission by one person of two or more criminal offences, which are provided for in one and the same Section of this Law, or two or more criminal offences which are provided for in various Sections of this Law, if liability for such repetition is provided for in this Law.”

## 2.8 Sanctions and Measures

**xxii.** For reasons of clarity, sanctions for the crimes mentioned are best explained in the form of a table.

<i>Table 1. Sanctions for crimes mentioned in the report</i>	
<b>Sexual abuse</b>	
act of sexual intercourse by means of violence, threats or taking advantage of the state of helplessness of a victim (rape) if commission thereof is on a minor	deprivation of liberty 5-15 years, with probationary supervision up to 3 years
rape, if serious consequences* are caused thereby, or rape of an underage person	life imprisonment or deprivation of liberty 10-20 years, with probationary supervision up to 3 years
pederastic or lesbian or other unnatural sexual acts of gratification, if such acts have been committed using violence or threats or by taking advantage of the state of helplessness of a person (violent sexual assault) if commission thereof is on a minor	deprivation of liberty 5-15 years, with probationary supervision up to 3 years
violent sexual assault if serious consequences are caused thereby, as well as	life imprisonment or deprivation of liberty 10-20 years, with probationary supervision

if commission thereof is on an underage person	up to 3 years
sexual connection, or pederastic, lesbian or other unnatural sexual acts of gratification, with a person who has not attained the age of sixteen years and who is in financial or other dependence on the offender, or if such offence has been committed by a person who has attained the age of majority	deprivation of liberty up to 4 years, or custodial arrest, or community service, or a fine up to 200 times the minimum monthly wage, with probationary supervision up to 3 years
cruel or violent treatment of a minor, if physical or mental suffering has been inflicted upon the minor and if such has been inflicted by persons upon whom the victim is financially or otherwise dependent	deprivation of liberty up to 3 years, or custodial arrest, or community service
<b>Child prostitution</b>	
involving a person in prostitution if such acts have been committed repeatedly or by a group of persons, or commits inducing or compelling a minor to engage in prostitution, or commits providing premises to minors for purposes of prostitution	deprivation of liberty 3-8 years, with or without confiscation of property, with or without probationary supervision up to 3 years
encouraging or compelling an underaged person to engage in prostitution	deprivation of liberty 5-12 years, with or without confiscation of property, with probationary supervision up to 3 years
the same acts, if commission thereof is by an organised group	deprivation of liberty 5-15 years, with confiscation of property, with probationary supervision up to 3 years
taking advantage, for purposes of enrichment, of a person who is engaged in	deprivation of liberty up to 8 years, with confiscation of property, with probationary

prostitution, if commission thereof is by a group of persons, or with respect to minors	supervision up to 3 years
the same acts if commission thereof is by an organised group or if commission thereof is with respect to underaged persons	deprivation of liberty 5-15 years, with confiscation of property, with probationary supervision up to 3 years
<b>Child pornography</b>	
downloading, acquisition, importation, production, public demonstration, advertising or other distribution of such pornographic or erotic materials as relate or portray the sexual abuse of children (...), or the keeping of such materials	deprivation of liberty up to 3 years, or custodial arrest, or community service, or a fine up to 200 times the minimum monthly wage, with or without confiscation of property
involvement or utilisation of minors in the production (manufacturing) of pornographic or erotic materials	deprivation of liberty up to 6 years, with or without confiscation of property, with or without probationary supervision up to 3 years
involvement or utilisation of underaged persons in the production (manufacturing) of pornographic or erotic materials	deprivation of liberty 3-12 years, with or without confiscation of property, with or without probationary supervision up to 3 years
involvement or utilisation of minors or underaged persons in the production (manufacturing) of pornographic or erotic materials by an organised group	deprivation of liberty 5-15 years, with confiscation of property, and with probationary supervision up to 3 years
<b>Corruption of children</b>	
leading to depravity of a minor against the will of the minor or if such have been committed by a person who has attained the age of majority	deprivation of liberty up to 3 years, or custodial arrest, or community service, or a fine up to 150 times the minimum monthly wage, with or without probationary

	supervision up to 3 years
leading to depravity of an underaged person	deprivation of liberty up to 5 years, or custodial arrest, or community service, or a fine up to 200 times the minimum monthly wage, with or without probationary supervision up to 3 years
<b>Solicitation of children for sexual purposes</b>	
encouraging a person who has not attained the age of 16 to involve in sexual acts or encouraging such person to meet with the aim to commit sexual acts or enter into a sexual relationship regardless of the way in which the encouraging is expressed, if such have been committed by a person who has attained the age of majority	custodial arrest, or community service, or a fine up to 100 times the minimum monthly wage, with or without probationary supervision up to 3 years
the same acts against an underaged person	deprivation of liberty up to 3 years, or custodial arrest, or community service, or a fine up to 150 times the minimum monthly wage, with or without probationary supervision up to 3 years

\* serious consequences – as defined in the Law on the Coming into Effect and Application of the Criminal Law, Article 24, paragraph 1, serious consequences of a criminal offence are death of a person, serious bodily injury or psychological disturbance to at least one person, less serious bodily harm to more than one person, damage to property on a large scale (value of at least 50 times minimum monthly wage, i.e., 10 000 LVL or 14 245.01 €) or other substantial harm to the lawfully protected interests and rights of persons.

As can be seen from the table, all examined criminal offences, except solicitation of a child between fourteen and sixteen years of age, carry sentences that include deprivation of liberty. Confiscation of property as a separate criminal sanction is expanded upon in answer to question xxv of this chapter.

Extradition procedure under national law can not be fully described here both because of space constraints and wide scope of the issue. Latvia is party to European Convention on Mutual Assistance in Criminal Matters (entry into force in 1997, since 30 June 2004 inapplicable in relations with the Member States of the European Union), European Convention on Extradition (entry into force in 1997), and Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (entry into force in 1999). Aforementioned conventions are fully implemented in national law.

Regarding specific requirements set out in Article 25 of Lanzarote Convention, Latvia claims jurisdiction over any offence established in accordance with Lanzarote Convention, when the offence is committed in its territory (Article 2, paragraph 1 of the Criminal Law), on board a ship flying its flag (Article 3 of the Criminal Law), by one of its nationals or habitual residents (Article 4, paragraph 1 of the Criminal Law). It should be noted that the term “nationals” here and in European Convention on Extradition is understood as citizens of the Republic of Latvia and non-citizens, i.e., permanent residents of Latvia with specific status regulated by the Law on the Status of Former USSR Citizens who are not Citizens of Latvia or any other State (non-citizens, *nepilsoņi* in Latvian).

Article 696 of the Criminal Procedure Law lists grounds for extradition of a person:

“(1) A person who is located in the territory of Latvia may be extradited for criminal prosecution, trial, or the execution of a judgment, if a request has been received from a foreign state to extradite or place under temporary arrest such person regarding an offence that, in accordance with the law of Latvia and the foreign state, is criminal.

(2) A person may be extradited for criminal prosecution, or trial, regarding an offence the committing of which provides for a punishment of deprivation of liberty the maximum limit of which is not less than one year, or a more serious punishment, if the international agreement does not provide otherwise.

(3) A person may be extradited for the execution of a judgment by the state that rendered the judgment and convicted the person with a punishment that is related to deprivation of liberty for a term of not less than four months, if the international agreement does not provide otherwise.

(4) If extradition has been requested regarding several criminal offences, but extradition may not be applied for one of such offences because such offence does not comply with the



conditions regarding the possible or imposed punishment, the person may also be extradited regarding such criminal offence.”

Article 697 of the Criminal Procedure Law lists reasons for refusal to extradite a person:

“(1) The extradition of a person may be refused, if:

- 1) a criminal offence has been committing completely or partially in the territory of Latvia;
- 2) the person is being held as a suspect, is accused, or is being tried in Latvia regarding the same criminal offence;
- 3) a decision has been taken in Latvia to not commence, or to terminate, criminal proceedings regarding the same criminal offence;
- 4) extradition has been requested in connection with political or military criminal offences;
- 5) a foreign state requests the extradition of a person for the execution of a punishment imposed in a judgment by default, and a sufficient guarantee has not been received that the extradited person will have the right to request the repeated adjudication of the case;
- 6) extradition has been requested by a foreign state with which Latvia does not have an agreement regarding extradition.

“(2) The extradition of a person shall not be admissible, if:

- 1) the person is a Latvian citizen;
- 2) the request for the extradition of the person is related to the aim of commencing criminal prosecution of such person or punishing such persons due to his or her race, religion affiliation, nationality, or political views, or if there are sufficient grounds for believing that the rights of the person may be violated due to the referred to reasons;
- 3) a court adjudication has entered into effect in Latvia in relation to the person regarding the same criminal offence;
- 4) the person may not, in accordance with a Latvian law regarding the same criminal offence, be held criminally liable, tried, or execute a punishment in connection with a limitation period, amnesty, or another legal basis;
- 5) the person has been granted clemency, in accordance with the procedures specified by law, regarding the same criminal offence;

6) the foreign state does not provide a sufficient bail that such state will not impose the death punishment on such person and execute such punishment;

7) the person may be threatened with torture in the foreign state.

(3) An international agreement may provide for other reasons for a refusal of extradition.”

Paragraphs 6 and 7 of Article 25 of the Lanzarote Convention, including principle *aut dedere aut judicare* are included in Article 4, paragraph 4 of the Criminal Law:

“Foreigners who do not have a permanent residence permit for the Republic of Latvia and who have committed a criminal offence in the territory of another state, in the cases provided for in international agreements binding upon the Republic of Latvia, irrespective of the laws of the state in which the offence has been committed, shall be held liable in accordance with this Law if they have not been held criminally liable for such offence or committed to stand trial in the territory of another state.”

In conclusion, while one crimes described in the Lanzarote Convention currently does not include penalty involving deprivation of liberty which can give rise to extradition under national law (solicitation of children between 14 and 16 years of age) and several crimes are defined vaguely or not at all (viewing of pornographic performances involving children, questions regarding clients of underage prostitutes, “simulated representations” part of child pornography etc.), the national extradition system is in full accord with the Lanzarote Convention.

**xxiii.** Evaluation of the effectiveness of sanctions is a complicated issue, especially in circumstances where said sanctions are frequently changed. An amendment to the Criminal Law<sup>102</sup> that came into effect on October 1<sup>st</sup> 2011 softened some of the sanctions for crimes of sexual nature, while at the same time strengthening the role of State Probation Service, which exists only since 2004. As can be seen from Table 1 in answer to question xxii of this chapter, most crimes of sexual nature now carry a mandatory probationary period. Probationary supervision was seen as a replacement for police supervision (a parole-like

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<sup>102</sup> Amendment to the Criminal Law (28 July 2011) Latvijas Vēstnesis No. 117 (4515) 28 July 2011.  
<<http://www.likumi.lv/doc.php?id=233715>> accessed 5 November 2012

system), thereby decreasing police workload and increasing the role of specialists with appropriate education.<sup>103</sup>

Same amendment increased length of deprivation of liberty for some crimes of sexual nature (rape, violent sexual assault) while at the same time decreasing it for others (grooming, corruption of children). Decreased sentences led to reclassification of some crimes in relation to their gravity (see definitions), thereby requiring the release from pre-trial detention of several suspects. Consequently several Members of Parliament initiated an amendment once again increasing the sentences, and the amendment was supported in Parliament. At the same time for several years there have been calls from Members of Parliament<sup>104</sup> to apply so-called “chemical castration” to persons who have been convicted of crimes of sexual nature, such calls increasing after media attention towards crimes against children.<sup>105</sup> In 2008 such initiatives were supported by Parliament’s Human Rights and Public Affairs Commission.<sup>106</sup> While leading NGOs urge caution<sup>107</sup> State Probation Service<sup>108</sup> and the Ombudsman of Republic of Latvia<sup>109</sup> are opposed, supporting their opinion by stressing the role of rehabilitative justice and non-exhaustion of alternative means respectively. It can be seen that, while the white paper Concept of Policy of Criminal Punishment<sup>110</sup> exists, in Parliament amendments are occasionally proposed and supported on an *ad hoc* basis, in conflict with stated policy and in a way that might be characterized as

<sup>103</sup> Ordinance of the Cabinet of Ministers of Republic of Latvia No. 6 (9 January 2009), *Concept of Policy of Criminal Punishment* p. 26. <<http://polsis.mk.gov.lv/LoadAtt/file36425.doc>> accessed 5 November 2012

<sup>104</sup> „Deputāts rosinās Latvijā pedofilus ķīmiski un ķirurģiski kastrēt” (Delfi.lv, 30 March 2012) <<http://www.delfi.lv/news/national/politics/deputats-rosinas-latvija-pedofilus-kimiski-un-kirurgiski-kastret.d?id=42248500>> accessed 5 November 2012

<sup>105</sup> For example, alleged rape of a ten year old child where the suspect was previously sentenced for rape of a minor, „Divreiz sodīts vīrietis izvaro desmit gadus vecu, iemidzinātu meiteni” (Tvnet.lv, 9 December 2008) <[http://www.tvnet.lv/zinas/kriminalzinas/289946-divreiz\\_sodits\\_virietis\\_izvaro\\_desmit\\_gadus\\_vecu\\_iemidzinatu\\_meiteni](http://www.tvnet.lv/zinas/kriminalzinas/289946-divreiz_sodits_virietis_izvaro_desmit_gadus_vecu_iemidzinatu_meiteni)> accessed 5 November 2012

or alleged rape of a two-year old child where suspects were part of child’s extended family „Slimnīcā nogādāta divarpus gadus veka izvarota meitenīte” (Apollo.lv, 26 October 2010) <<http://www.apollo.lv/zinas/slimnica-nogadata-divarpus-gadus-veca-izvarota-meitenite/465129>> accessed 5 November 2012.

<sup>106</sup> Klinta Ločmele „Noziegums īso svārku mīta paēnā” (Lvportals.lv, 7 October 2009), <<http://www.lvportals.lv/print.php?id=198744>> accessed 5 November 2012

<sup>107</sup> Ilona Kronberga „Velc, pelīte drošu dzīvi” (Politika.lv, 29 October 2010) <<http://www.providus.lv/public/27379.html>> accessed 5 November 2012

<sup>108</sup> Kalvis Bormanis „Ķīmiskā kastrācija nav efektīva dzimumnoziedznieku ārstēšanā” (Tvnet.lv, 11 October 2012) <[http://www.tvnet.lv/zinas/viedokli/439149-kimiska\\_kastracija\\_nav\\_efektiva\\_dzimumnoziedznieku\\_arstesana](http://www.tvnet.lv/zinas/viedokli/439149-kimiska_kastracija_nav_efektiva_dzimumnoziedznieku_arstesana)> accessed 5 November 2012

<sup>109</sup> „Tiesībsargs: Ķīmiskā kastrācija nevar tikt piemērota kā sods” (Tvnet.lv, 11 September 2008) <[http://www.tvnet.lv/zinas/latvija/224802-tiesibsargs\\_kimiska\\_kastracija\\_nevar\\_tikt\\_piemerota\\_ka\\_sods](http://www.tvnet.lv/zinas/latvija/224802-tiesibsargs_kimiska_kastracija_nevar_tikt_piemerota_ka_sods)> accessed 5 November 2012

<sup>110</sup> *Concept of Policy of Criminal Punishment*.

inevitably to a degree populist. Calls for tougher sentencing receive support among general public, while specialists generally call for more effective control over reintegration of prisoners in society and enforcement of existing regulations.

At the same time and while this report was being written, Ministry of Interior was once again engaged in a comprehensive overhaul of national regulation (mainly the Criminal Law and Criminal Procedure Law) of crimes of sexual nature to bring it in compliance with Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography.<sup>111</sup>

In 2009-2011 State Probation Service in cooperation with State Prison Administration and corresponding institutions of United Kingdom, Norway and Canada carried out a project on the development of sexual offenders' behavioral correction system in Latvia. Project's main goals included education of probationary specialists, better institutional support for interoffice and state-NGO cooperation, development of group therapy sessions, wider support for victims of sexual crimes as well as publicity efforts. In project's concluding document stressed several requirements for successful implementation and development of probationary control: continued education of specialists of State Probation Service, inclusion in purview of State Probation Service of persons who commit offences with a sexual element (such as sexual harassment) that are not considered sexual crimes and exclusion of persons without objective need of therapy (so-called "Romeo & Juliet" cases where the offender is underage), improved financial, institutional and psychological support for specialists of State Probation Service, and volunteer involvement.<sup>112</sup> Unfortunately, due to lack of financial resources in connection with global financial crisis, State Probationary Service received less budgetary resources and worked only part time, abandoning several probationary programmes. While Ministry of Justice considers restoring State Probationary Service to full functioning a priority, at the time of writing of this report probationary specialists are threatening a strike while calling for increased funding and monthly wages of

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<sup>111</sup> „Atbildīgie vienojas pārskatīt KL dzimumnoziegumu nodaļu” (Tvnet.lv, 2 March 2012)  
<[http://www.tvnet.lv/zinas/latvija/413035-atbildigie\\_vienojas\\_parskatit\\_kl\\_dzimumnoziegumu\\_nodalu](http://www.tvnet.lv/zinas/latvija/413035-atbildigie_vienojas_parskatit_kl_dzimumnoziegumu_nodalu)>  
accessed 5 November 2012

<sup>112</sup> Andrejs Judins, *Concluding Report of Project "On Development of Behavioural Correction System for Persons Sentenced for Sexual Crimes in Latvia"* (in Latvian, 14 April 2011) pp. 101-116.  
<[http://www.probacija.lv/uploads/projekta\\_nosleguma\\_izvertejums-judins.doc](http://www.probacija.lv/uploads/projekta_nosleguma_izvertejums-judins.doc)> accessed 5 November 2012

at least 400 LVL (569.15 €), pointing to specialists leaving State Probationary Service *en masse*.<sup>113</sup> Parliament has tentatively supported restoring full functioning to State Probationary Service from March 1<sup>st</sup>, 2013.<sup>114</sup>

Three sanctions for crimes of sexual nature have to be increased to bring them in line with Directive 2011/93/EU:

- 1) sexual connection with a willing person under 16 and over 14 years of age (Article 3 Clause 4 of the Directive, Article 161 of the Criminal Law, increase from four to five years deprivation of liberty);
- 2) solicitation of persons under 16 and over 14 years of age for sexual purposes (Article 6 of the Directive, Article 162.<sup>1</sup> of the Criminal Law, increase from current sentence which does not include deprivation of liberty to at least one year);
- 3) coercing or forcing a minor in prostitution, or threatening a child for such purposes (Article 4, paragraph 6 of the Directive, Article 164. of the Criminal Law, increase from eight to ten years deprivation of liberty).

While better separation of physical and non-physical sexual actions involving children, explicit regulation of pornographic performances, and clarity in defining criminal liability for clients of child prostitutes is all necessary, such concerns do not directly influence evaluation of current sanctions.

In conclusion, sanctions are proportionate, with minor exceptions. However, effectiveness of sanctions and long-term rehabilitation of offenders is severely constrained by an insufficiently supported State Probation Service. Authors of this report consider a well-educated, properly funded State Probation Service empowered to carry out preventive intervention programmes, work with accused persons in pre-trial phase, during custodial sentence and afterwards, providing long-term rehabilitative support and supervision to be vital for a functioning probationary system. Dissuasiveness of sanctions is dependant on public awareness of them, as well as united, objective and foreseeable application of

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<sup>113</sup> „Probācijas darbinieki piedraud ar streiku” (Tvnet.lv, 23 October 2012) <[http://www.tvnet.lv/zinas/latvija/440653-probacias\\_darbinieki\\_piedraud\\_ar\\_streiku](http://www.tvnet.lv/zinas/latvija/440653-probacias_darbinieki_piedraud_ar_streiku)> accessed 5 November 2012

<sup>114</sup> „Valdība atbalsta TM priekšlikumu par visu Probācijas dienesta funkciju atjaunošanu no 1.marta” (Leta.lv, 5 November 2012) <<http://www.leta.lv/home/important/554EFBB9-0FDA-4872-B263-3B7E74C522DF/>> accessed 5 November 2012

sanctions by the courts. Raising awareness is another stated role for State Probation Service that must be supported by Ministry of Interior, local municipalities and further education of members of the press. Indubitably, effectiveness of current trend towards rehabilitative, as opposed to retributive, justice must be evaluated, but only after it has been given a chance to work and provide statistical data without constant change in its legislative basis.

**xxiv.** If it has been ascertained during the course of criminal proceedings that a natural person has committed a criminal offence on behalf of a legal person (preconditions set out in answer to question xviii), the person directing the proceedings may take a reasoned decision to initiate proceedings for the application of coercive measures to the legal person (Article 439, paragraph 1 of the Criminal Procedure Law). The decision is communicated to the legal person. Upon completion of pre-trial proceedings and transferring the criminal case to a court, the public prosecutor indicates the grounds for the application of coercive measures to a legal person (Article 441 of the Criminal Procedure Law).

The court ascertains whether a natural person has committed a criminal offence in the interests of a legal person and the legal person, that is, one of the heads or owners of the legal person, had knowledge regarding such criminal offence and did not do anything in order to prevent the criminal offence or the consequences thereof (Article 547 and 548 of the Criminal Procedure Law). Having recognized such circumstances a court decides in a judgment regarding the application of coercive measure to the legal person.

It is possible to apply to a legal entity one of the primary coercive measures – liquidation, limitation of rights, confiscation of property or a fine. In addition to primary coercive measures it is possible to apply supplementary coercive measures – confiscation of property and indemnification.

Liquidation is compulsory termination of the activities of a legal person, a branch, representation or structural unit thereof. Claims of employees, the State and creditors are protected. Limitation of rights is the deprivation of rights as to a specific form of entrepreneurial activity for a term of not less than one and not exceeding five years. Confiscation of property is the compulsory alienation to State ownership without compensation, fully or partially, of the property owned by a legal person. Claims of employees, the State and creditors are protected. Property owned by a legal person, which has been transferred to another legal or natural person, may also be confiscated. A fine is a compulsory monetary levy, which in conformity with the seriousness of the criminal offence and the financial circumstances of a legal person, is determined in the amount of not less

than 1000 and not exceeding 10000 times the minimum monthly wage (see definitions). Indemnification is the compensation of the material losses caused as a result of a criminal offence, as well as the rectification of other interests protected by law and rights jeopardized.

For criminal violations and less serious crimes (see definitions) only a fine is applicable as a primary coercive measure, unless the legal person, a branch, representation or structural unit thereof has been especially established for the commission of a criminal offence. For serious and especially serious crimes all coercive measures can be applied. Confiscation of property may be applied to a legal person as a supplementary coercion measure, if as a result of the offence by the legal person it has gained a material benefit and as primary coercion measures limitation of rights or a fine has been applied to it. Indemnification may be applied as a supplementary coercive measure to a legal person, if as a result of the criminal offence by the legal person substantial harm or serious consequences have been caused.

While the legal framework for application of coercive measures exists, at least until 2010, the courts applied such measures so rarely, that it was found that “in practice coercive measures are not applied to legal persons”.<sup>115</sup> Speculation as to the causes of such discrepancy between regulation and implementation lies outside the bounds of this report.

**xxv.** Under national criminal legislation there are three types of seizure and confiscation of property: confiscation of property as an either basic or additional separate criminal sanction, confiscation of illegally acquired property, and seizure or confiscation of material evidence and documents. These understandings of confiscation and procedure required to carry them out partially overlap.

Confiscation of property as a separate criminal sanction is the compulsory alienation to State ownership without compensation of the property owned by a convicted person or parts of such. Property owned by a convicted person, which he or she has transferred to another natural or legal person, may also be confiscated (Article 42 of the Criminal Law). As any other criminal sanction, it's applied by the court in a judgment. Confiscation of property of legal persons, while not a criminal sanction in a strict sense, is expanded upon in answer to question xxiv of this chapter.

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<sup>115</sup> Ārija Meikališa and Kristīne Strada-Rozenberga, *Regulation of Confiscation of Property in Latvia and European Union, Ensuring the Effectiveness of its Enforcement* (in Latvian, 2010) p. 29 footnote.  
<<http://www.tm.gov.lv/lv/ministrija/imateriali/MantKonf.pdf>> accessed 5 November 2012

Property is recognized as criminally acquired, if such property directly or indirectly has come into the property or possession of a person as a result of a criminal offence. If the opposite has not been proven, property, including financial resources, of persons who have engaged in criminal activities with child pornography or sexual abuse of children, or maintains constant relations with a person who is involved in such activities, is recognized as criminally acquired (Article 355 of the Criminal Procedure Law, amendment regarding sexual offences against children came into effect in July 2009). Such recognition is effected by a judgment of the court or a decision of a public prosecutor regarding the termination of criminal proceedings. Whether a decision of a public prosecutor can in and of itself be a basis for confiscation or only for returning the property to its owner, is a disputed question.<sup>116</sup> It is also possible during pre-trial proceedings under a special criminal procedure by a decision of a district (city) court. If confiscation of criminally acquired property is not possible, other property at the value of the property being confiscated may be subjected to confiscation or recovery. Confiscation also applies to property that the accused person, after the committing of the criminal offence, has alienated to a third person without corresponding consideration; property of the spouse of the accused person, if separate ownership of the property of the spouses was not specified at least one year before the commencement of the criminal offence; property of another person, if the accused has a common (undivided) household with such person. The third person who acquired such property in good faith has the right to submit a claim, in accordance with civil procedures, regarding compensation for the loss (Article 360 of the Criminal Procedure Law). Recognition of property as criminally acquired is very rarely used in practice.<sup>117</sup>

The court in a judgment or the investigative body in a decision, whereby the criminal proceedings are terminated, indicates what shall be done with material evidence and documents (Article 240 of the Criminal Procedure Law). Property and documents are returned to the owners or lawful possessors thereof. Instrumentalities of a criminal offence owned by a suspect or accused, objects which were intended or had been used for commission of a criminal offence, and criminally obtained property must be confiscated. Objects the circulation of which is prohibited are transferred to the relevant institutions. If a criminal offence has been committed with an instrumentality owned by other person,

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<sup>116</sup> *ibid.* p. 29, para. 3.4.8

<sup>117</sup> *ibid.* p. 82, para. 8.3.



another property of a suspect or accused may be subject to confiscation. While the primary stated function of material evidence is its procedural role, it is often, arguably inappropriately, used as a tool for restitution and prevention.<sup>118</sup>

In 2010 professors and specialists in criminal law Ārija Meikališa and Kristīne Strada-Rozenberga compiled an extensive report on confiscation of property in Latvia and its effectiveness. Protection for third parties was found to be insufficient and disproportionate. It was proposed that confiscation should apply to third parties only in cases where the third party acquired the property under question without giving recompense, when the criminal origin of the property was known to the third party or comparable circumstances.<sup>119</sup> Such suggestions have as of yet not been implemented.

In a recent report by the State Police<sup>120</sup> it was suggested that current system of confiscation should be improved by establishing a detailed accounting of confiscated property, separating each investigative body to enable more accurate quantitative measuring of each investigative body's effectiveness.

Proceeds from sale of confiscated property are transferred to general state budget and no special funds currently exist. An exception exists regarding criminally acquired property – if the victim has requested compensation for harm within the bounds of the criminal proceedings, resources acquired from the sale are used first for the ensuring and payment of the requested compensation (Article 359 of the Criminal Procedure Law).

**xxvi.** Currently in cases when the crime has been committed within the family or within the close environment of the child, of the two primary approaches towards separating the accused from the victim, state practice favors removing the child. Unless the accused is placed under arrest or in custody, thereby physically removing him or her from child's environment, removal of the child is seen as best option for providing a safe environment for child's development.

The investigative body in a criminal case is empowered to apply prohibition to approach a specific person or location as a separate coercive measure (Article 253 of the Criminal

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<sup>118</sup> *ibid.* p. 84, para. 8.17.

<sup>119</sup> *ibid.* p. 83-84, para. 8.12.

<sup>120</sup> Cabinet of Ministers of Republic of Latvia, *Informative Report "On Capacity of Controlling Institutions to Prevent Possibilities of Corruption and Ensure Achievement of Full Control Functions"* (in Latvian, 20 July 2012). <<http://polsis.mk.gov.lv/LoadAtt/file39912.doc>> accessed 5 November 2012

Procedure Law). Prohibition to approach includes both approach and communication through any means, except within the framework of criminal proceedings. The prohibition expires upon completion of the criminal proceedings. In a 2008 report on coercive measures by Professor Andrejs Judins prohibition to approach was found to be less than 1% of all coercive measures applied. Of the judges, public prosecutors and police surveyed only 54% had a positive view of its effectiveness, perhaps owing to lack of an effective control mechanism (e.g., electronic tagging). While it has been applied in cases of criminal sexual offences, Professor Judins argues for more frequent application.<sup>121</sup>

In cases where arrest or custody is not deemed to be appropriate, an official of an orphan's court (a guardianship and trusteeship institution established by a municipality) is informed of the circumstances. The official of the orphans court evaluates whether the child lives in conditions that are dangerous to health or life, as well as if the subsequent living of the child in the family may endanger his or her wholesome development, and makes an immediate individual binding oral decision on removal of the child care rights from the parents if such conditions are found (Article 23 of the Law on Orphan's Courts). The child is taken to a foster family, an institution of long-term social care and social rehabilitation, a hospital or other safe conditions. The immediate decision undergoes further review by the orphan's court, can be challenged in an administrative court and is reviewed at least every six months. Further possible protective measures are enumerated in answer to question i of chapter 3 of this report.

The current approach is seen to be problematic in regards to best interests of child and potential implementation of Article 14 of the Lanzarote Convention.<sup>122</sup>

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

i. During the investigation the principle of the „best interests of the child” is implemented as follows. A psychologist is invited to participate in investigation. It plays an important role

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<sup>121</sup> Andrejs Judins, *Safety Measures unrelated to Deprivation of Liberty* (in Latvian, 2008) pp. 73-76.  
<[http://www.providus.lv/upload\\_file/Publikacijas/Kriminalt/Judins\\_Brivibas%20atnems.pdf](http://www.providus.lv/upload_file/Publikacijas/Kriminalt/Judins_Brivibas%20atnems.pdf)> accessed 5 November 2012

<sup>122</sup> *Explanatory report on Project of Cabinet of Ministers Ordinance "On Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse"* p. 3.

in the investigation. For example, according to Article 153, paragraph 1 of The Criminal Procedure Law:

„If a psychologist considers that the psyche of a person who has not reached 14 years of age, the psyche of a minor who has been recognised as a victim of violence committed by a person upon whom the victim is materially dependent or otherwise dependent, or the psyche of a minor who has been recognised as a victim of sexual abuse, may be harmed by a direct interrogation, such direct interrogation shall be performed with the intermediation of technical means and a psychologist. If an investigator or public prosecutor does not agree, the direct interrogation shall be performed only with the permission of the investigating judge, and in a court – with a court decision”<sup>123</sup>

Necessity of psychologist assistance is evaluated in each case. Psychologist should be trained to work with children in criminal proceedings. In the initial stage - the police station, - child protection is under the [Protection of the Rights of the Child Law](#) Article 59 paragraph 4, which states that, when the child gives explanations a professional must participate.

For the interests of the child a shorter time is set for questioning and it is accepted that the child does not repeat testimony in court. There is a very protective approach to the victims. About how children are protected during the trial read section **viii**. For the child is designated the best representatives, that would truly represent their interests (section viii).

**ii.** In Latvia there are no special units for investigating the crimes mentioned above within the legal force. The above-mentioned crimes are investigated by the general police units and officials. They are authorized to carry out covert operations. According to the Criminal Procedure Law Article 395, it is possible to create investigation groups (in case of large – scale of work or investigating complex crime). Yes, they investigate and analyse child pornography materials, they are entitled to call the industry experts. In relation to child pornography, the guidelines are created, to identify and investigate pornography. For example, The State Inspectorate For Protection Of Children’s Right created guidelines.<sup>124</sup>

<sup>123</sup> Law, Criminal Procedure Law (Latvia), <http://www.likumi.lv/doc.php?id=107820>, viewed on 12 October, 2012

<sup>124</sup> Valsts bērnu tiesību aizsardzības inspekcija, Vadlīnijas nelikumīgas un bērnu garīgajai attīstībai kaitīgas informācijas atpazīšanai internetā, <http://www.bti.gov.lv/lat/aktualitates/?doc=162>, viewed on 12 October, 2012

iii. It is required that the crime is reported in order to be investigated. However, the term – report – should be read broadly. If the victim is a child, there are many ways to report a suspected criminal offense, in some cases, reporting is mandatory. Article 369, paragraph of the Criminal Procedure Law states:

„(1)A reason for initiating criminal proceedings is the submission of information indicating the committing of a possible criminal offence to an investigating institution, Prosecutor’s Office, or court (hereinafter – institution responsible for the progress of criminal proceedings), or the acquisition of such information at an institution responsible for the progress of criminal proceedings.

(2)The information referred to in Paragraph one of this Section may be submitted:

- 1) as a submission by a person who has suffered as a result of a criminal offence;
- 2) by controlling and supervising institutions, in accordance with the procedures provided for in the regulatory enactments regulating the activities thereof;
- 3) by medical practitioners or institutions, as a report regarding traumas, illnesses, or cases of death the cause of which may be a criminal offence;
- 4) by non-governmental organisations, and authorities protecting the rights of children, as a submission regarding infringements upon the rights of minors the cause of which may be a criminal offence;
- 5) any natural person or legal person, as information regarding possible criminal offences from which such person has not directly suffered;
- 6) as a submission by any person regarding a criminal offence committed by such person;”<sup>125</sup>

Essentially, this provision requires that – even when a child makes a phone call to the hotline or provides information to the authority, for example, authority of the child rights protection, they are required to report the alleged offense. The same applies to doctors if they suspect that a child may be a victim of violence, including sexual violence. There are

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<sup>125</sup> Law, Criminal Procedure Law (Latvia), <http://www.likumi.lv/doc.php?id=107820>, viewed on 12 October, 2012

also a variety of public information campaigns. For example, State Police set up a pamphlet for residents, about who to notify in case of violence.<sup>126</sup>

Criminal Procedure Law Article 7, paragraph 2 sets:

“Criminal proceedings shall be initiated for the offences provided for in Articles 90, 130, 131, 132, 136, 157, Section 159, Paragraph one, Article 160, Paragraph one, Articles 168, 169, 180, Article 185, Paragraph one, Article 197, Article 200, Paragraph one and Article 260, Paragraph one of the Criminal Law, if a request has been received from the person to whom harm has been inflicted. Criminal proceedings may also be initiated without the receipt of a request from the person to whom harm has been inflicted, if such person is not able to implement his or her rights himself or herself due to a physical or mental deficiency.”<sup>127</sup>

It should be noted, that some of the above – mentioned articles relate to the research topic – sexual abuse, but these articles and paragraphs are not related to children.

Proceedings go on even in case of withdrawal from the statements.

**iv.** In order to determine what is the limitation period for the offense we must specify what is the classification of criminal offences in Latvia. It is stated in Criminal Law Article 7 – „crimes are sub-divided as follows: less serious crimes, serious crimes and especially serious crimes”<sup>128</sup>. Basically criminal offenses are classified by sanctions:

„A criminal violation is an offence for which this Law provides for deprivation of liberty for a term not exceeding two years, or a lesser punishment.

A less serious crime is an intentional offence for which this Law provides for deprivation of liberty for a term exceeding two years but not exceeding five years, or an offence, which has been committed through negligence and for which this Law provides for deprivation of liberty for a term exceeding two years, but not exceeding ten years.

A serious crime is an intentional offence for which this Law provides for deprivation of liberty for a term exceeding five years but not exceeding ten years, or an offence, which has

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<sup>126</sup> Valsts Policijas buklets, <http://www.vp.gov.lv/?id=527&said=527&print=1> , viewed on 13 October, 2012

<sup>127</sup> Law, Criminal Procedure Law (Latvia), <http://www.likumi.lv/doc.php?id=107820>, viewed on 12 October, 2012

<sup>128</sup> Law, Criminal Law (Latvia), <http://www.likumi.lv/doc.php?id=88966>, viewed on 17 October, 2012

been committed through negligence and for which this Law provides for deprivation of liberty for a term exceeding ten years.

An especially serious crime is an intentional offence for which this Law provides for deprivation of liberty for a term exceeding ten years or life imprisonment”<sup>129</sup>

Limitation of the offense depends on the severity of the committed crime. For reasons of clarity, criminal liability limitation period for the crimes mentioned are best explained in the form of a table:

<i>Table: criminal liability limitation period for the crimes mentioned in the report</i>	
<b>Sexual abuse</b>	
act of sexual intercourse by means of violence, threats or taking advantage of the state of helplessness of a victim (rape) if commission thereof is on a minor	fifteen years after the day of commission
rape, if serious consequences* are caused thereby, or rape of an underage person	thirty years after the day of commission *
pederastic or lesbian or other unnatural sexual acts of gratification, if such acts have been committed using violence or threats or by taking advantage of the state of helplessness of a person (violent sexual assault) if commission thereof is on a minor	fifteen years after the day of commission
violent sexual assault if serious consequences are caused thereby, as well as if commission thereof is on an underage person	thirty years after the day of commission *
sexual connection, or pederastic, lesbian or	five years after the day of commission

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<sup>129</sup> Ibid

other unnatural sexual acts of gratification, with a person who has not attained the age of sixteen years and who is in financial or other dependence on the offender, or if such offence has been committed by a person who has attained the age of majority	
cruel or violent treatment of a minor, if physical or mental suffering has been inflicted upon the minor and if such has been inflicted by persons upon whom the victim is financially or otherwise dependent	five years after the day of commission
<b>Child prostitution</b>	
involving a person in prostitution if such acts have been committed repeatedly or by a group of persons, or commits inducing or compelling a minor to engage in prostitution, or commits providing premises to minors for purposes of prostitution	ten years after the day of commission
encouraging or compelling an underage person to engage in prostitution	fifteen years after the day of commission
the same acts, if commission thereof is by an organized group	fifteen years after the day of commission
taking advantage, for purposes of enrichment, of a person who is engaged in prostitution, if commission thereof is by a group of persons, or with respect to minors	ten years after the day of commission
the same acts if commission thereof is by an organized group or if commission	fifteen years after the day of commission

thereof is with respect to underage persons	
<b>Child pornography</b>	
downloading, acquisition, importation, production, public demonstration, advertising or other distribution of such pornographic or erotic materials as relate or portray the sexual abuse of children [..], or the keeping of such materials	five years after the day of commission
involvement or utilization of minors in the production (manufacturing) of pornographic or erotic materials	ten years after the day of commission
involvement or utilization of underage persons in the production (manufacturing) of pornographic or erotic materials	fifteen years after the day of commission
involvement or utilization of minors or underage persons in the production (manufacturing) of pornographic or erotic materials by an organized group	fifteen years after the day of commission
<b>Corruption of children</b>	
leading to depravity of a minor against the will of the minor or if such have been committed by a person who has attained the age of majority	five years after the day of commission
leading to depravity of an underage person	five years after the day of commission
<b>Solicitation of children for sexual purposes</b>	
encouraging a person who has not attained the age of 16 to involve in sexual acts or encouraging such person to meet with the aim to commit sexual acts or enter into a sexual relationship regardless of the way in	two years after the day of commission



which the encouraging is expressed, if such have been committed by a person who has attained the age of majority	
the same acts against an underage person	five years after the day of commission

\* crime for which, in accordance with law, life imprisonment may be adjudged.

Criminal Law Article 56 states: the issue of the applicability of a limitation period, in respect of a person who has committed a crime for which life imprisonment may be imposed, shall be decided by a court if thirty years have passed since the day of commission of the crime. „The limitation period is calculated from the day when the criminal offence has been committed until when charges are brought or the accused has been issued an official extradition request if the accused resides in another state and a search warrant has been issued for him or her”.<sup>130</sup> It's certified by the court too, for example - Latvijas Republikas Augstākās tiesas Senāta Krimināllietu departamenta<sup>131</sup> judgment Nr. SKK – 352/2009.<sup>132</sup> In accordance with Criminal Law Article 56, paragraph 3:

„The running of the limitation period is interrupted if, before the date of termination of the period prescribed in Paragraph one of this Section, the person who has committed the criminal offence commits a new criminal offence. In such case, the limitation period provided for the more serious of the committed criminal offences shall be calculated from the time of the commission of the new criminal offence”<sup>133</sup>

In essence, the limitation period can not be suspended, but it can be interrupted.

v. In case when the age of the victim is not certain an expert-examination must be performed. Expert-examination is an investigative action performed by one or several experts under the assignment of a person directing the proceedings.<sup>134</sup> Expert-examination is

<sup>130</sup> Law, Criminal Law (Latvia), <http://www.likumi.lv/doc.php?id=88966>, viewed on 17 October, 2012

<sup>131</sup> The Republic of Latvia's Supreme Court

<sup>132</sup> The Republic of Latvia's Supreme Court judgment Nr. SKK – 352/2009 <http://www.at.gov.lv/files/archive/departament2/2009/skk%20352.doc>, viewed on 18 October, 2012

<sup>133</sup> Law, Criminal Law (Latvia), <http://www.likumi.lv/doc.php?id=88966>, viewed on 17 October, 2012

<sup>134</sup> Law, Criminal Procedure Law (Latvia), <http://www.likumi.lv/doc.php?id=107820>, viewed on 14 October, 2012, Article 193

made to give an opinion on an issue (in our case victim's age)<sup>135</sup>. In many cases, the examination is not required, at the same time, law states when an expert-examination is mandatory. Criminal Procedure Law Article 193 clause 3 and 4 states, that „An expert-examination is mandatory in order to determine:

- the age of a person, if age is significant in criminal proceedings but the relevant documents do not exist;
- Features that indicate the committing of a sexual offence.

An expert – examination is performed in Latvia State Centre for Forensic Medical Examination.

**vi.** Several public institutions are responsible of data recording and storage. In Latvia there are also several data records. Courts and judge, for example, are responsible of registering elaboration, after hearing details of the case and judgment are available in judicial information system<sup>136</sup>. In the system information is available on the Court's decisions and case's stage. Information is available, if the case is already in court. It should be noted that this information is only available for court employees. In International Cooperation in criminal matters, information can be transmitted to other public law enforcement authority (in other state).

The Ministry of the Interior has established a Criminal Information System (Sodu reģistrs). The purpose of this Punishment register is to establish uniform registration regarding persons who have committed criminal offences and administrative violations.<sup>137</sup> In this Punishment register, information about the criminal proceedings at any stage (police, prosecution, etc.) can be found. Police, Public Prosecutor's Office, investigating institutions can and are transmitting data to other competent authorities in other states. Report from criminal records can be issued upon request. Punishment register manager and holder is Interior Ministry's Information Centre. The following have the right to receive information from the Register:

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<sup>135</sup> A.Denkovskis, A.Žitkovs, K.Kalmikovs, A.Matiševs, *Tiesu medicīna*, Rīga, 1981, p.3.

<sup>136</sup> TIS – Tiesu informatīvā sistēma, <http://court.jm.gov.lv/>, viewed on 18 October, 2012

<sup>137</sup> Law, Punishment Register Law (Latvia), <http://www.likumi.lv/doc.php?id=119360>, viewed on 17 October, 2012

„**private individuals** – regarding himself or herself, as well as in the cases and in the amount specifically indicated by regulatory enactments – other information at the disposal of the Register;

**subjects of operational activities**, investigative institutions, prosecutorial institutions and courts – for the performance of the functions specified by the regulatory enactments regulating the operation of the relevant institutions;

**other State and local government institutions** – in the amount specified by regulatory enactments and for the intended purposes;

**employers** - in order to verify the compliance of a natural person with the restrictions specified by regulatory enactments in recruiting such natural person for employment or into service (indicating the regulatory enactment that provides for the relevant restrictions);

**sworn advocates** – regarding a defendant in criminal proceedings or in an administrative violation matter;

**The European Union** members central authority – in order to get the necessary information about the person’s previous convictions.”<sup>138</sup>

Authorities respect protection of personal data rules, according to Personal Data Protection Law.

More recently the minor persons support information system was set up. This system includes necessary information to protect the rights of children. This system contains information even about suspected abuse of a minor, but system includes information only about the minor. Information relating to criminal proceedings is inserted in the system, only with the permission of a person directing the proceedings.

### 3.2 Complaint Procedure

**vii.** As already pointed out at the *iii* question, child has ample opportunities to complain about the violations of Substantive Criminal Law. A child may submit an application to the law enforcement authorities; he can call to an anonymous hotline and report the alleged violation. Child may submit an application to the law enforcement authorities in the case if

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<sup>138</sup> Law, Punishment Register Law (Latvia), <http://www.likumi.lv/doc.php?id=119360>, viewed on 17 October, 2012

he/she is older than fourteen. In the case if he is younger, for example nine year old – an application may be submitted by the school, teacher, doctor - anyone who may be the child's representative (specified in question *vii*).

So that reports about children's rights violation, including reports of sexual abuse in various cases can be accepted – 1) written – application to the police, child protection authority, 2) oral – a call to any child protection authority. In some cases, a child can do nothing but search for medical care, the doctor can report the alleged violation.

The purpose of these organizations and their duty is to investigate an alleged violations, analyze the data and, if necessary, go to another law enforcement authority and report.

**viii.** Representation is a legal relationship whereby one person (representative) performs within the mandate of the other person (represented) on behalf of the defense of her rights and legitimate interests [...].<sup>139</sup> Infancy in criminal proceedings make some special criminal procedure characteristics, in particular because of their limited procedural capacity.<sup>140</sup>

Criminal procedure law does not expressly regulate that the juvenile victims in criminal proceedings must be represented, at the same time Article 104, paragraph 2 provides that:

„If harm has been caused to a minor person, the victim shall be represented by:

- 1) a mother, father, or guardian;
- 2) one of the grandparents, a brother or sister of legal age, if the minor has lived together with one of such persons and the relevant kinsperson takes care of the minor;
- 3) a representative of an authority protecting the rights of children;
- 4) a representative of such non-governmental organization that performs the function of protecting the rights of children”<sup>141</sup>

This particular provision implies that a minor must have a representative, to represent and defend his rights.

Due to the fact that Criminal procedure law contains indication that the representative is a mother, father [...] (relative) we must provide a definition of those relatives.

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<sup>139</sup> Group of authors, Juridisku terminu skaidrojošā vārdnīca, – Rīga: Nordik, 1998, 132.lpp

<sup>140</sup> Ā.Meikališa, K.Strada – Rozenberga, Kriminālprocess.Raksti 2005-2010, Rīga, Latvijas Vēstnesis, 2010, p.376

<sup>141</sup> Law, Criminal Procedure Law (Latvia), <http://www.likumi.lv/doc.php?id=107820>, viewed on 12 June 2012

According to the Civil Law mother of a child is the woman who has given birth to the child, which is certified by statement from a physician. The father of the child is a woman husband if a child is born to a woman during marriage or not later than 306 days.<sup>142</sup> While the Civil Law Article 154 notes:

„If the filiation of a child from the father cannot be determined in conformity with the provisions of Section 146 of this Law or a court has acknowledged that the child has not been born of his or her mother's husband, the filiation of the child from the father shall be based upon the voluntary acknowledgement of paternity or by the determination thereof by a court proceeding.”<sup>143</sup>

As regards the reference that the child's representative may also be a representative of an authority protecting the rights of children – it should be noted that in Criminal procedure law is not further defined what are these authorities protecting the rights of children. So it should be assumed that they are subjects that are mentioned in Protection of the Rights of the Child Law. In the Protection of the Rights of the Child Law Article 5. indicated following persons and institutions protecting the rights of the child:

(1) The protection of the rights of the child in the State shall be ensured by:

- 1) the parents (adopters), foster family and guardians of a child;
- 2) educational, cultural, health care and child care institutions;
- 3) State and local government institutions;
- 4) public organisations and other natural or legal persons whose activities are associated with the provision of support and assistance to children; and
- 5) employers.

The Criminal procedure law and The Protection of the Rights of the Child law is clear that juvenile victims may be represented by a relatively wide range of subjects that are not directly related to the victim. Usually separately identified – non governmental organizations and lawyers as representatives of the victim. In Latvia there are large number of non-governmental organizations that deal with children's right protection.<sup>144</sup> These organizations

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<sup>142</sup> Law, Civil Law (Latvia), <http://www.likumi.lv/doc.php?id=225418>, viewed on 29 July 2012

<sup>143</sup> Ibid

<sup>144</sup> Nevalstisko organizāciju saraksts, [http://www.bti.gov.lv/lat/noderigas\\_saite/nvo/](http://www.bti.gov.lv/lat/noderigas_saite/nvo/), viewed on 29 July 2012

brought together a wide range of people - concerned parents, specialists in their field, psychologists.

Non-governmental organizations are associations in accordance with Associations and Foundations Law. Non-governmental organizations offer a variety of services – such as anonymous hotlines. An example is the center of "Dardedze" – a non governmental, non profit organization working to prevent child abuse in Latvia and to provide direct help to children exposed to sexual, physical, emotional abuse and neglect.<sup>145</sup> If the child is involved in criminal proceedings as a victim of crime, they offer counseling sessions and support to children throughout the process.<sup>146</sup>

Article 104, paragraph 5 of the Criminal procedure law states that:

„If the rights of a minor and the protection of the interests thereof are encumbered or otherwise not ensured, or the representatives referred to in Paragraph two of this Section submit a substantiated request, a person directing the proceedings shall take a decision on the retaining of an advocate as the representative of a minor victim.”

So the lawyer can represent and protect the interests of the minor. A lawyer has the necessary training and knowledge to protect the child's best interests. We need to look at what are the rights of the above-mentioned representatives.

It should be mentioned that Article 107. of the Criminal procedure law states the rights of the representative of a victim:

„(1) If a victim implements his or her interests with the intermediation of a representative, the representative has all the rights of the victim.

(2) The representative of a minor victim who has reached the age of fifteen years may implement his or her rights together with the person to be represented.”

However, this article must be read in conjunction with article 104, paragraph 4, of the Criminal Procedure Law, that states:

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<sup>145</sup> Dardedzes centra mājas lapa, [http://www.centrsdardedze.lv/lat/par\\_mums/](http://www.centrsdardedze.lv/lat/par_mums/), viewed on 29 July 2012

<sup>146</sup> Dardedzes centra ziņojums „Bērns kriminālprocesā”, 2012  
[http://www.centrsdardedze.lv/eng/child\\_as\\_a\\_victim/](http://www.centrsdardedze.lv/eng/child_as_a_victim/), viewed on 29 July 2012

[..]all the rights of a victim belong completely to his or her representative, and the victim may not independently implement such rights, except for the rights of a minor to provide testimony and express his or her view.”

From the above it can be concluded that representative holds all the rights of victim other than personal (rights that can be exercised only by the victim), for example providing testimony. The victim's testimony is one of the most important evidence. This is particularly important in cases of child sexual abuse as the bodily injury on the victim or biological traces on clothes or body is not always detected. In such cases, person's guilt can be difficult to prove, and so the victim's testimony is especially important.

Certainly a major role in the representation of the child victim has An Orphan's court. “An Orphan's court is a guardianship and trusteeship institution established by a municipality or city local government”<sup>147</sup>. An Orphan's court is entitled to make representation, as well as legal actions to protect the interests of children (for example – had in an application in court).

In case if the complaint is brought against the parents, it is considered that the person/ persons are interested in the investigation/trial outcome – different representative is assigned for the child. As mentioned earlier the child can be represented by a relatively large range of subjects. Representative can be changed in the process (by investigator, prosecutor, court, etc.), for example, if the representative fails to represent the best interests of the child.

In relation to the rules of participation of minors in trials, it must be mentioned that in Latvia trials are divided into - open court session and closed court session. In a criminal case regarding a criminal offence against morals and sexual inviolability, and in order to not disclose intimate circumstances of the lives of persons involved in criminal proceedings - a court may determine a closed court session (Article 450 of Criminal procedure law).<sup>148</sup> In closed court session only persons involved in criminal proceedings can reside, consequently others or the media can not participate.

One of the general principle in victim's rights is that without victim's consent can not be published his image (in the press, the internet, television) during procedural actions, it is contained in Article 97, paragraph 9 of the Criminal Procedure Law. This is protecting

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<sup>147</sup> Law, Law On Orphan's Courts (Latvia), viewed on 29 September 2012

<sup>148</sup> Law, Criminal Procedure Law (Latvia), <http://www.likumi.lv/doc.php?id=107820>, viewed on 18 June 2012

victim's rights to an image and private life. As one of the most important forms of protection – special procedural protection. Special procedural protection is included in Criminal procedure law (Article 299):

„Special procedural action is the protection of the life, health, and other lawful interests of a victim, witness, and other persons who testify or have testified in criminal proceedings regarding serious or especially serious crimes, as well as of a minor who testifies regarding the crimes provided for in Sections 161, 162, and 174 of the Criminal Law, and of a person the threat to whom may influence the referred to [...] threatened person.”

Special procedural protection provides that in documents personal data is replaced by a pseudonym to ensure the protection of victim's name and other personal data. It contains special features of procedural actions in pre – trial proceedings too (Criminal procedure law Article 308, paragraphs 1,2, 3,<sup>1</sup> 4, 5:

“(1) A person for whom special procedural protection has been determined shall be summoned to an interrogation through the intermediation of a special protection institution.

(2) In recording in documents procedural actions wherein a protected person participates for whom personal identity data has been supplemented with a pseudonym, a person directing the proceedings shall only indicate a pseudonym in place of the identity data of such person. If an indication of the address of the receipt of a consignment is necessary, the address of a special protection institution shall be indicated.

(3) In performing procedural actions wherein several persons participate and wherein the prevention of the possibility of identifying a person under special procedural protection is necessary, technical means that do not allow for an identification of such person shall be used. Persons under protection have the right to not answer questions, if the answers may provide the opportunity to determine the identity thereof.

(3<sup>1</sup>) An official, who performs protection measures for a person involved in the criminal proceedings not exceeding his or her powers, has the right to be present in procedural actions which are performed with a person under special procedural protection.

(4) With the consent of the Prosecutor General, criminal proceedings against an accused for whom special procedural protection has been determined may be isolated in separate records.



(5) The address of a special protection institution shall be indicated instead of the address of a person under special procedural protection in the list of persons to be summoned to a court session. Only the pseudonym of a person whose personal identity data have been substituted with a pseudonym, and the address of a special protection institution, shall be entered.”<sup>149</sup>

In summary it can be concluded that the victim (child) representation offers a wide range of subjects, so that the child’s interests can be represented in the best possible way and be protected. In pre – trial and during the trial, the child is guaranteed with procedural safeguards (limited access to the media, protection of children’s data and image).

#### 4 COMPLEMENTARY MEASURES

i. Centre „Dardedze” is non-governmental organization which target is to protect children from violence. Dardedze has many professionals who continuously improve their theoretical knowledge. Training is organized in inter-active way and there are certificate at the conclusion of these courses. Dardedze offers different kind of courses: 1) instructions for specialists of different groups (psychologists, doctors, lawyers, prosecutors, police, school, primary school and childcare professionals etc.); 2) seminars; 3) individual training programs; 4) special training programs for psychologists, psychotherapists and social workers who work to rehabilitate child victims. The main target of this program is to give all the necessary theoretical and practical information to provide help for children who have suffered from violation in a high level.<sup>150</sup>

State makes conferences to aware people about sexual violence against children. There are publications in official portals.<sup>151</sup> The state provides financial support for NGO projects, including “Dardedze”.

ii. There is a special subject (health education) in primary and secondary school where children are taught about these issues. There are also periodical researches, for example, The

<sup>149</sup> Law, Criminal Procedure Law (Latvia), <http://www.likumi.lv/doc.php?id=107820>, viewed on 19 June 2012

<sup>150</sup> Dardedze centrs. Available: [http://www.centrsdardedze.lv/lat/apmacibas/liela\\_vd/](http://www.centrsdardedze.lv/lat/apmacibas/liela_vd/)

<sup>151</sup> D. Strautiņa, Vardarbība prēt bērniem - realitāte, par kuru bieži klusē. 05.10.2012. Available: <http://www.lvportals.lv/likumi-prakse.php?id=218970>, Latvijas Republikas Labklājības ministrijas Bērnu tiesību aizsardzības inspekcija. APKOPOJUMS: Valsts bērnu tiesību aizsardzības inspekcijas paveiktais 2009.gada JANVĀRĪ. 06.02.2009. Available : [http://www.bti.gov.lv/lat/zinas\\_par\\_iestadi/parskati\\_un\\_atskaites/?doc=1515](http://www.bti.gov.lv/lat/zinas_par_iestadi/parskati_un_atskaites/?doc=1515)

National Child Protection Inspectorate organized research for Children's Day. Participants were local city councils, children, parents, state's and non-governmental organizations.<sup>152</sup>

iii. There are no preventive intervention programs made by the state of Latvia for people who fear that they might commit a crime. But there is an opportunity to ask for help from probation service in such occasions. There is only one precedent in Latvia when a person asked for help and together with probation service a solution was found.

iv. There are three types of support provided. Hotline "Bērnu un jauniešu Uzticības Tālrunis" has been available from year 2006. It is a part of state's Children rights protection inspection. The users of this hotline can obtain advices on how to act in difficult situations. The second hotline "Bērnu un jauniešu uzticības tālrunis" is free of charge and it is for immediate help and support.<sup>153</sup>

The second section of help is legal help. The Legal Aid Administration subordinate body by the Ministry of Justice. One of the target is to pay compensations to victims. This compensation could be obtained only under Criminal Process law regulation. The person have to be recognized as a victim in a criminal proceeding criteria is that the crime against this person should be done intentionally. The second criteria is the result of crime – death, severe or moderate injuries, affronted person's sex, victim is infected with the human immunodeficiency virus, hepatitis B or C.<sup>154</sup>

Legal help are provided also by the University of Latvia legal practice and help center and the Business high- School "Turība" legal consultation office.<sup>155</sup>

The third type of help is sociopsychological help. There are two types of help provided. The First group - outpatient services is funded by the state, local governments, NGOs (fully and

<sup>152</sup> K. Ģērmanis. VBTAI izglītos bērnus par drošību uz ceļiem un peldvietās. 25.05.2007. Available: <http://www.lvportals.lv/print.php?id=157741>

<sup>153</sup> Bērns kācietušais. Available: [http://www.bernskacietusais.lv/lv/pakalpojumi\\_vardarbiba\\_cietusiem\\_berniem/uzticibas\\_talruni/biedriba-bernu-un-jauniesu-uzticibas-talrunis-64/](http://www.bernskacietusais.lv/lv/pakalpojumi_vardarbiba_cietusiem_berniem/uzticibas_talruni/biedriba-bernu-un-jauniesu-uzticibas-talrunis-64/)

<sup>154</sup> Juridiskās palīdzības administrācija. Available: [http://www.bernskacietusais.lv/lv/pakalpojumi\\_vardarbiba\\_cietusiem\\_berniem/juridiska\\_palidziba/juridiskas-palidzibas-administracija-65/](http://www.bernskacietusais.lv/lv/pakalpojumi_vardarbiba_cietusiem_berniem/juridiska_palidziba/juridiskas-palidzibas-administracija-65/)

<sup>155</sup> Biznesa augstskola "Turība" Studentu bezmaksas juridiskās konsultācijas birojs. Available: [http://www.bernskacietusais.lv/lv/pakalpojumi\\_vardarbiba\\_cietusiem\\_berniem/juridiska\\_palidziba/biznesa-augstskola-turiba-studentu-bezmaksas-juridiskas-konsultacijas-birojs-67/](http://www.bernskacietusais.lv/lv/pakalpojumi_vardarbiba_cietusiem_berniem/juridiska_palidziba/biznesa-augstskola-turiba-studentu-bezmaksas-juridiskas-konsultacijas-birojs-67/) . Latvijas Universitātes Juridiskās prakses un palīdzības centrs. Available: [http://www.bernskacietusais.lv/lv/pakalpojumi\\_vardarbiba\\_cietusiem\\_berniem/juridiska\\_palidziba/latvijas-universitates-juridiskas-prakses-un-palidzibas-centrs-66/](http://www.bernskacietusais.lv/lv/pakalpojumi_vardarbiba_cietusiem_berniem/juridiska_palidziba/latvijas-universitates-juridiskas-prakses-un-palidzibas-centrs-66/)

partly). The second group – crisis centers. Everyone can receive help by Social rehabilitation institutions funded by state for 30-60 days.<sup>156</sup>

These actions are coordinated by the project “Bērns kā cietušais”.

v. Are there any help lines in service of the victims? Are these help lines aware of the confidentiality principles?

Many help lines are available for the victims. The next are some examples: Center of Crises “Skalbes” help line, Riga Children Rights Center Children and Youth hotline. Center against Violence “Dardedze hotline”, Riga Children Rights Center Children and Youth hotline is for children and parents. One can get psychological, legal or social help there. And also a person can get help if he has problems with inner peace, worrisome mind, and feeling that you he is not needed by anyone. One can also get help there if someone does a physical or moral damage to him. It is also a shelter for those who have no place to go.

Center of Crises “Skalbes” help line’s main idea is to give a help generally not in any specific fields. There professionals will suggest where to find professional help.

Center against Violence “Dardedze hotline” is special help for children who have suffered from violence. Everyone can get answers to different kind of questions - what to do if a person has information that someone suffers from violence and also information about rehabilitation.

Those lines respect the principle of confidentiality.

vii. In 13 January 2012 European Social Fund project “Strengthening the administrative capacity of abused children and their families’ rehabilitation service delivery” was started. From year 2010 Children Fund of Latvia makes state’s social rehabilitation service for children who have suffered from violence administration. The experience and practice shows that generally there are no programs to help families with children who have suffered from violence. At the same time the number of children who have suffered from violence in families increases. There are no united systems and methodology for such cases.<sup>157</sup> There

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<sup>156</sup> Sociālās rehabilitācijas institūcijas. Available:

[http://www.bernskacietusais.lv/lv/pakalpojumi\\_vardarbiba\\_cietusiem\\_berniem/socialpsihologiska\\_palidziba/krizu\\_centri/socialas-rehabilitacijas-institucijas-79/](http://www.bernskacietusais.lv/lv/pakalpojumi_vardarbiba_cietusiem_berniem/socialpsihologiska_palidziba/krizu_centri/socialas-rehabilitacijas-institucijas-79/)

<sup>157</sup> Latvijas Bērnu fonds. Available: <http://www.lbf.lv/lang/lv/esf-projekts>

are no intervention programs for children who have suffered from violence and might have sexual behavior problems in the future.

### III NATIONAL POLICY REGARDING CHILDREN

i. There is a political document – “ACTION PLAN for the protection of minors from criminal crimes against morality and sex 2012-2013”. This document consists of main tasks for implementation of the policy regarding children protection from sexual violation, including prevention measures, society’s education, society’s involvement into limiting of offenses against morality and sexual offences. This document sets penalty policy, inter-institutional cooperation developing and other measures and it also sets that those who have done sexual crimes against children have to be monitored.<sup>158</sup>

ii The campaign “Sliktais pieskāriens<sup>159</sup>” was organized within the project “Protecting the right of child-victims of crime to psychological assistance and child friendly interviewing procedures”. Campaign was made against children sexual abuse. NGO of Poland “The Nobody’s Children Foundation” created this campaign in collaboration with public relation agency “Grey”. This campaign was realized in a several East-Europe countries – in Poland, Moldova, Ukraine, Bulgaria, Lithuania and Latvia. In Latvia this campaign was realized by NGO “Dardedze” in collaboration with seven partners – centers of crises in regions of Latvia. The main activities in this campaign was to inform society by information in media, to organize seminars and studies for parents “Audzināsim drošus vecākus nedrošā pasaulē”<sup>160</sup> where practical advises how to educate children about personal safety in relationship with other people were given, and also “what can be done if there is suspicion about children sexual abuse”.

This campaign also provided seminars and conferences for professionals, who work with children. During these seminars they were taught how to recognize children who suffer from sexual violence and they were also introduced with specific methods, which can be used to help children to get over trauma of sexual violence. This campaign also provided

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<sup>158</sup> 25.08.2010. ORDER OF MINISTERS OF CABINET NR. 581. *PAR RICIBAS PLANU NEPILNGADIGO AIZSARDZIBAI NO NOZIEDZIGIEM NODARIJUMIEM PRET TIKUMIBU UN DZIMUMNEAIZSKARAMIBU 2010.-2013.GADAM.*

<sup>159</sup> “Bad Touch”

<sup>160</sup> “Let’s educate safe parents in unsecure world”

lessons for children “Džimbas drošības ceļojums”<sup>161</sup> which taught how to recognize insecure situations and how to act in those situations; also these lessons gave acquirements to avoid potential violence.

This campaign was realized in the period of 03/10/11-24/11/11.<sup>162</sup>

Center “Dardedze” also organized project „Bērns kā cietušais vai liecinieks kriminālprocesā”<sup>163</sup>. The aim of this program was to enhance children interests’ protection in the process of investigation and litigation. During this project new guidelines for interweaving children were used in five centers of crises in Latvia. 50 children were interviewed using new methods: it turned out that in 45 cases children were victims, in 5 cases – witnesses.

iii. There is a project “Multidimensional protection of child victims of crime” (EC action (Grant Agreement JLS/2008/ISEC/AG/032) where statistics on children’s sexual exploitation are available.<sup>164</sup> There is no unified system, which lists all cases of violence against children. In Latvia statistic data which reflects violence cases count is registered by Policy of state and it shows only crimes against children and number of litigated cases. There are registered about 1238-2285 crimes against minor, accordingly- in 2005 – 2285, in 2006 – 2304, in 2007 – 1901, in 2008 – 1629, in 2009 – 1238. There is a tendency for the number of sexually abused children to decrease. Regarding to statistics about number of cases where child have suffered from sexual violence: 2005 – 475, 2006 – 168, 2007 – 355, 2008 – 309, 2009 – 176 cases.<sup>165</sup>

Police of state report is available - crimes done by minors, minor victims, and condition of roads in Latvia – prevention – about 2011. All together there were 19 909 persons who had suffered from crimes, 653 form them were children. 312 children were in the group of age from 1 to14 but 341 were at the age group from 14 to18. 375 Children who

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<sup>161</sup> “Safety trip of Džimba”

<sup>162</sup> Toma K. Centrs „Dardedze”. <http://www.centrsdardedze.lv/lat/kampanas/>,  
[http://www.centrsdardedze.lv/lat/dardedzes\\_hronika/?doc=416](http://www.centrsdardedze.lv/lat/dardedzes_hronika/?doc=416).  
[http://www.krizucentrs.lv/kr/data/Virselsis\\_LV.pdf](http://www.krizucentrs.lv/kr/data/Virselsis_LV.pdf)

<sup>163</sup> “Child as Victim or Witness in Criminal Procedure”

<sup>164</sup> “Multidimensional protection of child victims of crime” (EC action (Grant Agreement JLS/2008/ISEC/AG/032)[http://www.bernskacietusais.lv/download.php?file=files/object\\_files/1317552919225\\_Vardarb%C4%ABbas\\_pret\\_bernu\\_biezums.pdf](http://www.bernskacietusais.lv/download.php?file=files/object_files/1317552919225_Vardarb%C4%ABbas_pret_bernu_biezums.pdf)

<sup>165</sup> “Multidimensional protection of child victims of crime” (EC action (Grant Agreement JLS/2008/ISEC/AG/032)[http://www.bernskacietusais.lv/download.php?file=files/object\\_files/1317552919225\\_Vardarb%C4%ABbas\\_pret\\_bernu\\_biezums.pdf](http://www.bernskacietusais.lv/download.php?file=files/object_files/1317552919225_Vardarb%C4%ABbas_pret_bernu_biezums.pdf)

had suffered from violence were boys, 173 from them were at the age group from 1 to 14, but 202 were at the age group from 14 to 18. 271 from children who had suffered from violence were girls. 139 of them were at the age group from 1 to 14 but 139 were at the age group from 14-18.<sup>166</sup>

iv. In Latvia there are promotional campaigns organized by NGOs. The main aim in those campaigns is to inform the society how to recognize a child who has suffered from sexual violence and to support this victim with professional help. Most popular campaigns are “Sliktais pieskariens”, „Bērns kā cietušais vai liecinieks kriminālprocesā”, „Esmu mazs – saudzē mani!”<sup>167</sup>, “Redzi, dzirdi, paziņo”<sup>168</sup>, “Stopēt bīstami”<sup>169</sup>, “Neļauj sevi pazemot internetā”<sup>170</sup>

v. Children’s perspective and interests are represented by NGO’s in law making process. Government meetings are opened; all information about meetings is available in internet before every meeting. Representative of NGO participates in secretaries of state meetings. While there is a procedure - public participation, everyone can submit their suggestions. There are also expert groups which consist of representatives from NGO, and National Human Rights Office.<sup>171</sup> Expert groups hold meetings where they discuss the necessary regulatory frameworks. NGO’s also can give their opinions about law or policy document projects. All objections from opinions are reflected in reference of objections and protocol of inter-agency coordination. Policy documents` and law projects have an annex, where information about reconciliation of project with NGOs is written.

In every ministry there is a representative who makes collaboration with NGO.

vi. There is regulation for NGOs which determinate how to involve NGOs in law making process. Involvement in law making process of society is determined by political guidelines (declaration of government), policy planning documents in civil society’s development scope

<sup>166</sup> Police of state report - crimes done by minors, minors victims, and condition of roads in Latvia – prevention – about 2011. [http://www.vp.gov.lv/faili/relizes/2011\\_PARSKATS.doc](http://www.vp.gov.lv/faili/relizes/2011_PARSKATS.doc)

<sup>167</sup> “help me – I am small”. Palīgs vecākiem. <http://paligsvecakiem.lv/2012/04/uzsakta-sociala-kampana-%E2%80%99Esmu-mazs-saudze-mani/>

<sup>168</sup> „See, hear, inform”. Center „Dardedze”. [http://www.centrsdardedze.lv/lat/kampanas/redzi\\_dzirdi\\_zino/](http://www.centrsdardedze.lv/lat/kampanas/redzi_dzirdi_zino/)

<sup>169</sup> „car sharing - dangerous”. police of state official home page. <http://www.sargi-sevi.lv/?id=272&sa=317,272&lev=0>

<sup>170</sup> „Don’t let to abase yourself in network”. LATNET biznesa klases internets. <http://ls.lv/?fl1m12p61>

<sup>171</sup> **14.04.2003. ORDER OF MINISTERS OF CABINET NR. 148. PAR DARBA GRUPU LIKUMPROJEKTA “GROZĪJUMI BĒRNU TIESĪBU AIZSARDZĪBAS LIKUMĀ” SAGATAVOŠANAI.**

(Guidelines of Civil society's strengthening policy 2005-2014, program of Civil society's strengthening policy 2008-2012). Policy planning documents in public administration's scope (guidelines of public administration development policy 2008-2013, guidelines of development of policy planning system, guidelines of government communication policy 2008-2013) and also normative regulation such as State Administration Structure Law, Procedure of the Cabinet of Ministers, Rules of government about public participation in policy development planning process etc.)

#### IV OTHER

As already mentioned in answer to question xxiii of chapter 2 of this report, Ministry of Interior of Republic of Latvia is engaged in a comprehensive overhaul of criminal law relating to crimes of sexual nature. Several bills have already been submitted to Parliament, proposing changes in substantive and procedural law regarding, inter alia, definition of intent, aggravating circumstances, terms of limitations, abolishing custodial arrest, and classification of crimes depending on their gravity (seriousness). While proposed amendments may correct some of the shortcomings identified, inclusion of such propositions in this report must be regarded as both premature and impractical due to limited scope of the report.

1. Reports reveal that Latvia has discrimination problems against women, incidents of violence against ethnic minorities, and societal violence and incidents of government discrimination against homosexuals.
2. The marriage is enshrined constitutionally. In Latvia marriage creates an obligation on the part of a husband and a wife to be faithful to each other, to live together, to take care of each other and to jointly ensure the welfare of their family.
3. In lawful relations that affect a child, the rights and best interests of the child takes priority.
4. When adopting the Declaration on the Accession of the Republic of Latvia to International Instruments Relating to Human Rights it was declared that Latvia considers as binding more than 50 international instruments in the sphere of human rights.
5. Although Latvia is not the party to Lanzarote Convention the possibility to sign and ratify it in Latvia in future is regarded as positive, but no particular date stated the ratification being expected.

6. Although the Constitution of Latvia was adopted without a bill of rights, this bill was created and it consisted of human rights which is progressive for the time when the Constitution of Latvia was created, for example, gender equality.
7. After restoration of independence, in 1998, chapter 8 - human rights - was included in constitution and entered into force as constitutional law.
8. Constitutional court of Latvia is an independent judiciary body, which reviews cases that are in court's competence.
9. In Latvia a person is criminally liable when they become 14 years old. Underage are persons younger than 14 years and these persons are not criminally liable.
10. In Latvia there are NGOs which provide help for children victim. The state provides financial support for NGO projects.
11. There are no preventive intervention programs made by the state of Latvian for people who fear that they might commit a crime.
12. There are no intervention programs for children who have suffered from violence and might have sexual behavior problems in the future.
13. In Latvia there are promotional campaigns organized by NGOs. The main aim in those campaigns is to inform the society how to recognize a child who has suffered from sexual violence and to support this victim with professional help.
14. Children's perspective and interests are represented by NGO's in law making process. There is regulation for NGOs which determinate how to involve NGOs in law making process.
15. National definition of chld pornography is overly specific, constructed using flawed legal technique and incompatible with the Lanzarote convention.
16. Several offences, such as those relating to participation of a child in pornographic performances and recruiting and using child prostitutes, are defined insufficiently clearly and prosecuting some of them require inventive and broad interpretation of national regulations.
17. National definition of corruption of children (leading to depravity) is imprecise, doesn't differentiate between physical and non-physical activities, and continues to cause chronic difficulties in application.



18. While sanctions for crimes of sexual nature are generally proportionate, their dissuasiveness and effectiveness are seriously hampered by an unsupported and resource-poor State Probation Service.

19. Several legal instruments, such as coercive measures for legal persons, exist in regulations, but are not applied in practice.

20. In national substantive criminal law there is insufficient protection for children in so-called “Romeo & Juliet” cases, especially regarding child pornography and so-called “sexting”.

21. Confiscation of property under national criminal law is overly complex and often misused; current procedure offers insufficient protection to third parties.

22. State offers insufficient protection for child victims of crimes of sexual nature in cases where the offence occurs within the close environment of the child.

23. Both substantive and procedural criminal law is constantly being reformed to bring it in line with international and European obligations, while insufficient attention is given to continuing education of legal authorities regarding its application.

24. During the investigation the principle of the „best interests of the child” is implemented as follows: a psychologist is invited to participate in investigation, for the interests of the child, is set a shorter time for questioning and it is accepted that the child does not repeat testimony in court. There is a very protective approach to the victims.

25. In Latvia there are no special units for investigating the crimes mentioned in research within the legal force, crimes are investigated by the general police units and officials and they are authorized to carry out covert operations.

26. It is required that the crime is reported in order to be investigated, however, the term – report – should be read broadly. There are many ways to report a suspected criminal offense, in some cases, reporting is mandatory.

27. Crimes are sub-divided as follows: less serious crimes, serious crimes and especially serious crimes - limitation of the offense depends on the severity of the committed crime

28. In case when the age of the victim is not certain an expert-examination must be performed - expert-examination is an investigative action performed by one or several experts under the assignment of a person directing the proceedings

29. For data recording and storage are responsible a number of public institutions. In Latvia there are a number of data records, authorities respect protection of personal data rules, according to Personal Data Protection Law

30. Reports about children's rights violation, including reports of sexual abuse in various cases can be accepted – 1) written and 2) oral, in some cases, a child can do nothing but search for medical care, the doctor can report the alleged violation.

31. The victim (child) representation offers a wide range of subjects, so that the child's interests can be represented in the best possible way and be protected. In pre – trial and during the trial, the child is guaranteed with procedural safeguards (limited access to the media, protection of children's data and image).



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**Academic Supervisor:**

Dr. Ruth Farrugia

**National Co-Ordinator:**

Gabrielle Tabone

**Research Group:**

Christina M Borg

James Debono

Ursula Farrugia

Patrick Gatt

Anselmo Mifsud Bonnici

Clement Mifsud Bonnici

Gaynor Saliba

Anthea Turner

Gabrielle Tabone

## I INTRODUCTION

“Sexual violence is an attempt to the child’s human dignity and a serious violation of children’s rights. It causes irreparable damage to the victim’s physical and mental health and often has life-lasting effect.”<sup>1</sup>

### 1 GENERAL

i. The state of Malta’s commitment to regulate discrimination whilst also promoting and enforcing equal rights is evinced by the entrenchment of article 14 of the Maltese State’s Constitution, binding it to:

“promote the equal right of men and women to enjoy all economic, social, cultural, civil and political rights and for this purpose shall take appropriate measures to eliminate all forms of discrimination between the sexes by any person, organisation or enterprise; the State shall in particular aim at ensuring that women workers enjoy equal rights and the same wages for the same work as men”.<sup>2</sup>

Furthermore within the section Fundamental Rights and Freedoms of the Individual, of the said constitution, Article 45 defines discriminatory treatment as:

“means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.

The Maltese Government is prohibited from legislating in any discriminatory manner either of itself or in its effect, subject to sub-articles 4, 5 and 7 of the same article.<sup>3</sup>

The European Commission’s Eurobarometer public opinion report on “Discrimination in the European Union” published in January 2007, studied the sociological patterns of the different European States. According to this study the Maltese respondents declared that in their view with regards to the concept of multi-cultural society, the different ethnical origin of people does not enrich the culture of the society. Only 32% of the respondents claimed

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<sup>1</sup> Mrs Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe.

<sup>2</sup> Constitution of Malta

<sup>3</sup> Ibid

that it is beneficial, and so amongst the other members of the European Union, Malta placed the last.<sup>4</sup>

On the other hand on the same subject a report published by the same institution a year later, reported that only 14% of the respondents in the said previous 12 months, felt that they had witnessed someone being either discriminated against or harassed on the basis of discrimination: the lowest recorded amongst the 27 European states.<sup>5</sup> This positive result was signalled once more in the Eurobarometer's report: **Discrimination in the EU 2009**, where there only 12% of the respondents witnessed someone being discriminated in the previous 12 months. In the later report it was also recorded that, 7% of the respondents felt that in the previous 12 months, they had personally felt discriminated against or harassed, the second lowest amongst the other members of the European Union.<sup>6</sup>

Both in the 2008 and 2009 reports published by the Eurobarometer, respondents were asked whether enough effort was being made to fight all forms of discrimination in their respective country. The majority of Maltese respondents felt that enough is done, in 2008.<sup>7</sup> Yet this result contrasts with the 2009 report, where 43% replied positively, and a sharp drop of 9% of the respondents changed their views.<sup>8</sup>

ii. The term “family” is not defined under Maltese Law, although article 3 in the section ‘Of the rights and Duties arising from Marriage’ of the Civil Code, the clear indication is that there is a fore gone conclusion that a family is made up of two spouses.<sup>9</sup> The article reads:

“Both spouses are bound, each in proportion to his or her means and of his or her ability to work whether in the home or outside the home as the interest of the family requires, to maintain each other and to contribute towards the needs of the family”.<sup>10</sup>

According to the Maltese Census results published in 2005 by the National Statistics Office, the majority of the population's marital status is “married” with 59.3% an 8% increase over the span of 10 years. This document also records that the average marital age in the year

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<sup>4</sup> Discrimination in the European Union January 2007

<sup>5</sup> Discrimination in the European Union: Perception, Experiences and Attitudes July 2008

<sup>6</sup> Discrimination in the European Union in 2009

<sup>7</sup> (n.4)

<sup>8</sup>(n. 5)

<sup>9</sup> Noteworthy to the foregoing discussion is that the Courts have a different viewpoint and there is sound jurisprudence which reflects family as not necessarily being within marriage – the emphasis is on relationships and children born to parents whether within or outside wedlock

<sup>10</sup> Chapter 16 of the Laws of Malta

2003 for women was 26.9 years whilst in the case of men 28.5 years.<sup>11</sup> In a more recent document published by the United Nations Economic Commission for Europe, Statistical Database the marital age in men and women has increased constantly and according to the latest data recorded in 2008 the average marital age of women is 27.5 years whilst in the case of men the average is 29.6 years.<sup>12</sup>

**iii.** Historically children have always been regarded as the foundation of the family, where importance is given to taking care of them by providing shelter, protection, affection and support. This is mainly due to the fact that the law and society reflect the Christian traditions. The cultural directions of the Maltese are taken clearly into consideration in the Laws of Malta. This is further reflected in article 3B(1) of the Civil Code, which states;

“Marriage imposes on both spouses the obligation to look after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children.”<sup>13</sup>

The same genre of obligations is imposed on parents of children conceived and born out of wedlock.<sup>14</sup> The legal importance and judicial attention towards children’s rights and due protection has increased in the last two decades, mostly due to a higher awareness of the risks and vulnerability of children. The Maltese legislator has consistently updated and amended laws to protect and safeguard the status of children in an effective manner.

In 2003 through the Commissioner for Children Act, the government introduced the appointment of an official defined as the Children Commissioner who is specifically in charge of promoting the welfare and safeguarding the best interest of children whilst acting in an independent manner any person or authority.<sup>15</sup> Amongst other safeguards the government of Malta has also introduced the Child Offender Register through the Protection of Minors (Registration) Act in 2012, whereby a register has been introduced prohibiting persons found guilty of committing crimes against children (not limited to just sexual abuse cases) from finding employment in institutions where children are educated or taken care of.<sup>16</sup> This was a step further after the implementation of the Protection of

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<sup>11</sup> Maltese Families, Social Statistics and Information Society (NSO)

<sup>12</sup> UNECE Statistical Database

<sup>13</sup> (n.8)

<sup>14</sup> Ibid Art 93

<sup>15</sup> Chapter 462 of the Laws of Malta

<sup>16</sup> This register is restricted to prospective employers and is only just starting to be used



Children Act in 2010,<sup>17</sup> and the introduction of the children's advocate in the Civil Code. These being a few of the numerous amendments made to the law regarding children.

One of the most prominent cases given great importance by the media regarding child sex abuse, was the case of the Priests' child abuse case which occurred in Gozo, resulting in the conviction of 2 priests (still awaiting the decision of the Court of Appeal).<sup>18</sup>

iv. The main piece of legislation regarding the ratification of treaties is the Ratification of Treaties Act of 1983 (hereinafter the '**RTA**').<sup>19</sup> While the definition of 'treaties' is considerably broad,<sup>20</sup> its remit is clearly limited. The RTA regulates only those treaties which affect or concern:

- a) the status of Malta under international law or the maintenance or support of such status;
- b) the security of Malta, its sovereignty, independence, unity or territorial integrity; or
- c) the relationship of Malta with any multinational organization, agency, association or similar body.<sup>21</sup>

It is submitted that neither the United Nations Convention on the Rights of the Child (hereinafter the '**UNCRC**') nor the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (hereinafter the '**Lanzarote Convention**') has any provisions which fall within the scope of the RTA. In such cases, the Maltese Government does not have its hands tied, as is clear from a reading of Article 5 of the RTA:

"Nothing in this Act shall be construed as in any way affecting the powers of the Government with respect to treaties to which article 3(1) does not apply".<sup>22</sup>

However, it is custom for the Maltese Government to implement an international treaty, whether in its entirety or only selected provisions, into Maltese law by primary legislation.<sup>23</sup>

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<sup>17</sup> Chapter 507 of the Laws of Malta, Protection of Children (Hague Convention) Act

<sup>18</sup> <<http://www.timesofmalta.com/articles/view/20120706/local/priests.427421>>

<sup>19</sup> Chapter 304 of the Laws of Malta.

<sup>20</sup> Ibid., Art 2 reads "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.

<sup>21</sup> Ibid., Art 3 (1).

<sup>22</sup> Ibid.

<sup>23</sup> For example, the Child Abduction and Custody implements the Convention on the Civil Aspects of

Maltese law is unclear on this point. While we have opted for the dualist approach with respect to treaties falling within the remit of the RTA, it is unclear whether we follow the monist or dualist approach with respect to the treaties falling outside the remit of the RTA. It is the generally the accepted view that Malta has inherited the dualist approach with respect to all international treaties from its colonial days. The RTA, which was promulgated after the severance of the umbilical cord from the British, merely confirms the dualist view, however, only with a specific class of treaties.<sup>24</sup>

The UNCRC was signed by the Maltese Government on 26 January 1990 and ratified on 30 September 1990.<sup>25</sup> The Maltese Government did make a reservation upon notification, yet it was withdrawn on 20 August 2001.<sup>26</sup> The reservation read as follows: '[t]he Government of Malta is bound by the obligations arising out of this article to the extent of present social security legislation'.<sup>27</sup> The UNCRC has not, to date, been incorporated into Maltese national law. Therefore, its provisions do not have direct effect in our legal system. This is in line with a dualist perception of international law. This would effectively mean that a private complainant cannot, at law, hold the Maltese Government accountable to its positive obligations emerging from the UNCRC before the Maltese courts.

The only proper reference made to the UNCRC in domestic legislation is in the Child Commissioner Act of 2003.<sup>28</sup> Under the Act, the Child Commissioner may exercise certain powers and enforcement measures with respect to the UNCRC. These include:

- d) promotion and advocacy of children's rights under the UNCRC;<sup>29</sup>
- e) ensure that children's rights under the UNCRC are taken into account by public authorities in policy-making;<sup>30</sup>

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International Child Abduction; the Protection of Children (Hague Convention) Act implements the Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.

<sup>24</sup> Ian Refalo, 'Constitutional Change in Malta' (President's Forum on Constitutional Change, 2012). See also: Kevin Aquilina, 'The Parliament of Malta versus the Constitution of Malta: parliament's law-making function under section 65(1) of the Constitution' [2012] Common Law Bulletin for a view that Malta has adopted, with respect to European Union legislation a mixed monist/dualist approach.

<sup>25</sup> <[http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en)> last accessed 16 August 2012.

<sup>26</sup> <[http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en#39](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#39)> last accessed 16 August 2012.

<sup>27</sup> Ibid.

<sup>28</sup> Chapter 462 of the Laws of Malta.

<sup>29</sup> Ibid., Art 9 (a).

- f) investigation of alleged breaches of children's rights under the UNCRC, particularly a child's death;<sup>31</sup> and most notably,
- g) the issue of non-binding compliance notices recommending any person who is not in adherence with the UNCRCR to change his ways.<sup>32</sup>

The Council for Children, also set up under the Act, has some functions relating to the Convention which complement the role of the Commissioner.<sup>33</sup>

In any case, it must be acknowledged that Maltese law satisfactorily addresses the obligations arising from the UNCRC.

The United Nations Committee on the Rights of the Child in its 2000 Concluding Observations on Malta flagged a number of issues relating to the status of the UNCRC at Maltese law. The principal concern remains that the UNCRC has not been fully incorporated into Maltese law. Other issues were discussed including the low age of criminal responsibility (9 years of age).

Since 2000, Malta has addressed a number of these issues. For example, the distinction between legitimate and illegitimate children was removed from the Civil Code for purposes of succession law and the promulgation of the Domestic Violence Act has given remedies to the child where there is disproportionate corporal punishment.

Despite these concerns, it must be acknowledged that Maltese law satisfactorily addresses the obligations arising from the UNCRC.

v. The Directive on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA has been in part transposed in Maltese law by Act VII of 2010 amending various laws relating to criminal matters.<sup>34</sup> In its transposition, the Maltese Government had preceded the Directive's publication in the EU's Official Journal. Other aspects of the Directive were already in place in the Maltese legal system.

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<sup>30</sup> Ibid., Art 9 (f)

<sup>31</sup> Ibid., Art 11 (c)

<sup>32</sup> Ibid., Art 17

<sup>33</sup> Ibid., Art 12 (6)

<sup>34</sup> <<http://www.doi.gov.mt/EN/parliamentacts/2010/ACT%20VII%20Various%20Laws.pdf>> last accessed 22 August 2012.

## 2 THE LANZAROTE CONVENTION

i. Malta signed the European Convention of Human Rights on 12 December 1966 and ratified the same on the 23<sup>rd</sup> January 1967<sup>35</sup>. One must highlight that this Convention has been fully ratified into the Maltese legislative framework via Act XIV of 1987 which created the European Convention Act, Chapter 319 of the Laws of Malta.

ii. In the year 2007, the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse was adopted and opened for signature on the occasion of the 28<sup>th</sup> Conference of European Minister of Justice Lanzarote, Spain. Subsequently, following its fifth ratification, the Convention entered into force on the first day of July 2010.

This Convention set out to be the very first instrument/international treaty to address and establish the various forms of sexual abuse of children as criminal offences, including such abuse committed in the home or family, with the use of force, coercion or threats. As well as programmes to support victims, encourages people to report suspected sexual exploitation and abuse and sets up telephone and Internet help lines purposely for children. The Convention also caters for preventive measures<sup>36</sup>. The Convention also established itself to strive and work hard to promote an awareness campaign to encourage people to report suspected sexual exploitation and abuse.

The new legal tool also ensures that child victims are protected during judicial proceedings, for example with regard to their identity and privacy. From a legislative domestic point of view, as catered for by recent legislation, the child interests are always protected.

The Convention's trademark is known as The Modern "4 Ps" approach:

- Prevent and combat sexual exploitation and abuse of children;
- Protect the rights of child victims;
- Prosecute the perpetrators;
- Promote appropriate policies and national and international co-operation against this phenomenon.

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<sup>35</sup> Council of Europe Country Information <http://www.echr.coe.int/50/en/#countries-infos> accessed 21 September 2012

<sup>36</sup> Including the screening, recruitment and training of people working in contact with children, making children aware of the risks and teaching them how they should be protecting themselves and subsequently monitoring measures for offenders and potential offenders

The core of this Convention is its emphasis on keeping the best interests of children in the forefront.

On the 6<sup>th</sup> of September 2010, Malta signed the Council of Europe Convention on the protection of Children against Sexual Exploitation and Sexual Abuse. The Convention then came into force in Malta on the 1<sup>st</sup> January 2011.

The Ambassador Joseph Licari, Permanent Representative to the Council of Europe in Strasbourg, signed the convention on behalf of the Maltese government, he then deposited the instrument of ratification with the Treaty Office of the Council of Europe.

After signing this Convention, Malta together with the other parties have bound themselves to take the necessary legislative or other measures to encourage and support the setting up of information services, such as telephone or Internet help-lines, to provide advice to callers, confidentially and with due regard for their anonymity.

Malta did not make any reservations or opt-outs from the Convention. However, as required by the said convention, Malta made a declaration with regards to Article 37(2); which states that:

*Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the name and address of a single national authority in charge for the purposes of paragraph 1.*

Malta designated the Malta Police Force as the competent national authority for the purposes of Article 37.<sup>37</sup>

v. The Lanzarote Convention is locally ranked as a ratified and incorporated International Convention.

However, having said that, with reference to Article 65(1) of the Constitution of Malta, all Maltese legislation must be in accordance with Malta's international obligations. In this case, the convention is an international obligation.<sup>38</sup>

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<sup>37</sup> Paragraph 2 referred to above

<sup>38</sup> 65 (1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the

vi. The domestic situation is the following; The Authority lies with the Maltese Police Force and The incorporated Hague Convention.

## II NATIONAL LEGISLATION

### 1 GENERAL PRINCIPLES OF THE JURISDICTION

i. A brief history of Malta and of the Maltese governmental regime.

“Malta is a democratic republic founded on work and on respect for the fundamental rights and freedoms of the individual.”<sup>39</sup>

The above declaration is enshrined in the first article of the Maltese Constitution which was adopted on the 21st of September 1964, the day Malta acquired Independence from the United Kingdom. Upon Malta becoming a Republic on the 13th of December 1974, this article was subsequently amended to reflect its new status.

ii. The above quoted article is a formal statement by the Maltese government of its paramount obligation to safeguard and promote the fundamental rights and freedoms of individuals. Such commitment towards the protection and application of Human Rights may be observed in the fourth chapter of the Maltese Constitution which sets the core legislative provisions dealing with this subject.

This chapter provides a judicially enforceable Bill of rights, set in the 1961 Constitution which was subsequently retained and further enforced in the Independence Constitution of 1964. The provisions contained therein were modelled upon the European Convention on Human Rights by the Council of Europe. This mirroring relationship between the national legislative instrument and the international declaration conveys Malta’s commitment in safeguarding Human Rights both at a national and an international level. One must highlight that this Convention has been fully ratified into the Maltese legislative framework via Act XIV of 1987 which created the European Convention Act, Chapter 319 of the Laws of Malta. The third article of such Act declares that the provisions of such Convention are “enforceable as part of the laws of Malta” and that in case of inconsistency between the

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treaty of accession to the European Union signed in Athens on the 16th April, 2003

<sup>39</sup> Constitution of Malta, Article 1(1)

local and European Convention's provisions, the latter shall prevail while the Maltese ordinary law becomes void.<sup>40</sup>

The principles and regulations set forth in the Constitution form the basis for other subsequent laws. For example, the Protection of Right to Life<sup>41</sup> is addressed in further detail in the articles contained in the Criminal Code<sup>42</sup>, and the Protection of Freedom of Expression<sup>43</sup> sets the foundations for the Press Act<sup>44</sup> and the Broadcasting Act<sup>45</sup>.

With reference to Children's Rights in Malta, the mentioned Constitutional Bill of Rights does not have any particular provisions that relate directly to children or minors<sup>46</sup>. Nevertheless, one must refer to Article 33 of the Constitution which states that "every person in Malta is entitled to the fundamental rights and freedoms of the individual". Since the wording of the law provides for "every person" and personhood in Malta is deemed to be attained from birth<sup>47</sup>, one may conclude that the rights contained therein are therefore vested upon children as well.

However, apart from such declaration, the Maltese legal framework is not equipped with a specific Bill of Children's Rights, i.e. a single legal document which provides for all the rights pertaining to minors. Children's Rights are addressed in special provisions either in other chapters of the main law or as subsidiary legislation to the ordinary law.

The primary document which one should refer to when discussing Children's Rights in Malta is the Commissioner for Children Act.<sup>48</sup> This piece of legislation provides for the appointment of a person to the independent office of Child Commissioner whose role is to "promote and advocate the rights and interests of children"<sup>49</sup>. This Act also prescribes for

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<sup>40</sup> European Convention Act, Chapter 319 of the Laws of Malta, Article 3(1) & (2). This has also been confirmed in the constitutional case *Dr. Lawrence Pullicino v. Commanding Officer Armed Forces of Malta nomine et al* where the constitutional court confirmed that where a domestic law is not in conformity with the European Law, even though not completely contrary it is to be considered inapplicable.

<sup>41</sup> *Supra* 1, Article 33

<sup>42</sup> Chapter 9 of the Laws of Malta

<sup>43</sup> *Supra* 1, Article 41

<sup>44</sup> Chapter 248 of the Laws of Malta

<sup>45</sup> Chapter 350 of the Laws of Malta

<sup>46</sup> Which in the case of Malta it is generally deemed to be the age until one attains adulthood once turning 18.

<sup>47</sup> Even during gestation in certain particular circumstances.

<sup>48</sup> Chapter 462 of the Laws of Malta

<sup>49</sup> *Ibid*, Article 9(a)

the creation of a Council for Children<sup>50</sup> who shall meet at least once every three months and assist and advice the Commissioner in safeguarding and promoting children's rights. These actions extend to various areas including children's freedom of expression and being heard, children's right for recreation, minimising child poverty, the protection and stability of the family unit (including adequate support for parents), health standards during pregnancy<sup>51</sup> and "to promote compliance with the United Nations Convention on the Rights of the Child as ratified by Malta and with such other international treaties, conventions or agreements relating to children as are or may be ratified or otherwise acceded to by Malta."<sup>52</sup>

Moreover, Article 9(g) states that one of the functions held by the Commissioner for Children is "to promote the protection of children from physical or mental harm and neglect, including sexual abuse or exploitation."

Hence, the institution of the Commissioner for Children in Malta is especially equipped and vested with the authority to be the main instrument through which Children's Rights are truly promoted, put into practice and safeguarded. One should highlight that the rights adopted by Malta, and which the Commissioner is bound to protect and promote, are the rights promulgated in the UN Convention on the Rights of the Child (UN CRC)<sup>53</sup>. This document served as an inspiration to the creation of the 'Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse'<sup>54</sup> i.e. the Lanzarote Convention. In spite of this, one should remark that the office of the Commissioner of Children does not have any enforcement powers, as it has an educational and monitoring role which seeks to raise awareness and protect children's rights. The primary significance of this role is that the Commissioner does not only act on what adults would perceive to be in the best interests of children, but it acts upon the "children's experiences themselves"<sup>55</sup>.

Another important legislative framework within the Maltese jurisdiction in safeguarding children's rights is the Civil Code<sup>56</sup>. "The Civil Code preserves the principle of the 'best

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<sup>50</sup> Ibid, Article 12

<sup>51</sup> Ibid, Article 9(b), (j), (i), (k), (c) & (d), (h)

<sup>52</sup> Ibid, Article 9(l)

<sup>53</sup> CRC, United Nations, 1989

<sup>54</sup> CETS No. 201, 2007, Explanatory Report to the Convention section I(a.4)

<sup>55</sup> Official Website of the Commissioner for Children, Available

at: <<http://www.tfal.org.mt/aboutus.aspx?lid=1>> last accessed 12/9/2012

<sup>56</sup> Chapter 16 of the Laws of Malta. Because of its ancient origins, the Civil Code is the first piece of legislation in the Maltese jurisdiction which has provided for children's rights.



interests of the child”<sup>57</sup> by establishing specific provisions which ensure that a child is entitled for adequate care and custody, maintenance and education.

The compliance of Maltese authorities with international treaties like the UN CRC is essential in ensuring the protection and promulgation of children’s rights. As discussed in previous chapters, Malta ratified the UN CRC on the 30th of September 1990 and its Optional Protocol on the ‘Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography’<sup>58</sup>. However, this is not the sole international legal mechanism adopted by the local legislator to safeguard Children’s Rights. Malta’s membership in the Council of Europe in 1965 binds it to respect the shared values of the member states and to “accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms”<sup>59</sup>. This liability is enforced by Malta’s membership in the European Union which through Article 6 of the Treaty of the European Union (TEU) the EU Charter of Fundamental Rights has been given the same legal status of the Treaties. Therefore, the Maltese authorities are bound to legislate in conformity with the principles promulgated by these international institutions.

Until the present date, Malta has ratified the ‘European Convention on the Adoption of Children’ and the ‘European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children’ and the ‘Lanzarote Convention’<sup>60</sup>. It has also signed, but not yet ratified the ‘Convention on Contact concerning Children’ and the ‘European Convention on the Exercise of Children's Rights’<sup>61</sup>. However, Malta still has not given its formal commitment with regards to the ‘European Convention on the Legal Status of Children born out of Wedlock’ and the ‘European Convention on the Adoption of Children (Revised)’<sup>62</sup>. Other international instruments which have been enforced in the Maltese Legislative system include the ‘Convention on Civil Aspects of International Child Abduction’ and the ‘European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of

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<sup>57</sup> Draft National Children’s Policy, p. 43, Available at: [https://www.education.gov.mt/mediacenter.ashx?file=MediaCenter/Docs/1\\_child%20policy.pdf](https://www.education.gov.mt/mediacenter.ashx?file=MediaCenter/Docs/1_child%20policy.pdf) last accessed 22/9/2012

<sup>58</sup> United Nations, Treaty Series, vol. 2171, p. 227, ratified by the Maltese government on the 28th of September 2010

<sup>59</sup> Statute of the Council of Europe, London 5.V.1959, Article 3

<sup>60</sup> CETS 58 & CETS 105

<sup>61</sup> CETS No.: 192 & CETS No.: 160

<sup>62</sup> CETS No.: 085 & CETS No:202.

Custody of Children<sup>63</sup>, both ratified by Act XIII of 1999 which promulgated the Maltese ‘Child Abduction and Custody Act<sup>64</sup>. Another recent development in the field of children’s rights is the ratification of The Hague ‘Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children<sup>65</sup>’ through Act XXI of 2010. The ratification of such instrument led to the enactment of Chapter 507 of the Laws of Malta, entitled the ‘Protection of Children (Hague Convention) Act’. This document proves to be essential in harmonising local rules with international regulations, by establishing which jurisdiction should apply in a particular case, and therefore, avoiding legal procedures which may detrimental for the child.

Apart from the discussed mechanisms, the Maltese body of laws provides other legislative frameworks aimed towards the protection of minors. The earliest local legislation dealing with children’s rights dates back to 1962 and regulates the placing of protected minors in alternative homes<sup>66</sup>. Since the 1980’s, Chapter 287 of the Laws of Malta entitled the ‘Juvenile Court Act’ has regulated matters with regards to proceedings related to a child or a minor, who for the purposes of such legislation is ‘any person ... under the age of sixteen years’<sup>67</sup>. Having such a legislative mechanism is essential in ensuring a child’s right to a fair hearing which is suitable to his ‘dignity and worth’ as promulgated by Article 40 of the UN CRC. Such regulations would, however, be inadequate without the necessary provisions which stipulate for the suitable care, protection and placement of a child who has been found liable of a criminal offence and is remanded in custody. This situation is addressed by Chapter 285 of the Laws of Malta in the ‘Children and Young Persons (Care Orders) Act’<sup>68</sup>. This document also deals with children who may need protection or control where such protection is not being provided for by their parents or legal guardians, or the environment provided by the parents is detrimental for the child’s well-being. Another mechanism which

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<sup>63</sup> Convention on the Civil Aspects of International Child Abduction (1980) adopted at the Hague on 25 October 1980 & ETS 105 – Decisions concerning Custody of Children, 20.V.1980

<sup>64</sup> Chapter 410 of the Laws of Malta, 1st August 2000. A small preamble to the act states that the purpose of this legislation is ;“To enable Malta to ratify two international Conventions relating respectively to the civil aspects of international child abduction and to the recognition and enforcement of custody decisions.”

<sup>65</sup> Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children  
Entry into force: 1-I-2002

<sup>66</sup> Placing of Minors Regulations 16th February 1962

<sup>67</sup> Chapter 287 of the Laws of Malta, Juvenile Court Act 25th July 1980.

<sup>68</sup> Chapter 285 of the Laws of Malta 8th August 1980 (This has never been used in Malta

stipulates specific provisions for children's rights is the 'Broadcasting Code for the Protection of Minors'<sup>69</sup> which deals with the balance that needs to be established between children's rights for freedom of expression and information, and children's vulnerability at being exposed to certain material which is harmful to their development.

The most recent legislative development which provides for children's rights is the 'Protection of Minors Registration Act'<sup>70</sup>. This legislative framework has created a register which lists the names and details of perpetrators subjected to a notification requirement. Such register must be referred to by institutions employing individuals whose position involves contact with children. A notification requirement is a type of criminal retribution imposed on offenders who are found guilty of what the act calls 'scheduled offences' which include: inducing prostitution of minors, violent indecent assault (rape), abduction of minors and defilement of minors. Hence, because of this intrinsic relationship with substantive criminal law, this document must be read together with the particular provisions stipulated in the Criminal Code and other legislation. Both these provisions and the Protection of Minors Registration Act shall be further discussed in subsequent sections of this report.

**iii.** For an effective pursuit of justice, the adequate legal frameworks must be supported by the necessary judicial mechanisms. In Malta, cases dealing with infringement of human rights fall within the jurisdiction of the Civil Court First Hall, as established by Article 46 of the Maltese Constitution. Such court has exclusive jurisdiction upon issues arising from redress to human rights. In fact, if before another court, whether it is of first or second instance, an issue concerning human rights is raised, the latter court must refer the question to the Civil Court First Hall.<sup>71</sup> Moreover, as per Article 95 of the Constitution, once a decision is issued by the First Hall, either one of the parties may appeal to the Constitutional Court which apart from being by nature an appellate court is also regarded as the guardian

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<sup>69</sup> Subsidiary Legislation 350.05 of the Laws of Malta 1st September 2000

<sup>70</sup> Chapter 518 of the Laws of Malta, 20th January 2012

<sup>71</sup> Supra 1 Article 46 sub-articles 2 The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-article (1) of this article. Sub-article 3; If in any proceedings in any court other than the Civil Court, First Hall, or the Constitutional Court any question arises as to the contravention of any of the provisions of the said articles 33 to 45 (inclusive), that court shall refer the question to the Civil Court, First Hall unless in its opinion the raising of the question is merely frivolous or vexatious ...

of the Constitution and hence the most suitable court to deal with issues concerning human rights as enshrined in the Constitution<sup>72</sup>.

The procedure to be followed when seeking redress via Article 46, due to a breach of a constitutional right is regulated by the ‘Court Practice and Procedure and Good Order Rules’.<sup>73</sup> This Act states that for proceedings to be initiated before the Civil Court First Hall and the Constitutional Courts under their jurisdiction as human rights courts, one must file a *rikors* - a judicial application. The latter application may be instituted by any individual or legal person who feels that the rights set forth in either the Maltese Constitution or the European Convention for the Protection of Human Rights and Fundamental Freedoms have been breached. This mechanism must contain an outline of the facts which have led to the filed complaint and also

“indicate the provision or provisions of the Constitution of Malta or of the European Convention for the Protection of Human Rights and Fundamental Freedoms alleged to have been, to be or likely to be contravened.”<sup>74</sup>

Such application must also include the type of redress sought by the applicant; however, the court may of its own motion provide an alternative form of redress which it deems more appropriate.

As one may notice from the above quoted article, the law stipulates that one may also apply on the basis of breaches made to the provisions of the European Convention of Human Rights. Although the Maltese Constitutional Court has jurisdiction to hear and determine cases regarding the Council of Europe’s Convention of Human Rights, the final interpretation of this document falls within the competence of the European Court of Human Rights itself. Therefore, as signed by the Maltese Government in 1966 and 1967, Maltese citizens and all those found within the Maltese jurisdiction, may petition to the Strasbourg Courts. However, it must be noted that recourse to the European Courts is generally deemed to be a solution of last resort once an individual has exhausted all the other ordinary remedies.

**iv.** Article 95 of the Maltese Constitution states that;

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<sup>72</sup> Supra 1 Article 95 (2.c)

<sup>73</sup> Subsidiary Legislation 9 of Chapter 12 of the Laws of Malta as promulgated by L.N 279 of 2008

<sup>74</sup> Ibid Article 3 (1)

“There shall be in and for Malta such Superior Courts having such powers and jurisdiction as may be provided by any law for the time being in force in Malta.”

The Court of Organisation and Civil Procedure then provides that among the superior courts there shall be the Court of Appeal which may have either Civil or Criminal jurisdiction. In the case of the latter, the ‘Court of Criminal Appeal’ as established by article 498 of the Criminal Code, is the final appellate court for criminal matters and it is styled as either ‘The Court of Criminal Appeal - Inferior Jurisdiction’ or ‘The Court of Criminal Appeal - Superior Jurisdiction’. The former is when it is composed by only one Judge and it has jurisdiction upon appeals from the Court of Magistrates<sup>75</sup>. On the other hand, the Court of Criminal Appeal in its Superior Jurisdiction is composed of three Judges, one of them being the Chief Justice. This court hears appeals filed by the convicted party in decisions of the Criminal Court, and also appeals instituted by either the accused or the Attorney General (AG) on the grounds of admissibility of evidence and also preliminary decisions given by the Criminal Court<sup>76</sup>.

When a person in Malta is charged with an offence which its punishment entails more than six months imprisonment, this person is generally tried by the Criminal Courts. If the penalty would not exceed the ten year imprisonment and there is the consent of both the AG and the accused, the case would be brought before the Court of Magistrates in its criminal jurisdiction. This Court is composed by one Magistrate except when it is functioning as a Juvenile Court<sup>77</sup>.

The Court of Magistrates within the criminal law field also occupies the secondary role of a court of criminal inquiry where it is responsible for the compilation of evidence required in a case falling within the competence of the Criminal Court. During such process the Court must decide whether the evidence produced is sufficient for the AG to file a Bill of Indictment before the Criminal Court. The Court of Magistrates as a Court of Criminal Inquiry is different from a Magisterial Inquiry. The latter would generally be carried out

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<sup>75</sup> Both the one in Malta the one in Gozo. In fact, the Court of Criminal Appeal in its inferior jurisdiction unlike the one of superior jurisdiction presides both in Malta and in Gozo. Also, in accordance with the official website of the Judiciary of Malta; With the extension in 2003 of the right of appeal of the Attorney General, the work of the Court of Criminal Appeal (Inferior Jurisdiction) has increased considerably. This is shown by the number of cases decided each year from 2002 to 2008: 2002 - 268 cases, 2003 - 316, 2004 - 250, 2005 - 344, 2006 - 379, 2007 - 432 and 2008 - 404.  
<<http://www.judiciarymalta.gov.mt/court-of-criminal-appeal>> last accessed 20/9/2012

<sup>76</sup> Vide Articles 499 & 500 of the Criminal Code, Ch 9 of the Laws of Malta

<sup>77</sup> The subject of the Juvenile Court shall be discussed in further detail in subsequent sections

where there is a “suspicious or violent death” and criminal procedures would generally start via a Magisterial Inquiry. At this initial stage there is no accused, but a suspect, and the appointed Magistrate would be in charge of the investigation, collection and preservation of material evidence. Moreover, the individual Magistrates are also involved in the actual police investigation of certain offences, for example, the issuing of search and arrest warrants.

Cases not heard before the Court of Magistrates would then be tried before the Criminal Court which may be composed in two different manners, either as a Judge sitting alone or a trial by jury. In both cases, proceedings before the court are initiated via the filing of a Bill of Indictment by the AG. When the Criminal Court is composed by a sole Judge its jurisdiction is limited to “the determination of preliminary pleas and pleas as to the admissibility of evidence”<sup>78</sup>, consideration of applications for bail where such consideration would be beyond the competence of the court of Magistrates, review of decisions by the Court of Magistrates and applications under the Money Laundering Act<sup>79</sup>. Therefore, when a Judge sits alone in the Criminal Court it does not have the authority to determine whether the accused is culpable of the accusations brought against him. This responsibility would fall upon the jury in a trial by Jury, where the Criminal Court would be composed of a Judge and nine Jurors. In the context of such trials the Judge’s role is to determine questions related to law and to sum-up the evidence produced before the court in such a way as to “enable the jury to determine whether they are satisfied beyond reasonable doubt of the guilt of the accused.” It is the jurors who would then decide upon the verdict which may be either one of unanimity or qualified. The majority required is generally six to three, although in certain situations, such as the determination of the sanity of the accused at the time of the commission of the offence, a minimum majority of five is to four is sufficient.

v. When discussing the age of criminal liability in relation to minors, one must divide such liability in accordance with three different age groups; minors below the age of nine years, minors in between the age of nine to fourteen and minors who have turned fourteen but are not yet eighteen.

Article 35 of the Maltese Criminal Code establishes that children under the age of nine years are exempt from any kind of criminal liability. Exemption from criminal liability also applies

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<sup>78</sup> Vide ‘The Criminal Court’ from the official Judiciary of Malta website  
<<http://www.judiciarymalta.gov.mt/criminal-court>> last accessed 20/9/2012

<sup>79</sup> Chapter 373 of the Laws of Malta

for minors under the age of fourteen when acting without mischievous discretion. However, although these minors may be exempt from criminal responsibility, parents may still be found liable for '*culpa in vigilando*' meaning that they are responsible for their child's actions for not exercising the proper diligence required by a parent (the *bonus pater familias*). Article 36 then provides that minors falling within the nine to fourteen age group who would have committed an offence with mischievous discretion "shall be liable on conviction to the punishments established for contraventions" or else "to the punishment laid down for the offence decreased by three degrees provided that in no case may the punishment exceed four years imprisonment"<sup>80</sup>. A minor who turns fourteen is not exempt from criminal liability and the subsequent penalisation for their offence, however, the punishment shall be decreased by one or two degrees<sup>81</sup>.

Cases where minors are charged with a criminal offence fall within the jurisdiction of the Court of Magistrates. However, in such circumstances it is composed in a different manner and is referred to as the Juvenile Court<sup>82</sup>. Article 4 of the 'Juvenile Court Act', states that such court shall be composed by one Magistrate who shall be assisted by two lay persons one of whom must be a woman. It is important to highlight that according to the definition clause this Act, for the purposes of such legislative document, "'child or young person" means a person who is under the age of sixteen years"<sup>83</sup>. Hence, minors who have turned sixteen are generally prosecuted by the Court of Magistrates. The Court of Magistrates also prosecutes cases where a minor who has not yet attained the age of sixteen is co-accused with a person over the age of sixteen. In general, cases involving minors under the age of sixteen are prosecuted before the Juvenile Court. This different treatment by the judicial system towards minors is a reflection of the notion that minors, although having committed the same offences an adult person would have done, are still "emotionally and socially different from adults"<sup>84</sup>. Therefore, the main objective of proceedings having minors as accused should not be retribution but reformation and constructive social reintegration, especially in the light that most child offenders are victims themselves. Therefore it would be significant if for the latter to receive special reformatory services when in detention.

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<sup>80</sup> Chapter 9 of the Laws of Malta - Criminal Code, Article 36

<sup>81</sup> Chapter 9 of the Laws of Malta - Criminal Code, Article 37,

<sup>82</sup> Chapter 287 of the Laws of Malta, Maltese Juvenile Court Act, Article 3

<sup>83</sup> Ibid Article 2

<sup>84</sup> Dr. Ann Marie Mangion 'Age of Criminal Responsibility', The Times of Malta, 9/4/2010

Currently in Malta there is no official study about Child Prisoners<sup>85</sup>. The latest available statistics date back to 2009 and have been published by the Office of the Commissioner for Children in its Annual Report<sup>86</sup>. The Report stated that in 2009, seven children were housed at the Corradino Correctional Facilities - the main prison structure in Malta. Throughout the report, the situation and mechanisms providing for child prisoners are criticised as being unsatisfactory and also in contravention of Children's Rights as established by the UN CRC. Another study by the foundation 'Mid-Dlam għad Dawl' (From Darkness to Light), which promotes prisoners' rights and assists prisoners, ex-prisoners and their families, shows that the number of child prisoners has increased from two in 2001 to seven in 2006<sup>87</sup>. In 2010, the Office for the Commissioner for Children held an inquiry<sup>88</sup> following a case of imprisonment of two teenagers. As a result of the inquiry the Office issued a number of recommendations which stated that in conformity with Article 40 of the UN CRC, a better detention environment for children in conflict with the law should be provided. A solution would be to transfer the youth section outside of the Corradino Correctional Facility or Mount Carmel Hospital (the latter being a psychiatric Hospital). The Commissioner also suggested alternative types of detention which would be targeted towards the minors' reformation and positive reintegration in society, such as, probation orders, educational programmes and vocational training.<sup>89</sup> One must note that these recommendations were upheld by at the time Justice and Home Affairs Minister Dr. Carmelo Mifsud Bonnici. This resulted in the Young Offenders Unit Rehabilitation Services (YOURS) premises being moved to an undisclosed location in 2011. Such shift also led to the possibility for under-age

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<sup>85</sup> When the relevant Department for Correctional Services was contacted, the managing director informed this author that such information is sensitive and cannot be divulged. Also, upon contacting the Office of the Commissioner for Children, we were informed that even the Office hasn't carried out another inquiry as after 2009.

<sup>86</sup> Commissioner for Children Annual Report, Available at:  
<[http://www.tfal.org.mt/MediaCenter/PDFs/1\\_annual%20report%202009%20eng%20version%20LR.pdf](http://www.tfal.org.mt/MediaCenter/PDFs/1_annual%20report%202009%20eng%20version%20LR.pdf)> last accessed 26/9/2012

<sup>87</sup> Malta Prison Statistics by 'Mid-Dlam għad-Dawl', Available at:  
<<http://users.onvol.net/98560/site/support/Malta%20Prison%20Statistics/Age%20&%20sex%20groups.html>> last accessed 26/9/2012

<sup>88</sup> As empowered by Article 14 of the Commissioner for Children Act - stated in the 2010 Annual Report  
<[http://www.tfal.org.mt/MediaCenter/PDFs/1\\_Final%20Version%20Kummissaju%20ghat%20tfal%20AR%20-%20ENG.pdf](http://www.tfal.org.mt/MediaCenter/PDFs/1_Final%20Version%20Kummissaju%20ghat%20tfal%20AR%20-%20ENG.pdf)> last accessed 26/9/2012

<sup>89</sup> Recommendations Issued by the Inquiry Board established by the Commissioner for Children  
<[http://www.tfal.org.mt/MediaCenter/PDFs/1\\_Inquiry%20Minors%20in%20Conflict%20with%20Law%20\(In%20Maltese\).pdf](http://www.tfal.org.mt/MediaCenter/PDFs/1_Inquiry%20Minors%20in%20Conflict%20with%20Law%20(In%20Maltese).pdf)> last accessed 26/9/2012



females to subscribe to the educational and therapeutic programmes offered by this department<sup>90</sup>.

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. Maltese law falls short from defining the term ‘sexual activities’. Nevertheless, the law seems to consider such term broadly since it penalises any act which is deemed to be indecent, and which is capable of offending public decency or morals.

ii. Criminal intent is an important requisite which may determine the guilt or otherwise of a person. The law does not define the term ‘intentionally’ and the intent required depends on the specific type of sexual offence.

For instance the offence of rape requires that the agent had a specific intent to have carnal knowledge accompanied by violence, knowing that the passive subject dissents. In defilement of minors, on the other hand, the prosecution need not prove that the agent committed the lewd acts with the specific intent to defile a minor – the intent is a generic one consisting in the free and conscious will and the intention to commit the lewd acts on the person or in the presence of a minor.

Since the legislator intends to prevent sexual exploitation and sexual abuse, the punishment accorded to the various offences depends upon the seriousness of the offence. If the particular sexual offence is deemed by the legislator as very serious and the intent required is specific, then the punishment is more heinous.

iii. The law does not specifically provide the legal age in which minors can engage in sexual activities. Nonetheless, Article 204C (1) of the Criminal Code<sup>91</sup> provides that “whosoever takes part in sexual activities with a person under age shall... be liable to imprisonment”. This umbrella provision penalises any sexual activity with a minor, independently of whether the minor consents or otherwise to such acts. Since Maltese law provides that a person is

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<sup>90</sup> Announcement made in January 2011 and covered by the Times of Malta on Sunday 30/1/2011  
<<http://www.timesofmalta.com/articles/view/20110130/local/young-offenders-unit-moving-out-of-corradino-prison.347811>> last accessed 26/9/2012

<sup>91</sup> Criminal Code, Chapter 9 of the Laws of Malta.

considered of age when s/he attains the age of eighteen years<sup>92</sup>, then it is at this age that a person can legally engage in sexual activities.

There is no particular provision which caters for consensual sexual activities between minors. However, since the law criminalises any sexual activity with a minor, it makes no limitation upon the age of the agent and theoretically a minor who engages into sexual activities with another minor is liable for such an offence. Nonetheless, since the state requires the formal complaint of the injured party to prosecute sexual offences, it is unlikely that any of the parties is prosecuted in the case of consensual sexual activities between minors.

iv. The legislator gives paramount importance to the best interest of the child, especially in situations where the offender takes advantage of the vulnerable position of the minor. Consequently, the law provides an increase in punishment whenever the offence is committed by two or more persons acting together<sup>93</sup> or with the involvement of a criminal organisation<sup>94</sup>, thus creating a hostile situation for the child; when the person under age is a vulnerable person within the meaning provided by the Criminal Code<sup>95</sup>; and whenever the offender compels a minor to perform a sexual activity by means of violence or threats.

v. There is no specific provision regulating the crime of incest. However, the legislator is well aware that the most psychologically damaging sexual offences are those committed within the family environment, by persons who ought to protect and take care of the child.

The law increases the punishment whenever the sexual offence is committed by any ascendant by consanguinity or affinity, by the adoptive father or mother, by the tutor<sup>96</sup> of the

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<sup>92</sup> The law (Civil Code, Chapter 16 of the Laws of Malta; Article 188 (1)) specifies that majority is fixed at the completion of the eighteenth year of age.

<sup>93</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 208AC (1)(c).

<sup>94</sup> Various provisions in the Criminal Code cater for such an aggravation, including; Article 204A (2)(c), Article 204B (2)(c), Article 204C (2)(d)(iii), and Article 208A (1A)(c).

<sup>95</sup> The law (Criminal Code, Chapter 9 of the Laws of Malta; Article 208AC (2)) defines the term ‘vulnerable person’ as any person under the age of fifteen years; or any person suffering from a physical or mental infirmity; or any other person considered by the court to be particularly at risk of being induced into cooperating with the offender or into surrendering to the offender’s will when taking into account the person’s age, maturity, health, pregnancy, disability, social or other conditions including any situation of dependence, as well as the physical or psychological consequence of the offence on that person.

<sup>96</sup> Maltese law (Civil Code, Chapter 16 of the Laws of Malta) provides that a tutor must be appointed to a minor, whose parents have died or have forfeited parental authority, until the minor becomes of age or marries (Article 158). The tutor must take care of the minor, represent him in civil matters, and administer his property as a bonus paterfamilias (Article 172).

minor.<sup>97</sup> Moreover, the Court may order that the offender forfeits every authority and right over the person or property of the victim, or in the case of tutor, his removal from the office of tutor and disability from ever holding such office.<sup>98</sup>

**vi.** There no specific provisions which regulate offenders who take advantage of their established position in society. Nevertheless, whenever a person who is trusted, even though temporarily, with the care, education, instruction, control or custody of the minor, takes advantage of his position of trust, authority or influence, the punishment prescribed for the particular sexual offence is further aggravated.<sup>99</sup>

Moreover, the aggravating circumstances prescribed for sexual offences against minors provide certain scenarios whereby the punishment should be increased due to the position of the offender and the particular circumstances which were contributory to the offence. These include situations when the offender has availed himself of his capacity of public officer, or when the offender is a servant of the injured party, with salary or other remuneration; when the crime is committed by an institutor; or when the crime is committed on any prisoner by the person charged with the custody or conveyance of such prisoner.<sup>100</sup>

In addition to the punishment, the Court has the discretion to order that the name of the offender be listed in the Child Offenders' Register and the offender thus becomes ineligible for membership of, or any employment or other position with, any institution, establishment or organisation providing or organising any service or activity which involves the education, care, custody, welfare or upbringing of minors, whether such membership, employment or other position is against payment or otherwise.<sup>101</sup>

## 2.2 Child Prostitution

**vii.** Malta is a party to the Council of Europe Convention against Trafficking in Human Beings (Warsaw, 16<sup>th</sup> May 2005). The Convention was signed on the 16<sup>th</sup> May 2005 and

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<sup>97</sup> Various provisions in the Criminal Code cater for such an aggravation, including; Article 203 (1)(c), Article 204 (1)(c), and Article 208A (3).

<sup>98</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 197(4).

<sup>99</sup> Various provisions in the Criminal Code cater for such an aggravation, including; Article 203 (1)(c), Article 204 (1)(c), and Article 208A (3).

<sup>100</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 202 (a), (b) and (c) respectively.

<sup>101</sup> Protection of Minors (Registration) Act, Chapter 518 of the Laws of Malta; Article 3(3).

ratified on the 30<sup>th</sup> January 2008. The Convention entered into force on the 1<sup>st</sup> February 2008.

**viii.** Maltese law neither defines the term ‘prostitution’ nor the term ‘child prostitution’. Nonetheless, it is commonly understood that the offence will subsist as long as the child is involved in acts of lewdness, in exchange of money or any other form of remuneration or consideration.

**ix.** The various provisions of the Criminal Code and the White Slave Traffic (Suppression) Ordinance<sup>102</sup>, which deal with child prostitution, seem to suggest that only the recruiter is liable for the offence.

The Criminal Code punishes any person, who in order to gratify the lust of any other person, induces<sup>103</sup> or engages<sup>104</sup> a person under age to practice prostitution; encourages or facilitates the prostitution of a minor<sup>105</sup>; or with violence compels a person under age into prostitution or knowingly makes any gain or derives any benefit there from<sup>106</sup>. Similarly, the White Slave Traffic (Suppression) Ordinance criminalises whoever, in order to gratify the lust of any other person, induces a person under the age of twenty-one years to leave Malta or to come to Malta for purposes of prostitution, or encourages or facilitates his departure from Malta or arrival in Malta for the same purpose<sup>107</sup>; detains or is wilfully a party to the detention of a person, against his will, in any brothel, or in or upon any premises used for purposes of habitual prostitution<sup>108</sup>; and any person who knowingly lives on the earnings of the prostitution of any other person<sup>109</sup>.

Nevertheless, by virtue of recent amendments to the Criminal Code, the user may also be found liable for unlawful sexual activities, since the law punishes any person who participates in sexual acts with a minor, especially where recourse is made to child prostitution.<sup>110</sup>

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<sup>102</sup> White Slave Traffic (Suppression) Ordinance, Chapter 63 of the Laws of Malta.

<sup>103</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 204 (1).

<sup>104</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 204B.

<sup>105</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 204 (1).

<sup>106</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 204A.

<sup>107</sup> White Slave Traffic (Suppression) Ordinance, Chapter 63 of the Laws of Malta; Article 3(1).

<sup>108</sup> White Slave Traffic (Suppression) Ordinance, Chapter 63 of the Laws of Malta; Article 5(1).

<sup>109</sup> White Slave Traffic (Suppression) Ordinance, Chapter 63 of the Laws of Malta; Article 7(1).

<sup>110</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 204D (d).

### 2.3 Child Pornography

**x.** Malta is a party to the Council of Europe Convention on Cybercrime (Budapest, 23<sup>rd</sup> November 2001). The Convention was signed on the 17<sup>th</sup> January 2002 and ratified on the 12<sup>th</sup> April 2012. The Convention entered into force on the 1<sup>st</sup> August 2012.

**xi.** Maltese law fails to define the term ‘child pornography’, yet it punishes any act which is capable of portraying an indecent image of a child. The law defines the term ‘indecent material’ which includes photographs, images, audio or video recordings, digitally created or electronic images, drawings, cartoons, text and simulated representations or realistic images of a minor, even if the minor is non-existent, or of the sexual parts of a child for primarily sexual purposes.<sup>111</sup> This concise definition of the term ‘indecent material’ coincides with the definition ‘child prostitution’ in Article 20(2) of the Lanzarote Convention.

**xii.** The Criminal Code punishes any person who makes or produces or permits to be made or produced any indecent material or produces, distributes, disseminates, imports, exports, offers, sells, transmits, makes available, procures for oneself or for another, or shows such indecent material.<sup>112</sup> Moreover, the law punishes any person who acquires, knowingly obtains access through information and communication technologies to, or is in possession of, any indecent material which shows, depicts or represents a person under age.<sup>113</sup>

The conduct punished by the Maltese legislator is very similar to that punished by the Lanzarote Convention, and since the provision was recently added to our Code, one may conclude that it was designed purposefully to comply with the Convention.

**xiii.** The competent authority which controls pornographic materials is the Malta Police Force.

Malta has adopted the Lanzarote Convention without any reservation thereto, and thus it did not use the reservation right that has been given by the Lanzarote Convention in Articles 20(3) and 20(4).

**xiv.** The law criminalises any person who with violence compels a person under age into participating in a pornographic performance or knowingly makes any gain or derives any

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<sup>111</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 208A (7).

<sup>112</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 208A (1).

<sup>113</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 208A (1B).

benefit there from;<sup>114</sup> or who engages a person under age to participate in pornographic performances;<sup>115</sup> or who knowingly causes, for sexual purposes, a person under age to participate in real or simulated sexually explicit conduct or exhibition of sexual organs, including through information and communication technologies;<sup>116</sup> or who knowingly attends a pornographic performance involving the participation of a person under age.<sup>117</sup> The term ‘knowingly’ portrays the intentional nature of the offence, which requires that the agent is willing to either compel a person to participate in pornographic performances or to attend a pornographic performance involving children.

At face value, it does not seem that the legislator highlight and differentiate between recruitment and coercion. Nonetheless, the punishment attributable to the offence when the agent ‘compels’, ‘knowingly causes’ or ‘knowingly attends’ is somewhat more heinous than when the agent ‘engages’ a child to participate in pornographic performances. This shows that the legislator is more severe when the child is knowingly and intentionally coerced to participate in such performances.

Since the Lanzarote Convention was adopted without any reservation thereto, Maltese law also punishes any person who knowingly attends a pornographic performance involving the participation of a person under age.<sup>118</sup>

## 2.4 Corruption of Children

**xv.** The Criminal Code also punishes any person who despite not having defiled a minor, instigates, encourages or facilitates the defilement thereof.<sup>119</sup> This provision extends the offence of defilement to cases whereby the minor is not physically defiled, but nonetheless the act committed by the agent instigates, encourages or facilitates the corruption minor. The wording used by the legislator is quite ambiguous, yet it is clear that the provision intends to punish any sexual act which is not committed on the person of the child but which is likewise contributory to his defilement.

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<sup>114</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 204A (1).

<sup>115</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 204B (1).

<sup>116</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 204D (c).

<sup>117</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 204D (e).

<sup>118</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 204D (e).

<sup>119</sup> Ibid; Article 203A.

In a separate provision, the law punishes whosoever knowingly causes, for sexual purposes, a person under age to witness sexual abuse or sexual activities, even without causing the said person to participate in the activities.<sup>120</sup> This article, which is based on Article 22 of the Lanzarote Convention, criminalises the intentional causing of a minor to witness sexual abuse or sexual activities, even though not participating therein. The legislator does not define the term ‘causing’, but it is clear that the agent must have intended that such sexual acts are committed in the presence of a child.

## **2.5 Solicitation of Children for Sexual Purposes**

**xvi.** The law likewise punishes whosoever, by means of information or communication technologies, proposes to meet a minor for the purposes of committing any of the sexual offence provided for by the law, where the proposal is followed by the material acts leading to such meeting.<sup>121</sup> Thus the perpetrator is punished if he proposes to meet a minor by means of information or communication technologies, and such proposal is followed by concrete actions leading to such meeting.

**xvii.** There seems to be no specific provision regulating aiding or abetting and attempt of the abovementioned activities. Nonetheless, the said offences are regulated by the general provisions of the Criminal Code which deal with complicity<sup>122</sup> and attempt<sup>123</sup>.

## **2.6 Corporate Liability**

**xviii.** Maltese Company Law adheres to the principle of separate juridical personality of companies, which considers a legal person as a person totally separate and distinct from the persons which compose it. It follows that a legal person can possess the same type of rights and be subject to the same type of duties as a physical person.<sup>124</sup> Consequently, a legal person may incur liability for any act or omission which is performed by a physical person acting on its behalf.

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<sup>120</sup> Ibid; Article 204D (b).

<sup>121</sup> Ibid; Article 208AA.

<sup>122</sup> The law (Criminal Code, Chapter 8 of the Laws of Malta; Article 42 (d)) provides that a person shall be deemed to be an accomplice in a crime if he... in any way whatsoever knowingly aids or abets the perpetrator or perpetrators of the crime in the acts by means of which the crime is prepared or completed.

<sup>123</sup> The law (Criminal Code, Chapter 8 of the Laws of Malta; Article 41 (1)) provides that whosoever with intent to commit a crime shall have manifested such intent by overt acts which are followed by a commencement of the execution of the crime, shall be liable on conviction.

<sup>124</sup> Muscat A; ‘Principles of Maltese Company Law’; Malta University Press: Malta; 2007; Pages 216 – 217.

The Criminal Code holds that where the person found guilty of any of the above mentioned offences, was at the time of the commission of the offence, the director, manager, secretary or other principal officer of a body corporate or is a person having a power of representation of such a body or having an authority to take decisions on behalf of that body or having authority to exercise control within that body and the offence of which that person was found guilty was committed for the benefit, in part or in whole, of that body corporate, the said person shall be deemed to be vested with the legal representation of the same body corporate which shall be liable to the payment of a fine.<sup>125</sup>

**xix.** The Criminal Code states that every offence gives rise to a criminal action and a civil action<sup>126</sup>. Therefore, a person which is prosecuted for a criminal offence may also incur civil liability for any damage which might have ensued from the same offence.

**xx.** Although a company may incur corporate liability for any offence committed by its members acting on its behalf, the law does not exclude individual liability as it provides that every person who at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.<sup>127</sup>

## 2.7 Aggravating Circumstances

**xxi.** Each of the sexual offences against minors is accompanied by aggravating circumstances which lead to an increase in punishment of the said offence.

For instance the offence of rape in relation to minors may be aggravated whenever the offender has availed himself of his capacity of public officer, or when the offender is a servant of the injured party, with salary or other remuneration; when the crime is committed by any ascendant, tutor, or institutor on any person under eighteen years of age; when the offender has, in the commission of the crime, been aided by one or more persons; when the offender has, in the commission of the crime, made use of any arms proper; when the person on whom the crime is committed, or any other person who has come to the

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<sup>125</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 121D.

<sup>126</sup> Ibid; Article 3(1).

<sup>127</sup> Interpretation Act, Chapter 249 of the Laws of Malta; Article 13.



assistance of that person, has sustained any bodily harm; when the person carnally known has not completed the age of nine years; when the crime is committed in the presence of, or within hearing distance of a minor.<sup>128</sup>

The offence of defilement of minors is aggravated whenever the offence is committed on a person who has not completed the age of twelve years, or with violence; the offence is committed by means of threats or deceit; the offence is committed by any ascendant by consanguinity or affinity, or by the adoptive father or mother, or by the tutor of the minor, or by any other person charged, even though temporarily, with the care, education, instruction, control or custody of the minor.<sup>129</sup> These aggravations also apply when the offender induces, encourages or facilitates child prostitution together with a further aggravation which requires that the offence is committed habitually or for gain.<sup>130</sup>

The offences of instigation with violence or inducing persons under age to prostitution or to participation in pornographic performances is aggravated when the offender wilfully or recklessly endangered the life of the person under age; when the offence involves violence or grievous bodily harm on such person; and when the offence is committed with the involvement of a criminal organisation.<sup>131</sup>

Furthermore, the Criminal Code contains a list of aggravating circumstances which should apply to each of the aforementioned crimes. These apply where the offence results in harm to the physical or mental health of the person under age; where the person under age is a vulnerable person; where the offence is committed by two or more persons acting together; if the offender lives with or is a member of the victim's family; if the offender has been previously convicted of a sexual offence.<sup>132</sup>

## **2.8 Sanctions and Measures**

**xxii.** The previously discussed offences are all classified as Crimes affecting the good order, peace and honour of the family. The integrity of the family is one of the most fundamental values safeguarded by the Maltese authorities and society, hence the crimes against it are

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<sup>128</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 202.

<sup>129</sup> Ibid; Article 203 (1).

<sup>130</sup> Ibid; Article 204 (1).

<sup>131</sup> Various provisions in the Criminal Code cater for these aggravating circumstances, including; Article 204A (2), Article 204B (2), and Article 208A (1A).

<sup>132</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 208AC (1).

considered as extremely grievous. Therefore, for all of the discussed crimes, the legislator has provided that the adequate sanction should be imprisonment. However, the terms for this deprivation of liberty vary in accordance with the heinous nature of each individual crime.

For a better understanding of the punishment allotted to each individual crime, one may refer to the schedule illustrated below.<sup>133</sup>

Crime	Imprisonment Term	Aggravating circumstances and increase in imprisonment term.		
		Minor under the age of 12	Life at risk, Violence, Grievous Bodily Harm	Consanguinity, Affinity or Custody
Sexual Abuse	3-9 Years	increased by one degree	increased by one degree	increased by one degree
Child Prostitution	2-6 years	2-6 years	2-6 years	3-6 years
Child Pornography	12months-5 years	2-8 years	2-9 years	2-9years
Corruption of Children (Defilement)	not exceeding 3 years	3-6 years	3-6 years	3-6 years
Solicitation of Children for Sexual Purposes	not exceeding 2 years	not exceeding 4 years	not exceeding 4 years	not exceeding 4 years

Table 2 (h) - 1

One should remark that in relation to the crime of Corruption (defilement) of Minors, the law states that; “No proceedings shall be instituted in respect of any offence under this article except on the complaint of the injured party”<sup>134</sup>. However, where the offence is accompanied with an aggravating circumstance the proceedings shall be instituted out of the authorities’ own motion.

Apart from the listed offences the Maltese Criminal Code provides an additional offence, ‘Sexual Activities with Minors’<sup>135</sup>. This may be regarded as a more general provision which encompasses an activity that does not fit the characteristics of any one of the other discussed offences. The penalty for the offence of having sexual activities with minors is that of an imprisonment term not exceeding two years. However, following the spirit of the law

<sup>133</sup> Vide Chapter 9 of the Laws of Malta, Criminal Code, Articles 197-208AC

<sup>134</sup> *ibid* Article 203(3)

<sup>135</sup> *ibid* Article 204C

as promulgated with regards to the other offences, if this offence subsists with an aggravation then the imprisonment term may be from 2-6 years.

Imprisonment is not the only type of penalty contemplated by the law. Another type of retribution is the forfeiture of any supervision or authority exercised on the minor or his property when the offence has been committed by a person having some degree of authority over the minor.

On the 20th of January 2012, a new Act was promulgated by the Maltese Legislator<sup>136</sup>. This Act, entitled ‘Protection of Minors (Registration) Act’ has created an Offender’s Register<sup>137</sup>, where the names of any person found guilty of the accused offences should be listed making them

“ineligible for membership of, or any employment or other position with, any institution, establishment or organisation providing or organising any service or activity which involves the education, care, custody, welfare or upbringing of minors, whether such membership, employment or other position is against payment or otherwise.”<sup>138</sup>

Moreover, the Act imposes an obligation on all those employing or hiring the services of people whose position brings them in contact with children, to request the court for any information contained within the Register about a particular employee or prospective member of staff. Hiring a registered person would result in an offence carrying a term of imprisonment from three months to four years and/or, a fine between €2500 and €50,000<sup>139</sup>. Hence, this relatively new piece of legislation provides for an additional penalty which may be awarded at the discretion of the Judiciary. Therefore, this framework is aimed at preventing a scenario where children, instead of being sheltered and protected, are exposed to a child abuser or a person who has disrespected a child’s dignity.

The ‘Extradition Act’<sup>140</sup> and the ‘Criminal Code’<sup>141</sup> are the main legislative documents regulating extradition proceedings in Malta. Also, various bilateral Treaties have been signed by the Maltese authorities with other foreign jurisdictions as to specifically regulate the procedure for extradition between them. As provided by Article 8 of the Extradition Act,

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<sup>136</sup> Act XXIII of 2011, Chapter 518 of the Laws of Malta

<sup>137</sup> *ibid* Article 3

<sup>138</sup> *ibid* Sub-Article 3

<sup>139</sup> *ibid* Articles 4 & 5

<sup>140</sup> Chapter 276 of the Laws of Malta

<sup>141</sup> *Supra* 4

for a person to be extradited from Malta, the offence they are accused of must be one which has been provided for by the ‘arrangement’ between states and must carry at least a twelve month imprisonment term. Also following the principle of the double criminality rule “the act or omission constituting the offence or the equivalent act or omission, would constitute an offence against the law of Malta” if committed within Maltese jurisdiction. This does not imply that the offence must carry the same title or description, but that the offence as recognised within both jurisdictions is substantially the same.

As from 12th April 2012, Malta has also ratified the Council of Europe’s Cybercrime Convention<sup>142</sup>. Through the entering into force of such document, extradition provisions with regards to cybercrime offences such as child pornography<sup>143</sup> through the use of computer technology have become applicable within the Maltese jurisdiction.

**xxiii.** When asked about the proportionality of the sanctions provided by the Maltese jurisdiction one is inclined to answer positively, as the law seems to cater for a wide range of circumstances, including different aggravating circumstances, with harsh penalties. Moreover, the introduction of the Child Offender’s Register is a positive step forward towards better protection of children’s dignity and rights.

However, one must still comment that in certain areas, the provided sanctions still lack the expected effectiveness and dissuasiveness.

During a meeting held by the Maltese Legal Research Group with the Commissioner for Children on the 25th of June 2012, the Commissioner commented on three main areas which should be targeted in the legislator’s aim to increase sanctions’ effectiveness and dissuasiveness.

Firstly, the Commissioner advocated the drafting and application of harsher penalties with regards to offences concerning sexual abuse or violence, especially those relating to inducing or instigation of child prostitution<sup>144</sup>. Such recommendation results in a dual obligation, one upon drafters of the law to implement harsher penalties and the other upon the judiciary to apply such sanctions.

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<sup>142</sup> CETS No.: 185

<sup>143</sup> Dealt by the said Convention in Article 9

<sup>144</sup> Such recommendation has been also put forward in page 52 of the Draft National Children’s Policy (supra 19)

Secondly, the Commissioner commented on the lack of use by the judiciary of the Child Offender's Register. Until the date of the meeting, the local media had reported that only one name had been listed in the Register from a total of 14 persons being convicted of crimes which as provided by the Schedule of the relevant Act should be listed in the Register<sup>145</sup>. This first name was then later joined by a second on the 1<sup>st</sup> of November 2012 where the local courts condemned the perpetrator to four years imprisonment simultaneously to having his name listed on the Register.<sup>146</sup> When interviewed about the subject the Commissioner stated that; "It is obvious that this new tool cannot be effective in protecting children from crime unless it is applied whenever possible."<sup>147</sup> One might argue that the lack of effectiveness of this particular sanction is that too much discretion has been left to the judiciary. Hence, two possible solutions would be; either to transform this sanction in a mandatory procedure, or to persuade the courts to resort more frequently (ideally always) to this mechanism. In this author's opinion, the latter solution would be better than the former since one would still retain the judiciary's discretion, which ultimately is the result of wise and well-learned people, while still ensuring that the provided procedures are being implemented resulting in a more dissuasive nature of the stipulated sanctions.

The third comment made by the Commissioner during our meeting was the need for better co-ordination and structuring of the laws, as currently, the various relevant laws are scattered "like a puzzle" throughout the different statutes and chapters of the law. Hence, a better solution would be to have one document which incorporates all the relevant provisions relating to the enforcement of children's rights. This should facilitate procedures making the application of justice much more expedient.

Such criticism towards the effectiveness and dissuasiveness of the sanctions imposed by the Maltese legislator may be also supported by referring to the U.S Trafficking in Persons

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<sup>145</sup> First name added to the Child Offender's Register, C.Calleja for the Times of Malta, 2/7/2012  
<<http://www.timesofmalta.com/articles/view/20120702/local/First-name-added-to-the-child-offenders-register.426813>>

<sup>146</sup> **Sedqa school visit leads girl, 6, to reveal sexual abuse, Times of Malta 1/11/2012**  
<http://www.timesofmalta.com/articles/view/20121101/local/sedqa-school-visit-leads-girl-6-to-reveal-sexual-abuse.443618#.UJJ3e-MGWuU.facebook> & 'Jailed for abusing of six- year- old as he visited her sick grandfather' Malta Today  
<http://www.maltatoday.com.mt/en/newsdetails/news/courtandpolice/Jailed-for-abusing-six-year-old-as-he-visited-her-sick-grandfather-20121101>

<sup>147</sup> Judiciary 'not using child abuse register', C.Calleja for the Times of Malta, 23/6/2012  
<http://www.timesofmalta.com/articles/view/20120623/local/Judiciary-not-using-child-abuse-register-.425547>

Report of 2012. With reference to Malta, the Report recognises the commitment of the Maltese authorities in ensuring better prosecution, protection and prevention in relation to Human Trafficking offences and the progress it has made in these areas. However, it remarks that:

“the Maltese government did not identify children in prostitution as sex trafficking victims or provide them with support available under Maltese anti-trafficking laws, but instead charged some of them for loitering for prostitution and sometimes subjected them to punishment.”

In the light of such analysis, one must comment that because of the complexity of this subject what the local jurisdiction requires are not only harsher penalties but also an increased education and awareness programme. This programme would act both as a deterrent to prospective offenders, while simultaneously offer an opportunity to victims to report their cases and seek assistance. In fact, a study by the Eurobarometer<sup>148</sup> across the 27 member states on the Rights of the Child in 2008, showed that when it came to respondent's perceptions about the levels of protection of the Rights of the Child, Malta fared quite well with 27% of respondent's saying that rights in Malta are very well protected, while another 51% saying that they are fairly well protected. However, when it came to responses regarding the likelihood of seeking help when the Rights of the Child have been violated, 85% of respondents answered that they wouldn't report. Therefore, one concludes that apart from the sanctions and the various awareness campaigns held by the various authorities and institutions, a more public debate on the subject which encourages victims to report their abuse should be implemented. It is only through the combined work of all these instruments that the desired effectiveness and dissuasiveness of the intended sanctions may be truly achieved.

**xxiv.** One of the offences for which the Maltese jurisdiction recognises the criminal liability of legal persons is that of trafficking of minors<sup>149</sup>. When trafficking of minors is carried out by a legal person, or as the law defines it - a body corporate, the penalty of imprisonment cannot be applied. Hence, the law provides that the applicable sanction shall be a hefty fine of not less than €11,646.87 and not exceeding €1,863,498.72. Such liability shall extend to a person within the employment of the body corporate whose lack of prudence in the carrying out of his responsibilities resulted in commission of the offence. This standing of the law

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<sup>148</sup> Vide Draft National Children's Policy, pages 37-38

<sup>149</sup> Supra 4 Article 248E

also reflects the compliance of the Maltese authorities to the obligations set in the Cybercrime Convention<sup>150</sup>.

**xxv.** Articles 667 to 670 of the Maltese Criminal Code provide for the necessary procedures for seizure and confiscation of materials and instruments related to the crime. All property related to the crime must be delivered by the court to the Registrar who shall hold it in its custody until the conclusion of the relevant proceedings. All such property must be “properly catalogued, stored and preserved and kept in a secure place to be determined by the registrar.”<sup>151</sup>

With regards to property not owned by the accused, the law in article 674 provides that if the confiscated property belongs to a third party in good faith, such property shall be returned to him upon the property being released by the court. This return is subject to the third person’s ability to prove his title on the property, and “that there [is] no longer any need that the property remains materially exhibited in the record of the proceedings.”

**xxvi.** As stated during this report’s analysis of the sanctions imposed by law “the integrity of the family is one of the most fundamental values safeguarded by the Maltese authorities and society”. Hence, when crimes are committed within the family environment - that environment where the child should feel most secure, the grievousness of the crime increases. This heinous nature is reflected in the law’s consideration that when the abuse is carried out by a person who is close to the minor, or even a relative of the minor, this should be deemed as an aggravating circumstance resulting in longer imprisonment terms<sup>152</sup>. Unfortunately, because cases of abuse within the family environment are even more complex and delicate, victims may find it more difficult to report the abuse. Also, removing a child from the home may not always be in the best interest of the child.<sup>153</sup> Moreover, one must remark the lack of adequate facilities which cater for this type of cases.

The main governmental institution which offers its assistance and support to victims and their families is the ‘Aġenzija Appogg’. The agency conducts various educational

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<sup>150</sup> Supra 60. Article 12 of the Convention states that: “Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for a criminal offence established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it ...”

<sup>151</sup> Supra 4 Article 669 (1)

<sup>152</sup> Refer back to Table 2(h) - 1

<sup>153</sup> Vide R.Farrugia, ‘Child Rights and State Responsibility in determining “Home”’ Id-Dritt, Vol. XX, 2009, pp. 204-225

programmes for children in collaboration with various government entities. It also offers a free helpline support via the telephone number ‘179’, a service highly promoted on a national level as the first step in pleading for help in cases of abuse. It is also thanks to the assistance of the professionals at the Agency that many cases of abuse are instituted before the local courts.

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

i. The provisions on the powers of the Executive Police in the Criminal Code do not expressly enshrine the principle of best interests of the child,<sup>154</sup> but some provisions do reflect a more considerate approach towards minors during investigation of crimes, generally.

The Code of Practice for Interrogation of Arrested Persons, attached to the Fourth Schedule of the Police Act,<sup>155</sup> obliges Policemen to give ‘special attention’ when interrogating minors, irrespective of whether they are the victims. Police are to interrogate the minor, to the extent that it is practicable, before the presence of ‘a parent, tutor, foster carer, social worker, or any other person who has the effective care and custody of the young person’.<sup>156</sup> The Code also requires, to the extent that it is practicable, that minors attending school are not arrested, or interrogated, at school.<sup>157</sup> However, if this is not practicable, then the interrogation is to be conducted before the presence of the head teacher.<sup>158</sup> Both rules allow a certain degree of flexibility to the Police when conducting interrogations to treat each case accordingly on a case by case basis.

In this respect, a recent report commissioned by the Office of the Commissioner for Children, criticised the use of police depots and police stations as unsuitable premises for conducting interrogations with victims, witnesses, and offenders alike, who are not of age.<sup>159</sup> The report went on to recommend that:

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<sup>154</sup> Criminal Code, Chapter 9 of the Laws of Malta, Art 346 *et seq.*

<sup>155</sup> Police Act, Chapter 164 of the Laws of Malta.

<sup>156</sup> *Ibid.*, Rule 15.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> Office of the Commissioner for Children, *Interim Recommendations by the Task Force regarding Minors*,



“[p]olice and judicial proceedings, especially at the initial stages of the judicial process, should be carried out in a specially dedicated place, known as a ‘children’s house’<sup>160</sup>, where a multidisciplinary team of professionals, including professionals from social welfare services, forensic medical experts, psychologists, the police and prosecutors’ offices can collaborate so that proceedings can be carried out thoroughly whilst ensuring the protection and promotion of the minors’ well-being.”<sup>161</sup>

The rule is that where proceedings relate to a minor who has not, at the time of the proceedings, attained the age of sixteen, the Juvenile Court is competent to hear the case.<sup>162</sup> The Juvenile Court is a dedicated court for hearing cases against minors or where minors are involved. Unless the minor has committed an offence together with an adult in which case the child may – and usually is – tried in the adult court. It is deemed to have the same jurisdiction and powers as a Court of Magistrates, albeit it is more flexible when it comes to appointment of sittings,<sup>163</sup> by default court hearings are not open to the public,<sup>164</sup> and there are considerable restrictions when it comes to newspaper reports relating to hearings before the Juvenile Court.<sup>165</sup>

Where the Juvenile Court is not competent to hear the case, it is generally heard before the Court of Magistrates, whether sitting as a Court of Criminal Judicature or a Court of Criminal Inquiry. In such proceedings there is no need for the minor, as a victim, to be part in criminal proceedings against the perpetrator. However, the minor may appear before the Court and engage an advocate or a legal procurator to assist him.<sup>166</sup> The legal representative may examine or cross-examine witnesses, produce evidence or make, in support of the charge, any other submission which the court may consider admissible.<sup>167</sup> This is only possible if the minor is accompanied by a parent, relative, or guardian.<sup>168</sup>

ii. No there are no special units dedicated specifically to the crimes mentioned earlier, but within the Maltese Police force there are special investigative units that deal with such

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<[http://www.tfal.org.mt/MediaCenter/PDFs/1\\_Interim%20recommendations%20-%20Task%20Force%20regarding%20Minors.pdf](http://www.tfal.org.mt/MediaCenter/PDFs/1_Interim%20recommendations%20-%20Task%20Force%20regarding%20Minors.pdf)> accessed November 2012.

<sup>160</sup> This is in keeping with the Scandinavian model and the recommendation of the CFJ Guidelines of the Council of Europe (supra)

<sup>161</sup> Ibid. (The process also reduces re-traumatisation of the child)

<sup>162</sup> Juvenile Court Act, Chapter 287 of the Laws of Malta, art 6.

<sup>163</sup> Ibid., art 5.

<sup>164</sup> Ibid., art 7.

<sup>165</sup> Ibid., art 8.

<sup>166</sup> Criminal Code, art 410 (1) and (2).

<sup>167</sup> Ibid.

<sup>168</sup> Juvenile Court Act, art 10.

crimes. The Vice Squad is responsible for investigations relating to child sexual abuse<sup>169</sup>, while the Cyber Crime unit investigates matters relating to the internet; including child pornography, child safety and ‘e-stalking’. The Cyber Crime Unit is authorised to monitor internet use that may potentially produce, distribute or collect any prohibited data.<sup>170</sup> Operation “Rudolph” carried out by the Cyber Crime unit in 2003-2004 successfully brought to justice 13 persons; most of them were found guilty of crimes relating to child pornography. Another similar operation (“Fekruna”) was carried out by the same unit in 2008, but this time the scope of the investigation was widened to more than one p2p network, the Unit successfully arrested 13 persons.<sup>171</sup>

**iii.** Generally, criminal offences are acted upon without the complaint of the injured party (*ex officio*), however there are certain cases which require the official complaint of the injured party in order for the police to prosecute the offender (*querela da parte*). Sexual offences require such formal complaint (*querela da parte*), in order for the police to be able to initiate criminal proceedings. Nonetheless in the case of defilement of minors, the law provides that proceedings may be instituted without the complaint of the injured party (*ex officio*) whenever the crime is accompanied by public violence or any other offence affecting the public order or when the act is committed with abuse of parental authority or tutorship.<sup>172</sup>

The Criminal Code further provides that when proceedings cannot be instituted except upon the complaint of the private party (*querela da parte*), the complainant may, at any time before the final judgement is delivered, withdraw his complaint.<sup>173</sup> Where the offence is prosecuted under the Domestic Violence Act there is no need for a *querela* and the police must act on receipt of info *ex officio*.

**iv.** The statute of limitation is known under Maltese legislation as prescription or prescriptive period. As established by article 688 of the local Criminal Code, criminal action is time barred in accordance with the term of imprisonment imposed by the law. The offences discussed in this report all carry an imprisonment term which is not less than 1 year

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<sup>169</sup> Simon Attard Montalto, Mariella Mangion “*Child abuse in Malta: a review*” (June 2007)

<sup>170</sup> Sgt. Timothy Zammit “*Computer Crime*” (June 2010)

<sup>171</sup> Ibid

<sup>172</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 203(3)

<sup>173</sup> Criminal Code, Chapter 9 of the Laws of Malta; Article 545(1)

and some of them even exceed the six year imprisonment term<sup>174</sup>, hence, they are all barred by the lapse of five to ten years<sup>175</sup>.

In determining at what point does the prescriptive period start to run, one must look at the nature of the offence, meaning whether it is completed, continuous or continuing. In the case of a completed offence, prescription commences from day of completion, where it is continuous from the day the last violation took place and continuing from when the continuance ceased<sup>176</sup>. Therefore, in cases of a continuous case of sexual abuse, the prescriptive period shall start to run from the last episode of abuse.

Suspension of this prescriptive period shall commence from the moment the accused is served with a charge or bill of indictment<sup>177</sup>. This suspension shall subsist until the proceedings commenced through this charge or bill, become a *res judicata* i.e. a final and definitive judgment. Suspension shall also take place when for the criminal proceedings to be instituted a special authorisation must be issued. There is also the possibility for interruption of prescription, meaning that the statute of limitation is not only suspended but it shall run anew from the day it was interrupted<sup>178</sup>. Such procedure occurs when the accused is served with the proper notification of the charges brought against him and when a warrant of arrest or summons is issued.

v. There is no specific reference in the Criminal Code of Malta in relation to an uncertainty with regards to the age of the victims in said offences. Nevertheless, one of the basic principles of criminal law is the presumption of innocence, enshrined both in the Maltese Constitution as well as in the Charter of Fundamental Rights of The European Union:

*5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty*<sup>179</sup>

*Everyone who has been charged shall be presumed innocent until proved guilty according to law.*<sup>180</sup>

This principles is also referred to by the maxim, ***onus probandi incumbit qui dicit, non qui negat*** which implies that the onus of proof, which in criminal cases is beyond

<sup>174</sup> See table 2 (h) - 1

<sup>175</sup> Criminal Code, Chapter 9 of the Laws of Malta, Article 688 (c) & (d)

<sup>176</sup> *ibid* Article 691

<sup>177</sup> *ibid* Article 687 (2)

<sup>178</sup> *Ibid* Article 693

<sup>179</sup> Article 39 (5) of The Constitution of Malta

<sup>180</sup> Article 48 (1) of The Charter of Fundamental Rights of the European Union (2000/C 364/01)

reasonable doubt, lies with the prosecution. Thus, it is up to the latter to collect evidence and present facts which prove or indicate that the age of the victim in question, is that which is required by law.

vi. According to the Lanzarote Convention <sup>181</sup> *“Each party shall take the necessary legislative or other measures to collect and store, in accordance with the relevant provisions on the protection of personal data and other appropriate rules and guarantees as prescribed by domestic law, data relating to the identity and to the genetic profile (DNA) of persons convicted of the offences established in accordance with this Convention.”*

According to section 17 (1) of the Data Protection Act,<sup>182</sup> *“Data which relates to offences, criminal convictions or security measures may only be processed under the control of a public authority”* sub-article 2 of the same section states that *“For this purpose, the Minister may by regulations authorise any person to process the data referred to in sub article (1), subject to such suitable specific safeguards as may be prescribed: Provided that a complete register of criminal convictions may only be kept under the control of a public authority.”*

According to information collected from the Office of the Attorney General in Malta<sup>183</sup> the responsibility for the updating and safe keeping of the ‘conviction sheet’ is in the hands of the Police. It is the police who continue to update the latter. According to the same source the ‘conviction sheet’ is filed in Court each time proceedings are instituted and a criminal case commences. The transmission of data to other competent authorities in other states is dealt with by a specific department at the Attorney General’s office also in Valletta, referred to as the department of International Law.

### 3.2 Complaint Procedure

vii. Sexual offences require that victim or the person having his or her legal representation lodge an official complaint (*querela da parte*) to the competent authorities i.e. the Executive Police.<sup>184</sup> Nonetheless, when the crime is accompanied by public violence or when the act is

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<sup>181</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Lanzarote, 25.X.2007

<sup>182</sup> Data Protection Act, Chapter 440 of the Laws of Malta

<sup>183</sup> Office of the Attorney General, St.George’s Square, Valletta, Malta

<sup>184</sup> Criminal Code, Chapter 9 of the Laws of Malta, Article 203(3).

committed with abuse of parental authority or tutorship, proceedings shall be instituted even if there is no official complaint of the injured party (*ex officio*).<sup>185</sup>

Although children may themselves lodge a complaint against their aggressor, parents still have their legal representation, and thus it is ultimately up to the parents to determine whether proceedings are instituted. When the offender is a family member, parents may decide not to institute proceedings in order to prevent further family problems, and thus the aggressor may in certain situations go unpunished. Moreover, a rule of criminal procedure provides that when proceedings require the complaint of the injured party, the complainant may, at any time before the final judgement is delivered, withdraw his complaint.<sup>186</sup> It is therefore possible to have situations whereby parents initially institute proceedings, and then for some reason or other waive their complaint while the case is being heard.

The complaint to the Executive Police may be made either verbally or in writing.<sup>187</sup>

**viii.** The current Maltese legislative system does not provide a child with the possibility to make a personal request for an advocate to be appointed on his behalf<sup>188</sup>. Such appointment may be done at the discretion of the judge, or upon the request of a mediator or a parent<sup>189</sup>. Hence, a child, even though desiring representation via a child advocate must depend on what adults deem to be adequate in his best interests.<sup>190</sup> Therefore, children in Malta are not vested with a direct and independent right of representation. Such a situation is alarming in cases where a child would have to institute proceedings against either one of his parents, or maybe even both of them. In such a scenario, a child's access to justice would be limited to the will of one custodial parent or only to that of the mediator or a judge.<sup>191</sup>

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<sup>185</sup> Ibid

<sup>186</sup> Ibid, Article 545(1).

<sup>187</sup> Ibid, Article 537.

<sup>188</sup> Vide comments by Dr. R. Farrugia during an interview held by 'Għaqda Studenti tal-Liġi (GħSL)' - Law Student's Society, complimentary DVD with id-Dritt Volume XXII GħSL 2012

<sup>189</sup> Article 66I (2)(a) Where a demand for divorce is made to the competent civil court ... the court may, where it considers it necessary to do so, either **on its own initiative** or upon the **request of the mediator** or of **one of the spouses**:

(a) appoint a children's advocate to represent the interests of the minor children of the parties, or of any of them; and  
(b) hear the minor children of the parties, or any of them, where it considers it to be in their best interest to do so

<sup>190</sup> This is applicable in the Civil context

<sup>191</sup> Draft National Children's Policy p.47 -

<[https://www.education.gov.mt/mediacenter.ashx?file=MediaCenter/Docs/1\\_child%20policy.pdf](https://www.education.gov.mt/mediacenter.ashx?file=MediaCenter/Docs/1_child%20policy.pdf)>

This same argument applies for the appointment of curators by the superior courts as provided by Article 929 of the Code of Organisation of Civil Procedure.<sup>192</sup> However, in accordance with this article the court ‘shall’ and not ‘may’ appoint a curator. Therefore the obligation to appoint a curator leaves less discretion than that given in the appointment of a child advocate. Nevertheless, in practice, it is very common to find that a parent would be appointed as a ‘*curator ad litem*’ for the child, which doesn’t necessarily result in the parent working in the best interest of the child. Interesting to note that a child under tutorship may protest against the tutor’s care directly to the court. The newer legislation under the Foster Care Act and Adoption Admin Act and CC amendments give the child the right to a child advocate.

In analysing the above described procedures, one might argue that the Maltese system does not abide with the obligations Malta subscribed to when signing the UN CRC<sup>193</sup>. This international instrument stipulates that states shall assure that a child may express his opinion on all matters which affect him, and that this would include the provision of a system where the child is heard and is adequately represented. It is in the light of both Malta’s international obligations under this Convention, and also of the very need to cater for a more child-friendly justice system, that our authorities are called to legislate on the necessary amendments without further delay.

A level of protection for minors against their parents is offered by Subsidiary Legislation 440.04<sup>194</sup> which stipulates that if any information is ‘derived by any teacher, member of a school administration, or any other person acting in loco parentis or in a professional capacity in relation to a minor’, this person may process the information if in the best interest of the child. Moreover, such person may decide not to seek the permission of the parent or the legal guardian and also to withhold from sharing this information with the

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<sup>192</sup> Ch 12 of the Laws of Malta

<sup>193</sup> United Nations Convention on the Rights of the Child, Assembly resolution 44/25, 20/11/1989 - Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

<sup>194</sup> Processing of Personal Data (Protection of Minors Regulations), Ch 440.04 of the Laws of Malta, 12th March 2004, Article 2

parent. Hence, if a child feels safe to confide in an educator or a professional about a particular situation which involves abuse by parents, this person acting in loco parentis may institute the necessary proceedings independently from the knowledge and will of the child's parents. However, one must remark, that in such a context, children are again dependant on an adult to institute the relevant claims.

With regards to the participation of minors in trials, one must refer to article 391.3 of the Criminal Code which provides that witnesses given by minors under the age of sixteen 'shall be examined and cross-examined in one sitting and his testimony shall be recorded by audio-visual means.' It is only for exceptional circumstances that this rule may be derogated from. Moreover, when it comes to the publication of names of minors, it is a common rule of practice exercised by our courts that the names of minors are not disclosed. This prohibition upon both the court's registrar and the media, extends to the publication of the names of relatives or acquaintances related to the minor. The motive behind such custom is the protection of the minor's identity which is especially important in a small and closed community such as the Maltese society.

#### 4 COMPLEMENTARY MEASURES

i. Educational guarantees are enshrined in the Chapter 451 - Mutual Recognition of Qualifications Act which applies to all professionals, including those working with children in the area of sexual exploitation and abuse. In Article 3, it specifies that "no applicant shall be entitled to practice a regulated profession or a regulated professional activity unless he fulfils the conditions for the taking up or pursuit of that profession or activity in accordance with the provisions of this Act".<sup>195</sup> Moreover, in Schedule Article 2, the legislation in relation to the profession of Social Worker is the Social Work Profession Act, Cap. 468. The latter act describes a "registered social worker" or "social worker" means a "person who is registered in the official register of social workers kept by the Board and who has been granted a warrant to practice the profession of social work, in accordance with article 6".<sup>196</sup> Article 3 of such legislation further disqualifies "any person from working as a social worker against payment, assuming such title or holding himself out to be a professional social worker, unless he is a holder of a warrant issued under this act". In the five-year university

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<sup>195</sup> Chapter 451-Mutual Recognition Of Qualifications Act

<sup>196</sup> Chapter 468-Social Work Profession Act, Cap. 468

undergraduate course, Doctors in Malta are trained, among the other areas, in the field of Paediatrics. This subject is described in the Course Description provided by the University of Malta as dealing with the children's health from various perspectives including the social point of view". During these lectures, policies and procedures are outlined so that these professionals will have the knowledge on how to deal with cases of sexual abuse.

To qualify for such a warrant, a person must be:

- h) is a Maltese citizen, or is otherwise permitted to work in Malta under any law; and
- i) is of good conduct; and
- j) is in possession of the Honours Degree in Social Work conferred by the University of Malta or of another professional qualification as the Board may deem equivalent;
- k) satisfies the Board that he has received adequate experience in the practice of the profession of social work for an aggregate period of at least two years fulltime or its equivalent in part-time following the completion of such degree or such other professional qualification under the supervision of a registered social worker.

However, there are other professionals dealing with children in the aforementioned scenarios. Teachers play an essential role in these cases and thus, the Directorate for Quality and Standards in Education together with E-learning, the Secretariat for Catholic Education and Culture are organizing courses to deal with such matters. One of such courses is entitled "Child Abuse: Awareness, Intervention & Policy Procedures" aimed to aid teachers in the class environment by provide a definition of child abuse and tackle other important issues such as awareness of the abuse and what techniques are to be adopted.

**ii.** There are a lot of programmes intended to educate children on these matters, targeted both to students (from primary to secondary students) and to their parents. On the Sedqa Website, one may find the following variety of curriculums tackling these issues:

In Primary Schools Sedqa delivers interventions via its facilitators and school teachers, by providing "age-appropriate resources to be used during these programmes and educational talks and resources for parents. Sedqa also provides training seminars for professionals within the education system, who are willing to use Sedqa resources."<sup>197</sup> Amongst these

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<sup>197</sup> <http://www.kidsmalta.com/pages/view/sedqaprschools.aspx> - accessed on 27/09/2012



programs one may find T.F.A.L. Year 3: B.A.B.E.S Programme, T.F.A.L. Year 5: Programme Workbook , and T.F.A.L. Year 6: Qed Nikber.”

For senior classes in secondary and Post-Secondary schools, there is the LifeForce International Programme described as a Christian Theatre Organization<sup>198</sup> which organizes sessions addressing a variety of topics such addictions, bullying and violence, abuse and decision-making. Parents are also a part of the equation. Talks on such topics are offered in different times of the day to complement the limited availability of the parents. Apart from talks, sessions and lesson plans, Sedqa also offers leaflets which provide useful information both to adults as well as to children so as to be aware of what is abuse and how to deal with such situations.

As part of the Council of Europe Campaign “One in Five” Commission for Children Helen D’Amato launched the translated story book “Kiko and the Hand”. The latter was complemented with a parents’ guide educated them in preventing cases of sexual abuse and violence against children.<sup>199</sup>

iii. Currently, there are no specific intervention programs of this sort yet when there is suspicious behaviour which may give indications that the person in question is prone to commit the crime, psychology is usually the way forward. In the case of minors, Sedqa psychologists come into the picture, whilst in the case of adults, a system of referral comes into place. The latter are referred to private psychologists which will in turn aid in suppressing any negative outcomes.<sup>200</sup>

iv. Yes, Sedqa outlines a selection of programmes providing support, such as: “Kellimni” which, guided by the child helpline international, is a joint project between SOS Malta, Salesian’s of Don Bosco and the two agencies Appoġġ and Agenzija Zghazagh, encompassing support through the internet via e-mail, chat and online forums. “Programm Ulied Darna” comprises professional support and supervision on a voluntary basis, aimed at training parents in their family life by “enhancing their parenting skills, budgeting skills and housekeeping techniques”.<sup>201</sup>

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<sup>198</sup> <http://www.kidsmalta.com/pages/view/sedqaprschools.aspx> - accessed on 27/09/2012

<sup>199</sup> Ibid

<sup>200</sup> Mr.Joe Gerada CEO at Foundation for Human Resources Development, and former CEO of Appoġġ

<sup>201</sup> <http://servizzitfal.org.mt/CFC/departments/127?locale=en> – accessed on 28/09/2012

v. Yes, there is a child helpline with the number 179, operated by the agency Apogg. According to the agency's website, this freephone helpline provides "confidential support", serves as a source of useful information with regards to local welfare services, and is used also as a referral hub. Moreover, one can easily contact the agency itself via the number 2295 9000. Agenzija Appogg also makes reference to the EU-Wide Emotional Support Helpline 116 123 which is "available to all local and foreign citizens in Malta". This project is managed by the European Commission. The aim is to have one international number as directed by the European Commission, recognisable in all EU member states, available for all European citizens.

vi. State-directed agencies aid victims of sexual abuse to deal with the aftermath of such a trauma. "Appogg" caters for a wide spectrum of psychological-induced problems. Its services range from and include family therapy, carrying out adoptions and the reporting of child abuse over the internet. Psychologists who work at this same agency make sure that knowledge about the particularity of sexual abuse becomes common as they frequently take interviews on various kinds of media.

There are also specific programmes aimed to aid victims in their recovery, including:

Intake& Protection Services customer care personnel available to help the persons involved in making an appointment with a social worker and also refer them or inform them on any services which they might require. On the other hand, those in charge at the "Appogg" assess the needs of such persons and offer the much needed help within or outside the Agency, as the case may be. This aids to inform the victims about any recovery or intervention programs available for their use. Despite the need to tackle certain issues such as long waiting lists due to lack of psychologists, one should mention the introduction of having the option to record the children's testimonies or else listen to them via video-conferencing.

### **III NATIONAL POLICY REGARDING CHILDREN**

i. Malta holds a solid foundation in the protection of children; not solely by discussing it but by reaching a consensus on the idea that children should be protected in every circumstance of life. Therefore rather than a discussion the State is constantly reminding society of the importance of such a factor by issuing campaigns in all areas of exploitation of children, be they sexual or otherwise. It may also be argued that children's services may come up on the

agenda but in general they are still to be acknowledged as rights holders in terms of the CRC and your previous observations re child representation and participation, for instance, reinforce this.

Malta has a Commissioner for Children who is the political representative of children on a State level. Children need a voice as well as the right to be protected, and since many of them do not have the luxury to be represented by a parent, they need an entity that will represent them always.

The role of the Commissioner for Children was embedded in our law through the Commissioner for Children Act<sup>202</sup> which was passed on the 5<sup>th</sup> of December 2003. Our present Commissioner is Mrs. Helen D' Amato<sup>203</sup> who succeeds two other former commissioners. It is clear that in Malta the issue of a state representative for the protection of children has been present for the last nine year. Can we deem this a very short period and view this act as something very recent? We may. But we may also acknowledge the fact that the need for child protection is not only recognized but has become a priority due to it being embedded in our law to be further developed.

“4. In the exercise of the functions established under this Act, the Commissioner shall act independently and shall not be subject to the direction or control of any other person or authority.”<sup>204</sup>

The Commissioner for Children must act as an independent body from all other State organs whereas being participant in State matters which involve the well-being of children.<sup>205</sup> It is clear that the position of the commissioner is not led by politics or hidden agendas but rather has set principles which guide it:

- “10....(a) that the best interest of children and the family are paramount;
- (b) that all children are to be treated with dignity, respect and fairness;
- (c) disabled children and children with disadvantaged family or social circumstances should enjoy the same quality of life like all other children;

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<sup>202</sup> Chapter 462

<sup>203</sup> Mrs. D'Amato is the third Commissioner for Children. She has a vast and broad range of experience in this sector, and was appointed as Commissioner on the 20th May 2010, after consultation with the Social Affairs Committee of the House of Representatives

<sup>204</sup> Commissioner for Children Act, Chapter 462

<sup>205</sup> Noteworthy to this is that the Commissioner for Children is dependent on the Ministry with regards to matters relating to funding and although she is appointed by the Prime Minister and not the President, she answers to the Ministry of Justice Dialogue and the Family

- (d) that children and their families are to be provided with opportunities to participate in decisions that affect them and in defining, planning and evaluating services to children; and
- (e) that government, families and communities share the responsibility for the promotion of the development and well-being of children.”<sup>206</sup>

This office is assisted by the Council of Children which is made up of the Commissioner for Children as Chairperson, five other members appointed by different Ministries, Chairperson of the Social Affairs Committee of the House of Representatives, two other members co-opted by the Commissioner for Children and approved by the Council, four young persons co-opted by the Commissioner for Children and approved by the Council<sup>207</sup>. As we can see the Council has a wide spectrum of members all emanating from different bodies, however not lacking in expertise when it comes to children. This makes for a wide discussion with tangible solutions due to the knowledge of the subjects and issues at hand.

The functions of the Council according to the same Act mentioned prior are:

- “ 12. (6)(a) to monitor compliance with the United Nations Convention on the Rights of the Child as ratified by Malta and with all such other international treaties, conventions or agreements relating to children as are or may be ratified or otherwise acceded to by Malta;
- (b) generally to advise and assist the Commissioner in the performance of the functions of the Commissioner as listed in the Act;
- (c) to advise and assist the Commissioner in the promotion of the welfare of children as specified in Article 11 of the Act.”<sup>208</sup>

It is important that as a State we have to be aligned to European and international conventions on the rights of the child, providing the standards set out in these documents and treaties; hence Malta’s ratification to the Children’s Rights Convention in 1990.

These are the principles that hold together this office and as a result the role of the Commissioner for Children can really be seen as Malta’s foundation for the protection of children on a state level.

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<sup>206</sup> Commissioner for Children Act, Chapter 462

<sup>207</sup> Safeguarding Children from Poverty, 2011, Published by the Office of the Commissioner for Children

<sup>208</sup> Commissioner for Children Act, Chapter 462

There are various notions to what constitutes protection of a child as well as there are various dangers that a child must be protected from. Society must aid to eliminate such issues and use a tactic of prevention rather than cure. The state's political discussion can really be reflected in what the Office for the Commissioner for Children is implementing in terms of national policy.

It is best to present various situations through time where political discussions were made and various policies implemented

In 2007/2008 the Commissioner at the time undertook the project called the Manifesto for Children. This manifesto was created to guide political parties contesting the general election in 2008 to generate policies to address children's social problems at the time. In 2008 children's rights were very much in a rudimentary stage and therefore further development was needed. This manifesto was officially launched in February of 2008, creating a perfect scenario for political parties' to make an effort in discussing such issues and providing concrete solution due to the run up to the election.

In that same year the Commissioner for Children focused on children in out of home care. This was a three year project intended to lay down the foundations for a national policy and strategy for out-of-home care in Malta. Due to the issue being a consistent one the office took it upon itself to bring together a team of researchers to embark on a three phase project<sup>209</sup> asking significant questions to compile the necessary factors that would identify this trend. In a recent report<sup>210</sup> it was stated that further progress was made in the completion of this project, and the writing of the synopsis for the three study areas is expected to be finalised in 2012 and published as a book, whilst all research work will be in the form of an e-book.<sup>211</sup>

In 2010 a follow up to the Manifesto for Children was made, giving a sense of continuity and consistency to the principal goals set out in the first draft. This was launched in the beginning of 2011 and focused on principles found in the United Nations Convention on the Rights of the Child.

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<sup>209</sup> The Effect of Institutional Placement for Children, Mental Health needs of Children in Care and Exploring the long term outcomes of youth leaving care

<sup>210</sup> Volunteering By You and For You, 2012, Published by the Office of the Commissioner for Children

<sup>211</sup> This was published in November 2012

In October 2009 the Platform for Children was launched, based on the theme of Poverty and Exclusion. A familiarisation workshop was held as well as various presentations on the issue given by the Commissioner herself and the Social Inclusion Unit within the Ministry for Social Policy. A discussion was held on the various concerns raised such as:

“the lack of a comprehensive legal framework that focuses on the rights of the child; the need for continuous research, monitoring and evaluation of currently available services; the need for community based services and care; the need for more inclusive education; as well as the importance of financial support and human resources for NGOs in order to collectively reach the necessary goals and targets.”<sup>212</sup>

This platform is purely based on the idea of advocacy for children’s rights and creates a system to support NGOs working in this field, to attend meetings and conferences in Europe. Such meetings aid at creating an effective network of NGOs to help promote children’s rights.

In the same year a new programme was envisaged called Be Smart Online! – A Safer Internet Centre for Malta. This project involved the participation of various entities such as the Malta Communications Authority, Agenzija Appogg, the Directorate for Educational Services, the Cyber Crime Unit and the Office of the Commissioner for Children. The aim here was to set up a safe environment for children on the internet and to eliminate any abuse that children might be exposed to through the internet.

“This project is still running with an aim of raising awareness, fighting illegal content on the internet, and empowering and protecting children online. Through this project, stakeholders will establish and maintain partnerships and promote dialogue and exchange of information within this sector on both a national and European level, and adopt an active approach towards increasing safe access to new technologies for children.”<sup>213</sup>

The inexistence of a National Child Policy was severely felt and therefore as a consequence was highly welcomed by the Office in 2012 when invited by the Ministry of Education to formulate such a policy. This drafting was completed in 2011 and launched in November of the same year, with a period of public consultation which should lead to the planning of a strategy consisting of concrete measures to realise these principles set.

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<sup>212</sup> Safeguarding Children from Poverty, 2011, Published by the Office of the Commissioner for Children

<sup>213</sup> Safeguarding Children from Poverty, 2011, Published by the Office of the Commissioner for Children

The creation of the National Children's Policy<sup>214</sup>, ranges from the very foundations and principles of the best interest of the child, to their protection and also to their right to leisure and creativity. It offers a vision of what has been discussed over the years between various institutions on various issues, combined into one idea and document.

"The KA<sup>215</sup> would like to reiterate that the importance of this document is that it focuses public attention on children and issues related to their vulnerability and protection. The major argument, weaving throughout the document, is that children should be valued for who they are and not for what they can achieve. The KA would like to point out that in order to respond to the needs highlighted by the document, Maltese society needs to clarify its value system and decide what it really values and what it is willing to forfeit in order to safeguard its most prized possession ... the child."<sup>216</sup>

All of the policies mentioned indicate that there is a serious political discussion about children's protection in Malta. Without a doubt the most substantial of them all is the creation of the National Children's Policy which is the best evidence of this political discussion. Having said this, we cannot say that lacunae do not exist especially within the realm of sexual exploitation.

ii. Unfortunately, through extensive research in this area, one has to come to the conclusion that in Malta there are no NGOs dealing with children's sexual abuse and exploitation specifically. The only NGO that deals with children in terms of protection of their rights is Celebrities for Kids<sup>217</sup> set up by Chris Fearne, a paediatric surgeon and father of three, in March 2011. Since his job entails treating children's injuries as well as nursing them back to health he decided to set up this NGO to try and curb any harm that might be forthcoming to them.

Their first campaign in raising awareness in society through this NGO was that called Child Safety and Injury Prevention which focuses on ensuring that kids have a right to a safe environment. It was determined that the most serious injuries for school-aged children are those related to traffic accidents through the arrival and departure to and from school respectively, either through the use of the bus and school bus or even crossing the road. It

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<sup>214</sup> Draft National Children's Policy, Proud of our childhood, 2012, Published by the Ministry of Education, Employment and the Family

<sup>215</sup> Kummissjoni Interdjoċesana Ambjent

<sup>216</sup> Opinion Paper on the Draft National Children's Policy, Posted by Sarah Grech on Jan 26, 2012 in [maltadiocese.org](http://maltadiocese.org)

<sup>217</sup> New NGO to champion children's rights... starting with their safety, Fiona Galea Debono, Tuesday March 15<sup>th</sup>, 2011, The Times

was determined that implementing new measures would help minimise such accidents on children, such as having the presence of a responsible adult on the bus, having the kids buckled into their seats and the necessary equipment to cut them out of such belts should the need arise.

CFK's<sup>218</sup> main goal however is not that dealing specifically with the topic at hand as was mentioned earlier<sup>219</sup>. Therefore Malta seems to be at a loss with regards to NGOs on such matters. By elimination the only agency dealing with child abuse and sexual exploitation is the State agency, Agenzija Appogg.

Having spoken with Ruth Sciberras<sup>220</sup>, an experienced social worker who also works at the resource centre with Agenzija Appogg, she highlighted some of the key events and campaigns that happen through the year on an annual basis.

Agenzija Appogg creates a lot of awareness through the media. It submits various articles to the Times as well as appearing on various local TV programmes to promote the need of volunteers within the agency whilst all the while promoting the work that is done within Appogg. She explained that the agency has a hundred volunteers, ranging between students and older people who feel that they want to contribute in the work being done to protect these children.

Appogg also initiated the Blue Ribbon Campaign<sup>221</sup>, a campaign which has peculiar origins. It originated through the pain of an American lady, a grandmother whose niece was abused and therefore in order to raise awareness she would go around in a van with many blue ribbons each one signifying a bruise on the child's body.

Today it is an information campaign launched by the Foundation for Social Welfare Services, aimed at providing more awareness on how important it is for a child to be loved and respected without being exposed to violence. The main symbol used on the day is a blue ribbon, which is also being used in other countries to mark Child Protection Day.

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<sup>218</sup> Celebrities for Kids

<sup>219</sup> Its main aim however is to raise awareness on children's rights and to tackle issues in a non-partisan manner. Other issues it deals with are obesity

<sup>220</sup> Ms. Ruth Sciberras' work can be found at ;  
[www.europarl.europa.eu/document/activities/cont/200803/20080327ATT25018/20080327ATT25018EN.pdf](http://www.europarl.europa.eu/document/activities/cont/200803/20080327ATT25018/20080327ATT25018EN.pdf)

<sup>221</sup> The Blue Ribbon Campaign for Children, Sunday 13<sup>th</sup> May, 2012, The Sunday Times



Ms. Sciberras also explained how Appogg celebrates World Children's Day<sup>222</sup> on an annual basis, an event which falls in November. This is generally part of a month-long Malta Children's Festival presented by the Ministry of Education, Employment and the Family. It is a celebration of children's talents such as music, drama, arts, crafts, parades and much more, which raise awareness with regards to children's rights. Possibly it is the best event of the year focusing on children and creating debates to further discuss current issues that deal with children, such as their well-being, rights and obligations, inclusion in society, social protection and their creativity.

Although it cannot be described as an NGO, there is the Curia Response Team which works in collaboration with Agenzija Appogg and deals specifically with cases that involve sexual abuse on children by the clergy. Some cases do go through Appogg whereas others go to the Police directly.

The state agency Appogg also provides for investigative boards through the use of the Child Protection National Policy in order to investigate alleged situations of child abuse that are reported. Upon determination of the situation the agency has the right to take the necessary action accordingly.

The foundation is embarking on other initiatives to promote positive parenting. These include information for parents and children, parenting skills courses within the community, projects offering support to families in need, and services for families going through difficult situations.

Once can say that Appogg is the only foundation which focuses on child abuse and sexual exploitation among other children's rights, and therefore the idea of NGOs has to be eliminated in the context of Malta. Whilst being state funded, the budget provided is limited and therefore are in constant need of voluntary aid. An issue that may be raised is the lack of NGOs for children.

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<sup>222</sup> Malta Children's Festival to mark World Children's Day, Wednesday, 17, November, 2010 at Gozonews.com

**17.1. Cases of child abuse reported to Agenzija Appogg by district: 1993-2008**

District	1993	1994	1995	1996	1997	1998	1999	2000
Southern Harbour	1	14	62	95	100	109	107	146
Northern Harbour	11	8	72	102	89	83	118	134
South Eastern	-	6	18	37	34	18	42	47
Western	-	7	17	27	26	24	32	36
Northern	2	4	22	25	32	33	54	71
Gozo and Comino	-	-	1	2	8	9	11	8
Unknown	-	1	6	16	15	4	6	20
<b>Total</b>	<b>14</b>	<b>40</b>	<b>198</b>	<b>304</b>	<b>304</b>	<b>280</b>	<b>370</b>	<b>462</b>
	2001	2002	2003	2004	2005	2006	2007	2008
Southern Harbour	52	168	220	109	61	249	236	133
Northern Harbour	88	174	247	100	19	212	198	110
South Eastern	34	90	99	53	36	95	87	67
Western	18	58	91	24	14	89	55	47
Northern	28	102	120	44	61	119	74	48
Gozo and Comino	7	21	15	5	4	28	23	7
Unknown	4	13	35	26	20	94	43	52
<b>Total</b>	<b>231</b>	<b>626</b>	<b>827</b>	<b>361</b>	<b>215</b>	<b>886</b>	<b>716</b>	<b>464</b>

Note: Data for 1993-2000 refer to children aged 0-17, while data for 2001-2008 refer to 0-18 year-olds.

Here we the cases of child abuse reported by Agenzija Appogg between 1993 and 2008, arranged by district.

Chart 17.1. Cases of child abuse reported to Aģenzija Apogģ: 1993-2008



## 17.2. Cases of child abuse reported to Aģenzija Apogģ by type of abuse: 1993-2008

Type of abuse	1993	1994	1995	1996	1997	1998	1999	2000
At risk	4	10	41	55	26	35	33	79
Emotional	-	3	14	9	23	14	18	37
Neglect	2	6	41	79	84	48	89	102
Physical	2	14	67	118	123	119	184	177
Sexual	6	7	34	40	46	61	42	63
Other *	-	-	1	3	-	3	3	1
Not specified	-	-	-	-	2	-	1	3
<b>Total</b>	<b>14</b>	<b>40</b>	<b>198</b>	<b>304</b>	<b>304</b>	<b>280</b>	<b>370</b>	<b>462</b>
	2001	2002	2003	2004	2005	2006	2007	2008
At risk	32	86	91	33	16	215	200	126
Emotional	17	80	97	47	20	30	40	18
Neglect	66	129	171	63	46	162	111	80
Physical	77	211	276	146	77	285	242	134
Sexual	36	99	169	63	55	188	114	91
Other *	-	-	2	-	-	-	-	-
Not specified	3	21	21	9	1	6	9	15
<b>Total</b>	<b>231</b>	<b>626</b>	<b>827</b>	<b>361</b>	<b>215</b>	<b>886</b>	<b>716</b>	<b>464</b>

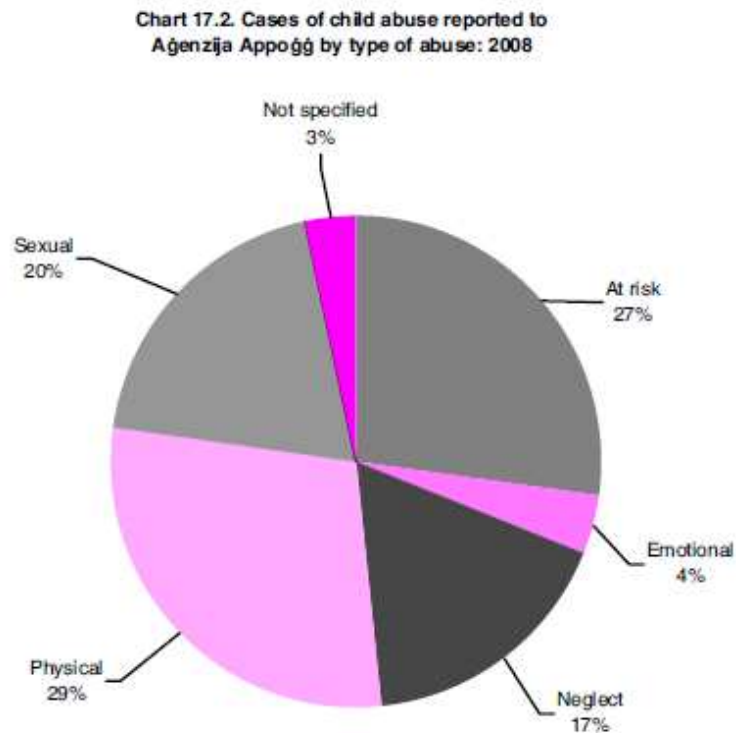
Note 1: Data for 1993-2000 refer to children aged 0-17, while data for 2001-2008 refer to 0-18 year-olds.

Note 2: All cases of abuse may involve multiple types of abuse.

Note 3: In 'not specified' cases, the only known information is that a report of abuse was lodged.

\* Includes pre-natal abuse.

Here we have cases of child abuse reported to Agenzija Appogg between 1993 and 2008 according to the type of abuse.



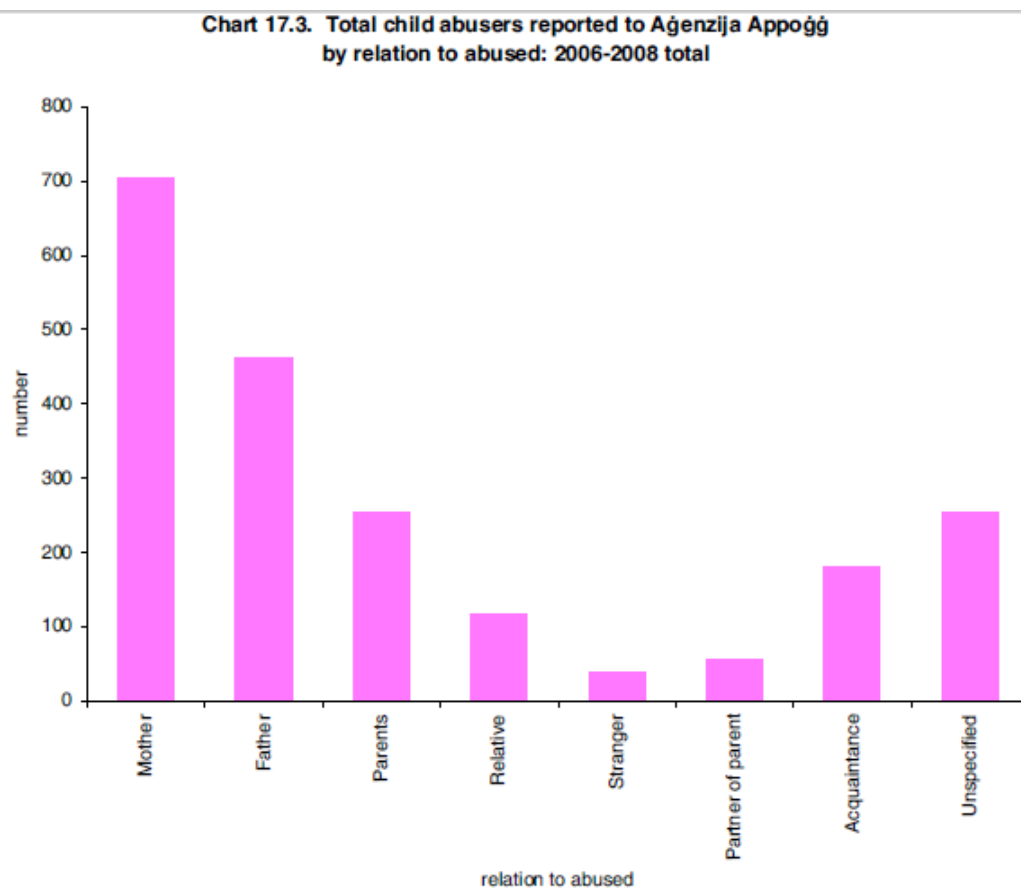
### 17.3. Child abusers reported to Aġenzija Appoġġ by relation to abused: 2006-2008

Relation to abused	2006	2007	2008
Mother	277	290	137
Father	197	168	97
Parents	129	76	49
Relative	50	42	24
Stranger	17	14	8
Partner of parent	25	18	13
Acquaintance	68	71	42
Unspecified	123	37	94
<b>Total</b>	<b>886</b>	<b>716</b>	<b>464</b>

Note: Data refers to abuse suffered by persons aged 0-18.

Source: Aġenzija Appoġġ

Here we have a chart indicating child abusers reported to Agenzija Appogg according to the relative of the abused between 2006 and 2008.



Abused children according to sex

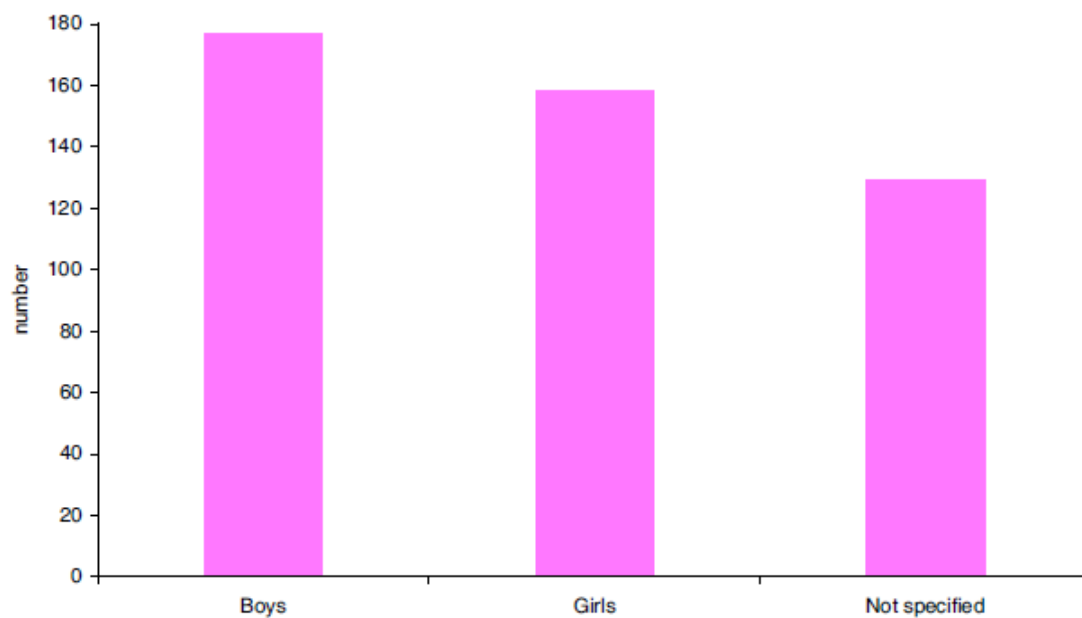
**17.4. Abused children: 1993-2008**

Sex	1993	1994	1995	1996	1997	1998	1999	2000
Boys	9	18	96	133	135	125	167	204
Girls	5	21	99	162	156	153	196	242
Not specified	-	1	3	9	13	2	7	16
<b>Total</b>	<b>14</b>	<b>40</b>	<b>198</b>	<b>304</b>	<b>304</b>	<b>280</b>	<b>370</b>	<b>462</b>
	2001	2002	2003	2004	2005	2006	2007	2008
Boys	80	278	371	154	103	447	368	177
Girls	133	310	381	185	105	415	319	158
Not specified	18	38	75	22	7	24	29	129
<b>Total</b>	<b>231</b>	<b>626</b>	<b>827</b>	<b>361</b>	<b>215</b>	<b>886</b>	<b>716</b>	<b>464</b>

Note 1: Data for 1993-2000 refer to children aged 0-17, while data for 2001-2008 refer to 0-18 year-olds.

Note 2: In 'not specified' cases, the only known information is that a report of abuse was lodged.

Source: Agenzija Appogg

**Chart 17.4. Abused children: 2008**

Abused children by age

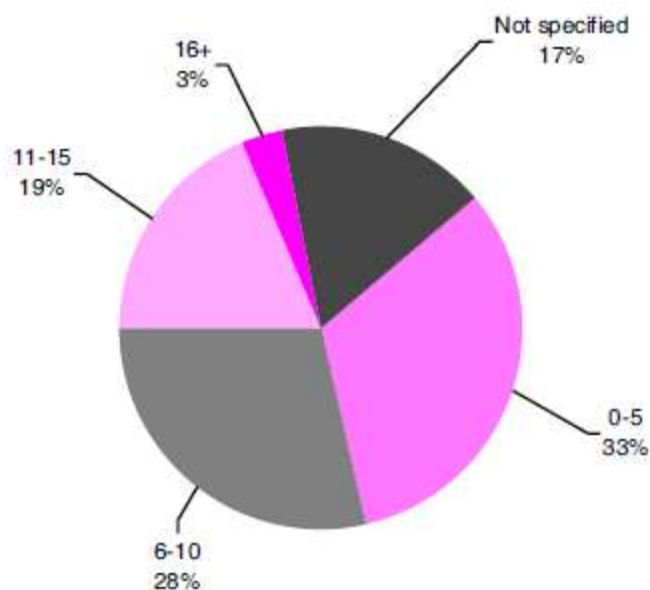
## 17.5. Abused children by age: 1993-2008

Age	1993	1994	1995	1996	1997	1998	1999	2000
0-5	10	18	55	91	81	75	106	125
6-10	1	11	63	104	108	103	118	142
11-15	-	6	48	78	79	74	102	124
16+	-	3	13	16	17	22	27	33
Not specified	-	-	-	-	-	-	-	-
<b>Total</b>	<b>11</b>	<b>38</b>	<b>179</b>	<b>289</b>	<b>285</b>	<b>274</b>	<b>353</b>	<b>424</b>
	2001	2002	2003	2004	2005	2006	2007	2008
0-5	47	106	163	92	70	191	167	151
6-10	62	205	255	111	63	268	238	132
11-15	51	160	254	104	16	255	193	87
16+	50	119	107	34	49	69	40	16
Not specified	21	36	48	20	17	103	78	78
<b>Total</b>	<b>231</b>	<b>626</b>	<b>827</b>	<b>361</b>	<b>215</b>	<b>886</b>	<b>716</b>	<b>464</b>

Note: For 1993-2000, total is exclusive of pre-natal cases, cases involving 18 year-olds, and cases about which no information is available.

Source: Aġenzija Appogg

Chart 17.5. Abused children by age: 2008



These are statistics presented in an official document called Children 2010 published by the National Statistics Office in Malta, after data given by Appogg was analysed.

Other data was provided by the police, reflecting the number of people arraigned in court due to cases of child abuse in the last five years. This is a list of figures indicating this data:

Persons arraigned in Court:

2008 - 39

2009 - 43

2010 - 25

2011 - 21

2012 - 12 (till July)<sup>223</sup>

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<sup>223</sup> Data provided by the CMRU and the Police Department



This data differs from that provided by Appogg due to the fact that at times reports are made directly to Appogg whereas others are made to the police therefore bypassing Appogg, unless officially requested.

iv. Appogg provides for various promotional campaigns in that it provides various schemes that can be adopted by parents in need or implemented on children that are in need. Whereas there are various ways that the agency in Malta has adopted to raise awareness<sup>224</sup>, it also offers various choices in order for broken families or children with various social problems caused by abuse to rehabilitate themselves.

Agenzija Appogg provides a leaflet defining abuse on children called “X’inhu l-abbuz?” stating that it has five forms; physical, sexual, negligence, emotional and through the use of technology. It defines each one and is in a format which is appealable to children through the use of cartoons. It is addressed to children and states that should children find themselves in any one of the situations described in the leaflet then they should call the support line and ask for help. Here Appogg may intervene and help eliminate such abuse.

The agency provides a similar leaflet on domestic violence which defines it and promotes the service offered by it to children and adults alike. Appogg aids in removing such people from danger and restoring their emotional and psychological health.

The Children’s Fund is an idea founded by Appogg however would not actually operate if it were not for people’s donations. The funds are used to buy the basic needs for all children such as nappies, milk, clothes, medicines, uniforms, transport for school and all other basic needs that children require to have the basic quality of life that they have a right to. This fund began in 2003 and helps over 200 children a year. It is given to children, through an application by a social worker, who come from disadvantaged households as a form of supplementary aid. Donations are usually raised through fund raising activities however sometimes direct donations from people or companies are made.

Appogg offers various types of other schemes to continue aiding children in their troubled scenarios such as in out-of-home care, fostering, family therapy as well as monitoring care orders as much as possible.

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<sup>224</sup>Vide question ii.

The Office of the Commissioner for Children also provides a certain degree of effort when it comes to children, abuse and sexual exploitation. The Office has worked in conjunction with the Council of Europe, and has published a child-friendly booklet on sexual abuse. It is called “Kiko u l-Id”<sup>225</sup> and provides simple information on child abuse and how to identify it whilst providing an elementary story helping children identify what is right way for them to be loved and not to misinterpret love and care with abuse. It has been translated in nine languages so far, Maltese being one of them and has been distributed to children who are at a Year 1 stage, in the majority of schools.<sup>226</sup> Also all schools have been given the necessary set of publications for the purposes of PSHD.<sup>227</sup>

v. Having spoken to the Commissioner for Children Mrs. Helen D’Amato she provided some insight as to how the department works and what bearing children have on the entire legislative process. It would seem that in drafting the National Children Policy children were consulted all through the discussion, assembling and drafting of the policy. A child-friendly committee was set up in order for children to feel at ease when discussing certain issues, so that a sound result would be achieved.

Although the office strives to consult children as much as possible in all sectors and surveys that they initiate, this is not so in legislation<sup>228</sup>. Mrs. D’Amato stipulates that until now it is only policy that passes through a period of consultation with children, highlighting the fact that this was also a first. Laws do not pass from this consultative process and do not involve children first hand. The fact that a committee of children was set up in drafting the policy was a stepping stone towards something greater that could infiltrate in the legislative process in the future.

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<sup>225</sup> *Kiko u l-Id* published in 2012 through the aid of COE at [www.coe.int/oneinfive](http://www.coe.int/oneinfive) - project supported by the Ministry of Education

<sup>226</sup> Approx. distributed to 4500-5000 children

<sup>227</sup> Personal, Social and Health Development

<sup>228</sup> Mrs. D’Amato explained how in all that the Office does, whether it is a study or an activity they take it upon themselves to consult with the relevant group of people that have been affected by such a scheme or policy in the past or who are going to be affected by it in the future. Examples given were the upcoming legal notice on teen parties where teenagers were consulted with the help of Agenzija Zghazagh, and the workshop on children who are in Out of Home Care held by through the European Network through the Ombudsman where Malta presented children who were presently in such a scenario. Other examples are councils in school set up by children which later discuss several issue with this Office as well as a recent survey on leisure and child advertising and electioneering where insight was gathered from children from all over the island.

The office works with the Council for Children which is composed of four members. Two of the children are selected through a live-in called Human Rights for You<sup>229</sup> where the two children are nominated by their peers to participate in such a council. The other two members stay on longer on the Council due to the fact that they would know what policies would have been implemented beforehand and so that there may be a degree of continuity. It is this Council that can have a degree of legislative bearing however this is very minimal.

“Every legislation is going to affect the entire population and children are part of that same population, therefore they should be consulted.”<sup>230</sup>

The main national procedure discussed very recently on how to deal with children is that portrayed in the round table conference held earlier in May 2012. This was a conference organised by Agenzija Appogg which involved the stakeholders involved in the local protection of children.

“Minister Chris Said said that such a national procedure discussed is to be part of the government’s commitment to protect children whilst ensuring better synergy between educators, social workers, the police and the law courts.”<sup>231</sup>

It is essential that the child’s perspective is taken into consideration when proposing legislation, participation rights of the child would be significant.

vi. As mentioned before there is only one NGO working on children’s rights. Mrs D’Amato stated that as an Office they had met with the relevant NGO, Celebrities for Kids to show their support for the work being initiated as well as some issue having been discussed. However, there are a number of NGOs that treat children’s rights within their remit, unfortunately they are not solely dedicated to child rights.

## IV OTHER

Recently there have been a couple of issues dealing with children and their abuse. Earlier this year it was proposed that a Sexual Offenders Register be enforced in Malta. However due to various constraints, one being the fact that Malta is an island and therefore a person

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<sup>229</sup> 3 of which were organized this year so far

<sup>230</sup> Mrs D’Amato

<sup>231</sup> National procedure on dealing with abused children planned, Friday, May 25, 2012, The Times of Malta

whose name is put down on the register can be greatly affected, was taken into consideration and was the cause for this register not to come in force. Instead the register was given a different title; the Protection of Children's Register. The idea is that all harmful acts on children are crimes, not only sexual ones therefore limiting it to sexual offenders would be detrimental to children and their protection. Other persons in the field have criticized this since when sexual offenders are placed on a list on their own everyone is aware of their crime and therefore children's protection will be greater. Putting them on a list with other offenders brings doubt as to the nature of the crime and therefore could reduce the protection provided for children. Nevertheless, access is also restricted since only a limited number of people may ask for the relevant information.

The register comes with its limitations. It is the courts that would decide whether a person should be included in the register - on the basis of the crime that was committed and the circumstances presented in the evidence. In exceptional cases, a court may also issue temporary orders for inclusion in the register, such as when an accused person admitted his crime involving children and before the actual sentence was delivered.<sup>232</sup>

Also such register would not be publicly accessible. It would be kept in the first hall of the Civil Court and it would be the court which would decide whether to divulge information found in the register to persons responsible for children.

This law made recently is among the most important laws, along with amendments to the Civil Code which protected children from pornography and child trafficking. Clearly, the level of protection to children has been substantially raised, a fact also recognised by the European Commission.

A less recent but very valid issue is that of the right of appeal in the context of care orders. In order to further explain the issue we must describe the case. In 2010, the Constitutional Court stated that a mother convicted of being cruel to her daughters did not have her rights violated when she was denied access to the courts following a care order issue on the children, after having filed a constitutional application before the First Hall of the Civil Court.

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<sup>232</sup>Child offenders register comes into force this week, Wednesday, January 18, 2012, The Times of Malta

In 2005 after having been given a suspended sentence and her partner jailed for two year for cruelty on the minor daughters, the children were placed in care with an institute run by nuns. Having ended her relationship she wanted her daughters back and due to the change in circumstances the care order was no longer necessary. Despite her requests the care order remained in vigore. Therefore she opened a constitutional case on the basis of a violation of her right to a fair hearing through an independent and impartial tribunal due to the care order.

The First Hall of the Civil Court upheld her request but the Attorney General appealed to the Constitutional Court composed of Chief Justice Vincent Degaetano, Mr Justice Joseph Filletti and Mr Justice Geoffrey Valenzia. The Constitutional Court said that, since the mother had been found guilty of cruelty to her children and had been given a suspended sentence, certain provisions of the Criminal Code came into effect in her regard. As a result, the mother lost all parental authority and all her rights over her children. This was an automatic consequence that did not even have to be imposed by the Criminal Court in its judgment against the mother. The mother had, therefore, lost all authority over her daughters even before she filed her constitutional application. She could not have filed her constitutional application on behalf of her daughters because once the care order was issued the children were in the custody of the Social Policy Minister.

Referring to the mother's allegation about not being given access to the courts to ask for the revocation of the care order, the Constitutional Court ruled that access was always to be had to the courts for a decision on civil rights and obligations or in criminal cases. The court had, therefore, to decide whether the mother had any right or duty that had to be determined at the time she filed her constitutional application. However, as the court had already established, after the mother had been given a suspended sentence she had lost all her authority and rights over her children. She could vaunt no claim in their regard. The Constitutional Court ruled that there was no violation of the mother's right to a fair hearing and it revoked the first court's judgment.<sup>233</sup>

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<sup>233</sup>'Cruel' mother has no right to appeal care order over her two daughters, Saturday, May 15, 2010, The Times of Malta

This case raised an issue in itself however it has shown the extent our courts go to as much as possible give a fair adjudication in terms of the child; in the best interest of the child awarding him/her the protection they deserve.

The Commissioner for Children feels that as a Member State within the union Malta is on its way in terms of children's rights and children's inclusion in society. In terms of abuse and exploitation no amount of help is ever enough however the bar is being set higher in order for Malta develop further in this area.

On a concluding note, it is essential that children are holders of rights, child participation is crucial in responding to child abuse and unless the protection mechanisms are child friendly one may risk that they remain unchecked. The keeping of disaggregated data is vital for present and future action. Finally, all services should have an evaluation process in built so that one can learn from good practice and mistakes but currently this is not done or is done in house instead of independently. The Council of Europe and EU recommend the setting up of a Child Rights Observatory to address this and perhaps this may be taken care through Parliamentary Committees and a Minister or Parliamentary Secretary for Children.

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#### **Interviews with:**

Mrs. Helen D'Amato

Dr. Ruth Farrugia

Mrs. Ruth Sciberras

Institutions involved and mentioned:

Agenzija Appogg

The Office of the Commissioner for Children

Kummissjoni Interdjoċesana Ambjent

Police Department (CMRU)

NSO (National Statistics Office)

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**Authors:**

Idun Alisia Bjørvik

Dina Camilla Schei Brask

Olav Vogt Engeland

Maren Folkestad

Sara Ege Grindaker

Dilan Karakuyu

Sun Sand

Anette Ødelien

Maria Mogstad Slinde

Einar Lund Sørensen

Maëlle Thorheim

Thea W. Totland

Morten W. Tvedt

## I INTRODUCTION

### 1 GENERAL

i. To give a complete description of discrimination in Norway would, of course, be impossible. The following is an attempt to present a brief overview.

In 2006 the Equality and Anti-discrimination Ombud (LDO) was established to supervise and ensure laws and administrative practice on discrimination. Between 2007 and 2011, LDO handled approximately 6,800 cases regarding discrimination. Most cases concerned gender discrimination and disability discrimination.<sup>1</sup> According to LDO, the large number of cases concerning discrimination on the grounds of disability was related to the Act on Discrimination and Accessibility (DTL)<sup>2</sup> that entered into force in 2009. LDO reviews questions of discrimination on the grounds of individual complaints. Therefore, their statistics may not be representative of the actual situation. Other factors may be determinative for determining the type of case brought before LDO.

According to a survey from 2009 by Statistics of Norway (SSB), about half of the inhabitants with foreign background say that they have experienced discrimination in one or more areas, including employment, housing, healthcare or nightlife. Young people (age 16-24) claimed to experience discrimination more often than older people (age 55-71). Furthermore, 60 to 70 per cent of people with Somalian, Iranian and Iraqi backgrounds reported they had experienced employment discrimination in the last five years. Examining the tenancy situation, SSB found that people with Asian and African background have higher rental costs than people with Norwegian background. With regard to healthcare, 80 per cent of the inhabitants with a foreign background reported that they felt that they were treated with the same quality of care as the inhabitants with a Norwegian background.<sup>3</sup>

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<sup>1</sup> The Equality and Anti-discrimination Ombud, 'Veiledningssaker etter diskrimineringsgrunnlag'. 12 June 2012, viewed on 15 August 2012, <<http://www.ldo.no/no/Tema/Statistikk-og-analyse/Veiledningssaker-etter-diskrimineringsgrunnlag/>>.on 15 August 2012, <<http://www.ldo.no/no/Tema/Statistikk-og-analyse/Veiledningssaker-etter-diskrimineringsgrunnlag/>>.

<sup>2</sup> Act of 20 June 2008 No. 42 relating to a prohibition against discrimination on the basis of disability (the Anti-discrimination and Accessibility Act).

<sup>3</sup> K. R. Tronstad, 'Opplevd diskriminering blant innvandrere med bakgrunn fra ti ulike land', Statistics of Norway, December 2009, viewed on 1 September 2012, <[http://www.ssb.no/vis/magasinet/slik\\_lever\\_vi/art-2009-12-14-01.html](http://www.ssb.no/vis/magasinet/slik_lever_vi/art-2009-12-14-01.html)>.

The Labour Research Foundation (FaFo) conducted an overview of the social science knowledge on the living conditions of gays, lesbians, bi-sexuals and the HIV -positive in Norway in 2008. The purpose for this report was to evaluate the possible need to expand the legal protection from discrimination for these groups. FAFO found that people with non-heterosexual orientation report little discrimination in their daily lives, and enjoy the same standards of living as the rest of the population. However, they found that non-heterosexual foster parents are opted out in favour of heterosexual foster parents in accordance with regulations on foster homes.<sup>4</sup> The stated reason for this provision is the interest of the child, but with the Marriage Act equating heterosexual couples and homosexual couples, giving equal status and right to apply for child adoption,<sup>5</sup> it is difficult to see how this is not to be regarded as discrimination. FaFo also found the state regulated practice of the Child Welfare Service ("Barnevernet") in evaluating the suitability of stepparents before adoption to be problematic for homosexual couples.<sup>6</sup>

The indigenous Sami population accounts for approximately 40,000 people in Norway. According to a survey by SAMINOR (University of Tromsø) in 2003/04, Sami people report experiencing more ethnic discrimination and bullying than ethnic Norwegians. The study found that the most common types of discrimination were bullying, gossiping and disparaging remarks at work, in their local community, and at school. The study notes that "[t]hese results are consistent with experiences from other minority and marginalized groups that experienced colonization".<sup>7</sup>

ii. The term "family" is derived from legal theory<sup>8</sup> and the government's report to the Norwegian Parliament (the Storting) St. Meld. Nr. 29 (2002 - 2003). The latter document states that:

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<sup>4</sup> Regulations of 18 December 2003 on Foster Homes Section 4, delegated by Act of 17 July 1992 no. 100 relating to child welfare services (the Child Welfare Act) Section 4-22 (3).

<sup>5</sup> Act of 28 February 1986 no. 8 relating to adoption, cf. Act 4 July 1991 No. 47 relating to marriage (the Marriage Act) Section 1.

<sup>6</sup> A. B. Grønningsæter & B R Nuland, 'Diskriminering av lesbiske, homofile og bifile og av hivpositive, en litteraturgjennomgang', *Fafo*, viewed on 1 September 2012, <<http://www.fafo.no/pub/rapp/10068/10068.pdf>, p.23>.

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<sup>8</sup> P. Lødrup & T. Sverdrup, *Familieretten* 7<sup>th</sup> edition, P. Lødrup, Oslo, 2011, p. 22.

“The family includes married couples with or without children, cohabiting couples with or without children, gay partners with or without children, single parents living with their children, non-resident parents, families with foster children and single, living alone.”<sup>9</sup>

In 2008, Section 1 of the Marriage Act was amended to include persons of the same sex to marry each other. In 2001 there were 204 357 people living in cohabitation, a rise from 102 000 in 1990.<sup>10</sup> In 2011 there was a total of 23 135 marriages. 9 067 of these took place in the State Church, while the District Court had 7 481.<sup>11</sup> These numbers show that the total amount of marriages has slightly decreased from 25 356 in 2000. Numbers from 2011 showcases a total of 21 and 12 per cent married women and men, respectively, in the age group 25-29.<sup>12</sup>

The age requirement for independently entering a marriage is 18 years, cf. the Marriage Act Section 1a. The average marital age of the population in Norway for first time marriages was 29.3 years for women in 2001, an increase from 26.2 in 1991. The average was 32.0 years in 2001 for men, an increase from 28.8 in 1991.<sup>13</sup>

**iii.** In 1991, the Norwegian Government ratified the UN Convention on the Rights of the Child (CRC).<sup>14</sup> With this the State is responsible for protecting children against abuse, exploitation or pain. In addition, Norway was the first country to establish an Ombudsman who has “statutory right to protect children and their rights”<sup>15</sup>. The Ombudsman for Children acts as an independent institution, meaning that neither the Parliament nor the Government can give instructions.<sup>16</sup>

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<sup>9</sup> St.meld. nr. 29 (2002-2003),

<sup>10</sup> Statistics Norway, ‘Singel eller samboer’, , 2008, viewed on 15 October 2012  
<<http://www.ssb.no/vis/emner/00/norge/fam/main.html>>.

<sup>11</sup> Statistics Norway, ‘Statistikkbanken’, StatBank, 2011, viewed on 15 October 2012  
<[http://statbank.ssb.no/statistikkbanken/Default\\_FR.asp?PXSid=0&nvl=true&PLanguage=0&tilside=selectvarval/define.asp&Tabellid=05713](http://statbank.ssb.no/statistikkbanken/Default_FR.asp?PXSid=0&nvl=true&PLanguage=0&tilside=selectvarval/define.asp&Tabellid=05713)>.

<sup>12</sup> Statistics Norway, ‘Statistikkbanken’, StatBank, 2011, viewed on 15 October 2012,  
<[http://statbank.ssb.no/statistikkbanken/Default\\_FR.asp?Productid=02.01&PXSid=0&nvl=true&PLanguage=0&tilside=selecttable/MenuSelP.asp&SubjectCode=02](http://statbank.ssb.no/statistikkbanken/Default_FR.asp?Productid=02.01&PXSid=0&nvl=true&PLanguage=0&tilside=selecttable/MenuSelP.asp&SubjectCode=02)>.

<sup>13</sup> St.meld. nr. 29 (2002-2003).

<sup>14</sup> Regjeringen, ‘FNs barnekonvensjon’, viewed on 3 August 2012,  
<[http://www.regjeringen.no/nb/dep/bld/tema/barn\\_og\\_ungdom/fns-barnekonvensjon.html?id=670174](http://www.regjeringen.no/nb/dep/bld/tema/barn_og_ungdom/fns-barnekonvensjon.html?id=670174)>.

<sup>15</sup> Barneombudet, “About the position”, viewed 5 August 2012,  
<[http://www.barneombudet.no/english/about\\_the\\_/about\\_the\\_/>](http://www.barneombudet.no/english/about_the_/about_the_/>).

<sup>16</sup> Barneombudet, ‘About the position’, viewed 5 August 2012,  
<[http://www.barneombudet.no/english/about\\_the\\_/about\\_the\\_/>](http://www.barneombudet.no/english/about_the_/about_the_/>).

The government of Norway has to report on the general status of children's rights every five year. The report is submitted to the UN Child Committee and the fourth and latest report is from 2008. In addition, the Norwegian government sends a report consisting of children and young people's own experiences and opinions on how it is to grow up in Norway (Children and young people report to the UN on their rights).<sup>17</sup> Also other non-governmental parties who are concerned about children's rights can report to the Child Committee. During the last round, the Ombudsman for Children and some other organizations and research centres made their own reports.

The United Nations Child Committee has commented that the Norwegian legislation needs amendments. The UN Child Committee is dissatisfied with Norway's practise of imprisoning minors together with adult prisoners. The committee also comments that there are large and regional differences in the Child Welfare Service throughout the country. Norway should ensure children the same rights, regardless of what part of the country they belong to. The Committee also comments that the Norwegian government does not allow The Ombudsman for Children to receive and follow up complaints from children. Such a complaint procedure could offer children immediate help, and it would provide the government with more knowledge about the issues occupying children. Moreover, the Committee was dissatisfied with the level of knowledge that persons working with children had about Children's Rights.<sup>18</sup> In 2011, the United Nations created a third additional protocol to the CRC which gives children the right to complain about their respective country directly to the United Nations Child Committee. The Norwegian Government has not signed this protocol.<sup>19</sup>

Being one of the most known sexual assault cases in Norway, the Alvdal Case exemplifies horrific abuse of children taking place in this country. It involved parents and their children and it was intensively covered by the media.<sup>20</sup> In this case, five adults were involved in sexual assault and rape against four children under 14 years of age through a period of several

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<sup>17</sup> Simonsen & Hagen, 'FN sier fra til Norge', Save the Children Norway, 2 February 2010, viewed 8 August 2012, <<http://www.reddbarna.no/nyheter/fn-sier-fra-til-norge>>.

<sup>18</sup> Save the Children Norway, 'Rapport barnehøringen med FNs Barnekomité i Norge 2009', 12 October 2009, viewed 29 July 2012, <<http://www.reddbarna.no/>>.

<sup>19</sup> M. Sydgård and I. K. Lund, 'Krever klagerett for barn', Save the Children, 17 September 2012, viewed on 20 October 2012, <<http://www.reddbarna.no/nyheter/krever-klagerett-for-barn>>.

<sup>20</sup> Ridar, Solem and Tommelstad, "Tiltalen som ryster Alvdal", VG, published 9th January 2011, changed 19th January 2011, viewed on 21 October 2012, <http://www.vg.no/nyheter/innenriks/artikkel.php?artid=10037347>

years. The accused persons were two pairs of neighbours, both having two children. Another fifth neighbour was involved and five other adults were suspected, but never charged. In this case the prosecutors had photos and videos as evidence against the accused adults. One of the videos showed the stepfather having sex with his stepdaughter and this man was charged with rape and sexual assault against all four children involved in the case. Save the Children Norway states that the Alvdal Case is not unique.<sup>21</sup>

iv. Norwegian legislation has a dualistic approach to the relationship between state law and international treaties. This approach includes the requirement that all international agreements, customary international law and general principles of international law must be implemented into domestic law in order to be applicable and applied by the courts. The dualistic principle in Norwegian legislation is not laid down in the Constitution, but can be deduced from the Constitutions' framework that distinguishes between a legislative, executive and a judicial power. This has been repeatedly confirmed by case law,<sup>22</sup> and is generally accepted as an unwritten legal norm, with the rank of formal law.

The legislator uses three different methods when implementing international treaties; transformation, incorporation and passive transformation (determination by the legislator that the legislation is in conformity with the international law). Other than incorporating human rights treaties in the Act of 21 May 1999 relating to the strengthening of the status of human rights in Norwegian law (the Human Rights Act), the most common method of implementing human rights treaties in Norwegian legislation has been through passive transformation.<sup>23</sup> There is no particular legislation that dictates when the various methods for implementation must be used. This decision will usually depend upon the recommendations of a specialized Committee from the Ministry of Justice.

A limited type of incorporation used in Norwegian legislation is "sector monism," including the premise that international law has precedence over domestic legislation in certain jurisdictions.

Norway ratified the United Nations Convention on rights of the Child on 8 January 1991. The Norwegian Government initially decided to make a reservation regarding Art.

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<sup>21</sup> E. Toft, Save the Children Norway, 'Alvdal-saken ikke enestående', Save the Children Norway, 18 February 2011, viewed 21 October 2012, <<http://www.reddbarna.no/nyheter/-alvdal-saken-ikke-enestaaende>>.

<sup>22</sup> Rt. 2000 p. 1811 *Finnanger*, Rt. = Norsk Rettstidende (English translation = Supreme Court Law Review).

<sup>23</sup> NOU: 1993: 18



40(2)(b)(v), but withdrew this reservation on 19 September 1995. Norway does not currently have any reservations to the Convention.<sup>24</sup>

## 2 THE LANZAROTE CONVENTION

i. Norway ratified the European Convention on Human Rights (ECHR) in 1952 and it took effect in 1953.<sup>25</sup>

ii. The Lanzarote Convention was signed by Norway on 25 October 2007.<sup>26</sup> However, Norway has not yet ratified the convention. At this point, according to the Ministry of Justice, Norway does not have any plans to make reservations to the Convention.

iii. According to the Ministry of Justice, Norway will ratify the Convention as soon as domestic legislation fulfils the requirements of the Convention.<sup>27</sup> According to the preparatory works for the implementation of the Lanzarote Convention, the General Civil Penal Code of 20 May 2005 no. 28 (the Penal Code of 2005)<sup>28</sup> fulfils the Lanzarote Convention's requirements concerning criminal law.<sup>29</sup> However, the main obstacle is that the Penal Code of 2005 has not yet entered into force due to technical improvements this requires in the police's computer system. Finally, other departments that are affected by the Convention have not yet given their opinion on the matter.

iv. The Norwegian legal system is a hierarchy of legal norms, the Constitution being the superior legal norm. According to the *Lex Superior* principle, statutory law is subordinate to the Constitution, and regulations are subordinate to statutory law.

What rank the Lanzarote Convention will have in the Norwegian legal system when ratified will depend on the legal area affected by the Convention. We distinguish between those articles which affect the General Civil Penal Code of 22 May 1902 no. 10 (the Penal Code)<sup>30</sup> and the Act of 22 May 1982 no. 25 relating to legal procedure in criminal cases (the Criminal

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<sup>24</sup> United Nations, viewed on 22 October 2012, <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en#43](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#43)>.

<sup>25</sup> NOU 2008:9.

<sup>26</sup> 'Ot. Prp. Nr. 22 (2008-2009).

<sup>27</sup> Folkestad, M., 'Re: Questions about the Lanzarote Convention' [email and phonecall to the Ministry of Justice] 27 August 2012.

<sup>28</sup> When indicating this Penal Code, the year of 2005 will always be mentioned in the following.

<sup>29</sup> Ot. Prp. Nr. 22 (2008-2009).

<sup>30</sup> When the year of the penal code is not stated, this penal code is the one referred to in the following.

Procedure Act), where sector monism is applied, and articles that affects other parts of the legislation, where the general principle of presumption applies.

The general principle of presumption is developed by case law and deals with the presumption that Norwegian domestic law is in accordance with international law. The principle applies in all legal areas in which Norway has international obligations. Accordingly, Norwegian law will, as much as possible, be interpreted in accordance with international law, cf. Rt. 2000 p. 1811 *Finnanger I*.

The articles in the Lanzarote Convention primarily regulate the Penal Code and the Criminal Procedure Act, where sector monism is applied, and thus the principle of presumption is not necessary. Since sector monism applies in both the Penal Code and the Criminal Procedure Act, the Norwegian courts are obligated to apply the law in such a way as to ensure compliance with binding international agreements and customary international law. Norwegian law may therefore be set aside if it is incompatible with the articles in the Lanzarote Convention. The Criminal Procedure Act Section 4 states: “The provisions of this Act shall apply subject to such limitations as are recognized in international law or which derive from any agreement made with a foreign State”<sup>31</sup>. Likewise, the Penal Code Act Section 1 states: “The criminal legislation shall apply subject to such limitations as derived from any agreement with a foreign State or from international law generally”<sup>32</sup>.

The term “limitations” in the Criminal Procedure Act Section 4 shall not be interpreted in the literal sense. International law can also inform the Criminal Procedure Act. For instance, the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights (ECHR)) requires certain rules of procedure in criminal proceedings. This does not only restrict the Criminal Procedure Act, but also supplements it where national legislation falls short. This is of importance regarding the Lanzarote Convention, for example in Chapter VIII about recording and storing of data.

When it comes to the articles that affect the Penal Code, the Norwegian principle of legality in criminal law requires a domestic and sufficiently precise statutory law in order to convict

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<sup>31</sup> Unofficial translation by R. Walford, E. Høgtvedt, P. Chaffee & S. Hamilton, The Ministry of Justice, viewed 3 on August 2012, <<http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf>>.

<sup>32</sup> Unofficial translation by H. Schjoldager, F. Backer, E. Walford & S. Hamilton, The Ministry of Justice, viewed on 3 August, <2012 <http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf>>.

someone for a crime. This principle is expressed in the Norwegian Constitution Art. 96: “No one may be convicted except according to law”.<sup>33</sup>

“Law” has been interpreted to mean formally enacted legislation, passed in conformity with the requirements of the Constitution Sections 76 - 79. Therefore, a Norwegian court will not convict an individual solely based on international law, since it does not fulfil the requirements of the Constitution. This applies although the precedence rule in the Penal Code Act Section 1, construed literally, may suggest otherwise.

In the case of conflict between either the Penal Code or the Criminal Procedure Act and the Lanzarote Convention, the Convention rule will prevail. Nevertheless, the Supreme Court has elaborated on this rule in Rt. 2000 p. 996 *Bøhlerdommen*. In situations where there is a conflict between a convention rule and other Norwegian statutory provisions, the result “cannot be resolved by a general rule, but must depend on a more detailed interpretation of the legal rules in question”. Accordingly, the effect of the precedence rule in both the Penal Code, and in the Criminal Procedure Act will, pursuant to case law, depend on an individual interpretation of both domestic statutory provision and international law.

It is worth mentioning that the precedence rule in the Penal Code Section 1 and in the Criminal Procedure Act Section 4 is not of constitutional rank, and can be repealed by the Parliament as any other law of statutory rank.

The question can be asked whether the Lanzarote Convention would have greater protection in the Norwegian legal system if it was incorporated in the Human Rights Act.<sup>34</sup> The Human Rights Act has a “semi constitutional” rank,<sup>35</sup> and has been considered to be a reinforced version of the principle of presumption. However, the question has not been asked by the government, and will not be an issue when implementing the Lanzarote Convention. .

## II NATIONAL LEGISLATION

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<sup>33</sup> Constitution of the Kingdom of Norway of 17 May 1814. Official translation by the Parliament, viewed on 4 August 2012, < <http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/>>.

<sup>34</sup> See subsection II. 1. ii.

<sup>35</sup> See subsection II. 1. ii.

## 1 GENERAL PRINCIPLES OF THE JURISDICTION

i. Norway is a Constitutional Monarchy with a representative parliamentary democracy and a central government. The legal system is based on civil law.

From 1380 through 1814, Norway was in union with Denmark, and then in union with Sweden from 1814 until 1905. As of 1905, Norway has been an independent State. Norway is not a member of the EU but participates in the European Economic Area and the Schengen and Dublin agreements. The Constitution was drafted in 1814, but has been amended several times. The most comprehensive changes were made in 2007. Among other revisions, the parliamentary system of government was formalized after having been recognized as constitutional customary law for over a hundred years.

The Parliament (the Storting) is the legislator and the highest elected organ for the State. The people legitimize the power of the Parliament by electing its members.<sup>36</sup> The Parliament's essential functions are described in Section 75 of the Constitution. Also, The King is given far reaching powers, but because of the constitutional customary law, these are all exercised by the executive power of the Government. Further, the courts of justice decide how laws and administrative regulations shall be interpreted, and the Supreme Court has the power to determine whether laws are in accordance with the Constitution.<sup>37</sup>

Political elections are held every second year, alternately, for the Parliament and the Sámi council, and, with regard to the local elections, for municipal councils (local) and the county councils (regional). Representatives are elected for a four year term. Since 1945, the Social Democratic Labour Party has been the most influential party in Norwegian politics, with the Conservative party acting as its biggest challenger. The current government is a coalition of the Labour Party, the Socialist Party and the Centre Party.

ii. Some human rights are legislated through the Constitution, which grants positive rights to the individual. The fundamental human rights in the Constitution are the right to free speech, the right to property, the right to a fair trial, and the prohibition of unlawful arrest.

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<sup>36</sup> L. H. Barstad, 'The Constitution - Complete text', Official web page for the Norwegian Parliament, 23 February 2012, viewed on 14 August 2012. <http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/>, art 49.

<sup>37</sup> Edited by L. H. Barstad, 'Om grunnloven', Official web page for the Norwegian Parliament, 3 October 2012, viewed on 3 October 2012, <<http://www.stortinget.no/no/Stortinget-og-demokratiet/Grunnloven/om-grunnloven/>>.

The Constitution also contains rights to a healthy environment and imposes responsibility on state authorities to: 1) create conditions enabling every person capable of work to earn a living, 2) to create conditions enabling the Sami people to preserve and develop its language, culture and way of life, and 3) to ensure human rights.<sup>38</sup> However, these rights are not considered to be positive rights that can be claimed by the individual directly through the Constitution.

Legislative proposals to revise and systemize the human rights in the Constitution have been brought before the Parliament this autumn (2012). The proposals include both civil and political, and social and economic rights. If voted for in Parliament, it may be adopted in 2014.<sup>39</sup>

To make amendments to the Constitution, a two thirds majority of the Parliament must vote in favour of the proposal, and at least two thirds of the representatives must be present. The process of amending the Constitution also requires a delay, such that the proposal to amend the Constitutional must be made before one Parliament within one term, and then voted for within the next four year term, when the composition of the Parliament may be different.<sup>40</sup> This requirement helps to avoid rash decisions and ensures real support from the citizens.

In addition to the human rights mentioned in the Constitution, a “Bill of Rights” was adapted to the Norwegian legal framework in 1999, consisting of 1) the European Convention of Human Rights, 2) the UN Declaration on Economic, Social and Cultural Rights, 3) the UN Declaration on Political and Civil Rights, 4) the UN Convention on the Rights of the Child, 5) the UN Convention on Women’s Rights. All these conventions are ratified by Norway, and implemented as positive law in a Bill of Rights (the Human Rights Act). This law is beneath the Constitution in the juridical hierarchy, but above normal legislation, giving it a “semi-constitutional” rank.

**iii.** There is no Constitutional Court in Norway. Constitutional, criminal and most civil cases are treated in the same court system. Positive constitutional rights can be claimed directly by individuals and legal persons before the courts that deal with civil disputes and criminal

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<sup>38</sup> The Constitution Art. 110, 110a, 110b, 110c.

<sup>39</sup> Document 12:31 and Document 12:30

<sup>40</sup> The Norwegian Constitution Art. 112

cases.<sup>41</sup> As mentioned above, the Human Rights Act implements five international conventions on human rights as positive law, and the rights granted in these Conventions can be claimed directly before the Norwegian courts.

Before an appeal can be made to the Supreme Court, legal questions concerning violations of human rights or violations of constitutional rights must have been brought before the lower court agency. The Norwegian court-system is divided into three agencies. The first agency is the District Court (“Tingretten”) and functions on a local level.<sup>42</sup>

The procedure and application process for civil disputes are described in The Civil Dispute Act. Civil and constitutional action cases are held on the basis of a summons directed to the court, either in written or oral form. The summons must form a basis for the trial, and must therefore contain the legal claims and the desired result, the factual and legal grounds for the claim and the evidence that will be brought before the court. The defendant is usually given three weeks to respond to the summons.<sup>43</sup> If the summons concerns the validity of an administrative decision, the summons is directed to the state organ that made the decision in question.<sup>44</sup>

The court only answers the claims set forth by the parties,<sup>45</sup> and decides on the grounds of the court session (including assertion, documents and other evidence, testimonies, witnesses etc. brought before the court).<sup>46</sup> As a general rule, it is the parties own responsibility to enlighten the court on the case. Exceptions can be made in cases where the parties control over their own affairs is limited. This is the case for children’s rights according to the Children Act and administrative decisions of child welfare.<sup>47</sup> This exception must be seen in relation to the court’s duty to ensure that the presentation of evidence and argumentation provides an accurate image of the actual situation.<sup>48</sup>

A ruling of the District Court can be appealed to the Appeal Court (“Lagmannsretten”). Most appeals on rulings from the District Court must be brought before this court agency

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<sup>41</sup> Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes, (the Civil Dispute Act), Section 2-1.

<sup>42</sup> Ibid, Section 4-1.

<sup>43</sup> Ibid, Sections 9-2 and 9-3.

<sup>44</sup> Ibid, Section 1-5.

<sup>45</sup> Ibid, Section 11-1.

<sup>46</sup> Ibid, Section 9-15.

<sup>47</sup> Act of 8 April 1981 no.7 relating to Children and Parents (the Children Act).

<sup>48</sup> The Civil Dispute Act, Section 11-4.

before the case can be brought before the Supreme Court. Exceptions can be made for questions of exceptional importance.<sup>49</sup> Not all cases will be accepted by the Appeal Court. To avoid exhausting this agency, disputes over smaller amounts of money may be declined. The Appeal Court also has a limited ability to decline cases where it is not clear that the appeal will lead to a different conclusion. The court proceedings are in most cases equivalent to those of the District Court.<sup>50</sup>

According to the Constitution, the Supreme Court (“Høyesterett”) decides on legal questions at last instance. Before a legal question of any nature will be heard by the Supreme Court, it must go through the Supreme Court’s appeal Committee.<sup>51</sup> Cases are only accepted by the Supreme Court if they are of general interest, or if there are other important reasons why the Supreme Court should treat the questions that the case raises.<sup>52</sup> A case brought before the Supreme Court is usually limited to the still uncertain parts of the claims, and factual grounds and evidence brought before the lower court agencies.<sup>53</sup> Moreover, if the case raises questions about a statute’s validity regarding the Constitution or international obligations, the State has the right to be represented if it is necessary in relation to public interest.<sup>54</sup>

**iv.** As described above, there is only a general Supreme Court in Norway. The Criminal Procedure Act regulates the procedures before the courts, from investigation and indictment to appeals before the Supreme Court. As a main rule, criminal cases involve the State, represented by the Prosecutor, and the accused.<sup>55</sup> In cases of serious criminal offence, the State will prosecute with or without the consent of the victim.

The accused has the right to a defence, to know his or her position and to read the State’s evidentiary documents in the case.<sup>56</sup> Further, the court may only consider the offences contained in the indictment from the Prosecutor. The indictment must contain actual penal

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<sup>49</sup> Ibid, Sections 29-2 and 29-3.

<sup>50</sup> Edited by E. Moe, ‘Når jeg skal i retten / Sivil sak’, Domstoladministrasjonen, viewed on 23 August 2012, <<http://www.domstol.no/Nar-jeg-skal-i-retten/Sivil-sak/>>.

<sup>51</sup> The Civil Dispute Act, Section 30-1 (2).

<sup>52</sup> Ibid, Sections 30-4, 30-5.

<sup>53</sup> Ibid, 30-7.

<sup>54</sup> Ibid, 30-13.

<sup>55</sup> The Penal Code.

<sup>56</sup> Ibid, Sections 94, 232 and 90.

provisions and a factual description for the court to build upon.<sup>57</sup> Only the Prosecutor and the accused, if sentenced, can appeal the ruling.<sup>58</sup> As with civil/constitutional cases, criminal cases are brought before The District Court as the first court agency. Unless there are questions of interest beyond the particular case, or other reasons that necessitate a swiftly decision by the Supreme Court, the Appeal Court is the appeal agency for criminal cases.<sup>59</sup>

v. The age of Criminal liability is fifteen years.<sup>60</sup> The Penal Code states that those who were under eighteen years of age when they committed a crime can only be sentenced to prison if absolutely necessary, and not for more than fifteen years.<sup>61</sup> To reduce the number of child prisoners, the Penal Code allows a broad use of community service instead of prison sentence for offenders under the age of eighteen years.<sup>62</sup>

A report from Statistics of Norway from 2003 provides numbers on prisoners in Norway between the age of fifteen and twenty, what crimes they serve prison sentences for, and some demographic information.<sup>63</sup> The statistics show that people between fifteen and twenty years of age serve prison sentences less frequently after being charged for criminal offences than other age groups. From 1993 to 2000, the number of new imprisonments<sup>64</sup> for fifteen to seventeen year olds was between 90 and 160. This corresponds to 60 to 100 imprisonments per 100 000 people in this age group.<sup>65</sup>

The statistics also provide information on what kind of criminal offences people between fifteen and twenty years of age are imprisoned for.<sup>66</sup> The most common is theft, which constitutes the grounds for one third of the imprisonments. Traffic offences and violence constitutes about twenty per cent each.<sup>67</sup> Only eleven per cent of the new imprisoned youth

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<sup>57</sup> Ibid, Sections 63 and 252.

<sup>58</sup> Ibid, Section 306.

<sup>59</sup> The Criminal Procedure Act Sections 5-8.

<sup>60</sup> The Penal Code Section 46

<sup>61</sup> The Criminal Procedure Act (Straffeprosessloven), Section 18.

<sup>62</sup> Ibid, Section 28a, second sentence.

<sup>63</sup> J. Bergh, 'Ungdommer i norske fengsler: Kriminalitet blant barn og ung, del 3, Notat nr. 2003-15. Statistisk sentralbyrå', 26 March 2003, viewed on 1 August 2012, <[http://www.ssb.no/emner/03/05/notat\\_200315/notat\\_200315.pdf](http://www.ssb.no/emner/03/05/notat_200315/notat_200315.pdf)>.

<sup>64</sup> New imprisonments: imprisonments for serving a prison sentence, police custody or preventive detention during one year. These numbers must be separated from persons, as one person can be represented in this statistic material more than one time.

<sup>65</sup> The exact numbers every year from 1993 until 2000 are 113 (in 1993), 101, 89, 93, 104, 104, 157 and 141 (in 2000).

<sup>66</sup> The crime committed that gives the highest sentence.

<sup>67</sup> J. Bergh, p. 14.



in 1999 and 2000 were female and urban areas were relatively overrepresented to rural areas.<sup>68</sup>

The Ombudsman for Children has expressed concern several times regarding the use of detention and police custody towards youth.<sup>69</sup> The Lawyers Association addressed the question of use of detention and police custody towards children in 2010. The statistical material gathered shows that there were 2,056 cases of police custody with regard to children under 18 in 2009, and that 49 of these involved children were under the age of fifteen. The Lawyers Association also gathered numbers on the use of detention of children under eighteen, and found that there were 44 cases in 2007, 52 cases in 2008, and 74 cases in 2009.

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## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. The Penal Code's chapter on sexual offenses uses different expressions, each with their own definition, denoting actions of different severities. The following will briefly explain the terms “intercourse”, “sexual activity” and “sexual acts”, as they are all important when deciding what penal provision is applicable, and when calculating the penalty.

*Intercourse* (“samleie”) is deemed as the most qualified of the sexual activities. Under otherwise equal circumstances, intercourse will lead to the strictest penalty. The understanding of the term has undergone a development from a strict to a more broad interpretation. Today, Section 206 of the Penal Code defines intercourse as following:

“When the term sexual intercourse is used in the provisions of this chapter, both vaginal and anal intercourse are meant. Insertion of the penis into the mouth and insertion of an object into the vagina or rectum shall be equated with sexual intercourse. In the case of acts referred to in Section 195 insertion of the penis in and between the labia majora and the labia minora shall also be equated with sexual intercourse.”

As we can see, the wording of Section 206 gives the impression that the introduction of any object of any size into the vagina or rectum is covered by the provision. However, in the

<sup>68</sup> Ibid, p. 16-17.

<sup>69</sup> See subsection I, Introduction, iii.

<sup>70</sup> Advokatforeningen, ‘Advokatforeningens årstale 2010, Varetekt – rettsstatens akilleshæl’, 11 November 2010, viewed on 15 September 2012  
<[http://www.advokatforeningen.no/PageFiles/17117/Advokatforeningens\\_Arstale2010.pdf](http://www.advokatforeningen.no/PageFiles/17117/Advokatforeningens_Arstale2010.pdf)>, p. 8-9.

interest of balance and coherence in the law, it is assumed that the provision requires a certain degree of severity. This is substantiated by the fact that introduction of fingers into the vaginal or anal opening is not deemed as intercourse, but as “sexual activity”.<sup>71</sup> It would not make sense if even the smallest object would trigger liability as “intercourse”, whereas the introduction of several fingers would be subject to more lenient provisions.<sup>72</sup>

The definition of intercourse was amended in 2000, in order to ensure a better protection for children under the age of 14.<sup>73</sup> In these cases, “intercourse” also includes the introduction of the penis into and between the major and minor labia. The rationale behind the rule is that the traditional definition of intercourse is not suitable when young children are victims of sexual abuse. When the children are particularly young, the introduction of a penis or an object into the vagina or anus might be physically impossible or very difficult. Although the offender would not be successful, the action was deemed as equally offensive and worthy of punishment as an intercourse with complete penetration.<sup>74</sup>

Strangely, the expansion of the definition regarding intercourse with children under the age of 14 only refers to consensual intercourse (Section 195) and not forced intercourse (rape, Section 192). This irregularity, however, does not have any practical significance. Due to the ideal concurrence of the offences<sup>75</sup>, the sentencing will be the same under Sections 195 and 192.<sup>76</sup>

When the Penal Code from 2005 enters into force, there will be a minor extension of the scope of “intercourse.”<sup>77</sup> Penetration or introduction of the penis or an object into the vaginal opening will be sufficient; the penis or the object does not need to enter the vagina. This will apply regardless of age.

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<sup>71</sup> See under, *sexual activity*.

<sup>72</sup> M. Matningsdal, *Norsk spesiell strafferett*, Fagbokforlaget, Oslo, 2010, p. 187-188. The author comments on the new Penal Code of 2005. However, the same considerations apply to the interpretation of “objects” in Section 206 of the Penal Code of 1902.

<sup>73</sup> The Penal Code Section 195 second sentence.

<sup>74</sup> See the reasoning of the Justice Committee of the Parliament in the preparatory works, Innst. O nr. 92 (1999-2000) p. 10-11.

<sup>75</sup> Concurrence implies the simultaneous occurrence of two or several criminal offenses. Heterogeneous ideal concurrence takes place when several different penal provisions are violated as a result of one single act, and is regulated in Section 62 of the Penal Code. About ideal concurrence, see under in II. 2. a. ii.

<sup>76</sup> J. Andenæs, *Spesiell strafferett og formuesforbrytelsene*, samlet utgave ved Kjell V. Andorsen, Univeristetsforlaget, 2008, p. 139.

<sup>77</sup> Preparatory works: Ot.prp.nr.22 (2008-2009) p. 439.

*Sexual activity* (“seksuell omgang”) has also undergone a development towards a rather broad interpretation. The term includes, but is not limited to, intercourse. Intercourse is deemed as qualified sexual activity. Typically, the punishment will be higher if the sexual activity was intercourse. Sexual activity includes actions with a certain intensity. Examples are oral sex which does not include the penetration of the penis into the offender's mouth,<sup>78</sup> sexual movements directed against another person's stomach or buttocks, and the introduction of fingers into the vagina<sup>79</sup> or anus<sup>80</sup>. Many of the penal provisions (e.g. Sections 192 and 199) require, in order to be applicable, that the action in question can be classified as intercourse or sexual activity.

The term *sexual acts* (“seksuell handling”) is less severe than sexual activity and is deemed to be less grave than the latter. The boundary must be defined after a thorough assessment in the particular case. Typically, it will be relevant whether touching or groping has taken place on bare skin (leaning towards sexual activity), or on the clothes. The typical case of sexual act is groping of breasts or genitalia.<sup>81</sup>

The lower boundary for punishable actions might be problematic, in particular in cases where the actions have no sexual motivation. In a Supreme Court judgment from 2007<sup>82</sup>, a four-year-old girl washed her stepfather's genital area with a sponge and subsequently removed the soap with the hand shower while they were both having a bath. This had happened on several occasions. The man did not encourage the action, and there was no sexual intention. Still, the Supreme Court found that sexual “action” can also include cases where the offender is passive. Particularly in relation to younger children who might not understand the implications of their actions, the lack of setting boundaries or the lack of interruption in the cause of events “might be juxtaposed with an active action.”<sup>83</sup> In this case, the limit was exceeded, as the stepfather should have actively sought to end the action of the child. The court stated that that the omission was in the lower range of what the term “sexual activity” comprised. If the child spontaneously or unintentionally would touch the caregiver's genitalia during a bath, it would not be deemed sufficient to violate the provision.

<sup>78</sup> Rt. 1982 p. 983, Rt. 1987 p. 364 and Rt. 1987 p. 88.

<sup>79</sup> Rt. 1989 p. 517 and Rt. 1989 p. 979.

<sup>80</sup> Rt. 1990 p. 319.

<sup>81</sup> J. Andenæs, *Spesiell strafferett og formuesforbrytelsene*, p. 140. See for example Rt. 1947 p. 394, Rt. 1976 p. 907 and Rt. 1988 p. 138.

<sup>82</sup> Rt. 2007 p. 1203.

<sup>83</sup> *Ibid*, paragraph 10. Translation by the author.

On the other side, if the caregiver would continue to bath with the child despite the continued touching without stopping the situation, the law might be violated.

Finally, the term *sexually offensive behaviour* (“seksuelt krenkende adferd”) is used in Section 201. While sexual activity or action entails activity between two or more persons, sexual offensive behaviour occurs in the presence of another person or in a public place. Some typical examples are exhibitionism and masturbation.

ii. “*Intentionally*”

One out of several conditions that need to be fulfilled in order to be punished by Norwegian law, is subjective guilt, cf. Section 40. In special circumstances prescribed by law, gross negligence is sufficient. As the main rule, however, intent is necessary.

“Intent” is a judicial, rather than a moral term.<sup>84</sup> There is a close relationship between the two, as they both rest on the presumption that the offender is to be blamed. Moral reproach is, however, not necessary for the legal requirement to be fulfilled.<sup>85</sup>

The term “intent” or “intentionally” is not defined in the current Penal Code, but has been defined through case law and legal theory. The new Penal Code of 2005 includes a definition of the term in Section 22, which according to the preparatory works is deemed to codify the current state of the law.<sup>86</sup>

According to the new definition, intent exists when someone acts a) deliberately, b) with the awareness that the action surely or most likely (50 % probability or more) will occur, or if c) the offender foresaw that it was possible that the action would fall within the scope of the objective description in a penal provision, but nevertheless chose to act even though the worst would happen and the consequence would occur. With respect to c), there is a difference between accepting a risk and accepting a consequence – the first can constitute conscious recklessness, which is not covered by the definition of intent. However, a positive acceptance of the consequence will be covered (*dolus eventualis by positive acquiescence*).

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<sup>84</sup> J. Andenæs, *Alminnelig strafferett*, 5. utgave ved Magnus Matningsdal og Georg Fredrik Rieber-Mohn, Universitetsforlaget, 2004, p. 208.

<sup>85</sup> Ibid. p. 208.

<sup>86</sup> Ot.prp.nr.90 (2003-2004) p. 424

The intent must be present at the moment of the criminal action. However, in cases of on-going activities, the offender can be held responsible if he or she continues after becoming aware of the factual situation.<sup>87</sup>

With regard to what the intent must comprise, the general rule is that the intent must encompass all the elements that make the action a criminal offense (the objective, factual content of the action).<sup>88</sup> If a person has committed an act in a state of ignorance concerning such circumstances that determine criminal liability or increase the penalty for the said act, such circumstances will not be attributable to him, cf. the Penal Code Section 42 (1). Ignorance resulting from self-induced intoxication is not an excuse, cf. third paragraph. The offender will, in these situations, be judged as if he or she were sober. There are certain exceptions to this, for example in cases of pathological intoxication.

The requirement of intent may be fulfilled even though the offender wasn't aware that the act was illegal. Ignorance of *the illegal nature* of an act at the time of its commission, as regulated in Section 57<sup>89</sup> of the Penal Code, rarely leads to impunity.

However, Section 42 (1)<sup>90</sup> states that if a person has committed an act in a state of ignorance concerning *circumstances* that determine criminal liability, such circumstances shall not be attributable to him. Regarding children, the Penal Code gives an exception to this general rule. This exception is related to delusion about the child's age. Criminal liability shall not be escaped due to any mistake made regarding the child's age. At this point, the responsibility is objective. However, the law includes one reservation: if the offender has acted with no negligence whatsoever regarding the age, and the age of the child is between 14 and 16 years, the offender cannot be punished (Section 196 (3)).

As stated in the Supreme Court's plenary decision in Rt. 2005 p. 833 para. 88, the term "no negligence whatsoever" is a "very strict criterion", and the accused must prove his innocence by accounting for specific circumstances that supports the claim that he has been "diligent in relation to the victim's age". The Recommendation of the Penal Code Committee for revision of the Penal Code on sexual offences<sup>91</sup> also states that the rule must be guarded as

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<sup>87</sup> J. Andenæs; *Alminnelig strafferett*, p. 210.

<sup>88</sup> Ibid p. 221.

<sup>89</sup> See the Penal Code of 2005 Section 26.

<sup>90</sup> See the Penal Code of 2005 Section 25.

<sup>91</sup> Innstilling Fra Straffelovrådet. (Det Sakkyndige Råd for Strafferettslige Spørsmål) Om Revisjon Av

an exemption clause, where only “very weighty reasons” may exempt the offender from punishment. If the offender “in any way” has acted negligently, he cannot be exempted from responsibility.

According to the wording, this exception is not applicable if the child is under 14 years of age, cf. Section 195 (3). However, in 2005,<sup>92</sup> the Supreme Court stated in an unanimous ruling that the objective rule in case of delusion was contrary to the presumption of innocence, as stated in the European Convention on Human Rights Art. 6 (2). Accordingly, the reservation needs to be applied also in cases where the child is under 14 years of age. The wording of Section 195 is still not amended.

*The criminal liability for intentionally committed acts of sexual abuse*

The criminal liability of an intentionally committed crime of sexual abuse depends on the action in question. In Norway, the minimum prison sentence is 14 days, cf. the Penal Code Section 17. The maximum time of imprisonment is usually specified in the specific provisions, but in absence of such a specification, the maximum sentence is 15 years. In any case, imprisonment cannot exceed 21 years, which is the maximum penalty in the country.<sup>93</sup>

The new Penal Code of 2005 will keep the minimum imprisonment sentence of 14 days, as well as the maximum penalty of 21 years.<sup>94</sup> However, there will be some technical changes. For example, the maximum penalty for each offence will be included in every provision. Consequently, there will be no rule prescribing a maximum of 15 years for situations where no maximum prison sentence has been prescribed.

The punishment for rape<sup>95</sup>, as described in Section 192 (1), is imprisonment for a term not exceeding ten years. A penalty of imprisonment for no less than three years shall be imposed if the sexual abuse consisted of intercourse, or if the victim was unconscious or incapable of resisting the act, and the offender rendered the person in such a state in order to engage in the sexual activity (Section 192 (1) *in fine*). Under particularly serious circumstances as

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Straffelovens Bestemmelser Om Forbrytelser Mot Sedeligheten’, 17 March 1960, p. 25

<sup>92</sup> Plenary ruling by the Supreme Court, Rt. 2005 p. 833

<sup>93</sup> However, a maximum of 30 years can be imposed in cases of genocide, crimes against humanity and war crimes, see Chapter 16 of the Penal Code of 2005. This specific chapter entered into force on 7 March 7 2008.

<sup>94</sup> See also the Penal Code 2005 Section 31.

<sup>95</sup> See also the Penal Code of 2005 Sections 291, 292 and 293. The penalties under the new Penal Code are roughly the same.

described in the third paragraph, an imprisonment for a term not exceeding 21 years may be imposed. These grave circumstances include cases where a) the rape has been committed by two or more persons jointly, b) the rape has been committed in a particularly painful or offensive manner, c) the offender has previously been convicted and sentenced pursuant to Sections 192 or 195 concerning sexual activity with children under 14 years of age, and finally, cases where d) the aggrieved person dies or sustains considerable injury to body or health as a result of the act. The circumstances mentioned in litra a-d are not cumulative; it is sufficient that the circumstances described in either of the litras have taken place.

Aiding and abetting another person in engaging in sexual activity by misuse of position or misuse of a relationship of dependence or trust may lead to imprisonment not exceeding six years (Section 193 (1)). If the aiding and abetting concerns exploiting someone's mental illness or mental retardation, the same penalty applies (Section 103 (2)).

Sexual activity with children under 14 years of age is subject to an imprisonment for a term not exceeding 10 years.<sup>96</sup> In these cases, the minimum penalty for sexual intercourse is three years. The maximum penalty of 21 years may be imposed in case of circumstances prescribed in Section 195 (2).<sup>97</sup> These include sexual activities committed jointly by two or more persons, cases where the act was committed in a particularly painful or offensive manner, cases where the child has not reached the age of 10 and there have been repeated assaults, cases of secondary crime (pursuant to this provision or Section 192 regulating rape), and cases where the aggrieved person dies or sustains serious physical or psychological injury as a result of the sexual activity. It is sufficient that only one of the described circumstances has taken place.

Furthermore, according to Section 196<sup>98</sup>, any person engaging in sexual activity with a child younger than 16 years of age shall be liable to imprisonment for a term not exceeding six years. This limit may be raised to 15 years in some circumstances, *inter alia* if the act is committed by two or more persons jointly, if the act is committed in a particularly painful or offensive manner, in cases where the offender has previously been convicted and sentenced for violating Sections 196, 192 or 195, or if the aggrieved person dies or sustains considerable injury to body or health.

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<sup>96</sup> Penal Code Section 195 (1). See also the Penal Code 2005 Section 299.

<sup>97</sup> See also the Penal Code 2005 Section 301.

<sup>98</sup> See also the Penal Code 2005 Sections 302 and 303.

Sexually transmitted diseases and infectious diseases generally (See Section 1-3, no. 3 cf. no. 1 of the Act relating to control of communicable diseases<sup>99</sup>) shall always be considered as a “considerable” or “serious” injury to body and health in relation to Sections 192, 195 and 196 of the Penal Code. This will, therefore, automatically raise the threshold for the maximum prison sentence that can be imposed on the offender.

Incest with someone in the descending line (children, grandchildren) is punished with imprisonment for a term not exceeding five years, cf. Section 197.<sup>100</sup> Incest with a brother or a sister is punished with imprisonment for a term not exceeding one year, cf. Section 198.<sup>101</sup>

Anyone who engages in a sexual activity with a foster-child, child in his<sup>102</sup> care, step-child or any other person under 18 years of age which is under his care, or subject to his authority or supervision, faces imprisonment for up to five years.<sup>103</sup> Any person who aids and abets another person to engage in sexual activity with any person with whom he himself has such a relationship shall be liable to the same penalty.

With regard to sexual acts, fines or imprisonment for up to one year may be imposed against any person who commits such an act with any person who has not consented thereto, cf. Section 200 (1). Committing a sexual act with a child under 16 years of age raises the threshold to three years.<sup>104</sup> Misleading a child under 16 years of age to behave in a sexually offensive or otherwise indecent manner is also punishable by up to three years of imprisonment.<sup>105</sup> In the last two mentioned situations, the limit can be raised to six years under especially aggravating circumstances. According to the fourth Section of the provision, which makes reference to the third and fourth paragraphs in Section 196, mistake made with regard to age does not exclude responsibility, except if there was no element of negligence in this respect.

Section 62 provides rules in cases of ideal concurrence. The first paragraph reads as follows:

“If any person has by one or more acts committed more than one felony or misdemeanour punishable by imprisonment or detention, a joint custodial sentence shall be imposed which must be more severe than the

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<sup>99</sup> Act of 5 August 1994 no. 55 relating to control of communicable diseases.

<sup>100</sup> The penalty in the Penal Code 2005 Section 312 is a term not exceeding six years.

<sup>101</sup> See also the Penal Code 2005 Section 313.

<sup>102</sup> In the following, when referring to “he” or “his”, both sexes are meant to be included.

<sup>103</sup> The Penal Code Section 199. The penalty in the Penal Code 2005 Section 314 is a term not exceeding six years.

<sup>104</sup> See also the Penal Code 2005 Section 305.

<sup>105</sup> Section 200 (2) second sentence of the Penal Code.



highest minimum penalty prescribed for any of the felonies or misdemeanours and must in no case be more than twice the highest penalty prescribed for any of them. The joint custodial penalty shall normally take the form of imprisonment when any of the criminal acts would have been punishable thereby.”

This rule can be very relevant in cases of sexual abuse. For example, in cases where a father forces his 15-year-old daughter to engage in sexual activities with him, he will be criminally liable under Section 192 about rape, Section 19 about sexual activity with children under 16 years of age, and Section 197 about incest.<sup>106</sup>

When a sentence for a specific term is deemed to be insufficient to protect society, a sentence of preventive detention in an institution under the Correctional Services may be imposed instead of a sentence of imprisonment. The requirements are listed in Section 39c. Particularly relevant here is that the offender must be found guilty of having committed or having attempted to commit a sexual felony, and that there is an imminent risk that the offender will again commit such a felony.

The length of preventive detention is regulated in Section 39e. The fixed term might not exceed 21 years. However, upon application by the prosecuting authority the court can extend the fixed term by up to five years at a time.

### iii. *The legal age for engaging in sexual activities*

The general legal age for engaging in sexual activities is 16 years. This emerges implicitly from Section 196 of the Penal Code<sup>107</sup>, where the person who engages in sexual activity with minors under 16 years of age will be punished. The punishment is stricter if the child is under 14 years of age.

In certain cases, the legal age is increased to 18 years, cf. Section 199.<sup>108</sup> The first paragraph of this provision states:

“Any person who engages in sexual activity with a foster-child, child in his care, step-child or any other person under 18 years of age who is under his care, or subject to his authority or supervision, shall be liable to imprisonment for a term not exceeding five years.”

Accordingly, the legal age is 18 if the minor is subject to the sexual partner’s care, authority or vigilance. Equivalently, according to the provision's second paragraph, anyone in the

<sup>106</sup> J. Andenæs, *Alminnelig strafferett*, p. 369

<sup>107</sup> See also the Penal Code 2005 Section 302.

<sup>108</sup> See also the Penal Code 2005 Section 314.

position of the caregiver who provides another person with the opportunity to commit such sexual activities with the minor, will be punished.

Section 199 also prohibits sexual activity with foster-children, children in care and stepchildren who are under the perpetrator's care. It was, up until recently, an undecided matter in Norwegian law whether the age limit at 18 only referred to “any other person ... subject to his care”, or whether it also referred to foster children, step children etc. under such care. In a recent judgment from the Supreme Court<sup>109</sup>, a person was sentenced to imprisonment because of sexual activity with his stepdaughter, who at the time was 18 and a half years old. The Supreme Court decided, after a thorough review of the legal history and the preparatory works, that the limit of 18 years of age did not refer to foster children, stepchildren, etc. This legal understanding was not found to be contrary to the principle of legality in the Constitution's Art. 96 or ECHR Art. 7. In conclusion, there is no specified legal age for engaging in sexual activities with foster children etc. Such activities will always be illegal as long as the child is subject to the other person's care.<sup>110</sup>

#### *Regulation of consensual sexual activities between minors*

Consensual sexual activities between minors are regulated in the last paragraphs of Sections 195 and 196 of the Penal Code<sup>111</sup>, which have the same wording:

“A penalty pursuant to this provision may be remitted or imposed below the minimum prescribed in the second sentence of the first paragraph if those who have engaged in the sexual activity are about equal as regards age and development.”<sup>112</sup>

The provision covers cases where the participants in the activity are both minors, and where only one participant is a minor.<sup>113</sup> The requirements of approximate equality in age and development are cumulative; they both have to be fulfilled.<sup>114</sup> Thus, the requirement of a “similar development stage” is unfulfilled if the age difference between the two participants is considered to be too vast, and vice versa.

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<sup>109</sup> Rt. 2012 p. 387.

<sup>110</sup> See above on page 24 (II. 2. a. ii.).

<sup>111</sup> See also the Penal Code of 2005 Section 308

<sup>112</sup> Sections 195 and 196, *in fine*. Translation by the author.

<sup>113</sup> As 15 is the minimum age for criminal liability, no person under 15 can be held criminally responsible for any sexual activity.

<sup>114</sup> See Rt. 1994 p. 1000 with further references, and J. Andenæs, *Spesiell strafferett og formuesforbrytelsene*, p. 154.

In a Supreme Court judgment from 2005,<sup>115</sup> the girl was 15 years and three months of age, while her male partner was 20 years old. Although the age difference of five years was approaching the acceptable end of the spectrum, it was deemed too vast by the court. An age gap of two years and ten months between a 13 and eight month year old girl and a 16 and six months year old boy was, under the circumstances, deemed legal in a judgment from 2003.<sup>116</sup> The result will thus depend on an overall assessment of several significant factors.

iv. The Norwegian Penal Code has no particular provision that specifically regulates situations where the offender uses force, or takes advantage of threats or disabilities to offend *children* sexually. Use of force or threats is regulated by the general provision of rape. However, regard has to be given to Section 62 of the Penal Code about ideal concurrence.

Rape is covered by Section 192.<sup>117</sup> The first paragraph states that:

“Any person who

- a) engages in sexual activity by means of violence or threats, or
- b) engages in sexual activity with any person who is unconscious or incapable for any other reason of resisting the act, or
- c) by means of violence or threats compels any person to engage in sexual activity

with another person, or to carry out similar acts with himself or herself,

shall be guilty of rape and liable to imprisonment for a term not exceeding 10 years. In deciding whether the offender made use of violence or threats or whether the aggrieved person was incapable of resisting the act, importance shall be attached to whether the aggrieved person was under 14 years of age.”

As the paragraph states clearly, the aggravated person’s young age will at times play an important role when ascertaining whether violence or threats were used, or whether the aggrieved person was incapable of resisting the act. Typically, the younger the victim, the more easily the conditions will be found met.

In regards to threats, it is not necessary that the threats were linked to any illegal act. As an illustration, the threats can consist of telling someone a secret that the minor wants to keep hidden. The severity of the threats will be relevant when establishing causation.<sup>118</sup> Similarly,

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<sup>115</sup> Rt. 2005 p. 101.

<sup>116</sup> Rt. 2003 p. 442.

<sup>117</sup> See also the Penal Code of 2005 Sections 291-294.

<sup>118</sup> Ot.prp.nr.28 (1999-2000) p. 111.

it is not necessary that the perpetrator perform the threatening acts himself. The key issue is that the sexual action is not consensual, and the perpetrator was aware of this fact.

Punishment for rape is attributable to the perpetrator if he or she acts with intent. Gross negligent rape is also subject to punishment, cf. Section 192 *in fine*.

In the new Chapter 26 from the new Penal Code of 2005 on sexual offenses, several changes have been made to strengthen children's protection against sexual abuse, and to elevate the penalty levels for the most severe sexual crimes.<sup>119</sup> Particularly relevant here is the new Section 299, which states that sexual activities and the most grave sexual acts with children under 14 years of age will be regarded as rape, regardless of how the sexual activity or action was induced.

v. Sections 197-198<sup>120</sup> regulate the crime of incest. Incest is sexual activity between people that are closely related. The rationale behind the rules differ from the rationale behind the provisions that protect minors under 16 years of age from sexual activities, and from the provision that protects victims against rape. While the latter provisions are based on the need to protect the aggrieved person, the provisions regulating incest are intended to serve the interest of the community as a whole. This is particularly true when it comes to incest among adults. In regards to children, it is obvious that the regulations exist additionally to protect them from abuse from close family members. Through the construction of ideal concurrence, the punishment will be greater if the abuser was a close family member of the victim, than if the abuser was a person without such ties to the child. Section 197 states:

“Any person who engages in sexual activity with a blood relation in the descending line shall be liable to imprisonment for a term not exceeding five years. Both biological and adopted descendants shall be regarded as blood relations in the descending line.”

“[I]n the descending line” implies that only the older person is punished. If, for example, a father engages in sexual activity with his daughter, only the father will be held criminally responsible. Parents, grandparents and persons further up in the ascending line are equally covered by the provision.<sup>121</sup>

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<sup>119</sup> Ministry of Children, Equality and Social Inclusion, ‘Follow-up on concluding observations from the UN CRC of January 2012’, June 2011, p. 44.

<sup>120</sup> See also the Penal Code of 2005 Sections 312-313.

<sup>121</sup> J. Andenæs, *Spesiell strafferett og formuesforbrytelse*, p. 171.

Sexual activity between foster-parents or stepparents and the child is not regarded as incest, cf. the wording “blood relation”. These cases are governed by Section 199. The rationale behind Section 199 is that children need to be protected not only against family members by blood, but also against family members who are in a position of care or authority and that might abuse that position to initiate a sexual relationship.

Section 198 regulates incest between siblings:

“Any person who has sexual intercourse with a brother or sister shall be liable to imprisonment for a term not exceeding one year.

No penalty shall, however, be imposed on persons under 18 years of age.”

The wording states two important limitations with regard to incest between siblings: (i) the offense is limited to intercourse, and (ii) there will be no punishment imposed on the sibling which is under 18 years of age. Most cases of sibling incest are assumed to take place during adolescence.<sup>122</sup> Finally, complicity in incest is a criminal offense, and is regulated in Section 205.

**vi.** Misuse of a position or a relationship of dependence or trust is regulated in the Penal Code Section 193. The first paragraph states:

“Any person who engages in or who aids and abets another person to engage in sexual activity by misuse of a position, or a relationship of dependence or trust shall be liable to imprisonment for a term not exceeding six years.”<sup>123</sup>

The word “misuse” implies that the perpetrator must have taken advantage of the interpersonal relationship that the provision describes. “Position” is not limited to formal positions such as teachers or doctors; for example, a handball coach is sufficient, see Rt. 2003 p. 453. If the sexual activity happens outside of the context of the hierarchical structure between the parties, the provision does not apply. The preparatory works mention situations where the two persons fall in love.<sup>124</sup>

The alternative clauses, “relationship of dependence” and “relationship of ... trust” are applicable in situations where the individual in the position of power, by means of

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<sup>122</sup> Ibid., p. 172.

<sup>123</sup> See also the Penal Code of 2005 Section 295

<sup>124</sup> Ot.prp.nr.28 (1999-2000) p. 113

manipulation or deception, develops a relationship with the weaker party, which they subsequently exploit to obtain sexual activity.<sup>125</sup>

Section 194 of the Penal Code<sup>126</sup> regulates sexual activity with inmates and persons under the Correctional Services or the Child Welfare, if that person is under the offender's authority or supervision:

“Any person who engages in sexual activity with any person who is an inmate of or placed in any home or institution under the correctional services or the police or in an institution under the child welfare service and who is there subject to his authority or supervision, shall be liable to imprisonment for a term not exceeding six years.

The same penalty shall apply to any person who aids and abets another person to engage in sexual activity with any person with whom he himself has such a relationship.”

For the provision to be applicable, it is necessary that the offender's position actually involves “authority or supervision.” Cleaning personnel working in Correctional Services, for example, would therefore not be subject to the provision. This is related to the rationale behind the rule, which is again closely linked to misuse of positions of power as regulated in Section 193 (1) of the Penal Code.

The term “aids and abets” in the second paragraph of Section 194 refers to activity rather than mere participation. For example, encouragement and incitement will often be deemed as aiding and abetting.<sup>127</sup>

Section 194 will cover some of the cases falling in under Section 193.<sup>128</sup> Both provisions may be used in ideal concurrence if necessary to cover all criminal aspects of the situation. The preparatory works mention a scenario where an employee in the Correctional Services engages in sexual activities with a person subject to his authority, while at the same time abuses a relationship of dependence.<sup>129</sup>

Exploiting any person's mental illness or mental retardation, or aiding or abetting another person in doing so, is also illegal and regulated in Section 193 (2) of the Penal Code.

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<sup>125</sup> J. Andenæs, *Spesiell strafferett og formuesforbrytelsene*, p. 161

<sup>126</sup> See also the Penal Code of 2005 Section 296.

<sup>127</sup> Ot.prp.nr.28 (1999-2000) p. 114

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

## 2.2 Child Prostitution

**vii.** Norway is a party to the Council of Europe Convention on Action against Human Trafficking. The Convention was signed by Norway on 16 May 2005, ratified on 17 January 2008 and entered into force on 1 February 2008.

**viii.** Prostitution is regulated in Sections 202, 202a and 203 of the Penal Code.<sup>130</sup> According to the third paragraph of Section 202, prostitution is defined as “[engaging] in sexual activity or [committing] a sexual act with another person for payment.” Criminal liability shall not be avoided by any mistake regarding the victim’s age, unless it is made in “good faith without negligence”, cf. Section 202 *in fine*.

In cases of child prostitution, the definition in Section 202 must be read in conjunction with Section 203<sup>131</sup>, which regulates prostitution where the victim is younger than 18 years of age. Child prostitution carries a higher penalty than prostitution where the victim is older than 18 years of age.

“Payment” includes any kind of remuneration or consideration, such as clothing, drugs or alcohol. An agreement or promise of future payment is equated with made payment. The payment can be made or promised to either the person performing the sexual service, or to any other person, as long as there is causation between the sexual act performed and the payment. It is not required that the payment is made by the person receiving the sexual service.

One isolated case of exchanging sexual acts for payment suffices to qualify the act as prostitution.<sup>132</sup> Finally, the definition is gender neutral.

Considering the above, the national definition of “child prostitution” is perfectly compatible with the definition in Art. 19(2) of the Lanzarote Convention.

**ix.** National legislation criminalizes both the recruiter and the user. Any person who engages in, or who aids and abets another person to engage in sexual activity with the child, is criminalized, cf. Section 203.<sup>133</sup> Furthermore, the first paragraph of Section 202<sup>134</sup>

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<sup>130</sup> See also the Penal Code of 2005 Sections 309, 315 and 316.

<sup>131</sup> Section 203 was amended in 2008 and entered into force 1 January 2009.

<sup>132</sup> Rt. 2004 p. 331.

<sup>133</sup> See also the Penal Code of 2005 Section 15.

<sup>134</sup> See also the Penal Code of 2005 Section 315.

criminalizes anyone who “promotes the engagement of other persons in prostitution”, or that “lets premises on the understanding that such premises shall be used for prostitution or is grossly negligent in this respect”. Finally, it is illegal to “unambiguously offer, arrange or ask for prostitution” by means of a public announcement, cf. Section 202 (2).

### 2.3 Child Pornography

x. Norway is party to the Council of Europe Convention on Cybercrime. It was signed by Norway 23 November 2001, and ratified 30 June 2006.<sup>135</sup>

xi. The 1902 Penal Code describes “child pornography” as “any presentation of sexual abuse of children or any presentation of a sexual nature that involves children”. The description is used in the section that criminalizes child pornography (Section 204a), and should serve the definitional purpose in this context<sup>136</sup>.

Art. 20 (2) of the Lanzarote Convention defines “child pornography” as: “any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes”.

The main questions here are whether or not the Norwegian provision is compatible with the definition when it comes to 1) “any material”, that is visually depicting a child engaged in 2) “real or simulated sexually explicit conduct”, or depictions of a child’s sexual organs 3) “for primarily sexual purposes”. Secondly, another significant question will be whether the definition of a “child” in the convention is compatible with the definition in the Norwegian legislation.

*Art. 20 (2): “any presentation”*

According to preparatory work of the Norwegian Penal Code, the term “any presentation” in the Penal Code Section 204a refers to any medium, including text based presentations.<sup>137</sup> This seems to be compatible with the term, “any material”, used in the convention’s definition.

*Art. 20 (2): “real or simulated sexually explicit conduct”*

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<sup>135</sup> Council of Europe, viewed on 24 October 2012,

<<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CL=ENG>>.

<sup>136</sup> Ot.prp. nr. 22 (2008-2009). (Preparatory works for the Penal Code of 2005)

<sup>137</sup> Ot. prp. nr. 37 (2004-2005).



According to the Explanatory Report of the Convention, the term “sexually explicit conduct” must be defined by the parties to the Convention. It covers, however, at least sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse in a sexual context and lascivious exhibition of the genitals or the pubic area of a child. As clarified above, the Norwegian Penal Code refers to “any presentation of a sexual nature that involves children” (Section 204a). According to the preparatory works of the Penal Code, this refers to presentations of actions that are sexual in the sense that they are linked to genitals or sexual activity.<sup>138</sup>

It is not a requirement that the acts are sexually motivated.<sup>139</sup> Any presentation that is presenting a child as a sexual object, will, according to the preparatory works, be affected by this provision – for instance where children are forced to pose in sexually provocative positions.

This should at least cover the required criteria clarified in the Explanatory Report. The Norwegian term probably comprises more than the requirements by including presentations that are not sexually motivated, but that appear to be of sexual nature in specific contexts. For example, pictures of young children without clothes on, that were taken for an innocent purpose by their parents, could be regarded as “of sexual nature” if they are spread to unauthorized persons for sexual purposes.

The definition of the convention refers to material that depicts children in sexually explicit conduct that is “real or simulated”. The Explanatory Report does not explain this term, but it seems correct to interpret this so that “child pornography” also includes material which simulates existing or non-existing children engaging in sexual conduct. This interpretation can be supported by the fact that Art. 20 of the Convention, according to the Explanatory Report, was inspired by the Council of Europe Convention on Cybercrime Art. 9, which includes “realistic images representing a minor engaged in sexually explicit conduct” in its definition of child pornography. This comprises images that are morphed of natural persons, and also images generated entirely by a computer.<sup>140</sup> The Norwegian Penal Code Section 204a, on the other hand, does not define whether or not simulated images could be classified as child pornography. The more general term “any presentation” is used here.

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<sup>138</sup> Ot. prp. nr. 22 (2008-2009).

<sup>139</sup> Ibid.

<sup>140</sup> The Explanatory Report of the Convention of Cybercrime.

However, animated or manipulated presentations are considered to be child pornography if they depict sexual abuse or sexualisation of children<sup>141</sup>. This should cover the same material as the term “simulated” in the Lanzarote Convention Art. 20 (2).

*The term “primarily sexual purposes”*

The Lanzarote Convention’s definition of child pornography includes “any depiction of a child’s sexual organs for primarily sexual purposes”. This sentence modifies the definition, meaning that material having a pure artistic, medical, scientific or similar merit will not be within the ambit of the provision. As a result, presentations could be considered acceptable in some contexts whereas they could be considered to be of “sexual nature” in others.

The Norwegian Penal Code Section 204a (5) and 204 (4) state that “sexual depictions that must be regarded as justifiable for artistic, scientific, informational or similar purposes shall not be regarded as pornographic”. Therefore, Norwegian legislation seems to be compatible with the Convention on this point.

Moreover, “child” is to be, according to the Lanzarote Convention Art. 3, any person under the age of 18 years. “Child” is defined in the Norwegian Penal Code Section 204a. as “any person who is or who appears to be under 18 years of age”. This means that the Norwegian legislation complies with the requirements of the Convention, but also goes a bit further by including persons that “appears to be under 18 years of age”.

Finally, the Convention’s definition of “child pornography” is, according to the Explanatory Report, based on the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. This convention is ratified by the Norwegian government and was implemented in the Norwegian legislation in 2000. During the preparation of the national ratification act, the current Norwegian national legislation was assumed to be compatible with the requirements of the protocol, and new national legislation was not needed for the implementation.<sup>142</sup> This suggests that Norwegian legislation is compatible with the Convention’s Art. 20 (2).

**xii.** To prepare for ratification of the Lanzarote Convention, amendments to the national legislation relating to child pornography have occurred (in the 2005 Penal Code), but they

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<sup>141</sup> Ot. prp. nr. 22 (2008-2009).

<sup>142</sup> St. prp. nr. 58 (2000-2001).

have not yet entered into force. It is not confirmed when this will happen. The following discussion will be based on the current legislation (the 1902 Penal Code), but the amendments will also be discussed to determine whether or not they satisfy the requirements of the Convention.

Criminal liability related to child pornography in the current Norwegian legislation is essentially regulated in the Penal Code Section 204a (1). Any person who engages in any of the following acts, is to be criminally liable:

- “a. produces, procures, imports, possesses, delivers to another person or for payment or systematically acquaints himself with any presentation of sexual abuse of children or any presentation of a sexual nature that involves children,
- b. concerns himself with presentations of sexual abuse of children or presentations of a sexual nature that involve children in any other way as referred to in Section 204, first paragraph, or
- c. induces any person under 18 years of age to allow pictures of himself or herself to be taken as part of any commercial presentation of moving or non-moving pictures of a sexual nature, or produces such presentations depicting any person under 18 years of age.”

Section 204a litra b is referring to Section 204 (1) litra d, which attributes liability to any person, who: “gives a public lecture or arranges a public performance or exhibition of a pornographic nature”. In addition to this, Section 204a attributes liability to any person who “willfully or negligently fails to prevent the commission in any activity of any act referred to in the first paragraph”. Also, Section 205 states that the liability stated in the provisions in this chapter, “shall also apply to any person who aids and abets the act”.

The Lanzarote Convention Article 20 (1) litra a to litra f attributes criminal liability to those who are producing, offering, making available, distributing, transmitting, procuring or possessing child pornography, and those who are knowingly obtaining access to child pornography. Further, Article 24 (1) and (2), also attributes liability to any person who is intentionally “aiding or abetting the commission” of the offences or “attempts to commit” the offences established in accordance with the Convention.

According to the preparatory works of the amendments to the 2005 Penal Code,<sup>143</sup> it was assumed that the national penal legislation essentially met the requirements of the Lanzarote

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<sup>143</sup> Ot. ptp. Nr. 22 (2008-2009).

Convention. When it comes to the criminal liability regulation, it was assumed that only small amendments were needed to meet the requirements.

*Art. 20 (1) litra a: "Producing"*

The Lanzarote Convention Article 20 (1) litra a attributes criminal liability to a person who is "producing child pornography". Likewise, the Penal Code Section 204a (1) litra a attributes criminal liability to "Any person who...produces...any presentation of sexual abuse of children or any presentation of a sexual nature that involves children". This provision is upheld in the amended 2005 Penal Code Section 311 (1) litra a.

*Art. 20 (1) litra b: "offering or making available"*

Article 20 (1) litra b of the Convention also attributes criminal liability to a person who is "offering or making available child pornography". According to the Explanatory Report (paragraph 136), this covers a wide range of cases, for example providing material to others, including creation of websites or web communities of child pornography or publishing material there, which is available for others. On this point, the current Norwegian legislation has been regarded to not fully meet the requirements of the Convention.<sup>144</sup> The Penal Code uses the terms "delivers to another person" (Section 204a (1) litra a), "publishes" and "in any other way attempts to disseminate" (Section 204a (1) litra b cf. 204 (1) litra a)). It seems clear that the terms "delivers to another person" or "publishes" do not cover the convention's "offering or making available". This would probably, in most cases, be covered by the term "in any other way attempts to disseminate" in the current Norwegian provision. However, the interpretation of "attempts to disseminate" is debatable. To make sure the convention is fulfilled on this point, the amended legislation will use the terms "offers" and "makes available", see the 2005 Penal Code Section 311 (1) litra b.

*Art. 20 (1) litra c: "distributing or transmitting"*

The Convention's Article 20 (1) litra c attributes criminal liability to a person who is "*distributing or transmitting child pornography*". According to the Explanatory Report, "distribution" is active dissemination of material. The Norwegian Penal Code Section 205 (1) litra a uses the term "*attempts to disseminate*", which should fulfil the requirements. This

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<sup>144</sup> Ibid.

provision is continued in the amendments.<sup>145</sup> “Transmitting” does, according to the report, cover actions like sending material through a computer system to other persons, and also providing material such as photographs or magazines. This should in the Norwegian legislation be covered by the terms “delivers to another person” (Section 204a (1) litra a), “publishes”, “sells”, and “in any other way attempts to disseminate” (Section 204 (1) litra). The 2005 Penal Code includes the same elements<sup>146</sup>.

*Art. 20 (1) litra d: “procuring”*

Article 20 (1) litra d criminalizes procuring of child pornography for one self or for another person. The Norwegian legislation is in the same way criminalizing “procuring” of child pornography in the Penal Code Section 204a (1) litra a, and this is continued in the Code of 2005. Also at this point, the legislation seems to be compatible with the requirements of the Convention.

*Art. 20 (1) litra e: “possessing”*

In Article 20 (1) litra e of the Convention, criminal liability is attributed to persons who are “possessing child pornography”. The Explanatory Report states that this covers possession by whatever means, such as video cassettes, DVDs, magazines, mobile phones, sorted material in a computer system, storage devices, diskettes etc. Likewise, the Norwegian Penal Code attributes liability to “any person who [...] possesses [...] any presentation of sexual abuse of children or presentations of a sexual nature that involves children”, cf. Section 204a (1) litra a. The same elements are continued in the 2005 Penal Code. On this point, both the Convention and the Norwegian legislation go slightly further than the UN Optional Protocol about sale of children, child prostitution and child pornography. Article 2 of the protocol does not require that the States attribute liability to those who are only possessing child pornography for personal use.

*Art. 20 (1) litra f: “knowingly obtaining access... to child pornography”*

The Lanzarote Convention Article 20 (1) litra f attributes criminal liability to a person who is “knowingly obtaining access, through information and communication technologies, to child pornography”. The Explanatory Report states that the rationale behind this provision is to

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<sup>145</sup> The Penal Code of 2005 Section 311 b).

<sup>146</sup> The Penal Code of 2005 Section 311 (1) c).

also attribute liability to those who are accessing child pornography websites without downloading, and therefore cannot be caught under the offence of procuring or possession. There has to be an intention behind this action, and the person in question has to know that child pornographic material can be found there. According to the preparatory works for the amendments of the 2005 Penal Code regarding child pornography,<sup>147</sup> it was suggested to amend the national legislation on this point to make sure that the requirements of the Convention were met. The current legislation concerning this is to be found in the 1902 Penal Code Section 204 a (1) litra a.

In contrast to the Convention, the Section 311 (1) litra c of the 2005 Penal Code is not limited to access obtained through information and communication technology, therefore including for example printed images, video-cassettes, magazines etc. It has nevertheless been discussed whether or not the term “systematically acquaints himself” covers all cases where somebody after the Convention Art. 20 (1) litra f is “knowingly obtaining access”. The provision has therefore been amended, and the term “intentionally gains access” will be used when the Code enters into force.

It was assumed in the preparatory works that the Convention does not give any qualifying conditions for how access has to be achieved. The Convention’s use of the word “knowingly” could probably embrace a wider area than the wording “intentionally” in the Norwegian amendment. The Explanatory Report does however state that the provision only covers those cases where the access is achieved intentionally. Therefore, the Norwegian legislation has to be assumed to meet the requirements of the convention when the 2005 Penal Code enter into force.

*Art. 24 (1): “aiding or abetting the commission”*

As mentioned above, Art. 24 (1) of the Convention also attributes liability to any person who intentionally is “aiding or abetting the commission” of the offences established in accordance with the Convention. In the same way, the Norwegian Penal Code Section 205 indicates that the liability stated in the provisions about child pornography shall apply to any person who “aids and abets the act”. This provision has been maintained in the Penal Code

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<sup>147</sup> Ot. prp. ne. 22 (2008-2009).

of 2005. This being said, it seems clear that the Norwegian legislation is compatible with the requirements of the Convention on this point as well.

**xiii.** The National Criminal Investigation Service (Kripos),<sup>148</sup> in cooperation with the Norwegian internet provider Telenor, developed in 2004 an internet filter<sup>149</sup> that blocks access to web sites containing child pornographic material. Kripos say they have a good overview of web pages of such material, much because of tips from the public.<sup>150</sup>

When child pornographic material is detected, a “stop” site will show up on the screen. The number of views of this warning in recent years has been at about 15 000-16 000 per day in Norway, but many of the hits are results of virus or redirection without user involvement. The filter does not store information about the IP address or any identifying information about the user, and generates no criminal charges. The filter is used by most internet providers in Norway, and a several other countries have started using similar filters after the same model. As child pornography is an international issue, international cooperation is essential. Therefore, the information that Kripos receives from the investigation of the detected material, is shared with the authorities of other countries.<sup>151</sup>

**xiv.** The current Norwegian legislation is in the Penal Code Section 224 (1) and (3) attributing criminal liability to any person who “exploits” a person who is under 18 years of age for the purpose of prostitution or “other sexual purposes”, “independently of any use of force or threats”. This includes the act of inducing another person to “allow himself or herself to be used for such purposes”. Section 224 (2) is also attributing criminal liability to any person who “aids and abets such exploitation or inducement”. Under the preparations of the 2005 Penal Code, the Norwegian government assumed that the requirements of the Convention’s Art. 21 (1) litra a and b about recruiting a child into participating in pornographic performances, or coercing or causing a child to participate in such performances, were met by this provision.<sup>152</sup> The wording is continued in the 2005 Penal Code<sup>153</sup>.

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<sup>148</sup> See also subsection II. 3. i. ii. for more information about Kripos.

<sup>149</sup> The Child Sexual Abuse Anti Distribution Filter (CSAADF).

<sup>150</sup> Kripos, ‘Internettfilteret CSAADF’, the Police, viewed on 24 October 2012, <<https://tips.kripos.no/cmssite.asp?c=1&h=41&menu=2>>.

<sup>151</sup> Ibid.

<sup>152</sup> Ot.prp. nr. 22 (2008-2009).

<sup>153</sup> The Penal Code of 2005 Section 257.

To sum up, the Norwegian State does criminalize intentional conduct of making a child participate in pornographic performances, the difference between recruitment and coercion is not highlighted.

The Norwegian legislation has no provisions that clearly attribute criminal liability to persons who attend pornographic performances involving the participation of children. At this point, the Norwegian Government has assumed that amendments are needed to meet the requirements of the Convention's Art. 21 (1) litra c, which is prohibiting the act of "knowingly attending pornographic performances involving participation of children".<sup>154</sup> Therefore, a new provision in the 2005 Penal Code (Section 311) will attribute criminal liability to those who "attend a performance of sexual abuse against children or a performance that sexualizes children".<sup>155</sup>

## 2.4 Corruption of Children

**xv.** Before dealing with the details concerning sexual gratification through communication technologies, it is helpful to first establish the main rule in this particular field, given in The Penal Code Section 201:

"Any person who by word or deed behaves in a sexually offensive or otherwise indecent manner

a) in a public place,

b) in the presence of or towards any person who has not consented thereto, or

c) in the presence of or towards children under 16 years of age,

shall be liable to fines or to imprisonment for a term not exceeding one year."

For this section to apply, the person must behave in a "sexually offensive manner." or in an "otherwise indecent manner". These conditions can be met by words or by actions. In addition to these conditions, the behaviour has to be performed either "in a public place, in the presence of or towards any person who has not consented thereto or in the presence of or towards children under 16 years of age." Violation of this provision leads to fines or imprisonment for a term not exceeding one year.

Causing a child to witness sexual activities is a crime pursuant to Section 201 according to the litra c, "in the presence of or towards children under the age of 16." Here, there is no

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<sup>154</sup> Ot.prp. nr. 22 (2008-2009).

<sup>155</sup> Translation by the author.



requirement of participation of the child in the sexual activities. Sections 195 and 196 cover situations where children are forced to participate.<sup>156</sup>

Section 201(1) litra c, has broad effect and does not specify what “causing” specifically means. This section must therefore cover any situation where a child witnesses sexual activities, and the performance can be considered sexually offensive or otherwise indecent. A typical example is indecent exposure. However, according to the preparatory works, the child must be able to perceive the act as indecent.<sup>157</sup>

Section 201(1) litra b, makes an exception from the main rule in litra a, for situations where the involved person consents to the act. This exception, however, does not exist under litra c, and such actions will therefore always be criminal when they are directed at children under the age of 16, with or without their consent.

## **2.5 Solicitation of Children for Sexual Purposes**

**xvi.** The next question to discuss is whether Section 201 also applies to situations where sexual exploitation of children is manifested through different information and communication technologies. The section explicitly states that sexually offensive behaviour communicated through information technologies is illegal. A typical example is when a perpetrator contacts children on websites for communication (“chatting”).

The discretionary element located in Section 201 (2), defines what is either a sexually offensive manner or in an otherwise indecent manner. This particular formulation will be briefly explained.

In regard to the term “*sexually*,” it is clear that for the provision to apply the action needs an element of sexuality. Several acts are included in this term. The scope of “sexually” is delimited by Section 196.<sup>158</sup> Consequently, Section 201 intends to include more situations than Section 196.

With regard to the term “manner,” it is clear that the act does not need to be physical. Actions where victims are not physically touched are also within the scope of the regulation. The last part of the same sentence expands the scope of Section 201. It states that other

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<sup>156</sup> See subsection II. 2. a. above about *sexual abuse*.

<sup>157</sup> Ot.prp. nr. 28 (1999-2000), chapter 16.1.1, p. 116

<sup>158</sup> See subsection II. 2. a.

indecent manner is criminal. Therefore, situations when the indecent manner is committed over the telephone or the Internet, are regulated by Section 201.

Examples from case law help to illustrate what situations are covered by Section 201 (2). Indecent speech or other obscene communication has several times been classified as illegal. In 2007, a man was sentenced by the Supreme Court for sending text messages containing sexual language and pictures of his genitalia to a young girl.<sup>159</sup> Without further interpretation of the formulation we can determine that the section's scope is compatible with the demands and requirements in the Lanzarote Convention Art. 23.

In the Norwegian Penal Code Section 201a, a further restriction applies to cases where the perpetrator meets children, or proposes to do so, with the intention and purpose of committing any offences in Sections 196, 197 and 200 (2).

“A person who arranges a meeting with a child under the age of sixteen years old with intention to commit either of the acts mentioned in Section 195, 196 or 200 second paragraph is liable to fines or to imprisonment for a term not exceeding one year, when that person has reached the appointed meeting place or a place where the meeting place can be observed from.

Delusion about the child's age does not preclude criminal liability unless no negligence has been committed in this respect.

Criminal liability may no longer apply in cases where the persons that arrange the meeting are about coequal in age or in development.”<sup>160</sup>

The background for this regulation was the corresponding statutory provisions enacted in England in 2004.<sup>161</sup> The NGO Save the Children Norway, with support from the Ombudsman for Children, initiated the work on the implementation of a similar regulation in the Penal Code. The rationale behind the rule was the need for improved protection of children because of rapid development and technical advances. Of particular concern was children's open access to meet other people through different communication technologies such as the Internet. The increased use of mobile phones and online services among children makes them more vulnerable to abuse, as potential abusers can make contact with them more easily.

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<sup>159</sup> Rt. 2007 p. 442.

<sup>160</sup> Translation by the author. The regulation has not yet been translated since it was recently passed.

<sup>161</sup> Innst. O. Nr. 46 (2006-2007).

The regulation criminalizes actions when a person arranges, or proposes to arrange, a meeting with a child under sixteen years of age, when the purpose of this meeting is to commit a crime listed in Section 195, 196 and 200 (2). For this regulation to be applicable the adult has to propose or arrange a meeting with a child under 16 years old. The purpose of the meeting must be to exploit the child for a sexual purpose. In this, an element of intent is found.<sup>162</sup>

The second paragraph in Section 201a states that any mistake made as regards to the child's age does not preclude criminal liability, unless the mistake was made without negligence. This regulation demands that if there is uncertainty as to the age of the other person, the adult has to actively investigate how old he or she is.<sup>163</sup>

This regulation becomes enforceable either when the potential abuser arrives to the agreed meeting place, or to a place where the meeting place can be observed. This means that the act is criminalized as soon as the potential abuser reaches a spot where he can see the meeting place. Consequently, the possibility for withdrawal is precluded a relatively early stage of the act. This also impacts the question of when an action is characterized as an attempt, which will be discussed under.

The regulation also contains an exception. If the offender and the child are approximately equal in age and development, this may have an exonerating effect, based on an overall assessment of the situation<sup>164</sup>.

Although Section 201a., is relatively new, examples from case law exist. In 2008, a person was arrested and charged with violation of this provision. He had arranged a meeting over the Internet with a fifteen years old girl, and they both agreed to have sexual intercourse. The person had first met the child on a website. Later, they arranged a meeting at a hotel for the purpose of having intercourse. The child, however, proceeded to express regret when she met the defendant at the hotel. The defendant accepted this and they did not have any sexual relation. The defendant was sentenced to 30 days of prison.<sup>165</sup>

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<sup>162</sup> See sub subsection II. 2. a. ii.

<sup>163</sup> J. Andenæs, *Spesiell strafferett og formuesforbrytelsene*, p. 146.

<sup>164</sup> See subsection II. 2. a. iii. about consensual sex

<sup>165</sup> Rt. 2008 p. 867.

In a more recent criminal case, a 69-year-old male was sentenced to 30 days in prison after attempting to meet a child. The person was arrested in his car near the appointed meeting place. The place in this case was not deemed as a place where the “meeting place could be observed from”.<sup>166</sup> He was, consequently, not convicted for violating Section 201a., but for attempting, cf. Section 49.<sup>167</sup>

**xvii.** Aiding and abetting in the mentioned activities are illegal and criminal pursuant to the Penal Code Section 205. This regulation takes effect to every Section in Chapter 19 that applies to sexual violations (Section 191 to 211).

Case law establishes that aiding or abetting includes both physical and mental participation.<sup>168</sup> An example of the latter can be a person encouraging the perpetrator to conduct the crime, or threatening the victim. Physical participation occurs if, for instance, a person prevents the victim from escaping by physically holding the victim back.<sup>169</sup>

Attempting any of the aforementioned actions in subsection a, b, c, d or e is criminal, according to the Penal Code Section 49.

“When a felony is not completed, but an act has been done whereby the commission of the felony is intended to begin, this constitutes a punishable attempt.

An attempt to commit a misdemeanour is not punishable.”

It is necessary to clarify what actions are considered to be attempts. To do so, it is convenient to establish two boundaries. The upper limit is drawn towards actions that are not attempts, but completed. This limit is obvious. A more complex and difficult task is to draw the lower limit toward actions that are not considered attempts. Actions in this category are, for example, preparatory actions.

It is established in case law that the regulation contains two necessary conditions.<sup>170</sup> First, the perpetrator must have the intention to fulfil the crime, and second, there must be actions indicating that the person has this particular intention.<sup>171</sup> The first requirement is a subjective element. The second requirement is often easier to prove. Evidence in this respect might be

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<sup>166</sup> Rt. 2011 p. 1455.

<sup>167</sup> See below in II. 2. e. xvii, about attempt.

<sup>168</sup> J. Andenæs, *Spesiell strafferett og formuesforbrytelsene*, p. 145.

<sup>169</sup> Rt. 2003 p. 1455.

<sup>170</sup> J. Andenæs, *Alminnelig strafferett*, p.348.

<sup>171</sup> Rt. 2011 p.1455.

that the person has acquired necessary equipment, conducted investigations or that the person approaches the place where the action is planned to be committed. These actions can however also be seen as preparatory actions, which in Norwegian law is not criminal. The key factor in this assessment is whether the action shows that the person is about to commit the crime. It depends on the length of the time between the already executed action and the remaining parts. The action's character is also of great significance, along with the action's psychological differences.<sup>172</sup>

## **2.6 Corporate Liability**

**xviii.** Corporate liability is a supplement to the personal criminal responsibility. This emphasizes two different remedies, both personal responsibility and/or liability on behalf of a corporation. Action on behalf of the corporation can be punished through the provisions in the Penal Code Sections 48a and 48b.

In Section 48a (2), the “enterprise” is defined as a company, society or other association, one-man enterprise, foundation, estate or public activity.

Criminal liability of corporations must be regulated separately since an entity cannot be punished according to the general liability rules. One of the basic conditions for criminal liability is the presence of guilt, which is difficult to conceive in the context of an enterprise. Therefore, corporations are punished on objective grounds for acts committed by persons acting on their behalf, cf. Section 48a.

The conditions for the imposition of a corporate penalty are specified in the first paragraph of Section 48a:

“When a penal provision is contravened by a person who has acted on behalf of an enterprise, the enterprise may be liable to a penalty. This applies even if no individual person may be punished for the contravention.”

Employees of the company make up the main group of persons acting “on behalf of an enterprise”. In addition, the entity can be responsible for the acts made by independent contractors, cf. Section 48a.

An additional condition for corporate liability is violation of a penal provision. The provision is general and applies in principle to any violations of a criminal sanctioned norm.

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<sup>172</sup> Rt. 2008 p. 867.

However, Section 48a, has a special rule for corporate punishment. The first paragraph second sentence, states that the company may be punished even if no individual can be punished for the contravention. This means it is not necessary to identify a responsible person, meaning that both anonymous and known cumulative errors are encompassed.

Even if these conditions are met, the court may choose not to punish the company. This is known as facultative admission. Section 48b provides guidance for the assessment deciding whether a penalty shall be imposed and for the sentencing. The court shall pay “particular consideration” to “the preventive effect of the penalty”, the seriousness of the violation, whether guidelines could have prevented the infringement, whether the offence was committed in the interest of the corporation, whether advantages have been obtained from the violation and the corporation’s financial ability.<sup>173</sup> The same factors are important when determining the penalty fines.<sup>174</sup> The corporation’s financial situation will normally have a greater impact on the assessment of fines than for assessing whether corporate liability shall be imposed.

The Penal Code does not distinguish between leading persons and regular employees.<sup>175</sup> If the offender is employed and acts on behalf of the firm, this can lead to corporate liability regardless of the person’s position.<sup>176</sup> This is in contrast to the Lanzarote Convention cf. Section 26, which distinguishes between persons in position of authority and regular employees.

**xix.** Norwegian legislation may impose civil and administrative punishment on the corporation, cf. Section 48a:

“The penalty shall be a fine. The enterprise may also by a court judgement be deprived of the right to carry in business or may be prohibited from carrying it on in certain forms, cf. Section 29.”

**xx.** National legislation does not exclude individual liability when imposing corporate liability. Corporations will normally be punished through restrictions and/or through fines, while the individual can be held criminal responsible according to regular assessment in the Penal Code.

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<sup>173</sup> Penal Code Section 48 b.

<sup>174</sup> See the II. 2. h., *Sanctions and Measures*.

<sup>175</sup> The Penal Code Sections 48a and 48b.

<sup>176</sup> The Penal Code Section 48a.

If there are anonymous mistakes, the individual cannot be held responsible. This could nevertheless lead to the punishment of the corporation and it will exclude individual liability. Where it is clear that a company is involved with a crime, but it is not possible to find the culprit, the corporation can be held objectively responsible.<sup>177</sup>

## 2.7 Aggravating Circumstances

**xxi.** The crimes of sexual abuse, child prostitution, child pornography, corruption of children and solicitation of children for sexual purposes, have been described above. In this part, these crimes will be linked with aggravating circumstances. For thorough information about aggravating circumstances applied on the crime of *sexual abuse* of children, see subsection II. 2. a. ii. (*The criminal liability for intentionally committed acts of sexual abuse*).

Section 61 of the Penal Code states that:

“If a previously convicted person again commits a criminal act of the same nature as that for which he has previously been convicted, the maximum penalty laid down in the penal provision shall be increased to double its prescribed limit, unless it is otherwise provided in the penal provision itself.”

Chapter 19 of the 1902 Penal Code about sexual offences, open for increasing the penalty when aggravating circumstances occur. The purpose of applying aggravating circumstances is to enforce the protection of certain interests that are considered more important than others. Such an interest is, amongst others, the protection of persons who are particularly vulnerable, e.g. children.

Aggravating circumstances for the above mentioned crimes are outlined in Chapter 19 in the Penal Code. The provisions that protect individuals from sexual assault by use of force, violence and intimidation are found in the first chapter, followed by the provisions on abuse of power. Section 202 concerns liability for persons who “promotes the engagement of other persons in prostitution” followed by the incest provisions and the pornography provision.

In the 2005 Penal Code the general rule of aggravating circumstances is found in Section 77. This provision defines (more detailed than the corresponding provisions of the 1902 Penal Code) the circumstances that should be given weight when assessing the sentence. The 1902

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<sup>177</sup> The Penal Code Section 48a (1) second sentence.

Penal Code is the law in force, but the 2005 Penal Code reflects, to a certain degree, the current state of law.

## 2.8 Sanctions and Measures

**xxii.** All of the above mentioned crimes are as a general rule sanctioned by either imprisonment or fines depending on the severity of the crime. According to Section 26a of the Penal Code, the court may also impose a fine *in addition* to a custodial sentence. Besides, community sentence may be imposed instead of a sentence of imprisonment, cf. Section 28 a.

A person who has committed any of the above mentioned crimes may be deprived of any position, now or in the future, or to carry on any enterprise or other activity, cf. Section 29. This is manifested in the fact that for certain positions it is mandatory to provide a satisfactory police certificate of good conduct. The certificate shows, *inter alia*, whether the person concerned has been charged with, indicted for, or convicted of sexual abuse of children. Positions that require the submission of a police certificate are, among others, positions within health care, social services and most other positions that involve contact with children. For example, persons convicted of sexual abuse of children are barred from employment in kindergartens as well as in the primary and lower secondary school.<sup>178</sup>

According to Section 33, a ban on making contact, with for instance children, may be imposed on an offender. The ban on making contact may entail that the person subject to the ban is prohibited from being present in specific areas, or pursuing, visiting, or in any other way making contact with another person.

Through the provisions in Section 53 relating to deferred sentence, the court may impose various conditions regarding the penalty, for example that the convicted person undergoes psychiatric treatment or that she/he shall stay in a home or institution for up to one year.<sup>179</sup> This is a judgement in a criminal case whereby the court may postpone execution of the passed sentence and lay down certain conditions, so that on the expiry of a specified period and the fulfilment of the conditions imposed, the sentence is entirely remitted.<sup>180</sup>

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<sup>178</sup> Act of 17 June 2005 no. 64 relating to kindergartens (the Kindergarten Act) Section 19 and Act of 17 July 1998 no. 61 relating to Primary and Secondary Education and Training (the Education Act) Section 10-9.

<sup>179</sup> Section 53 no. 3 litra f and g

<sup>180</sup> More about this under subsection II. 2. h. xxiii.



Further, the court may impose a sentence of compulsory mental health care, cf. Section 39, or a sentence of compulsory care, cf. Section 39a. Also, preventive detention in an institution under the Correctional Services may be imposed instead of a sentence of imprisonment, cf. Section 39c.

The Child Welfare Act Section 4-12 states that a care order may be made, which implies that a parent may lose permanent custody of the child. According to the Child Welfare Act Section 4-20, it can also be decided that the parents shall be deprived of all parental responsibility.

### *Extradition*

To prevent offenders from evading criminal prosecution or execution of a sentence by escaping country, the Norwegian government has signed treaties on extradition with other States. Extradition is primarily regulated by the Extradition Act.<sup>181</sup> Section 1 of the Extradition Act states that “any person who is charged, accused or sentenced by a foreign state by a punishable act, and who is located in Norway” may, on petition of the state, be transferred there compulsory.<sup>182</sup> However, the power to extradite is subject to certain limitations. The Norwegian government does not extradite Norwegian citizens to foreign countries, cf. Section 2. Furthermore extradition may not take place for a political offence, cf. Section 5, or if there is a serious risk that legal safeguards or fundamental values will not be complied with, cf. Section 6. Extradition is precluded if it would conflict with basic humanitarian considerations, cf. Section 7 of the Extradition Act.

Norway is member of Interpol and participates in the Schengen Information System (SIS). The Norwegian police may institute an international search for a person who is charged, accused or convicted in a criminal proceeding in Norway by these two channels in terms of arrest and extradition.<sup>183</sup> Norway has signed treaties on extradition with several countries, which basically entail an obligation to surrender the criminals. Most important is the

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<sup>181</sup> Act of 13 June 1975 no. 38 relating to extradition of offenders etc.

<sup>182</sup> The Ministry of Justice and Public Security, ‘Utlevering av utenlandske borgere’, The Government, viewed on 7 September 2012, <[http://www.regjeringen.no/nb/dep/jd/tema/internasjonalt\\_justissamarbeid/sub/utlevering-av-lovbrytere/utlevering-av-utenlandske-borgere-fra-no.html?id=445367](http://www.regjeringen.no/nb/dep/jd/tema/internasjonalt_justissamarbeid/sub/utlevering-av-lovbrytere/utlevering-av-utenlandske-borgere-fra-no.html?id=445367)>.

<sup>183</sup> Ministry of Justice and Public Security, ‘Utlevering fra utlandet til Norge’, The Government, viewed on 7 September 2012, <[http://www.regjeringen.no/nb/dep/jd/tema/internasjonalt\\_justissamarbeid/sub/utlevering-av-lovbrytere/utlevering-fra-utlandet-til-norge.html?id=445365](http://www.regjeringen.no/nb/dep/jd/tema/internasjonalt_justissamarbeid/sub/utlevering-av-lovbrytere/utlevering-fra-utlandet-til-norge.html?id=445365)>.

European Convention on Extradition of 1957. Additionally, Norway has bilateral treaties on extradition with, among many others, the U.S. and Australia. Extradition between the Nordic countries is regulated in the new Act relating to Arrest Warrant.<sup>184</sup>

**xxiii.** The Norwegian legal system is constantly evolving and there is regular debate about which sanctions are proper and effective. The topic has been much discussed and there is no definitive answer to the question. Research and studies provide for new knowledge in the field and paves the way for the use of new methods and other sanctions.

Recent development has been moving towards stricter penalties. The Government has in its policy platform taken steps to intensify the efforts to prevent violence against children and to heighten the level of punishment for rape and other sexual offenses. The amendment act to the chapter on sexual abuse demonstrates a focus on strengthening the protection of children against abuse and raising the level of punishment for serious sexual offenses. This is maintained in the new Penal Code of 2005.

In general, Norway has a legal system that is intended to ensure a safe society by preventing crime and detecting and prosecuting violations. There are nevertheless different views on how the system works in practice. It is clear that the sanctions have various individual results and that while a punishment may be very effective on one person, it may not have the desired effect on another. To ensure efficiency and proportionality, the Norwegian legal system has different sorts of sanctions, such as those mentioned above.<sup>185</sup> The courts may, under given circumstances, choose between these alternatives and combine them. In this way, the punishment can be adapted to the individual offender.

### *Efficiency*

A general and important goal is to reduce the occurrence of relapse into crime and thereby provide increased security for society.<sup>186</sup> This includes a constant focus on rehabilitation, which with more monitoring and support shall help prevent sexual offenders from

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<sup>184</sup> Act of 20 January 2012 no. 4. The Act entered into force 16 October 2012 conducting the Convention establishing a Nordic Arrest Warrant signed by the Nordic countries 15 December 2005. The act replaces the Act of 3 March 1961 no. 1 relating to extradition of offenders to Denmark, Finland, Iceland and Sweden.

<sup>185</sup> See subsection II. 2. h. xxii.

<sup>186</sup> Ministry of Justice and Public Security, 'Faktaark – Straff som virker', The Government, viewed on 9 September 2012, <<http://www.regjeringen.no/nb/dep/jd/tema/kriminalomsorg/faktaark-straff-som-virker.html?id=528070>>.

committing further crimes. Reduced recidivism is an important measure of whether the sanctions have worked. Unfortunately there is not much research on sexual offenders, and it is difficult to determine whether the sanctions are effective and deterrents.

Figures from Statistics Norway indicate that 36 per cent of the 263 persons accused of sexual crime in 1996, are registered with recidivism in the five years from 1997 to 2001.<sup>187</sup> The statistics are, however, not sufficiently specified thus one can hardly draw conclusions based this.

Experiences from the Nordic countries, gathered in the report by the Nordic Council of Ministers,<sup>188</sup> suggest that imprisonment doesn't work for sexual offenders and that therapy is the only way to change their behaviour. Moreover, mandatory participation in a program for sexual offenders may be given as a condition to a deferred sentence, cf. the Penal Code Section 53 no. 3.<sup>189</sup> The purpose of this provision is, in addition to prevention, to set conditions adapted to the individual convicted person and thereby improve their ability to reintegrate into the society.

Certain treatment programs for sexual offenders in Norway do exist, but these are mostly voluntary. One example is the program in Bergen prison, a joint project between the prison and expertise for safety, prisons, and forensic psychiatry.<sup>190</sup> The goal of the program is to reduce the risk of relapse, by making participants able to cope with their difficulties in a good way.

At the same time, general deterrence is an important principle and it is a goal that the sanctions are dissuasive. For *inter alia* this reason, imprisonment is still considered an effective sanction.

All over, the Norwegian legal system seems to contain rather proportional and effective sanctions. One can claim that the main issue regarding sexual abuse of children is not the

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<sup>187</sup> Statistics Norway, 'Siktede personer i 2005, etter politiets avgjørelse, hovedlovbruddskategori og hovedlovbruddsgruppe i 2005, og tilbakefall i den påfølgende femårsperioden', viewed on 9 September 2012, <<http://www.ssb.no/emner/03/05/lovbrudde/tab-2012-03-28-22.html>>

<sup>188</sup> The Nordic Council of Ministers, 'Personer som begår seksuelle overgrep mot barn - Kunnskapsstatus og erfaringer fra de nordiske landene, TemaNord 2000:547', 2000, <<http://www.norden.org/en/publications/publikationer/2000-547>>

<sup>189</sup> See subsection II. 2. h. xxii above.

<sup>190</sup> Bergen prison, 'Nasjonalt behandlingsprogram for personer som er dømt for lovbrudd av seksuell karakter', The Norwegian Correctional Services, viewed on 10 September 2012, <<http://www.bergenfengsel.no/ekstra/sedlighet.htm>>.

sanctions' efficiency, but rather the amount of detected cases. Another problem is the lack of sufficient support and monitoring that child victims receive by the State. More about this under subsection II. 2. h. xxvi.

**xxiv.** In subsection II. 2. h. xviii, it was found that legal entities can be held liable when crimes are committed on their behalf. Legal entities held liable for the above mentioned crimes are sanctioned by fines, cf. Section 48a of the Penal Code. The enterprise, by a court judgment, may also be deprived of the right to carry on business or may be prohibited from carrying it on in certain forms, cf. Section 29.

**xxv.** According to the Penal Code Section 35 (2) cf. the Criminal Procedure Act Section 203, objects that have been used or were intended for use in a criminal act may be confiscated.

#### *Bona fide third parties*

The Penal Code Section 36 concerns from whom the confiscation, pursuant to Section 35, may be effected. Section 36 (1) states that confiscation "may be effected from the offender or from the person on whose behalf has acted". Moreover, confiscation may be effected from an owner "who has or should have understood that the object was to be used for a criminal act". This precludes confiscation from bona fide third parties. However, objects that are deemed to be significant as evidence may be seized until a legally enforceable judgement is passed, cf. the Criminal Procedure Act Section 203. This is regardless of whether the owner was acting in good faith. When the seized object is no longer needed as evidence, it will be returned to the aggrieved person, cf. Section 214.

#### *Confiscated properties*

The proceeds of any confiscation made by the State shall as a rule accrue to the State Treasury, cf. the Penal Code Section 37d. The court may decide that the proceeds shall be applied to covering any claim for compensation made by the aggrieved person.

Although the proceeds will not go *directly* to any particular fund, the government funds different measures, hereunder the prevention of sexual abuse of children.

**xxvi.** In recent years there has been an increased focus on domestic violence in Norway. The government has initiated several plans of action to combat the abuse of children and to

ensure the subsequent care of children who have been victims of abuse within the private sphere.<sup>191</sup>

### *The Children's Houses*

In the year 2007, the first Children's House ("Barnehus") was opened in Norway. This public service is provided for children who have witnessed or have been the victims of violence or sexual abuse. The Children's Houses were conceived of as multidisciplinary competence centres, also providing services for mentally impaired adults. They form part of a project between the Ministry of Justice and the Public Security, the Ministry of Children, Equality and Social Inclusion, and the Ministry of Health and Care Services. The Children's Houses have no legal basis, but are established through the mandate of the project.

The Children's Houses are organized in such a way that the necessary services are provided all in one place, so that the child does not need to be transported between different services. This provides a less stressful environment for the children. The Children's Houses are equipped for judicial interviews, medical examination and for treatment and follow-up of the children. Competent workers within different fields are employed to ensure that adequate support and monitoring of the abused children is undertaken. The Children's Houses also offer consultations and support to the child's close family. The use of an institution requires that the relevant crime has been reported to the police. Advice and guidance will be given, however, under any circumstance. Consultation can also be anonymous. Further, the system has become a nationwide initiative, with seven units established across the country (autumn 2012). These new institutions represent a significant improvement in the service of support and monitoring of children who have been victims of sexual abuse within the family or close environment.

Despite their advantages, the Children's Houses are criticized for the fact that the time period that passes between the report of the incident and the subsequent judicial examination is too long. According to the annual report from the Oslo Children's House

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<sup>191</sup> See among others the plan of actions against violence in close relations of 2012: Ministry of Justice and Public Security, 'Handlingsplan mot vold i nære relasjoner 2012', the Government, viewed on 10 October 2012, <[http://www.regjeringen.no/nb/dep/jd/dok/rapporter\\_planer/planer/2012/handlingsplan-mot-vold-i-naere-relasjoner.html?id=669093](http://www.regjeringen.no/nb/dep/jd/dok/rapporter_planer/planer/2012/handlingsplan-mot-vold-i-naere-relasjoner.html?id=669093)> and 'Vendepunkt', Ministry of Justice and Public Security, the Government, 2007, viewed on 10 October 2012, <<http://www.regjeringen.no/nb/dep/jd/pressemeldinger/pressemeldinger/2007/styrket-innsats-mot-vold-i-naere-relasjon.html?id=493927>>.

from 2011, it takes an average of 71 days from the moment the crime is reported to the judicial examination take place.<sup>192</sup> This is a severe deviation from the Criminal Procedure Act Section 239 (4) and the Regulation on judicial examination and observation Section 4,<sup>193</sup> which states that examinations shall be carried out no later than two weeks after the criminal offence has been reported to the police. While the report explains this by pointing to the challenges that follow from the procedure and coordination of investigation and varying expertise on domestic violence, others indicate a lack of resources and insufficient prioritizing.

In case of further need for treatment, the child's care is taken over by other institutions for additional monitoring and support. The Children's Houses cooperate with the local Child Welfare Service and The Children's and Young People's Psychiatric Out-Patient Clinic regarding the progression and support of the child and his or her family. The kind of service provided is supposed to adapt to the needs of the individual child.

The claim to receive assistance from the Child Welfare Service is statutory in Child Welfare Act. When a child has been victim of abuse within the family or close environment, it may be necessary to apply alternative, more drastic measures, such as care orders, cf. Section 4-12 of the Child Welfare Act, and deprivation of parental responsibility, cf. Section 4-20. The purpose of the act is "to ensure that children and young persons who live in conditions that may be detrimental to their health and development receive the necessary assistance and care at the right time" and "to help ensure that children and young persons grow up in a secure environment", cf. Section 1-1. In order to do so, the Child Welfare Act has different provisions such as the right to assistance for children and families with children in Section 4-1.

According to Section 4-12 litra c, a care order may be initiated if the child is mistreated or subjected to other serious abuses at home. This means that the child is taken away from his or her parents and the daily care is transferred to others on behalf of the Child Welfare Service. "If the county social welfare board has made a care order for a child, the county social welfare board may also decide that the parents shall be deprived of all parental

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<sup>192</sup> The Children's House Oslo, 'Aktuelt fra statens barnehus Oslo – årsrapport 2011 osv', 2012, viewed on October 7 2012, <<http://www.statensbarnehus.no/barnehus/oslo/aktuelt/?lang=nb>>.

<sup>193</sup> Regulations of 10 February 1998 no. 925 on judicial examination and observation (Regulations on Judicial Examination).

responsibility”, cf. Section 4-20 of the Child Welfare Act. The consideration of the child’s best interest is an important principle and is statutory in Section 4-1 of the Act. It states that:

“When applying the provisions of this chapter, decisive importance shall be attached to framing measures which are in the child’s best interests. This includes attaching importance to giving the child stable and good contact with adults and continuity in the care provided.”

#### *Right to access*

A problematic issue is the right to access. As a principle, children and parents are entitled to have access to each other. This is founded in the Child Welfare Act Section 4-19.

The courts have been strongly criticized for giving the parents right to access without examining whether there are grounds for allegations of violence against the children. Part of the recent debate on the issue is exemplified in the book “Child custody in the court – when the child’s best interest becomes the child’s worst”, published in the autumn 2012.<sup>194</sup> The book suggests that the system fails to fulfil the principle of the child’s best interest when it comes to the right of access. It suggests that there is a need for both tightening and expanding the rules regarding the right to access.

The Ministry of Children, Equality and Social Inclusion is currently working on a proposition with the aim to strengthen the child's perspective and increase participation of the child.<sup>195</sup> The Ministry demands better evaluations of the child’s need for protection and the possible shielding from a parent. It is also pointed out that families should be monitored more closely than at present. The proposition is intended to make it easier to determine that the right to access should be denied altogether. This applies to cases where the child cannot be protected well enough through supervision, and in cases where the child currently has a strong aversion to contact with their parents.

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<sup>194</sup> (Translation by the author), K. Mevik and F. Breivik; *Barnefordeling i domstolen - når barnets beste blir barnets verste*, Universitetsforlaget, 2012.

<sup>195</sup> Ministry of Children, Equality and Social Inclusion, ”Aktuelt - Nye lovforslag skal beskytte barn mot vold og overgrep”, the Government, viewed on 10 October 2012, <<http://www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2012/nye-lovforslag-skal-beskytte-barn-mot-vold.html?id=704636>>

Abuse committed within the close relations of the child may affect the sentence and impose a stricter penalty.<sup>196</sup> It may also lead to a claim for economic compensation pursuant to the provisions of Act of 13 June no.26 relating to compensation under certain circumstances.

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

i. The principle of “the best interest of the child”<sup>197</sup> is a legal standard. The principle is mentioned in the Child Act, the Child Welfare Act and it is used as common practice in the public administration. The principle’s main focus is the child’s wellbeing. In practice, the principle is used to describe the minimum standard for a child’s interests and needs.

In a case of sexual abuse or violence, the child may have the right to free legal aid provided by the State, cf. Criminal Procedure Act Section 107a (1) litra a. A counsel for the victim is presumed to protect the child’s interests during the police investigation and ensure the best interests of the child during the process. The counsel is also supposed to assist the child in a civil suit for economic compensation. A police or state attorney will lead the criminal proceedings on behalf of the prosecutors.

The examinations of a witness under the age of 16 shall, in accordance with Regulations of 2 February 1998 no. 925 concerning judicial examination and observation (Regulations of Judicial Examination) Section 13, if possible, not occur more than once. New interviews can only occur if it is found necessary to the case, and if the interests of the witness or other substantial reasons do not give rise to the contrary. The provision’s main objective is to protect the child from being exposed to the stress of having to repeat what he or she has experienced.

When the age of the child or other circumstances so indicate, the judge may decide that before or instead of examination, the child shall be placed under observation in accordance with the Criminal Procedure Act Section 239 (3). The observation is regulated by the Regulation of Judicial Examination Chapter 2 and is based on the rules of procedure for the examinations cf. Section 15 (3). The legislative purpose is here to give the child an

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<sup>196</sup> See subsection II. 2. g. xxi. about *Aggravating Circumstances*

<sup>197</sup> See also subsection II. 2. h. xxvi. about the *Right to access*



opportunity to communicate on its own terms and conditions through play and conversations. In contrast to examinations, observations should take place several times so that there is confidence between the observer and the child in accordance with the Regulation of Judicial Examination Section 17.

ii. Within the Norwegian legal force, the Government has created a special unit, Kripos.<sup>198</sup> This is the national unit for fighting organized and other severe crime and it is designed to function as a central agency for the local police departments. Kripos' main focus is assisting the local police with forensic work and connecting them to the international collaborations such as Interpol and Europol.<sup>199</sup>

Within Kripos there is a special group working on sexual exploitation of children, human trafficking and racism cases and a special group working on Internet related assault cases.

According to Norwegian customary law and other regulations, the police is authorized to carry out covert operations. Kripos collaborates with VGT (Virtual Global Taskforce) as part of several operations initiated by the VGT.<sup>200</sup> The aim is to build an "effective, international partnership of law enforcement agencies, non-governmental organisations and industry to help protect children from online child abuse".<sup>201</sup>

One of the measures the VGT carries out is a so called "honey-pot". The "Honey-Pot" is a website designed to deceive a perpetrator into thinking they are accessing a website containing documented child abuse, such as pictures and videos. The "honey-pots" are part of a covert operation and is designed to catch perpetrators in the act of accessing documented child abuse. When software that is able to analyse 15 minutes of film in just one minute without losing important details. The database is a so-called "Hash Set". This is a system that holds a set of objects, and that is easily and quickly able to determine whether an object is in the set or not. This is meant to assist the local police in efficiently going through material, and will spare the officers the strain and distress caused by witnessing sexually abusive material several times.

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<sup>198</sup> See also subsection II. 2. c. viii for more details about Kripos.

<sup>199</sup> Kripos, 'About Kripos', the Police, accessed 3 July 2012, <2012[https://www.politi.no/kripos/om\\_kripos/Tema\\_71.xhtml](https://www.politi.no/kripos/om_kripos/Tema_71.xhtml) >.

<sup>200</sup> Virtual global taskforce, 'What we do', viewed on 3 July 2012, <<http://www.virtualglobaltaskforce.com/what-we-do/>, >.

<sup>201</sup> Ibid.

Because of the vast amount of child pornographic material distributed across borders, the international collaboration is essential for efficiently identifying a perpetrator enters a “honey-pot” their information is sent directly to the police.<sup>202</sup>

Kripos has developed a national database of material depicting sexual abuse of children. To build up the database more efficiently, Kripos has purchased

the material. Kripos is hence working closely with Interpol when it comes to identifying unknown children. Interpol has a database with a large amount of sexually abusive pictures and video clips. The identification of the material and the abused children is organised by a special taskforce in Interpol.

**iii.** In accordance with the Criminal Procedure Act Section 224 (1), a criminal investigation shall be carried out when: “as a result of a report or other circumstances there are reasonable grounds to inquire any criminal matter requiring prosecution by the public authorities subsists”.

The police has, according to Section 224, an obligation to start a criminal investigation in two cases; with the purpose of solving an already conducted crime, and with the purpose of preventing one. The police does not, however, have an obligation to investigate every suspicion they might have. This is deduced from the wording “reasonable grounds”, which sets a certain limit for when an investigation will be “reasonable” to initiate.

An investigation shall be carried out, either as a result of a “report” or if there are “reasonable grounds” to inquire whether a criminal matter that requires prosecution exists. Therefore, it is not required that a crime is reported in order to be investigated. Nor is it a condition that there must be a suspect in the investigation.

The question whether an investigation should be initiated or not depends on several important factors. Among them is the probability that there exists a criminal offence or plans of conducting one, the seriousness of the case, and what authority is responsible for the investigation.<sup>203</sup>

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<sup>202</sup> See also the Internet filter developed by Kripos, subsection II. 2. c. viii.

<sup>203</sup> The Director General of public prosecutions, ‘Rundskri fra Riksadvokaten, Del II – nr. 3/1999’, 22 Desember 1999, viewed on August 27 2012, <[http://www.riksadvokaten.no/filestore/Dokumenter/Eldre\\_dokumenter/Rundskriv/Rundskrivnr3for1999-Etterforskning2.pdf](http://www.riksadvokaten.no/filestore/Dokumenter/Eldre_dokumenter/Rundskriv/Rundskrivnr3for1999-Etterforskning2.pdf)>.

The most practical restriction for the police is nevertheless their capacity. There are not enough resources in the police force to investigate every offence they become aware of. Therefore, the state attorney has developed general guidelines that indicate which cases are to be given priority.<sup>204</sup> According to the Prosecution Instruction the cases that are the most highly prioritized are violent crimes and serious sexual offenses.

There is no general rule of law that regulates the event of someone withdrawing their statement. Whether a victim's withdrawal should have effect on the investigation depends upon the remaining evidence and the circumstances of the case. Generally, the proceedings of the investigation will still go on, even if the victim's statement is withdrawn.

According to the Criminal Procedure Act Section 224, the issue must be of "criminal matter". As a matter of fact, this requires that the action is an offence in pursuant to the Penal Code. This also includes the act of planning to conduct a criminal offence.

There are, however, several exceptions from this rule. In conformity with Section 224 (2), the police is also obligated to conduct an investigation even though the person was between 12 and 15 years of age on the date the act was committed. A child below the age 15 cannot be punished, cf. the Penal Code Section 46, and therefore, this will not be a "criminal matter".

Another exception from the main rule is deduced from the Penal Code Sections 39 and 39a.<sup>205</sup> The exception is based on the assumption that an investigation will be conducted even though the person was criminally insane in the moment the act was committed. This is also expressly specified in the Prosecution Instruction Section 7-4.3.

iv. According to the Penal Code Section 68 (1), the period of limitation begins to run from the date the criminal activity has ceased. However, in the event of a contravention of Sections 195 or 196, the said period shall begin to run from the day on which aggrieved person reaches 18 years of age. The sections apply to sexual activity and sexual acts with a child under 14 and 16 years of age.

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<sup>204</sup> Regulations of 28 June 1985 no. 1679 (the Prosecution Instruction) Section 7-5 (3).

<sup>205</sup> See the 2005 Penal Code Section 20.1 d.

According to the Penal Code Section 67 (1), the period of limitation is determined by the maximum penalty in each penal provision. If a person has committed several crimes with different periods of limitation, the period that is the longest shall be the one that applies.

*Sexual activity*<sup>206</sup> with a child under the age of 14 will be punished with a 10, 15 or 21 year prison sentence, depending on the circumstances. In these cases, the period of limitation will be 10, 15 or 21 years respectively. Following the same pattern, sexual activity with a child under 16 years of age will have a period of limitation of respectively 10 and 15 years, cf. the Penal Code Section 67 (1). Moreover, *Sexual acts*<sup>207</sup> with a person under 16 years of age will have the period of limitation of 5 years. If the act was conducted under aggravating circumstances, the period of limitation will be 10 years. The crime of spreading pornographic pictures has a period of limitation of 5 years, cf. the Penal Code Section 67 (1).

The period of limitation is fixed and it is not possible to suspend it in any way. Finally, the Ministry of Justice claims that the periods of limitation are long enough to meet the justification of the Art. 33 in the Lanzarote Convention.<sup>208</sup>

v. All children born in Norway are registered in the national register, cf. Act of 16 January 1970 No. 1 relating to national registration (National Registration Act). The rule applies even if the mother of the child is not a Norwegian citizen.<sup>209</sup>

When children enter the country either through trafficking or immigration there are cases where the age of a victim is not certain. In these cases the Child Welfare Services will contact the local police to investigate. Often, the victims will have unofficial paperwork or no paperwork at all. The police is hence required, in collaboration with the Directorate of Immigration, to try and investigate the age of the victim. If they cannot find the age, practice shows that unofficial paperwork or statement of the child itself is often accepted if this is coherent with the appearance and behaviour of the victim.<sup>210</sup>

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<sup>206</sup> See subsection II. 2. a. i.

<sup>207</sup> See the subsection 2. II a. i.

<sup>208</sup> Ot.prp. nr. 22 (2008-2009).

<sup>209</sup> I. Børresen, 'Hva skal til for å kunne anse identiteten for å være dokumentert', Norwegian Directorate of Immigration, viewed on 10 August 2012, <<http://www.regjeringen.no/nb/dep/bld/dok/nouer/2009/nou-2009-5/7/6.html?id=549577>>.

<sup>210</sup> Ministry of Children, Equality and Social Inclusion, 'Lov om folkeregistrering', Norwegian Directorate of Immigration, 4 May 2012, viewed on 10 August 2012, <[https://www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2012-009/#\\_Toc322694548](https://www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2012-009/#_Toc322694548)>.

vi. Kripos deriving its authority from the National Police Directorate,<sup>211</sup> is responsible for recording and storing data of convicted offenders.<sup>212</sup>

Norway is party to the European Convention on Mutual Assistance in Criminal Matters (1959) and the Schengen Agreement (1990). Kripos is therefore obligated to transmit relevant data to other competent authorities in other members states of these conventions.

In accordance with Act of 11 June 1971 no. 52 relating to Criminal Registration (Act relating to criminal registration) Section 8, all civil servants are bound to professional secrecy. Therefore, the authorities are obliged to respect the protection of personal data rules, and cannot release personal data to any authority or person without it being in conformity with the law.

### 3.2 Complaint Procedure

vii. In cases of sexual felonies or misdemeanours against a child under 16 years of age, the examination shall be conducted by a judge separate from the trial, if the judge finds it to be in the child's interest or for other particular reasons, cf. the Criminal Procedure Act Section 239 (1) and the Regulations on Judicial Examination Section 1. The judge must take into account the age and maturity of the child, compared to the character of the offence. When considering whether it is desirable to conduct the examination separate from the court, the judge must also take into consideration the interest of the accused/defendant and whether it is more desirable that the interview is conducted directly to the court.<sup>213</sup>

The case Rt. 1997 p.1288, shows that the judge conducting the judicial examination will be considered prejudiced when the interview is used as evidence in a criminal case, cf. the Criminal Procedure Act Section 243 cf. Section 239. Therefore, the very same judge cannot be part of the hearing. A fundamental principal in Norwegian criminal law is the right to a fair trial conducted by an independent and impartial tribunal.<sup>214</sup> In this case, the court reasoned that the judge would give a statement as to the credibility of the child, cf. the Regulations of Judicial Examination Section 7, and would therefore not be impartial.

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<sup>211</sup> Regulations of 20 December 1974 no. 4 relating to criminal registration, Section 1.

<sup>212</sup> NOU; 2003: 21.

<sup>213</sup> H. Kristiansen Bjerke, E. Keiserud & K. E- Sæther, *Straffeprosessloven Kommentarutgave Bind II*, 4th Edition, Universitetsforlaget, Oslo, 2011, p.873.

<sup>214</sup> Rt. 1999 p.1823.

According to the preparatory works of the Criminal Procedure Act, judicial examination can be executed without the presence of a relevantly well-qualified person if the judge has the necessary education and experience handling cases of sexual felonies or misdemeanours against children. Practice show that the judge usually summons a well-qualified person to assist during the examination.

The age of the witness at the time of the trial will determine whether the child has to make a statement in court. If the child on the day of the trial has turned 16, the child shall make a statement in court. It will be an exception however if the child invokes the principle of necessity.<sup>215</sup> Essentially, this means that if the statement in court will cause the child unnecessary strain and stress, the child can request not to testify in court.

If the judge decides that the child shall be placed under observation in accordance with the Criminal Procedure Act Section 239, an expert shall carry out the observation of the child. The expert will later have to be a witness during the trial. According to Regulations of Judicial Examination Section 16 (1), the expert should be a child psychologist or child psychiatrist.

According to the Criminal Procedure Act Section 239 (4), examinations or observations of the child shall be carried out within two weeks after a complaint has been reported to the police (see subsection II. 2. h. xxvi.). The aim is to make sure that the child is interviewed as soon as possible. The Ministry of Justice and the Police have accentuated that the above-mentioned timeframe is the deadline and that it is importance that each case is processed as soon as possible<sup>216</sup>. However, as mentioned in subsection II. 2. h. xxvi., this is not the case in practice.

#### *Individual complaint and the formal requirements*

There is no age limit as to when a person can make a complaint to the police of a criminal affair. If the child is mature enough to contact the police, it can. This applies both in the case of sexual exploitation of children and in Internet related assaults.

In accordance with the Criminal Procedure Act Section 224 (1), the police can only undertake an investigation when a complaint has been submitted or other circumstances

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<sup>215</sup> The Penal Code Section 17.

<sup>216</sup> H. Kristiansen Bjerke, E. Keiserud og K. E. Sæther, *Straffeprosessloven Kommentartutgave Bind II*, 4. edition, Universitetsforlaget, Oslo, 2011, p.881.

give reasonable grounds for investigation, see subsection II. 3. i. iii. When the police receive information about sexual abuse, they may be obliged to follow up on independent grounds if there are reasonable grounds. A tip to the police does not however replace an actual report of an offence.<sup>217</sup>

#### **viii.** *Representation of Children*

In criminal cases where a child is involved, the child's parents will usually be appointed as legal guardians in accordance with the Act of 22 April 1927 no. 3 relating to legal guardianship (the Guardianship Act) Section 3 cf. the Child Act Chapter 5. It is presumed that the parent will act in the best interests of their child.

However, in a case where one or both of the parents are presumed or accused of not acting in the child's best interest, the act stipulates that a provisional guardian will be appointed cf. the Guardianship Act Section 15 (2). The Act's main objective is to protect the child's interests and prevent the parents from protecting each other over their child. It is sufficient that there is suspicion towards one of the parents; there is no requirement that a complaint has been submitted.

#### *Participation of Minors in Trials*

A child will not have to give a statement in court. The Regulations of Judicial Examinations' main objective is to protect the child from being exposed to the stress of having to face the alleged perpetrator and relive any traumatic abuses that previously occurred. This is coherent with the principle of the best interest of the child.

In accordance with the Courts of Justice Act Section 130a<sup>218</sup>, the court can also prohibit the entire court ruling, in consideration of the victim, from being released to the public. The basis of the evaluation will be how the disclosure of the courts proceedings and judgment will affect the child, and whether it is necessary in light of these interests to make the rulings anonymous.

In accordance with the Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) Art. 6 (1), the press and the public may be excluded from all parts of the trial and the judgement where the interests of juveniles so require. This also follows from

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<sup>218</sup> Act of 13 august 1915 No. 5 relating to the courts of justice (the Courts of Justice Act).

the International Covenant on Civil and Political rights (ICCPR) Art. 14 (1). The fundamental principle is that any criminal case sentence shall be made public except where the interests of juvenile persons requires otherwise. Adherence to these provisions causes the depersonalization of the trial and judgments.

Norwegian judicial precedents show that the provisions in ECHR and ICCPR give a better protection and more extensive rights to depersonalization of court cases than the Regulations of Judicial Examination. Due to the Human Rights Act Section 3 these international conventions are incorporated into the Norwegian legislation, see the subsection II. 1. ii.

## 4 COMPLEMENTARY MEASURES

i. In 2007, the Norwegian Centre for Violence and Traumatic Stress (NKVTS)<sup>219</sup> conducted a survey in which future kindergarten teachers, middle school teachers and child welfare workers were questioned about their received education.<sup>220</sup> The results showed that there were deficiencies in the teaching of the UN Convention on the Rights of the Child, physical and sexual abuse of children and conversation techniques with children. Many students, especially those studying to become kindergarten and middle school teachers, did not feel qualified enough to deal with issues related to domestic violence and child abuse.

As a result, the Ministry of Children and Family Affairs released a report accentuating that:

“Lectures about physical and sexual abuse of children in basic higher education programs are limited. Knowledge about children's sexual development and abnormal sexual behaviours is vital in order to detect signs of abuse [...]. It is important to focus on these issues in specialization programs for relevant professional groups.”<sup>221</sup>

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<sup>219</sup> The Ministry of Health and Care Services, the Ministry of Defence, the Ministry of Labour and Social Inclusion, the Ministry of Justice and the Ministry of Children and Equality initiated the establishment of the Norwegian Centre for Violence and Traumatic Stress (NKVTS) and are also the main funders of its operations. The centre disseminates knowledge and competence in the field of violence and traumatic stress and its objective is to help, prevent and reduce the health-related and social consequences that can follow from exposure to violence and traumatic stress.

<sup>220</sup> C. Øverlien and H. Sogn, ‘Kunnskap gir mot til å se og trygghet til å handle’, NKVTS, 2007, viewed on 15 September 2012, <[http://www.nkvts.no/biblioteket/sider/Info\\_KunnskapMotHandle.aspx](http://www.nkvts.no/biblioteket/sider/Info_KunnskapMotHandle.aspx)>.

<sup>221</sup> The Ministry of Children and Family Affairs, ‘Strategi mot seksuelle og fysiske overgrep mot barn (2005-2009)’, the Government, May 2005, viewed on 15 September 2012, <[http://www.regjeringen.no/nb/dep/bld/dok/rapporter\\_planer/planer/2005-2/plan-mot-seksuelle-og-fysiske-overgrep-m.html?id=462242](http://www.regjeringen.no/nb/dep/bld/dok/rapporter_planer/planer/2005-2/plan-mot-seksuelle-og-fysiske-overgrep-m.html?id=462242)>.



Ever since the release of this NKVTS survey, the Government has worked to strengthen these education programs and increase professionals', especially kindergarten and middle school teachers', knowledge on the subject in order to prevent child abuse. Nowadays, a variety of universities and university colleges offer courses and specialization programs to enhance knowledge about child abuse.

Furthermore, the Norwegian Directorate for Education and Training (Udir)<sup>222</sup> has published elaborate brochures for teachers on topics such as incest, recognizing signs of sexual abuse, talking and listening to children, cooperation with the Child Welfare Service etc. The brochures are meant to familiarize teachers with appropriate preventive, immediate and long-term measures.<sup>223</sup>

The Child Welfare Services must solve complex and demanding cases. The Government has therefore focused on strengthening this agency and in 2011/2012, the number of jobs and the employees' level of expertise increased.<sup>224</sup> Indeed, in Official Norwegian Report (NOU) no. 2009:8, an expert committee listed a number of recommendations for enhanced quality in education that qualifies graduates to work with child welfare.<sup>225</sup> The Ministry of Children, Equality and Social Inclusion cooperates with the Ministry of Education and Research to follow these recommendations. The importance of ensuring the supervision of new employees in the Child Welfare has also been a priority. In 2012, a specialization program that qualifies experienced employees in the Child Welfare to provide professional guidance to graduates and newly employed colleagues was established.<sup>226</sup>

ii. In 2009, Udir published a booklet for schoolteachers to use in their lessons about sexuality and gender.<sup>227</sup> Topics related to sexuality are part of the national curriculum for the

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<sup>222</sup> The Norwegian Directorate for Education and Training ("Utdanningsdirektoratet" abbr "Udir") is responsible for the development of kindergarten and primary and secondary education. The Directorate is the executive agency for the Ministry of Education and Research

<sup>223</sup> Udir, 'Veiledere for beredskap og krisehåndtering i skolen', June 2011, viewed on 19 September 2012, <<http://www.udir.no/Laringsmiljo/Beredskap-og-krisehandtering/Veiledere-for-beredskap-og-krisehandtering-i-skolen/Seksuelle-overgrep2/Seksuelle-overgrep-i-hjemmet2/Foreldre/>>.

<sup>224</sup> The Ministry of Children, Equality and Social Inclusion, 'Barnevernsløftet: 70 nye stillingar i barnevernet', October 2011, viewed on 20 September 2012, <http://www.regjeringen.no/nb/dep/bld/pressesenter/pressemeldinger/2011/barnevernsløftet-70-nye-stillingar-i-bar.html?id=659585>

<sup>225</sup> NOU 2009:8.

<sup>226</sup> Prop. 1 S 2011-2012.

<sup>227</sup> Udir, 'Seksualitet og kjønn', June 2011, viewed on 21 September 2012, <[http://www.udir.no/Laringsmiljo/helse\\_i\\_skolen/Undervisning-om-seksualitet---Et-ressurshfte-for-larere-i-grunnskoleopplaringen/](http://www.udir.no/Laringsmiljo/helse_i_skolen/Undervisning-om-seksualitet---Et-ressurshfte-for-larere-i-grunnskoleopplaringen/)>.

10-year compulsory school. The curriculum elaborates the preamble to the Norwegian Education Act, it sets overall goals for training and includes the cultural and intellectual foundation for primary and secondary education.

In kindergarten, the focus has been on "mastery programs", in which children learn to be conscious of their own bodies and to be respectful towards others.<sup>228</sup> The purpose is partly to teach children how to protect themselves against sexual abuse through empowerment-techniques. Information about the sexual abuse of children is also given to parents in the form of brochures provided by Udir. Supplementary information is available on several websites.<sup>229</sup>

The schools decide independently whether or not they wish to teach about incest and sexual and physical abuse.<sup>230</sup> The Ombudsman for Children argues that the children should all receive necessary information through compulsory classes.

In addition, the Government informs children through the media. In fact, web portals run by the Ministry of Children, Youth and Family Affairs and the Health Directorate provide information about sexual abuse. The Ombudsman for Children has even raised awareness about the topic through a video-sharing website.<sup>231</sup> Several videos have been released informing the general public about sexual abuse of children and other articles in the UN Convention of the Rights of the Child. Besides, a great deal of children's books has been published. For instance, the former Minister of Justice, Knut Storberget, is author of a book about how adults and children experience violence and abuse.<sup>232</sup>

Furthermore, the Government cooperates with a multitude of organizations. The Norwegian Children and Youth Organizations Council (LNU) has published, with support

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<sup>228</sup> The Ministry of Children and Family Affairs, 'Strategi mot seksuelle og fysiske overgrep mot barn (2005-2009)', the Government, May 2005, viewed on 15 September 2012, <[http://www.regjeringen.no/nb/dep/bld/dok/rapporter\\_planer/planer/2005-2/plan-mot-seksuelle-og-fysiske-overgrep-m.html?id=462242](http://www.regjeringen.no/nb/dep/bld/dok/rapporter_planer/planer/2005-2/plan-mot-seksuelle-og-fysiske-overgrep-m.html?id=462242)> and Udir, 'Rammeplan for barnehagens innhold og oppgaver', January 2012, viewed on 21 September 2012, <<http://www.udir.no/Barnehage/Rammeplan/Rammeplan-for-barnehagens-innhold-og-oppgaver/>>.

<sup>229</sup> E.g. <<http://www.fug.no>>.

<sup>230</sup> The Ombudsman for Children, 'Brev fra Barneombudet til Kunnskapsdepartementet og Helse- og omsorgsdepartementet', April 2011, viewed on 10 September 2012, <<http://www.barneombudet.no/brev/2011/seksuelleovergrep/>>.

<sup>231</sup> <http://www.youtube.com/user/Barnekonvensjonen/videos?view=0>

<sup>232</sup> The Ministry of Justice and Public Security, 'Justisministerens tiltak mot overgrep mot barn', the Government, 19 November 2010, viewed on 11 September 2012, <<http://www.regjeringen.no/nb/dep/jd/tema/kriminalitetsbekjempelse/overgrep-mot-barn-/regjeringens-tiltak-mot-overgrep-mot-bar.html?id=495407>>.

from the Ministry of Children and Family Affairs, various information and guidance material that examines youth and sexuality, boundaries and violations.<sup>233</sup> Finally, the foundation “Det er mitt valg”, partly funded by the Directorate of Health, has developed an educational program on violence and sexual assault.<sup>234</sup>

iii. Experts have on several occasions pointed out the importance of preventive measures aimed at offenders and potential offenders. It has been emphasized that treatments should be created both for offenders who are motivated, seeking help on their own initiative, and for those who are convicted of sexual offenses against children.

In Oslo, the Institute for Clinical Sexology and Therapy (IKST) and Alternatives to Violence (ATV) offer treatments to anyone who fears they may commit a crime.<sup>235</sup> In Bergen, Trondheim and Kristiansand there are courses aimed at prisoners who already are convicted of sexual crimes.<sup>236</sup>

Treatment attempts in Bergen and Kuopio in Finland have shown that although it is difficult to document the effect of such programs, there is reason to believe that the offenders’ knowledge and experience obtained through treatments have a preventive effect on child abuse.<sup>237</sup>

Working preventively is a difficult task, regardless of the issue. In addition to the development of new strategies and initiatives that work, there is a pressing need to coordinate prevention efforts that are being implemented and to systematically evaluate the outcome and long-term effects of these measures.<sup>238</sup>

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<sup>233</sup> The Ministry of Children and Family Affairs, ‘Strategi mot seksuelle og fysiske overgrep mot barn (2005-2009)’, May 2005, viewed on 15 September 2012, <[http://www.regjeringen.no/nb/dep/bld/dok/rapporter\\_planer/planer/2005-2/plan-mot-seksuelle-og-fysiske-overgrep-m.html?id=462242](http://www.regjeringen.no/nb/dep/bld/dok/rapporter_planer/planer/2005-2/plan-mot-seksuelle-og-fysiske-overgrep-m.html?id=462242)>.

<sup>234</sup> For more information see <<http://www.determinnvalg.no/>>.

<sup>235</sup> The Ministry of Children and Family Affairs, ‘Strategi mot seksuelle og fysiske overgrep mot barn (2005-2009)’, the Government, May 2005, viewed on 15 September 2012, <[http://www.regjeringen.no/nb/dep/bld/dok/rapporter\\_planer/planer/2005-2/plan-mot-seksuelle-og-fysiske-overgrep-m.html?id=462242](http://www.regjeringen.no/nb/dep/bld/dok/rapporter_planer/planer/2005-2/plan-mot-seksuelle-og-fysiske-overgrep-m.html?id=462242)>.

<sup>236</sup> The Ministry of Children and Family Affairs, ‘Strategi mot seksuelle og fysiske overgrep mot barn (2005-2009)’, the Government, May 2005, viewed on 15 September 2012, <[http://www.regjeringen.no/nb/dep/bld/dok/rapporter\\_planer/planer/2005-2/plan-mot-seksuelle-og-fysiske-overgrep-m.html?id=462242](http://www.regjeringen.no/nb/dep/bld/dok/rapporter_planer/planer/2005-2/plan-mot-seksuelle-og-fysiske-overgrep-m.html?id=462242)>.

<sup>237</sup> Nasjonalt ressurscenter for seksuelt misbrukte barn, ‘Seksuelle overgrep mot barn- utvalgte temaer’, 2011, viewed on 20 September 2012, <<http://www.smih.no/Seksuelle-overgrep/seksuelle-overgrep-mot-barn>>.

<sup>238</sup> Glad, Øverlien & Dyb, ‘Forebygging av fysiske og seksuelle overgrep mot barn. En kunnskapsoversikt 2010’, NKVTS, 2012, viewed on 10 September 2012,

iv. Treatments facilitated by experienced practitioners take place at psychiatric polyclinics and treatment institutions, child welfare institutions, the Family Counselling, psychologists' and psychiatrists' private practices and sometimes at the Educational Psychological Service.

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Some child victims of sexual and physical abuse are not sufficiently protected from new violations and/or do not receive adequate care and are thus placed in foster homes or child welfare institutions in pursuance to the Child Welfare Act Section 4-6. Children who are victims of sexual abuse or violence, or have witnessed such abuse in their families, can receive help and treatment in Governmental Child Houses, see subsection II.2.h.xxvi. Experts with extensive experience welcome children and converse with them, their parents and families. The Child House may recommend and establish contacts with other local services. Also, it can cooperate with the Child Welfare Services, schools, health care services and other support services, and it can accommodate more extensive or prolonged treatment when necessary.

v. In 2005, the Ministry of Children, Equality and Social Inclusion (BLD) decided the Incest Centre in the county of Vestfold would operate a national help line for incest and sexually abused children and adults.<sup>240</sup> The line is connected 24 hours a day, seven days a week and seeks to help individuals to increase their sense of security and self-respect. Furthermore, BLD established in 2009 another free emergency help line for children and adolescents exposed to various forms of violence, abuse or neglect.<sup>241</sup> It operates when the Child Welfare Services' offices are closed. Concerned adults can also call this help line.

Any person acting on behalf of a public body has a duty of confidentiality according to the Public Administration Act Section 13.<sup>242</sup> However, according to the Child Welfare Act Section 6-7, all public authorities have a duty to provide the Child Welfare Services data when there is reason to believe that a child is being abused at home, or if they are subject to

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<[http://www.nkvts.no/biblioteket/Sider/Info\\_Forebyggingavfysiskeogseksuelleovergrepmotbarnenkunnskapsoversikt.aspx](http://www.nkvts.no/biblioteket/Sider/Info_Forebyggingavfysiskeogseksuelleovergrepmotbarnenkunnskapsoversikt.aspx)>.

<sup>239</sup> Nasjonalt ressursenter for seksuelt misbrukte barn, 'Seksuelle overgrep mot barn- utvalgte temaer', Senter mot incest og seksuelle overgrep i Hordaland, 2011, viewed on 20 September 2012, <<http://www.smih.no/Seksuelle-overgrep/seksuelle-overgrep-mot-barn>>.

<sup>240</sup> Landsdekkende telefon for incest- og seksuelt misbrukte, 'Om oss', viewed on 13 September, <<http://www.incest80057000.no/om-oss/>>.

<sup>241</sup> 116 111 Emergency Telephone for Children and Youths, 'About the Emergency Telephone', viewed on 10 September 2012, <<http://www.116111.no/Om%20alarmtelefonen>>.

<sup>242</sup> Act of 10 February 1967 relating to the procedure in cases concerning public administration.

other forms of serious neglect. The obligation involves a duty to provide information on their own initiative, and the obligation to provide information if the Child Welfare Services request it.

vi. There are many different forms of therapy to help children overcome their struggles caused by violence or sexual abuse inflicted upon them. These include individual, family and group therapy. Therapy techniques used are drawn from a wide range of psychological theories. Regardless of theoretical orientation, any remedial measures will depend on the circumstances of the abuse, the child's developmental history, the family situation and the social and cultural context.<sup>243</sup>

Most treatments will usually both explore the traumatic event (what happened and the child's understanding of this), the specific symptoms the child is struggling with, and how the event has affected the child's relationships with others. The programmes are aware of the possibility that the children could have sexual behaviour problems in the future. However, studies show that with the help and support from caring adults and good psychological interventions, many children who have been victims of violence or sexual abuse do well later in life.<sup>244</sup>

In the Health Personnel Act<sup>245</sup> Section 10 and in the Patient Rights Act<sup>246</sup> Section 3-2, patients have the right to receive information on their condition and the content and extent of the treatment they are receiving in order to properly participate in the medical discussions.

### III NATIONAL POLICY REGARDING CHILDREN

i. The political discussion in Norway is based on topics that are of current interest. During televised debates or in newspapers, the topics of sexual abuse and exploitation of children are not regularly discussed. In recent years the dominating issues have been the rising

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<sup>243</sup> NKVTS, Seksjon Barn og unge, 'Behandling av barn utsatt for vold eller seksuelle overgrep', 2007, viewed on 9 September 2012,

<<http://www.nkvts.no/tema/Sider/BehandlingavBarnutsattforVoldellerseksuelleovergrep.aspx>>.

<sup>244</sup> NKVTS, Seksjon Barn og ungdom, 'Seksuelle og fysiske overgrep mot barn og unge. Kunnskapsstatus revidert 2011', 2011, viewed on 15 September 2012,

<[http://www.nkvts.no/biblioteket/Sider/Info\\_SeksuelleFysiskeOvergrepBarUngeKunnskapsstatus2007rev2011.aspx](http://www.nkvts.no/biblioteket/Sider/Info_SeksuelleFysiskeOvergrepBarUngeKunnskapsstatus2007rev2011.aspx)>.

<sup>245</sup> Act of 2 July 1999 no. 64 relating to health personnel (the Health Personnel Act).

<sup>246</sup> Act of 2 July 1999 no. 63 relating to patients' rights (the Patients' Rights Act).

numbers of children with minority backgrounds in the Child Welfare Services<sup>247</sup> and parent's visiting rights<sup>248</sup>.

This being said, there are cases concerning sexual violence against children that receive much attention in the media. Examples of such cases are the so-called "Christoffer-case", and the most recent and on-going "Øygard-case". In the latter, the Mayor of the municipality Vågå is prosecuted for having had sexual intercourse with a 16-year-old girl (13 at the time when the abusive actions first found place). The family of the girl claims that the Mayor was a close and trusted friend.<sup>249</sup>

These cases are just a few examples of issues that occupy the news media from time to time. The media in Norway are, naturally, in many cases leading the political agenda. The Ombudsman for Children in Norway and several NGOs, such as Save the Children, SMI<sup>250</sup>, DIXI<sup>251</sup>, play an active part in creating news coverage on topics that are related to children's mental and physical health. These NGOs cooperate with various media to boost the focus on these issues.

A blog in *Aftenposten* (a nationwide newspaper) "Si ;D", offers an opportunity for children and adolescents to write and discuss issues that are of importance to the younger generation. The participants in the debate can write about any topic and the politicians are often active in responding the blog posts.<sup>252</sup>

**ii.** Various NGOs are actively involved with fighting sexual abuse of children by informing the society and reducing people's notion that this is a taboo. NGOs and public agencies try to highlight these issues by creating campaigns on these matters.<sup>253</sup>

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<sup>247</sup> T. Dyrhaug & T. Kalve, "Oslos mange ansikter gjenspeiles i barnevernet", Statistics Norway, 2012, viewed on 23 October 2012

<<http://www.ssb.no/vis/samfunnsspeilet/utg/201201/05/art-2012-03-07-01.html>>.

<sup>248</sup> O. Stokke and S. E. Kirkebøen, "Departementet vil endre barneloven", in *Aftenposten*, 11 October 2012, viewed 23 October 2012

<<http://www.aftenposten.no/nyheter/Departementet-vil-endre-barneloven-7014434.html>>.

<sup>249</sup> L. M. Gimse, 'Vågå-ordføreren tiltalt for seksuell omgang med mindreårig', in *Aftenposten*, 29 March 2012, viewed 23 October 2012,

<<http://www.aftenposten.no/nyheter/iriks/Vaga-ordforeren-tiltalt-for-seksuell-omgang-med-mindrearig-6795485.html>>.

<sup>250</sup> The Support Center for Victims of Incest (*Støttesenter mot Incest*).

<sup>251</sup> Resource Centre for Victims of Rape and Sexual Abuse (Ressurssenter for voldtatte).

<sup>252</sup> Editor: H. Haugsgjerd, Youth blog on the web site of *Aftenposten*, viewed on 22 October 2012,

<<http://www.aftenposten.no/meninger/sid/>>.

<sup>253</sup> More about campaigns, see subsection III. iv. below.

In recent years, one priority for Save the Children Norway has been to educate adults who work with children and adolescents, for instance in schools and kindergartens. Save the Children has worked towards a contingency plan that identify what the staff should do to detect and prevent violence and sexual abuse.<sup>254</sup> This is aligned with Art. 5 and 10 in the Lanzarote Convention dealing with recruitment, training and awareness rising of persons working in contact with children, and with national measures of coordination and collaboration.

An article based on statistics from Statistics Norway, documents a nationwide increase in the number of FTEs (Full Time Employment) in the Child Welfare. From 2010 to 2011 the amount of FTEs rose from 3525,8 to 4017, a rise in a total of 14 per cent. Much of this rise is due to earmarked funds allocated from the State.<sup>255</sup> In the state budget for 2011 the government earmarked 240 million NOK to the Child Welfare. The amount was for the major part allocated to help increase the number of staff members, but also to strengthen skill development among the staff.<sup>256</sup> In a Proposition 1 S (2012–2013) Yellow Book (Gul bok), a parliamentary decision on the state budget, it was suggested to earmark 205 million NOK to the municipal Child Welfare for 2013.<sup>257</sup>

The increase in the number of FTEs in the Child Welfare can be related to the rise in the number of children in the Child Welfare. The number in which children received assistance measures increased from 31.900 in 2000 to 46.500 in 2009, a total of 46 per cent.<sup>258</sup> The number has risen even more, to a total of 52.100 in 2011. Approximately 84 per cent of these were children who received assistance, while around 16 per cent received care measures.<sup>259</sup>

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<sup>254</sup> Editor: Ingrid K. Lund, 'Beredskapsplan mot vold og overgrep', Save the Children, viewed on 29 August 2012

<http://www.reddbarna.no/forstyr/beredskapsplan-mot-vold-og-overgrep>.

<sup>255</sup> Statistics Norway, 'Fleire tilsette og fleire barn i barnevernet', 27 June 2012, viewed on 21 October 2012, <<http://www.ssb.no/emner/03/03/barneverng/>>.

<sup>256</sup> Editor: H. Haugsgjerd, "Øremerker penger til barnevernet", in Aftenposten, 5 October 2012, viewed 23 October 2012 - <<http://www.aftenposten.no/nyheter/iriks/Oremerker-penger-til-barnevernet-5347955.html>>.

<sup>257</sup> Prop. 1 S (2012 - 2013).

<sup>258</sup> Editor: H. Haugsgjerd, 'Øremerker penger til barnevernet', in Aftenposten, 5 October 2012, viewed on 23 September 2012, <<http://www.aftenposten.no/nyheter/iriks/Oremerker-penger-til-barnevernet-5347955.html>>.

<sup>259</sup> Statistics Norway, 'Fleire tilsette og fleire barn i barnevernet', 27 June 2012, viewed on 24 October 2012 <<http://www.ssb.no/emner/03/03/barneverng/>>.

Cases of children with child protection who have been sexually abused and/or have been victim of incest in the period of 2007 to 2011 have increased according to numbers from Statistics Norway. The number of children in the age group 13 – 17, who have been subjected to sexual abuse/incest, has increased from 24 in 2007 to 51 in 2011. The numbers has increased from 18 to 41 in the age group 6 - 12 years, in the same time-period.<sup>260</sup>

These numbers indicate the effort and work the State and NGOs, in recent years, have put towards identifying and revealing individual situations. In order for the Government and the NGOs to raise the public awareness, these numbers are of vital importance. The outcome of such studies is useful when NGOs and the ministries, such as the Ministry of Children, Equality and Inclusion, are working on preparing propositions, which can later result in legislation.

**iii.** As seen right above, available statistics have shown an increase in the number of child victims. An article by Statistics Norway shows a thorough research conducted in the period 1980 to 2010. Parts of the article showcase the rise in the number of reports made about sexual abuse and violence against children. Since 2003 there have been reports of approximately 600 cases of child abuse annually in the age group 10 to 15 years. For children under the age of 10, there have, in average, been reported 80 instances of incest, and 160 instances of sexual contact annually.<sup>261</sup>

Amongst the crimes registered in 2009, 3 200 people were victims of sexual offences. 740 of these were reports of sexual contact with children under the age of 16. In addition, the reports contain around 1000 victims of rape or attempted rape, in which three out of four were in the age group 13-28 years old. Children are overrepresented in this category, most of which are under 16. 85 per cent of registered crimes to sexual crimes were females in 2009.<sup>262</sup> In 2010 this number rose to 87 per cent. The number of registered sexual crimes rose to 3 400.<sup>263</sup>

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<sup>260</sup> Statistics Norway, "Statistikkbanken", 2011, viewed 24 August 2012, <[http://statbank.ssb.no/statistikkbanken/Default\\_FR.asp?PXSid=0&nvl=true&PLanguage=0&tilside=selectvarval/define.asp&Tabellid=09078](http://statbank.ssb.no/statistikkbanken/Default_FR.asp?PXSid=0&nvl=true&PLanguage=0&tilside=selectvarval/define.asp&Tabellid=09078)>.

<sup>261</sup> S. Lid & R. J. Stene, 'Mindre utsatt – men hvem utsettes hvor', Statistics Norway, 2010, viewed on 26 August 2012, <<http://www.ssb.no/samfunnsspeilet/utg/201005/10/>>.

<sup>262</sup> Ibid.

<sup>263</sup> S. Lid & R. J. Stene, 'Kriminalitetsbilder i endring', Statistics Norway, 2011, viewed on 23 October 2012 <<http://www.ssb.no/vis/samfunnsspeilet/utg/201105/11/art-2011-12-05-01.html>>.



iv. Several campaigns are being made and promoted by NGOs and state organizations to highlight problems and difficult issues regarding children.

From 2008 until 2010, Save the Children ran a campaign called “Please Disturb” (“Vennligst forstyrr”). The aim of the campaign was to encourage adults to notify the police or other public authorities, in cases where they suspected that a child might be exposed to violence or abusive actions at home. According to Save the Children, following the campaign, the number of reports to the Child Welfare increased.<sup>264</sup>

During the spring of 2012, Save the Children organized the “Disturbance Weeks” (“Forstyringsuker”) for two weeks. The goal of the weeks (organised each year) is to focus on domestic violence, and promote the need for a healthy and safe upbringing. Rising awareness is also important during the Disturbance Weeks. Statistics suggest that approximately 8 per cent of Norwegian children are subject to violence from a parent.<sup>265</sup>

Dixi (Resource Centre for Victims of Rape and Sexual Abuse) is each year handing out the so-called Dixi Award. The award is given to persons or companies who work diligently to help victims of sexual abuse.<sup>266</sup>

In order to highlight the issue of incest, SMI (Support Centre for Victims of Incest) has created a commercial that currently runs on national television. The message at the end is translated to; “Children exposed to abuse are prematurely adult - if they do not get help”.<sup>267</sup>

v. The children's perspective in the law making process in Norway is represented by NGOs and state agencies that work to promote and maintain the rights of children living in Norway, e.g. Save the Children and the Ombudsman for Children. In many cases, the NGOs and state organs are cooperating with ministries of the Government. They are for example cooperating on the development of various reports, such as the Official Norwegian Reports (NOU) that seeks to provide the Parliament with knowledge before voting on a bill. The Government or the ministries appoint committees and working groups that investigate

<sup>264</sup> Save the Children Norway, ‘Vennligst forstyrr’, viewed on 3 September 2012, <<http://vennligst-forstyrr.campaign.webscape.no/?nid=10>>.

<sup>265</sup> M. Simonsen, ‘Fortsetter å forstyrre’, Save the Children Norway, 28 May 2012, viewed on 27 August 2012 <<http://www.reddbarna.no/nyheter/fortsetter-aa-forstyrre>>.

<sup>266</sup> Dixi, “Dixi award”, 2012, viewed 24 October 2012, <<http://www.dixi.no/dixi-award.76660.en.html>>.

<sup>267</sup> Web-editor: T. Berg Utheim, A commercial sponsored by Support Center for Victims of Incest, 2012, viewed on 24 October 2012 <<http://www.sentermotincest.no/reklamefilm-smi-oslo.html>>.

various matters in society. These committees and groups may consist of NGOs and state organisations whose primary goal is to ensure that the rights of children.<sup>268</sup>

NGOs and public organisations are lobbying with the objective of causing the authorities to make more assessments regarding issues that affect children. The Ombudsman for Children is a public institution and one of the main spokespersons for children and adolescents. Through various forums they provide children the opportunity to express themselves. Through the Youth Panel, the Ombudsman receives advices from adolescents writing about issues that are important to them. The Ombudsman is working closely with the decision makers on national and regional level, and can therefore provide them with important information so that decision makers can preserve the interest of children.<sup>269</sup> The Ombudsman is also stressing the importance of listening to children when important decisions about them are being made. The Youth Panel, and “Si ;D” – the Aftenposten blog, are central areas of which children can express their views. These are also platforms that politicians frequently use.<sup>270</sup> The duties of the Ombudsman for children are written in the Commissioner for Children Act of 6 March 1981 no. 5 relating to the commissioner for children Section 3.

In cooperation with Save the Children, the Parliamentary Network for Children’s Rights is arranging “Children’s Question Hour” in the Parliament. This gives children the opportunity to ask questions directly to the ministers about matters that concern them.<sup>271</sup>

**vi.** Save the Children is one of the main NGOs playing a role in protecting and maintaining children's rights in Norway. As mentioned about, they are actively involved in creating various campaigns. They also meet up for consultation in the parliament on topics regarding children, and cooperate with the government in the preparation of reports.<sup>272</sup>

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<sup>268</sup> Editor: M. B. Espinoza, , ‘Norges offentlige utredninger’, The Ministry of Children, Equality and Social Inclusion, viewed 24 October 2012 ,  
<<http://www.regjeringen.no/nb/dep/bld/dok/nouer.html?id=1809>>.

<sup>269</sup> The Ombudsman for Children, ‘Hva er Barneombudet’, viewed on 20 August 2012  
<<http://www.barneombudet.no/ombarneombudet/>>.

<sup>270</sup> The Ombudsman for Children, ‘Ungdomspanel’, viewed on 22 October 2012,  
<<http://barneombudet.no/ungdomspanel/>>

<sup>271</sup> Save the Children Norway, ‘Barnas spørretime på Stortinget’, viewed on 24 October 2012  
<<http://www.reddbarna.no/vaart-arbeid/barn-i-norge/barns-medvirkning/barnas-spoerretime-paa-stortinget>>.

<sup>272</sup> Save the Children Norway, ‘About u’, viewed on 20 August 2012  
<<http://www.reddbarna.no/om-oss/organisasjonen>>.

SMI is another NGO working to better the conditions for children and adolescents who are victims of sexual violence. The purpose of SMI is to help and support victims of incest. SMI is also working towards the goal of preventing incest, by exposing the problem and opposing the conditions in the society that legitimise, build and maintain sexual abuse of children. SMI has a broad view on the definition of incest. They consider incest not only to be abuse committed by family members; it is enough that the persons engaging in incest are trustees to children.<sup>273</sup> SMI has offers directed towards men who are victims of incest. About 7 – 14 % of all men have been victim of sexual abuse by someone they know, according to statistics from SMI.<sup>274</sup> Finally, SMI offers an alarm phone for those who are victims of sexual abuse, see subsection II. 4. v. p.<sup>275</sup>

DIXI is a resource centre for victims of rape and sexual abuse. They provide information and help create conversation groups for victims and their families. The NGO engages in awareness rising work, and publishes information about rape and sexual abuse in schools and in local communities. They offer free legal aid to victims. Their offers are available to children, adolescents, adults, men and women.<sup>276</sup>

The law making process in Norway is time-consuming and often very complex. The Ministry of Children, Equality and Social Inclusion is in many cases sending bills out for comment/consultation. The Ministry will consider input from concerned parties (public and private institutions, NGOs, etc.) when they are working on a proposal. The government will invite NGOs, such as Save the Children, to write and answer consultation reports.<sup>277</sup> During the consultation process, inputs to research, statistics, etc. can be vital for the outcome of the report. The reason for “out for consultation” process is the desire to better evaluate the consequences of government measures. Such consultations may result in regulations thus giving NGOs the opportunity to engage in the law making process.

## IV OTHER

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<sup>273</sup> Web-editor: T. Berg Utheim, ‘Om SMI – historie og arbeidmetoder’, Support Center for Victims of Incest, viewed 20 August 2012, <<http://www.sentermotincest.no/Om-SMI/om-smi.html>>.

<sup>274</sup> Web-editor: T. Berg Utheim, “Incestutsatte menn”, Support Center for Victims of Incest, viewed on 28 August 2012, <<http://www.sentermotincest.no/Malgrupper/incestutsatte-gutter-og-menn.html>>.

<sup>275</sup> 116 111 Emergency Telephone for Children and Youths, op. cit.

<sup>276</sup> Dixi, ‘About Dixi’, viewed on 20 August 2012, <<http://www.dixi.no/>>.

<sup>277</sup> NOU 2011:20.

The legal issue of most relevance for the data provided in this paper is the status of the new Penal Code of 2005. Norwegian legislation is not, strictly speaking, in accordance with the Lanzarote Convention. This is because the Penal Code of 2005 has not entered into force. Norway will not ratify until national legislation is in conformity with the international obligations of the Convention. In other words, the most relevant issue for this report is the consequence of IT-complications. It is not confirmed when the police's computer system will be able to implement the new Penal Code.

Moreover, some argue that the real challenge Norway faces when it comes to protecting children from sexual violence is not the legislation, but rather the practice in the public administration and in the courts. This is another legal issue that might influence the status of children's rights.

From a theoretical standpoint, the legislation seems to grant children solid legal protection. This, however, tends to be true as long as the interest of the child is not in conflict with the interest of adults. In child welfare-cases and in criminal cases, children are considered much less credible than adults. It is difficult to realize and accept that a child has been sexually exploited by, for example, a parent. In many cases there is no evidence (most offenders do not record and distribute material that documents the abuse); resulting in a situation where the most credible statement prevails.<sup>278</sup> This illustrates the child's difficult situation in practice.

Another example of the disconformity between legislation and practice is the delay of judicial examination of victims in the Children's Houses, see subsection II. 2. h. xxvi. The project has received positive feedback, but the exceeding of the time limit regarding examination of child victims, by an average of 57 days, is a drawback.

A last Norwegian characteristic, from a European perspective, is the size and density of the population.<sup>279</sup> Norway has been criticised by the UN Child Committee for the fact that some municipalities are not offering services at the same level as elsewhere, see subsection I. 1. iii. A reason for this inequality may be the fact that some rural parts of the country have a very

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<sup>278</sup> These views were collected during an interview with T. W. Totland, 'Legal and political particularities affecting children's rights in Norway' [interviewed by O. V. Engeland], 7 October 2012, Skype.

<sup>279</sup> As a matter of fact, Norway has the third lowest population density in Europe (15 persons pr. km<sup>2</sup>). Only Russia and Iceland have a lower population density. Source: Index mundi, 'Population Density - Europe', 1 January 2012, viewed on 15 October 2012, <<http://www.indexmundi.com/map/?v=21000&r=eu&l=en>>.

small population. This makes it difficult, due to human and financial resources, to offer the same services as in the bigger cities. It is therefore plausible that this factor may affect the administrative practice, for instance the Child Welfare Service, public health care and schools, i.e. the institutions that are supposed to ensure children's rights.

## V CONCLUSION

This legal report has sought to investigate how the Norwegian legislation protects children from sexual violence. The provided questions have formed the framework of our investigation. As a result, some parts of this research might have deserved more attention than what the guidelines allowed. Due to the large amount of questions, the conclusion is not able to discuss all findings. Therefore, only the most critical points will be summarized here.

First, Norwegian legislation does emphasize human rights. The Human Rights Act has incorporated, *inter alia*, the UN Convention on the Right of the Child (CRC) into national law. A widespread view is that the legislation, as a whole, establishes an adequate legal protection for children.

Some, however, remain less satisfied. The United Nation Child Committee has pointed out several conditions that Norway should improve. Besides, the Government has not signed the third protocol of the CRC which grants children the right to complain about the State's compliance with the Convention. Finally, and most important to our research, is the fact that Norway has waited, at the time of research, five years to ratify the Lanzarote Convention.

The substantive criminal law section of the report is marked by the fact that Norway is in something of a transition period on this field. A new penal code was passed in 2005 by the Parliament, but has not yet entered into force due to technical challenges relating to the introduction of a comprehensive act into the police's computer system.

The Lanzarote Convention requires a few amendments of the current Penal Code of 1902. The clearest example of disconformity is the prohibition of attending pornographic performances involving children. The Penal Code of 1902 does not fulfil the Convention at this point, resulting in a new provision in the Code of 2005.

Furthermore, Norway's compliance with other requirements is more debatable. The report mentions the attribution of criminal liability relating to acts that involve child pornography.

The research found that it is uncertain whether the Norwegian legislation's terms "delivers to another person", "publishes" and "in any other way attempts to disseminate", comply with the Convention's term: "offering or making available". Also, it is unclear whether the term "systematically acquaints himself" equals the term "knowingly obtaining access", expressed in the Convention. In order to prevent uncertainties on such a sensitive field of law, the legislative body has amended ambiguous wordings of the 1902 Penal Code that relate to the Lanzarote Convention. The new provisions appear in the Penal Code of 2005.

For the reasons mentioned above, Norwegian legislation is not, *at present*, in absolute accordance with the Lanzarote Convention. The new Code of 2005 is assumed to meet all requirements of the Convention, implying that conformity will occur when ratified.

Moreover, it has been found that, with regard to some specific matters, the Norwegian legislation offers more protection than the Convention. One example is the fact that sexual depiction of a person who *appears* to be less than 18 years of age is, according to Norwegian law, classified as child pornography.

In addition, our research points out a conflict between national statutory law and the principle of innocence that Norway is internationally bound by. According to the Penal Code, criminal liability is objective when the child is under 14 years of age. This is nevertheless in conflict with the presumption of innocence found in the ECHR. The case was brought to the Supreme Court where the provision was disapplied. As a matter of fact, the effect of precedence causes the provision to be set aside also in future cases.

Further, it has been underlined that the presence of ideal concurrence is particularly present on this field. Criminal offences are typically committed by a person close to the child, meaning that the sentence will reflect the presence of several crimes, e. g. rape, intercourse with an under-age person and incest or abuse of a position of confidence.

Some factual circumstances, influencing this field of law, have been pointed out. First, sexual abuse of children is to some extent a taboo. Besides, some children might feel committed to the perpetrator and fear to harm its own and other people's future. These factors can cause reluctance to use the public services. Measures dealing with this issue are in place. A court can, for instance, decide to close the doors of the trial and the court ruling can be made unavailable to the public in order to serve the best interest of the child.

A second substantive consideration on this field, affecting the legislation, is the special needs of children. Children are exceptionally vulnerable and may therefore require flexible

procedures. The Norwegian courts allow examination to take place on the child's terms by releasing him/her from the duty of testifying in court. The child is placed under observation of an expert, the Child Welfare Service will be involved and the Children's House will provide safe surroundings.

The report elaborates on the Children's Houses' important range of services. Experts from a variety of professional background can here merge their knowledge and preserve the best interest of the child. The purpose of this initiative was to create a coherent programme, placed in *one* institution, which supports the child throughout the different stages of a recovery. This way, the children avoid the stress related to changing conditions, for example new specialists, new contact persons and new institutions.

The report elaborates on the promotion and monitoring of children's rights by NGOs and state organs. These entities are important sources of information, they offer several services and they take active part in the public debate, for instance in the legislative process.

One such state organ is the Child Welfare Service. They can, if necessary, initiate deprivation of parental responsibility. Their main task is to detect and grant assistance when a child, or a family, is in need. Children have limited ability in pleading their own case. Adults should take on this responsibility, but sometimes their motivations, or opinion about the child's best interest, lead to results that in fact do more harm than good. The parental right to access may be one such example. Even though one is innocent until proven guilty, spending time with an accused father is not the most urgent need of a child. The controversy on this specific matter is demonstrated by the on-going discussions in Norway these days. The debate is about the requirements that must be met in denying parental visitation.

We have seen that the police play a fundamental role. The activity of Kripos is one of the State's main tools in the fight against exploitation of children. This special unit is part of an international network and has developed several computer programs that are crucial when investigating criminal cases. The expanding use of technology amongst children, reducing the parent's control, creates a pressing need for certain surveillance measures by the authorities.

The internet has been a rapidly growing arena for paedophiles in the last decade, creating a need for adaptability within the police. Kripos has tried to adapt to this new reality by, *inter alia*, developing a filter that gives Internet users a warning before entering an illegal web page. Moreover, the dangers relating to chatting have been considered by the legislative

body. As a result, arranging a meeting with a child may be, depending on the purpose of the meeting, illegal even though no criminal act has been executed. These two examples manifest that crime prevention on this field strives to, and needs to, keep up with developments in society.

The report also discusses measures taken by the State towards the offenders. A convicted individual may be deprived the right to hold a certain position, and their sentence can contain conditions, for instance mandatory psychological therapy.

Furthermore, there is a trend that sexual offences are subject to longer sentences. This is prominent in the Penal Code of 2005. Also, the definitions of sexual offences have expanded in order to cover more situations. The described development reflects an evolving policy towards the crimes in question. Society has become more aware of the problem, affecting the general public opinion and causing politicians to move towards stricter penalties.

In the Norwegian Correctional Services (“Kriminalomsorgen”), there is a widespread conception that prison is a place for rehabilitation, rather than retributive punishment. One can argue that harder punishments will not make a difference. Sexual abuse of children is so stigmatized that higher prison sentences are not likely to have any further deterrent effect. However, the sentence may say something about how much we value our children and express a general attitude towards the crime.

Finally, the legislation on children’s rights is a result of conflicting interests. The best interest of the child must of course be strongly emphasized, but other factors should be considered too, e.g. the principle of innocence and the right to privacy. Children are, generally speaking, not able to preserve their rights; hence they need a system that takes their particularly fragile position into account. We have seen that the Norwegian legislation is adjusted to this vulnerability in many respects. The report finds grounds to argue that the level of legal protection of children against sexual violence is relatively well developed despite several issues mentioned above. This overall assessment should nonetheless be, as pointed out in Chapter IV, moderated by the fact that there is a difference between theory and practice.





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**Academic Advisor:**

Małgorzata Dziewanowska - University of Warsaw

**National Coordinators:**

Alicja Dżuryk and Barbara Marlewska

**National Researchers:**

Alicja Dżuryk

Monika Florczak

Patrycja Karłowska

Wiera Kupczanka

Marta Łukasiewicz

Barbara Marlewska

Agnieszka Mierska

Zuzanna Nowakowska

Jakub Wieczerzak

Łukasz Witkowski

**Translators:**

Maria Chimiak

Natalia Cieśliewicz

Jakub Sekulski

Jakub Chlebowski

Aleksandra Czubek

Monika Florczak

Barbara Marlewska

Alicja Dżuryk

Łukasz Witkowski

## I INTRODUCTION

### 1 GENERAL

i. Legal equity in Polish legal order has its origin in Constitution as one of the constitutional norms (article 32 of Constitution), and in such international agreements as United Nations Charter (article 55), European Convention on Human Rights and Fundamental Freedoms (article 5) or the Treaty of European Union (article 2) and in each of the ratified by Poland agreements. Poland, as a Member State of the EU is obliged to implement the European directives, including the directive on equality, what the result of is the new act on equity that came into force on 1st January 2011<sup>1</sup>

The legal equity is one of the foundations of our democracy. Article 23 of the Constitution states, that everyone enjoys legal equity and should be treated equally by the public authorities.

The matter of equity, defined so clearly in the principles of constitution, comes, unfortunately, not always into the practice. For this purpose it is necessary to distinguish two terms: „equality in law” and „equal justice under law”. The equality in law appears in the level of creating law, but the equal justice under law means the equity while applying this law. In order to avoid the situation of discrimination under law, means unjustified and unequal treating the citizens during the process of applying this law, Polish authorities took steps to call, in the way of draft act, the Ombudsman for Combating Discrimination, but in June 2012 the attempts were blocked by the Legislator Commission<sup>2</sup>, which justified its opinion with argument, that creating this institution would be a breach of Constitution, because the range of activity of the Ombudsman for Combating Discrimination would collide with the range of competences of Ombudsman for Citizens' Rights.

The Ombudsman for Citizens' Rights is constitutional, independent organ of legal protection, which acts on the basis of Constitution of RP (article 212) and Act on Ombudsman for Citizens' Rights. His task is to uphold the human and citizens' rights, defined in the Constitution and other legal principles.

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<sup>1</sup> Act from 3<sup>rd</sup> December 2010 on implementing some rules of EU in case on equal treatment

<sup>2</sup> <http://www.sejm.gov.pl/sejm7.nsf/komunikat.xsp?documentId=B54BD1927B809C9DC1257A2C004873FB>

ii. Family is an important value of our society. The way and the efficiency of its protection have significant impact on the feeling of citizens' stability and trustiness to the state, its representatives and the law stated by them. The good law takes care on the family as autonomous, basic social unit.

There is a lack of legal definition of family in Polish legal order, but in the jurisdiction of the Supreme Court<sup>3</sup> we can find, that under the term of „family” in Polish legal order could be understood spouses, their children (their own, a spouse's children, children adopted for their upbringing in the substitute parents, the children under the special legal protection of the state). It is also not to be omitted that many families are not based on the marriage on the parents, but on the concubinage.

The legal protection of the family is guaranteed but the Constitution (article 18) which states, that: “[...],[...] marriage, as the matrimony of a woman and a man, family, maternity and the parentship is under the special protection of Republic of Poland”. This legal protection is moreover precised in the principles of special acts, inter alia in the Code of Family Law<sup>4</sup>, and in the documents of international law, like e.g. Convention on Children's Rights, and in the documents of international law, like e.g. Convention on Children's Rights<sup>5</sup>, which precises the attitude of a state to the matter of family and children's rights.

Every family, as well as their children, have right to state's assistance. Article 71 point 1 of the Constitution states, that the state in its social policy and economy should always take into account the good of family. *„The families in difficult economic and social situation, especially the large and single – parent ones; have right to the special assistance of the public authorities”*<sup>6</sup>

In addition, children are protected from any forms of violence (Constitution, article 72 paragraph 1).

*„The Republic of Poland shall ensure the full protection of children's rights. Everyone can demand from the organs of public authority the protection of a child from violence, cruelty, abuse and demoralization”*<sup>7</sup>

In Poland a serious danger for families is rising rate of unemployment<sup>8</sup>, which in August 2012 was about 10,1 %. The higher rate of unemployment contributed into the more and

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<sup>3</sup> Sentence SN from 13 April 2005, IV CK 648/04

<sup>4</sup> The Family Code from 25<sup>th</sup> February 1964

<sup>5</sup> [http://www.unicef.org/magic/resources/CRC\\_Polish\\_language\\_version.pdf](http://www.unicef.org/magic/resources/CRC_Polish_language_version.pdf)

<sup>6</sup> Constitution of the Republic of Poland from 2<sup>nd</sup> April 1997

<sup>7</sup> Constitution of the Republic of Poland from 2<sup>nd</sup> April 1997

more often emigration in material purposes of the members of families (even the adolescent children)<sup>9</sup>, what puts the family relations into the danger of weakening. It leads to the phenomenon of single – parent family, where only one adult person is responsible for the entire house – keeping matters. If the relationship of parents does not survive the test of long – distance, what happens quite often, and the partners come into new relationships, it comes to the phenomenon of patchwork – family. Such a situation is extremely difficult for the children, who can have some difficulties in accepting their new family, what also requires the assistance of public authorities.

The term of family stays in close relation to the term of marriage, the socially accepted relation of woman and man.

Nowadays, people more and more seldom decide to get married,<sup>10</sup> what is considered as a departure from the rules of catholic tradition, which promotes the idea of marriage. The Catholicism is deeply inrooted in Polish tradition and has influence on the common feeling of duty and buiding a family in the sense of doctrine of the Roman Catholic Church. The tradion teaches the Poles to ive in accordance with their common – sense and the religion. The decreasing number of marriages shows, that we can observe in Poland the greater belief in one's strenght and departing from the religion. It appears at the same time, that in some cases not – getting married by partners places the family in more – favoured position, e.g. in case of getting a place for a child in a nursery or kindergarden. The legal aspects of the civil (or concordate) marriage are regulated in the Code of Family Law, which states, that the person who has not turned 18 cannot get marries, but the legislator introduces the exeptions from that principle. According to the current regulation, a person, who wants to get married before age of 18 has such a possibility in case of submitting the motion in Court for Family Matters. The Courts can permitt the woman before 16. To get married, if the circumstances taken into account while looking into the motion and accepted, would influence the good of a family in a positive way. One of the most common conditions is the woman's pregnancy if she decides to marry a man, who is the father of the baby.

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<sup>8</sup> [http://www.stat.gov.pl/gus/5840\\_1487\\_PLK\\_HTML.htm](http://www.stat.gov.pl/gus/5840_1487_PLK_HTML.htm)

<sup>9</sup> <http://wpolityce.pl/wydarzenia/33989-rzeczpospolita-zagranica-przyciaga-po-fali-powrotow-do-kraju-z-emigracji-polacy-ponownie-decyduja-sie-na-zycie-za-granica>

<sup>10</sup> <http://www.bibula.com/?p=26413>

Moreover, the woman getting married gets the full capacity to perform legal acts, which, in case of not getting married, she has to achieve, the age of 18.

In order to protect the good of a family, the legislator introduces into the Polish legal system the principle, which states the wife's pregnancy makes the husband unable to turn to a court with a motion of invalidating the marriage.

**iii.** In previous periods Poland didn't have the institution of Ombudsman for Children's Rights, but it does not mean that the state was unaware of children's rights. The representatives of our state took part in the discussions around the Convention on Children's Rights, which was adopted in 1989 during the UN General Assembly. The Convention was ratified by Poland in 1991. The first Ombudsman for Children's Rights was called in 2000 on the basis of Article 72 of the Constitution. Currently, the children's rights are protected on the basis of the Article 72, special acts of the Ombudsman for Children's Rights and international agreements, e.g. Convention on the Rights of a Child. Article 72 states, that „Republic of Poland provides full protection of the children's rights, protects them from violence and cruelty.

The Act on Ombudsman for Children's Rights defines the role of Ombudsman for Children's Rights. The Ombudsman must „uphold the children's rights, act for protection of children's rights in respect of rights and duties of parents” (article 1)<sup>11</sup>

Every child has some special rights. They are, for instance, right for social protection and right for the proper standard of living. The law guarantees every child safe development till it becomes an adult person and is free and conscientious enough to take decisions and responsibility for them. Good law supports parents in preparing children for getting duties and coming into adult life.

Obviously, the best care taker for every child is its parents. Unfortunately, it happens that the parents are absent or denied parents' rights. In order to provide child the proper care, the legislator decided to give the possibility of appointing carer. According to the Article 154 of Code of Family Law the carer has a child in his care and serves him the needed help. The carer can be appointed by one of the child's parents (if not denied parent's rights), it can be

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<sup>11</sup> Ustawa z dnia 6 stycznia 2000 r. o Rzeczniku Praw Dziecka

one of the child's relatives or a person dear to a child. In case of lack of such a person, the court asks the unit of social care system which takes care on juveniles.

Children are endangered on being abused by adults. There are many cases, when the children were forced to begging. The Ombudsman for Children's Rights, having in mind such cases, condemned these delinquencies, recalling article 32 of the Convention on the Rights of a Child, which obliges Poland to „to protect the youngest from, inter alia, economic abuse or doing a work, which could be dangerous or collides with education.<sup>12</sup>

**iv.** Talking about Polish obligations coming from being a member of various international organizations, which deal with human rights and children rights, we can discuss sever legal documents, that are especially important.

At the very beginning we should talk about Declaration of Children Rights, adopted on 20<sup>th</sup> November 1959 by General Assembly UN. It was not the first binding document for the member states of UN, but was some kind of kick – off for the further for activity of UNICEF and set the direction for Convention on Children Rights, adopted by General Assembly UN in the 30<sup>th</sup> anniversary of amendment of the Declaration on 20<sup>th</sup> November 1989, which this time was document binding its parties. The Convention was ratified after permission expressed Sejm in 27<sup>th</sup> September 1990, President of Republic of Poland on 7<sup>th</sup> July 1991, becoming the part of national legal order. The Convention is considered as one of the most important achievements in the area of protection of children rights, because the proposition of amendment of this document and its project was submitted to Commission for Human Rights Protection by Poland in 1978. The text of Convention included the greatest catalogue of children rights and has been accepted by 192 countries in the world. Becoming a party of the Convention, Poland made some reservations concerning general matters related to the right of a child to know his genetic origin, expressing its own will, protection from abuse and political freedom. Despite these reservations, the text of the Convention became a part of legal system, binding citizens and legislative power.

In relation with the change of system and necessity of introducing into legal system many changes in Polish legal system and adjusting of current legal order to the requirements of democratic state of law, the Convention became a tip for the legislator, and its statements

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<sup>12</sup>[http://www.brpd.gov.pl/wystapienia/wyst\\_2012\\_07\\_03\\_msw.pdf](http://www.brpd.gov.pl/wystapienia/wyst_2012_07_03_msw.pdf)



influenced modification of many legal acts. The report on execution of the Convention submitted by Poland in 1993 to Committee for Children Rights Protection UN was criticized. The words of critics were expressed in the Report of Committee adopted in 209<sup>th</sup> meeting on 27<sup>th</sup> January 1995.

Although not every recommendations of the Committee have been taken into account by the legislator, basing on these suggestions, it introduced the article 40, 48 and 72 of the Constitution of Republic of Poland, make novelization of the act from 7<sup>th</sup> January 1993 on planning family, protection of human fetus and conditions of possibility of terminating of pregnancy and the act from 25<sup>th</sup> February 1964 – Family Code. On the 6<sup>th</sup> June 1997 the new Penal Code came into force, which contained the chapter regulating crimes against family and custody as well as sexual crimes.

v. The European law regulates the matter of children rights and their protection in a very detailed way in many legal documents. To the most important ones belong: European Convention on Human Rights, European Strategy for Children, published by Council of Europe in 1995, European Convention on application of children rights from 1996, Draft Decision of Council 2004/68/WSiSW from 22<sup>nd</sup> December 2003 on combating sexual abuse of children and children pornography, replacing the mentioned before decision of the Council. The Directive obliged every the MS to implement it into their national legal system till 18<sup>th</sup> December 2013, creating the need for introducing some changes in some legal acts in Poland. The state of legislative works today is, unfortunately, not the best result. In August this year, the Ministry of Justice as answer to motion on giving information of the object of implementation of the Directive, said that „due to constant evolution of obligations coming from the European law in the area of combating sexual abuse of children (except from directives 2011/93/UE and Lanzarote Convention), and having in mind the need for avoiding too often changes in codification, the project of novelization, that enable full coordination of Polish rules with the duties coming from international instruments will be ready in 2012”. It has been also pointed out, that the partial transposition of the directive is project of novelization of Polish Penal Code, which is being prepared by Commission for Codification of Penal Code and is the object of public consultations. The proposed changes, as the Ministry informs, are to „improve the protection of children, which are victims of sexual crimes and human trafficking. (Project of the article 185a and 185b of the Code of Criminal Procedure.)”. In relation to this information it is worth underlining, that the date of beginning of works on implementation of the directive is doubtful. The start of works in the

last one fourth of 2012 (and it is relevant, as it was mentioned before, that the information was passed in the middle of August 2012) lets to suppose that to keep the date (and it is necessary to take into account long time of *vacatio legis*, required in this kind of cases), the projects of novelization will be created quickly, the consequence of which will be lack of public consultations. It can appear, that the changes will not cover the real needs and they will not be efficient protection from sexual abuse of the youngest citizens.

Coming back to the Directive, we should mention about undoubtedly the controversial article 25, which obliges Member State to monitor websites in order to control information published on them and blocking the ones, which contain pornographic or pedophilic materials. The duty of each legislative body of Member State is introducing changes in the already existing legal documents (in Poland the right act in this area is, inter alia, act Law of Telecommunication). Implementation of the article to the national legal system is difficult, because it requires from the operator knowledge about the information supplied by users, and law does not allow to do so, because such behavior of operator would breach rights protecting personal data and could result with breach of law of other subject in case of blocking also other, legal, materials. Poland belongs to a group of states, which do not have institution controlling information publishes in internet, because creating such a body requires the necessity of spending much money, what the state cannot at the moment afford.

The subject of the last point of the matter is the Convention on protection of human rights and fundamental freedoms that came into force 3<sup>rd</sup> September 1953. Its task was to guarantee practical obeying of rights included in General Declaration of Human Rights from 1948. On the basis of it was established European Court of Human Rights, which deals with claims on violations of principles of European Convention on Human Rights. Coming into force of this Convention is very important, because it allows citizens of MS to claim all the actions of organs of national administration violating human rights. The Convention is not a remnant of the past, thank to unique institution of additional protocols, which complete it efficiently, it does not contain expired rules, but introduces relevant changes e.g. total prohibition of capital punishment, which is probably the issue that protects the most value – human life. The most significant consequence of accepting Convention is guarantee of possibility of protection of the rights covered by the Convention and its Protocols, what is an additional control of organs of public administration and completes the available in every Member State list of legal instruments – tools of reaction to violation of law.

## 2 THE LANZAROTE CONVENTION

i. Poland has signed The European Convention of Human Rights on the 26th of November 1991, on the same date that has joined The Council of Europe. The Convention was ratified on the 19<sup>th</sup> January 1993 and on the same day it has come into force. Since 10<sup>th</sup> October is a site of protocols number 1 and 4 to The Convention, since 1<sup>st</sup> November 2000 of protocol number 6, since 1<sup>st</sup> March 2003 of protocol number 7. Protocol number 12, treating about discrimination was not signed by Poland yet, although protocol number 13 was signed on 3rd of May 2002 but wasn't ratified yet. Moreover, Poland has ratified and signed all protocols to The Convention, treating about procedural issues.<sup>13</sup>

ii. Poland has signed The Lanzarote Convention on the 25th October 2007 and is preparing to ratify it<sup>14</sup>. Poland has not introduced any amendments to The Convention.

iii. Poland is planning to ratify the Convention, however to do so it has to introduce a lot of amendments to the national legislation. Currently is preparing to ratification by introducing changes to the Penal Code.

Convention has been signed for each child to have equal means of defense, to prevent and fight against using and wicked behaviors towards children in sexual means. The Convention indicates requirements, which have to be fulfilled by the countries which have signed the Convention, to provide adequate protection towards kids. Immediately after signing the Convention Poland has started proceedings in the field of adjusting Polish law to requirements of The Convention.

The first change occurred in 2008, it has given people who were victims of sexual act in their childhoods, after becoming adults, the possibility to disclose information about a crime committed, which would launch criminal proceedings. A victim will be able to warn about the crime within 5 years from the day of his 18<sup>th</sup> birthday. However the question remains, whether 5 years is a long enough period of time. There were voices for extending this period to 10 years or to decline the possibility of crime expiration, according to article 200 of Penal Code. The arguments standing for such regulation were that in majority of cases, using kids

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<sup>13</sup> <http://www.msz.gov.pl/Regulacje,prawne,11644.html>

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[http://www.mpips.gov.pl/userfiles/File/Spoleczne%20Prawa%20Czlowieka/EKS/X\\_Sprawozdanie\\_070710.pdf](http://www.mpips.gov.pl/userfiles/File/Spoleczne%20Prawa%20Czlowieka/EKS/X_Sprawozdanie_070710.pdf)

in sexual way is caused in their familiar environment and after reaching complete independence, victims are able to deal with their past. But such kind of independence is usually a fact after graduating or giving birth to a child, which can take place later than in the age of 23.<sup>15</sup> However, finally the decision taken is that 5 years is period of time long enough. The change was regulated in a legal act from 24th October 2008, which is the way in which Penal Code has partially adapted to requirements article 33 of the Convention. Article 101 §4 has been addend.

In the draft of regulation, introducing amendments to Penal Code, which at the moment is being proceeded to the adoption by parliament; this article is going to be supplemented by the new type of crime which is grooming, introduced to Polish Penal Code later. Moreover, on the 26<sup>th</sup> of July as taken place the first reading of the act. The act is going to include the crime of grooming (article 197 of Penal Code) to catalogue of crimes which are not considered as expiring. Draft of a new law was proceeding to Extraordinary Committee, responsible for changes in codifications.<sup>16</sup>

In the same regulation, changing Penal Code from 2008 the term „pornography” has been changed as well in additional article 202 § 4b, after this amendment shall it also include electronically generated, realistic visions of people (including minors) in situations involving pornography.<sup>17</sup>

On the 8th of June 2012 another amendment of Penal Code has been introduced, adapting it to the requirements of The Lanzarote Convention. Grooming has been penalized as follows in article 200a.

Thanks to this change, Polish Penal Code is now consistent with article 23 of The Convention, treating about children solicitation and seduction for sexual aims, via information and communication technologies. This article obliges the parties to undertake any means necessary to punish intentional propositions towards children provided via information and communication technologies and propositions of meetings or undertaking any other activities leading to sexual abuse or committing rime of children prostitution. Poland, after introducing this amendment, punishes aforementioned behaviors whereas

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<sup>15</sup> <http://www.jakubspiewak.pl/2011/03/23/przedawnienie-przestepstw-seksualnych/>

<sup>16</sup> <http://www.dkblog.pl/2012/07/26/przestepstwo-zgwalcenia-wylaczenie-instytucji-przedawnienia-zmiana-trybu-scigania-analiza-projektow-ustaw/>

<sup>17</sup> Ibidem.

before those amendments police could have undertaken actions only when it came to sexual harassment. Act amending Penal Code has also added article 202b.

**It leads to situation that all statements which were placed for example in the media, which were about to indicate that pedophilia is positive phenomenon became illegal, and their authors might be lead to legal responsibility.<sup>18</sup> Authors of introducing this article claim that there is no such a thing as positive pedophilia. And there is no way of positive way of hurting anybody.<sup>19</sup> They claim that promoting “positive pedophilia” is closely related to grooming, which is in Poland, since this amendment, a regular crime.**

What is more, article 197 §3 of Penal Code, treating about rape on minors below 15 years, has been changed and became qualified as a crime and perpetrator who commits such act will be punished by imprisonment, for not less than 3 years. However protection of harmed child hasn't been improved, because before addition of 3 § to this article, the crime of rape has been punished ex officio, according to article 200. Whereas now to commence prosecution, there should be a notification. Moreover, a victim who is a minor below 15 years has no entitlement to apply for prosecution (only can notify about the event to the guardianship court, which doesn't seem like an adequate protection) and is dependent on his guardians will. Most often because of fear for re-victimisation, victims decide not to give any notice to anybody, so a crime remains unpunished.<sup>20</sup>

Also the aim of this change was responsibility exacerbation for perpetrators of sexual crimes. Because were added in article 95a §1a.

This § introduces even better protection against those who committed rape on minors below 15 years because if perpetrator was sentenced to imprisonment without its temporary suspension than a court can settle perpetrator in custodial institution or refer such person to a forced outpatient treatment, which is pharmacologically connected with psychotherapy, which mainly leads to reduction of sexual desires but other diseases can also be treated, psychiatric or psychological as well, not excluding possibility to recognize the meaning of an

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<sup>18</sup> <http://stoppedofilom.pl/2010/05/wykorzystanie-seksualne-dziecka-w-kodeksie-karnym-od-czerwca-2010-r/>

<sup>19</sup> <http://stoppedofilom.pl/2008/12/lewica-nie-ma-pozytywnej-pedofilii/>

<sup>20</sup> [http://www.lex.pl/c/document\\_library/get\\_file?uuid=33b0b029-767d-4f82-957c-f0cc37bdbbc3&groupId=2221015](http://www.lex.pl/c/document_library/get_file?uuid=33b0b029-767d-4f82-957c-f0cc37bdbbc3&groupId=2221015)

act. Court decides whether there is necessity to imprison perpetrator or to refer him to outpatient treatment within half a year before parole or accomplishing the sentence.

According to crimes relating to prostitution, Polish Penal Code punishes even more crimes than The Convention requires.

Despite, The Convention requires punishing just forcing kids to prostitution, in Poland also persuading kids to prostitution is being punished as strictly as forcing them.

Before ratification, national law ought to be in full compliance with the requirements of The Convention. On the 5<sup>th</sup> of July 2012 Minister of Justice informed that the appraisal has been conducted as to ensure compliance with The Convention and which implies that the only obstacle that stands in the way to ratification is age of the minor who takes part in the process of capturing or producing pornographic contents. Currently article 202 §4 and §4a statute that the responsibility has to be taken by perpetrator who has committed this delinquency, relating to people under 15 years, although The Convention mentions the age of at least 16 years.<sup>21</sup> Poland should have increased this border on 23rd of November 2001, when The Convention of Crime in Cyberspace was ratified. Convention has entered into force on the 1st of July 2007 but still wasn't ratified because suggested age, in which children can be used in pornography, is 16 years. Introducing this change to Penal Code, relating to increasing age is not so easy because if the border was increased from 15 to 16 years it would appear that production of porn with participation of minors for own use, though its lower social harm, would be punished more severely than porn production in order to spreading it.

The Minister said that after signing The Convention by Poland, legislation works have caused that Polish law is compatible with the Convention in its major parts and some minor edits prevent from ratification. He also assured that in 2012 the project of changing legislation will be prepared, whereby Poland will be ready to ratify The Convention.<sup>22</sup>

Apart from changes relating to age border, before ratification Polish Penal Code has to be prepared in the prosecution of crimes committed against children. Already in 20120 the project of a law changing Penal Code has been prepared, in which Polish law adapts to The Convention requirements, however this law has not been forced into life yet.

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<sup>21</sup> <http://www.sprawny-generalne.brpo.gov.pl/szczegoly.php?pismo=1653291>

<sup>22</sup> Ibidem.

According to this project would be a change in crimes prosecution mode, relating to illegal sexual intercourses or submission to any other sexual act or performing such acts.

According to a different project, which has currently been directed to the Special Commission to Codification Changes, assumes a complete repeal of an article 205 Both propositions of amendments would cause that all sexual crimes, committed on minors harm would be prosecuted *ex officio* and Polish Penal Code would be compatible with article 32 of The Convention, which requires all crimes committed, causing minors harm to be prosecuted *ex officio*.<sup>23</sup> In contrast to currently entitled law, which statutes that prosecuting those crimes occur at the request of a victim.

Afterwards a project from 2010 assumed changes connected with children pornography. Amendments should be dividing article 202 § 3 into parts and changing a border of punishment. However it has to be taken under consideration whether dividing this § makes any sense because that would lead to very little change according to current law which would mean just specifying punishments for those crimes, enumerated article 202 § 3. Polish Penal Code had to be free of casuistry, and this change finally leads to fragmentation of Penal Code

To sum up, Polish national law is on its track to comply with the requirements of The Convention, as though it could be ratified. It is visible that Polish legislator tries to fulfill all requirements as quickly as it is possible. The only disturbing fact is that people who are dealing with legislation relating to The Convention in The Sejm are not willing to share information about the state of striving to ratification. While preparing this report, despite numerous attempts to receive such information, they were not given.

iv. After ratifying The Convention it will be considered as Ratified International Agreement, after earlier agreement, mentioned in the statute. In case of conflict of laws expressed in the Convention and the laws, laws from The Convention will be prior to the other ones.

## II NATIONAL LEGISLATION

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<sup>23</sup> <http://www.sejm.gov.pl/sejm7.nsf/wypowiedz.xsp?posiedzenie=19&dzien=3&wyp=237>

## 1 GENERAL PRINCIPLES OF THE JURISDICTION

Poland, like many other countries in the East-Central Europe, went through transformation in 1989. Not only its' political system changed from communist to democratic, but along with it - the whole legal order.

### I. Human rights in the Polish legal order

Legal act of the highest importance is the Constitution of the Republic of Poland of 2<sup>nd</sup> April, 1997. The Constitution contains laws on separation of powers, leading and central organs of the State and both people's and citizens' rights. In its Chapter II entitled "the freedoms, rights and obligations of persons and citizens" there is a division on personal, political and economic, social and cultural freedoms and rights.

- Primary personal rights and freedoms: life protection, ban on tortures, personal inviolability, the presumption of innocence, right to trial, privacy protection, freedom of conscience and religion, freedom of speech.
- Primary political rights and freedoms: freedom of gathering and association, passive and active electoral rights.
- Primary economic, social and cultural rights: right of ownership, the right to free choice of employment and the place of employment, the right to health care and social protection.

Article 72 talks about children's rights: "The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense. A child deprived of parental care shall have the right to care and assistance provided by public authorities. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child".

The laws are developed through statutory law, such as the Family and Guardianship Code (it contains regulations on child's identity, parents' discretion, adoption, the parents' maintenance (to fulfil child's needs) duties, Polish Civil Code (C.C.) (capacity to make acts in the law), Act on Counteracting Domestic Violence (Article 12 allowing to take child away from family that causes harm on the child), the Commissioner for Citizens' Rights Act



(Article 3 says about the right to life and health protection, right to grow in a family, right to fair social conditions, right to education).

## II. People's and citizens' rights protection

### a) National judiciary

Infringement of human rights is subject to national courts: district, regional, courts of appeals and the Supreme Court. Administrative courts: regional and the Supreme Administrative Court have their own structure. Jurisdiction in Poland is in two instances. Not legally binding rulings can be appealed using ordinary appellate measures: *appellation* (against judgements) and *complaint* (against resolutions). Legally binding rulings can be appealed using extraordinary measures: *cassation* to the Supreme Court, *petition for instituting a trial de novo*, *complaint to invalidate the ruling*).

If a Party is convinced that his/her rights, contained in the European Convention on Human Rights, were infringed, the Party can make a complaint to the European Court of Human Rights. To make this possible, a Party has to exploit national appellate measures and to make a complaint on time – the deadline expires in 6 months since the final ruling was held.

### b) Constitutional Tribunal

The Constitution of 2nd April 1997 lists four areas of its interest. The most important one is making control of legal norms. The control means ruling whether a minor legal acts (legal norms) are in accordance with major legal acts (legal norms) or not and eliminating the former from the legal system if they are contradictory to the latter. There is an *a posteriori* (consequent) control (of legal acts that has been already passed, are in force or in the *vacatio legis* period – between the proclamation of the act and its coming into force) and *a priori* (preceding) control (it can be initiated only by the President of the Republic of Poland). *A priori* control can refer only to Acts of Parliament and international agreements enacted and presented to the President.

Article 188 of the Constitution establishes Constitutional Tribunal's control over three types of legal acts: Acts of Parliament, international agreements and legal acts enacted by central organs of the State.

Many subjects can initiate consequent control. There is an abstract and concrete control. The Constitutional Tribunal cannot make a ruling on its own initiative (*ex officio*).

Abstract control divides into common initiative and particular initiative.

Common (general) initiative is a right to challenge any legal act's accordance with Constitution. The act does not have to be linked with petitioner's activity. Common initiative can be used by leading organs mentioned in the Constitution (Article 191 s. 1 point 1).

Particular initiative means right to challenge only legal acts or norms connected with petitioner's activity. A motion is heard by one of the Constitutional Tribunal's judges. If a motion is unacceptable or surely groundless, the judge defeats the motion. Petitioner can lodge a complaint against the decision (the Constitutional Tribunal Act Article 36), which is examined by three judges of the Tribunal.

A petitioner can withdraw his/her motion. If a motion is withdrawn before the beginning of a trial, the Tribunal is bound by petitioner's will. Withdrawing a motion after the trial has begun is not binding for the Tribunal and the Tribunal can continue. Tribunal is bound by the scope of a motion (CTA Article 66).

Concrete control concerns so called legal questions. Such a question can be asked by any court, if settling a case in this court depends on legal act's accordance or incompatibility with the Constitution (Constitution of the Republic of Poland Article 190 s. 1). Tribunal's ruling is binding for all addressees (*erga omnes*) and cannot be appealed.

The result of a control of the legal norms is presented in the form of a ruling and is immediately published in the organ of the State in which the legal act was enacted (Constitution Article 190 s. 2).

In the Polish legal system legal act (norm) not in accordance with the Constitution, international agreement or Act of Parliament is not invalid *ex tunc*, but defective (revocable). Therefore it is necessary to designate the date when the act will be invalid. Normally it happens when the Tribunal's ruling is published in the official journal, but the Tribunal can designate the other date (Constitution Article 190 s. 3).

In Poland, there is no idea of legal norms' invalidity. Acts and rulings based on invalid act (norm) are not automatically invalid. Any petitioner (and, sometimes, prosecutor), can demand another hearing of final and binding case. Article 190 s 4 of the Constitution introduces a principle that Tribunal's ruling on incompatibility with the Constitution, international agreements or legal act (regulation) enacted on the ground of an Act of

Parliament can lead to instituting a trial de novo, overruling of a decision or other resolution, in accordance with rules and procedure specified in proper regulations.

Another form of checking whether legal acts are in accordance with the Constitution is constitutional complaint. Article 79 of the Constitution allows “anybody” to file a complaint, if only his/her “constitutional freedoms or rights” were infringed. Thus a right to complaint have all persons that can be subject to constitutional freedoms or rights. It is obvious that a right to complaint have natural persons, both citizens and foreigners. The Tribunal’s judicature states that the right have also artificial persons, but only within the scope of their freedoms and rights.

To make the constitutional complaint possible to be filed:

- 1) infringement of complainant's rights must have occurred as a result of a court's or public administrative organ’s ruling, in complainant's individual case;
- 2) the ruling must be final and binding (Article 79 s. 1 of the Constitution), the complainant must not have any legal measures allowing to start a proceeding;
- 3) the only matter of a complaint can be legal act's incompatibility with the Constitution, which infringed complainant's rights or freedoms;
- 4) it is possible to file a complaint within three months since the final and binding ruling, decision or any other definitive resolution was delivered to the complainant (CTA Article 46). This period cannot be extended. The complaint must be drawn up by advocate or legal advisor.

#### c) Commissioner (Ombudsman) for Citizens’ Rights

Commissioner for Citizens' Rights is the organ guarding adherence to regulations on human rights. His/her main tasks are monitoring of infringements of human rights and intervening if the Commissioner finds out that human rights are infringed. Article 80 of the Constitution states: “In accordance with principles specified by statute, everyone shall have the right to apply to the Commissioner for Citizens' Rights for assistance in protection of his freedoms or rights infringed by organs of public authority”. The Commissioner acts from his/her initiative or on a motion filed by citizens, their organisation, local government or Children’s Commissioner. The Commissioner for Citizens' Rights can take up the case described in a motion, advise the initiator as to his/her future actions, hand over the case or decide not to take up the case. If the Commissioner takes up the case, he/she can conduct clarifying

proceeding, ask relevant organs, in particular supervisory bodies, prosecutor's office, organs of state, professional or social control for examining the case or part of the case or can request the Parliament to give the Supreme Chamber of Control commission to examine the case or part of the case. After the Commissioner examines the case the Commissioner can:

- explain petitioner that the Commissioner did not confirm infringement of people's and citizens' freedoms and rights;
- address speech to organ, organisation or institution, in which activities the Commissioner found infringement of people's and citizens' freedoms and rights;
- file for the superior organ a motion for using measures permitted by law;
- demand initiation of proceedings in civil cases and take part in any trial in progress in the same way as prosecutor does;
- demand from entitled prosecutor initiation of preparatory proceedings, if a crime is publicly prosecuted;
- demand initiation of administrative proceedings, complain to administrative court and take part in proceedings like prosecutor;
- file a motion for punishment and for revoking final and binding decision in the case of an offence;
- file cassation to the Supreme Court or lodge an extraordinary appeal against the final and binding ruling.

Each year the Commissioner informs both Chambers of the Parliament about his/her actions and the standard of adherence to regulations on human and citizens' freedoms and rights.

You can file a motion to the Commissioner on the website. You can also make an appointment with the lawyers working in the Commissioner's Office or call Commissioner's info line. This way you can receive legal advice or gain information about your rights.

#### d) Children's Commissioner (Ombudsman)

Children's Commissioner is a special organ appointed to protect children's rights. The Commissioner's activities are to guarantee a child a full and harmonious development, with respect to its dignity and subjectivity. The Commissioner supports children's rights' protection, in particular the right to life and health protection, right to grow in a family, right to fair social conditions, right to education. The Commissioner protects children against violence, cruelty, exploitation, moral corruption, neglect and any other rough treatment

bearing in mind especially disabled children. The Commissioner promotes children's rights and ways of its protection as well. The Commissioner acts on his/her own initiative, taking into account in particular information from citizens or their organisations, indicating infringement of children's rights or violation of the children's good. The Commissioner can:

- examine the incident in the place where it occurred;
- demand explanation or information from the state authorities, organisations or institutions, or make the records and documents available to the Commissioner;
- take part in proceedings before the Constitutional Tribunal initiated by the Commissioner for Citizens' Rights' or in the case of a constitutional complaint concerning children's rights;
- file a motion to the Supreme Court for settling a conflict about differences in interpretation of regulations on children's rights;
- file a cassation or lodge an extraordinary appeal against the final and binding ruling;
- demand initiation of civil proceedings and take part in proceedings in the same way as prosecutor does;
- take part in proceedings before a juvenile court like prosecutor;
- demand from entitled prosecutor initiation of preparatory proceedings in the case of crimes;
- demand initiation of administrative proceedings, complain to administrative court and take part in proceedings like prosecutor;
- file a motion for punishment in the case of an offence;
- commission to conduct research and compile opinions and analysis.

The Commissioner can also ask relevant organs, organisations or institutions for taking actions, within the scope of their competence, in the children's interest. When the Commissioner finds out infringement of child's rights or violation of its good, he/she can demand initiation of a disciplinary proceedings or disciplinary actions. The Commissioner presents to the relevant public authorities, organisations and institutions assessments and conclusions to aim at effective protection of rights and good of the child and to facilitate the procedure, due to which the cases are solved. The Commissioner can ask holders of the right of legislative initiative to propose a law to the parliament, to pronounce or change other legal acts.

Due to the article 12 of the Children's Commissioner Act: "Each year, but not later than March 31<sup>st</sup> the Commissioner informs Sejm and Senate<sup>24</sup> about his/her activity and comments on the state of adherence to regulations on children's rights. The Commissioner's information is given to the public". Motions to the Commissioner can be filed by yourself or through website, e-mail or info line.

### III. Criminal responsibility

#### a) Regulations of the Penal Code

At the beginning it is advised to understand few terms necessary for analysing the Penal Code:

- criminal responsibility – responsible is only a person who commits a forbidden act under the risk of punishment by an Act of Parliament in force when the act was committed;
- forbidden act – act that is forbidden by an Act of Parliament (not only by Penal Code, but by other Acts as well);
- crime – in can be a grievous crime or misdeed; Not every forbidden act is a crime. If its social harmfulness is irrelevant, the act is not a crime. If a perpetrator cannot be assigned guilt whilst committing the act, there is also no crime;
- grievous crime – forbidden act punishable by 3 years imprisonment or more;
- misdeed – forbidden act punishable by a fine exceeding 30 daily rates, restricting freedom or more than 1 month imprisonment;
- offence – act forbidden by an Act of Parliament in force when the act was committed, punishable by arrest, restricting freedom, fine up to 5,000 PLN<sup>25</sup> or reprimand. There is no offence if there is no guilt;
- guilt – perpetrator's psychological attitude towards an act. There is no guilt if a perpetrator is a minor, mentally and emotionally immature, is insane or acted under misapprehension;

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<sup>24</sup> The two Chambers of Polish Parliament.

<sup>25</sup> Around 1,550 US Dollars or 1,200 Euros, <http://kursy-walut.mybank.pl/> (access: 4<sup>th</sup> November 2012).

- intentional guilt – direct intention means a perpetrator wants to commit unlawful act, indirect intention denotes a perpetrator, conscious of possibility of committing unlawful act, agrees to this;
- unintentional guilt – no intention to commit unlawful act. Perpetrator, however, commits the act due to lack of carelessness required, although possibility of committing unlawful act he predicted (recklessness) or could have predicted (negligence).

The age of criminal responsibility in Poland is 17. In some cases a perpetrator can be liable if is 15, circumstances of the case, perpetrator's psychological maturity, characteristics and conditions opt for it or, particularly, when previously used educational measures or detention appeared to be ineffective. However, the penalty shall not exceed two thirds of the maximum punishment for the perpetrator's crime; the court can also commute punishment (sentence a punishment below the lowest limit predicted in the Act of Parliament for a punishment for a certain crime, e.g. 1 year imprisonment instead of 3 years or punish with a lighter kind of punishment, e.g. fine instead of imprisonment). Moreover, if a perpetrator committed a misdeed when he was 17, but not turned 18, the court instead of a punishment applies educational measures, health services or detention suitable for minors, if circumstances of the case and perpetrator's maturity, characteristics and conditions opt for it.

#### b) Regulations of the Children (Criminal Proceedings) Act

Due to article 1 of the CA it is applied in:

- preventing and eradicating moral corruption among persons that not turned 18;
- criminal proceedings, if a perpetrator is over the age of 13, but under the age of 17;
- performing educational measures or detention towards a person as long as the person has not turned 21.

Cases are conducted by a family court. The parties are: minor, his parents or guardian and prosecutor. Towards a minor, educational measures and a detention (lodging at a young offenders' home<sup>26</sup>) are to be applied; a punishment can be sentenced only when it is allowed

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<sup>26</sup> In Polish: ZP – Zakład Poprawczy ('Poprawczak' – infml).

by law, when other measures cannot assure minor's rehabilitation. Towards a minor a family court can:

- give reproof;
- oblige a minor to do something, especially to repair a damage, to do certain works or benefit for aggrieved or local community, to apologize to aggrieved, to take up education or job, to take part in proper educational, therapeutic or training course, to restrain from contact with certain communities or places or to stop drinking alcohol or using other substances;
- establish parental or guardian's supervision;
- establish youth organisation's supervision or supervision of a grass root organisation, work place or a reliable person vouching for minor;
- establish probation;
- refer a minor to a juvenile probation home or, by mutual agreement, to a grass root organisation or educational, therapeutic or training institution working with minors;
- ban from driving;
- confiscate things obtained from an unlawful act;
- refer a minor to a juvenile educational home or to a professional foster family that have completed a course in taking care of a minor;
- lodge a minor at a young offenders' home.

This can be suspended if perpetrator's characteristics, conditions and his environment together with circumstances of the case and a nature of minor's act prove that educational goals will be achieved without lodging. Suspension is temporary and lasts 1-3 years, during the suspension period a court uses educational measures. If during the suspension period minor's behaviour indicates further moral corruption or a minor dodges his duties or supervision, family court can cancel suspension and lodge a minor at young offenders' home. If during the suspension period and further 3 months the cancellation did not take place, sentence lodging a minor at a young offenders' home is considered to have never existed.

If an unlawful act is committed by a person under the age of 13, it is considered to be a manifestation of a moral decay. This justifies institution of protective and educational proceedings. A measure used in such situation is, for example, probation.



## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. Penal Code broadly defines the term "sexual activity" by dividing it into four categories - "sexual intercourse", "other sexual activity", "behavior leading to sexual activity", "forcing sexual activity".<sup>27</sup>

Penal Code distinguishes two age limits established to protect the child: "minor" and "minor under 15 years of age." Depending on the regulation, the Penal Code protects: all without exception, only minors, or minors under 15 years of age.

The legislator expands the definition of different categories. The "sexual intercourse" is defined as "pre-vaginal intercourse, anal intercourse, oral sex, as well as all other forms that can be recognized as a substitute for sexual activity - one without contact of reproductive organs - even if there is no ejaculation. It includes exclusively activities that involve direct contact of the reproductive organs of one of the participants with any body parts of the other participant, even if the latter ones are not normally considered sex organs, but the perpetrator treats them as such. In other words, sex organs of one of the participants (usually the perpetrator, but the possibility of role reversal should not be excluded) are entered into the body in a way generally considered to be normal."<sup>28</sup>

The other category is "other sexual activity". This term raises a lot of controversies in jurisprudence - especially on the issue of distinction between "sexual intercourse" and "other sexual activity". The answer can be found in resolution of the Supreme Court I KZP 17/99 which states, that term applies to behavior that is related to broadly defined human sexuality, involving bodily contact of the victim with the perpetrator, or at least of a bodily and sexual involvement of the victim (in accordance to 200 § 1 Penal Code and in accordance with article 197 § 2 Penal Code and article 198 and 199 Penal Code)

In aforementioned resolution of the Supreme Court, we can find the more in-depth explanation of definition "behavior leading to sexual activity". It occurs when the perpetrator, aiming to stimulate or satisfy his sexual arousal, touches genitals of the victim

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<sup>27</sup> Article 200 of the Penal Code - Journal of Law from 1997 No. 88 item 553

<sup>28</sup> Criminal protection of minors form sexual abuse" "Karnoprawna ochrona dziecka przed wykorzystywaniem seksualnym" Mierzwinska-Lorencka Joanna."

(through underwear or clothing) or takes any other action involving body of a victim (eg. fondling, kissing).

As an example of "forced sexual activity" the Supreme Court specifies following actions of a victim: stripping, self-masturbation, masturbation of other participant, touching the perpetrators' genitals, or performing other acts of sexual manipulation.

**ii.** Forcing a child to participate in sexual intercourse or other sexual act is an action always considered to be done willfully. It is generally agreed, that the act may be done with both direct and eventual intent. The latter applies especially when the offender is not sure of the age of the victim. If somebody starts sexual intercourse or forces someone to participate in sexual activity, while not sure about the age of the other party involved, he or she shall be treated as if they possessed the knowledge.<sup>29</sup>

In order to strengthen the protection of minors from sexual abuse, the legislator has introduced a severe criminal sanction (2 to 12 years of imprisonment), which is further "supported" by the other provisions in the form of:

1. Prohibiting the convict from pursuing activities associated with treatment, education or care of minors,
2. An obligation to refrain from staying in certain environments or places, prohibiting contact with certain people, prohibiting the freedom to leave a specific place of residence without the permission of the court.<sup>30</sup>

**iii.** In Poland, the legal age of consent for sexual activity is 15 years of age. It is not regulated directly in any act, but it can be concluded on the basis of article 200 Penal Code, which regulates the offense of participating in sexual activity with a minor. The victim of the offence can only be a person under the age of 15. It is not permitted for people under this age limit to participate in sexual activities with each other, but such acts are not punishable on the basis of the Penal Code. The minors can only be held liable for such actions on the basis of the Statue on Juvenile Justice, which regulates the possible use of educational and corrective measures.

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<sup>29</sup> " Criminal protection of minors form sexual abuse [Karnoprawna ochrona dziecka przed wykorzystywaniem seksualnym]."Mierzwinska-Lorencka Joanna.

<sup>30</sup> op.cit.

**iv.** Minors are protected in as all the same manner as other potential victims of such crimes.

Article 197 and 198 Penal Code, regulate respectively rape and sexual activity forced due to disability of the victim. In addition, under article 199 § 3 Penal Code, all minors are protected from sexual abuse that occurs as a result of the promise of financial benefit or a breach of trust. The same article also protects them from abused caused by their unfavorable position or actual legal dependency. The sexuality of minors under the age of 15 is further protected in a case of rape. The perpetrators convicted on the basis of article 197 § 3 point. 2 Penal Code can be more severely sentenced.

**v.** Incest is forbidden on the grounds of article 201 Penal Code This regulation is considered justified not because of eugenic reasons, but because this act is considered amoral. This act can only be performed on ascendant, descendant, adopted, adopting, adoptive brother or sister. Being held liable under this provision shall not prevent the concurrent punishment under other provisions if their conditions are met.

**vi.** In the case of person that has convicted offense against sexual freedom or decency to the detriment of the minor, the court may decide to not only sentence jail-time, but also introduce further punitive measures: prohibiting the convict from pursuing activities associated with treatment, education or care of minors, an obligation to refrain from staying in certain environments or places connected with minors, issue a restraining order for some people (children), and in case of possible abuse by one parent, the court may decide to limit or even revoke parental rights.

## **2.2 Child Prostitution**

**vii.** Poland has ratified The European's Council convention, treating about taking action against human trafficking. The ratification has taken place on the 17th of November 2008, although it came into force in case of Poland on 1st of March 2009.

**viii.** Polish penal law doesn't define the term „prostitution”, leaving its introduction to the doctrine. Most current and valued definition is one saying, that prostitution “is the provision of sexual services, in any form, depending on customers preferences, permanent or casual, in exchange for material benefits (money, gifts), where material benefits dominate over sexual

motivations.”<sup>31</sup> Important element, mentioned in the doctrine in the context of defining prostitution is lack of emotional involvement both on prostitutes and customers behalf.

Definition from article 19 (2) of The Convention consists of two parts- using child for sexual activities and performance of such activities by a child, due to expected, or actual material benefit for a child or third person. Polish definition concerns prostitution of adults; however scope of occurrence includes those mentioned in the Conventions definition. Although Penal Code does not define prostitution, it mentions borders of acceptable fornication in article 199. Article 199 § 3 states that Any admission of a sexual act in relation to a minor, which was caused not only because the material benefit was promised but also personal benefits were. Punishment in such case is even broader, than in the Convention. Regulation article 199 § 3 meets some critic from the doctrines because it finds it possible to cause some specific sexual prohibition according to people who turned 16 which seems to be to excessive interference in one’s sexual liberty sphere<sup>32</sup>.

A very wide scope of article 199 § 3 from Penal Code Has been limited to situations in which minor over 15 years accepted to enter sexual activity just to fulfill this rules premisses. If motivations of financial or personal benefits or malpracticing were not integral parts of decision about undertaking sexual activities or did not have dominating meaning, the rule does not come into force<sup>33</sup>.

Both: mentioned law and the definition do not consider *expressis verbis* of conceivable financial benefit on third person behalf. This is being fulfilled by legislation, article 204 of Penal Code, punishing in § 1 procuration and pimping<sup>34</sup>, caused in the aim of receiving financial benefits and in § 2 pandering, when the benefit is actually received. If any of those activities are being undertaken on minors loss, penalty is exacerbated by § 3, and is between one and ten years of imprisonment. If in case of § 2, there was no financial benefit, a perpetrator may be punished on attention to cause this act which means that Polish

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<sup>31</sup> M. Antoniszyn, A. Marek, *Prostytucja w świetle badań kryminologicznych*, Wydawnictwo Prawnicze, Warszawa 1985, s. 6-12

<sup>32</sup> Andrzej Zoll, *Kodeks Karny, Komentarz*, Warszawa 2007

<sup>33</sup> Postanowienie V KK 369/09 z dnia 2 czerwca 2010 r.

<sup>34</sup> W rozumieniu polskiego prawa karnego czynności wspierające wykonywanie prostytucji nabierają charakteru penalizowanego kuplerstwa w momencie, w którym pomoc ma charakter usystematyzowany, oraz trwa przez dłuższy czas – tak Izba Karna Sądu Najwyższego w wyroku z dnia 5 lutego 2009 r. II KK 251/2008

legislation considers all situations mentioned in definition of article 19 (2) of The Convention and both definitions, Polish and conventional, are compatible.

**ix.** Person organizing children prostitution ought to be punished, under the provision of aforementioned article 204 of Penal Code, which means as mentioned earlier article 199 § 2 or § 3 of Penal Code, while a prostituting child did not turn 15, it will be a situation from article 200 §1 and §2 of Penal Code, according to crime of sexual intercourse with a child. Any form of furthering children prostitution is being penalized, in addition to article 19 (2) of the Convention.

### **2.3 Child Pornography**

**x.** Poland has signed the convention on the cybercrime on the 23 of November 2001, however, has not ratified it yet.

**xi.** There is lack of pornography definition in material law, introducing of this has been left to the doctrine. Between many considered definitions, the most respected is one by Professor M. Filar, defining pornography as:

„Performance of sexual activities, in a way which concentrates only on its technical aspects, in isolation from intellectual or personal aspects. Showing genitals, while they are operating, resolving to dehumanized sex technology.”<sup>35</sup>

This definition is not free from defects<sup>36</sup>, or in different words, it does not include all types of content, usually considered as pornography. Essential in this case is judge’s role, who may interpret the term broadly, adapting it to different cases.

The Convention requires considering the image of naked person as pornography, not necessarily taking part in sexual activity. Using alternatively systemic interpretation and comparing laws article 202 in relation to article 191 § 1 of Penal Code, it has to be concluded that just an image of naked person may also be considered as pornography within the meaning of Penal Code. Earlier definitions by professor Filar, which state that pornography presents behaviors which are against those commonly accepted or tolerated and do not comply with minimal aesthetic standards, are helping to interpret when does an image of

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<sup>35</sup> M. Filar, *Przestępstwa seksualne w nowym KK. Krótkie komentarze*, Toruń 1997s. 39-40

<sup>36</sup> A. Marek, *Prawo Karne*, CH Beck, Warszawa 2011, s. 500-503

naked person become pornography<sup>37</sup>. Again, role of the judges is visible, because they decide which content shall be considered as presenting pornographic, artistic or educational values. Aforementioned analysis leads to the conclusion what in particular cases might or must not be considered as pornography, even though it does not allow deriving a general definition. Child pornography is nothing more than content mentioned above, treating about children.

Definition from article 20 (2) of The Convention states that pornography is showing a child during the sexual activity, which refers to first definition, or that pornography is performance of genitals in sexual approaches, which complies with definitions mentioned further. Finally, Polish law allows applying (for court proceedings) actual definition introduced in The Convention and after ratification it will become part of national legal order. This means that The Conventions requirements are fulfilled.

**xii.** Penal responsibility for acts mentioned in Penal Code may be incurred by individuals, over 17 years. On special conditions, also juveniles over 15 years might be taken under responsibility, however it is limited to heaviest torts, does not contain prohibited acts, connected with child pornography (also in chapter referring to punishments).

Legal entities and other collective entities have to take responsibility, according to the rules in law on liability of legal entities<sup>38</sup>. It's article 3 states that legal entities have to take responsibility for acts undertaken on their behalf or benefit, either when a person authorized to act on others behalf crosses those limits or does not fulfill duties or when a third party acts while the other person knowing what she is doing. Collective entities have to take responsibility for wide variety of delicts, also according to article 16 item 1 pt 7 of the law, for crimes from article 202 § 3-4b of Penal Code, which means that responsibility for crimes connected with child pornography has to be taken by everyone, apart from minors below 17 years, which fulfills The Conventions requirements.

**xiii.** At present there is Lack of specified mechanism of pornographic content control. In Polish penal law shall be that adults may use pornography, which makes punishing possession for personal use pedophile pornography excessive, although it is not right because in the process of its formation at least touching child is necessary, which is harmful and is a penal act. Only when someone is forced to watch any type of pornography (article

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<sup>37</sup> M. Filar, *Pornografia. Studium z dziedziny polityki kryminalnej*, Toruń 1997

<sup>38</sup> Dz.U. 2002 Nr 197 poz. 1661

202 § 1 Penal Code<sup>39</sup>), or when it is being presented to the minor (article 202 § 2<sup>40</sup>), penal law is applicable. In such case, commitment of punishable act has to be notified to the Police. As though act is being prosecuted *ex officio*, notification may be provided by anyone, not only a victim. Apart from notifications, cells of Bureau of Criminal Investigation Police Headquarters<sup>41</sup> are searching for pedophile content on the internet, mostly with external organizations' help<sup>42</sup>. Failure of preventive censorship comes from The Constitution, certainly from Press independence, coming from article 54 of Penal Code, basic for democratic state, and before 1989 commonly broken in Poland<sup>43</sup>. Exception of this rule was introduced to Penal Code within the article 200b, according to which public preaching of pedophilia is being punished. It is an interesting regulation, because Penal Code has punished only preaching of genocide or commencing aggressive war or similar crimes before. It is hard to imagine a situation in which one will commit crime from article 200b of Penal Code.<sup>44</sup>, because pedophiles usually conceal their preferences, aware that they are against the law and regular people will never agree to commit sexual acts against children, because of pedophilia promotion. This is why regulation seems useful as shaping legal awareness however, as punishment basis it is not reasonable

Individuals enjoying the artistic freedom (manufacturing pieces involving children) or educational freedom (generating documentation containing for ex ample images of nude minors) have to consider that penalizing proceedings might be commenced against them, although it may occur only when their behavior may intentionally seem as a delict from article 202, and article 191a<sup>45</sup> of Penal Code. However it would be impossible to control any piece of pornography entering the circulation. And what is more important it also limits its number.

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<sup>39</sup> w roku 2011 52 skazania, z czego 47 na karę pozbawienia wolności, w tym 39 w zawieszeniu

<sup>40</sup> w roku 2011 14 skazań, z czego 8 na karę pozbawienia w wolności w zawieszeniu

<sup>41</sup> m.in. Zespół dw. z Handlem Ludźmi i Pornografią dziecięcą; więcej na stronie <http://www.policja.pl/portal.php?serwis=pol&dzial=1&t=32&x=59&y=7>

<sup>42</sup> m.in. ściśle współpracujący z Policją i organizacjami międzynarodowymi zespół Dyzurnet.pl, działający przy Naukowej i Akademickiej Sieci Kontaktowej i w ramach Stowarzyszenia INHOPE; więcej pod adresem: <http://www.dyzurnet.pl/>

<sup>43</sup> wynika z tego uczulenie społeczeństwa na wszelkie formy ograniczania wolności mediów

<sup>44</sup> choć istnieją m.in. strony internetowe propagujące „pozytywną pedofilię” – np. [www.nambla.org](http://www.nambla.org) i inne

<sup>45</sup> article 191a jest przepisem ogólnym, obejmującym dorosłych i dzieci, ale o szerszym zakresie, gdyż penalizuje wykonywanie każdego wizerunku nagości osoby, bez jej zgody;

Penal Code punishes in article 202 § 4b an act, based on production, distribution, presentation, storage, possession, generation of pornography in which an object is generated or converted image of a minor, taking part in sexual act, which means that there is no exclusion mentioned in article 20 (3) of The Convention.

Penal Code does not punish the act mentioned in article 20 (3) sentence 3 of The Convention, which means when individuals presented will become mature enough to incur penal responsibility, they shall not possess any more pornographic content, showing minors, even if there were exceptions aforementioned law. Although such act is punished, its social harm, in the meaning of Penal Code may be little or even there might be no social harm in it, it means that according article 1 § 2 of Penal Code such act is not a crime at all. However this must be considered by the Court, which allows boosting flexible attitude towards so delicate content, without exclusion of punishment in particular cases. If an individual is in possession of pornographic content, showing him or her own, then an offender and a victim are one person, so there is Lack of punishment because there is no social harm. It is also important that penal law cannot interfere into people's life in an exaggerated way- which would happen in aforementioned case.

Lack of stipulation from article 20 (3) makes Polish legal system more flexible, fulfilling The Conventions requirements at the same moment.

**xiv.** There is Lack of regulations, directly penalizing children involvement in pornographic performances, according article 21 of the Convention. Enough although not direct protection is provided by other laws. Every single pornographic performance will be mentioned at least in article 198, 199, 200 or 200 § 2 of Penal Code and people not involved in the process directly, though helping in performance organization, may be sentenced for help to commit a crime or attempting to commit it. So punishment includes all individuals connected with pornographic performance but it does not general one, general law, while it lets to vary the responsibility, according to part which one has taken in committing an act and what was ones action based on.

Attempt to commit any crime is being punished on Penal Code basis as strictly as its actual commitment. (article 13 § 1 relating to article 14 § 1 Penal Code).

In case of leading children to taking part in pornographic performances, punishment is sometimes, according to article 200a of Penal Code moped to preparation process. If perpetrator wants to some crimes from article 200 and 197 § 3 pt. 2 of Penal Code or



capturing pornographic content (which corresponds with described above parts of pornographic performance) and according to this he or she commences contact via telecommunication or teleinformation system with the minor commits the same crime which is an act sui generis. As later processed punishment against offenders acting in situations in which child is unable to discover or identify them is set to protect children, when it is harder to get adults help and in which it is much easier to manipulate kids, so mainly when perpetrator uses the Internet. In other situations, for example personal contact in the street, perpetrator will be punished for eventual attempt to undertake action, (for example article 200 of Penal Code), but only when it will directly lead to committing a crime. If perpetrator according article 200a § 1 just to commit an act, misleads minor or uses minors mistake or inability to interpret situation in a relevant way or uses illegal threats, is punished far more strictly than when there is Lack of such evidence according to § 2 minor relevantly interprets situation and is not forced to anything.

Existing laws fulfill requirements from article 21 of The Convention in sufficient, although not direct way, both in the meaning of action, recruitment and attempt.

## **2.4 Corruption of Children**

**xv.** Article 200 § 2 Penal Code penalizes the act of presenting sexual activities to a minor under 15 years of age. To meet the conditions of the action, it is not necessary for a child to be directly involved. The force of this legal protection is severely weakened by the requirement for the offender's act to be aimed to reach sexual satisfaction. This means, that if this particular intention is not proven (it cannot be presumed), or if they intent (even if condemnable) was different (for example perpetrators acted to cause damage to the psyche of a minor), criminal liability shall be excluded. The doctrine has presented many critical remarks regarding this regulation, but because of the absolute prohibition of using analogy in criminal law, it is not possible to fill this loophole without changing the wording of the regulation. Regardless of the critical evaluation, the provision meets the requirements of article 22 of the Convention.

## **2.5 Solicitation of Children for Sexual Purposes**

**xvi.** Article 23 of the Convention obliges Member States to create solutions that would allow punishing the persons who undertook the contacts with a juvenile to commit a transgression against him/her. Article 200a of the Penal Code penalizes the acts of troubling the minor under the age of 15 years (thus, the one who still has not entered the age licensing

him/her to take a decision on the beginning of the sexual life) to have a sexual intercourse, to record pornography or to perform the 'other sexual activity'. Tougher criminality is bound to situations, in which the action of the offender is based on taking advantage of a child's insufficient understanding or abusing a child's confidence. Polish regulation is a literal repetition of the Convention's provisions; as it is for the moment of accomplishment of the act, which in fact is not meeting, but even coming in contact with the victim.

**xvii.** Intentional help or persuasion to commit any of the acts described in pts. a-e is punishable with the constructions from the article 13, 16 and 18 of the Penal Code, i.e. attempt, aid and abetment. In this respect, the requirements from article 24 of the Convention are completely fulfilled.

## **2.6 Corporate Liability**

**xviii.** This situation is regulated in article 3 of the Act of on the Liability of Collective Entities for Acts Prohibited Under the Threat of Punishment, 28 October 2002, Journal of Law from 2012 No. 768. The regulation determines the actions of an individual, for which corporate entity can be held liable. The aforementioned actions are:

1. acting on behalf of, or in the interest of the collective entity, within authorized right or duty to represent it, making decisions on behalf of the entity, exercise internal competences, or exceeding one's powers or failing to fulfill one's duty,
2. the person has been licensed to work as a result of exceeding of power or a failing to perform a duty by a person to whom such authorization has been given,
3. acting on behalf of, or in the interest of collective entity, with the consent or knowledge of the person, mentioned in point 1,
4. being an entrepreneur that directly interacts with a collective entity in order to realize a legally acceptable target,
5. if the behavior is brought or could bring to the collective entity a benefit, even a non-material one.

The possible liability of collective entity is addressed directly to the collective entity, not to its directors or employees. Individual criminal liability of these people is the same, although in the case of management it is easier to assign specific features of acts, such as the abuse of actual legal dependence. This not sanctioned by law.

**xix.** The Act on the Liability of Collective Entities for Acts Prohibited Under the Threat of Punishment, 28 October 2002, Journal of Law from 2012 No. 768 provides the penalties of: fine of no more than 3% of the income calculated from the financial year's balance in which the offense was committed, the forfeiture of financial benefits or items, gained from prohibited act or intended to be used while committing a prohibited act. There is an exhausted catalogue of prohibitions that the court can rule against the collective entity, such as the prohibition of promoting or advertising, the prohibition of the use of grants, public announcement of the ruling.

The penalties provided in the Act, do not preclude the possibility of further civil or administrative proceedings, or perpetrator's individual liability

**xx.** The individual perpetrator is also liable for his or her actions.

## **2.7 Aggravating Circumstances**

**xxi.** Does the state accept any aggravating circumstances for the crimes that have been described above? (E.g. when the offence damaged physical health of the child) Please, write down these circumstances and explain, try to specify the different crimes if there are different aggravating rules applying.

The offences against the minors are constructed as qualified grades to the basic, standard types, or as distinctive crimes. In the grades, they appear for example in the article 197, 202, and 204 of the Penal Code. Solely in the case of the article 197 of the Penal Code, making the criminality tougher is possible. It is also attainable when the crime is committed with particular cruelty, which is however an aggravating circumstance for adult victims as well. Usage of a notion of the particular cruelty is justified, when the cruelty level exceeds is higher than the cruelty requisite to commit a crime in its basic form. The affliction may have physical or psychological character.

Article 202 of the Penal Code provides that the production of the child pornography with the participation of a minor under the age of 15 is punished tougher than the child pornography produced with minors in general. Also, the distribution or the production succumbs under a stricter punishment than a common possession. This regulation should be assessed advantageously, because the delinquent possessing the pornography does not harm the child directly, while the production is immanently connected to the child's damage. On the other hand, the distribution may appear for a minor harmful hereafter, and allows the other persons to commit the crimes coming under the article 202 of the Penal Code.

Beyond those provisions, the aggravation of the criminality follows the judicial assessment of a punishment, therein the eventual (discussed farther on) special aggravation of the criminality. The transgressions, which may be committed only in relation to a minor, are described in the article 200 and the article 200a of the Penal Code. The article 200a § 1 provides for the tougher punishment, when the minor is not undertaking the relation completely at ease. The provision enumerates misleading the minor, exploitation, taking advantage of the lack of discernment of a minor and, finally, the threat; it is considered as an expression of a dose (little one) of the recognition of will and understanding of a minor.

## 2.8 Sanctions and Measures

**xxii.** The main punishment for aforementioned crimes is imprisonment. Crime, according to the article 53 of the Penal Code (Penal Code), is inflicted by the Criminal Court. The court analyses the perpetrator's guilt, crime's social harmfulness together with educational and preventive aim of the punishment and the need for educating society. Punishments allowed by the Penal Code are presented in the table below:

Article of the Penal Code	Forbidden act	Punishment allowed by the PENAL CODE	
		Minimum (years)	Maximum (years)
197 § 3 item 1 together with § 1	Rape on a minor under the age of 15	3	12
197 § 3 item 1 together with § 2	Forcing a minor under the age of 15 to have intercourse	3	8
197 § 4 together with § 3 item 1 and § 1	Doing the acts mentioned above with cruelty	5	12
197 § 4 together with § 3 item 1 and § 2		5	8
199 § 2 together with § 1	Using a minor's dependence or grave situation to have intercourse with the minor	3 (months)	5
200 § 1	Sexual intercourse with a person under the age of 15	2	12
200 § 2	Showing sexual act to a minor in order to have sexual satisfaction	2	12
200a § 1	Using telecommunications in order to do act described in the Article 197 § 3, 200 or 202 § 4 of the PENAL CODE by using minor's	1 (month)	3

	mistake or by leading a minor to a mistake		
200a § 2	The same act without any minor's mistake	1 (month)	2
202 § 2	Presenting to a minor under the age of 15 pornography or giving things related to pornography	1 (month)	2
202 § 4	Producing pornography with minors under the age of 15	1	10
202 § 4a	Import, storing or having pornography mentioned above	3 (months)	5
202 § 4b	Producing, spreading, presenting or storing pornography containing created or distorted picture of a minor having sexual act	1 (month)	2
204 § 3 w zw. z § 1 or 2	Making a minor under the age of 15 do prostitution or easing it	1	10

In Polish criminal law it is possible to change the punishment allowed by the Penal Code by commuting the punishment or restricting it.

Extraordinary restricting in case of crimes against minors can take place especially when a perpetrator on the ground of the Article 64 § 1 of the Penal Code is a recidivist: within 5 years since the punishment was ended commits a similar crime (against the same good protected by the law, e.g. minor's) sexuality. The maximum limit for a punishment in such situation is 50% higher<sup>46</sup>. If a perpetrator commits rape again or uses violence, the punishment, due to § 2, has to be higher than the minimum punishment allowed by the Penal Code.

The maximum limit can be also raised when a perpetrator committed many similar crimes in a short period of time (article 91 of the Penal Code).

Sentencing less than a minimum punishment is allowed when the accused only tried to commit a crime and the unlawful act did not occur due to the accused ineptitude, the accused tried to counteract the crime, the accused was only an assistant or a perpetrator was insane. It can be also applied when a perpetrator is a minor. In some situations sentencing any punishment would be wrong. This can happen when the gravity of the offence is not serious, and both its social harmfulness and a minor's injury are slight. Sentencing less than a minimum punishment describes Article 60 § 6 of the Penal Code.

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<sup>46</sup> This is not possible when a committed crime is grievous – minimal punishment is at least 3 years of imprisonment (Article 64 § 3 together with Article 7 of the PENAL CODE).

The court can also apply additional measures. The most important is allowed by the Article 69 of the Penal Code suspension of a punishment no higher than 2 years of imprisonment. The suspension period lasts from 2 to 5 years. If a punishment is not reinstated in six months since the suspension period has ended, the punishment is considered to have never existed. In the case of crimes mentioned in the Article 197 § 3 and 4 of the Penal Code suspension cannot be used. It can be applied to all other crimes with some exceptions. Due to Article 58 of the Penal Code the imprisonment shall be used only when punitive measures or a suspended detention do not carry out their tasks. The lawgiver wants to use this punishment only when circumstances of the case allow doing this.

The court, when suspends a punishment, can fine a condemned person, establish supervision over a person or put a person to the test (impose some duties on the person). The most important duties are not to contact with injured and the obligation to leave a flat if a minor lives with a condemned person<sup>47</sup>.

Suspension of a punishment is very important in case of acts against sexuality and morality because if a person is sentenced imprisonment the fact cannot be effaced from a criminal record, which means a condemned person will always be convicted of a crime. It is very harsh punishment, because “sentencing 25 years imprisonment for most grievous crimes is effaced from a criminal record”<sup>48</sup>. According to Article 107 § 1 of the Penal Code it takes place 10 years after the punishment was executed or waived.

If a crime's weight is little<sup>49</sup>, and its circumstances arise no doubts, according to the Article 66 of the Criminal the court can conditionally dismiss criminal trial. It can happen when a maximum punishment for a crime is no higher than 3 years, but if the accused person reconciles with the injured or repairs the loss, the maximum punishment can be up to 5 years imprisonment. If a case is dismissed, the court places the blame on the accused and can impose additional duties on him, just like it happens in a suspension of a punishment.

The court can also cancel execution of a punishment due to Article 61 of the Penal Code.

Besides every sanction imposed for the crime committed against children, court according to article 39 pt. 2a Penal Code has the authority to impose a rule of “forbidding conducting

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<sup>47</sup> Which does not change ownership of the flat.

<sup>48</sup> A. Marek, Criminal Law, CH Beck, Warsaw 2011, s. 388.

<sup>49</sup> Perpetrator's guilt and social harmfulness of the act are not significant.

businesses involving taking care, curing, and tutoring of minors”. This measure might be imposed for a period of time from 1 to 10 years, however if the perpetrator re-commits the crime of sexual exploitation and sexual abuse of children, that period will be extended to the life-annuity. Special regulations apply to a situation where the perpetrator of a criminal act is a minor. The Penal Code is applicable to persons who are at least 17 years old, while those between the age of 17 and 18 years shall be punishable under specific conditions.

When deciding whether or not particular minor should be penalized, judges take into the account, minors current “properties” (in particular, the level of their development). In some cases Penal Code allows to apply only the corrective and educational means, law treats those individuals as juveniles. It is unacceptable to judge against them the penalty of life imprisonment, however the court may in accordance with article 60 § 1 in conjunction with Article of article 54 § 1 , extraordinarily mitigate other penalties, motivated by educational reasons.

Exceptionally, when it comes to a criminal act of article 197 § 3 and 4 of the Penal Code, person who has completed the age of 15 can be held liable, provided that it can be attributed to the sufficient understanding of that person. The rules described above are applicable for juveniles. The penalty imposed shall not exceed 2/3 upper limit of the sanctions. If such person has committed any other act, then that person does not comply with article 10 § 2 of the Penal Code, or a person has not completed the age of 15, the sentence is judged on the basis of the Penal Code, but on the basis of the Act on juvenile justice.

This Act governs the liability of people between 13 to 17 years for offenses under penalty, and the proceedings in the event of their demoralization. The competent courts on the basis of this Act are the family courts, and instead of punishments and measures of the Penal Code, the measures provided in Article. 6 of the Act apply, in particular educational measures listed there, and the only corrective measure, which is placing such a person in a reformatory. The main directives, which have to be followed by the court, are the welfare of the minor, and the need for raising him/her. Pursuant to article 13 of the Act, the court may exceptionally mitigate the punishment rule (of the Penal Code), if a minor at the time of adjudication is under the age of 18, and there would be a reason to put him in a reformatory. This possibility also exists when a minor is sentenced to be held in the correctional facility, but by the time sentence is implemented, minor has completed the age of 18.

In accordance with article 55 of the Constitution, the extradition of a Polish citizen abroad is generally inadmissible. Exceptions are determined in the §. 2 and 3, it becomes acceptable to

extradict Polish citizens in cases provided by ratified by Poland international agreement, especially if the illegal act was committed abroad and the act is penalized by the Polish penal law. There are no exceptions to this rule provided in the Constitution. In accordance with Article 55 passage 5 of the Constitution, the court determines the admissibility of the extradition. Conventional requirement for the admissibility of the extradition of the perpetrators is realized.

**xxiii.** In assessing the proportionality of the sanctions, we should compare them with the other sanctions contained in the Penal Code, not forgetting about the public perception of the facts and legal traditions.

Proportionality assessment should be done by comparing the sanctions for offenses against minors with the other crimes against sexuality and morality. Next they should all be put in the context of the size.<sup>50</sup>

article Penal Code	148 § 1	157 § 1	189 § 1	191a § 1	197 § 1	207 § 1
act	murder	slight body injury	deprivation of liberty	preserving the image of a naked person, while sexual intercourse, without peron's consent	rape	cruelty to the closest ones
lower level of sanction	8 years	3 months	3 month.	3 months	2 years	3 months
higher level of sanction	life sentence	5 years	5 years	5 years	12 years	5 years

A comparison of threatening sanctions for major crimes against persons and threatening sanctions for acts of a pedophile, first of all puts sexuality and morality at a very high place among the goods protected by law (but taking into account the public perception of action, strikes low minimum sanction for the offense of rape<sup>51</sup>). Second, acts against minors up to

<sup>50</sup> Postępowania wszczęte, przestępstwa stwierdzone i wykrywalność w latach 1999-2011; statystyki policyjne dostępne pod adresem:  
[http://statystyka.policja.pl/portal/st/842/47682/Postepowania\\_wszczete\\_przestepstwa\\_stwierdzone\\_i\\_wykrywalnosc\\_w\\_latach\\_19992011.html](http://statystyka.policja.pl/portal/st/842/47682/Postepowania_wszczete_przestepstwa_stwierdzone_i_wykrywalnosc_w_latach_19992011.html)

<sup>51</sup> mimo, że przestępstwo to jest w odbiorze społecznym bardzo ciężkie, oraz wywołuje ogromne cierpienie psychiczne ofiary, możliwe jest zawieszenie wymierzonej kary, z której to możliwości w 2011 roku sądy skorzystały w 182 przypadkach na 481 skazań. Biorąc pod uwagę, że skazani nie traktują zawieszenia w ogóle jako kary, jest to rażąco niewłaściwe;



15 are characterized by a rigorous penalty in relation to their adult counterparts, and often those acts do not have such equivalents<sup>52</sup>.

The lower limit of the statutory penalty allows for conditional suspension of punishment for almost all torts described in Penal Code. Only punishment for murder can not be suspended, and when it comes to pedophile offenses, the suspension does not apply to the rape of a minor under the age of 15, but this does not compensate for the fact that the crime is pursued at the request, not from the office. The formation of the upper limits of sanctions for acts of article 197 and 200 K.K. is righteous, it takes into account the size of typical violations in committing these acts, and corresponds to the penalties for other offenses, and finally it is in accordance with the condemnation of these acts in the society. Similarly, in the case of an act of article 203 there are no doubts about the validity of high-risk, because forced prostitution leads to considerable and often irreversible damage to the psyche of a young person.

Society welcomes leaving judges much freedom in the evaluation of the act, which is expressed in terms of sanctions. However what offends the society is the upper limit sanctions sentenced for acts related to child pornography in particular. Courts do not mete out punishments even close to the upper limit of threat<sup>53</sup>, they also mete out very low statutory sanctions in the case of rape crimes.

The total number of convictions for sexual offenses in the years 2006 - 2011 is about 2000 per year, of which 40 to 50% are committed against minors under the age of 15. From the total number of penalties for acts against sexuality and morality half are meted on probation.

In the case of offenses against minors, the penalties for the offenses specified in Article 202 § 2-4b are almost always are subjected conditional suspension, from article 200 and 204 are subjected to it in about 50% of cases, and for the acts from article 197 § 3 are suspended only in exceptional <sup>54</sup> circumstances. This well illustrates the seriousness of the offenses,

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<sup>52</sup> w przypadku przestępstw skierowanych przeciwko dorosłym decydujące znaczenie ma przyzwolenie dorosłego, podczas gdy przyzwolenie małoletniego do lat 15 nie de penalizuje zachowania

<sup>53</sup> w roku 2011 z ogólnej liczby 12 skazanych z article 202 § 4 k.k. wszyscy otrzymali kary nieprzekraczające 2 lat pozbawienia wolności, wszystkie zostały warunkowo zawieszono. Z ogólnej liczby 150 orzeczonych w tym roku na podstawie article 202 § 2-4b k.k. kar pozbawienia wolności zawieszono 145. Źródło: INFORMACJA STATYSTYCZNA o ewidencji spraw i orzecznictwie w sądach powszechnych oraz o więziennictwie Cz. III Sprawy karne w 2011 r. Warszawa 2012 r. s. 93 (załącznik 1)

<sup>54</sup> na podstawie załączników 1 i 2

however courts assessment differs from the importance given to the acts by the legislature with the the limits of sanctions.

Particularly bright is disproportion of the sanction for an act with article 202 § 4 of the PENAL Code, punishable by 1 to 10 years in prison (with twelve sentence imposed in 2011, all were suspended), with the fatal beating with article 158 § 3 in conjunction. with § 1 of the Penal Code, punishable to the same extent, in which case that same year with 122 adjudicated custodial sentences only 3 were suspended <sup>55</sup>. Judicial practice shows clearly that the sanctions were framed incorrectly, and the Penal Code in this regard is highly fragmented and it can impose sanctions, which would be disproportionate to the seriousness of the act, taking into account the whole penal repression. The jurisprudence clearly shows the unjustification for such an amount of possible punishment.

Changes made in the Polish penal law in the years 2004 - 2009 for pedophile offenses have focused on increasing penalties provided for them, and on the introduction of new, precise regulations, including the implementation of provisions of the Convention of Lanzarote. The amendments have not changed the number of acts, or the structure of sentences. This is illustrated in the table below:

	2006			2011		
sentences	a.s.	d.l.	s.s.	a.s.	d.l.	s.s.
article 200	722	722	311	660	655	360
article 202 § 2	14	11	8	14	8	8
article 202 bez § 1 i 2	96	94	85	151	142	133
article 204 § 3	44	44	24	22	22	10

Legend: a.s. – all sentences, d.l. – deprivation of liberty, s.s.– sentences suspended

The analysis of the above table shows that the number of convictions has not changed drastically, despite the amendment. Noticeable is the increase in the number of convictions under Article 202, which is the result of a significant build up of the provision, and the

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<sup>55</sup> podobnie niekorzystnie wypada zestawienie sankcji za inne czyny z article 202 k.k. z przepisami przewidującymi podobne zagrożenie, jak choćby article 157 § 1, 189 § 1 i 207 § 1 k.k.; źródło: załącznik 1

decline in convictions under § 3, due to the creation of the special rule in article § 4b, which penalizes possession of child pornography.

In summary, having in mind that the increase of penalization has not reduced the number of criminal offenses, and courts continue to mete out punishments in the lower limits of threats, one might ask about the need to change the existing sanctions. Frequently used term of imprisonment in suspension, combined with the preventive measure of article 39 pkt. 2a Penal Code is effectively punishable, only in relation to offenders with no disorder who have committed an offense under the influence of an error (for example, thinking that the person you have sex with is an adult), and for people diagnosed with pedophilia, as well as those that do not have respect for the legal system (those people often commit sexual crimes<sup>56</sup>), such a judgment does have not at all penalty qualities. Even sentencing pedophile for a life and sentencing lifelong mentioned above the penal measure may not be sufficient. Existing facilities in Poland treating pedophiles have many vacancies, but only a few patients<sup>57</sup>. The existing possibility of forced chemical castration of pedophiles is used very rarely<sup>58</sup>, and the voluntary submission to it can bring the conditional early release from serving the penalty. Overallly speaking, the courts have a range of options in punishing pedophiles, and a lot of flexibility on the level of the sanctions. But despite that, they don't use it, sentencing penalty with a similar amount, and rarely use the power to rule further punitive measures. Nevertheless, the sanctions should be regarded as both deterrent and effective and generally proportionate, when it comes to legislation, there might be some doubts concerning the practical usage.

**xxiv.** The Penal Code provides sanctions only applicable to individuals (physical person). It is prohibited the existence of organizations with the aim of committing crimes – punished, only their members are punished (on the basis of Article 258 of the Penal Code), and the organization itself is illegal. Article Regulations 44 and 45 of the Penal Code makes it clear, that if an organization is legitimate, and if by the offender (member) actions organization will receive any benefits, those benefit will be forfeited.

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<sup>56</sup> często także pod wpływem innych czynników, zarówno natury wewnętrznej (psychicznej) jak i zewnętrznej

<sup>57</sup> zobacz: <http://tvp.info/informacje/polska/osrodki-leczenia-pedofilii-stoja-puste/7292518> lub:

[http://m.wiadomosci.gazeta.pl/wiadomosci/1,117915,10924298,Szpital\\_chcial\\_leczyc\\_pedofilow\\_\\_ale\\_nie\\_ma\\_chetnych.html](http://m.wiadomosci.gazeta.pl/wiadomosci/1,117915,10924298,Szpital_chcial_leczyc_pedofilow__ale_nie_ma_chetnych.html)

<sup>58</sup> i tylko wobec najgorszych zbrodniarzy, takich jak Mariusz T., morderca i gwałciciel

The liability of collective entities regulated by the separate Act<sup>59</sup>, it provides a range of penalties that can be applied to these entities. In accordance with Article § 16 1 pkt. 7 of the Act, entities are responsible for the offenses specified in Article. 199-200, Article 202 § 3 and Article 4b. 203-204 of the Penal Code and the fundamental penalty is a fine in the amount specified by the article 7 of the Act, an exception to this rule: person isn't liable if he/she didn't receive any benefits while committing the offense. In accordance with Article 9 of the Act there is also the possibility of a judgment for a period of one to 5 years, the prohibition of promotion or advertising, the prohibition on the use of grants, subsidies, and other forms of support, the prohibition of the use of the assistance of international organizations, prohibited from competing for public contracts. In addition the judge may rule the judgment to be given to the public.

**xxv.** Penal law provides the confiscation of objects used to commit a crime, and objects and other benefits derived from the offense. As a general rule, the good faith is protected of persons owning things, but who committed no crime. If those things were used to commit it, they recover it, unless the rule states otherwise. Article 204 § 5 of the Penal Code provides that if the object was used to perform an act of article 204 of the Penal Code, the court may order the forfeiture even if it was not owned by the perpetrator. If there is a high probability that the offender transferred the benefit of the crime to another person, then that person must prove that they obtained it legally, otherwise it will be forfeited. This does not apply to eg child pornography, the possession of which is illegal and punishable by law, and \_ profits from its sale. Objects to be forfeited in accordance with the Article 44 § 6 of the Penal Code become the property of the State Treasury and shall be destroyed. In accordance with Article.49 Penal Code the court has the ability to sentence exemplary ruling for *Fundusz Pomocy Pokrzywdzonym* and post-penitentiary aid.

However exemplary rule is permitted in accordance with article 59 Penal Code, only in case of the withdrawal of punishment, sentencing self-contained penal measure, and in accordance with Articles 67 § 3 of the conditional discontinuance of the proceedings. Exemplary does not exceed 60 000 PLN.

**xxvi.** In the case of committing one of discussed acts within the family or close environment of the victim, there may be coincidence of acts of article 201 and 207 of the

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<sup>59</sup> wspomniana wcześniej Ustawa o odpowiedzialności podmiotów zbiorowych, Dz.U. 2002 Nr 197 poz. 1661

Penal Code, penalizing incest and abuse in the family. In general, the apparent coincidence (the Act) of the article 11 of the Penal Code will be included, which carries a punishment on the basis of stringent regulation and allows the application of punitive measures from all concurrent provisions, the multiplicity of actions (article 85 Penal Code)

A criminal court may also take additional measures, protecting the victim. For the duration of the proceedings, may order the defendant to leave the premises jointly occupied with the victim, and if in his/her opinion, further protection for the child by his/her guardian, guardian would be detrimental to the child, in accordance with Article. 51 Penal Code, judge notifies then the competent family court. Family and Guardianship Code allow taking away the children from a parent, especially when he has carried the offense on a child. If it is dangerous for a child to be with his/her guardians, the child is taken away promptly from those guardians and next the child is placed in an emergency shelter or facility involved in the taking care of children.

If the act was committed in close proximity to the child, but not in the family, the offender may be prohibited contact with the victim, approaching her, or prohibit residence in a certain place or a certain environment. The victim is then isolated from the family, as previously described, unless the family is not able to provide the security, when the act was a result of improper care (or even lack thereof) of a minor, and there is no prospect of improvement situation.

If the act was committed in close proximity to the child, but not in the family, the offender may be prohibited to contact with the victim, to approach the victim, to stay in a certain place or a certain environment.

The victim is then not isolated from the family, as previously described, unless the family is not able to provide the security (if the act was a result of improper care or lack of it, and there are no prospects for the improvement of the situation).

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

##### 1. Introduction

Criminal procedure provides for a number of exceptions in Poland on the participation of the minor both at the stage of pre-trial investigation, as well as judicial. To start any debate on this issue some technical remarks should be made on the terminology in the Polish legal

system, being used for civil law and criminal law which presents some definitions relating to people who do not yet have full legal capacity, which in a sense, limits their rights.

### 1.1. Minor

Penal Code, like the code of criminal procedure, use the term "minors", which we can find in the article, for example: 51,207, 208 Penal Code and in article 23 code of criminal procedure. Despite the use of the word its definition cannot be found. Therefore, you should look to the Code Civil. This term is derived from article 10 § 1 Code Civil, which provides that "the legal age is, who completed eighteen years". In view of the above, we can conclude that "minor" means a person who is not completed 18 years. With the statutory context, it appears that the term "minors" may include both offender criminal, as the victim, and in addition, such a minor who committed a crime or was found in the circumstances, which may be indicative of his demoralization or of demoralizing impact on him.

### 1.2 Juvenile and adolescents

The Penal Code and other laws, such as law of "Proceedings in the cases of minors" dated 26 October 1982 or the Code of Offences, use such terms as "juvenile" and "adolescent". According to the article 10 § 1 and 2 Penal Code, juvenile offender "is guilty of offence before reaching the age of 17". While adolescent is the perpetrator, who at the time of the offence is not completed 21 years of age and in the time of having jurisdiction at first instance – is not completed 24 years (article 115 § 10 Penal Code).

## 2. Notice of the crime.

Information about the crime can come from different sources. Most often it is provided in the notice of the crime. In most cases the preparatory proceedings is the result of the Police response to the notice of certain events, which can be considered, in the evaluation of the notifiers, for crimes, and not the actions of the Police itself targeted directly on citizens' behavior that violates the standards of disclosure of criminal law. The comparison of data, which are collected in the police crime statistics<sup>60</sup>, 1990 and 2005 shows that in 2005 the proceedings were initiated more rarely by the notice of the crime submitted by citizens (1990 - 79,1% of cases, while in 2005 - 72.1%) by institutions (1990 - 79,1%, 2005 - 5.5% - we see here a sharp decline in the number of notifications, which is the result of changes in the

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<sup>60</sup> Such data can also be found in the extended Annual Statistical Bulletin issued by the Main Police Command.

rules), but definitely more often as a result of the offender being caught red-handed or in the immediate pursuit (1990 - 3%, 2005 - 15.1% - grew rapidly only after 2000 - in 2000 - 2.5% while already in 2001 - 10.8%).<sup>61</sup>

## 2.1. The social obligation of notification of an offence

Polish criminal procedure in article 304 code of criminal procedure states that anyone who knows about the crime prosecuted *ex officio* (e.g., sexual intercourse with a minor under the age of 15), is obliged to notify the Police or the public prosecutor's office.

Used in this provision, the term "social obligation" means that each citizen has the permission to deposit the notification of an offence prosecuted *ex officio*. This obligation is not supported by any sanction of criminal liability, only ethical and social. We can indicate that the essence of the obligation that was indicated in the Act and its failure does not cause any legal response, possibly in the case of public officials which can result in disciplinary liability (subject to other provisions). It is explained that people want to be protected from crime; therefore, every citizen should help law enforcement authorities in the detection of offences, in particular in the case of criminal offences to the detriment of a minor. At the basis of this regulation is the attention of the legislature for the welfare of the public, as well as increasing the possibility of the detection of offences committed particularly to minors and prevention before demoralization. The note should be that this obligation is subject to restrictions as indicated above this only covers offences prosecuted *ex officio*. In this connection, the disabled are indictable offences and on request (e.g. crime suspicion - article 197 Penal Code).

To submit a notice of an offence is entitled any person who has such information regardless of age or nationality. If the person notifying about the crime is not Polish, the Protocol shall be drawn up with the translator. However, if the notice of the crime is submitted by a deaf person, this Act will be drawn up with the participation of the expert of the Court with the relevant specialties. The offender may also notify about the crime that he committed, however, considering the type of criminal acts covered by this report, it is hard to imagine such a situation.

## 2.2 The obligation to deposit the notification of the crime to the detriment of a minor

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<sup>61</sup> J. Blachut, Problems with measurement of crime, Warszawa 2007 s. 171.

In article 304 § 2 code of criminal procedure contrary to section 1 of this article we are already required to submit notification of the crime, which also applies to offences committed to the detriment of a minor. In the case of non-preserving the disciplinary sanction threatens.

Article 304 § 2: "State institutions and local government, which in connection with his activities became aware of the crime prosecuted ex officio, shall immediately inform the public prosecutor or the police and is obliged to take the necessary steps to the time of arrival of the law enforcement authorities to avoid blurring the traces and evidence of a crime ".

The legal obligation of notification of the crime was imposed on State institutions and local government, which in connection with their activity (legal or statutory) became aware of the crime prosecuted ex officio. This obligation rests upon the person who is the manager or who, according to internal rules, is obliged to inform the law enforcement authorities of the crime<sup>62</sup>. In the present case, on the background of the article 304 § 2 code of criminal procedure, notification of the crime of rests mainly upon people acting in the management functions (e.g., directors of the school or kindergarten) or bearing special responsibility. The wording of the 304 § 2 can lead to a conclusion that only managers are obliged to notify about the crime, but such interpretation would significantly narrow the catalogue of the possibilities of its application, and it would lower the detection of crimes to the detriment of minors. Therefore, the employees of individual institutions subordinated to the manager/director are also obliged to notify the manager/director about the crime.

Unexecuted obligations indicated in the article 304 § 2 code of criminal procedure result in the liability of the public official (article 231 Penal Code). This provision penalizes behavior of the public official to the detriment of the public or private interest due to non-compliance with the obligation imposed on him (in the form of the total omission or its implementation in non-conformity with the content).

### 2.3. Notification of an offence submitted by the non-governmental organizations

The code of criminal procedure of 6 June 1997 released the non-governmental organizations from the obligation to notify about the crime (e.g. associations). This change is important

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<sup>62</sup> T. Weatherford, J. Tylman Polish criminal proceedings, Warsaw 1998, s. 569



for the legal protection of the victims, since reduced circle of entities is obliged to notice about the crime. This state of things potentially can adversely affect the degree of detection of crimes committed in particular those to the detriment of the minor. However, we should not be so sceptical about the actions of the legislature because it is perceived to allow victims of the crime to return to legal entities that do not have a statutory obligation to notify law enforcement authorities. Often the police is the last step that victims want to do. It may seem that the first they will seek professional help, and then take action to punish the perpetrators of the crimes.

#### 2.4 Submission of the notification of an offence by a minor

Person who does not have full legal capacity (a minor or an incapacitated person) also may file a notice of the crime prosecuted ex officio. The rules for submitting a notice of offence are the same in respect of minors, as well as of persons with full legal capacity. Each notice of offence equally obliges law enforcement authorities to take the appropriate measures provided by law. Law enforcement authorities have a duty to verify the accuracy of the information given in the notice of the crime, and then check the circumstances of the offence, collect evidence incriminating the suspect (the accused in the course of the process).

#### 2.5. Notice of the further course

Person or institution (Government or municipality), which filed a notice of the crime you should be notified of its initiation, the refusal to initiate or about the redemption of the inquiry or investigation. If the notifier of the crime will not receive this information within 6 weeks, he may lodge a complaint to the supervising prosecutor (article 306 § 4 and § 6 code of criminal procedure).

### 3. The presence of a minor in a criminal trial

#### 3.1. The right to exercise rights conferred to the victim

The principle is that the victim, a natural person having legal capacity, occurs in a criminal trial. However, there is an exception from this principle, in article 51 § 2 code of criminal procedure, which lists entities who can exercise the powers given to the victim, whose age or total or partial legal incapacitation limits deprives them of their legal capacity.

Article 51 § 2 code of criminal procedure provides that "If the victim is a minor or totally or partially incapacitated, his legal representative performs (legal or actual guardian) or a person under whose constant keeping the victim remains".

Representatives of the rights of the child are his parents, what is stated in the family code (article 98 section 1). If the child remains under parental responsibility of both parents, each of them is its legal representative. In the case of the differences between legal representatives the Court decides.

#### 3.1.1. A crime to the detriment of a minor committed by a parent

This situation complicates in the case of the offence committed by the parents of the child, if he remains under their parental responsibility. Sometimes there are cases when a person residing in the nearest, common household with a minor commits a sexual offence on her injury. At the stage of criminal proceedings the competent authorities (the public prosecutor or the Court) can apply to the suspect (or accused) the preventive measures, which are designed to secure the correct line of the process. Those precautionary measures can be applied at any given time. Mostly police supervision and provisional arrest shall apply. Provisional arrest is designed to secure the correct line of the process, but also to isolate the offender from a minor person. There is no difference in relation to criminal proceedings where the accused is a person from outside the ranks of the minor's family -court may also declare a preventive measure in the form of provisional arrest. In practice, the law enforcement authorities often use a preventive measure in the form of provisional arrest in such cases. It is also possible to declare an order to leave the premises jointly occupied. Therefore the argument *de lege ferenda* is in this case to provide specialist help for example of a psychologist, therapist or psychiatrist, for example at the hearing of the minor (article 185a code of criminal procedure). However, at the second hearing, the prior opinion of the mental state of the child is not necessary.

#### 3.1.2. The prohibition of personal contact in civil procedure

You should also have regard in the context of offences committed to the detriment of the minor by the next family members, that in the case of the notification of the crime to the detriment of the minor, which does not involve the effect of provisional arrest, it would return to the family court for a protective proceedings in order to declare a prohibition of personal contact with the victim for the duration of the criminal proceedings. However, we must remember, that the conduct of civil proceedings in this area entails costs. The decision

of the prohibition would result in "physical" ban on contact, which in practice means that the offender, in order to implement the ban issued by the Court, would have to leave jointly occupied premises regardless of the title, which he has to this place. In addition, the continuing considerations on the parental authority and a minor in criminal proceedings, it should lead to a conclusion that in this case, the guardian shall be established to carry out the rights of the victim. (Article 99 of the Family Code).

It should be noted that in accordance with the resolution of the Supreme Court of 30 September 2010 (and PRC 10/2010) a parent of the minor may, acting as legal representative of the minor victim's rights, cannot exercise victims' rights in the criminal proceedings, if the accused is the other parent." In this situation, at the beginning of the proceedings it is requested to establish for the child's guardian to represent the interests of the child in the proceedings. This request is made to the appropriate family court by the criminal court, the prosecutor or the parent<sup>63</sup>. If the offence is committed by any of the parents in the detriment of several children, the court establishes as many guardians how many children are to be represented. The authority hearing the case is obliged to check whether the guardian actually performs and whether it is careful.

### 3.2 Hearing of a minor

When hearing of the minor there should be a regard to the interests of such a witness, which due to the age should be provided with special care, taking into account the protection of the child's psyche before traumatic experience. Such protection is undoubtedly provided by the psychologist, who may be present at the hearing. Polish legal system assumes that the Court upholds the principles of fair trial and equality of the parties. Consequently, it is prohibited to vary the parties even if on one side there is a minor. This means that we cannot put the suspect (in the process - the accused) in a worse situation than a victim, who, as has been indicated, may be a minor.

It should also be noted that the act of hearing of the victims, witnesses and the accused (suspect) has been dealt with in the Polish criminal procedure uniformly by article 171 code of criminal procedure. Only in 2003 under the amending law was introduced as a separate article 185a code of criminal procedure, hearing of a minor became different procedure. It

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<sup>63</sup> <http://www.lex.pl/osnkw-akt/-/akt/i-kzp-10-2010>

should be noted here that the Supreme Court in its resolution of 30 November 2004, states that article 185a code of criminal procedure (which will be referred to later in the report) refers to both the investigation and the proceedings, because the use of the word "accused", and not "suspect" when you specify the exceptions contained in this article provides, in the opinion of the Supreme Court, the absence of obstacles to carry out the hearing referred to in article 185a code of criminal procedure in proceedings from legal process<sup>64</sup>.

### 3.2.1. A minor as a personal source of evidence

There is no doubt that the minor is a special witness for several reasons. It is worth to point out that the ability of the perception and the memorization of the minor witness, and then reconstruction of the factors, which influences the proportion of observations, shall design the degree of child development. Clearly disputed evidence is the testimony of minors. For example, J. Bossowski argued that the testimony of children before the age of 7 years old cannot be treated seriously due to naivety in understanding life phenomena, the risk of suggestions and narrow range of words and concepts<sup>65</sup>. Opponents of this view in the wake of the survey contend that the child may be as valuable witness as an adult. Cases in which the testimonies of minors have nothing to do with the case or reality are only the result of this that the interrogators did not appreciate the specific features of the minor associated with age. There are 3 periods of growth, which have an impact on the assessment of the reliability of the information: a period of pre-school (3-7 years), the period of the younger school age (7-12 years) and adolescence (12-18 years). For example, children in the pre-school age are characterized by "activity of the mind and instability", which contribute to the involuntary distortion of the information. The resulting gaps in memory are filled with any content - the so-called confabulations.<sup>66</sup>

The child is a special witness, so it is important to take into account its growth period<sup>67</sup>. Polish code of criminal procedure does not prohibit the admission of the evidence obtained from the minor but states that the use of this kind of evidence requires prudence and far-reaching precautions. The legislature made the exception to the rule of repeated hearing of a

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<sup>64</sup> And PRC 25/04, Lex No 132572

<sup>65</sup> View J. Bossowski after B. Holyst, *Criminality*, Warsaw 2004, s. 1112

<sup>66</sup> *Ibid*, p. 1113

<sup>67</sup> In the wake of T. Hanauski, *Criminality*, the outline of the lecture, Kraków 2005, s. 219 and the next

minor (that is less than 15 years) in the article 185a code of criminal procedure. There is no doubt that the hearing of the minor of the victim as a witness is difficult, requiring specific qualifications and, in particular, extensive knowledge of psychology. The hearing of a minor in case of sexual offences is not conducted by the prosecutor, because he may not have the appropriate knowledge and life experience. In consequence, the hearings of minors are conducted by members of the Committee for the Protection of Children's Rights, consultative and diagnostic centers, family workers and by psychologists, who are constantly present. It seems that the hearing of the minor in the case of crimes of a sexual nature should be made by the psychologist with sexological specialization because he possesses the needed knowledge of psychology and sexology and may lead the hearing so as to minimize the traumatic experiences of a minor. The decision depends on whether the prosecutor will hear the minor himself or will do it in the form of law enforcement police officer. This decision is affected by various factors: the form of accumulated evidence, whether the minor is the only witness to the crime, the nature of the case, the public reaction to this action and many others.

### 3.2. The hearing of the minor according to article 185a code of criminal procedure.

If the minor is below 15 years and is the victim of a crime, his hearing will be held under the conditions referred to in article 185a code of criminal procedure.

The principle set out in article 185a § 1 code of criminal procedure – there is only one hearing (which is highlighted by the use of the word "only"). From this principle, however, two exceptions are provided for:

- disclosure of the circumstances, the explanation must be heard (the truth),
- the request for a hearing by the accused, who did not have the defender at the time of the first hearing of the victim (the principle of the right to defense).

If one of these conditions is met, it will be possible to hear a minor again. In view of the fact that the legal regulation contained in this article, should be applied both to the pre-trial investigation and to legal proceedings, it must be therefore accepted that the authority entitled to the hearing referred to in article 185a code of criminal procedure is the Court which makes it both for the first time, and again, and also regardless of whether this occurs in the preparatory proceedings or in legal proceedings. A.M. Wesółowska considers that

prior to the hearing of the minor the judge should already have evidence that allows for full hearing of a minor<sup>68</sup>. The court hearing shall be made in accordance with article 30 § 1 code of criminal procedure – by one person. In the light of the article 185a code of criminal procedure the participation of an expert psychologist is obligatory. In addition, persons entitled to participate in the activity were listed exhaustively.

By determining the jurisdiction of the Court the general provisions should apply, from which it appears that the hearing in the course of the investigation, the competent court is called to resolve the matter in the first instance (article 330 § 1 code of criminal procedure). It is the District Court, since all the crimes against sexual freedom and morals are the in the competence of this Court (article 25 § 1 code of criminal procedure). When the Act sets a different competence, specifically so notes (e.g. article 250 § 2 code of criminal procedure). The District Court could hear the victim in accordance with article 185a code of criminal procedure only then, if it became competent according to article 25 § 2 or § code of criminal procedure or 33 2 code of criminal procedure<sup>69</sup>.

### 3.3. Technical aspects of conducting hearings

Statistics of the Ministry of Justice - containing data about the interrogation of minors in accordance with article 185a and 185b code of criminal procedure in Poland in the years 2003 – 2010, show that the participation of children in legal procedures is becoming more and more common. For example: the number of hearings of minors in accordance with article 185a code of criminal procedure in the period from July 2003 to July 2004 was 1.161 in relation to total number of 1.443, and throughout 2009, amounted to 4.969 4.769. In turn, the number of hearings of minors in accordance with article 185b code of criminal procedure in the period from August 2005 to August 2006 was 542 in relation to the total number of 572, and throughout 2009 was 746 compared to 773<sup>70</sup>.

#### 3.3.1. The hearing of a minor witness at the stage of pre-trial investigation

For considerations on technical aspects of the conduct of the hearing of the minor we should start from article 147 § 2 § 2 code of criminal procedure. This provision provides

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<sup>68</sup> A. M. Wesółowska, Regulations concerning the protection of minors in the course of criminal proceedings, a child abused 2007, no 3, p. 39

<sup>69</sup> And PRC 25/04, Lex No 132572

<sup>70</sup> the data come from the publication of the "Kids Count" Nobody's Children Foundation, 2011

that if technical considerations do not prevent the hearing of a witness, victim, and referred to in article 185a code of criminal procedure perpetuates using recording equipment. It is a guarantee of the rule of a single hearing, therefore, it is recommended to use this type of equipment commonly. Article 147 § 3 gives the Court the opportunity to choose the form of the Protocol, however, it is advisable to base on the summary of the hearing of a minor to avoid distortion.

### 3.3.2. The hearing of the minor witness at the stage of judicial proceedings

The hearing, in accordance with article 185a and 185b Code of Criminal Procedure, takes place only once and would not be repeated (at the stage of pre-trial investigation). On trial the evidence contained in the Protocol of the hearing is evidence. The Protocol is read at the hearing (article 185a § 3 Code of Criminal Procedure). You should assume that this applies both to the preparatory and judicial proceedings. It would be incomprehensible to diversify between the proceedings. Article 185a code of criminal procedure contains no such differentiation. This provision does not provide for a solution along the lines of article 396 § 2 code of criminal procedure that the Court may order the hearing of a witness, who has not appeared because of the obstacles too difficult to remove, the judge designated for its composition, and also allows you to order the hearing of such a witness to the Court to the requested party. In this last variant the witness does not come into contact with the court. However, it should be noted that in the case of sexual crimes, there is the possibility of application of the aforesaid article. (396 § 2 code of criminal procedure)

An important feature which distinct the minor victim's hearing from the adult is also included in the article 189 point 1 code of criminal procedure which states from people who have not completed 17 years, the pledge is not taken. This is justified by the lack of awareness on the importance of the pledge made in the process. Therefore, you should not receive a pledge from a person, for who it has no meaning.

Without a doubt before the hearing, the child must be informed of this, and of the consequences of making the statements inconsistent with the truth, in the most appropriate way for him (taking into account his age, mental development and character traits). In addition, according to the article 190 code of Code of Criminal Procedure of criminal procedure, a minor witness should be warned before the start of the hearing of perjury for testimony being false or concealment. In doctrine there appear opinions that it should not be treated as the general principles of criminal liability. Children of a certain age are not subject to criminal liability under the Penal Code and the code of civil procedure. Article 10

provides that on the basis of Penal Code the code corresponds to the one who committed the offence after 17 years of age. In connection with the provision of article 189 code of criminal procedure, it should be noted that in the opinion of the legislature, minors below the 17 years old are not able to comprehend fully the nature and importance of the pledge. In addition, since minors who have not completed 17 years of age shall not be liable criminally, they cannot therefore be liable for perjury<sup>71</sup>.

Non-governmental organization, Nobody's Children Foundation in 2004 came out with the initiative to the Polish courts of the blue rooms or audition rooms. These are the rooms equipped for auditions of minors. They are situated outside the buildings of the Court or the public prosecutor's office. This location is to make the child feel safe, and in friendly conditions. In the room are the toys that the child may feel more comfortable. The necessary pieces of equipment should be the Venetian mirror room and the audiovisual equipment to record sound and image. Such rooms are located in the premises of the Nobody's Children Foundation or the Committee of the Protection of the Rights of the Child. The hearing of the child is in the form of a conversation with the judge, in which participates the psychologist. In the room next to it, the Prosecutor or the accused stands, the defender and the technicians who take care of the quality of the recordings. Hearing is recorded mostly on DVD, VHS tape and attached to the evidence of the case. Evidence obtained at the hearing in the blue (friendly) room have the same legal force as the testimony obtained during a hearing in the judicial review hearing room<sup>72</sup>.

### 3.4. The right of a minor to refuse to testify

An important issue is also the right to refuse to testify of a minor victim in to repeal the answers to questions (article 182 Article 183 § Code of Criminal Procedure). The legislature gave the primacy of the good of family before interest of Justice, leaving the witness the will testify against the nearest person.<sup>73</sup> Thus, only the witness is entitled to exercise the right to refuse to testify. It might seem that if the witness is a minor, the decision to refuse the submission by him of evidence, in accordance with article is made by his legal representative. Legal representative of a minor cannot force him to testify, as well as to the refuse. In connection with this argument comes the conclusion that minors themselves may make use

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<sup>71</sup> . Kornak, A minor as a witness in a criminal trial, Warsaw 2009, p. 43

<sup>72</sup> Wikipedia: [http://pl.wikipedia.org/wiki/Niebieski\\_pok%C3%B3j](http://pl.wikipedia.org/wiki/Niebieski_pok%C3%B3j)

<sup>73</sup> T. Weatherford, J. Tylman, Polish criminal proceedings, London 2011, s. 473



of the opportunities contained in the article 182 section 1 code of criminal procedure. This view is supported by the Supreme Court, which provides that each witness, also a minor, has the right to refuse to testify.<sup>74</sup>

Opinion of the Court on article 182 section 1 Code of Criminal Procedure does not contain any provisions that would justify different treatment of the minor.

### 3.5. The hearing of a minor as a witness

Article 185a code of criminal procedure treats about a hearing of the victim. Similar regulation is in the article 185b code of criminal procedure and it concerns the hearing of the minor witness, who at the time of the interview has not completed 15 years. This provision provides that such witness can be heard in the conditions referred to in article 185a code of criminal procedure in matters concerning violent offences or unlawful threat or crimes against sexual freedom and morals, if the testimony of the witness may be important for the settlement of the case.

The consolidation guarantees the ability to return to full and undistorted version of the testimony or opinion in any moment of the procedure, in which the need occurs.

In the case of the above grounds in the preparatory proceedings, the prosecutor shall make a reasoned request to the competent court to conduct a hearing in the mode specified in the article 185a code of criminal procedure. If the need appears only at the stage of judicial proceedings, the Court should issue the appropriate order in this matter.

In view of the above considerations the hearing of the minor shall remain valid. It should be noted that this provision does not apply to the witness who collaborated in the commitment of the offence - article 185b § 2 code of criminal procedure.

### 3.6. The participation of third parties in the hearing of a minor as a witness

Code of criminal procedure provides the matter of participation in the hearing of the minor issue of the third witness.

Article 171 § 3 code of criminal procedure allows the possibility of "hearing the person who has not completed 15 years in the presence of a legal representative or guardian, unless

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<sup>74</sup> Resolution SN of 19 February 2003, and PRC 48/02, <http://prawo.money.pl/orzecznictwo/sad-najwyzszy/uchwala;sn;izba;karna,ik,i,kzp,48,02,5642,orzeczenie.html>

the good of the process is not endangered.” The principle is to hear such a person in the presence of such third parties, and only exceptionally can be waived from it and it is only because of the good of the ongoing proceedings. It should be noted here, that this provision does not order to hear the minor witness in the presence of a third party, but only allows such a possibility. The presence of parents in the hearing stems from the article 171 section 3 Code of Criminal Procedure and a moral right to care, as well as the regulations contained in the article. 95 section 1 of the family code (it states the principle that the child remains under the keeping of parents). This means that while calling a minor for being heard as a witness, his parents or guardians, under whose keeping the child remains, should be called too.

The participation of the legal representative or the actual guardian is limited to the presence at the hearing; his role is passive. However, there are no obstacles for the authority that conducts the hearing to approve asking questions, as this could help to explain the circumstances of the case. He can be present for the entire hearing, as well as in parts of it. The last situation may take place when in the course of the hearing, it appears that the presence of a legal representative or guardian actually affects the course of the hearing or when in its ongoing run without the presence of that person proves that her presence is desirable<sup>75</sup>.

#### 4. The principle of the good of the child

In accordance with the opinion of the Supreme Court concluded in its judgment of 1 February 2008<sup>76</sup> it should be considered that the principle of the good of the child is on the ground of procedural law, can suffer limitations in the event of circumstances covered by the disposition of the article. 185a § 1 code of criminal procedure states that the re-hearing of the child is not dependent on the opinion of a psychologist as to the possibility of obtaining certain information from the child and the impact on his psyche. The primacy of the good of the child is provided by the directive of article 185a § 1 Code of Criminal Procedure by the introduction of a single hearing rules, as well as by the same way its conduct.

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<sup>75</sup> Ibid.

<sup>76</sup> Judgment of 1 February 2008, SN, V KK 231/07

The most important legal regulations relating to the implementation of the principle of the good of the child are included in the following article:

- article 171 § 3 Code of Criminal Procedure - hearing the minor, who has not completed 15 years old as a witness in the presence of a legal representative,
- article 185a Code of Criminal Procedure, which introduced an exception for minor victims to be heard once
- article 185b Code of Criminal Procedure which introduced the possibility to hear minor witness on the principles referred to in article 185a code of criminal procedure.

It is worth to note at this point, that the police in order to increase the effectiveness of their activities and exchange valuable ways of carrying out various activities created The Bank of Good Practice, which consists of the rules of good practice, to which the officers have access. In the Bank you can also find information and tips on criminal proceedings involving a minor.

An NGO, the Nobody's Children Foundation has developed a so called "Standards for the interrogation of minor witnesses according to article 185a and 185b code of criminal procedure". The document was a recommendation from the Ministry of Justice, which promotes and distributes these standards.

#### 5. An adhesive action (*adhaeret causae criminali*)

Following legal remedies can be used to investigate civil claims: adhesive action and application for judgment action to repair the damage on the basis of the article 46 of the Penal Code. The victim has the permission of the investigation of damages from the offender in the situation, when he suffered the injury as a result of an offence. In the case of crimes of a sexual nature this institution is not used often, however, because of its legal importance it will be briefly described in this chapter.

##### 5.1. Notification of the action

A civil action may be notified in the preparatory proceedings. This notification shall be attached to the files of the case, but ultimately the act of its acceptance or rejection is done by the court when it obtains the indictment together with the acts of the pre-trial investigation. Provision on the acceptance of the request is done by the Court after receiving the indictment, but the day of notifying the action is believed to be the day of the

submission of the action. Civil action in the criminal process may be notified not later than at the beginning of the trial - article 62 Code of Criminal Procedure. The term cannot be restored. Non-notification of the civil action in this particular period loses this permission at a later stage of the proceedings. The notification shall be effected by the deposit of the petition action.

#### 5.2. Legitimation to sue

Adhesive action can be submitted not only by the victim, but also, in specific situations can be submitted by the closest person to the victim, the social insurance company in so far as the damage was repaired, the State control authorities or the Prosecutor acting on behalf of the victim. The legal representative of a minor can also submit an adhesive action on behalf of a minor.

#### 5.3. The civil action left without consideration

There are cases when the court hearing the criminal case, although the lawsuit meets the formal requirements, refuses to accept a civil action. This occurs when: the action is unacceptable because of particular regulations, the claim has no direct connection with the charges of the indictment and does not result directly from the committed offence, an action was brought by an unauthorized person, the same claim is the subject of another investigation or the claim has been legally ordered, the state, municipal or social institute participated in the offence or with a person who is not accused, or the application to repair the damage was submitted.

If the application complies with the formalities and any of the circumstances mentioned above does not occur, the Court shall order the adoption of a civil action. However, if any of the circumstances reveals in the later stage of the proceedings, the Court has a duty to leave the action without consideration.

#### 5.4. Transfer of the lawsuit to the competent civil court

In case of leaving the action without consideration, a person who has filed it may within 30 days from the date of refusal or of leaving the civil action without consideration, may claim to the court competent to request the transfer of civil recognition, for the day of the claim is considered the day of the submission of the lawsuit in the criminal proceedings. After the transfer of the claim to the court hearing civil cases, the plaintiff must pay the cost. In addition, in the event of a failure to indict because of pre-trial relief or its suspension, the injured party, within 30 days from the date of service of the mandatory time provisions may

require the transfer of the case to the court competent to hear civil cases. If the victim does not request within this period, a lawsuit submitted before does not have legal effects and to enforce their claims in civil proceedings a separate legal action must be lodged.

#### 5.5. The content of the claim

Only claims arising directly from the crime can be claimed in the adhesive action process – compensation for the injury and reparation for the moral harm. It is allowed to claim actual losses (*damnum emergens*) and lost benefits (*lucrum cessans*), since the Act does not make restrictions in this respect. But it is not possible to claim personal. You cannot claim protection of personal goods – article 24 of the c.c.

#### 5.6. A decision issued by the Court after the investigation

It should be stressed that a necessary condition to settle the suit by the Court, is the conviction. Given the above, the Court may: take the action into account, take action into account in part and dismiss the rest, take the action into account in part and leave the rest without consideration or dismiss the action in its entirety.

The Court will take into account the civil action in the criminal judgment in whole or in part, if it will make sense in the light of the collected evidence and established the basics facts. Otherwise it will be dismissed. If the circumstances of the adhesive action do not allow the court to judge the claim or results in prolixity of the criminal proceedings - the Criminal Court leaves an action without consideration. If the person awarded against a civil action or imposed the obligation to repair the damage in the parts do not cover the entire damage, the entitled person can assert additional claims in civil proceedings.

In the case of the dismissal of the civil action by the criminal court also in parts, it results in *res judicata* and it is not possible to assert claims again before the Court<sup>77</sup>.

### 3.2 Complaint Procedure

Remedy at law is defined as legal remedy predicted by the law of criminal proceedings, which provides an opportunity to adduce procedural decision decision by submitting this decision to control of procedural authority, illeglize the decision or demanding the control diverse from the authority's procedural document. There are two types of remedies of law:

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<sup>77</sup> Judgment of the Court of 11 September 1974.And K-66/74, Lex No18913

ordinary and extraordinary remedies. The most popular legal remedies are: *środki odwoławcze* (legal remedies) such as *apelacje* (appeals) and *zażalenia* (appeals).

We are given the opportunity to lodge an appeal against the sentence of the appellate court, which serves as the control. Parties in criminal proceedings such as: defendant, public prosecutor, auxiliary prosecutor, private prosecutor, civil plaintiff have the authorisation to lodge the appeal. The party which appeals against the sentence may demand its control in terms of law and actual state of affairs. The basis of appealing can be the following:

- contempt of substantive law
- contempt of legal proceedings, whether the impact on the essence in a sentence is possible
- mistakes in establishing the actual state of affairs, which became the basis of the sentence, whether they could have an influence on the sentence
- considerable disparity of penalty

Moreover, the *apelacja* (appeal) may contain of the whole range of accusations, which cannot be included in the *zażalenie* (appeal).

The court of appeal adjudicate in terms of remedies, which means that the court has to allow the direction of the appeal (in advantage or disadvantage of the accused) and its scope (challenging the whole sentence or a particular excerpt of the sentence). The court of appeal can uphold, repeal the challenged sentence (than the case is directed to a judicial review or the proceedings are discontinued) or if only the collected evidence is sufficient, the court can even change the verdict, but it will be never powerful enough to sentence the accused, who has been acquitted by the Court of First Instance. In case of re-examination, the Court of First Instance has to allow the instructions and legal opinions of the Appellate Court. The Court does not collect evidence unless the procedure should be accelerated.

It should be considered that an appeal must be prepared and written by an advocate. A term during which the appeal should be lodged is 14 days long dating from servicing a verdict and justification.

Another remedy is *zażalenie* (appeal), which is used to appeal against orders and decisions.

According to the rules of criminal proceedings we have a legal right to lodge an appeal against the decisions of a court which terminate legal proceedings, protecting measures and any other legal decisions. Hereinabove is entitled to the parties of proceedings and persons.

The appeal could relate to a stay of proceedings, treatment in a psychiatric hospital or extending the period of treatment, decision of keeping witness' personal data in strict confidence. We can lodge the appeal against the decisions prepared by the prosecutor, advocate or attorney at law terminating the procedure. The appeal does not suspend the implementation of the decision. The court which issued the decision or has been appointed to consider it has the power to retain the implementation of the decision. However, cancelling hereinafter does not require justification. The decision against which the appeal has been lodged may be considered by the court composed of the same judges who issued that. In any other case the president of the court forwards the appeal, case files and its duplicates immediately to the court in charge of considering the appeal. Whether the appeal refers to a remand or security on property it should be forwarded in 48 hours.

Parties, advocates and agents have the legal right to attend the session of the appellate court considering the appeal against the decision concluding the procedure and against arrest. They have also the hereinabove right, if they could attend the session of the court of first instance. In any other situation the appellate court can give permission to parties, advocate or agent to attend the session

From the date of the decision we are given 7 days for lodging appeal.

Cassation is an exceptional sort of remedies. It is regulated precisely by the Criminal Proceedings Code. That is why it can be used only in situations which meet legal conditions.

Cassation (appeal) can be also lodged against the sentence of the court of second instance finishing the whole procedure. It is lodged to the Supreme Court of Poland through the agency of the appellate court. The reason for lodging the appeal may be a striking breach of the law, if this could have a negative impact on the content of the sentence. Other reasons may be the following flaws:

- Unauthorised, incapable or excluded person took part in a decision process,
- The court was staffed in an inappropriate way or there was an absence of a judge during the proceedings.
- One of the common courts adjudicated a case which was due for a particular court and whether a particular court adjudicated a case due for a common court.
- The court adjudicated a penalty, a penal measure or protective measures which was unknown by the law

- The decision was ruled with the violation of the majority rule or was not signed by any of the ruling judges,
- There is a logical contradiction in the decision
- The decision was ruled despite the fact that criminal proceedings concerned the same person were legally finished
- the accused died
- The case was barred by limitation
- The perpetrator is not a subject to the Polish jurisdiction
- There was not an action brought by the prosecutor against the decision
- The permit for investigation or motion for prosecuting was not issued by entitled person unless the act provides otherwise.
- Other circumstances occurred that disable investigation
- The accused did not have an advocate or the advocate was not attending mandatory sessions
- The decision was issued under the absence of the accused while his attendance was mandatory.

It needs to be said that the basis of the appeal (cassation) cannot be disproportion of penalty. The appeal has to clarify the flaw. The appeal could be lodged by The Public Prosecutor General, The Chief Military Prosecutor, The Polish Ombudsman and The Children's Ombudsman. It should satisfy requirements of legal acts and must be prepared or written by the agent who needs to be an attorney at law or a solicitor.

The term for lodging an appeal is 30 days starting from the date of servicing decision and the explanation.

#### Representation of children's interest

Code of Criminal Procedure provides the situation in which the interest of a child are represented by a legal agent and a person who is in charge of caring for the child constantly. The essence of the agency is undertaking actions with the result for the represented person.

A statutory representative is a person who represents a child not only because of his/her willingness to help but also by virtue of law. According to The Family and Guardianship Code, child's parents have the role of his/her legal agents. While the child is under the authority of the parents it can be represented by both of them.



While the agents' actions are conflicting child's interests the decision is issued by the guardianship court that issues the decisions in favor of the child's good.

While one of the parents has committed crime on a child under his legal authority or is expected by the court not to meet the agent's obligations referring to the child, the court designates a curator who has legal right to represent the child's interests. The Supreme Court emphasizes that the number of curators should be close to the number of children that need legal representation.

A person who constantly takes care for the child may become his/her legal agent. The legal premise considers only a constant and indivisible custody. The custody during certain periods of time is viewed as insufficient for gaining the position of legal agent. All premises must be examined before establishing the guardianship.

According to the research done by the „Dzieci niczyje” Foundation the guardianship in criminal proceedings should be seen from more critical perspective. The majority of the children was represented by one of the parents not having mentioned the situations in which the parent was expected to be guilty for the crime committed on his child. In almost half of the situations a parent has lived with the injured child.

According to the survey the law institution of a curator hereinabove cases is used rarely by the proceedings authorities. Lack of using legal tools may affect the criminal proceedings and the child as well.

Passiveness of the agents during the criminal proceedings can raise doubts. The agents do not protect their charges effectively. The reason for this situation may be an insufficient legal knowledge. According to the research relating to the professional agents the injustice seems to be obvious. The number of actions conducted by legal agents in the accused cases in proportion to the children representation is 3:1.

It should be emphasized that despite the fact children have their constitutional rights, in many situations they are not respected by the state and children do not have a sufficient legal representation, because the institution of legal curator is used very rarely and children are not protected against the domestic violence in an effective way.

Taking hereinabove situations into consideration we should think over providing more comfortable access to cost free guardianship guaranteed by the state or organizing encounters with the lawyers during parent-teachers nights. It may have the influence on extending parents' and legal guardians' consciousness of breeding a child and the

implementation of children's rights. Moreover, there should be special lessons about children's rights and guardianship. The education might prevent children from becoming injured.

## 4 COMPLEMENTARY MEASURES

i. Under the term of preventive measure we should understand all the legal instruments available in (criminal, civil and administrative) proceedings, aiming at making the accused or the suspected manipulating the direction of proceeding, means escape, hiding from the court or organs of prosecution impossible. In case of heavy crimes related to sexual abuse, the preventive measures may be used to prevent committing a crime again by the suspected. In the matter of crimes of sexual abuse of juveniles, the main aim of preventive measures is to prevent the suspected from further abuses or negative influence of the fact that the accused remains at large, as well as any kind of pressure on the victim and his surrounding, what would have an impact on the way of their cooperation with the organs of administration of justice. The Penal Code introduces division of preventive measures into two categories: isolating measures and unisolating measures.

### 1. Isolating measures

The provisional arrest is the most common isolating measure, which consists in placing the accused or the suspected of committing a crime of sexual abuse in the certain place and isolating him from the outside world. About the provisional arrest decides the court on the motion of prosecutor. The provisional arrest prevents from intimidation, which often leads to resignation from fight of punishing the propagator.

Article 258 of the Code of Criminal Proceeding defines the prerequisites for provisional arresting, underlining the term “huge probability”, that the perpetrator has committed a crime of sexual abuse against children, stated on the basis of the already collected proves in the case concerned. The adverb “huge” can be interpreted as “probability verging on confidence of fault and cause”. Provisional arrest does not refer to the situation, if use of any other measure is in certain case enough.<sup>78</sup>

### 2. Unisolative measures

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<sup>78</sup> Polskie postępowanie karne, T. Grzegorzczak, J. Tylman, wyd. LexisNexis, Warszawa 2011, p. 587 – 616;

a) Sureties

Material surety (regulated in article 266 – 270 of the Code of Criminal proceeding) consists of folding of money, securities, deposits or mortgage as some kind of surety in case of escape, hiding or disturbing in criminal proceeding in another way by the accused. In case of escape or hiding, property law are the subject of forfeiture or raise, nevertheless, disturbing in criminal proceeding results with adjudication of forfeiture or raising of these rights.

Social surety is a kind of obligation of an object that the accused will appear on every calling and will not disturb at the proceeding in illegal way. The position of the surety must come from the party that takes it on, it can be e.g. defendant's employer or head of the school the defendant attends etc. The party which takes the social surety on lodges a motion with abstract of report including a resolution on taking on the surety and pointing the person and the duties, the defendant has to fulfill. In Polish legal system there is also a possibility of individual surety from the person which enjoys respect. The conditions are in this case similar to the conditions of social surety.<sup>79</sup>.

Another of preventive measures, applied in case of sexual abuse against children is surveillance, which consists of putting the defender under the surveillance of police and obliging him to fulfill the duty of decision of court of prosecutor (article 275 KPK). The defender under the police surveillance must not leave the place of stay concerned, must appear at the organ of surveillance in certain moments, informing the organ about planned leaving and time of coming back, must not contact with the victim or other people concerned.<sup>80</sup>.

b) The warrant of leaving the living space

The warrant of leaving by the defender the living space (article 275a KPK) is applied in case of crimes committed with use of force against a person living together with the perpetrator in a living space if there is huge probability that the crime might be committed against a juvenile. In preparatory proceeding the measure is used for the period of time no longer than 3 months.<sup>81</sup>.

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<sup>79</sup> Polskie postępowanie karne, T. Grzegorzczak, J. Tylman, wyd. LexisNexis, Warszawa 2011, p. 617 – 622;

<sup>80</sup> Ibidem, p. 622 – 624;

<sup>81</sup> Ibidem, p. 623 – 624;

c) Suspension in job activities or occupying a position or prohibition of doing certain business

In case of sexual abuse against juveniles, the measure is related to teachers and other workers of education system, people having in their work contact with children, workers of public healthcare services. The measure isolates the perpetrator from the victim and other children and protects from committing the crime once again. It serves also building the trust to the professionals working with children. The measure isolates the people, who committed the crime of sexual abuse from working with them by not allowing them to have contact with juveniles, because they lost the confidence in the matter of jobs ethics. The Code does not define the timeframes of the measure and the ways of prolonging it. Due to its severity, the time of it is always defined in advance, what can be done by the court or the prosecutor.<sup>82</sup>.

d) Prohibition of leaving state

The greatest aim of prohibition of leaving the state (article 277 KPK) as a preventive measure is precluding the perpetrator from escaping from the state. It is often connected with invalidating the passport or another document entitling to crossing the boarder or prohibition of issuing such document. The organ conducting the proceeding can from the moment of issuing the decision about the subject of the matter detain the document, but no longer than 7 days.

Invalidation of a passport or an another document entitling to leaving the state is done by the passport office on the basis of article 39 passage 1 and article 38 passage 1 of the act on passports and documents related on motion of the court that conducts the proceeding against the accused. In the matter of time limits, the rules of article 35 § 3 is applicable.

**iv.** The Polish rules of Penal Code separates two basic kinds of protective measures. For predicating protective measures it is not necessary to prove the guilt and bigger social noxiousness. The relevant feature is in this case the danger for the legal order, which the perpetrator caused with his act. Generally speaking, the aim of the measure is to secure the society and the juvenile victim from the perpetrator.

#### 1. Protective measures of healing

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<sup>82</sup> Polskie postępowanie karne, T. Grzegorzczak, J. Tylman, wyd. LexisNexis, Warszawa 2011, p. 624 – 625;

The first group of protective measures regulated by the Polish PENAL CODE are measures healing, regulated in 94 § 1 KK, 95 § 1 KK, 95a and 96 § 1 KK.

- placing the perpetrator of a crime committed in the insanity in psychiatric hospital
- placing the perpetrator of a crime committed in the limited insanity in a penitentiary, where the special healing and re-medial measures are used
- placing the perpetrator in isolated penitentiary or referring him to ambulatory treatment in case of imprisonment with no stay of the carrying out of a sentence for a crime against sexual freedom, committed as a result of disorders of sexual preferences

The additional condition of using protective measures with healing character, consisting of placing the perpetrator in a close penitentiary and referring him to the ambulatory treatment is the fact, that the use of the measure is necessary to prevent the perpetrator from committing the crime related to the disorders of sexual preferences. The used in article 93 KK term „only when” underlines, that the close imprisonment has special character, and obliges the adjudicating court to act with special caution. Article 93 KK makes the decision of placing the perpetrator in close imprisonment dependent on the obligatory hearing of psychologist's and (at least two) psychiatrists.

The Penal Code determinates in article 94 § 1 the legal basis of obligatory placing the perpetrator of a crime related to the sexual abuse against juvenile in the rights mental hospital, which in this case is appreciable social noxiousness of an act and high probability, that the perpetrator will commit the crime once again. The act does not regulate the time of stay in a mental hospital, nevertheless article 94 § 2 obliges the courts to release perpetrator if the longer time of stay in a mental hospital is not necessary anymore.

The court should take into account the probability if the perpetrator can commit the crime again. The lack of duty of defining the length of stay in mental hospital in advance is the reason for permanent and systematic control of the progress in treatment. The courts, basing on the reports on the psychiatric health of perpetrator made once on 6 months by the head of the close penitentiary (article 206 KKW), are obliged to decide about the further stay in close penitentiary (article 204 KKW). The decision releasing the perpetrator is made by the court on the basis of psychiatrists' and psychologists' opinion after the head's notification of lack of reasons for further stay in the imprisonment.

There is also possibility of facultative placing of the perpetrator of a crime of sexual abuse against juveniles in the situation, when the crime has been committed in insanity or the

perpetrator has already been sentenced to imprisonment with no stay of the carrying out of a sentence (article 95 § 1 KK). The perpetrator in that case serves the sentence and is put on a treatment.

Placing the perpetrator in the close penitentiary or referring he to ambulatory treatment was introduced into the Polish Penal Code in 2005. The measure is adjudicated facultatively in case of sentence on imprisonment with no stay of the carrying out of a sentence or committing a crime related to disorders of sexual preferences. There is also possibility of obligatory adjudication of the measure.

The treatment comprises pharmacological or psychiatric therapy aiming at elimination of disorders and preventing from committing the crime again. The condition for treatment based on pharmacological measures is the lack of contraindications for using it. The time of treatment depends on the progress in healing.

## 2. Preventive administrative measures

In case of administrative measures, the Penal Code defined them in art 99 and 100. The measures are used in case of committing crimes in insanity, small social noxiousness, discontinuance of criminal proceedings or if there are some additional reasons excluding punishing of the perpetrator. In case of the crimes of sexual abuses against juveniles, there are used following measures:

- prohibition of occupying certain posts, doing certain job and conducting a certain kind of business;
- prohibition of conducting a business related to educating, healing, teaching of juveniles and taking care of them;
- obligation of refraining from staying in certain places, prohibition of contacting with certain people or prohibition of leaving the place of stay without permission of a court;
- forfeiture

In case of prohibition of doing a certain job or conducting a certain business related to education, healing and teaching of juveniles or taking care of them, the obligation of refraining from staying in certain places, contacting with certain people or prohibition of leaving the place of stay without court's permission, the court can adjudicate the measure if the perpetrator commits the crime in insanity consisting of disability of varying the meaning of the committed crime or controlling his behaviour due to mental disease, handicap of other

disorder of psychological activity, and the use of a measure is necessary because of the protection of the legal order.

The forfeiture is adjudicated when the perpetrator committed a crime in insanity and could not have control his behaviour due to mental disease, handicap or other disorder of psychological activity, the social noxiousness is small, there is conditional stay of the carrying out of a proceeding and there are circumstances excluding punishing the perpetrator. The adjudication of forfeiture as a preventive measure aims at protecting the society from another violation of the public order by the perpetrator and strengthening the feeling of social justice<sup>83</sup>.

### III Assistance to victims

At the moment there are many associations in Poland providing the victims of the sexual abuses some psychological support and therapy helping them to deal with the affects of traumas lived in the times of their childhood. One of the best – known initiatives is association Koniec Milczeni (The End of Silence) which consists of therapists, lawyers and other people offering help to the victims of sexual abuse and supporting them in re-building the feeling of their self – confidence and dignity.

#### 1. Legal position of victim of sexual abuse

In Polish legal system there is a document called the Charter of the Victim's Rights, comprising also the regulation of the victims of sexual abuse. Its supreme aim is protection of the victim's good, with special attention on the juvenile victims. The Charter is result of many documents guaranting the entity the respect for his rights and duties. Article 12 of the Charter regulates the issue of sexual abuse in detailed way: „*The victims of sexual abuse shall be heard by the police officers of the same gender, and if the victim is a child, the hearing shall take place with presence of psychologist or a person the child trusts*”, what aims at strengthening the position of a child as a victim of witness, whose already hurt psycho should not be ballasted with stressing experiences related to the hearing. The Charter is on the basis for some claims

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<sup>83</sup> Prawo Karne Materialne, M. Bojarski, J. Giezek, Z. Sienkiewicz, wyd. LexisNexis, Warszawa 2010, p. 423 – 426;

on the person conducting the proceeding and not – proceeding activities in the situation, when his duties against heard child and not being fulfilled.<sup>84</sup>

The Charter of the Rights of a Child as the Withness of a Crime is unbinding document elaborated by the experts of the foundation Dzieci Niczyje (Nobody's Children), which comprises detailed directives for the way of conducting the hearing and underlines the parts of proceeding, where the good of a child should be protected in a special way. The patronage over the document takes the Minister of Justice. The Charter is addressed to the organs of justice and the helping institution and highlights the importance of the highest value which is the good of a child during the proceeding<sup>85</sup>.

The Charter is the effect of national initiative of the Foundation Nobody's Children in frames of the programm „A Child – the Withness of the Special Care” for the respect of children's rights in the proceeding of hearings and unifying the practice of treating the children harmed or being the victims of the sexual abuse. In the programm there are organized several seminars for the workers of organs of justice, lobbying actions for creating legal regulation concerning the children – friendly ideas of friendly hearing and establishing of Coalition for Children – Friendly Hearing of Children.<sup>86</sup>

## 2. Adhesion claim as special institution of criminal proceedings

The adhesion claim is a special legal measure for civil claims in criminal proceeding. Art, 62 KPK states, that the harmed person can till the moment of beginning of the legal proceeding in the main trial bring a civil action of against the accused to assert a claim answing from property rights which result directly from committing of a crime. The current regulation enable vindication of claims relates to the material damages (property damages and lost benefits) and compensation of moral injury. In both of situation the claims must stay in a close relation with already committed crime. The claim must be brought by the person entitled, so in case of juveniles – parents or commitee. The adhesion claim can be brought only and exclusively against the acussed person or people.

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<sup>84</sup> Source: official webside of foundation Dzieci Niczyje;

<sup>85</sup> See: article 8 – 12 Charter of the Victim's RIghts;

<sup>86</sup> Dziecko – świadek szczególnej troski, article comes from the website of Ministry of Justice from 12.07.2011, full text available at: <http://ms.gov.pl/pl/dzialalnosc/przeciwdzialanie-przemocy-wobec-dzieci/programy-i-kampanie-na-rzecz-dzieci/dziecko-swiadek-szczegolnej-troski/news,3366,kampania-bede-przeslychanyprzesluchana.html>



Article 69a KPK states, that the criminal court deciding about the criminal liability in the crime concerned has also the jurisdiction in cases for property claims referring to the crime. This principle is also applicable in case of prosecutor in preparatory proceeding at securing the civil claim.<sup>87</sup>

### 3. Telephone Line of Trust for Children and Teenagers

Another step for help the victims is national Line of Trust for Children and Teenagers as a free of charge and anonymous line ensuring the highest level of discretion of talks seven days a week under the phone number 116 111. The line has been established as a part of European initiative of the European Commission and should be activated in every Member State of the EU. In Poland it was introduced in 2008 by the Ministry of Internal Matters and Administration and the President of the Office of Digital Communication.<sup>88</sup> At the moment it is led by the Foundation Dzieci Niczyje (Nobody's Children) as an element of realisation of the national policy of protection of children's rights.

Currently the line is a part of a program named „116 111”, addresses to children and teenagers as well as to adults and aims at helping young people in difficult situations, also the ones related to sexual abuses. The program comprises education of juveniles and their surroundings in the area of their own rights and the ways of exercising them.

### 3. The institution of Ombudsman for Children's Rights

The institution playing crucial role in the area of protection of rights of children as victims or witnesses of the crimes of sexual abuse is the Ombudsman for Children's Rights, who is the one-person constitutional institution, whose main task is to undertake all the necessary steps towards ensuring every child balanced conditions of upbringing in respect with its dignity and subjectivity (see: art 3, act on the Ombudsman for Children's Rights) and protection of a child from any forms of violence, cruelty, abuse, as well as demoralisation and inattention.

The aim of creating this apolitical and independent organ was improving of the system of the protection of children's rights in Poland, According to the act on the Ombudsman for

<sup>87</sup> Polskie postępowanie karne, T. Grzegorzczak, J. Tylman, wyd. LexisNexis, Warszawa 2011, p. 327 – 335;

<sup>88</sup> Dziecięcy Telefon Zaufania dzwoni bez przerwy!, article comes from the magazine „Newsweek” z dnia 6.04.2011, full text available at <http://m.newsweek.pl/spoleczenstwo,dzieci-telefon-zaufania-dzwoni-bez-przerwy,74891,1,1.html>

Children's Rights the actions related to the protection of children's good can be undertaken only on his own initiative basing on the information about certain problem, which prove the violation of the children's right. He can also, using available legal possibilities, deal with individual cases.

The activity of the RPD concentrates on addressing to the organs of public administration, institutions and organisations to give explanation and necessary information on the particular subject and making the files and documents accessible for him. RPD can also ask the organisations, organs and institutions (including Ombudsman) to undertake the rights activities for the protection of children's right, intensifying the works aiming at adapting Polish law to the international standards. According to article 72 passage 4 of the Constitution the right to ask to RPD has every citizen of Poland, legal person and organisational entity without legal personality if according to these principles it can be subject of rights and duties or organisation of citizens or organ of city/ town government, The addressees of RPD's actions are all the organs of public administration (e.g. Sejm, Senat, President of Poland, Government, courts), city/ town governments, government's institutions and NGOs<sup>89</sup>.

### III NATIONAL POLICY REGARDING CHILDREN

i. The problem of sexual abuse of children is the most shocking one regarding public opinion; tolerance against such abuse is marginal. For example in Polish prisons adults who had sexually abused children have the lowest position. For that reason prison authorities are forced to assign them separate cells and supply restricted contact with other prisoners. If not, the prison society can endanger children abusers with humiliating and inhumane treatment. Discussions on the internet fora show the difference of opinions concerning that subject. Some of the people think that punishments imposed on such criminals are way too little and the persecution which they experience during the stay in prison is completely deserved. Others bring up humane values and claim that the abusers are treated in Polish prison as dehumanized creatures.<sup>90</sup>

As for the public debate about children's sexual exploitation – that topic used to be extremely popular in the mass media in the beginning of the previous decade. Data

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<sup>89</sup> Prawo Konstytucyjne, B. Banaszak, wyd. C H Beck, 2010,

<sup>90</sup> <http://www.gk24.pl/apps/pbcs.dll/article?AID=/20070921/MAGAZYN/70920025>

contained in dr Monika Sajkowska's study 'Messages in the mass media concerning children's sexual exploitation' (FDN) demonstrate an interesting phenomenon concerning rapid rise of the average number of article related to this subject in Polish press throughout 2000 – 2004. Till year 2003 this number had been staying on quite low level but with a tendency to slow growth (beginning from 49 article in 2000 to 138 article in 2003). But the most rapid growth taken place in 2004. From January till September 2004, 711 articles were published in press. We have to pay attention to the fact that press has been interested in the most shocking cases of children's sexual exploitation: by catholic priests, for commercial use and child pornography in the internet.

Undoubtedly there is a good aspect of the growth of such topics in press, namely: the disclosure of such social problem by the media. Unfortunately, so called 'media facts' started to become a weapon in political intrigues; for example – numerous references to the children's sexual abuse by priests is a serious attack of left-wing parties on the Polish right-wing political parties for whom Catholic Church is an authority. Of course, among these reports there are unfortunately reliable facts based entirely on the truth. However, dominant part of these reports is not focused on diagnosing the problem and solving it with the means of law, but on the creation of false image of certain people or groups of people (more in chapter IV).

Manipulation of sexual abuse topic in political games caused marginalisation of it as so called 'media facts' domain. Monica Sajkowska (FDN) has summarised it marvellously: *Image of the problem that is presented by the press takes into consideration mostly the most invasive forms of children's sexual exploitation simultaneously marginalising including children in such sexual activities of adults as touching, persuading to watch pornography, exhibitionism. Ipso facto media messages favour narrow definition of sexual exploitation and can in some degree preserve social disorientation considering occurrence, harmfulness and classification of less drastic forms of sexual contacts with children.*<sup>91</sup>

Serious political debate has started in Poland back in May 2012. It was connected with MPs' project of Penal Code novelization that was being prepared after Agata Baraniecka-Klos's case exposure.<sup>92</sup> After 30 years of silence she had submitted in public prosecutor's office notification of being perpetrated with a criminal offence – sexual harassment. That project is

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<sup>91</sup> [http://zlydotyk.pl/tl\\_files/artykuly/Sajkowska\\_M\\_Wykorzystywanie\\_seskalne\\_dzieci.pdf](http://zlydotyk.pl/tl_files/artykuly/Sajkowska_M_Wykorzystywanie_seskalne_dzieci.pdf)

<sup>92</sup> <http://www.rp.pl/artykul/906286.html?print=tak&p=0>

suggesting a change that is abolishment of prescription children's sexual exploitation and incest crimes. It is a brave suggestion taking into consideration the fact that for now the only crime that is not affected by prescription in Polish criminal law is genocide. Currently binding article 101 § 4 determines that *prescription of the crimes defined in article 199 § 2 and 3, article 200, article 202 § 2 and 4 and furthermore article 204 § 3 as well as crimes defined in article 197, article 201, article 202 § 3, article 203 and article 204 § 4 when disadvantaged is juvenile cannot occur during 5 years from achieving of the juvenile the age of 18.*<sup>93</sup> It is quite a sensible solution. Firstly, to 'make the first step' and submit notification of a perpetration of a criminal offence, the victim of sexual exploitation as a child needs some time to become independent – financially, emotionally – from his/her persecutor. It is a frequent situation that the oppressor is someone from the family. 75% of the victims know the perpetrator. Most of such crimes take place at home – almost 3000 cases – when other places like: school, street, meadow, orphanage, forest – never reach number higher than 330 cases. On the other hand, the longer is the period of preparatory proceedings commence after the crime commitment, the more difficult is to find evidences. Therefore extension of the prescription period or even its abolishment won't cause detection of the criminal in all cases submitted. Other issue, also problematic, is penalization's expiration. One can assume that legislator will consider with difficulties abolishment of incest and paedophilia's prescription. It seems justifiable to extend this period to 20 or 30 years as to provide the victim with actual possibility of commencing the proceedings. On the other hand there are heard some proposals about shortening of prescription period to 5-10 years but counted from victim's coming of age.

On the other hand, longer period of preparatory proceedings starting from the moment of committing a crime – the bigger difficulties to prove one's statements. Prolonging of limitation or getting rid of it, does not mean that in all cases the perpetrator will be detected. Another matter, also problematic is the time of the punishment, which is also subject to the statute of limitations.

We can suppose that the legislator will have huge difficulties with eliminating expiration of pedophilia and incest, but prolonging of period of expiration to 20 or even 30 years in order

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<sup>93</sup> <http://lex.online.wolterskluwer.pl/WKPLOnline/index.rpc?#content.rpc--ASK--nro=16798683&wersja=61&fullTextQuery.query=kodeks+karny&reqId=1350302782015497&class=CON TENT&loc=4&full=1&hId=2>

to enable the victim the real possibility of starting the proceeding is justifiable. On the other hand, there is a proposal of shortening the time of expiration to 5 – 10 years, but starting with the moment of reaching the age of 18 by the victim.

The project, supported by the party *Ruch Palikota*, was consulted in social forum, and it is supposed that it will be let to the first reading in Sejm before 2012. The members of parliament of various parties say, that Polish law does not guarantee sufficient protection of victims of sexual violence.<sup>94</sup>

Another controversial problem was raised before, during the debate regarding idea of novelization of the Penal Code, to be more precise – of introducing in 2005 article 106a which regulates in some cases lack of possibility of the cover up of conviction (erasure from Register of Convictions) for the crime against sexual freedom if the victim was juvenile under the age of 15. According to prof. Monika Platek, the novelization is justified with the need for *better protection of juveniles from pedophilia*.<sup>95</sup> The solution is controversial: there is a variance with principle of humanitarianism, because even the people sentenced for work imprisonment sentence have the chance for erasure of conviction – 10 years after recognizing it as executed.<sup>96</sup>

To sum up, we can say that the political discussion on the subject of protection of children and victims of sexual crimes exists when it is initiated by the society. Maybe more intensive strategic litigation, focused on juvenile victims of sexual abuse would attract the attention of more important number of people.

ii. The official website of Ministry of Justice ([www.ms.gov.pl](http://www.ms.gov.pl)) offers a lot of helpful information regarding sexual abuse of children and the society can find some tips, where to find certain activities of the state. In 2009 in the network of Department of Human Rights has been created the Department of Group for Combating Violence in Family. This is special governmental unit dealing with children – victims of crimes. We can say that Ministry of Justice together with the above mentioned Department is a public partner of the discourse on the subject of human rights in Poland.

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<sup>94</sup> <http://www.rp.pl/artykul/907523.html?print=tak&p=0>

<sup>95</sup> [http://www.lex.pl/c/document\\_library/get\\_file?uuid=33b0b029-767d-4f82-957c-f0cc37bdbbc3&groupId=2221015](http://www.lex.pl/c/document_library/get_file?uuid=33b0b029-767d-4f82-957c-f0cc37bdbbc3&groupId=2221015)

<sup>96</sup> <http://kodeks-karny.wieszjak.pl/zatarcie-skazania/289877,Wylaczenie-zatarcia-skazania-art-106a.html#ixzz28eNpTgMc>

Except that, Ministry of Justice established a special internet portal [www.pokrzywdzeni.gov.pl](http://www.pokrzywdzeni.gov.pl), where people can find some information about rights of the people affected by crime, Homes of Help for People Affected by Crime, „Information for Victim” and data base of institutions and non-governmental organizations offering victims of crimes psychological support and legal information. The addressees of the website are society and professionals.

The structure of partnership of NGO is more complicated; the best – known subjects of the 3<sup>rd</sup> sector dealing with the criminality among children are: Foundation „Dzieci Niczyje” (Nobody’s Children), Helsinki Foundation for Human Rights, Committee for Protection of Children Rights. At the beginning of 2011 over 20 subjects dealing with raising awareness on the matter of violence against children united to establish National Partnership for Protecting Children from Violence. In June the organization appealed for improving children's protection from violence.

A) Social campaigns– raising awareness of the society

**1. Zły dotyk boli przez całe życie** (The bad touch hurts for life) – The first Polish campaign concerning sexual abuse of children, 2002

The campaign was led by Foundation Dzieci Niczyje and Ombudsman for Children's Rights. It was addressed to parents and teachers, aiming at making the society aware, that the problem of sexual abuse appears in every social group, not only dregs of society. The idea has its reflection in the motto of the campaign „The hurt children want to be invisible” which shows the level of social awareness of children problems, which should have, regardless of the social status. The campaign has its own website and various educational materials, sketches of the seminars, leaflets.

**2. Child in the Net** The next program is released by the Foundation Dzieci Niczyje. There are two target groups:

a) Children

Some time ago all Poland knew the characteristic dialogue, taken originally from internet chat: „Hi, I am Anna, I am 12 years old. I want to make friends. - Hi, I am Wojtek, I am 12 too. You never know, who is on the other side.” The message of the slogan is to make children aware of anonymity of the internet users and make them less trustful towards the new mates from chat rooms.

b) “Every movement in the internet leaves a trace. Exploitation of children in internet is a crime punished with imprisonment”. The slogan of campaign aims at raising adults' awareness, who could eventually commit a crime of sexual abuse against children in internet, of legal consequences of making internet – friends. The detection of such crimes rises constantly.

**3. Campaign „Nie przegraj! (Don't lose!)** is a campaign promoted during Euro 2012 against commercial abuse of children, organized by Ministry of Computerization, Ministry of National Education, the Police, the Main Office of Police, The Voivod of Mazowsze. The campaign comprises materials for teachers: 3 scripts of lessons, films with other children's stories, poster „You are priceless”.

Before the campaign, in summer 2011 there was a research which resulted with a raport, available on the website of Foundation Dzieci Niczyje in Polish and Ukrainian language. The results of the research are not ravishing: although 48% of Polish juveniles consider prostitution or sponsoring as a real problem, the Poles are not aware of legal regulation of the problem. To conclude, although the attitude to the problem is rights, without legal knowledge we get rid of possibility of combating the crimes, which are committed in our society.<sup>97</sup>

#### **4. The helpline „Niebieska Linia” („Blue Line”)**

This is national helpline for the victims of violence in families, established as initiative of the National Agency for Solving the Alcoholism Problems (*PARPA – Państwowa Agencja Rozwiązywania Problemów Alkoholowych*) and the Main Police Office in Poland. The addressees are victims, perpetrators and witnesses of home violence and works since 3<sup>rd</sup> July 1995. „Niebieska Linia” offers psychological support to the calling people, psychological and legal advisory on combating violence in family, education about the phenomenon of violence and alcoholism, motivating to taking an action aiming at stopping violence in family, whose addressees are every places which have contact with violence in families and intervention in certain institutions. The workers of the helpline must have a higher degree in Pedagogics and Psychology and, additionally, they are educated on criminal, civil and family law.

B) Raising awareness among professionals working with sexually abused children

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<sup>97</sup> <http://dzieciofiaryhandlu.fdn.pl/badania-postaw>

## **1. National Conference on Helping Children – Victims of Crimes; *Ogólnopolska Konferencja Pomocy Dzieciom – Ofiarom Przestępstw***

The Conference has taken place every year in October for 9 years by now, there are usually 55 participants. The organizers are: Ministry of Justice, Foundation Dzieci Niczyje and the City Council of Warsaw. The main subject is usually protection of children from violence, and protection of the rights of children who are, for various reasons, participants of criminal proceedings. During the conference the results of the latest empirical and theoretical research and projects and initiatives of practical support for family experiencing home violence (especially children) are presented.

## **2. Certified rooms for hearings and campaign, „Child – a special care witness”**

Campaign refers to especially difficult issue of hearing children, witnesses of sexual crimes, or home violence; its' aim is sharing knowledge about juvenile witnesses' rights, making various groups of professionals and justice administration aware of specific situation of a child in criminal proceeding.

The campaign is the result of activity of Coalition for Friendly Hearing of Children which was established on 22<sup>nd</sup> February 2007 during the Days of Victims of Crimes and was inspired by Foundation Dzieci Niczyje. Today the Coalition has 260 members.

The Coalition, apart from campaign, initiated good practice in Polish proceeding – rooms of hearing of children and proceeding of certifying such rooms. The standards of equipment and using of these rooms were elaborated in 2007; they consist of two neighboring rooms: *room of hearing of a child – where a child is heard with presence of psychologist and judge and technical room – for other adults, participating in the proceeding (prosecutor, attorney). In technical room there are audio – video equipment, microphone and phones. The rooms can be divided with looking-glass. Nevertheless, if there is another possibility of observation from technical room (e.g. through the screen), the looking-glass is not needed. The main purpose concerning hearing room is making it cozy – but not too childish (because there are also older children heard), colorful – but in calm colors, rather bright, not too much furniture and toys (it is important to hide and take out a toy only in necessity and only some of them must be in the reach of children's sight; it is also relevant to make place not only for the youngest, but for the older children as well, e.g. two kinds of tables, two kinds of chairs.*<sup>9899</sup>

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<sup>98</sup> <http://dziekoswiadek.fdn.pl/przyjazny-dziecku-po;koj-przesluchan?cat1=&cat2=674&cat3=1590>



iii. The statistics are made; regularly updated and published on the official website of Polish Police. The data received between 2007 – 2011 show, that the number of people affected by sexual abuse, including juveniles – is decreasing. In 2007 the number of affected was 11 597 people, 10 036 of them were the juveniles and 8 151 were victims of sexual exploitation by an adult person. In 2011 the statistics were 9 475 in general, 8 106 juveniles and 5 086 affected victims of sexual exploitation by adult person.<sup>100</sup>

*The Police elaborated also statistical portrait of pedophile, basing on data from 2008<sup>101</sup> In most of cases it is liable man (in 2008 only 111 of suspected people were women and only 31 people were declared insane); 3 for 4 victims of these crimes know the perpetrator (in case of pedophilia the percentage is higher and it is 80%). While committing the crime they use dependence the victim on the perpetrator. The suspected of rape threaten their victim with a gun or other weapon, 21 times with a other dangerous tool, Most of suspected are unemployed or not-working and not-looking-for-a-job – 919 people, but there were also 651 pupils, 204 retired, 51 farmers, 42 students. 7% of suspects were previously punished for similar crimes. After detention and informing of the charges the court decided about temporary arrest in case of 1.038 suspected, of which in 203 cases the arrest was waived. These crimes are committed most often in a house or a flat – 2.727 crimes, but also in places like street – 327, primary and secondary school - 135, forest - 150.*

According to the statistics published on the official website of Police, the number of detected crimes and initiated proceedings under article 202 § 1 – 3 of PENAL CODE is constantly decreasing. The data show that only in the period of 2007 – 2009 almost 25.000 juveniles were affected by sexual crimes, of whom:

- article 200 of the Penal Code (sexual abuse): about 6.000 to 8.000 juveniles
- article 197 of the Penal Code (rape): about 350 juveniles
- article 202 of the Penal Code (children pornography) : about 1000 juveniles

All in all, 2.800 suspected were finally charged with the legal consequences of their behaviors.<sup>102</sup>

<sup>99</sup> [http://www.kujawsko-pomorska.policja.gov.pl/\\_portal/12747868394bfbb4170b28c/Niebieskie\\_pokoje.html](http://www.kujawsko-pomorska.policja.gov.pl/_portal/12747868394bfbb4170b28c/Niebieskie_pokoje.html)

<sup>100</sup> [http://www.statystyka.policja.pl/portal/st/840/76225/Pokrzywdzeni\\_przestepstwami\\_seksualnymi.html](http://www.statystyka.policja.pl/portal/st/840/76225/Pokrzywdzeni_przestepstwami_seksualnymi.html)

<sup>101</sup>

[http://www.statystyka.policja.pl/portal/st/840/48806/Przestepca\\_seksualny\\_\\_\\_quotstatystyczny\\_portretq\\_uot.html](http://www.statystyka.policja.pl/portal/st/840/48806/Przestepca_seksualny___quotstatystyczny_portretq_uot.html)

<sup>102</sup> [http://www.statystyka.policja.pl/portal/st/840/50010/Dzieci\\_ofiary\\_przestepstw\\_seksualnych.html](http://www.statystyka.policja.pl/portal/st/840/50010/Dzieci_ofiary_przestepstw_seksualnych.html)

Moreover, the data received in proceeding of the Blue Card, the freshest - from 2009, shows that the number of victims under the age of 13 is 27.000 people and number of victims in the age of 13 – 18: 14.000 people.<sup>103</sup>

#### **iv. 1) Foundation Dzieci Niczyje (Nobody's Children)**

On 17<sup>th</sup> January 2011 Foundation Dzieci Niczyje took a stand in public discussion initiated by Piotr Waglowski and Foundation Panoptykon on article 21 of the project of Directive of EU Council on combating exploitation of children for sexual purposes, sexual abuse and children pornography, published one year later by the European Commission. The Foundation is for obligatory character of the obligation of blocking internet websites including materials related to children pornography and formulated its statement in 5 points of report. Argumentation of Foundation is based mainly in claim of incorrect interpretation of freedom of speech and conviction of necessity of complex fight, which has been undertaken by Great Britain, Italy and Scandinavian states. The final voice of directive states the possibility, not the obligation of blocking such websites.<sup>104 105</sup>

#### **2) Ombudsman for the Rights of a Child**

In the same year 2012 there were several general performances of Mr. Marek Michalak, Ombudsman for the Rights of a Child, including 3 regarding violence against children.

On the 6<sup>th</sup> September 2012 he asked in a letter the Minister of Justice for the matter of releasing teacher Mariusz T. sentenced for imprisonment for killing children and pedophilia. The sentenced was bisexual and had tendency to pedophilia and deep psychopathology<sup>106</sup>. The Ombudsman thinks that resocialization of the sentenced, despite its length, can appear to be not enough and appeals to further consideration on the topic of some preventive and penitentiary actions. The Minister of Justice Jarosław Gowin has not answered to the letter yet.

On 27<sup>th</sup> July 2012 there was public hearing of Ombudsman for Children's Rights concerning the Blue Cards; proceeding elaborated by the the Main Police Office, Police Office for Warsaw, accompanied by National Agency for Solving the Alcoholism Problems for families

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<sup>103</sup> [http://www.statystyka.policja.pl/portal/st/840/53986/Dzieci\\_ofiary\\_przemocy\\_domowej.html](http://www.statystyka.policja.pl/portal/st/840/53986/Dzieci_ofiary_przemocy_domowej.html)

<sup>104</sup> <http://fdn.pl/walka-z-pornografia-dziecieca-sprawa-polska>

<sup>105</sup> <http://fdn.pl/dzialania-lobbingowe-fdn>

<sup>106</sup> [http://www.brpd.gov.pl/wystapienia/wyst\\_2012\\_09\\_06\\_ms.pdf](http://www.brpd.gov.pl/wystapienia/wyst_2012_09_06_ms.pdf)

affected with violence at home. The Ombudsman asked the authorities of doctors' council, appealing for activation of workers of health care in area of detecting and prevention from violence in families.<sup>107</sup>

He pointed out the legal instrument, novelisation of the act on combating violence in family, which states that the people who due to doing their job duties suspect committing a crime of use of violence pursued by the court, must immediately inform about it the prosecutor of police. The Blue Card, which police officers use during the intervention in case of violence at home, consists of two parts :

- Card A, which is a document of reported situation and place, as well as the action undertaken.
- Card B describing the most important crimes related to violence at home and contact data of institutions and non-governmental organization, the victim can ask for help.

The Card A is fulfilled by intervening officers (from police, public health services, commission for solving problems of alcohol). It is a document of medical intervention, related to violence and can be used as a proof in proceeding in the situation of pursuit. The Ombudsman appealed to doctors, life guards and nurses who, as people who can notice the signs of home violence as first, can give a prove by putting special note in Card A.

The proceeding of the Blue Cards has existed in Police for 12 years by now. During this periods – year by year – police officer protect from the violence 100 to 150 thousands of people. The most often they are women, but also children, even the youngest, who are also affected by violence.<sup>108</sup>

A month before, on 28<sup>th</sup> June 2012, the Foundation Dzieci Niczyje asked the Minstry of Labour and Social Policy to publish the information, if the nurses in nursery schools are obliged to complete the Cards A. It seems that the performance of the Ombudsman confirms the existence of the duty.

The President of Supreme Doctor's Council, Mr. Maciej Hamankiewicz has answered on the letter of the Ombudsman, confirming the necessity of the proceeding of the Blue Card and pointed out some lacking regulations, which should describe the duties of public health care

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<sup>107</sup> [http://www.brpd.gov.pl/wystapienia/wyst\\_2012\\_07\\_27\\_nrl.pdf](http://www.brpd.gov.pl/wystapienia/wyst_2012_07_27_nrl.pdf)

<sup>108</sup> [http://www.statystyka.policja.pl/portals/st/840/53986/Dzieci\\_ofiary\\_przemocy\\_domowej.html](http://www.statystyka.policja.pl/portals/st/840/53986/Dzieci_ofiary_przemocy_domowej.html)

in this area and underlined the need for organizing work time and system of salaries of doctors doing forensic examination of abused children. The regulation does not breach the rules of keeping doctors' secrecy, included in the act on profession of doctor from 1996. In principle, the doctor's secrecy has an absolute character; nevertheless it can be limited *ex lege*, *ex voluntas* (under the permission of a patient) or *ex officio* (under the consent of organ of public administration or another subject entitled). It can have *in blanco* character and must be revokable in every moment, because the patient is its exclusive manager of the information of doctor's secrecy. On the other hand, if the act allows doing so, the administrator of such information can be also the doctor, what is stated in article 40 of the above mentioned act, which points out that the doctor can be released from this duty of keeping secrecy can be harmful for patient's life or health.<sup>109</sup>

Another interesting performance of Ombudsman was the letter to Minister of Justice from 2<sup>nd</sup> April 2012 about novelization of article 205 of Penal Code in order to make the crimes against sexuality of juveniles (over 15 years old) possible to pursue in proceeding of public sue. The Ombudsman in his argumentation underlined the problem of financial or psychological dependence between the perpetrators and his victims. Unfortunately, the Minister has not answered on the letter yet.<sup>110</sup>

### 3) The National Partnership for Protection of Children against Violence

- Krajowe Partnerstwo na Rzecz Ochrony Dzieci przed Przemocą

On 31<sup>st</sup> May 2011 the association of more than 20 Polish organisations dealing with combating violence against children appealed to Minister of Justice, Krzysztof Kwiatkowski, to prepare complex reform of Polish law, due to ratification of Lanzarote Convention. The project from 1<sup>st</sup> December 2010, which included, inter alia, raising the age of protection of juveniles from 15 to 18 in case of crimes related to recording and storing pornographic materials, which executes the statements of the Convention partially.<sup>111</sup>

**v. (vi)** The main NGOs, dealing with combating sexual exploitation of children are: Foundation *Dzieci Nigdy* ("Nobody's children"), Foundation Kidprotect.pl and Committee for Protection of Children Rights - *Komitet Ochrony Praw Dziecka*

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<sup>109</sup> [http://www.mp.pl/etyka/index.php?aid=7605&\\_tc=BFF76D939F96B368D444D7BB33CEF86E](http://www.mp.pl/etyka/index.php?aid=7605&_tc=BFF76D939F96B368D444D7BB33CEF86E)

<sup>110</sup> [http://www.brpd.gov.pl/wystapienia/wyst\\_2012\\_04\\_02\\_ms.pdf](http://www.brpd.gov.pl/wystapienia/wyst_2012_04_02_ms.pdf)

<sup>111</sup> <http://wiadomosci.ngo.pl/wiadomosci/661377.html>

The non – governmental organizations and citizens in Poland have opportunity to speak up in legislator proceeding thank to the institution of public hearing, in which they can take part after filling the form available at the official website of Sejm ([www.sejm.gov.pl](http://www.sejm.gov.pl)).

On the official website of Sejm there is available a list of professionals in lobbying in Polish parliament. However, in general, there is a lack of children rights' lobbyists on Poland.

## IV OTHER

### I. Protection of adolescent against sexual abuse

Protection of adolescent from sexual abuse is not only the matter of a Penal Code, but it should be guaranteed by other branches of law as well, beginning with the Constitution, and ending with specialist medical law regulations. Aforementioned constitutional provisions seem to be restricted in many ways by detailed Acts, not always working to minors' benefit.

The first important matter is limitation contained in The Family and Guardianship Code as to the minor's possibility to decide about private and sexual life. The limitation is to protect all persons under the age of 18<sup>112</sup> with complete parental control. The only exception is when persons under the age of 17 become perpetrators of sex crimes and the State is obliged to initiate and conduct proceedings against them. The accused can be older than the injured party (Article 200 of the Penal Code) or younger (Article 199 § 3 of the Penal Code), which can be controversial.

The adult/minor threshold of 18 years of age comes from the C.C., where it means the end of being a minor. The term 'minor' is used frequently in the Penal Code in relation with sex crimes despite the fact the term is not precise. C.C. allows shortening the period, when a 16-year-old girl files a motion to the guardianship court to give her agreement for early marriage. If the court agrees and a girl enters into marriage, she is no longer a minor.

Lack of definition of 'minority' in the Penal Code may lead to situation in which such a woman will not be protected against sexual abuse, because she had entered into marriage.

The consequence of the Family and Guardianship Code is the Act of the Medical Doctor Profession and the Dentist, which limits the children's possibility to seek professional

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<sup>112</sup> For a minor married women over the age of 16 this period is obviously shorter.

assistance and to protect their sex life, which protection is to be controlled by parents. The Act's provisions limit the possibility to gain information about physical health until turning 16 and impose a duty on a doctor to have parental agreement if he gives treatment to a person under the age of 18. It leads to situation in which constitutional privacy protection is far restricted and until turning 18 there is no free access to sexual counselling or medical remedies linked with sexual health. As the practice shows, victims' unawareness and their limited non-penal protection act in favour of perpetrators of sex crimes.

The aforementioned threshold of age implies also no possibility of filing a motion to prosecute on the basis of some Penal Code regulations, for instance if a victim of rape is a person under the age of 15. All the limitations arise due to conviction that children are asexual and chaste. The conviction is deeply rooted in Polish tradition and culture.

## II. Access to sex education

The foundation for protection should be solid, comprehensive and corresponding to the age sex education, which task is to provide indispensable information not only as to sex and reproductive rights, but also as to basis of protection and possibility to counteract injury. However, Polish lawgiver decided to restrict youth's access to this knowledge by introducing a possibility of parental opposition as to child's participation in the class, recommending outdated books on medicine and sexology and by not controlling teachers conducting classes.

Making sex education optional significantly reduces minors' access to specialist and professional knowledge and advice, exposing them to potential injury arising from lack of skill at running own life well and from ignorance of all forms of protection provided by the State.

From what the PONTON sex educators in Poland report, it turns out that standard of teaching on classes on a subject 'Education to live in a family' and parental home sex education's standard are equally low<sup>113</sup>. Thus the main source of information for young people is the Internet and other contemporary media, presenting from time to time deformed view of reality. Lack of solid, special knowledge as a counterbalance may lead to acceptance of the view as just and universal. In this context such phenomena like children's

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<sup>113</sup> Source: <http://ponton.org.pl/pl/raporty> (access: 13.10.2012)

prostitution in the form of sponsorship, early sex contacts with mature people or acceptance of sex relations based on violence have a different meaning, calling rather for educative measures than bringing to justice.

### III. Challenges for the law from common access to the Internet

Rapid and dynamic development of telecommunication is now an increasing threat for normal sex development of youth. Access to pornography, unlimited possibilities of making friends, gaining information and the phenomenon of transferring one's identity from the real world to the virtual one, which are accompanied by deep feeling of anonymity, create new forms of delinquency more and more often mirrored in introduced regulations. But because of exceptional child's situation, both as a perpetrator and a victim of unwanted behaviour, it may turn out that penal act on telecommunication might cause more loss than benefit. However, raising problems like stalking, cyber bullying, sponsorship or sexting which join legal issues of the Penal Code, The Children (Criminal Proceedings) Act, but also family law, educational law and even medical law allows broader consideration of minor's interests in a criminal trial.

However, giving protection against sexual abuse is problematic when access to pornography (which often presents untrue vision of sexual relations) is so easy today. It is difficult to interpret a pop-up message saying about the necessity for being over the age of 18 as a sufficient barrier against minors. In this context it is only a guarantee against administrator's criminal responsibility (Article 202 of the Penal Code) based on a fiction that users are truthful. Lack of right education, solid information and knowledge of the possibility of protecting sexuality is a real and urgent problem in Poland, which should be solved in a non-penal way as well.

## V CONCLUSION

On the basis of presented studies it can be said with sure that Polish criminal justice system, despite introducing many positive changes aiming to protect children against sexual violence, will have to be transformed in following years because of foreign pressure, such as EU regulations or international treaties, but also the growth of social consciousness and the need for protection of youngest citizens against challenges of the future. These elements result not only in adjusting legislation to meet children's needs, but also consistently broaden the

scope of penalization, arising many questions concerning rightness of such deep interference in private lives.

Having the consciousness that taking into consideration other factors than penal is a must, when minors are involved in sexual behaviour under the risk of punishment by Polish Penal Code, attention to several problems should be drawn. Adjusting criminal law in these areas to reality of youth social life and to other bodies of law would be another form of protecting their sex life, privacy, health or normal development.

The main problems are:

1. Lack of definition of minor in Penal Code, resulting in difficulties in interpretation in case of minor married women, which may restrict protection for them.
2. Using two thresholds of age in case of sex crimes, which victims are 'minors' and 'minors under the age of 15' (Article 202 of the Penal Code). This may cause difficulties in interpretation for the victims.
3. Applying criminal responsibility to juveniles (over the age of 17, but under the age of 18) and minors (over the age of 13, but under the age of 17) on the ground of the Children (Criminal Proceedings) Act may lead to minor perpetrator's injury during the proceedings. In Polish Penal Code there is no close-in-age exception (Article 200 of the Penal Code) and liability cannot be excluded.
4. Prosecuting on the basis of a victim's motion in the case of a rape on a minor under the age of 15 significantly reduced chances of apprehending and convicting a perpetrator. It is also contrary to international obligations imposed on Poland.
5. Penalization of children's prostitution on the ground of the Penal Code at present form arises serious legal, social and cultural objections.
6. Amending Penal Code in the case of sex crimes against minors hardly ever takes into account social context of youth sex behaviour. It may lead to secondary injury in victims and perpetrators' original victimisation.
7. Restricting minors' sexual rights influences on the level of protection, which can worsen injury. Limiting parental discretion in favour of extending youth access to medical care, specialist information or giving them possibility to decide about themselves would reduce the risk of injury caused by sex crimes.



8. It is necessary to conduct solid, comprehensive and real sex education including child's protection against sexual abuse.

9. Taking into consideration both threats and benefits coming from wider access to the Internet must be intrinsic to criminal policy as to minors' protection against sex crimes.

10. Crucial problem is to increase lawgiver's consciousness as to how regulate sex crimes perpetrators' criminal responsibility. It turns out that raising penalties or creating new crimes falls short of expectations as to increased minors' protection and sometimes can worsen their injury.

11. It is necessary to take into consideration cultural conditionings, tradition, customs and social conditions, which are supplement to proper criminal policy in the field of protecting children against sex crimes.

State actions to counteract children's injury caused by sex crimes should be interdisciplinary. Only then will criminal act's principles be just, effective and, as a consequence, leading to real minors' protection.

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**National Coordinator:**

Daniela Marques Cardoso

**National Researchers:**

António Pinto de Mesquita

Bruno Monteiro

Carla Alexandra Paiva

Sara Carpinteiro

Solange Nóbrega

Diana Correia de Sá

Raquel Madalena

Rita Resende Soares

Daniela Marques Cardoso

**National Advisors:**

Prof. André Lamas Leite

Prof. Bárbara Figueiredo

Prof. Carla Paiva

Prof. Flávia Loureiro

Prof. Rute Teixeira Pedro

## I INTRODUCTION

### 1 GENERAL

i. The principle of equality (art. 13º) proclaimed in the Portuguese Constitution (CRP) refers that "all citizens possess the same social dignity and are equal before the law". This principle states on the number 2 that "no form of discrimination based on ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation is accepted".

The same principle is expressed in the Article 36º as far as family is concerned. It reports to equal rights and duties within family circle. It states that "everyone has the right to form a family and to marry under conditions of full equality" (nr.1). It also stresses that "spouses have equal rights and duties in relation to their civil and political capacity and to the maintenance and education of their children" (nr.2). The same provision puts an end to unfavourable legal status of children born out of wedlock, stating in art. 36º (nr. 4) that they "may not be the object of any discrimination for that reason, and neither the law, nor official departments or services may employ discriminatory terms in relation to filiations".

Historically, Portugal had an authoritarian regime till 25th April 1974. The revision of Portuguese Constitution of 1976 was sensitive to the rights to the family, by considering a special "protection to them by the society and the state", as is expressed in arts. 67º, nr. 1) and to the children, protection from all forms of abandonment, discrimination and oppression and from the abusive exercise of authority in the family or any other institution".

ii. The notion of Family as "the natural and fundamental group unit of the society"<sup>1</sup> have accompanying important changes in society values with profound implications on political and legislative sensitivity to family rights. Particularly changes related with the women's fight for gender equality rights<sup>2</sup> and an increased sensitivity of international community and governments for the promotion of children rights and protection of risk situations. Family issues are a matter of legal protection by different branches of law (civil, penal, social security and labour) which adapts to the fluidity dynamics and changes in the structure of

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<sup>1</sup> Universal Declaration of Human Rights- article 16º, nr. 1.

<sup>2</sup> As enclosed in the historical evolution of family organization in modern western societies, traditionally sustained in a patriarchal ideology.

family demands. The principles of equality and dignity of human person permeate the children rights. However any of political and legal measures directed to the protection of children by the family, the society and the State, should attend to the specificities of their level of formation and always giving a paramount consideration to the "superior interest of the children". The promotion of conditions to an integral development of children and youth, as well as the identification of risk situations that may impair this development, such as experience of violence or other harmful treatment inside or outside the family context, are aspects contemplated in the family and children law.

In the particular case of family violence, by involving different targets (the couple or the children) and motives (societal, familiar and individual), and presenting a specific nature, as it occurs "*behind closed doors*"<sup>3</sup> turning it difficult to social control and to estimate. Moreover, children tend to omit the criminal offenses by fear of retaliation by the offender, to deny it or to feel guilty, as a result of blaming the victim beliefs. Consequently, many children suffer in silence, and the complaints to the police or formal agencies happen late to occur or never happen, which results on a bias in estimates of real occurrences.

Despite the underreporting bias associated with the family and children violence, there are also different prevalence estimates according with sources and methodologies. Retrospective studies<sup>4</sup> measured by self-report questionnaires with community-based samples of parents and college students differ from other reports collected with professionals (health, education, social service) that treat with children regarding different types of child maltreatment<sup>5</sup>, and even official estimates of formal agencies such as the Commission of Protection of Children and Youth at risk (CPCJR)<sup>6</sup> or the Legal Medicine Institute<sup>7</sup> reports.

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<sup>3</sup> cf. M. Straus, R. Gelles and S. Steinmetz, *Behind Closed Doors — Violence in the American Family*, London, Sage Publications, 1988.

<sup>4</sup> cf. B. Figueiredo, A. Bifulco, C. Paiva, A. Maia, E. Fernandes, & R. Matos History of abuse during childhood in a representative series of Portuguese parents. *Child Abuse & Neglect*, 28, 669-682, 2004; see also the study of C. A. Paiva,., Dating violence: Causes and Effects. Doctoral Dissertation, School of Psychology, Braga, University of Minho, 2012; both of these studies support the hypothesis of intergenerational transmission of child maltreatment and revictimization latter on the development.

<sup>5</sup> Cf. A. Nunes de Almeida, I. Margarida André e H. Nunes de Almeida, *Famílias e Maus Tratos às Crianças em Portugal — Relatório Final*, Lisboa, Instituto de Ciências Sociais, 1999.

<sup>6</sup> *Relatório Anual de avaliação das comissões de proteção de crianças e jovens (2011)*. available at [www.portugal.gov.pt/media/602408/rel\\_actividade\\_cpcj\\_2011.pdf](http://www.portugal.gov.pt/media/602408/rel_actividade_cpcj_2011.pdf) accessed on 30th October 2012.

<sup>7</sup> cf. F. Taveira, S. Frazão, R. Dias; E. Matos, and T. Magalhães, O Abuso sexual intra e extra-familiar. *Acta Médica Portuguesa*, 22, pp.759-766, 2009; T. Magalhães, *Instituto de Medicina Legal registou mais de 15 mil incidências de violência intrafamiliar, em 2009*. *Jornal Público*, 26 de Março de 2010. Available at <http://www.publico.pt/Sociedade/instituto-de-medicina-legal-registou-mais-de-15-mil-casos-de-violencia->

According with the report of the CPCJR for the year 2011 the estimates of "danger situations for children and youth" resulted in 30574 measures of protection or promotion, as a consequence of different situations of risk observed, being the neglect (27.9%, N=7771), domestic violence exposition (21.1%, N=5873), risk of failure on educational rights (15%; N=4166), psychological maltreatment (8.6% N=2385), other risk situations (7.3%, N=2023), behaviours that affect the well-being (7%, N=1958) and physical maltreatment (6.2%, N=1738), practice of facts considered as crime (2.4%, N=681), sexual abuse (N=628, 2.3%), abandoned child or left to him/her own care (1.8%, N=509).

The pervasive effects of violence, physical, psychological and sexual, have deep consequences on health and well-being of the victims and a significant disturbance in accomplishment of major life tasks across development<sup>8</sup>, such as the direct physical or sexual injuries resulting from the abuse, anxiety, depression and post-traumatic stress reactions are commonly found among victims of child abuse and neglect, and more expressively among sexual abuse victims. Moreover, the effects of trauma related with the abusive experiences correlate with abuse characteristics – poly victimization, types of abuse, as also children variables like the age and context of the abuse, such as low social support networks or other family risk factors (e.g., alcoholism of parents, poverty). The consequences of the abuse are susceptible to affect emotional regulation, cognition and memory, and also interpersonal and social functioning of children. Therefore, impairing the normal development tasks and personality formation by disruption of the establishment of healthy interpersonal relationships based on trust and love. Abusive experiences during childhood and adolescence may become noxious pervasive agents resulting in serious mental and physical health consequences.

All-encompassing preventive efforts are essential to stop any type of violence against children and youth in order, to break the "silence" and "powerlessness" observed in many of the child victims of crime, inside or outside de family<sup>9</sup>. The importance of sensitization and

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dentro-das-familias-em-2009-1429615, access on 30 October 2012.

<sup>8</sup> cf. D. Finkelhor & A. Brown, *The Impact of Child Sexual Abuse: A Review of the Research*. Psychological Bulletin, 99, pp. 66-77, 1990; C. A. Paiva, *Dating violence: Causes and Effects*. Doctoral Dissertation, School of Psychology, Braga: University of Minho; 2012; Kendall-Tackett, K.A. (2003). *Treating the lifetime health effects of childhood victimization: A guide for mental health, medical and social service professionals*. New York: Civic Research Institute; T. Magalhães, *A vítima como objeto da intervenção médico legal*. Acta Médica Portuguesa, 18, pp. 453-458, 2005.

<sup>9</sup>C. Manita, Quando as portas do medo se abrem... Do impacto psicológico ao(s) testemunho(s) de crianças



educative campaigns for children, acknowledge them from the different shapes of abuse ways, and effective ways to stop it, or protect from abusive situations. All contexts where the children belong should be addressed as a way to reduce the exposure to risks, always attending to the interface between psychological characteristics of children and social-economic and cultural contexts. The interface with parental supervision and new technologies risks (internet), and implementation of measures to control the access of the children to contact with strangers.

Regarding the offenders, penal law sanctions are effective but they are not always sufficient ways to stop child abuse<sup>10</sup> and particularly sexual abuse. A multidisciplinary oriented treatment for offenders should also be considered and other withdrawal measures from children since the moment of the suspect, and limited access to contexts involving children (the victim and others).

However as a result of the increased public awareness for child abuse and neglect, and the particular increased risk associated with new technologies and the occurrences of child sexual abuse, result in noteworthy concerns about the protection of the more vulnerable persons of the society - the children.

Portuguese internal juridical order in agreement with international law predicts some measures to protect children against sexual exploitation and sexual abuse and the application of Lanzarote Convention in Portuguese juridical order.

In Portuguese juridical system, there is no family definition. However, there are so many legal references to the family depending on the legal issue, with family considered as an object of Portuguese Constitution (CRP), civil law, penal law and social security and labour law.

Portuguese Constitution in its part I, dedicated to the provisions about "fundamental rights and duties" and in its title I - and in title III refers to family.

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vítimas de abuso sexual», in *Cuidar da Justiça de Crianças e Jovens, A função dos Juizes Sociais, Actas do Encontro, Universidade Católica Portuguesa – Porto*, 11 e 12 de Outubro de 2002, Coordenação de M. C. Sottomayor, Coimbra, 2003, pp. 240-245.

<sup>10</sup> Child abuse including the types of psychological, physical and sexual abusive acts, as also neglect in its multiple dimensions (educational, emotional, physical), see for definitions: A. Nunes de Almeida, I. Margarida André e H. Nunes de Almeida (opcit); C. Paiva (opcit).

In the title I, addressing the "personal rights, freedoms and guarantees", it considers the prevision of "family, marriage and filiations" expressed in the article 36°, the nr. 1 states that "everyone shall possess the right to found a family and to marry on terms of full equality", as an expression of the principle of equality (art. 13°) of spouses on admissibility to the divorce (nr. 2) and to the maintenance and education of their children (nr.3), as also the equality of status among children born inside or outside wedlock (nr. 4). In title III devoted to the "economic, social and cultural rights and duties" (chapter II - social rights and duties) recognizes in the article 67°, the family as a fundamental element of the society "protected by the society and the State". In number 2 of the last article, it is enunciated the duty to effective implementation by the State of all the conditions needed to enable family members to achieve personal development, like the promotion of social and economic independence of family units; access to national crèches, or elderly centres; children education, family planning; assisted conception, taxes and benefits, implement global and family policies and reconciliation of professional and family life. Even predicting that bringing up the children is a responsibility of parents (art. 68°, nr. 1; art. 36°, nr. 5), the State has a duty to cooperate with parents in upbringing their children (art. 67°. nr. 2, (c) and art. 68, nr. 1), and in art. 36° (nr. 6) enunciates that children shall not be separated from their parents unless when the latter do not fulfil their fundamental duties, only through judicial order (art. 36°, nr. 5 and nr. 6).

The Civil Code has a special part focusing specifically on the family rights, however not presenting any juridical definition of family, but we can conclude from art. 1576° the "sources of juridical familiar relationships, marriage, kinship, affinity and adoption". The article 1577° defines the marriage as "a contract celebrated which want to constitute a family, with a total communion of life" (*vide* Law 9/2010 of 31 May). In the chapter II of the Civil Code are enunciated the effects of filiations and the duties of parents and children (articles 1874°, 1877°, 1879°) as also the conditions through which the parental responsibility can be inhibited (article 1915°).

Other legal predictions of the family, directed to the protection of maternity and paternity are also considered in the social security law and the labour law (subsection IV- protection of maternity and paternity). The right to the maternal license (Decree Law, nr.503/80 of 20 October), the protection of maternity and paternity (Law 4/84 of 5 April; DL 136/85, 3 May and DL 154/88 of 29 April) attending also to the equality of gender in paternity-

maternity license (Law 142/99 of 31 August, republished by DL 70/2000 of 4 May and DL 105/2008 of 25 June).

The penal law consider also the family in diverse types of crime, such as the articles 247° to 250° of the Penal Code (bigamy, falsification of civil status, subtracting minor, and breach of the requirement of food), and includes the crime of "domestic violence" expressed in article 152° "to inflict psychic and physical abuse, including corporal punishment, deprivation of liberty and sexual offenses" also encompasses the family members (nr.1) (the spouses or former spouses, those analogous to spouses, the progenitor of common descendent, and defenceless person) and in the redaction of nr. 2 attend to the specific condition of the minors. The degree of kinship is considered as a aggravating condition (article 177° nr. 1), in the cases of the crimes considered in chapter V of the Penal Code - crimes against sexual freedom (arts. 167 to 176°) and sexual self-determination (arts. 163 to 165°).

The evolution of legal instruments accompanies the changes in family structure and dynamics in consequence of the changes in social, economic and political conditions<sup>11</sup>. The report of the Observatory of Families and Politics of Family (OFPF)<sup>12</sup>, for the last two years (2010/11), permits to characterize the status of family and marriage in Portugal, adding together with the result of the Census for the year 2011 (compared with the previous of 2001). Considering the number of celebrated marriages in last decade, there is a reduction of the marriages (39.993) in 2010, which represent a rate of 3.8 marriages per 1000 inhabitants compared with the rate of 5.7‰ in 2001. The number of non-first marriage is 26% of the total marriage rate. The average age of the first marriage is later, for men 34 years old and for women 32 years old in 2010 (men married average age 28 years old and women at 26 years old in 2001).

According with the last year report of OFPF there is an increase of 10.8% in the number of families in Portuguese society in the last decade. The couple is the predominant type of structure of organization of family, representing 60% of the Portuguese families that in

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<sup>11</sup> For further developments on this issue see Pedroso, J. and Branco, P. Mudam-se os tempos, muda-se a família. As mutações do acesso ao direito e à justiça de família e das crianças em Portugal. *Revista Crítica de Ciências Sociais*, 82, Setembro 2008: 53-83.

<sup>12</sup> OFPF (2012). *Observatório das famílias e das Políticas da Família, Relatório de 2011*. Wall, K., Aboim, S., Leitão, M., Marinho, S., Cunha, V. & Ramos, V. (Coord). Instituto de Ciências Sociais da Universidade de Lisboa, Julho de 2012. Disponível *online* em: <http://www.observatoriofamilias.ics.ul.pt/index.php/publicacoes/relatorios/10-relatorios>

average have 2.6 persons living together. The number of couples without children increased as a result of the decrease of fecundity rate among Portuguese women. Few families have more than 5 persons (6.5%) in their aggregate<sup>13</sup>. Other structures of family living are also observed, as an increase in single-parent households (9%) and persons living alone (21%). It is significant the increase of the rate of the cohabitation and de facto union (44% on 2011 and 24% on 2001 Census), matching with an increased rate of divorce, with a rate of 2.6 per million inhabitants in 2011 (compared with 1.8‰ in 2001), a result above the mean in EU<sup>14</sup>. Re-structured families with common previous children have doubled, representing 13.5% in 2011 and 5.2% in 2001. These results seem to be indicative that Portuguese after divorce reorganize their family trajectory organization, by cohabitation or a second marriage<sup>15</sup>. The raise of women in labour market have also an impact on the family system organization with remarkable gender differences regarding paid- non paid work (domestic and child care) in men and women. Women are more occupied with domestic tasks than men, more 10h per week, and more involved in parental care, more 7h than men. The nativity rate has been decreasing and according with National Statistical Institute (INE) in year 2010, 101381 children were born in Portugal (41% are wedlock babies), with mean motherhood age, 29 years old<sup>16</sup>.

The economic crisis that Portugal is living nowadays and the sensitivity of different politics regarding this issue, has affected markedly the organization of family structure. Responding to the increased rate of unemployment and correspondent risk of poverty in the Portuguese families, and particularly the more vulnerable, such as the children, elderly and persons with disabilities, the actual government through tutelage of Ministry of Solidarity and Social Security have implemented the "Social Emergency Plan"- SEP<sup>17</sup>.

The SEP consists in "mitigating the social impact of the crisis in order to create a "social cushion" which permits to buffer for many persons the difficulties they are passing",

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<sup>13</sup> *idem*

<sup>14</sup> Eurostat (2012). available at [http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/3-18012010-AP/EN/3-18012010-AP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-18012010-AP/EN/3-18012010-AP-EN.PDF)

<sup>15</sup> cf. Wall, K., Aboim, S., Leitão, M., Marinho, S., Cunha, V. & Ramos, V. (Coord). *Observatório das famílias e das Políticas da Família, Relatório de 2011*. Instituto de Ciências Sociais da Universidade de Lisboa, Julho de 2012.

<sup>16</sup> *idem*

<sup>17</sup> Ministry of Solidarity and Social Security web page - <http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-solidariedade-e-seguranca-social/documentos-oficiais/20110805-programa-emergencia-social.aspx>

supported by the notion that "at present juncture it is not possible to choose paths that reduce further the global levels of social protection of disadvantaged persons, or that involve additional financial effort that the country cannot support". The program strengthens that "many of the families live difficult moments nowadays, enmeshed in the webs of unemployment, financial collapse, of over-indebtedness, social disintegration, exclusion and poverty (...) the reduction of social inequalities must begin by combating early school leaving, the adoption of measures to support the family, the fairer distribution of income and sacrifices, and, moreover, at fair recognition each person's merit and effort, based on a personal and collective promotion and training dimensions". Additionally, underlines that "the social crisis, associated to the social disruption, have hardest effects on children. The Government together with the Commissions for Protection of Children and Young People at risk (CPCJR) will focus at the level of primary and secondary prevention, by increasing the signalling of risk cases and not jeopardizing the principle of subsidiary". The Social Emergency Plan contemplates also various implementation measures directed to the a) poverty situations and disadvantaged families and children (al. a), elderly (al. b), and persons with disabilities (al. c), by reinforcing and encouraging the volunteering (al. d) and also in the articulation and formal cooperation with municipalities, aid non-governmental agencies and solidarity institutions which are already working in site (al. e)<sup>10</sup>. (see note 1 this measures description of SEP) <sup>18</sup>.

**iii.** Portuguese Constitution considers the value of children's rights, however without a clear definition about the concept of childhood (art. 69º) and youth (art. 70º).

The right to the personality development of the minor, as an expression of the Principle of Human Dignity (art.1º) is present in the redaction of the article 69º, nr.1, "the children have the right to the protection of society and State in order to their integral personality development, especially against any forms of abandonment, discrimination and oppression and against the abusive exercise of authority in the family or any other institution". This article express the right of children to be protected and also that this protection of children, while a duty of the State and society, should be performed in an equality plan. Nevertheless, according with the doctrine, there are situations that deserve a positive discriminative action in the sense of treat equally what is equal and differently what is different, and in order to

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affirm the respect from the development of an integral, free, autonomous and self-determined personality of the minor, two main assumptions that should be observed: the guarantee and respect for the dignity of the human person as well as to consider the fact that a minor is a person in formation<sup>19</sup>. The decisions take in relation to the children - by parents or by administrative and judicial authorities - must consider these specificities to give paramount consideration to the "superior interest of the child".

Contrasting with the authoritarian model of State that defines unilaterally the "superior interest of the children", in last decades in Portugal there is a progressive change in juridical awareness regarding children rights, mirrored in legislative acts and policies focusing on the rights of the children and young people, and strengthening their participative role as active agents on their own rights and decisions in educational and civil matters<sup>20</sup>

Portuguese family law, following the reform of Civil Code in 1977 have emphasizing the concept of family as unified within parents and children having a duty to respect, aid and assist each other (art. 1874º, nr.1), and since then, states that children have a duty to obey their parents (art.1877º, nr.2) and depending on the maturity of the children, the parents have to take into account the opinions of children and youth in important family matters and allow their autonomy in running their life. A practical effect of this assumption is, under the Civil Code, that young people over 16 years old are entitled to administer the property acquired as fruit of their labour (art. 1888,nr. 1, (d)), to decide on their religious education (art. 1886, nr.47), to recognize a child born out of wedlock (art- 1850, nr. 1 and nr. 2), and young people over 14 years old have to consent on their adoption (art. 1981nr. 1, (a)). Minors are entitled also to seek protection in court against any form of abuse of authority, in family or institutions, and to be heard "whenever it is possible" in matters of their own, when they are at risk, socially maladjusted or involved in criminal offenses. The value of children and the protection of children and adolescents at risk or victims of ill treatment are present also in two other documents in national juridical order (Law 147/1999 and DL 142/1999 of 1 September).

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<sup>19</sup> J.J. Gomes Canotilho and Vital Moreira. *Constituição da República Portuguesa Anotada*, Coimbra Editora, 1993, pp.869-870.

<sup>20</sup> Sottomayor, M.C (Ed.). *O Poder Paternal como Cuidado Parental e os Direitos da Criança, em Cuidar da Justiça de Crianças e Jovens – A Função dos Juízes Sociais. Actas do Encontro*, Almedina, 2003, p.12.

The concerns of the legislator in the protection of children rights, aiming to promote a more intense tutelage of children and youth, extended also to penal matters. In the last Penal Code revision at 2007, the age of justifying agreement is changed from 14 to 16 years old, according with the victims' agreement by orientation of EU regarding the crimes against freedom and sexual self-determination of minors. It was introduced a new crime against the self-determination sexual of minors, traduced in the payment or other benefit for the practice of sexual acts, which is based in the encouragement of children and youth prostitution. The amplification of incriminators types for the pimping and pornography and reported to all minors and not only to those under 14 or 16 years old. Moreover, a systematic distinction was performed also regarding the aggravation for victims under 14 years old, among 14 and 16 years old, and between 16 and 18 years old, and all the crimes against the freedom and self-determination sexual against minors, except the crime sexual acts with adolescents, are public crimes. As a way to prevent and protect the children, to the condemned agents of these crimes, the Penal Code also predicts an accessory penalty of prohibition of professional exercise, function or activity that involves the existence minors at their responsibility, education, treatment or vigilance.

In conclusion, the significant changes on Portuguese socio-economic conditions in the last quarter of century XX and more recently in century XXI, have an impact on family dynamics and structure, as well as definition of political and legal instruments that protect children and family rights.

If the family is the "safe haven" to protect from the harms of strangers, the development of new technologies, paired with some familiar disruption and situations of poverty can expose the children to higher number of risk factors, susceptible to impair their integral and healthy development. The reinforcing of measures that strength the family ties, namely through political measures supporting the family life and reinforce of supportive and caring relationships in the "cell of society", and community can be a way to begin the combat of crimes against children, many of them perpetrated at home or by those considered as trusting persons (neighbours, acquaintances). The empowerment of children to recognize the danger situations by educative campaigns could also prevent new incident cases. Furthermore, in matter of children's rights protection, the increasing the social awareness and politic agenda for the promotion and guarantee of children rights and particularly on the reduction of risk factors present in the diverse socio-educative and familiar contexts where

children belong, attending to their specific developmental stage, their familiar and macro-structural conditions.

iv. The relevant legislation regarding the implementation of international treaties in Portugal is Article 8(2) of the Portuguese Constitution, which states that “the rules set out in duly ratified or passed international agreements shall come into force in Portuguese internal law once they have been officially published”.

In the interplay between national and international law it is consensually agreed upon by legal scholars and recognized by the Constitutional Court that Portugal adopts a monist approach, assimilating international agreements into the national legal framework, placing them under the Constitution but above all domestic law, according to Article 8(2) of the Portuguese Constitution.

The United Nations Convention on the Rights of the Child was ratified by Presidential Decree nr. 49/90, September 12<sup>th</sup>, and the instrument of ratification was deposited with the Secretary-General of the United Nations on the 21<sup>st</sup> of September 1990. According to Article 49(2) of the Convention, it came into force in Portugal on the 21<sup>st</sup> of October 1990 (the thirtieth day after the deposit of the instrument of ratification). The Resolution of the Assembly of the Republic<sup>21</sup> nr. 20/90 and Presidential Decree nr. 49/90 was published in Portugal’s Official Journal nr. 211/90 (Series I, Supplement)<sup>22</sup>, and notice of the deposit of the ratification of the Convention with the UN Secretary General was published in Portugal’s Official Journal nr. 248/90 (Series I)<sup>23</sup>.

The Portuguese State made no reservations to the Convention neither upon its ratification nor afterwards. Moreover, Portugal has consistently made objections to reservations expressed by other Member States<sup>24</sup>, which read as follows:

“The Government of Portugal considers that reservations by which a State limits its responsibilities under the Convention by invoking general principles of National Law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International Law. It is

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<sup>21</sup> The Portuguese Parliament.

<sup>22</sup> <http://dre.pt/pdfgratis/1990/09/21101.pdf>;

<sup>23</sup> <http://dre.pt/pdfgratis/1990/10/24800.pdf>, p. 4416;

<sup>24</sup> These objections did not constitute an obstacle to the entry into force of the Convention between Portugal and the other States;



in the common interest of States that treaties to which they have chosen to become parties also are respected, as to object and purpose, by all parties. The Government of Portugal therefore objects to the reservations.<sup>25</sup>”

Portugal also accepted the amendment to article 43 (2) of the Convention on the Rights of the Child<sup>26</sup> and ratified, without reservations, both Optional Protocols to the Convention, the first regarding the Involvement of Children in Armed Conflict<sup>27</sup>, and the second relating to the Sale of Children, Child Prostitution and Child Pornography<sup>28</sup>. A third Optional Protocol to the Convention on the Rights of the Child, regarding a communications procedure, was adopted on the 19<sup>th</sup> of December 2011. It has been signed by Portugal, on the 28<sup>th</sup> of February 2012 but it has yet to be ratified. At the present moment no reservations have been made by the Portuguese State regarding the new Optional Protocol.

v. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography sets forth as a deadline for its transposition the 18<sup>th</sup> of December 2013, according to its article 27(1).

Presently, as regards to Portugal, no national implementation measures have been taken so far. Nonetheless, Portugal’s Minister of Justice has publicly reiterated<sup>29</sup> the Government’s intention to transpose the Directive until the end of 2012 and is preparing several draft proposals for Parliamentary approval to that effect.

One of the proposed measures openly disclosed by the Ministry of Justice is the creation of a national registry of persons convicted of offences referred to in the Directive, in accordance with recital 43 of the preamble of Directive nr. 2011/92/EU.

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<sup>25</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en#4](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#4);

<sup>26</sup> Amendment entered into force on the 18<sup>th</sup> of November 2002;

<sup>27</sup> Protocol was adopted by the UN on the 25<sup>th</sup> of May 2000, it was ratified by Portugal’s Presidential Decree nr. 22/2003. The instrument of ratification was deposited on the 19<sup>th</sup> of August 2003 and the Protocol entered into force in Portugal on the 19<sup>th</sup> of September 2003. Source: <http://dre.pt/pdfgratis/2003/10/251A00.pdf>;

<sup>28</sup> Protocol was adopted by the UN on the 25<sup>th</sup> of May 2000, it was ratified by Portugal’s Presidential Decree nr. 14/2003. The instrument of ratification was deposited on the 16<sup>th</sup> of May 2003 and the Protocol entered into force in Portugal on the 16<sup>th</sup> of June 2003. Source: <http://dre.pt/pdfgratis/2006/01/009A00.pdf> (notice nr. 94);

<sup>29</sup> [http://www.oa.pt/Conteudos/Artigos/detalhe\\_artigo.aspx?idc=31623&idsc=31624&ida=118818](http://www.oa.pt/Conteudos/Artigos/detalhe_artigo.aspx?idc=31623&idsc=31624&ida=118818)

## 2 THE LANZAROTE CONVENTION

i. The European Convention on Human Rights was ratified by Presidential Decree nr 1.º 65/78 on the 13th October and it came into force in Portugal on the 9th of November 1978. Portugal made reservations to the Convention, contained in the letter from the Permanent Representative of Portugal, dated 8 November 1978, handed to the Secretary General at the time of deposit of the instrument of ratification, on 9 November 1978 stating that the Article 5 of the Convention would be applied subject to Articles 27 and 28 of the Military Discipline Regulations, which provide for the placing under arrest of members of the armed forces. Articles 27 and 28 of the Military Discipline Regulations read as follows:

“Article 27: 1. Arrests consist of the detention of the offender in a building intended for the purpose, in an appropriate place, barracks or military establishment, in suitable quarters on board ship or, failing these, in a place determined by the competent authority. 2. Between the reveille and sundown, during the period of detention, the members of the armed forces can perform the duties assigned to them.

Article 28: Close arrest consists of the detention of the offender in a building intended for the purpose.”

Another reservation was contained in the letter from the Permanent Representative of Portugal, dated 8 November 1978, handed to the Secretary General at the time of deposit of the instrument of ratification, on 9 November 1978. Article 7 of the Convention would be applied subject to Article 309 of the Constitution of the Portuguese Republic (revoked at the present time), which provided for the indictment and trial of officers and personnel of the State Police Force (PIDE-DGS).

ii. Regarding the Lanzarote Convention, the Portuguese State is a party to the convention given its statue of Member State of the Council of Europe and considering that the convention was signed by the Representative of Portugal on the 25<sup>th</sup> of November 2007 and it was ratified by Presidential Decree nr 90/2012 on the 28<sup>th</sup> of May 2012 and approved by the Resolution of the Assembly of the Republic nr 75/2012. The Portuguese State made no reservations to the Convention neither upon its ratification nor afterwards. The Convention will come into force in Portugal on the 1<sup>st</sup> of December 2012.

iii. Under Portuguese legal order, international conventions like the Lanzarote Convention are ranked under the Portuguese Republic Constitution and above Law Decrees from the

Assembly of the Republic and Prime Minister Cabinet. This means that under the Portuguese legal order, the Lanzarote Convention is above what we might call the non-reinforced legislation, which means that any kind of law that is hierarchically under the Convention that contradicts it, it is suitable to be dismissed for not complying with the hierarchically superior legislation. Under the number 2 from the article 8 from the Portuguese Republic Constitution, the precepts in an international convention, fairly rectified or approved, apply in the internal legal order after its official publication and while internationally binding on the Portuguese state. There is no legislation regarding specifically its implementation.

iv .The implementation of the Lanzarote Convention has been made by the ratifying Presidential Decree that transposed the convention, by fully transposing the text of the convention (both the Portuguese language version and the English language version). So in the Presidential Decree nr 90/2012 we can find the complete text of the convention, meaning that all the provisions of the Convention are now legally binding in the whole Portuguese territory while internationally binding on the Portuguese state. In terms of new legislation regarding the issues of the Lanzarote Convention, it will be more a question of mandatorily adapting the present law to the words of the Convention due to the hierarchy of the sources of law mentioned above. So in a practical manner, the work from now on will be carried by finding “old” legislation that might now contradict the Lanzarote Convention and adapt it in order to comply with the Convention. This might work on a legislative way, buy approving decrees updating the “old” laws, or by Court decisions, dismissing Laws that may not yet comply with the text of the Convention.

v. The Portuguese State made no reservations to the Convention neither upon its ratification nor afterwards.

## **II NATIONAL LEGISLATION**

### **1 GENERAL PRINCIPLES OF THE JURISDICTION**

i. In order to understand the differences between a Federal State and a Central Government, it is necessary to do a short introduction to the Portuguese Modern History. It is usually considered that the 1820 Liberal Revolution was an important stage in our History. In fact, the first Portuguese Constitution was published in 1822 as an effect on the legal and political system of this Revolution.

Baumlim said: “The Constitutions’ History reflects the history of the mankind”. Looking through the Constitutions we can discover in which time they were written and the changes that have been implemented. The Portuguese Constitutions were not an exception and each one reflects their time.

After the 1822 Constitution there were published 5 other Constitutions: 1826, 1838, 1910, 1933 and 1976 however the most important for the ELSA for Children and One in Five Campaign is the last one: the 1976 Constitution. This one had great influences from the Carnation Revolution from 1974.

Indeed, it is said that both Revolutions – the Liberal and the Carnation – are remarkable marks in the Portuguese History. The first one broke the ‘Ancien Régime’ – the Royal Absolutism - and established the liberal classes - the bourgeois system.

Undoubtedly, the second one introduced the Democratic Principle in our Jurisdiction.

Marcelo Rebelo de Sousa – University Professor of Constitutional Law - said ‘what really matters between Federal State and Central Government is the way the State itself models its power towards other similar powers in the same country and between the same people’.

A Federal State is an association or union between several states which gave birth to a new state with different powers inside. It is very important to stress that there are a duality or a superposition between several powers. Similarly, The West Encyclopaedia of American Law defines Federalism as “A principle of government that defines the relationship between the central government at the national level and its constituent units at the regional, state, or local levels.

Under this principle of government, power and authority is allocated between the national and local governmental units, such that each unit is delegated a sphere of power and authority only it can exercise, while other powers must be shared” As a result of this duality of powers, at the same time there are two different sovereignties: one from the Federal State and the other from federate states.

Differently, a Central Government as a characteristic of the Unitary States exercises its functions through an organized government in all the territory. The Central Government has all the powers.

The Portuguese Constitution shows in its article 3<sup>rd</sup> that in Portugal we have a Central Government - *‘Sovereignty shall be single and indivisible and shall lie with the people, who shall exercise it*

*in the forms provided for in this Constitution*’. Again, in the same article, it is stressed that *‘The validity of laws and other acts of the state, the autonomous regions, local government and any other public bodies shall be dependent on their conformity with this Constitution.’*

However, it is important to point that there is a special regime for the Autonomous Regions such as Azores and Madeira Islands. They have its own Political and Administrative powers (article 227<sup>th</sup>) and its own Government (article 231<sup>st</sup>) that are elected by universal election. Nevertheless, according to article 225<sup>th</sup> (3) *‘Regional political and administrative autonomy shall not affect the integrity of the sovereignty of the state and shall be exercised within the overall framework of this Constitution’*

ii. The most recent Constitution was created in 1976 after the 1974 Carnation Revolution. After two years of intense public discussion the Constitution was voted and finally came into force in 2nd April 1976. Several Principles were introduced such as the Democratic Principle, the Legality Principle, the Democratic State based on the Rule of Law and last but not the least the Fundamental Rights (can be find at the 1<sup>st</sup> Part of the Constitution).

First, the concepts of “Human Rights” and “Fundamental Rights” must be distinguished. The Human Rights belong to all the international community and not only to a specific country. The United Nations Human Rights defines it as *‘rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible’*. However, it is also common to point out some problems regarding difficulty of defining concretely what the human rights are and their lack of legal sanction.

On the other hand, Fundamental Rights can be defined using the classification of one of the most important Portuguese Constitutional Professor Jorge Miranda: “Fundamental Rights are the rights or active legal positions of people – as individuals or institutions – that can be found in the Constitution”. There are no real Fundamental Rights without an organized State and where people have their own judicial space. In totalitarianism, since there is no permission to individual freedom and everything is subordinate to the authority of the government, cannot be found Fundamental Rights. However, since the implementation of Democratic principles in the 1976 Portuguese Constitution it could be said that Portugal has real Fundamental Rights: the Rights, Liberties and Guarantees and the Socioeconomics Rights.

Sometimes Human Rights and Fundamental Rights are similar; nevertheless, the last ones - since they belong to a specific jurisdiction - are enforceable in courts.

We have an open clause at the article no. 8<sup>th</sup> where sometimes the Human Rights can automatically be part of the Portuguese jurisdiction - *‘The rules and principles of general or common international law shall form an integral part of Portuguese law’*.

In Portugal, there is a special connection between Human Rights and Fundamental Rights because ‘The provisions of this Constitution and of laws concerning fundamental rights shall be interpreted and construed in accordance with the Universal Declaration of Human Rights’.

In several provisions it is possible to find the Fundamental Rights (from article 12<sup>nd</sup> to article 79<sup>th</sup> of the 1976 Portuguese Constitution: e.g.: *Principle of Universality*; *Principle of Equality*) and sometimes in another parts of the Fundamental Law (such as article 268<sup>th</sup>: Citizens’ Rights and Guarantees when they are dealing with Public Administration).

To conclude, it is possible to state that the most recent Portuguese Constitution gives a special status to the Human Rights. All Fundamental Rights are interpreted in accordance to the Universal Declaration of Human Rights, which gives a special force to some Human Rights in Portugal.

Looking through the Portuguese Constitution we can find some provisions regarding Children Rights. The article 69<sup>th</sup> is dedicated to the Childhood Protection: *‘With a view to their integral development, children shall possess the right to protection by society and the state, especially from all forms of abandonment, discrimination and oppression and from the abusive exercise of authority in the family or any other institution.’* Also at the article 67<sup>th</sup> Family should be protected as a way of family members to achieve personal fulfilment. Moreover *‘young people shall receive special protection in order to ensure the effective enjoyment of their economic, social and cultural rights (...)’* – (article no. 70<sup>th</sup>). Even a special focus is given to emigrant children: *“Ensuring that emigrants’ children are taught the Portuguese language and enjoy access to Portuguese culture”* (article 74<sup>th</sup>)

Some other indirect provisions can be found – article 26<sup>th</sup>: As a Personal Right *‘everyone shall possess the right to a personal identity, to the development of their personality, to civil capacity, to citizenship, to a good name and reputation, to their likeness, to speak out, to protect the privacy of their personal and family life, and to legal protection against any form of discrimination’*. As a Right of having a Family (article 36<sup>th</sup>) – *‘Everyone shall possess the right to found a family and to marry on terms of full equality’*

It is also important to mention some special legislation regarding Children in need such as Law nr 147/1999 of 1<sup>st</sup> September and Decree-Law nr 11/2008 of 17<sup>th</sup> January. The first one has the principles to protect children's and young adults' rights - especially from those who are in need - as a way to prevent and give them a safe place to grow. The second one has measures that should be used to help the families of those children in need and ways to help young adults to promote their rights.

Furthermore, we cannot forget the "The Convention on the Rights of the Child". Since it was ratified by Portugal and published, in accordance to the article 8 '*shall come directly into force in Portuguese internal law*'.

iii. There are several models to describe the Constitutional Justice. In Portugal, we adopted the American System by having a Judicial Review instead of having a Political Control (as used in France). The American System settles that courts are the competent jurisdiction to supervise the Constitution and the laws in general. According to the article no. 202<sup>nd</sup> from the Portuguese Constitution '(2) *In administering justice the courts shall ensure the defence of those citizens' rights and interests that are protected by law, repress breaches of the democratic rule of law and rule on conflicts between interests, public and private.*'

Since according to article 8<sup>th</sup> / 2- '*The rules set out in duly ratified or passed international agreements shall come into force in Portuguese internal law once they have been officially published, and shall remain so for as long as they are internationally binding on the Portuguese state.*' – Conventions and Treaties like Universal Declaration of Human Rights, International Pact on Civil and Political Rights and European Convention on Human Rights are part of the internal Portuguese law. From that moment on, Portuguese courts can monitor the compliance of international human rights treaties of which Portugal is part.

However it is important to note the limitations of this system, once there are only two types of control: The Incidental/Casual and the Main/Principal Control.

For the first one it is necessary to have a lawsuit. At least one part needs to bring the case to court. There, the parties can raise the constitutional question and if this question is really important for the main law suit it will be taken into consideration by the judge. On the second there is an autonomous lawsuit for evaluating the violation of the Constitution or International Law. However, only a few citizens can submit this type of lawsuit: according to article 281<sup>st</sup> only The President of the Portuguese Republic, The President of the Assembly of the Republic, The Prime Minister, The Ombudsman, The

Attorney General or one tenth of the Members of the Assembly of the Republic can ask for an Abstract review of constitutionality and legality. This review is done even if there is no dispute resolution to be discuss in court. These people can ask to the Constitutional Court to review the unconstitutionality of any rule. Differently, when a party decides to raise one constitutional question it is necessary to submit one specific conflict to the court decision. This Specific Review of Constitutionality and Legality follow the American Judicial Review where every court needs to evaluate if the rules are in accordance with the Constitution. In the end, there is the possibility to appeal to the Constitutional Court when: the Court *'refuse(s) the application of any rule on the grounds of its unconstitutionality'* or if the Court decides to *'apply any rule, the unconstitutionality of which has been raised during the proceedings in question.'* (article 280<sup>th</sup>).

According to the article 18<sup>th</sup> from the Portuguese Constitution all the *'Constitution's provisions with regard to rights, freedoms and guarantees shall be directly applicable to and binding on public and private persons and bodies'*. Since all the Constitutional rules have direct effect on our jurisdiction this means that at the same time individuals can claim their constitutional rights directly in every Portuguese court and public entities are obliged to apply the Law.

We follow a Judicial Review that allows every court to analyse and control the application of the Constitution Rules. Individuals do not need to wait for a final decision and appeal for the Constitutional Court. The 1<sup>st</sup> Instance Court can, at the same time, decide the dispute resolution and control if a concrete rule is violating or not the Constitution.

Despite having Constitutions since 1820, the first Constitutional Court was only created in 1983 (Constitutional Law 1/82 of 30<sup>th</sup> September).

Until 1974 Portugal followed the French system by having a Political Control of its Constitution. Instead of the Constitutional Court it was the National Assembly or the Government the bodies responsible for the control of the Constitution (article no. 123<sup>rd</sup> from the 1933 Constitution). The main role of the courts was to solve the conflict between the parties, always in accordance to the Constitution and the general Laws. When a part raised a constitutional question the National Assembly or the Government were the bodies able to answer.

After the Carnation Revolution, Portugal had some years of political uncertainty. Indeed, during one year there were a provisional civil government that ruled the country in order to establish a plan as a way to have elections and to form a democratic government.



In 1975 it was created the Council of the Revolution as an instrument to allow the participation of Armed Forces Movement to be part of the Portuguese political scenario after the 1976 Revolution. The composition of the Council of Revolution was the President of the Portuguese Republic, Chief and Vice-Chief of the Defence Staff, Chief of the Army Force, the Navy Force and the Air Force, the COPCON (Continent Operational) Commander, the Commission for the Coordination of the Movement of the Armed Forces (MFA) and other 8 elements that should be selected by the MFA. The Prime-Minister could also be part of the Council but only if part of the military system.

To the military system was given a huge political power due to their role in Carnation Revolution and as a way to keep the spirit brought with that important democratic Revolution. The Council of Revolution attributions were the creation of the Constitutional Assembly and the vigilance for the correct execution of the MFA Programme and the Constitutional Laws.

In the original version of the 1976 Constitutional, the Council of Revolution was part of the Entities that exercised Sovereignty – article 113<sup>th</sup> of the original version of the 1976 Constitution – alongside with the President of the Republic, the Assembly of the Republic, the Government and the Courts. According to the original Constitutional version, the Council of Revolution was also the Council of the President of the Portuguese Republic –as an adviser and to give some authorizations together with the President of the Portuguese Republic. It was also responsible for the observance and execution of the Constitution by pronouncing on the constitutionality of the laws before their promulgation and by having legislative veto powers. The Council of Revolution could also analysed the constitutionality of every diplomas submitted and had the competence to consider them unconstitutionality.

After the transition period (1976 – 1982) it was conducted the 1<sup>st</sup> Revision of the Portuguese Constitution that withdraw the Council of Revolution from the section regarding the entities that exercised Sovereignty. It was decided that the Council of Revolution was no longer needed in Portugal and was abolished by the Constitutional Law 1/82 of 30<sup>th</sup> September (1<sup>st</sup> Revision of the 1976 Portuguese Constitution).

At the same time, it was published the Law which allowed the creation of the Constitutional Court. This Court is totally independent from the Political System (article no. 203<sup>rd</sup> from the Constitution) and it is responsible for the Constitutionality and Legality Review of the Portuguese Constitution. The definition could be found in the recent Constitution (with the

7<sup>th</sup> revision in 2005): *“The Constitutional Court is the court with the specific competence to administer justice in matters of a constitutional-law nature.” (article 221<sup>st</sup>).*

The Law nr 28/82 of 15<sup>th</sup> September regulates the organization and the process inside *the Constitutional Court*.

Yes, it is possible to apply individually in Portugal. Since we follow the American Review every Court is the competent jurisdiction to supervise the Constitution and the laws in general. If one individual citizen finds that one of its constitutional rights was violated he/she needs to start a lawsuit and raise the constitutional question. Every Court is competent to control and pronounce if in that concrete case there was a Constitutional violation.

Moreover, it is also important to highlight an Urgent Administrative Process present at Administrative Courts Procedure Code (*Código do Processo nos Tribunais Administrativo - CPTA*) where individuals can claim individual and directly a concrete violation of constitutional rights. This lawsuit only can be presented at the Administrative Jurisdiction.

First of all it is important to present the general organization of the Portuguese Courts: in addition to the Constitutional Court there is the Supreme Court of Justice (and the Courts of Law of First and Second Instance) the Supreme Administrative Court (and the remaining administrative and tax courts) and the Audit Court. These 4 types of Courts are the Categories of Courts in the Portuguese Jurisdiction.

It is important to state that, since they belong to different categories, they are not at the same hierarchy system. An administrative lawsuit can only be decided for the Administrative Jurisdiction. The same for the civil cases that need to be presented at the Court of First Instance and then the appeals are decided by the Court of Second Instance. The Supreme Court of Justice does not analyse evidences but only how the law was applied.

Differently for the Constitutional Jurisdiction, since Portugal adopted the Judicial Review every court is allowed to control the application of the Constitution and to evaluate if any rule is against the Portuguese Constitution. The Constitutional Court only appears as appeal court, after a final decision and when a constitutional question is raised during the law suit - *the Court ‘refuse(s) the application of any rule on the grounds of its unconstitutionality’ or if the Court decides to ‘apply any rule, the unconstitutionality of which has been raised during the proceedings in question.’ (article 280°).*

iv. In Portugal there is no specific Supreme Criminal Court. Nevertheless we have a general Supreme Court of Justice that usually work as an Appeal Court and it is the higher court in the Portuguese Jurisdiction. Working as an Appeal Court the Supreme Court has the main task of reviewing the decisions or trials made by the lower courts when the parties claim that had occurred a legal error. Normally the Supreme Court of Justice cannot answer to questions of facts: the trials are strictly to the discussion of questions of law. The Supreme Courts does not analyse evidences but only how the law was applied. However, sometimes the Supreme Court has the competence to answer to both questions – article 11<sup>th</sup> CPP number 2 – *Regarding criminal cases, the President of the Supreme Court of Justice is responsible for: a) the resolution of conflicts between the Supreme Court of Justice sections; b) give authorization to record and transcript the conversations of the President of Portuguese Republic, the Prime-Minister and the President of the Portuguese Assembly and also to order the destruction of that recorded material (...)*

Regarding criminal cases, the Supreme Court of Justice is also responsible for the President of the Portuguese Republic, President of the Portuguese Assembly and the Prime-Minister trials for the crimes they committed and were related to that political positions (article 11<sup>th</sup> number 3. a). The same applies for the Supreme Court of Justice Judges, Public Prosecutor Office and Judges of Second Instance Court : the Supreme Court of Justice is responsible for the trials of crimes committed and related to these positions.

In all these cases, since the Supreme Court of Justice is working as a First Instance Court, it can answer to questions of facts and questions of law.

Even for certain types of Appeals – the extraordinary Revision Appeal (article 449<sup>th</sup> – 466<sup>th</sup> CPP) the Appeal Court can answer to question of facts when new facts are the motivation of the Appeal and these new facts can create reasonable doubt about the former conviction.

Regarding the Supreme Court administrative organization there are different sections: some are specialized in Criminal Actions, others only work with civil cases and other with labour cases. – (article 34<sup>th</sup> from Law 52/2008 – Judicial Courts Organization Law)

Concerning the rules of court or procedure rules we should follow the Code of Criminal Procedure, published in 1987, to know which Court is suitable for each lawsuit. However, we cannot forget that the Supreme Court does not work as a court of first instance only as a last instance court. First it is mandatory to bring the action to an initial trial court – ‘Tribunais de 1<sup>a</sup> Instância ou de Comarca’. Therefore, only after a final judgment, which usually completes the case, the parties can decide to appeal to a higher court.

There is a specific section on the Code of Criminal Procedure that rules the Appeals in general (articles 399º - 466º Código Processo Penal).

Furthermore, it is also necessary to distinguish the regular appeals from the extraordinary ones. According to the Code of Criminal Procedure, it is possible to appeal during 20 days after the final decision. This is a regular appeal and it's always possible (except in certain circumstances where there is not an exact legal and final decision).

The part should base to get a successful appeal. After that the judge will evaluate the appeal and confirm the last decision or change it.

v. Early it was settled that a change on Criminal area should be done due to 25th April 1974 – The Carnation Revolution. After intensive working groups it was published the Decree-Law no. 400/82 of 23rd September which contains the Portuguese Criminal Code.

According to this new Criminal Code the age to be criminally punished is 16 years. There is a huge controversial public discussion in Portugal regarding this age, however, the article 19º established that the under age 16 thus not have criminal responsibility and cannot be sentenced as an adult.

It is also important to stress that there is special legislation regarding Juvenile Delinquent according to article 9º Criminal Code and Decree-Law nr 401/82 of 23rd September for those who are between 16 to 21 years old.

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. The Portuguese legislation applies the fairly undetermined expression “relevant sexual act” in the pertinent legal articles<sup>30</sup>, whose definition cannot be found in the Portuguese Criminal Code. Nevertheless, doctrine<sup>31</sup> has defined it as any behaviour which nature, content or meaning severely contends with the freedom or sexual determination of those who practice or suffer it. It has been comprehended that two elements should always be analyzed – the objectively sexual nature of the act, and its subjective component, both the impact caused to

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<sup>30</sup> Articles no 163 to 179, Portuguese Criminal Code

<sup>31</sup> Cf. Dias, Jorge de Figueiredo, *Comentário Conimbricense do Código Penal*, vol. I, 2nd edition, Coimbra Editora, Coimbra, 2012; Simas Santos, Leal Rodrigues, *Código Penal Anotado*, vol. II, Rei dos Livros, pp 368

the minor as the sexual intention of the accused. This way, the concrete circumstances of the situation shall always be considered. Nonetheless the fact that the criminal theoretical tend to an over restrictive interpretation, leaving child victims of sexual abuse with no physical evidences unprotected, the national jurisprudence has applied the term somewhat broadly. A distinction is made between relevant sexual acts and copulation, anal or oral intercours, vaginal or anal objects or body parts introduction, being that the latter are aggravated forms of sexual abuse.

**ii.** As a general principle of the criminal law it is stated that only intentional acts shall be punished, as well as, when legally previewed, negligence. The concept of intent consists in two key elements, both pondered at the time of the fact. The first, referred to as the intellectual or cognitive element, is characterized by the knowledge of the illicitness of the offender's conduct. The volitional or dispositional element represents the decision issued to such conduct, and its' execution. This last element allows us to distinguish between three categories regarding intention. The first degree contains two elements: the representation of the circumstances that fulfil the "actus reus", and the intent to act so. The "actus reus" is the direct and immediate goal of the defendant. The second degree is applied when the accused acknowledges the criminal fact as a necessary consequence of his/her conduct. He foresees the "actus reus", as a certain or almost certain effect, although it is not the direct end of his/her action. In the third degree, the perpetrator recognises the "actus reus" as a virtual cause of his behaviour, not intending the fact per se, but accepting the possibility of its performance.

Note that this conception of intent is highly influenced by the German's understanding. The national legislation establishes no criminal liability of a crime of sexual abuse committed by negligence or by omission, but only of an intentional nature.

**iii.** 14 is the determinant age concerning sexual activity. The Portuguese law establishes the minority as less than 18 years old, and sets at 16 years old the capacity to consent. However, in the matter of sexual abuse, the Criminal Code has the age of 14 as the key one. No sexuality is recognised to children less than 14 years old. In fact, there is what we can consider a legally imposed abstinence. It is irrelevant if the child has given its consent or not,

as it is understood that sexual activities prior to this age will always jeopardize the child's sexual development and self-determination<sup>32</sup>.

Bearing in mind the irrelevance of the minor's consent, it is possible to contemplate an offense of sexual abuse between minors. The Portuguese jurisprudence has acknowledged such possibility<sup>33</sup>, considering that the gap of ages between the minors is relevant, and attending to the concrete circumstances of the case.

iv. The Portuguese Criminal Code distinguishes between crimes against sexual freedom and crimes against sexual self-determination. The later refer to consensual sexual interactions, which are criminalized taking into consideration the young age of at least one of the perpetrators who practice or suffer the sexual act. Consent is irrelevant in such cases, for it is understood that any sexual act at that age will jeopardize one's development and self-determination, since there is not enough maturity to understand such acts or their meaning.

Crimes against sexual freedom embrace instances where no consent has been given. Here are punished 'sexual coercion' and 'rape'. These legal types have in common the requirement that the defendant has made use of violence or serious threat, or for that purpose put the victim in a state of unconsciousness, being that 'rape' is applied in the case of copulation, anal or oral intercourses, vaginal or anal objects or body parts' introduction<sup>34</sup>. These crimes' victims can either be an adult or a child, being that minority operates as an aggravation. If the victim is less than 16 years old, penalty shall be aggravated to a third, to the minimum and maximum limits. Where the victim is less than 14, penalty shall be aggravated by half.

v. National legislation previews no crime of incest, as the criminal law is based on the leading principle that any private consensual sexual activity, regardless of its nature, between adults, isn't to be regarded. However, despite the fact that the crime of incest has no independent preview, such relationship isn't completely ignored by the law, as it functions as an aggravation of the crime of sexual abuse – sibling sexual abuse is a type of aggravated child abuse.

vi. Taking advantage of the authority resulting from a family relationship, guardianship, trusteeship, hierarchical obedience, economical or work dependence, allows the perpetrator

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<sup>32</sup> Clara Sottomayor, *Direitos das Crianças Vítimas de Crimes Violentos*, pp 7

<sup>33</sup> Cf. Ac. STJ de 17-01-2008

<sup>34</sup> Articles 163/1 and 164

to be punished for the crimes of ‘sexual coercion’ and ‘rape’, even in cases where no violence or serious threat has taken place. Such circumstances regarding the relationship between the accused and the victim can also function as an aggravation. Liability of these crimes is justified by the thought that the victim’s freedom is tempered by the existence of a dominance relationship.

Special circumstances where the victim is incapable of resistance or institutionalised are taken into deliberation in autonomous articles. Once more, it is considered that due to that condition, one’s liberty is severely diminished.

Article no 165 contemplates the criminal liability of a relevant sexual act engaged with an unconscious or, for a different reason, incapable of resistance person. The perpetrator takes advantage of such state or incapacity.

In addition, article no 166 previews circumstances where the victim is institutionalized, whether it is due to need of care or assistance, judicial sentence or education. The defendant will then take advantage of his/hers position or occupation in such facility, as of the victim’s condition. This particular crime gained considerably more awareness due to the case law referring to Casa Pia de Lisboa. Casa Pia is a public institution that offers education services and temporary accommodation for minors in risk of social exclusion or without parental support. The case, turned public in 2002, revealed several offenses of child abuse committed within this institution, by employees that availed their status and trust gained among children, through money offers.

## **2.2 Child Prostitution**

**vii.** Portugal is a party to the Council of Europe Convention on Action against Human Trafficking, being the signature dates to 16/05/2005, and having ratified it at 27/02/2008. The Convention’s entry into force dates to 1/06/2008.

**viii.** National legislation defines “child prostitution” in Criminal Code’s article 174, as the active behaviour of engaging in a relevant sexual act with a minor between the ages of 14 and 16 years old, in exchange for payment or any other form of recompense. Copulation, anal or oral intercourses, vaginal or anal objects or body parts introduction are aggravated forms of this offense. This crime’s perpetrator is necessarily an adult, never minding its gender, and the recompense can include any material advantaged, not only monetary payment. Such definition is compatible with the article 19/2 of the Lanzarote Convention, both regarding the conduct to be perpetrated and the broad interpretation of the

remuneration needed, even though the Convention does not mention the majority of the defendant. The promotion, favouring and facilitation of such practice also represent an important offense regarding child prostitution.

**ix.** Criminal liability of the user, thus being the person who pays to conduct sexual activities with children, is affirmed in article 174, under the title ‘use of minors’ prostitution’. As for the recruiter, his liability can be found in article 175, ‘minor’s favouring prostitution’, the recruiter being the person that coordinates the business of child prostitution. As article 174 finds correspondence in Convention’s article 19/1.c, Conventions’ 19/1.a and b are previewed by article 175.

### **2.3 Child Pornography**

**x.** The Council of Europe Convention on Cybercrime was signed by Portugal on the 23<sup>rd</sup> of November 2001. It was approved by Resolution nr. 88/2009 of the Portuguese Parliament and ratified by Presidential Decree nr. 91/2009 on the 29<sup>th</sup> of August 2009, as published in Portugal’s Official Journal nr. 179/2009 on the 15<sup>th</sup> of September 2009. On the 24<sup>th</sup> of March 2010 the ratification of the Convention was deposited with the Secretary General of the Council of Europe, date in which it is considered to be officially ratified by the Portuguese Government. Pursuant to article 36(4) of the Convention, it entered into force in Portugal on the 1<sup>st</sup> of July 2010.

Upon ratification, Portugal issued the following reservation:

“In accordance with Article 24, paragraph 5, of the Convention, the Portuguese Republic declares that it shall not grant extradition of persons who: a) are to be trialled by an exceptional court or who are to serve a sentence passed by such a court; b) it has been proved will be subject to a trial which affords no legal guarantees of criminal proceedings complying with the conditions internationally recognised as essential to the protection of human rights, or will serve their sentences in inhuman conditions; c) are being demanded in connection with an offence punishable with a lifetime sentence or a lifetime detention order. The Portuguese Republic shall grant extradition only for crimes punishable with penalty of deprivation of liberty superior to one year. The Portuguese Republic shall not grant extradition of Portuguese nationals. Portugal shall not grant extradition for offences



punishable with the death penalty under the law of the requesting State. Portugal shall authorise transit through its national territory only in respect of persons whose circumstances are such that their extradition may be granted.<sup>35</sup>”

In order to harmonize national legislation with the Convention on Cybercrime, Law nr. 109/2009, September 15<sup>th</sup>, was passed.

**xi.** The most relevant piece of national legislation regarding child pornography (*rectius*, underage<sup>36</sup> pornography) is article 176 of the Portuguese Penal Code, where no clear-cut definition of “child pornography” analogous to that of Article 20(2) of the Lanzarote Convention can be found in order to assess the compatibility of both.

In Portugal, in order to ascertain a definition of “child pornography”, one must therefore turn to international agreements or European acts to which the State is bound, such as article 2(c) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; article 1(b) of the Council Framework Decision nr. 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography; or Directive nr. 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, which will replace the Council Framework Decision 2004/68/JHA.

**xii.** According to Article 176 of the Portuguese Penal Code, the State attributes criminal liability to any male or female of at least 16 years of age<sup>37</sup> who attempts or succeeds in one of the following four actions<sup>38</sup>:

1. Using or inciting an underage person to participate in a show, photo, film or digital recording of a pornographic nature;
2. Producing, distributing, importing, exporting, broadcasting, exhibiting or transferring pornographic material, for any reason and by any means;

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<sup>35</sup> As can be noted at:

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=185&CM=8&DF=16/09/2012&CL=ENG&VL=1>

<sup>36</sup> In Portugal, people under the age of 18, according to article 122 of the Portuguese Civil Code.

<sup>37</sup> The threshold for criminal liability in Portuguese law. See Article 19 of the Portuguese Criminal Code.

<sup>38</sup> Following the arrangement of ALBUQUERQUE, Paulo Pinto de, *Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem*, Universidade Católica Editora, 2010, p. 551;

3. Acquiring or possessing pornographic material with the intent to distribute, import, export, broadcast, exhibit or transfer it;
4. Acquiring or possessing pornographic material even without such intent.

It should be noted that we presently make reference only to the so-called *real* child pornography (i.e. featuring real children). Below we will address other forms of child pornography, such as *virtual or realistic* child pornography and *seeming* child pornography.

Still, the legislation is fundamentally compatible with article 20(1) of the Convention to the extent it criminalises most of the conducts listed down in the latter, perhaps with exception made to paragraph 1.f. This paragraph is intended to proscribe the conduct of those who knowingly and intentionally enter websites where child pornography is available and proceed to watch it by means other than downloading<sup>39</sup> (e.g., streaming videos or observing images online), therefore never *de facto* “acquiring” or “possessing” any of the pornographic material. In fact, the Portuguese provision does not cover such conduct, which could therefore take place without incurring criminal liability. However, seeing as article 20(4) of the Convention expressly provides each State with the right not to apply paragraph 1.f., the Portuguese legislation could still be deemed compatible with article 20(1) of the Lanzarote Convention.

**xiii.** In regards to the reservation rights provided to all states party to the Convention, article 20(4) could be in play insofar as the Portuguese legislation does not apply article 20(1.f). Further reference to this issue can be found above (question *iii*).

Concerning the first part of article 20(3), Portugal does not criminalize the production and possession of pornographic material consisting exclusively of simulated representations of realistic images of a non-existing child.

As we have seen in the previous section (*iii*), Portugal criminalises four typical conducts relating to *real* child pornography. The conduct covered in article 20(3) of the Convention would be tantamount to *wholly virtual or realistic* child pornography (the virtual representation of a non-existing child), which the State does not criminalise in any way, shape or form; in contrast to *partially virtual or realistic* child pornography (the virtual representation of an

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<sup>39</sup> See recital 140 of the Explanatory Report to the Lanzarote Convention, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/201.htm>;

existing child, with the assistance of graphic technology) which is criminalized if associated to production, distribution, import, export, broadcast, exhibition or transferral activities (parallel to action nr. 2, on question *iii* above) or to acquisition and possession with the intent to carry on any of the previous activities (parallel to action nr. 3). Finally, it is disputed whether the so-called *seeming* child pornography (featuring real people of age that resemble children) is criminalized, seeing as some scholars also include this final category in the concept of *virtual or realistic* child pornography, reasoning that the determining factor is the pornography viewer's impression that he is indeed watching a child<sup>40</sup>, while others hold that configuring pornography made by people of age as child pornography runs afoul of the principle of legality<sup>41</sup>.

Concerning the final part of article 20(3), there is no such exclusion from criminal liability under the current Portuguese legal provision.

In regards to control mechanisms, the Portuguese legislation does not require Internet Service Providers (ISPs) to report suspected child pornography to law enforcement or any other mandated agency. There is however a combined project entitled *Internet Segura*<sup>42</sup> ("Safe Internet"), co-founded by the European Commission with the participation and support of the Ministry of Education, the Foundation for National Scientific Computing, Microsoft Portugal, the National Agency for Knowledge Society and the Foundation for the Dissemination of Information Technology.

The mission of *Internet Segura* is to block illegal content on the Internet including (but not restricted to) child abuse and child pornography, and prosecute their disseminators in an effective way in conjunction with Portuguese law enforcement agencies and both national and international Internet Service Providers. It also strives to provide minors with information, guidelines, alerts regarding safe Internet usage, and even a help line and an e-mail address which children are encouraged to reach out to if they feel troubled or confused by anything they come across with on the internet.

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<sup>40</sup> See ALBUQUERQUE, Paulo Pinto de, *Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem*, Universidade Católica Editora, 2010, p. 552;

<sup>41</sup> See ANTUNES, Maria João, Cláudia Soares, «Artigo 176.º», *Comentário Conimbricense ao Código Penal*, dir. Jorge de Figueiredo Dias, Tomo I, 2012, p. 883 to 885;

<sup>42</sup> <http://www.internetsegura.pt/>

**xiv.** The State does indeed criminalize the intentional conduct of making a child participate in pornographic performances.

It should however be noted that such participation may encompass several behaviours, ranging from the mere physical presence of the child as a passive bystander amidst the other interveners in the performance, perhaps with some contact of sexual nature or exhibitionism, to the practice of relevant sexual acts. Where actual relevant sexual acts take place, involving children under the age of 14, the case will be for “sexual abuse of children” rather than mere “participation of children in pornographic performances”.

As such, please refer to the section immediately below for a more detailed analysis of the legal nuances regarding the participation of children in pornographic performances.

## **2.4 Corruption of Children**

**xv.** Yes, the State criminalizes the intention of causing a child to witness any kind of sexual activity. This crime is punished differently or falls under different statutes according to the offender’s participation in the act.

If the perpetrator does not interact with the child’s body in anyway, his/her acts will fall under article 171, nr. 3, a) or b), if the victim is under the age of 14.

Of course in order for a conversation, written word, pornographic show or object to fall under the scope of nr. 3, b), it has to be suitable to sexually arouse the child. Basically it’s not needed that the act is erotic or pornographic; it’s sufficient if it’s adequate to sexually arouse the minor. Our law does not distinguish between sensual or pornographic objects, therefore criminalized just the same.

- Pornographic conversation: It aims to include any kind of pornographic or sensual word exchange or oral communication (colloquial) by the perpetrator with a child or another third person in the presence of a child<sup>43</sup>, whatever its material support may be. E.g.: telephone, mobile phone or any other kind of technology. Since the statute explicitly contains the word “conversation”, some authors show their concern whether or not this also includes the exposure of minors to pornographic songs.<sup>44</sup>

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<sup>43</sup> Cf. Albuquerque, Paulo Pinto de, *Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem*, 2nd. Edition, Universidade Católica Editora, 2010,

<sup>44</sup> Cf. Dias, Jorge de Figueiredo, *Comentário Conimbricense do Código Penal*, vol. I, 2nd Edition, Coimbra Editora,

- Pornographic writing: It includes every written/drafted text suitable or adequate to sexually arouse a child<sup>45</sup>, therefore any kind of exposition translated into alphabetic characters<sup>46</sup> falls under the scope of this provision (drawings, photos or discs are not included).

- Pornographic show: It's a meeting of several people who aim to watch or intervene in an act suitable to sexually arouse a child. The show does not have to be public or paid, it's sufficient that it's open to spectators, or rather, third people who only want to watch the show. The show can be either visual or audio (hot lines).<sup>47</sup>

- Pornographic object: It can be any object suitable to sexually arouse the victim. It can either be a drawing, photograph, a movie, or any other object in a solid state.<sup>48</sup>

- It's possible that the perpetrator might use his own body to corrupt the minor. Thus, article 173 nr 3, a), which refers to article 170, a), criminalizes "sexual importunity" when committed in the presence of a minor. It punishes anyone who commits exhibitionism (showing parts of the body with the intent of offending others' sexual freedom, but only when it is predictable that from such an action another sexual offence can result<sup>49</sup>) and "constraining others to sexual nature contacts", "which represents a normative phrase of difficult concretization and unparalleled in other legal systems"<sup>50</sup>.

The State defines "causing" as when the offender "acts upon" a minor under the age of 14 using one of the means or objects stated above. For that, it's not needed that the offender interacts with the victim's body in any way. It's sufficient that the minor participates in the act even if he/she takes an extremely passive role or just observes the pornographic object.<sup>51</sup>

As a general rule and according to our law, when the victim's age is between 14 and 16, the offender cannot be prosecuted for this crime, since there is not any statute which criminalizes this conduct<sup>52</sup>. However, when the victim and perpetrator are in a relationship of trust, even if the minor is over the age of 14 (and up to the age of 18), the act of

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Coimbra, 2012, p. 840-841

<sup>45</sup> Cf. Albuquerque, Paulo Pinto de, *op. cit.*, p. 538

<sup>46</sup> Cf. Dias, Jorge de Figueiredo, *op. cit.*, p. 840-841

<sup>47</sup> Cf. Albuquerque, Paulo Pinto de, *op. cit.*, p. 538

<sup>48</sup> Cf. Albuquerque, Paulo Pinto de, *Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem*, 2ª edição, Universidade Católica Editora, 2010, pp 538

<sup>49</sup> Cf. Albuquerque, Paulo Pinto de, *op. cit.*, p. 531

<sup>50</sup> Sexual Offender Treatment, Volume 6 (2011), Issue 2 available at <http://www.sexual-offender-treatment.org/98.html>, date of access (27.10.2012)

<sup>51</sup> Cf. Dias, Jorge de Figueiredo, *op. cit.*, p. 840-841

<sup>52</sup> Article 173º of the Criminal Code

corruption of minors is punished, because it is considered that the freedom and sexual self-determination of the minor entrusted to someone for education and assistance is in need of particular protection<sup>53</sup>, especially when the offender uses that condition to commit the sexual act, abusing the child's trust. To characterize this relationship our law resorts to the expression "under care for education or assistance", which aims to cover every relation of trust even if it has its origin in the law, contract, court decision or a *de facto* decision, or if the child is entrusted to a third person or family or a temporary, intermittent, permanent situation.<sup>54</sup> Thus the defendant, according to this provision may be parents, tutors, family members, professors, educators, doctors, social servants and any other person involved with his/her social or medical education<sup>55</sup>.

The articles which cover non-consensual acts do not explicitly criminalize the offense of forced corruption to minors. But that does not mean in this case it would remain unpunished. The perpetrator would be convicted for committing the offense of coercion or threat according to article 153 and 154 of the Criminal Code and the crime of sexual abuse under nr. 3, and subject to a concurrent sentence.

Moreover, if the perpetrator resorts to inducement or promises the victim a reward; he/she would still be punished, because his/her conduct is still an "actus reus" covered by nr. 3, since "there is a kind of "legal presumption" that certain acts, even though consensual, when perpetrated with a minor, are noxious to her/his personality's development"<sup>56</sup>.

## 2.5 Solicitation of Children for Sexual Purposes

**xvi.** In the Portuguese legal system, there's no specific statute which criminalizes an adult who uses information and communication technologies for sexual gratification with a minor. Instead, it covers any kind of "sexual contact" made or not through technological means. We show concern not to exceedingly criminalize every contact; the law only intervenes in some exceptional situations, in conformation with the "minimum intervention principle"<sup>57</sup>. In the context of solicitation of children, our law maker translated that to when "relevant

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<sup>53</sup> Cf. Antunes, Maria João, *Comentário Conimbricense do Código Penal*, vol I, 1st Edition, Coimbra Editora, Coimbra, 1999, p. 554

<sup>54</sup> Cf. Albuquerque, Paulo Pinto de, *op. cit.*, p. 541

<sup>55</sup> Cf. Albuquerque, Pedro Pinto de, *op. cit.*, p. 542

<sup>56</sup> Sexual Offender Treatment, Volume 6 (2011), Issue 2, available at <http://www.sexual-offender-treatment.org/98.html>, date of access (27.10.2012)

<sup>57</sup> Criminal Law won't intervene when the legal interest injured is irrelevant

sexual acts” or “oral and anal sex is practiced”. The rationale behind each provision aims at compassing sexual acts harmful to the child and which may jeopardize the development of his/her physical and psychological wellbeing and safeguard the child’s sexual self-determination. This means that when the perpetrator uses the internet for his/her sexual gratification, the law only criminalizes the conduct on the very moment it becomes relevant. Therefore, when the offender resorts to grooming, he/she will only be condemned if he/she practices any acts which fall under the several statutes mentioned up until now.

Today, the Portuguese courts have yet to deal with a crime of grooming perpetrated through the internet. But, if such a case should appear it would be solved using the relevant criminal law provisions from the Criminal Code, or else it would violate the *nullum crimen, nulla poena sine praevia lege* principle.

Grooming of a child can be achieved in several ways, but every method serves “to gradually desensitize the child to the culminating act of sexual abuse, which is his goal”<sup>58</sup>. This is often conducted in a set period of time where through ways of conversation, the offender exposes the minor to sexual material or induces him/her to produce child pornography. The purpose of grooming is to build a trusting relationship with the minor and slowly, step-by-step, educate the child to the sexual abuse that the offender wants to perpetrate.

The law does not prohibit innocent interaction in anyway. So even though some child molesters befriend the victim by talking about subjects that interest the minor, up to a point where the child fully trusts the perpetrator, at this stage, the law will not intervene. This stage could only be described as “preparatory acts”, which are not criminalized in the Portuguese system (article 21 of the Criminal Code).

The offender’s conduct will only become relevant when he/she exposes the child to sexual material. When the seemingly normal conversation between the criminal and the minor switches to a sexual topic, the *actus reus* is punishable under nr. 3, b) since it will be considered “pornographic conversation”<sup>59</sup>, or if the culprit resort’s to offline instant

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<sup>58</sup> Russell, D. H. E. and Purcell, N. J. (2011), Exposure to Pornography as a Cause of Child Sexual Victimization, available in [http://www.dianarussell.com/exposure\\_to\\_porn\\_cause\\_child\\_sexual\\_victimization.html](http://www.dianarussell.com/exposure_to_porn_cause_child_sexual_victimization.html), date of access (01.08.2012)

<sup>59</sup> Cf. Carla Börjesson, Master’s Thesis – *Tecnologias de Informação e Crimes Sexuais Contra Menores*, Universidade Católica do Porto, Porto, 2012, p. 46.

messaging that's also covered by the same provision but under the "pornographic writing"<sup>60</sup>. Although usually, in the most common cases, the minor does not know the offender's true identity or age, if by some chance he/she does and the perpetrator practices any lewd act in front of a webcam with a child on the other end, this act is covered by nr. 3, a), article 171.

Since the criminal's goal is in fact the sexual abuse of a child, the other question that needs to be answered is at which stage the agent may be accused for committing such a crime. The considerations made above about the sexual abuse of children are fully applicable here: in order for someone to be convicted for the sexual abuse of a child he/she has to practice any act established in nr. 1 and 2, article 171. So the proposition of a meeting is not enough to accuse the perpetrator of sexual abuse, but under certain circumstances, there could be grounds for attempt of committing the offense of children's sexual abuse.

In any case, if the child actually met the offender and he/she sexually abused the minor, then if the perpetrator used the acts depicted in nr. 3, a) or b) as a means to bring about the acts established in nr. 1 or 2, our courts would consider the former as a part of the latter and he/she would only be convicted according to the penance specified in nr. 1 or 2.<sup>61</sup> On the other hand, if by any chance, the offender forcefully imposed himself on the minor to achieve his/her goal (i.e. the sexual abuse), by resorting to "violence", "serious threat", or causing the victim to "become unconscious or in a state impossible to resist", is punished according to the penance established in article 177 nr. 5, and 6 and 171 nr. 3, a) or b), in a cumulative sentence, since it was the use of force the means to bring about the result. If later it was found that the perpetrator sexually abused more than one child, he/she would be punished for the two or more accounts and sentenced for successive terms for each crime committed.<sup>62</sup>

**xvii.** Under Portuguese law someone is considered an accomplice when, intentionally and in anyway, offers substantial or moral help to the commission of someone else's intentional crime (article 27 of the Criminal Code). Through this provision, the act of aiding or abetting is condemned and treated the same way. The same thing should be said when the secondary

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<sup>60</sup> Cf. Carla Börjesson, Master's Thesis – *Tecnologias de Informação e Crimes Sexuais Contra Menores*, Universidade Católica do Porto, Porto, 2012, p. 46.

<sup>61</sup> Cf. Dias, Jorge de Figueiredo, *Comentário Conimbricense do Código Penal*, TOMO I, 2ª edição, Coimbra Editora, Coimbra, 2012, pp 843

<sup>62</sup> Cf. Dias, Jorge de Figueiredo, *Comentário Conimbricense do Código Penal*, TOMO I, 2ª edição, Coimbra Editora, Coimbra, 2012, pp 843



party helped the principal offender by offering material assistance or moral support or encouragement. For a secondary party to incur in criminal responsibility according to article 27 of the Criminal Code, his/her assistance and the principal offender's act must be intentional, there must be a causal link between the support provided and the *actus reus* brought about, and, finally, liability is dependent on the commission of the offence even if it doesn't go past the stage of attempt. In order to distinguish between an offender and his/her accomplice, we apply the now dominant theory among us, and heavily influenced by foreign authors such as Claus Roxin, called "dominion of the fact theory". In its essence, an accomplice does not have dominion of the principal fact or offense, over the act that is considered the *actus reus*, they limit themselves to facilitate it through the support offered, aggravating the injury caused to the legal interest committed by the offender<sup>63</sup>, even without his/her help, the offender would commit the crime just the same. In contrast, the offender is the one in control of the main fact, he/she is the one who has dominion over it, who brings the result to come about with his/her own body, it's up to him/her the "if" and the "how" of the offense. The crime wouldn't occur if the perpetrator didn't commit it. In addition, the perpetrator may have control over the result, without physically intervening in it, for instance when he/she has dominion over the executor's will (e.g. through err or coercion).<sup>64</sup> Moreover, it should be noted that this theory is not applied in crimes of omission and negligent.

For the offenses mentioned above:

#### A. For the crime of sexual abuse of children or teenagers

Anyone can be held accountable for the assistance provided to the commission of a crime of sexual abuse of children or teenagers, whether force was used or if it was of a consensual nature (article. 27 in connection with article 163, 164, 171, 172, 173 of the Criminal Code). As it was mentioned above, a secondary party is liable if he/she intentionally supported the perpetrator who intentionally sexually abused the child.

#### B. Child Prostitution

The same considerations stated above can be made here. But when the secondary party supports the child prostitution professionally or with an intention to make profit, he/she

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<sup>63</sup> Cf. Germano Marques da Silva, *Direito Penal Português, Parte Geral*, vol. II, Verbo Edition, p. 179.

<sup>64</sup>p. 767-8

shall be considered the principal offender of a crime of “prostitution favouring” (article 175 of the Criminal Code).

#### C. Child Pornography and D. Corruption of Minors

Anyone can be criminally liable for any assistance provided to the commission of the crime of child pornography or corruption of minors.

#### E. Grooming

It's not an autonomous crime according to Portuguese criminal legislation; nevertheless, it's possible for someone to be criminally responsible as a secondary participant through assistance according to other relevant statutes.

#### Attempt

As article 22 from our Criminal Code explains, there is an attempt when the offender practices “execution acts” of the crime he decided to commit, but without reaching its full offense. The Law considers “execution acts”: conduct which is a key element of a determined crime (a)), or those suitable to bring about the result stated in a specific provision (b)), or according to common experience, and without disregarding unpredictable circumstances, it's possible to assume that the perpetrator would in fact commit the crime or would act in a suitable way to do it (c)). The *mens rea* for attempt has to be intentional, since it was the perpetrator's desire to bring about the full offence, not part of it.

Under Portuguese Criminal Law, not every attempt to commit a crime is punishable. As a general rule, an offender can only be convicted for the attempt of a specific crime if the sentence for the full offense is superior to 3 years in prison, unless the statute explicitly says otherwise (article 23 of the Criminal Code).

For the crimes mentioned above:

##### a. Sexual abuse of children

If the attempt is made against minors under the age of 14, or over the age of 14 up to 18 and under the perpetrator's care for education or assistance, the attempt is always punishable, because the prison sentence may exceed the three year limit. But if the victim is a teenager between the age of 14 and 16, the attempt isn't punishable, because the prison sentence may ascend up to two or three years.

##### b. Child Prostitution

Although the prison sentence for the commission's attempt of child prostitution may only go up to two or three years, the statute explicitly says the attempt is punishable.

c. Child Pornography

The statute's criminal punishment does not exceed the three year limit, nevertheless, under nr. 5 of article 176, one can be liable simply for the attempt.

d. Corruption of Minors

According to article 23's general rules, the attempt isn't criminalized.

e. Grooming

As stated earlier, the attempt for the crime of grooming will have to be interpreted in harmony with the other relevant crimes. It is difficult to judge when the offender can be accountable for the attempt of Grooming. Nevertheless, the answer lies in when one can consider that the offender committed any "execution acts" of the offense of sexual abuse of children, in this context. If in earlier conversations with a child the offender expressed his/her desire to have sexual intercourse with the child or showed arousal or sexual interest for the minor's body and to touch him/her in real life, is the proposal of a meeting enough to form a conviction of attempt? Or is the fact that the child showed up at the meeting place relevant? Since there is not any specific provision criminalizing this offense, several considerations have to be made, and we'll try to be brief.

Although the sexual interest might be important, we'll have to consider if setting the meeting is an execution act according to article 22, c). For the offender to be liable, his/her conduct must be considered, according to common experience, and without disregarding unpredictable circumstances, possible to assume that the perpetrator would in fact commit the crime or would act in a suitable way to do it. This provision's aim is to cover all acts which indicate that the legal interest protected by the law was, in fact, in danger. As such we have to believe that when the offender proposed a meeting, the child's sexual freedom and/or self-determination was in danger. We can consider that due to the nature and sexual intensity of the conversations, it's possible to assume that the agent would in fact sexually abuse the minor or would act in a suitable way to do it. On the other hand, it should be noted that the proposal of a meeting does not mean that it would inevitably occur, that all the relevant parties would appear at the agreed time and place, after all the perpetrator might at some point forfeit the commission, or the child, for several reasons, might not even show up. Which means it's difficult to say that at this point, the child's sexual freedom and self-

determination was in danger. However, this solution might be defensible if the time period between the proposal and the actual meeting is considerably small (a few minutes? Hours?), because even though the distance between the offender and the legal interest was still far, the danger would be proximate<sup>65</sup>.

A somewhat different situation is when the offender just invites the child to his/her household. Here the perpetrator already committed all the acts considered necessary to bring about the result discussed online, which means it might be enough to form a conviction<sup>66</sup>.

Notwithstanding the considerations made thus far, some authors showed their concern that some perpetrators may use the lack of punishment of the attempt of the crime of corruption of minors to justify the invitation of a child to the offender's house, saying it was their intention to only show pornographic photos or videos, and not sexually abuse the child, therefore escaping conviction.<sup>67</sup>

In the end, we consider that in order for someone to be convicted for the crime of grooming, in its attempt form it is needed; 1) that the offender proposes a meeting; 2) the child has to appear at the meeting place; 3) the offender must have shown sexual interest for the child, before or during the meeting; 4) the time period between the proposal and the actual meeting is relevant in certain circumstances.

## 2.6 Corporate Liability

**xviii.** The liability of legal entities such as civil companies and associations is prescribed in Portuguese Law, with the exception of the State or legal bodies whose actions corresponds to the exercise of public power as well as international public organisations. In fact, in Portugal, the Law excludes criminal liability of administrative authorities, entities that grant public services and public companies.

Also, there are a couple of European legal frameworks that also state the exclusion of liability of "*the State or any other public bodies acting in the exercise of their sovereignty rights and for public international organisations*", particularly as far as criminal liability is concerned. For

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<sup>65</sup> Cunha, Maria da Conceição F., *personal communication*, 2012

<sup>66</sup> Cunha, Maria da Conceição F., *op.*, 2012

<sup>67</sup> Cf. Dias, Jorge de Figueiredo, *op. cit.*, p. 842

example, The Criminal Convention against Corruption - that was adopted by Portugal in 1.9.2002.

Portuguese legislation adopts the criminal liability of legal entities since 1982, regarding it as exceptional. However such rule did not know any practical applicability because the Criminal Code was very poor as far as the regulation of this topic was concerned. Two years later, the introduction of the Decree Law nr 28/84, January 20<sup>th</sup> determined criminal liability of collective beings considering economy and public health. So, we can conclude that the acceptance of such liability has been uprooted in an ascending revolution.

In 2007, considering the Law nr 59/2007 of September 4<sup>th</sup>, a general principle of non-criminal liability of collective beings was enhanced because it was very difficult to prove that people who held leading positions were liable for their practices.

Differently, as far as civil liability is concerned, there is no difference in the treatment aimed at companies and entities in general. However, when it comes to criminal liability, for a long time, such liability was not recognized until the introduction of a new article in the Portuguese Penal Code: article 11, which has thwarted that tendency.

Concerning to civil liability, the Portuguese Civil Code consecrates this principle very clear in its article 165<sup>o</sup> stating that collective entities are liable for the consequences caused by actions or omissions performed by their employees, representatives or mandatory, as far as some conditions are fulfilled. These conditions will be referred when describing civil liability in a further question. Nevertheless, taking into account the above mentioned, it is important to be aware of some situations and how they are regulated.

For example, considering civil liability of the State and other collective entities, the rules established in the Portuguese civil code will be put in practice if such entities have performed practices or omissions on the same ground as particulars. Nevertheless, if such actions / omissions are inherent to administrative functions, they have to submit to another legislation: Law nr 67/2001. So, Portuguese legislation establishes a difference between private and public field.

The situations regarding groups of companies and their criminal liability are not entirely regulated, which has paved the way to a couple of possibilities. The article 4<sup>o</sup> of the Penal Code states that Portuguese law regulates the facts that take place in Portuguese territory, regardless of the perpetrator's nationality. The article 5<sup>o</sup> predicts that the same law has also

applicability considering facts that have not occurred in the Portuguese territory but which have been committed by or against other collective person, whose head office is in Portugal.

Moreover, being more thorough, we can consider the following situation: if an employee of a certain company or association is using its office and his position to undertake illegal actions as well as sexual abuse, the collective being can also be considered liable for it.

Portuguese legal framework introduces some differences between the actions / omissions directly performed by the leading person and those that are only indirectly influenced by them.

First of all, considering the definition of “perpetrator / defendant”, we need to know if the law refers to the leader itself or to any other agent. In order to determine corporate liability, the crime has to be committed by a person in charge of an authority and a leadership position, regardless of his individual liability.

Regarding corporate liability due to crimes committed by regular employees being held by their leaders, there is corporate liability if that leader has violated his supervision and control obligations. There is a general principle of liability of the Administration of the collective being – the administrative body of professionals has to organize their tasks and jobs so that their employees do not commit crimes aimed at collective goals.

When the offense has been committed by someone in position of authority on behalf of the collective interest, we can define such practice as direct commission aimed at a criminal purpose, regardless of a malicious or negligent practice. What is important to the existence of corporate liability on this topic is the identification of a physical, natural person who has adopted a special behaviour for the benefit of the legal person.

The designated indirect commission of the leading person occurs when the “fact” takes place as a consequence of the violation of supervision and control duties. However, the only facts on which the collective being can be liable for are the facts put in practice by regular employees, being held by diligent and prudent leaders, who should have avoided such consequences if they had performed his tasks.

When it comes to “leading person”, we must clarify that definition. According to the Portuguese legislation – article 11º/4 of the Criminal Code, “leading person” is the name used to designate a person in position of authority; control, supervision and decision-making process on behalf of the legal person. Such definition has already been presented by Portuguese jurisprudence (Case Law nr 395/2003 from the Constitutional Court). For

example, considering a delegation or a branch office, criminal liability may be a consequence of the behaviour led by its director or manager.

The legal relevance depends on the fact that such leading person has committed the crime himself, on the grounds of immediate authorship; mediate authorship or co-authorship (Article 26° of the Criminal Code).

In addition to that, other answers need to be searched for interpreting the fact that the crime is undertaken by employees under authority and subordination of someone who has to comply with vigilance and control duties. There are some situations that impel to a precise and clear regulation: for example, when some orders or instructions have been barely communicated; if the leader has clearly omitted his orders when confronted with illegal actions by his employees.

On this topic, another concept needs to be pointed out: *“fault in vigilando”*. This expression designates the imputation criteria of the punishable fact to the leader and to the collective person. It is not a necessary condition that the leader has to be superior to the regular employee; it is enough that the first one has a position of authority and has not complied with his own obligations, which has impelled to his employees to commit infractions legally relevant.

So, the penalty attributed to the collective person also depends on the fact that the regular employee has committed the crime. However, if the conditions to its execution had been created by the leader, if the regular employee is under justification or exculpation causes or if he has committed a crime accidentally, having his conscience wrongly guided (error on legal interpretation of the offense), no penalty is stipulated for the entity itself.

Until now, we have referred to criminal liability although it shares common points of contact with civil liability. As far as the last is concerned, it is important to mention both leading persons and regular employees have to assume the legal consequences that result from their actions or omissions as long as they have acted guiltily.

**xix.** There are three different kinds of liability that national legislation imposes that are important to take into account on this topic. Starting with civil liability, it can be divided into contractual liability and extra contractual one. According to the Portuguese legal framework, as far as the contractual liability is concerned, article 800° states that the company ( or the debtor) is responsible for actions or omissions of its legal representatives or other people whom the company might resort to for complying with its obligations. If their behaviour

deviates from the behaviour owed (in obligation) and cause damages to the creditor or certain involved third parties, the responsibility is imputed to the company as if it was this last one who had action or omission.

On the other hand, articles 483º and 500º from the same Code consecrate “extra contractual liability”. As a rule stated in article there is no liability but for guilty (intentionally or neglectfully) practised actions or omissions. On the grounds of the article 483º, legal consequences occur when the perpetrator has wrongfully violated someone rights, acting with guilt or negligence. As a consequence, he/ she is obliged to indemnify such third party if some damages are caused.

However the major doctrine has been unanimous and accepting that “extra contractual liability” also designates liability for the effects of legal actions and for the consequences of casual facts that happen “at risk” – “Ubi Commoda, Ibi incommoda”, when some strict conditions are met.

Considering this kind of liability, national legislation admits the name above mentioned for designating the responsibility of commercial companies and associations when some practices, which are considered legally relevant, are performed by its employees: “Ubi Commoda ibi incommoda” (Strict or Absolute Liability – it does not include guilt). The last statement means that if the so-called company takes advantage or benefits from the performance of its employees, it is also natural that the same company has to suffer or endure the consequences, even when negative, which are inherent to its work.

For example, if a person, following superior orders, ends up damaging a third party, taking into account that such action only took place because it was strictly connected with the tasks for which the agent had been designated for, the company has to suffer the consequences. On this topic is important to mention the article 500º which states the explained Absolute Liability (regardless of the guilt). Considering liability of legal entities, its extra contractual liability is referred in article 165 of the Civil Code which reproduces the all content of the article 500º.

Sometimes, but not necessarily, extra contractual liability on the grounds of article 500º derives from the fact the crime has been committed by someone who is the company’s legal representative. At the same time, the crimes need to be connected with the professional duties / obligations of which the perpetrator was responsible for.



Such behaviour may be designated as direct commission when the illegal action / omission has been intentional or neglectfully practised by the entity 's leader and for its benefit. On the other hand, the indirect commission refers to the violation of vigilance and control duties.

When it comes to the terms “whom is its legal representative”, it is important to clarify the “performers” behind “the scene”. The article refers to: managers; directors; members of the General Council and Supervision (for anonyms companies); liquidators when it comes to dissolution of corporations and even its mandatory or “ad hoc” attorneys.

However, corporate liability on this stage only happens if the obligation of indemnify has to be also supported by the agent, which means that five conditions need to be taken into consideration in the light of article 483° of the Civil Code: actions or omissions -: wrongfulness of the action or omission; fault (dolus or negligence); damage and causality between the behaviour and its consequence. At the same time, it is also necessary to verify if such practice or omission have taken place when the agent was complying with his professional obligation or because of the tasks the regular employee was in charge of. The practices he might have been performed or omitted “at random” or without professional connection are not relevant.

In addition to that, the Portuguese Code of Commercial Companies (Commercial Law) states, in its article 6/5°, that the company has to support the negative outcomes or consequences from the performance adopted by its employees.

As far as criminal liability is concerned, for a long time national legislation was submitted to a general principle designed as “societas delinquere non potest”, which can be translated into “non liability of commercial companies or associations” as they would not be able to commit crimes once they do not have physical and natural expressions such as “will” or “fault”, which are inherent to human beings. However, this is not entirely correct.

A commercial company might perform a couple of crimes in order to strive itself for a profitable purpose. The entity itself corresponds to a body of people who perform individual and specific tasks aimed at a collective goal, expressing a collective will. For example, regarding public health and economy, we can mention the Decree Law nr 28/84, January 20th). In fact, the introduction of corporate liability follows the European legal frame. More precisely: the Recommendation nr° 11, 19.05.2000 about human trafficking for sexual exploitation. We can also mention the Recommendation nr 16, 31.10.2001 about

child exploitation. Both recommendations are from the Committee of the Ministers of the Council of Europe.

The Portuguese criminal code holds criminal liability of collecting beings – article 11/2º. However, the article itself impels to the evaluation of the circumstances before coming up with the certainty that there is corporate liability.

First of all, practices under current discussion need to be performed directly by a leading person or by someone on his behalf (who is part of a particular sector in which the first one is responsible for). Secondly, the practice has to be performed on behalf of the collective interest. That is the main set of criteria according to European Law and Council of Europe. In fact, based on the regulation published in The Official Journal of the European Communities, in March 31st 1999, *“Liability of a legal person...exists if at least two complementary criteria are met: 1. the offense has been committed for the benefit of the legal person; 2. the offense has been committed by a natural person who has a certain leading positions within the legal person”*. Therefore, broadly speaking, the wrongdoing is attributed to the leading person of the corporative being so that it can be considered liable for. The leading person needs to be functionally identified according to his/ her duties within the sector where the practice took place. The true intentions that contributed to it (if a person was motivated by malice or was “victim” of negligence) are not relevant.

Frequently, most of the crimes are imputed to the collective beings as “improper omissions”. Its representatives and leaders have a duty: guarantee that the illegal result is not put into practice.

The imputation criteria established for the Portuguese criminal system follows what has been stated in other European frameworks. For example, we can quote some Decisions: 9º, 2000/383/JHA; Article nr 4º/4 2002/629/JHA and the Second Protocol added to the European Convention on Corruption, 27.1.1999.

When it comes to criminal offenses’ limitation, there is a considerable number of crimes that might be imputed to legal entities such as: attempt; malicious or negligent criminal offenses; actions or omissions; authorship; instigation and complicity.

As far as children ‘rights are concerned, those corporate bodies can be criminally liable for: people trafficking (article 160º); sexual constraint (article 163º); sexual abuse (article 164º); sexual abuse on people who cannot be assisted (article 165º); sexual abuse on people under medical care internee (article 166º), specially when the victim is a minor (it also includes

internees e inmates), as well as sexual abuse on children (art article 171º); sexual abuse on under age children who are held by someone in case of education, assistance (article 172º); the performance of sexual acts with adolescents (article 173); using prostitution (article 174); favouring minor's prostitution (article 175ª) and minor's Pornography (article 176º).

Moreover, taking criminal liability into consideration, Portuguese Law, more precisely the Law nº 59/2007, September 4<sup>th</sup> established the principle of subsidiary civil liability of leading people of the collective being through fines and indemnities attributed to the last one. Although it explains joint liability, this one can exclude if such leading people proof they have taken all the adequate measures to prevent their employees to commit the infraction. Also, if fine has been replaced by punishment by confinement, joint liability is also excluded because there is no more pecuniary obligation.

As far as administrative liability is concerned, we can add that Portuguese system recognizes another legal institute considering liability: liability for infractions. These infractions constitute a kind of violations that do not hold such legal relevance, which do not result in an ethically censored behaviour and do not require a serious prevention; therefore they are designated as administrative infractions. For example, if someone is driving his / her car, but his/her level of alcohol is not superior to a certain percentage, he/she will be punished with a fine, which means that his/her infraction does not hold social relevance so that it can be considered a serious law violation with criminal dignity.

In Portugal, there are both criminal liability and liability for the kind of infractions above mentioned that we can be integrated into administrative liability. If the fact itself simultaneously constitutes administrative infraction and a crime, the author will be punished because for crime, although accessories penalties already predicted for social infractions might also be applicable.

How does the connection of two similar liabilities work? The penal process takes place within a judicial entity. However, supposing that the Public Prosecutor files the process but agrees with the existence of administrative liability, it will re-send the case to the competent administrative body. We can conclude for a certain level of hierarchy regarding these two entities. The Public Prosecutor decision, considering if a certain fact can or cannot be designed as crime, will be binding to the administrative authorities that cannot thwart such decision because of the principle “*ne bis in idem*” – *nobody can be judged for the same fact more than once*.

Also, supposing that the accused is submitted to a fine or any other punishment pronounced by the administrative authority. Later on, she is condemned for the same fact but in the criminal process. The first decision (the administrative) will have to be considered firstly instead of the second one.

Therefore, in Portugal, we can say that the criminal political frame is based on hetero-liability and the imputation criteria for establishing liability derives from the criminal behaviour of the legal natural and physic person.

Recently, another kind of corporate liability has been emancipated: social liability. Broadly speaking, it refers to a wide range of duties, rights, ethical and social behaviour 'patterns which should be followed by professionals. This different and new kind of liability tends to incorporate social and environmental concerns into companies ' "daily routine" and interactions.

The penalties attributed to the collective beings do not differ too much from the ones imposed on legal people. There are penalties which are determined by the judge when he pronounces the sentence, regardless of any other. They are stated in the article nr 90-A of the penal code referring to fines and dissolution. Also, there are other penalties which can only be pronounced with the "main penalty", stated in Article 90-A/2. On this topic, it is important to clarify that a "main penalty" is a penalty already prescribed in law, designed for a certain legal fact /crime pronounced by the judge. On the other hand, subsidiary penalties referred to penalties whose its applicability depends on the existence of a main penalty which means that the first ones do not have individual autonomy.

We can quote some of them: dissolution of corporation; authorisations 'refusals for necessary administrative licenses or closure of commercial unities. In fact, the practice itself needs to enhance an insupportable social "damage", which imposed the immediate need to punish the corporate entities themselves.

At last, there are other penalties which have a replacement "function". They might be executed in order to replace the main penalties such as guaranty and judiciary supervision. These penalties are put in practice instead of a "main penalty" in order to avoid the applicability of the last one. They are regarded as penalties which are not inherent to the specific legal crime / fact but can replace concrete and already determined penalties.

**xx.** As far as corporate and individual liability are concerned, it is important to “recover” part of the content of the previous answer. Both situations (exclusion and non-exclusion are predicted).

In fact, the European Directive 2011/11/92 December 13<sup>th</sup> states that companies are liable for the acts or omissions performed by members who have representative powers; authority to make decisions on behalf of the collective being and for those who are responsible for supervision or control.

In addition to that, our Criminal Code states on its article nr 11°/7 that corporate liability does not depend on individual liability or that even excludes the last one. The Portuguese system accepts both liabilities also allowing the exclusion of one or other according to the situations. For example in the case of exculpation causes. This article also states that it is possible to conclude about corporate liability without punishing the practitioner itself.

So, we can conclude that this article designates a cumulative liability: the perpetrators and the company, if this is the case. In fact, it is possible to establish corporate liability, even if it is not possible to identify the perpetrator of the crime. If it is impossible to attribute the crime to the collective being’s organ or to the person in charge of control duties, there is no criterion for establishing a nexus of casualty imputation.

There are situations in which the Court can prove that the crime has been committed by authorities, but it can’t individualise the author himself, among others. For example, the perpetration of the crime was led by two people among eight. These eight people might have cooperated in the crime, concealing some evidences for example, but have not perpetrated it itself. Regarding such situation, the court cannot determine who the real perpetrator was; it is only aware of the participation and involvement of the group. Following this example, corporate liability is not excluded if the court concludes that the crime could only be committed by the company’s professionals. They ended up expressing the company’s will.

Similar to the Article 11°/7° of the Penal Code, we can point out Article 3 of the Decree-Law 28/84 January 20<sup>th</sup>, designating individual liability. Once again, the last can be accepted regardless of the corporate one, as well as the opposite. For example, if in the presence of a plural organ, one of its members has behaved without guilt strictly opposing to the violation of the law.

Taking into account the answer given on the previous question, on exemplifying the two necessary conditions for the existence of criminal corporate liability, the article 11<sup>o</sup>/6 from the Portuguese Criminal Code states that if the crime has been committed aimed at a collective interest, corporate liability will only be excluded if the author has rebelled against orders or instructions emanated by leaders. But such instructions need to be imperative.

First of all, when it comes to law violations committed by the collective being's members or representatives, it is important to clarify some definitions. There are singular or collective professional bodies, and there are independent and dependent organs. The first ones can act on behalf of the company. The organ itself can rebel against the expression of the decision made by the majority of professionals; the representative can rebel against the collective will and the dependent organ can opt for not adopting the instructions from the professional whom it depends. These cases highlight the fact that the individual behaviour is susceptible of differing from the collective goal.

If the crime has been committed by a natural and physical person who did not have the authority required for a leader, on behalf of the collective interest, corporate liability is excluded too. And what if the person has overcome the circle of his professional duties? Corporate liability is excluded too. So, there are striking differences between functional performance and personal one. The first designates the illegal facts, which have taken place during the exercise of the professional duties and because of them. On the contrary, personal behaviour corresponds to the exercise of functions that do not respect such professional obligations.

On the other hand, if he/she has taken all the necessary measures to prevent the crime, he is not considered responsible for it. Article 11/6<sup>o</sup> cannot be interpreted as a fault's presumption from the collective being. For example, there are situations in which some employees perform their ordered tasks by mistake, without having the ability to understand their wrongdoing. This situation is regarded as error on wrongfulness stated in article 17<sup>o</sup> of the Criminal Code differing from error on legal prohibitions stated in article 16.1<sup>o</sup> of the same code.

Another exception occurs when the criminal procedure against the leading person has already prescribed. That does not prevent collective being's persecution.

What is relevant for reaching the conclusion that there is corporate liability is the fact that the so-called "crime" or "wrongdoing" has been committed for the benefit of the legal

person”, regardless of having achieved or not such goal. However, the major Portuguese doctrine tends to agree that it is not relevant if the “representative” of the collective being has guided his/her behaviour regardless his/her circle of duties and social aims of the company itself.

In Portugal, there are certain situations in which corporate liability is excluded. Firstly, if the regular employee has not complied with serious instructions emanated by leaders. Secondly, in the presence of a administrative or executive body, if the leading person has rebelled against the will of the most of the members of that professional body. Moreover, if the leader has been wrongly influenced or guided, or if he/she is under justification or exculpation fault causes. Also, considering an executive or administrative body, if the behaviour adopted by most of its professionals is under mistake and justification or exculpation causes. At last, if the regular employee has “has been wrongly influenced or guided, or if he/she is under justification or exculpation fault causes” and such situation has not been created by the leading person.

Another question needs to be pointed out: once the collective person is extinguished, it does not influence the extinguishment of its liability. In fact, according to the article 127/2º of the Penal Code, it is its capital that serves to pay out fines and indemnifies in which the entity has been condemned to. The same can be said about “merger”: it does not extinguish the criminal procedure put in practice because of a crime previously committed. According to article 11/8 º of the Penal Code, the responsibility can be imposed on the collective person or similar entities that resulted from the merger. However, regardless of their cumulative liability, the penalty is graduated accordingly to the reality in which the corporation is rooted in.

Also, corporate liability is not excluded in case of death of the person who has committed such punishable action.

If the leader has expressively opposed to wrongdoing, he is not criminally liable for it. If such person is part of a collegial body, liability is also excluded if he/she votes against the organization’s deliberation.

Law nº 59/2007 September 4<sup>th</sup> designates the principle of subsidiary and joint civil liability of people who hold a position of authority in case of them being condemned to fines or indemnifies. It determines that unless those who have a leading position have not taken all the necessary measures to prevent the offense, they are submitted to joint liability – article

3º/3 and 2/3º of the Decree-Law nr 28/84 January 20<sup>th</sup> , 20/1; article 3/4º of the Law nr 109/91; articles 17.8º and 134/4º of the Decree-Law 34/2003 February 25<sup>th</sup> , 25.02; article 497/1 of the Civil Code and article 79/1 of the Commercial Code. All the leaders who have been part of the offense's perpetration have assumed an opposite position regarding it are not liable for the offense – article 164/2º of the Civil Code and 72/3/4º of Commercial Code.

In Portugal, the rules which are inherent to joint liability depend on that fact that the fine has not been extinguished. The article 11/9 of the Portuguese Penal Code states that if the fines are not wiped out by the collective person or any other legally similar entity, the payment of the debt can be demanded from the subsidiary responsible for it, whether global or individually.

Article 9º of the Penal Code states that those who are in charge of a leading position are subsidiary liable for the payment of fines and indemnities for which the legal entities is condemned.

This articles enhances civil liability resulted from the crime. All the perpetrators are considered liable, regardless of their position. The doctrine tends to consider the last as an excessive rule because the person not only has to support the consequent fines and indemnities but has also to support the consequences from the collective person 's punishment. It is the civil law that determines who is responsible for the damages caused. Its articles nº 483 and 490º state that the responsible are the author, the instigator and the accomplice. Corporate liability highlights its own liability combined with the agent or the leader.

Also, there is the possibility of fine's suspension, although it only works in case of small and medium gravity; when the simple fine's threat is enough to comply with punishment goals.

It is important, once again, to mention the content of the Directive 2011/11/92 from EU, December 13<sup>th</sup> , which, in its article nr 12º states that regardless of corporate liability, judicial action can be brought against the individual authors, accomplice and instigator of the following crimes: sexual abuse (article 3º); sexual exploitation (article 4º); child pornography (article 5º); solicitation of children for sexual purposes (article nr art 6º) and instigation, complicity, assistance and attempt (article 7º). Please, note that the articles previously mentioned result from the Directive.



At last it is important to mention that even when there is corporate liability, it does not mean that the company has to support all the consequences. As far as it is concerned, corporate liability does not exclude individual liability (from the authors themselves or leaders, when confronting with a third party seriously damaged). Portuguese rules stipulate a direct liability of members of social bodies of administration and financial and do not exclude the right of reversion on the author(s) for the amount of money the company had to pay out for recovery the of damages ´ purposes. That is stated in articles 79º and 81º of the Commercial Code and artº 500/3 of the Civil Code.

## **2.7 Aggravating Circumstances**

**xxi.** Directive 2011/11/92/UE from the European Parliament and European Council states that each Member State should predict in its respective legal framework aggravating circumstances for the crimes above mentioned according to rules directly applicable in its territory. Although there is no such obligation of putting such aggravating circumstances into practice, the Court has to take them into consideration when pronouncing a judgement.

According to this Directive, there are many peculiarities that are considered legally relevant for adjusting the due penalty. Among others: when the victim (the child) is under vulnerable circumstances due to mental or physical disability or mental state; when the crime has been committed by someone who shares an intimate relationship with the victim, for being member of the family, living in the same house or abusing of an authoritarian position; when the crime has been committed by a group of people or by a criminal organisation; if the author has been condemned by similar crimes or if such practices result in serious damages to the victims.

The national legal framework, on this topic, does not differ too much from the European one.

The aggravation of the limits of penalties depends on the presence of three cumulative requirements: the intentional performance of the crime; the result and the causality established between the author´s behaviour and the consequence (its direct consequence).

Considering article 177º from the Portuguese Criminal Code, one of the reasons behind aggravating rules and, as a consequence, graver sentences, is the sharing of a familiar relationship between the author and the victim. The content of such concept (“familiar relationship”) includes: affinity; parentage; kindred, but also hierarchical relationships based on economics, work and guardianship. It is this special relationship between the author and

the victim that intensifies the gravity of the illegal fact and serves the purpose of the aggravating penalty. That one is also aggravated if the author took advantage of such relationship, not being enough the mere existence of the relationship itself. Which means that the Criminal Law is confronted with an element of the offense's description, whose the final conclusion depends on the proved certainty that the fact was highly influenced by the existence of a dependent relationship.

Taking into account such circumstances, the penalties attributed to the following crimes are aggravated a third on its minimum and maximum limits: Sexual Constraint (article 163º); Sexual Abuse (article 164º) Sexual Abuse on people who cannot be assisted (165º); sexual fraud ( article 167º); Pimping; Non-assisted artificial procreation (article 168º); Child Sexual Abuse (article 171º); sexual abuse on under age children whom are subordinate to someone in case of education, assistance... (article 172º) ; the performance of sexual acts with young people (article 173º); Under age – people 's prostitution (article 174); Pimping (article 175ª) and Child Pornography (article 176º).

However, different from what is stipulated in European legislation (the Directive, in particular), the limits of the penalties imposed on crimes such as Sexual Constraint (article 163º); Sexual Abuse (article 164º) Sexual Abuse on people who cannot be assisted (article 165º); sexual fraud (article 167º); Abuse on people who cannot be assisted (article 165º); sexual fraud (article 167º); Pimping; Non-assisted artificial procreation (article 168º); Child Sexual Abuse (article 171º); sexual abuse on under age children whom are subordinate to someone in case of education or assistance (article 172º) ; the performance of sexual acts with young people (article 173º); Under age – people 's prostitution (article 174) are aggravated if the author carries a STD – sexually transmitted. Recently, the Portuguese major doctrine and jurisprudence has enhanced that the aggravation also depends on the fact that the author was aware of his own health condition, despite the fact that our criminal legislation does not require such demanding. In fact, the kind of knowledge previously mentioned is not necessary considering that for the crime's performance and punishment what is relevant is the deceitfulness (malice).

On the other hand, another cause for aggravating the sentence pronounced by the court refers to the consequences of the perpetration of the practices above mentioned. If the sexual abuse results in pregnancy, suicide, death of the victim or transmission of a pathologic gene, all the penalties are aggravated in a half, accordingly to article 177/3º. On this topic, it is important to mention the article 18º which refers to aggravated offenses by

the event. Then, we need to consider that the aggravation is always influenced by the possibility of attributing that result to the author, even if negligently.

However, if the intentional crimes lead to serious criminal offense such as physical integrity violation or death of the victims, the author is submitted to a different punishment: cumulating offenses - the homicide and the serious offense to physical integrity.

Following the Leitmotiv of the European framework, penalty's aggravation also derives from the fact that the victim is underage, which means – less than 16 years old. However, different measures can be taken on calculating the quantum of the penalty imposed if the victim is less than 14 years old.

All these circumstances are stated in article 177 of the Portuguese Penal Code.

## **2.8 Sanctions and Measures**

**xxii.** The state sanctions the above mentioned crimes resorting to the penalties already prescribed in law. In fact, Portuguese legal system obeys to the principle of legality – article 29º.1.4 of the Portuguese Constitution: the judge can only pronounce the penalty if it is stated in Law.

Sexual Constraint (article 163º) is sanctioned with imprisonment (1-8 years). Considering sexual abuse (article 164º) the main sanction is also imprisonment (3-10 years). For sexual abuse on people who cannot be assisted (article 165º), we have two penalties: when the practice corresponds to a relevant sexual practice, taking advantage of his/her mental and physical state and incapacity, the penalty is since 6 months to 8 years. When the practice is more serious (oral coitus) the limits are between 2 and 10 years. Sexual Fraud (article 167º), for instance, involves the same penalty's dimension: the first reality corresponds to a penalty whose the maximum is 1 year and the second corresponds to the maximum is 2 years.

As far as child sexual abuse is concerned the practice itself involves a penalty of imprisonment (1 – 8 years). However if the perpetrator intends to exhibit such practices or use the minor for pornography, for example, the penalty involves a maximum of 3 years. If the agent is moved by profitable purposes, he is punished with a penalty of imprisonment (6 months until 5 years) – article 171º.

On the other hand, under age – people's prostitution is also sanctioned with penalty of imprisonment although it also allows the possibility of fine's payment until 240 days – article 174º - penal code. Moreover, child pornography stated in article 176º involves a different

penalty considering the actions performed. For example, if the perpetrator has used violence or serious threat or has performed the crime aimed at a profitable intention, as well as taking advantage of the victim's mental incapacity (a minor – not more than 14 years old), the punishment is inherent to 2 – 10 years of imprisonment. However, if the agent only favours the prostitution, he is punished with a sanction of imprisonment since 6 months to 5 years.

To sum up, we can conclude that there is a penalty including deprivation of liberty.

As far as extradition is concerned, Law nr 144/99 (December, 31st) has approved international judiciary cooperation to regulate such subject. Starting with extradition goals, it can take place in order to guarantee the penalty's effectiveness and to regulate the criminal procedure. In fact, article 31º of the same law states that the admission of extradition depends on the fact that the crime for which someone is convicted (even in case of attempt) is punishable for Portuguese law and for the law of the state of the perpetrator with a penalty not superior to 1 year.

Article 32º, on the other hand, regulates the situations in which extradition is excluded. This article refers to article 6º, 7º and 8º that also do not admit such reality. For example, article 6º establishes the refusal of the extradition's request if the process itself does not respect European Convention for the Protection of Human Rights and Fundamental Freedom (4th of November, 1950) or any other international tools that Portugal has ratified. In addition to that, if the cooperation is required so that the perpetrator can be chased due its genre, religion and nationality, which might aggravate his/her procedural position, such solicitation is not recognizable too.

The request can be denied if the fact for which the agent is convicted has a political nature or share political connections. On this topic, we should refer that genocide, war crimes and other crimes stated in United Nations Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment ( 17th of December , 1984) and other international laws are not regarded as political crimes – article 7º.

Considering the following situations: Portugal shares with another state the same process, based on the same crime; the perpetrator has already served the sentence and the process is extinguished, criminal procedure is also extinguished – article 8º.

Article 32º of the Law nr 144/99 as well states that apart from the situations above mentioned, extradition may also be excluded if the person has Portuguese nationality. However, if national extradition is regulated in treaties or conventions which Portugal has

signed, if the facts are inherent to terrorism or organized criminality and the other state provides the agent with a fair and an equitable process, extradition is acceptable. Nevertheless, it is in the original State, in the national State that the penalty takes place.

**xxiii.** The sanctions are effective, proportionate and dissuasive. In fact, Portuguese legal system holds two kinds of sanctions: the ones that prevent freedom (imprisonment) and the ones that allow its effectiveness in public. Due to the principles of necessity and proportionality, the main goal of the penalty's execution is positive and socializing, which means that the goal is the reintegration of the perpetrator in society, which motivates the judge to consider the applicability of penalties which hold a replacement function (already explained) – Article 18°.2.3 of the Portuguese Constitutional Law. In addition to that, in Portugal, we can find penalties and security measures (which are aimed at “treating” and controlling the dangerous state in which the perpetrator can be found, not being considered when the agent has been influenced or moved by guilt).

The penalty itself is limited by the person's guilt, which imposes some limits that cannot be overcome – article 40° and 70° of the Penal Code. Also, article 24° of the Constitution does not allow cruel penalties, stating the so called principle of humanity – the prohibition of death penalty. It is important to mention that penalties are not automatically prescribed for a certain crime regardless its existence in law. In fact, the judge's decision has to be based on facts and judicial conclusions - articles 30°.3.4 and 27°.2 of the Constitution and 65°.1 of the Penal Code.

**xxiv.** Portuguese legal system established two kinds of criminal sanctions: penalties and security measures. The consideration of penalties depends on the perpetrator's fault. The main penalties are the ones which are already prescribed in law and are pronounced by the judge when he/she makes his/her decision. They include imprisonment and fines. Regarding legal entities, these penalties involve its dissolution and fines as well – articles 90°-A, 90°-B and 90°-F of the Penal Code.

Considering the dissolution of the legal entity, it only occurs when concluding that the last one was only created in order to perpetrate the crimes above mentioned or it is exclusively used by someone who holds a leading position to achieve the same outcome – article 90°F. On the other hand, fines imposed on the legal persons are limited. The minimum is ten days; if the entity does not comply with the obligation of payment, its heritage is susceptible of being executed. The Court established the fine according to the economic and financial state of the entity – article 90°-B and article 71° and 40° of the Penal Code.

The same code states accessory penalties which can take place at the same time that the main penalty as well as replacing it. We have the prohibition of establishing certain kinds of contracts with other entities – article 90°H; judiciary injunction article 90°G; the interdiction of a public activity's exercise article 90°J; closure of establishment article 90°L and publishing of the judicial decision article 90°M, to quote some.

**xxv.** For example, we can refer child pornography considering the materials used for that. The agent can be seriously punished if he/she distributes, promotes, obtains and exhibits pornographic materials (photographs, recording videos) – article 176° contemplates a penalty of imprisonment (1 -5 years). If someone has voluntarily obtained such materials, he/she can be also sanctioned with imprisonment (until 1 year) or with a fine. We could not find more information regarding this question.

**xxvi.** The answer of such question implies the consideration of the specificity of some crimes. Starting with sexual constraint (article 163°), when the action is a consequence of abuse of authority by a familiar member, the sanction corresponds to imprisonment (until 2 years). The same situation is sanctioned when it comes to sexual abuse (article 164°), although the limit is now until 3 years.

Article 179° of the Penal Code states the inhibition of parental responsibility within a period between 2 and 15 years if the crimes regulated in articles 163° until 176° have been committed by someone in charge of such responsibility.

## 3 CRIMINAL PROCEDURE

### 3.1 Investigation

Looking at criminal proceedings where children are the victims of crimes against freedom or sexual self-determination<sup>68</sup>, the “best interest of the child” is a sensitive issue and the cause for heated discussion, but it should be brought to the spotlight.

The “best interests of the child”, as mentioned by article 3 of the Convention on the Rights of Children, is a primordial criterion that must be considered in every decision involving a

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<sup>68</sup> The crimes against freedom or sexual self-determination are provided in the chapter V of the Portuguese Criminal Code (articles 163 to 179 of this Code). This chapter is divided into two sections: the first section typifies the crimes against sexual freedom; the second section typifies the crimes against sexual self-determination.

child, even when they are made by a public entity. So, we can conclude that the “best interest of the child” appears as a core legislative principle when it comes to laws that involve children, regardless of the particular issue they focus<sup>69</sup>.

We can affirm that the Portuguese Criminal Procedure Law contains a set of principles that must guide the other public bodies, namely the Public Prosecution and the judges<sup>70</sup>. But, when facing a sexual crime against a child, we can say that the “best interest of the child” is also considered a procedural principle that must be taken into account by those bodies<sup>71</sup>.

This means that the “best interest of the child” may work as a negative delimitation to certain procedural norms in force. The law establishes some procedural instruments and intervention measures to protect the minor, still taking into account that all the others subjects’ procedural guarantees are assured. To give a few examples: the exceptional rules for a minor’s deposition, the restrictive pre-trial rules that may be imposed on the accused, the possibility of a process’ provisory suspension<sup>72</sup> when the interests of the minor call for it<sup>73</sup>.

When the Portuguese legislator gave the crimes against a minor’s sexual freedom and self-determination a public nature, he imposed a duty upon the Public Prosecution to promote the criminal process every time they become aware a crime has been committed, without the need of a formal complaint by the victim. Consequently, the thesis that the best interest of the child is to promote the penal process was adopted. It should be noted that until 2007 the proceedings for this type of crimes was dependent of a complaint by the child’s legal

<sup>69</sup> See LEANDRO, Armando, “Protecção dos direitos da criança e Portugal”, in *Direitos das Crianças*, Coimbra Editora, Coimbra, 2004, p. 111.

<sup>70</sup> The Portuguese Criminal Procedural Law has a civil law structure. Our criminal procedure has been characterized as an accusatorial structure’s model, which means that there are two different entities, one is the investigator and the accuser - the Public Prosecutor -, and the other is the judging entity. However, the accusatorial structure is integrated by a principle of judicial investigation that allows the judges to investigate autonomously the facts necessary for the discovery of the truth, as stipulated by article 340, nr. 1, of the Code of Criminal Procedure.

<sup>71</sup> As sustained by SILVA, Fernando, “Representação de menores em processo penal”, in *Que Futuro para o Direito Processual Penal?, Simpósio em Homenagem a Jorge de Figueiredo Dias, Por ocasião dos 20 anos do Código de Processo Penal Português*, Coimbra Editora, Coimbra, 2009, p. 771.

<sup>72</sup> The process’ provisory suspension is an institute provided in the articles 281 and 307 of the Code of Criminal Procedure. This institute allows that, verified certain requirements of the article 281 of the Code of Criminal Procedure, the Public Prosecutor, with the agreement of the investigating judge, during the inquiry, or the investigating judge, with the agreement of the Public Prosecutor, during the “instruction” phase, to suspend the criminal procedure by imposing on the accused some injunctions and rules of conduct. It is an exception to the principle of legality and its application is guided by criteria of discretionary and consensus.

<sup>73</sup> See SILVA, Fernando, “Representação de menores em processo penal”, *cit.*, p. 776.

guardian and, in their absence, the Public Prosecution could promote it, but they had to observe the criterion “if the victim’s interest calls for it”<sup>74</sup>.

However, having in mind the child’s interest, article 178, nr. 3, of the Criminal Code allows the process’ provisory suspension by the Public Prosecution, in crimes against a minor’s sexual freedom and self-determination not aggravated by the result<sup>75</sup>, in concordance with the judge and the accused, and as long as no similar measure had been applied concerning a crime with the same nature. This instrument is an expression of the “best interest of the child” principle which, in some situations, may not be to carry on with the penal process<sup>76</sup>.

During the investigation of a sexual crime against a child, when the legal requisites are verified, certain measures of promotion and protection of the child by competent entities must be undertaken. Some of these measures can be found in Law nr. 147/99, September 1st<sup>77</sup>, known as “law concerning the protection of endangered children and youngsters”. According to article 3, nr. 2, a), of this law, a child is in danger, as it is easily understood, when he/she is the victim of sexual abuses. The legitimacy for the application of promotion and protection measures results from the fact that the child’s legal guardians where the ones that were putting him/her in danger, or from the fact that these legal guardians did not develop any effort to cease the danger a third party was creating (see article 3, nr. 1, of the Law nr. 147/99).

Due to the circumstance that often the aggressor is someone close to the child, he/she can be temporary moved from the family or closed social group he/she is included in. Therefore, during any penal process stage, namely during “inquiry” following a request by the Public Prosecution, the judge may determine the child’s temporary removal – see article 31, nr. 2, of the Law nr. 93/99, July 14th<sup>78</sup>, and article 38 of the law concerning the

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<sup>74</sup> See SILVA, Fernando, “Representação de menores em processo penal”, *cit.*, pp. 779-783.

<sup>75</sup> See article 18 of the Criminal Code. A crime aggravated by the result is the one that the result exceeds the intention of the agent, so, the result is charged by way of negligence. For example, the aggressor intended to perpetrate a sexual abuse, but, because of this abuse, he killed the minor.

<sup>76</sup> For example, it can be applied to the accused some injunctions or rules of conduct as: exclusion from contact with certain people or places; reside or not reside in certain place; attend certain programs or activities. In the case of crimes against freedom or self-determination of minors, the duration of the suspension, and the compliance of the injunctions, may be up to five years.

<sup>77</sup> Modified by the Law nr. 31/2003, August 22<sup>nd</sup>.

<sup>78</sup> Law nr. 93/99, July 14<sup>th</sup>, regulates the application of protective measures to witnesses in penal process, and was amended, successively, by Law nr. 29/2008, July 4<sup>th</sup>, and by Law nr. 42/2010, September 3<sup>rd</sup>. It was regulated by Decree-law nr. 190/2003, August 22<sup>nd</sup>, and in its article 19, about the temporary removal, it refers to the law concerning the protection of children and youngsters in danger.



protection of endangered children and youngsters. When all the legal requisites are complied with, a temporary measure can be applied: the child may be taken in by a qualified family or a private or public institution (see articles 46 to 54 of the law concerning the protection of endangered children and youngsters)<sup>79</sup>.

The judicial authority must also promote for the nomination of a social service worker to accompany the child and, if necessary, provide him/her psychological care, as established by article 27, nr. 1, of the Law nr. 93/99.

When it comes to the Portuguese criminal procedure law, the investigation of any crime takes place during a specific procedural phase designated “inquiry” (pre-trial stage). As soon as there is news that a crime has been committed, an inquiry is opened and it will comprise “the set of diligences that aim to the investigation of the existence of a crime, determine its perpetrators and their responsibilities, as well as discovering and gathering evidences, in order to decide about the criminal accusation” (see article 262, nr. 1, of the Code of Criminal Procedure).

The inquiry falls within the competence of the Public Prosecutor’s Office, assisted by the criminal police authorities (see article 263, nr. 1, of the Code of Criminal Procedure). The Public Prosecutor’s Office is the entity which represents the State and “puts into practice the criminal proceedings oriented by the principle of legality” (see article 1 of the Law nr. 47/86, October 15th, which adopted the Statute of the Public Prosecutor’s Office).

In our legal system, accordingly to the Law nr. 49/2008, August 27<sup>th</sup>, known as the law of the criminal investigation organization, the competent police for the investigation of the offenses against minor’s freedom or sexual self-determination is the “Judiciary Police” (*Polícia Judiciária* – see article 7, nr. 3, a) of the above mentioned law).

The competence for the investigation of such crimes is reserved to “Judiciary Police” following the principles of specialization and rationalization of the available sources for the criminal investigation (see article 4, nr. 1, of the Law nr. 49/2008), which means that the other police authorities, as the “National Republican Guard” (*Guarda Nacional Republicana*)

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<sup>79</sup> See RAMIÃO, Tomás d’Almeida, *Lei de protecção de crianças e jovens em perigo anotada e comentada*, Quid Iuris, Lisboa, 2004, pp. 65 and 66.

and the “Public Security Police” (*Polícia de Segurança Pública*)<sup>80</sup>, must abstain from the investigation of these types of crimes (see article 4, nr. 2, of the Law nr. 49/2008).

However, exceptionally, in accordance with article 8, nr. 1, of the Law nr. 49/2008, the Republic’s General Prosecutor may, during the inquiry, grant the investigation of a specific crime against the minor’s freedom or sexual self-determination to another police, other than the “Judiciary Police”, as long as it seems, in that case, more adequate to the good progress of the investigation and, namely, if there are simple and evident proofs, or the investigation does not involve exceptional performance mobility or means of highly technical specialization.

With regard to the organizational units of the “Judiciary Police”, there is no specialized national unit for the investigation of crimes of exploitation or sexual abuse of minors, differently from what happens with other types of crimes like, for instance, drug trafficking (see article 22, nr. 2, of the Law nr. 37/2008, August 6<sup>th</sup>, which approved the Organizational Law of “Judiciary Police”, and Decree-law nr. 42/2009, February 12<sup>th</sup>, which establishes the competences of Judiciary Police units). Thus, the investigation of the crimes we are analyzing fall within the competence of the territorial, regional and local units of “Judiciary Police”. These units have their competence geographically bound and must prevent, detect and investigate all offenses that are not attributed to the national units, amongst which the crimes of exploitation and sexual abuse of minors.

During the inquiry, the “Judiciary Police” may perform searches, telephone tapping, as long as they have been authorized by the competent judge - the judge in charge of the preliminary enquiries-, seize objects used to commit a crime, as well as those objects that are the result of a crime.

Looking at the publicity of the inquiry, until 2007, the rule was the secrecy; this means that it was under judicial secrecy, because it was believed that this was the way to ensure the success of the investigations<sup>81</sup>.

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<sup>80</sup> The “National Republican Guard” has a military nature and resembles the French *Gendarmerie* or the Italian *Carabinieri*, and acts, essentially, in rural areas. The “Public Security Police” has a civil nature and acts in urban areas. However, both authorities exercise powers of prevention, suppression, and investigation of crimes.

<sup>81</sup> See PINTO, Fernando Valério, “Segredo de Justiça”, available at [www.trp.pt/mp\\_outros/segredojustica.html](http://www.trp.pt/mp_outros/segredojustica.html) (accessed in August 22<sup>nd</sup>, 2012).

Though, since 2007<sup>82</sup>, the legal framework changed. Our legislation distinguishes two situations: the external publicity, when the process may be revealed to third parties that are not involved in it, and the internal publicity, when the content of the process is shown to those involved<sup>83</sup>. It should be said that during the inquiry, the rule is for the publicity of the process, external and internal, unless there is a decision by the competent judge that rules otherwise.

Regarding the external publicity, article 86, nr. 1, of the Code of Criminal Procedure, states that the rule is for the process to be public, even during the inquiry. Nevertheless, the judge may, upon request of the defendant, the victim or the *assistente* (“assistant”)<sup>84</sup>, come to the conclusion that the publicity may collide with the rights of the persons involved in the process and order judicial secrecy, under the terms of article 86, nr. 1, of the Code of Criminal Procedure. The Public Prosecutor, with regard to the same statute, can feel that the interest of the investigation is compromised and determine that the process must stay under judicial secrecy. Still, this decision is always valuated by the judge within a seventy two hour period.

Concerning the intern publicity, article 89, nr. 1, of the Code of Criminal Procedure, prescribes that, during the inquiry, the persons, namely the accused, the victim (that may assume a different role in the process, when it becomes a part which may carry proofs to the process as an *assistente*), and the “civil parties”<sup>85</sup>, may consult, on request, the process, unless it is under judicial secrecy and the Public Prosecution opposes to this because he/she considers that it may be prejudicial to the investigation or the victims’ rights.

<sup>82</sup> Due to Law nr. 48/2007, August 29<sup>th</sup>, which changed several articles of the Code of Criminal Procedure.

<sup>83</sup> See ALBUQUERQUE, Paulo Pinto de, “Comentário do Código de Processo Penal”, 4<sup>th</sup> ed., pp. 250 and 262; LEITE, André Lamas, “Segredo de Justiça Interno. Inquérito, Arguido e seus Direitos de Defesa”, RPCC, 2006, nr. 4, p. 549 e ss.

<sup>84</sup> This figure is totally characteristic of the Portuguese Code of Criminal Procedure. Article 68<sup>o</sup> of the Code of Criminal Procedure specify who can be *assistente* (“assistant”): the victim; the legal representative of the victim when he/she is a minor; the successors of the victim when she/he is dead; any person in certain crimes against the humanity or the peace. The *assistentes* (“assistants”) has the position of collaborate of the Public Prosecutor, as stipulated in article 69, nr. 1, of the Code of Criminal Procedure. For example, the *assistente* may participate in the inquiry offering proves and requiring procedures, or may appeal against decisions (see article 69, nr. 2, of the Code of Criminal Procedure). In accordance with article 70 of the Code of Criminal Procedure, the *assistente* has to be always represented by a lawyer.

<sup>85</sup> This figure is similar to the French *parties civiles*. They are a subject of the process with civil interests: they suffered damages with the crime and, due to the principle of adhesion, they formulate the claim for compensation in the criminal process (see articles 71 of the Code of Criminal Procedure). Thereupon, their intervention is limited to proof the claim for compensation (see article 74 of the Code of Criminal Procedure).

This legislative innovation, which determined the publicity as a rule during the inquiry, has been widely challenged by several authors; they believe that the internal and external publicity rule violates the Constitution since it goes against the accusatorial structure of the process, guaranteed by the Portuguese Constitution in its article 32, nr. 5, which presupposes the investigation to be secret, a non-adversarial phase, and a public judgment, an adversarial phase. It is sustained that publicity rule violates articles 2, 20, nr. 1 and 3, and article 219, nr. 1, of the Portuguese Constitution <sup>86</sup>.

For some types of crimes, the victim must file a complaint. If this complaint is not filed, the Public Prosecution does not have legitimacy to promote the process, due to the semi-public or particular nature of the offenses. When it comes to the semi-public crimes, the only element necessary is the complaint for the Public Prosecutor to promote the process, whereas for the particular crimes, the victim must become a part in the process, designated *assistente* (“assistant”; see articles 49 e 50 of the Code of Criminal Procedure). The semi-public or public nature of the crime is established by the Penal Code. All the crimes not configured by the law as semi-public or particular are public crimes and no complaint by the victim is necessary for the Public prosecution to promote the process.

The crimes against sexual freedom and sexual self-determination, where the crimes against minors are included, can be found in the fifth chapter of the Penal Code (articles 163 to 179). Namely, article 178, nr. 1 and 2 of the Criminal Code, as defined by Law nr. 59/2007, September 4<sup>th</sup>, lists the crimes that depend on complaint. Although some crimes need a complaint from the victim, like sexual coercion and sexual assault crimes, the penal law previews an exception for the crimes committed against children (see article 178, nr. 1, of the Criminal Code). This means that if, for instance, there is news of a child’s sexual abuse or child pornography, the victim or his/her legal guardian does not need to file a complaint for the investigation to be promoted. The only exception can be found in article 178, nr. 2, of the Criminal Code which institutes that a complaint must be filed when the crime is a sexual one involving teenagers (minors between 14 and 16 years old).

If the Public prosecution promotes a process to conclude whether a crime has been committed against a minor, when to complaint was necessary, the opposition of the victim, even if he/she is 16 years old does not imply the end of the criminal proceedings.

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<sup>86</sup> See ALBUQUERQUE, Paulo Pinto de, “Comentário do Código de Processo Penal”, 4<sup>th</sup> ed., pp. 262-263.

Even when a complaint has been made by a child's legal guardian and later they decide to drop it, the criminal proceedings do not end there since the legitimacy of the Public Prosecution does not depend on a complaint. It is understood that the Public Prosecution may begin, as well as proceed, a penal process because these actions are no longer in the pendency of the victim or its legal guardians<sup>87</sup>.

The recording and storing of convicted offenders data is regulated by Law nr. 57/98, August 18<sup>th</sup>, modified by Rectification nr. 16/98, September 30<sup>th</sup>, Decree-Law nr. 323/2001, December 17<sup>th</sup>, Law nr. 113/2009, September 17<sup>th</sup>, Law nr. 114/2009, September 22<sup>nd</sup>, and Law nr. 115/2009, October 12<sup>th</sup>.

Its article 3, nr. 1, states that the entity responsible for the criminal identification database is the General Director for the Justice Administration. This singular entity runs the General Directory for Justice Administration, a central service of the Portuguese State direct administration, associated with the Ministry of Justice, whose attributions also enclose the "assurance of criminal identification and the registration of those judged in their absence", as prescribed by article 2, nr. 2, c) of the Decree-Law nr. 165/2012, July 31<sup>st</sup>, which approved its organizational law.

The convicted offenders' data is stored at a central informatics file. They contain the offenders identification, parts of criminal decisions and communications of facts that relate to these subjects and must be registered (see article 4, nr. 2, of the Law nr. 57/98). Regarding the parts of criminal decisions and communications of facts that involve them, this information includes the court that made the decision and the process number, the offenders' identification, the offenders' civil identification, the decisions' date and form, its content and the articles applied (see article 4, nr. 3, of the Law nr. 57/98). When the decision convicts the accused, its extract must contain, in addition, the name and date of the committed crime, indicating the articles violated and the specific sentencing (see article 4, nr. 4, of the Law nr. 57/98).

When it comes to the data inscribed on the criminal record, the General Director for Justice Administration is, according to article 3, nr. 1, of the Law nr. 57/98, obliged to respect Law

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<sup>87</sup> As it has been decided in several sentenes such as, to name a few, *Acórdão do Tribunal da Relação do Porto, de 31.01.2001, Processo n.º 011239*, *Acórdão do Tribunal da Relação de Lisboa, de 11.5.20014, Processo n.º 4021/04*, and *Acórdão do Tribunal da Relação de Coimbra, de 25.5.2004, processo n.º 364/04*.

nr. 67/98, October 26<sup>th</sup>. This law, concerning the protection of singular individuals when their personal data is being stored and their free circulation, transposing Directive 95/46/EC, from the European Parliament and the Council, dated October 24<sup>th</sup> 1995, which imposes the transparent treatment of personal data in strict compliancy with the respect for personal life, as well as fundamental rights, freedoms and guarantees (see article 2 of the Law nr. 67/98). If the norms related to the criminal identification database are violated, Law nr. 67/98, in its sixth chapter, third section, establishes the criminal offenses and the sanctions the perpetrators may incur.

The data transmission to a third party is restricted in some situations. Article 7º, g) of the Law nr. 57/98 prescribes that “foreign authorities or diplomatic and consular entities, following permission from the Ministry of Justice and in the same condition from the corresponding national authorities, for the promotion of criminal proceedings”. Within the European Union, the same article 7, h), mentions that “the official entities of the European Union State-members, in the same conditions of the corresponding national entities, following authorization from the Ministry of Justice, for the purposes of article 27º, number 3 of the Directive 2004/38/EC, from the European parliament and Council, dated April 29<sup>th</sup>, as well as the entities from another State, within the terms established at an international convention or agreement, as long as there is a reciprocal treatment assured to national entities”.

Finally, we should add that Law nr. 113/2009, September 17<sup>th</sup>, altered the drafting of article 7º, a) of the Law nr. 57/98. This change was made to accommodate the exigencies of article 5 of the Lanzarote Convention, allowing access to criminal identification data by the judges and public prosecutors when the decisions involve adoption, guardianship, and curatorship, foster care, civil custody of minors or regulation of the exercise of parental rights.

### **3.2 Complaint Procedure**

As previously explained, the criminal proceedings, since these are public crimes, are not dependent on a complaint by the victim or its legal guardians. Therefore, as soon as there is news that a crime has been committed (*notitia criminis*), the Public Prosecution must open an inquiry and start the investigation to find out what happened, with the help of the police.

The Public Prosecution may become aware that an offence has been committed by its own means, through the police or due to a complaint (see article 241 of the Code of Criminal Procedure). In addition, anyone who knows or suspects that a crime has taken place may

make a denunciation to the Public prosecution, or to any other judicial authority or criminal police body. When the news of the crime is reported to these last two entities, they must transmit it to the Public Prosecution (see articles 244 and 245 of the Code of Criminal Procedure). In our legal system, as a general rule, the denunciation is not mandatory, except in the cases that the law stipulates that it is; for example, it is mandatory to all the police authorities for all the crimes that they know, or to the civil servants for all the crimes that they know in the exercise of their functions.

This denunciation it is not subjected to any specific formalities, and can be written or oral, but in this last situation it must be written down and signed by the entity that received it and by the complainant.

The only exception to this rule can be found in article 137 of the Code of Criminal Procedure which criminalizes the sexual acts committed against a minor between 14 and 16 years old, because, due to article 178, nr. 2, of the Criminal Code, the criminal proceedings are dependent on a complaint. In this case, the complaint must be reported by the minor's legal guardians (see article 113, nr. 4, of the Criminal Code). Yet, the Public Prosecution may begin with the criminal proceedings, even though it depends on a complaint, whenever he/she considers that this action is in the minor's best interest and as long as the victim is under 16 years old (see article 114, nr. 5, of the Criminal Code).

Since we are in the presence of a public crime, the criminal proceedings end when the crime has prescribed. To stop the prescription of several crimes committed against children, since often they remain secret during a large period of years, the Penal Code, since 2007, stipulates, in its article 118, nr. 5, that “in crimes against a minor's sexual freedom and self-determination, the criminal proceedings do not end, through the effects of prescription, until the victim is 23 years old”<sup>88</sup>.

In conclusion, we can say that the minor of 16 years, by himself/herself, cannot file a complaint when the crimes in question are semi-public or particular; the complaint must be made by their legal guardians or, in their absence, by their predecessor, by their adopter, or by their sibling and theirs descendants (see article 114, nr. 2 and 4, of the Criminal Code); the Public Prosecution can, also, due to the minor's interests and because he/she is a minor,

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<sup>88</sup> ALFAIATE, Ana Filipa, “Crimes sexuais contra menores: questões de promoção processual”, in *Estudos em Homenagem ao Prof. Doutor Jorge de Figueiredo Dias*, vol. III, Coimbra Editora, Coimbra, 2010, p. 737.

promote the criminal proceedings, even without the necessary complaint (see article 114, nr. 5, of the Criminal Code).

The minor's legal representation is, normally, made by the parents. They are in charge of the exercise of the rights the minor cannot exercise by himself/herself, including the penal process. For instance, the minor of 16 years old cannot become *assistente*, but his/her legal guardian is able to do it (see article 68, nr. 1, a) and d), of the Code of Criminal Procedure).

But, sometimes, the legal guardians do not act, do not want to act, or are themselves the offense's perpetrators. In this situation, the task of representing the interests of the minor belongs to the Public Prosecution, resolving, hence, the problem of the lack of the child's legitimacy<sup>89</sup>.

When the crimes relate to a minor's sexual freedom and self-determination, contrarily to the general rule established by the Portuguese criminal procedure law, to avoid any damages to the minor's dignity and for his/her protection, the trial hearings, generally, are not public (see articles 87, nr. 3, and 321 of the Code of Criminal Procedure). The identity of the child victim of any crime of this type cannot be made public, by any means, by the media. If they do so, they may face criminal proceedings for simple disobedience, as established by article 88, nr. 2, c), of the Code of Criminal Procedure.

If a child victim of any crime is to testify during any phase of the process, even during the trial, certain measures are established for their protection, because they are a particularly vulnerable witness due to their age and because, in the majority of the situations, they are going to testify against their family or other people they depend on (see article 1, nr. 1 and 3, and article 26, nr. 1, of the Law nr. 93/99, July 14<sup>th</sup>).

According to article 26, nr. 1, of the Law nr. 93/99, the competent judicial authority has the duty to guarantee that the child's testimony is given in the best possible conditions so as to "ensure the spontaneity and the honesty of the answers" (during the trial, that authority is the judge).

For the child's protection, the judge may adjust the order by which procedural acts are to be performed to make sure that the child does not have to face certain persons, namely the accused (see article 29, a), of the Law nr. 93/99). The child's examination may be performed

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<sup>89</sup> See SILVA, Fernando, "Representação de menores em processo penal", *cit.*, p. 770.



only by the judge, but other intervenient, like the defendant's lawyer, can ask the judge to make specific questions (see article 29, c), of the Law nr. 93/99).

Furthermore, in order as a child not to be recognized while testifying, means of image concealment or voice distortion, or both, can be used, as prescribed by article 30, b) and article 4 of the Law nr. 93/99, July 14<sup>th</sup>. The child can also be heard trough teleconference, and, likewise, means of image concealment or voice distortion, or both can be used. When the testimony is given trough this means, it should be made at judicial or police facilities article 30, b) and articles 5 to 15 of the Law nr. 93/99).

To conclude with, one should add that every time a minor is the victim of a crime against his/her sexual freedom or self-determination, they must give their testimony so that later it can be used during the trial; they must make statements *ad perpetuam rei memoriam* (see article 271, nr. 2, of the Code of Criminal Procedure). Therefore, when these statements were made, the minor may not have to give a new deposition during the trial, hence avoiding the psychological damages that such tense situation may bring. However, when it is possible for the minor to testify without any damage to its health, it should give a new deposition during the trial (see article 271, nr. 8, of the Code of Criminal Procedure).

#### 4 COMPLEMENTARY MEASURES

i. The information is not available. The researcher has established contact with some institutions able to convey a general idea about educational guarantees although any answer has been received.

ii. Within the psychological literature, one can find, at least since the late nineteenth century clinical reports of cases of abuse. However these testimonies were, by the end of the 70's, early 80's, relatively unknown, attributed to childhood fantasy, or overlooked due to the alleged children inability to testify. It is, therefore, only in the early 80's that abuse constitutes object of social concern.

The prevention of violence requires a fundamental change in social silence, which has been tolerating this problem, a change that can begin in schools. The school curriculum could include elements related to the teaching of skills, values education and family life, as well as direct teaching about relationships and violence.

Thereby, the Law nr 60/2009, of 6<sup>th</sup> of August, establishes the regime of application of sexual education in schools and the Ordinance nr 196-A/2010, of 9<sup>th</sup> of April, which

regulates this Law, establishes the functional organization of sexual education in schools. Thus, these are the Portuguese diplomas of reference on this matter.

The Ordinance nr 196-A/2010, of 9th of April, establishes, in its Appendix Table, minimum goals for sexual education:

- l) In the 1<sup>st</sup> cycle, teaching the protection of the body and concepts of boundaries and how to say no to abusive approaches; in 3<sup>rd</sup> and 4<sup>th</sup> grades, the teacher can develop themes that make students understand the need to protect their own bodies, and of defending themselves of possible abusive approaches;
- m) In the 2<sup>nd</sup> and 3<sup>rd</sup> cycles and in high school, teaching how to prevent mistreatment and abusive approaches.

The Law nr 60/2009, of 6th of August states, in its Article 2, paragraph e), as one of the goals of sexual education, the capacity of protection against all forms of sexual exploitation and abuse.

The Article 6 – School Educative Project – states that sexual education is object of compulsory inclusion in educative projects and that the students associations, parents associations and teachers must be heard.

In Article 11 – School Community Participation – is reaffirmed the participation of parents or guardians: parents, guardians, students and their respective structures of representation must take an active role in the prosecution and achievement of the purposes of this Law.

**iii.** In the whole process of child protection, prevention of maltreatment constitutes a key priority. Classically, 3 types of prevention are considered:

- n) Primary - providing services to the general population in order to avoid the appearance of cases of mistreatment;
- o) Secondary - providing services to specific risk groups in order to treat or prevent new cases;
- p) Tertiary - providing services to victims of abuse, to lessen the severity of the consequences and prevent relapse.

To implement these programs is necessary to raise awareness and stimulate public opinion on the need for prevention; include this matter in the national schools programs, in some college programs and in government programs, listen to the community; coordinate efforts at a regional level; seek support of groups with local power (municipalities, victims

associations, schools, social authorities, voluntary organizations, etc.); mobilize, creatively, all members of the community; the participation of health services (registration of cases and participation in the prevention program), the existence of specific programs for groups at higher risk or more vulnerable; a long term program.

Prevention programs should be planned at a level of: specific training to professionals working with children and youth, family support (parental education programs, home visits and support programs from anonymous family groups), health service (improvement of health and life conditions of the population), community intervention (organization of campaigns and educational programs of information and public awareness about the extent, severity and the consequences of the phenomenon), social strategies and the creation of effective services in victims support, legal and judicial system and, finally, the responses of political structures that must be assumed as social partners in prevention activities relating to mistreatment.

By the way, a concrete measure that was applied in Portugal is The III National Plan Against Domestic Violence (2007-2010), adopted by the Resolution of the Council of Ministers nr 83/2007, 22<sup>nd</sup> of June which was structured in accordance with a model that defines five Areas of Intervention: 1 - Raise Awareness and Educate; 2 – Protect the victims and Prevent Revictimisation; 3 – Capacitate and Reintegrate the victims of Domestic Violence; 4 – Qualify Professionals; 5 – Deepen the knowledge on the domestic violence phenomenon.

**iv.** In Portugal, we can find these kinds of social responses<sup>90</sup>:

A) Family support centre and parental advice: social response, developed through a service dedicated to the study and prevention of social risk situations and to the support of children and youth at risk and their families, materialized in their community through multidisciplinary teams. Goals: promote the study and the assessment of families in psychosocial risk; prevent dangerous situations; avoid disruptions that may lead to institutionalization; ensure the satisfaction of physical, cognitive, emotional and social needs of children and youth; improve the skills of those involved in the family system of children and youth through an integrated approach of community resources; promote mediation between the family and the services involved to facilitate communication, foster contacts

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<sup>90</sup> <http://www2.seg-social.pt/left.asp?03.06.01.02.01>

and promote the solution of any difficulties; and contribute to the empowerment of families. Addressed to children and youth at risk and their families.

B) Street team of support of children and youth: social response through a service destined to support children and youth in danger that are detached from their families and that subsist by the route of deviant behaviours. Goals: promote their reintegration into their families, schools and communities; recover children and youth from the streets, encouraging the construction of a healthy lifestyle project; make primary prevention on drug abuse and deviant behaviours and routing the children and youth to existing structures to promote their social inclusion; outwit risk situations in young consumers and raise awareness for a change of behaviours and for the abandon of drug abuse; make STD's prevention and meet basic food, hygiene, health and clothing needs; and promote contact with families and the enrolment of the community. Addressed to children and youth in family and social disruption and at risk, without any context of institutional or family support.

C) Hosting Family for children and youth<sup>9192</sup>: social response through a service consisting in the attribution of the trust of the child or young person to a family or to a singular person, towards their integration in a family environment. Goals: guarantee the integration in a suitable family environment that ensures to the child or young person the needs and the attention that its biological family couldn't provide; ensure accommodation to the child or young person; guarantee appropriate care; ensure the necessary means to the individual development, education and professional formation; promote, when possible, the integration in the family of origin. Addressed to children and youth whose promotion and protection measure so determines.

- q) Temporary hosting centre<sup>9394</sup>: urgent and temporary measure, lasting less than six months, addressed to children and youth up to 18 years old.
- r) Home for children and youth<sup>9596</sup>: measure that is aimed to last more than six months, addressed to children and youth up to 18 years old.

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<sup>91</sup> [http://www.cnpcjr.pt/preview\\_documentos.asp?r=1227&m=PDF](http://www.cnpcjr.pt/preview_documentos.asp?r=1227&m=PDF);  
[http://www.cnpcjr.pt/preview\\_documentos.asp?r=1060&m=PDF](http://www.cnpcjr.pt/preview_documentos.asp?r=1060&m=PDF)

<sup>92</sup> Articles 46 to 48 of Law nr 147/99, of 1st of September

<sup>93</sup> <http://www.sanchoeassociados.com/OM/Omlegis/sns/Unidades%20Privadas%20de%20Saude/Lares%20de%20Idosos/Decreto%20Lei%20133.A.1997,%2030.05.htm>

<sup>94</sup> Articles 49 and 50 of Law nr 147/99, of 1st of September

<sup>95</sup> [http://www2.seg-social.pt/preview\\_documentos.asp?r=34662&m=PDF](http://www2.seg-social.pt/preview_documentos.asp?r=34662&m=PDF)

To close this part, emphasis must be made to Abrigo<sup>97</sup> (Portuguese Association of support to children) and to Instituto de Apoio à Criança<sup>98</sup> (Child Support Institute), centres of documentation and support of children and youth.

v. In Portugal, help lines as 144 and 800202148 are emergency lines to which victims can call to get support and, once contacted, they assure them that the information they receive is treated with confidentiality.

vi. The Portuguese State began to worry about the issues of unprotected minors by formalizing, in 1911, the Law for Children and Youth. This concern has continued with the Organization Guardianship of Minors, in 1962, text that was revised in 1978 (Decree-Law nr 314/78 of 27<sup>th</sup> of October) and which remained in force until the end of 2000.

For maltreatment, and at international level, it is to refer the United Nations Convention on the Rights of the Children (New York Convention of 20th of November of 1989), signed by Portugal on 8th of June of 1990 and ratified by the Resolution of the Portuguese Parliament nr 20/90, which states in Article 19:

“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

From 1st of January of 2001, it came into force the new Law on Protection of Children and Youth in Danger (Law nr 147/99 of 1st of September). This law took the ten years of experience of the committees of protection of minors at risk (Decree-Law nr 189/91 of 23rd of November) and restructured these committees with new powers and a new statute,

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<sup>96</sup> Article 51 of Law nr 147/99, of 1st of September

<sup>97</sup> <http://abrigo.pt/>

<sup>98</sup> <http://www.iacrianca.pt/>

leaving the court as a subsidiary of the new committees of protection of children and youth at risk.

According to Article 4 of this Law, the intervention for the promotion of the rights and protection of children and young people in danger obeys the following principles: a) best interests of children and youth (the interest of the child or young person is an interest that outweighs the interest of the social group "family", since the overall interest of the family group may be different from the interests of the child and, in a collision, always will prevail the interest in achieve full physical and intellectual maturity of the child or young person, even if the interest of keeping it in the family may be delayed), b) privacy (rights promotion and protection of children and youth must be done with respect for privacy, image rights and private life), c) early intervention (once the danger is known), d) minimal intervention (the intervention must be exercised exclusively by the entities and institutions whose work is essential to the effective promotion and protection of the rights of children and youth at risk), e) timeliness and proportionality (the intervention should be necessary and appropriate to the danger in which children or youth are at the moment when the decision is made and can only interfere with their life and their family as far as that is strictly necessary for this purpose), f) parental responsibility, g) family prevalence (prevalence should be given to measures that include children or youth in their family or that promote their adoption), h) mandatory information (children and youth, parents, legal guardians or the person having the custody of fact are entitled to be informed of their rights, of the reason for the intervention and how it is processed), i) mandatory hearing and participation (children and youth, separately or with their parents or the person chosen by them, as well as parents, legal guardian or person having the custody of fact, are entitled to be heard and to participate in the acts and in the definition of the measure of rights promotion and protection) and, finally, j) subsidiary (the intervention must be carried out successively by the entities with competence for childhood and youth, by the commissions for protection of children and youth and, ultimately, by the court).

The Article 6 of the Law mentioned above states that the promotion and protection of the rights of children and youth in danger lies in the entities with competence in childhood and youth matters, in the commissions of protection of children and youth and in the courts.

Entities with competence in childhood and youth matters:

From the Article 69 of the Constitution of the Portuguese Republic results, in its number 1, that children are entitled to protection by society and the State, with a view to their integral

development. The Draft Law nr 265/VI, which approved the Law on Protection of Children and Youth in Danger, aimed at regulating the social intervention of the State and society in situations where the child or young person is at risk and, as such, in lack of protection. It is a state subsidiary intervention in relation to the intervention of the community, taking into account, first, the entities with competence in childhood and youth.

As examples of such entities with competence in children and youth matters, can be referenced schools and private institutions of social solidarity (mercies, parents' associations, associations or private organizations that develop sporting, cultural or recreational activities, the infant emergency, the Institute of Child Support<sup>99</sup>, homes and shelters).

In addition to the above mentioned private entities, other "entities" that deal closely with issues related to children and youth, such as schools, hospitals, day-care centres, local councils, the parish councils, the Institute of Solidarity and Social Security<sup>100</sup>, also have an important role, especially in the detection of risk situations and its referral to entities that can ensure the rights and the protection of the child or young person, as it will be explained below.

Commissions of protection of children and youth:

The commissions of protection of minors were created by Decree-Law nr 189/91 of 17th of May and are now called Committees for the Protection of Children and Youth, being regulated in Law nr 147/99 of 1st of September, in articles 12 to 33, working in extended and restricted mode (Article 16).

The Article 8 of the Law under consideration states that the intervention of children and youth protection committees takes place when it is not possible to the first entities to act appropriately and sufficiently to remove the danger in which children find themselves.

Intervening the committees of protection, its knowledge of the danger to the child or young person should take them to inform other entities of the situations that transcend their area of competence. Thus, it is imperative that the commissions of protection give information to the social security bodies of the situations referred to in Article 1978 of the Portuguese Civil Code (trust with a view to future adoption), when it is in question children or youth

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<sup>99</sup> <http://www.iacrianca.pt/>

<sup>100</sup> <http://www2.seg-social.pt/>

parents that are unknown or deceased, of the situation in which the biological parents gave consent for children or youth to be adopted, when the parents have abandoned them and other situations therein (Article 67).

In the same way, the committees, in accordance with Articles 68 and 69 of this Law, shall give notice to the prosecutor of the situations referred to in these articles.

Particularly relevant is the duty of the committees to make the prosecutor and the police authorities know that the cases in which the danger the child or young person is found were determined by facts that constitute a crime (Article 70).

Courts:

Courts appear as a "last resort" in promoting human rights and in the protection of the child or young person in danger.

The Article 11 of the Law on study states that judicial intervention takes place when: a) there is not an installed commission of protection of children and youth with competence in the county or parish in their area of residence, or the commission has no competence, under the law, to apply the measure of adequate promotion and protection; b) the consent required to the intervention of the commission is not provided or is withdrawn or when the deal on rights promotion and protection is repeatedly not fulfilled; c) child or young person opposes to the intervention of the commission of protection, under Article 10; d) the committee of protection does not get availability of the means necessary to enforce or execute the measure it deems appropriate, especially by opposition of a service or entity; e) six months after awareness of the situation by the committee, it has not been no decision; f) the prosecutor finds that the decision of the commission is illegal or improper to the promotion of the rights or the protection of the child or young person; and finally, g) the court decides the joinder of the proceedings of the committee to the judicial process, in accordance with paragraph 2 of Article 81.

Framework for Intervention:

The initial phase of the abuse discovery, i.e., the time of suspicion or detection, is crucial for ascertaining the truth, in view of the best interest of the victim and ensuring not only their protection but also the promotion of justice.

The abuse cases can be detected at home, in institutions (e.g. emergency departments, hospital consultations, in health centres, schools or nurseries), or in other spaces. However,



many cases are not detected and others fail to be marked, thus, preventing the possibility of realization of the right of the child or young person and their family to be supported.

The professional who first contacts with a possible abuse situation may take cognizance of it, or be led to suspect it, through the report made by the victim or a third party (in writing, by phone - especially anonymously - or personally) or, yet, through observation of symptoms or suggestive signs of abuse associated with identification of possible risk factors.

Health services have, at this stage of the process, a key role, especially in cases involving children up to six years, since these are not covered by compulsory schooling.

If the communication of the case is made through a third party and not directly by the child or young person to a health service technician, social assistance technician, to an operator of justice services, or any other professional who has the duty to direct this type of cases, so this person should make a collection of initial information that will allow realizing the dimension of this suspicion and its degree of consistency. This preliminary approach of the case aims to situate it in relation to the type of abuse, the date when it occurs, to its context, to the alleged abuser and to the possibility that there had been destruction of evidences.

Based on the information gathered, the professional shall, in cases when such makes sense (e.g. suspicion of recently sexual abuse) indicate the following procedures for the preservation of biological traces (e.g. do not eat or drink, do not wash mouth or teeth, not bathing or washing the genitals, do not change clothes, or, if already done, to preserve it in paper bags, not washing hands, not clean or cut the nails, not combing, not clean or tidy the place where the abuse happened), until the victim is subjected to medical and legal expertise (urgent in these cases).

Thereafter, the professional shall signal the occurrence to the competent authority, according to the case in question, sending it the information collected, with detail and rigor, for this to be properly investigated. The choice of which entity should be contacted may depend on the urgency that this first contact suggests in terms of clinical or medical and legal intervention.

The question of diagnosis is very complex because of the difficulty in establishing differential diagnoses, particularly with social and cultural situations of instability, and especially when you want to consider, in due time, the most effective response in each case.

In emergency situations or while proceeding the diagnosis of the situation of the child and the definition of its subsequent routing, provisional measures may be applied (Law nr 147/99, of 1st of September, article 37).

Only the situation of actual or imminent danger to life or physical integrity of the child or young person and the fact that there is opposition from the holders of parental responsibility or who has custody of fact, justify the use of emergency procedures (Law nr 147/99, of 1st of September, Article 91 et seq.).

The number 1 of Article 62 (Law nr 147/99, of 1st of September) states that the measure applied is compulsorily revised at the end of the deadline in the agreement or the court order and, in any case, at the end of a six-month period.

When considering the impact on victims, it must be emphasized that abuse is an experience and not a disorder (Becker and Bonner, 1998). Thus, there is no specific clinical syndrome of abused children and they can have a variety of symptoms or even none. A review of studies conducted in 1993 by Kendall-Tacket, Williams and Finkelhor (cit. In Becker and Bonner, 1998) showed that about one third of abused children does not exhibit any symptoms. More recently, a review of studies conducted by Saywitz and colleagues (2000) places this number between 21% to 49% of the children analyzed.

Finkelhor proposes different effects for the different dynamics involved in the abuse: traumatic sexualisation that results from premature and atypical initiation of the child in sexual activities, treason generated by the violation of a previous trusting relationship, the stigmatization produced by the feeling of indifference, guilt and shame and powerlessness fostered by use of force, threat or deception and by the invasive nature of sexual activity. The dynamics present in a particular case are associated with specific consequences for the victim. Thus, distrust and hostility are related to the feeling of betrayal, which can be generalized to other stimuli (eg: men in general); symptoms of anxiety, depression, sleep disorders and learning difficulties could be attributed to the feeling of powerlessness and low self-esteem due to stigmatization and this could also promote inadaptive conducts as the use of drugs or the involvement in prostitution. As for problematic sexual behaviour, this would result from traumatic initiation, leading to avoidance behaviours, or, on the contrary, to the association of sex with obtaining material or emotional rewards.

The notion of trauma has been, however, to be associated with the attempt on the part of the child, to find meaning and achieve control over a situation that is difficult to accept and

that was experienced with intense helplessness. In boys, sexual and aggressive acting out may even be a way to restore the sense of masculinity (culturally associated with power and control), affected by the experience of abuse.

Carla Machado and Rui Abrunhosa Gonçalves point out that not always it seems legitimate to them to interpret the sexual behaviour of victims as a sign of psychological disturbance, because the change strategies that victims often need are not available except through behaviours that society labels as deviant (e.g. running away from home, aggression and prostitution).

In addition to the symptoms mentioned above, several authors argue further that victims may suffer from post-traumatic stress disorder (PTSD): intense physiological activation, re-experiencing the trauma in the form of flashbacks, nightmares or intrusive memory, avoidance of behaviours, places or thoughts associated with the abuse (Lutzker et al. 1999; Birt and Wolfe, 1997).

In general, the studies seem to indicate a trend towards a decrease in symptoms over time, however, even in adulthood, several studies suggest an association of the experiences with several adjustment problems, namely sexual and interpersonal difficulties, depression, anxiety, dissociation, harmful behaviours to itself (e.g. self-mutilation, drugs or alcohol abuse, suicide attempts) and aggressiveness.

In one hand, the intervention of the entities with competence on children and youth matters and of the commissions of protection of children and youth depends on the acceptance of the child or young person with 12 years old or more, being that the opposition of the child aged less than 12 years old is considered relevant according to its capacity to understand the intervention – Article 10 of Law nr 147/99, of 1<sup>st</sup> of September.

In the other hand, the intervention of the commissions of protection of children and youth depends of the expressed consent of their parents, legal guardians or the person who has the custody of fact – Article 9 of Law nr 147/99, of 1<sup>st</sup> of September (see also Articles 94 and 95).

### **III NATIONAL POLICY REGARDING CHILDREN**

i. One current discussion in Portugal is focused on legal investigation and the effectiveness of protective measures. As far as the first is concerned, the fact that there is no specific syndrome to detect sexual abuse and the interpretation of law depends on casuistic analysis

might lead to contradictory opinions and decisions. For example, we can mention the discussion between two concepts: virginity and experience. In fact, due to sexual crimes in which the victim does not adopt a typical reaction (violent reaction in order to escape from the perpetrator) because of the shock (the victims remains quiet in silence), such consideration might lead to determine that the victim was an experience person and the conduct is not considered sexual abuse.

Also, protective measures need to be strengthened in order to be constant and regular, adapted to the different atmospheres in which the child is involved in.

**ii.** Social awareness regarding these issues has known a considerable progress. Portuguese NGOs have led dynamic campaigns through different sources of information. We can mention television; reviews; internet, among others, which raise people attention. In particular, a different branch of psychology has been emancipated and investigated: criminal psychology. Most of the Portuguese NGOs seek people's involvement for collaboration too.

**iii.** In the last 5 years, reports regarding the sexual exploitation of children reveal some reasons to be concerned and optimist. The Portuguese Directorate-General for Justice Policy (PDGJP), through the organs of criminal police registered the occurrence of several sexual crimes committed to children.

When sexual abuse of children under 14 years of age, or between 14 and 16 by abusing their inexperience, or between 14 and 18 years of age but in a dependent relationship with the offender, is concerned, the number of reports between 2007 and 2010 revealed an alarming growth within the number of sexual crimes. In 2007, 123 crimes of sexual abuse were reported, in 2008 the number increased to 593, in 2009, again, up to 668, in 2010 reached the 778 reports, and finally, in 2011 the numbers continued to grow but started to stabilize until the 784 formal charges<sup>101102</sup>.

From 2007 until 2010, the law enforcement agencies registered an increase of 665 (+84%) crimes of sexual abuse of children. The growth within the number of this specific crime is

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<sup>101</sup> Cf. Portuguese Directorate-General for Justice Policy, Police Records - Statistical Information from [http://www.siej.dgpj.mj.pt/webeis/index.jsp?username=Publico&pgmWindowName=pgmWindow\\_633918141195530467](http://www.siej.dgpj.mj.pt/webeis/index.jsp?username=Publico&pgmWindowName=pgmWindow_633918141195530467), date of access (07.11.2012)

<sup>102</sup> It should be noted that these figures include every type of crime of sexual abuse of children, irrespective the minor's age or relationship with the offender. However, they do not preview the crime of rape.

explained by the “changes in the practices of government departments (e.g. police and justice agencies)”<sup>103</sup>. Among others, some changes were: improved professional training; implementation of measures aimed at reducing the social stigma associated with these crimes and facilitate reporting. Another reason for the growth within the numbers can also be found in the “Casa Pia”<sup>104</sup> lawsuit and its media coverage which amplified public attention to the issue of sexual abuse of children. On the other hand, the increasing number of formal charges is associated with the decrease of the dark figures, i.e., crimes committed but not reported to the authorities.

In the period between 2010 and 2011, the amplification has stabilized, and were registered 6 more crimes (0,8 %) than the former year. Social behavioural changes which continue to reduce the stigmatization of the victim contributed to this result<sup>105</sup>.

Regarding the crimes of child pornography and child prostitution favouring, unlike the crime of sexual abuse, the difference within the numbers result from the operations conducted by the organs of the criminal police<sup>106</sup>, it doesn't necessarily indicate an amplification or decrease of these crimes. In between 2007 and 2009 the number of crimes registered increased from 6 to 209, revealing a growth of 97% , but then, in 2010 the numbers decreased to 66 (68%), solely to increase again in 2011 by 36,9%.

Although there exists more data about crimes against freedom and sexual self-determination, especially the crime of rape, it's not possible to determine specific statistics for when the victim is a minor. Nonetheless, for a general note, the reporting of these crimes has been steadily decreasing. Between 2010 and 2011 the crime of rape number has reduced by 11,8% while all other crime against freedom and sexual self-determination by 0,5%.

Analysis of several cases of crimes of sexual nature committed to children revealed that most of the victims are of the female gender (78,4 %), average age of 9.8, students (69,2 %),

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<sup>103</sup> Cf. Ricardo G. Barroso, André Lamas Leite , Celina Manita , Pedro Nobre, *Sexual Offender Treatment, Volume 6 (2011), Issue 2*, available at <http://www.sexual-offender-treatment.org/98.html>, date of access (27.10.2012)

<sup>104</sup> Cf. Ricardo G. Barroso, André Lamas Leite , Celina Manita , Pedro Nobre, *ibidem*

<sup>105</sup> Cf. From the office of the Secretary General of the Internal Security System, *Relatório Anual da Segurança Interna*, 2011, p 97

<sup>106</sup> Cf. From the office of the Secretary General of the Internal Security System, *Relatório Anual da Segurança Interna*, 2011, p 97

abused by a male offender (99,5 %), a person that the victim knew (85,4 %), and 50,3 % of the times belonged to the family<sup>107</sup>.

We can refer to the investigation and reports in which a couple of NGOs and centre of studies have been working on in order to publish the results. For example, Committees for the Protection of Children and Youth which have to lead a serious investigation in order to give information to the social security bodies that will implement social protection programs; the Institute of Child Support; Legal Medicine Institute and The Commission of protection of Children and Youth at risk.

iv. The Institute of Child Support and other associations in collaboration with the first one have led a serious and dynamic campaign through videos; reports; lectures... In addition to that, the project ELSA for Children is also intended to be regarded as promotional campaign regarding these issues.

v. As far as children's rights are concerned, the Portuguese law making process is aimed at preserving the best interest of the child without compromising his/her normal growth. The legislator takes into account the extension of damages which can be caused to the child due to his/her involvement in legal situations such as the ones above mentioned, particularly, when the child is the victim or has testified a crime. The main goal is provide the child with parental or institutional care, physiological support inside and outside the process.

vi. The main national Non-Governmental Organisations working on the topic of children's rights are: The Institute of Child Support; Portuguese Association of support to children and The Commission of protection of Children and Youth at risk. The State participates in the development of some projects coordinated by such NGOs when providing them with materials (international reports).

## IV OTHER

In the last 5 years, reports regarding the sexual exploitation of children reveal some reasons to be concerned and optimistic. The Portuguese Directorate-General for Justice Policy

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<sup>107</sup> Patrícia Jardim, Master's Thesis - *O abuso sexual na criança - Contributo para a sua caracterização na perspetiva da intervenção médico-legal e forense*, Universidade do Porto, Porto, 2011, p. 36

(PDGJP), through the organs of criminal police registered the occurrence of several sexual crimes committed to children.

The issues raised on this topic are attended on the *CHAPTER III: NATIONAL POLICY REGARDING CHILDREN*: i. "Is there a serious political discussion regarding the children in the respective country?"

## V CONCLUSION

The development of this project contributed to broaden our horizons and motivate the awareness of social and legal issues. The deep investigation of such controversial topics and its discussion helped us to strengthen social responsibility.

A brief presentation of some guidelines of Social Emergency Plan<sup>1</sup> translated is presented below (see the complete version of the Plan of Social Emergency, <sup>1</sup>available at <http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-solidariedade-e-seguranca-social/documentos-oficiais/20110805-programa-emergencia-social.aspx>)

The Social Emergency Plan <sup>1</sup> consists in "mitigating the social impact of the crisis in order to create a "*social cushion*" which permits to buffer for many persons the difficulties they are passing", supported by the notion that "at present juncture it is not possible to choose paths that reduce further the global levels of social protection of disadvantaged persons, or that involve additional financial effort that the country cannot support", the program assumes "a social innovation model that can respond to needs and help to the flagella of severe social deprivation situations" which is enacted by "a national solidarity network focused on proximity and experience" - through the "local authorities as the focal point" and "institutions that permanently guarantee a social response: the particular social solidarity institutions (IPSS), the mercies and mutual's. These are the entities which can better contribute to help to the social emergency situations that do not stop growing".

The program strengthens that "many of the families live difficult moments nowadays, enmeshed in the webs of unemployment, financial collapse, of over-indebtedness, social disintegration, exclusion and poverty (...) the reduction of social inequalities must begin by combating early school leaving, the adoption of measures to support the family, the fairer distribution of income and sacrifices, and, moreover, at fair recognition each person's merit and effort, based on a personal and collective promotion and training dimensions".

These Social Emergency Plan consists in five major areas<sup>1</sup>:

a) "a program that can respond to families confronted with new phenomena of poverty as a result of the unemployment, over-debt, social and familiar disruption and very especially the children". The enacted measures to accomplish these aims are: the increase of the unemployment benefits by 10% for couples with children - both unemployed; the implementation of a national program of micro-credit; promotion of active and solidarity work in order to remain in the labour market functions and performance of socially useful functions specially among those persons who receive the social insertion income (rendimento social de inserção - RSI); to ensure the distribution of meals to the poorest and combat waste in the case of products with limited date of consumption; lower housing rental prices lower; "indebtedness of households, together with unemployment, are two of the causes that contribute most for new phenomena of exclusion" - sensitization actions for savings, value for money, responsible credit; to meet the needs of education in problematic neighborhoods, as well as scholarships for undergraduate students, reduced social tariffs for transport, gas and electricity; "the new social emergency telephone line, looking to adapt it to the new contingency of poverty, the new phenomena of exclusion, ensuring a faster response that may help to identify social responses on the contexts"; children at risk "the social crisis, associated social to the social disruption, have hardest effects on children - the Government together with the Commissions for Protection of Children and Young People will focus at the level of primary and secondary prevention, by increasing the signaling of risk cases and not jeopardizing the principle of subsidiary"<sup>1</sup>.

b). "A program which can respond to the elderly, with yields very degraded and very high intakes of health", specifically through: the maintenance of purchasing power for minimum (247euros), rural (227 euros) and social (189 euros) pensions; donation of drugs by pharmaceutical industry six months before the expiration date; agreement with solidarity pharmacy by distributing medicines within an stipulated plafond for the more needy persons; return to solidarity neighbourhood networks in order to reduce the institutionalization and home support not only for the elderly as also for the families with dependents or analogous situations, as in permanent sickness or family rupture; combat to loneliness and urgency situations through social support lines (tele-alarm line) and solidarity line; night centers for seniors who are not subject to institutionalization, at night they can stay at the center and passing the day in their homes, to improve the access to health care networks and continuing or palliative care<sup>1</sup>.



c) "The inclusion of the persons with disability is a transversal task". However, in the framework of the Social Emergency Plan, besides the insertion on professional programs and supports to the creation of self-employment, " is important to highlight some other aspects, such as the employability of people with disability, the maintenance of teachers in IPSS, the "ramp" program as well as "caregiver respite" measure for caregivers and families with people with disability and other dependents or patients in need of 24h support<sup>1</sup>.

d). "At a time of emergency is necessary to recognize, encourage and promote volunteering"; to create incentives for volunteering in social area, to put volunteer hours into school certificates, and "studying the possibility of devoting a "bank of social hours " where workers of public functions are allowed to perform the volunteering tasks<sup>1</sup>.

e) The government believes and contracts with the social institutions. "The social institutions exist to help others and it is time for the Government humbly ask them for help. Not for itself, but for those who suffer, those who have little or nothing, those who were confronted with the exclusion of unemployment. It doesn't makes sense that the State build own structures, in places where there are already social responses; but it makes sense that the State use the most of the structures that are already on the places and simplify its rules of operation; simpler legislation for the children's daycare institutions, attending to their safety, operation and installation conditions; simplify legislation of elderly households increasing the number of vacancies in conditions of quality and safety among the existing structures, and to find strategies for their sustainability; review of the legislation for the licensing of social equipments, simplify rules of food and hygiene safety of kitchens in social institutions, and the increase and co-participation of QREN in further 10% in convergence areas; to promote formation of social institutions directors, a line of credit to institutions of social economy, entrepreneurship and social innovation for the third sector; revise legislation to fund the social aid by passing to act as an emergency social fund, the solidarity card and law of basis of social economy; transfer of equipment from the State to the social institutions, allowing the response to situations of social deprivation, which can permit lower costs and faster responses<sup>1</sup>.

1available at <http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-solidariedade-e-seguranca-social/documentos-oficiais/20110805-programa-emergencia-social.aspx>)

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**National researchers:**

Marija Angelovska

Stefan Andonovski

Elena Trajkovska

Gligorie Kjatoski

**National coordinator:**

Ana Velkovska

**National Academic Advisor:**

Mila Isakovska

## I INTRODUCTION

### 1 GENERAL

i. Considering the progress report from the European Commission for Macedonia for 2011 and 2012, there has been some progress in the anti-discrimination policy. In 2011 the Commission for Protection from Discrimination started to work. The Commission became a member observer of the European network of equality bodies. Overall capacity of the commission remains weak, and its levels of visibility and accessibility to the public is low. Public awareness of the need for non-discrimination is very limited. Anti-discrimination law leaves out discrimination based on sexual orientation. Community of gay, lesbian, bisexual and transgender persons is still subject to discrimination and stigmatization.

As far as women's rights and gender equality, discriminatory customs, traditions and stereotypes are distributed especially in rural areas and violate the fundamental rights of women. Active participation of women in politics is still low, especially at the local level. Women are also underrepresented in the labour market.

In terms of minorities the Ohrid Framework Agreement provided an important opportunity to strengthen dialogue between the communities. Overall representation of public workers from minority communities is satisfactory and remains 29 percent. Some progress has been made with the rights of the Roma. Strategy was adopted for the social inclusion of Roma 2012-2014 along with an action plan. Despite the budgetary constraints of the financial support for Roma programs was maintained at the level of 2009 and 2010. Macedonia is among the few countries in the region where minorities' rights are respected.

There has been progress in terms of property rights. The process of returning property confiscated during the Socialist Yugoslavia resulting in a solution of 30 744 cases in the period of May 2000 to December 2007.

“It is prohibited any direct or indirect discrimination, reference and encouraging discrimination and helping in discriminatory treatment on the basis of sex, race, colour, gender, belonging to a marginalized group, ethnic origin, language, nationality, social origin, religion or religious beliefs, other beliefs, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property status, health status or any other basis which is regulated by law or ratified international agreement

(hereinafter: discriminatory basis)” – Article 3 Prevention And Protection Of Discrimination Law 08.04.2010 Official Gazette of RM no. 50 from 13.04.2010

As it can be seen from the article, the Prevention and Protection of Discrimination Law covers most of the discrimination problems issue. The main of the few deficiencies in the law is its exhaustive enumeration of the grounds of discrimination that is contrary to the idea of protection from all possible grounds for discrimination and does not go in the direction of compliance with Protocol 12 of the European Convention on Human Rights. In article 1 the Protocol specifies general prohibition of discrimination, which determines the general prohibition of discrimination on any ground **such as** discriminatory treatment on the basis of sex, race, colour, gender, belonging to a marginalized group, ethnic origin, language, nationality, social origin, religion or religious beliefs, other beliefs, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property status, health status or any other basis which is regulated by law or ratified international agreement. The words "Such as" leaves a non-exhaustive list of grounds for discrimination.

Unlike, the law did not foresee this formulation from the protocol and thus requires strictly interpreting the provisions of the law to the detriment of potential victims of discrimination.” As a model for the wrong interpretation of the law can be taken publicly exploited example of homosexuals. This group of people, although sensitive and marginalized is not envisaged in the law as basis for discrimination” writes the Foundation Institute Open Society – Macedonia in their comments of the law.

ii. “Family is a community of parents and children and other relatives living in the common household. Occurs with the birth of children and family by adoption” Article 2 Family law Official Gazette of RM no 80/1992 from 22.12.1992.

“Marriage is legally regulated community of life between husband and wife in which they realize the interests of spouses, family and society” – Article 6 Family law Official Gazette of RM no 80/1992 from 22.12.1992.

By the statistical review of population and social statistics in July 2012, created by State statistical office of the Republic Macedonia in the table above are shown marriages by the age of the bride and the groom. The average marital age of the male population (5 580) is between 25-29. The average marital age of the female population (5 384) is between 20-24.

iii. By a research form the First Children’s Embassy in the World “Megjasi” about the status of children from representative sample of 2344 children in seven cities in Macedonia 70% of children do not know any of the child's right and what most worries a lot is that if the child does not recognize the right that has been violated, they cannot even report it. Most of those 30% who know the rights of the child learned from school, but nobody advised school pedagogue or psychologist to complain if a law has been breached.

On the occasion of the presentation of alternative reports of non-governmental organizations to the state reports on the status of children in Macedonia, it must be pointed out that the rights of children in Macedonia are threatened and are not always respected and to express concerns about inefficiency and failure of the mechanisms of the state in terms of:

**T-18: Склучени бракови според возраста на невестата и младоженецот**

**T-18: Marriages by age of bride and groom**

Возраст на невестата	Вкупно Total	Возраст на младоженецот Age of groom										Age of bride
		под 20 години under 20 years	20 - 24	25 - 29	30 - 34	35 - 39	40 - 44	45 - 49	50 - 54	55 и повеќе години 55 and over	непо- знато Un- known	
<b>Вкупно</b>	<b>14 736</b>	<b>312</b>	<b>3 539</b>	<b>5 580</b>	<b>3 055</b>	<b>1 123</b>	<b>475</b>	<b>284</b>	<b>148</b>	<b>220</b>	-	<b>Total</b>
15 - 19	1 926	236	1 135	466	73	14	1	1	-	-	-	15 - 19
20 - 24	5 384	69	2 153	2 420	624	93	17	4	3	1	-	20 - 24
25 - 29	4 476	6	226	2 361	1 463	313	81	22	1	3	-	25 - 29
30 - 34	1 711	1	16	301	795	418	108	48	14	10	-	30 - 34
35 - 39	620	-	3	26	88	240	154	71	23	15	-	35 - 39
40 - 44	291	-	3	3	8	35	93	84	37	28	-	40 - 44
45 - 49	152	-	1	1	3	8	18	45	39	37	-	45 - 49
50 - 54	94	-	1	-	1	1	1	8	27	55	-	50 - 54
55 и повеќе години	82	-	1	2	-	1	2	1	4	71	-	55 and over
Непознато	-	-	-	-	-	-	-	-	-	-	-	Unknown

- Child protection and the prevention of their abuse
- Violence against children and between children
- Lack of commitment to the state of children in institutions, their needs and problems

- Discrimination of Roma children in every way, especially in the education system
- In Macedonia, the rights of children are violated in all areas: social work, education, health, justice, family, media, and communications.

iv. The relevant legislation regarding the implementation of international treaties is the signing, ratification and implementation of international agreements Law "Fig. Gazette of the Republic of Macedonia "no. 5/98 dated 30.01.1998.

In Macedonia, international law does not need to be translated into national law. The act of ratifying an international treaty immediately incorporates the law into national law, the conclusion is that Macedonia have accepted the monalistic approach.

By the UN Treaty collections Macedonia have ratified the United Nations Convention on Rights of the Child on the 2 Dec 1993 by succession from former Yugoslavia. Former Yugoslavia made a reservation to the Convention and because of the succession Macedonia have also indirectly made a reservation:  
[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en)

Reservation:

"The competent authorities (ward authorities) of the Socialist Federal Republic of Yugoslavia may, under article 9, paragraph 1 of the Convention, make decisions to deprive parents of their right to raise their children and give them an upbringing without prior judicial determination in accordance with the internal legislation of the SFR of Yugoslavia."

Convention on the Rights of the Child (CRC) by the United Nations (UN) is one of the first international documents ratified by the Republic of Macedonia (1993). By the report of implementation of the Helsinki Committee for Human Rights in Macedonia the ratification is not followed by appropriate review of all laws and regulations, and despite efforts does not lead to significant changes in the child's reality.  
<http://www.mhc.org.mk/?ItemID=653ECA518BE40945AF33DBFA65A210FE>

## 2 THE LANZAROTE CONVENTION

i. Republic of Macedonia signed the European Convention for Human Rights and Fundamental Freedoms on 9 November 1995, and ratified it in the Assembly on 10 April 1997.<sup>1</sup> On the issue of the Protocols on the Convention for Human Rights and Fundamental Freedoms, Republic of Macedonia signed/ratified in the following timeframe: Protocol No. 1 (9 November 1995 / 10 April 1997) with a reserve on the right of private primary education stipulated in Article 2; Protocol No. 2 (14 June 1996 / 10 April 1997), Protocol No. 3 (9 November 1995 / 10 April 1997), Protocol No. 4 (14 June 1996 / 10 April 1997), Protocol No. 5 (9 November 1995 / 10 April 1997), Protocol No. 6 (14 June 1996 / 10 April 1997), Protocol No. 7 (14 June / 10 April 1997), Protocol No. 8 (9 November 1995 / 10 April 1997), Protocol No. 11 (9 November 1995 / 10 April 1997), Protocol No. 12 (4 November 2000 / 13 July 2004), Protocol No. 13 (3 May 2002 / 13 July 2004), Protocol No. 14 (15 September 2004 / 15 June 2005) and Protocol No. 14bis (3 September 2009 / 27 April 2010).<sup>2</sup>

ii. Republic of Macedonia is part of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and signed it at the 25 October 2007 at the moment when the Convention was opened for signing. Republic of Macedonia enacted the Law for ratification of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse on 8 October 2010, which entered into force on 16 October 2010.<sup>3</sup> Nevertheless, the official ratification of the Convention according to the international law procedure (deposing the instrument of ratification) happened on the 11 June 2012, and the Convention entered into force on the 1 October 2012.<sup>4</sup> Republic of Macedonia did not make any reservations or opt outs on the Convention.<sup>5</sup>

iii. The Convention of Lanzarote, according to the Macedonian Constitution is ranked higher than the laws enacted in the Assembly on the legal hierarchy, and cannot be changed by them, as stated in the Article 118 of the Constitution, as follows:

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<sup>1</sup> Treaty Office on <http://conventions.coe.int>

<sup>2</sup> Ibid

<sup>3</sup> “Official Gazette of the Republic of Macedonia” of the Republic of Macedonia No. 135/2010

<sup>4</sup> Ibid

<sup>5</sup> Ibid



„The international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law. “<sup>6</sup>

According to this Article, all international documents cannot be changed by laws after their adequate ratification in the Assembly of the Republic of Macedonia. Special legislation on the implementation of the Lanzarote Convention has not been enacted yet.

**vii.** In the Republic of Macedonia, according to the cited Article 118 of the Constitution, all international acts ratified in accordance with the Constitution have direct effect in the national legal framework. This constitutional provision is under direct influence by the continental tradition, which provides en block incorporation of the international instruments in the internal legal framework only by their ratification in the national assemblies. On the implementation of the Lanzarote Convention works the Ministry of Justice, as stated in the Law on Ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse<sup>7</sup>.

## II NATIONAL LEGISLATION

### 1 GENERAL PRINCIPLES OF THE JURISDICTION

**i.** Republic of Macedonia is, as stated in Article 1 of the Constitution of the Republic of Macedonia<sup>8</sup>, sovereign, independent, democratic state, with a sovereignty which derives from the citizens and is indivisible, inalienable and non-transferable. Republic of Macedonia declared its independence after the huge success of the Referendum for independence, held on 8 September 1991. On the Referendum voted 75, 7% of the citizens with the right to vote, from who 96, 4% voted “for”<sup>9</sup> on the referendum question: "Would you support independent Macedonia with the right to enter future union of sovereign states of Yugoslavia?" Nonetheless, the complete international recognition, under the (привремена) reference ‘former Yugoslav Republic of Macedonia’ gained on 8 April 1993 with an

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<sup>6</sup> Constitution of the Republic of Macedonia, “Official Gazette of the Republic of Macedonia” of the Republic of Macedonia” No. 52/91 on 22 November 1991

<sup>7</sup> Article 3 Law on Ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse “Official Gazzette of the Republic of Macedonia” No. 135/2010 on 8 October 2010

<sup>8</sup> Constitution of the Republic of Macedonia, “Official Gazette of the Republic of Macedonia” of the Republic of Macedonia” No. 52/91 on 22 November 1991

<sup>9</sup> Nohlen, D, Stover P (2010) *Elections in Europe: A data handbook*, page 1278 ISBN 978-3-8329-5609-7

acclamation of the General Assembly of the United Nations Organization. In the years to come, Republic of Macedonia, as its fundamental interests proclaimed the membership in the European Union and NATO, goals on which the country works today and will continue to work in the days to come. By its political constellation, Republic of Macedonia represents parliamentary democracy with three-part structure: one-seated parliament (the Assembly of the Republic of Macedonia) which acts as a law-enacting institution; the executive is divided between the President of the Republic of Macedonia (acting PHD Gjorge Ivanov) – with basically ceremonial function, except in the field of defence, where he is commander in chief and President of the Security Council. Additionally he has influence in the foreign policy and in the promulgation of the enacted laws with an act called Ukaz; and the Government of the Republic of Macedonia (institution created by a political coalition by the winning Macedonian and Albanian political party in the Assembly) which is the main institution of the executive, collective body compelled by 15 ministries and a Prime minister (acting Nikola Gruevski, Master of science in Economics); third is the judicial system formed by primary courts (Primary courts - Osnoven sud), secondary courts (Appellate courts – Apelacionen sud) and tertiary courts (Supreme court of the Republic of Macedonia). Special, independent subject in the Macedonian political and legal structure is the Constitutional Court of the Republic of Macedonia, which members are elected by the Assembly of the Republic of Macedonia, with a mandate of 9 years.

ii. In the Constitution of the Republic of Macedonia, enacted on 22 November 1991 and in its 31 Amendment (enacted in 1992, 1998, 2001, 2003, 2005 and 2009), human rights and their protection are important and, so to say, crucial part. The protection of human rights is declared at first in the Preamble<sup>10</sup>, and then, as fundamental values of the constitutional system, among the others, are settled the basic freedoms and rights of the individual and citizen, recognized in international law and set down in the Constitution and the free expression of national identity<sup>11</sup>. In Chapter 2 of the Constitution, human rights are divided into several parts, such as: Civil and political freedoms and rights (Article 9-29), Economic, social and cultural rights (Article 30-49), Guarantees of basic freedoms and rights (Article

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<sup>10</sup> Preamble of the Constitution of the Republic of Macedonia, “Official Gazette of the Republic of Macedonia” No. 52/91 on 22 November 1991, and Amendment IV, “Official Gazette of the Republic of Macedonia” No. 91/01 on 20 November 2001

<sup>11</sup> Article 8 of the Constitution of the Republic of Macedonia, “Official Gazette of the Republic of Macedonia” No. 52/91 on 22 November 1991

50-54) and the fourth part of the Chapter, surprisingly is the part named Foundations for economic relations (Article 55-60). In the first part, the Constitution guarantees that everyone is equal in their rights and freedoms, regardless the differences (Article 9), the right of life and the abolishment of the death penalty from the previous regime (Article 10), the right of physical and moral dignity and the prohibition of torture and forced labour (Article 11). In the next few Articles, the Constitution regulates the right of freedom (Article 12), the presumption of innocence (Article 13), the rule *nullum crimen, nulla poena sine lege* (Article 14), the right of appeal (Article 15), the freedom of conviction, conscience, thought and public expression of thought (Article 16), the freedom and confidentiality of correspondence (Article 17), guarantees on security and confidentiality of personal information (Article 18), the freedom of religious confession is guaranteed and separation of the country and all the religious organizations (Article 19), freedom of association to exercise and protect their political, economic, social, cultural and other rights and convictions (Article 20), to assemble peacefully and to express public protest without prior announcement (Article 21), the right to vote on the age of 18 (Article 22), right to take part in the performance of public office (Article 23), petition state and other public bodies, as well as to receive an answer (Article 24), respect and protection of the privacy of personal and family life and of dignity and repute (Article 25), the right to the inviolability of the home (Article 26), the right of free movement on the territory of the Republic and freely to chose the place of residence (Article 27), the defence of the Republic of Macedonia as right and duty (Article 28) and the guarantees for foreigners who enjoy freedoms and rights guaranteed by the Constitution in the Republic of Macedonia, under conditions regulated by law and international agreements (Article 29). The part of economic, social and cultural rights includes the ownership of property and the right of inheritance, the right to work, to free choice of employment, protection at work and material assistance, obligation for tax payment, right to social security and social insurance, protection and social security of citizens, social security rights to veterans of the Anti-Fascist War and of all Macedonian national liberation wars, to war invalids, to those expelled and imprisoned for the ideas of the separate identity of the Macedonian people and of Macedonian statehood, the right to establish trade unions, the right to strike, the right to health care, care and protection for the family, right freely to decide on the procreation of children, persons under 15 years of age cannot be employed, minors and mothers have the right to particular protection at work, minors may not be employed in work which is detrimental to their health or morality, right to a healthy environment, right to education, right to establish private at schools at all levels of

education, with the exception of primary education, guarantees on the autonomy of universities, the freedom of scholarly, artistic and other forms of creative work, free expression, fostering and development of identity and national attributes of the national minorities, care for the status and rights of those persons belonging to the Macedonian people in neighbouring countries. Moreover, the segment for guarantees of basic freedoms and rights includes the right to invoke the protection of freedoms and rights determined by the Constitution before the regular courts, as well as before the Constitutional Court, based upon the principles of priority and urgency in the urgency, judicial protection of the legality of individual acts of state administration and the right to be informed on human rights and basic freedoms as well as actively to contribute, individually or jointly with others, to their promotion and protection in Article 50, the accordance of laws with the Constitution, and all other regulations with the Constitution and law and the obligation to respect the Constitution and the laws is in Article 51, publication of laws and other regulations before they come into force (Article 52), attorneyship is promulgated as an autonomous and independent public service (Article 53) and the guarantee that the freedoms and rights of the individual and citizen can be restricted only in cases determined by the Constitution in Article 54. The rights of children are guaranteed as a part of the general citizen's and individual's right with the specification in Article 42, where the Republic is „obliged of special care for minors and children, the ban children to be employed under the age of 15, and minors to be employed in work which is detrimental to their health or morality“<sup>12</sup>.

**iii.** On the issue of monitoring the implementation of international and national human rights instruments, the Constitutional Court of the Republic of Macedonia has a role on several human rights clearly stated in the Constitution as rights that are applicable for control and activity. According to the Constitution in Article 110, Paragraph 3, the Constitutional Court of the Republic of Macedonia is entitled to protect the freedoms and the rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation made by an act or an action. The Constitutional Court uses its methods and instruments that include enacting a Decision for protection of freedoms and

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<sup>12</sup> Article 42 of the Constitution of the Republic of Macedonia, “Official Gazette of the Republic of Macedonia” No. 52/91 on 22 November 1991

rights<sup>13</sup>. In this Decision the Court defines whether there is an infringement and if the decision is positive, the Court annuls the individual act, prohibits the action causing the infringement or refuses the request. On the other hand, by the Constitution „Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution“<sup>14</sup>. According to this Article, individuals can claim their constitutional rights directly before the courts, together with their rights guaranteed by international instruments ratified in accordance with the Constitution similar as rights guaranteed by law. As stated before, in the Republic of Macedonia functions the Constitutional Court of the Republic of Macedonia. This Court is primarily legally based on the Articles 108 – 113 of the Constitution of the Republic of Macedonia and secondly, on the Rules of Procedure issued by the Court itself on the basis of the Article 113 of the Constitution. Before the Constitutional Court „any citizen of the Republic can address individually if he considers that an act or action has infringed his/her freedom“<sup>15</sup>. The validity of the request of protection is determined by two aspects – temporal and functional. The temporal aspect is that the request should be addressed within 2 months from the day of delivery of the final individual act or the date on which the person became aware of the activity undertaken, but not later than 5 years from the day of the undertaking, as stated in Article 51 of the Rules of Procedure of the Court. The functional aspect means that citizens can only address the Court for protection of freedom and rights of the Article 110, Paragraph 3 of the Constitution of the Republic of Macedonia. This derives from the Article itself, because it is clearly stated that the Court is entitled to:

„protect the freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation.“<sup>16</sup>

From this Article it is clear that the Court is entitled to resolve the requests of protection of human rights only in the framework given by the Constitution, and for all other violations

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<sup>13</sup> Article 56 of the Rule of Procedure of the Constitutional Court of the Republic of Macedonia, “Official Gazette of the Republic of Macedonia” No. 394/92 on 9 November 1992

<sup>14</sup> Article 98 of the Constitution of the Republic of Macedonia, “Official Gazette of the Republic of Macedonia” No. 52/91 on 22 November 1991

<sup>15</sup> Article 51 of the Rule of Procedure of the Constitutional Court of the Republic of Macedonia, “Official Gazette of the Republic of Macedonia” No. 394/92 on 9 November 1992

<sup>16</sup> Article 110 Paragraph 3, Constitution of the Republic of Macedonia, “Official Gazette of the Republic of Macedonia” No. 52/91 on 22 November 1991

the citizens are obliged to address the regular courts. As stated, individuals can address the Constitutional Court directly only on the matter of protection of several strictly stated human rights. On other cases, the Constitutional Court is not competent, and citizens can address the regular courts. In the regular judiciary system there is a strict hierarchy of addressing, and that hierarchy citizens are obliged to follow by law. The application process for violation of human right starts with a lawsuit before the Primary Court. The individual can appeal on the decision of the Court at an Appellate Court which decision is binding and final. Only in exceptional cases, special appeal can be made – extraordinary remedy before the Supreme Court of the Republic of Macedonia, as a third and highest degree in the judiciary system.

iv. In the Republic of Macedonia, Criminal Supreme Court as such, does not exist. Criminal divisions exist in the judiciary system, but together with other divisions they are a part of a three-part judiciary structure – Primary, Appellate and Supreme Court. The criminal procedure in the Macedonian system is regulated by the Law on Criminal Procedure, enacted on 18 November 2010 and it entered into force on 26 November 2010. The procedure starts by enacting an order to start an investigation procedure, or by the first investigation action, or by determination of main hearing of indictment or private lawsuit, or by a proposal to enact criminal warrant, or by a proposal for issuing a security measure<sup>17</sup>. The criminal procedure in the Republic of Macedonia is divided into 5 stadiums: Preliminary (investigation procedure); Accusation; Main hearing; Procedure on legal remedies; Execution of the verdict. The procedure can be regular (if a person is accused of criminal action for which can be issued a penalty over 3 years of imprisonment), shortened (up to 3 years of imprisonment) or a criminal procedure for minors. Only the regular procedure is consisted of all of the 5 stadiums. The preliminary procedure is consisted of all the actions which state organs take to reveal the existence of a criminal act and to find the actor, to secure the evidence and to start the formal procedure. Organs that act in this stadium are the Ministry of Interior, public prosecutor and the investigation judge. The accusation procedure starts with securing the person who is supposed actor in the criminal act. If such person cannot be found, there could not be a procedure. On the basis of the evidences and their quality, the Primary Court decides if there should be a criminal trial or not. According to that, an

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<sup>17</sup> Article 19 of the Law on Criminal Procedure, “Official Gazette of the Republic of Macedonia” of the Republic of Macedonia No. 150/2010 on and 100/2012

investigation can be performed only against a person for whom there is a reasonable doubt that acted in a crime, and the aim is to find facts that support the prosecution. Reasonable doubt is the one based only on evidence. The accusation means filing an indictment against someone. The accusation can be made only by an authorized prosecutor. That means that crimes that can be sentenced with an over 3-years-prison penalty are prosecuted *ex officio* and can be started only by the police, public prosecutor or investigation judge, according to the seriousness of the crime. If the crime is penalized with minor penalty, the impaired should start the procedure. The main hearing is the most important stadium in the criminal procedure because all collected facts and evidence are presented. This part is oral, public, contradictory and immediate, and finishes by rendering and announcing a verdict. The right to appeal to an Appellate Court and the right of an extraordinary remedy before the Supreme Court of the Republic of Macedonia is the stadium of legal remedies. This institute allows the primary-court-decision to be controlled and revised by a higher-ranked court in order to suppress eventual errors or bias. The last stadium is the execution of the verdict, and happens only if the verdict is final (the court has announced the verdict) and enforceable (all the legal remedies have been used). The execution is performed by the Directorate for Execution of Sanctions under the Ministry of Justice.

v. In the Republic of Macedonia, according to the Law on Juvenile Justice, the age of criminal liability is 14 years, that means that under the age of 14 a sanction cannot be issued, and only special measures can be provided:

„A sanction anticipated in this Law cannot be pronounced to a juvenile who at the time of performing the activity determined by law to be a crime or misdemeanor has not reached the age of 14 – a child at risk.”<sup>18</sup>

Moreover, according to the Criminal Code of the Republic of Macedonia, the Code cannot be applied against juveniles who at the time of committing the crime have not turned the age of fourteen<sup>19</sup>. In the Republic of Macedonia minors can be sentenced to juvenile prison in special parts of the prison for adults, or can be imprisoned in educational-correctional institutions for minors. The statistics in the Annual Report for 2011 issued by the

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<sup>18</sup> Article 13, Law on Juvenile Justice “Official Gazette of the Republic of Macedonia” of the Republic of Macedonia” No.87/2007; 103/2008; 161/2008 and 145/2010

<sup>19</sup> Article 6-a. Paragraph 1 Criminal Code “Official Gazette of the Republic of Macedonia” of the Republic of Macedonia” No.37/96; 80/99; 4/2002, 43/2003, 19/2004, 60/2006, 73/2006, 7/2008, 139/2008 and 114/2009

Directorate for Execution of Sanctions<sup>20</sup>, which is an organ in the Ministry of Justice of the Republic of Macedonia, shows that of the total amount of convicted prisoners in the penitentiary-correctional institutions on 31 December 2011 (2212), only 6 are under the age of 18 (juveniles). On the other hand, in the Educational-correctional institution for minors located in Tetovo, 42 minors served their penalty on the 31 December 2011<sup>21</sup>. Of this number, statistically 4 persons are on the age 14 - 16, 16 on the age 16 – 18 and 22 on the age 18 – 23.

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. The National legislation<sup>22</sup> incorporates a part which refers to the meaning of the terms mentioned in the Criminal Code of the RM (further CC of the RM). In fact includes 39 definitions.<sup>23</sup> Unfortunately, there isn't a definition of the term 'sexual activities'. Some of the given definitions, for example the definition of family violence do include 'sexual or other physical and psychological violence which causes a feeling of insecurity...', yet it is not an appropriate definition for the term 'sexual activities'. Further on, while explaining diverse crimes against sexual freedom and sexual morality, the legislator only uses the term 'sexual acts' and the term 'other sexual acts' as well. Their meaning is not determined in a more detailed matter. According to the Macedonian legal theory<sup>24</sup>, the meaning of the general term of "sexual activities" may be well understood and explained by an extensive or restrictive exegesis of the crimes separately.<sup>25</sup>

ii. The CC of the RM incorporates an article, explaining two cases of committing a premeditated crime. The article is named as 'Intent'. As further follows: "A crime was

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<sup>20</sup> Annual Report of the Directorate for Execution of Sanctions on the situation and the work of penitentiary-correctional and educational-correctional institutions in the Republic of Macedonia for 2011, Skopje, April 2012, on [http://www.pravda.gov.mk/UIS/God\\_izvestaj%20UIS-2011\\_.pdf](http://www.pravda.gov.mk/UIS/God_izvestaj%20UIS-2011_.pdf)

<sup>21</sup> Page 33 of the Annual Report of the Directorate for Execution of Sanctions on the situation and the work of penitentiary-correctional and educational-correctional institutions in the Republic of Macedonia for 2011, Skopje, April 2012, on [http://www.pravda.gov.mk/UIS/God\\_izvestaj%20UIS-2011\\_.pdf](http://www.pravda.gov.mk/UIS/God_izvestaj%20UIS-2011_.pdf)

<sup>22</sup> In regards to the Criminal Code of the Republic of Macedonia (37/96), enacted on July 23 1996, which came into effect on 1 November 1996, with an implemented amendments from 2011

<sup>23</sup> Section XIII of the general part of the Criminal Code

<sup>24</sup> Academician Phd.Vlado Kambovski,Phd.Nikola Tupancheski,Criminal Law – special part, Skopje,2011

<sup>25</sup> f.g. the term "other sexual activity" used in article 188 of the Criminal Code includes an activity which does not mean making a physical contact with the minor, yet it means violation of the feeling of shame and violation of moral norms for dealing with children



committed with intent when the offender was aware about his act and he wanted it to be committed OR when he was aware that a damaging consequence may occur because of his act or omission, but agreed for it to happen anyway.”<sup>26</sup> In the legal theory<sup>27</sup>, this article is not considered to give us a general definition of the intent, but instead only an explanation of the content of two types of intent: direct and oblique. Actually, the first part of the definition provided refers to the direct intent and the second part to the oblique intent. Apparently, they’re different, but they both consist of two common elements: awareness for committing the crime and the willingness to do it. Although the legal theory makes difference between these two types of intent, the legislation does not draw this kind of distinction. Thereby, every offender will be punished in a same way, when a crime is committed intentionally; the Court will not make any difference during the criminal procedure whether the offender just agreed for the damaging consequence to happen or strongly wanted it to happen. Only one thing will be declared in the Court decision: the crime was premeditated (committed intentionally). Moreover, the legislation imposes more severe sanctions when a crime is committed intentionally in comparison to a crime committed by negligence. It’s because of the higher level of culpability of the offender.

- What is the criminal liability of an intentionally committed crime of sexual abuse?

Regardless of the committed crime, criminally liable is the mentally competent perpetrator who committed the crime intentionally. Moreover was aware, needed to be aware or could have been aware that the act has been prohibited by the law.<sup>28</sup>

Consequently, every punishment which is provided by the CC of RM for the given crime will be applied properly. That means the punishment will be measured within the limits prescribed by the law for that crime, having in mind the criminal responsibility of the offender, the weight of the crime and the aims of the punishment, all the circumstances that have influence upon decreasing or increasing the punishment (extenuating or aggravating circumstances), and especially: the level of criminal responsibility, the motives for the perpetrated crime, the extent of endangerment or damage to the protected goods, the circumstances under which the crime was committed, the contribution of the victim in the perpetration of the crime, the previous life of the offender, his personal circumstances and

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<sup>26</sup> Section I, Article 13 of the Criminal Code

<sup>27</sup> Academician Phd.Vlado Kambovski, Criminal Law – general part, Skopje,2011

<sup>28</sup> Criminal Code of the Republic of Macedonia, section II, article 11 (1)

his behaviour after the perpetrated crime, as well as other circumstances that concern the personality of the offender.<sup>29</sup>

In case of a rape, the main sentence is from three to ten years of an imprisonment, under aggravating circumstances at least four.<sup>30</sup>

In case of a sexual attack upon a minor under the age of fourteen, the main sentence is at least eight years of an imprisonment, at least ten years under aggravating circumstances and in case when a damage consequence was caused, at least ten years of an imprisonment or a life sentence.<sup>31</sup>

In case of a rape by misuse of position upon a minor older than fourteen years, at least ten years of an imprisonment.<sup>32</sup>

iii. The legal age (age of consent) for engaging in sexual activities is not regulated by the National legislation as well as the consensual sexual activities between minors. As usual, the law provides legal age only for contractual marriage.<sup>33</sup> In regard to the legal age for engaging in sexual activities, the state even provides a special National strategy (2010-2020)<sup>34</sup> in which it establishes different interventions for improving the access to services and quality of the care for sexual and reproductive health of adolescents and young people which are tailored to their needs, as for an example:

Creating a network of counselling services for sexual and reproductive health in the health care system, offer of free and confidential services, especially free contraceptive counselling services and free contraceptives, providing free condoms and oral contraceptives, counselling, medical and psychosocial support for girls with an unplanned pregnancy, developing standards and protocols for youth friendly services and sexual and reproductive health and etc.

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<sup>29</sup> Criminal Code of the Republic of Macedonia, section III, article 39 (1) and (2)

<sup>30</sup> Criminal Code of the Republic of Macedonia, section XIX, article 186 (1) and (2)

<sup>31</sup> Criminal Code of the Republic of Macedonia, section XIX, article 188(1), (2) and (4)

<sup>32</sup> Criminal Code of the Republic of Macedonia, section XIX, article 189 (2)

<sup>33</sup> Law on family (1992, with an implemented amendments from 2012), Section II, article 16

<sup>34</sup> National strategy for sexual and reproductive health in the Republic of Macedonia (2010-2020) was prepared in the framework of the cooperation of the Ministry for Health of the Republic of Macedonia with the Institute for Public Health and UNFPA for implementation of the project: Improving The National Response In Terms Of Rights Of Sexual And Reproductive Health In Macedonia, Skopje, 2009

iv. The use of force, taking advantage of disability or threat may be contemplated in regards to a few different crimes determined by the CC like crimes against sexual freedom and sexual morality which refers to sexual offences against children.

At first, the term 'child' is defined in many diverse national laws, like The Constitution of Republic of Macedonia, the Law on Children Protection, the Law on Juvenile Justice, the Law on Family etc. And all these definitions are compatible.<sup>35</sup> They all define the term 'child' in accordance with many of the ratified international conventions like The Convention on Children rights. The CC of the RM also defines the term 'child as a victim of a crime' for a minor who has not reached the age of eighteen yet.

Looking through the articles inside, the CC criminalizes the sexual offence, but only upon a minor under the age of fourteen. Nothing is said about cases when a minor who has reached the age of 14, but not yet eighteen, appears to be a victim of a sexual crime. Thereby, those cases are always determined by the Court like an ordinary sexual crime of 'A rape', although reading the article itself, it does not precise the victim's age. It may be literally anybody.

Thus, we will discuss the use of the force etc. in regards to a rape at first. Usually, the use of force, taking advantage of disability and threat are the basis for more severe punishments. In regards to a rape, the use of force and threat are crucial part of the crime's essence, thus the punishment is not determined heavier as it is when other sexual crime against a child is committed. As follows:

(1) A person who by the use of force or threat to directly attack upon the life or body of another or upon the life or body of someone close to that person, forces him to intercourse, shall be punished with an imprisonment from three to ten years.

(2) If because of the crime from item 1 a severe body injury, death or other severe consequences were caused, or the crime was perpetrated by several persons or in an especially cruel and degrading manner, the offender shall be punished with an imprisonment of at least *four* years.

(3) A person that forces another to intercourse with a serious threat that he shall disclose something about this person or about another close to this person, that would harm his

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<sup>35</sup> Ministry of Justice of the Republic of Macedonia, Comparative review of the legislation of the Republic of Macedonia with the Convention on the rights of children, Skopje, May, 2010

honour and reputation, or which would cause some other big evil, shall be punished with an imprisonment from six months to five years.<sup>36</sup>

All this suggests that taking advantage of disability in context of this crime is not regulated.

In regards to the sexual attack upon a minor under the age of fourteen, the situation is opposite. Taking advantage of disability is regulated, yet not the use of force or threat:

(1) A person who commits a statutory rape or some other sexual act upon a minor below the age of fourteen shall be punished with imprisonment of at least eight years.

(2) If the crime from the item 1 is committed by a blood kin in a straight line or brother respectively sister, a teacher, educator, adoptive parent, tutor, stepfather, stepmother, a doctor or another person by misusing his position or while performing sexual violence, shall be punished with an imprisonment of at least ten years.

(3) The punishment from item 2 shall be also applied to a person who commits the crime from item 1 upon a minor below the age of fourteen by misusing his mental illness, mental disorder, helplessness, retarded mental development or some other state, because of which the child is incapable of resistance.

(4) If because of the crimes from items 1 and 2 a severe body injury, death or some other severe consequences were caused, or the crime was perpetrated by several persons, or in an especially cruel and degrading manner, the offender shall be punished with imprisonment of at least ten years or with a life imprisonment.

(5) The perpetrator of the crime given in item 2 of this article will be given a sentence by the court – banning the performance of professional job, activity or duty under the conditions from Article 38-b of this Code.<sup>37</sup>

The CC of RM also establishes the trafficking in minors as a crime against humanity and international law.

Reading carefully the following article, we'll conclude that the use of force, taking advantage of disability, threat, in regards to sexual offences against children are regulated in the matter of the trafficking with human beings as well.

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<sup>36</sup> Criminal Code of the Republic of Macedonia, Section XIX, Article 186

<sup>37</sup> Criminal Code of the Republic of Macedonia, Section XIX – Crimes against sexual freedom and sexual morality, Article 188

Items 1, 2, 5 and 7 are very important to be mentioned here:

(1) A person that recruits, transports, transfers, buys, sells, tucks away or accepts a minor due to exploitation by means of prostitution or any other form of sexual exploitation, pornography, forced labour or servicing, slavery, forced marriages, forced fertilization, unlawful adoption, or a similar relationship or illicit transplantation of human body parts, shall be punished with imprisonment of at least eight years.

(2) A person that will commit the crime from the item 1 by force, serious threat, misinformation or some other form of force, rape, deception, abuse of position or state of pregnancy, infirmity or physical or mental inability of another, or by giving and taking money or other benefit in order to get approval of a person controlling another person, shall be punished with an imprisonment of at least ten years.

(5) If the crime from items (1),(2),(3) or (4) is committed by an official due to proffesion, shall be punished with an imprisonment of at least ten years.

(7) If the crime from this article is committed by a juridicial person, he shall be punished with a fine.<sup>38</sup>

In this context, for a better understanding of the meaning of the term ‘force’, the Criminal Code provides a definition:

“A force shall also mean the use of hypnosis and stunning instruments in order to bring a person in a state of unconsciousness against his/her will or to incapacitate him/her and prevent resistance.”

v. The CC of RM determines the incest as a crime against sexual freedom and sexual morality (Chapter XIX), Article 194 and 194-a.

It can be committed upon a blood kin in a straight line (without respect to the degree of kinship) or upon a brother or sister - which means between blood kins from second degree in side-line.

The Code provides only an imprisonment like a punishment. The perpetrator shall be punished with an imprisonment from five to ten years.

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<sup>38</sup> Criminal Code of the Republic of Macedonia, Section XXXIV – Crimes against humanity and international law, Article 418-g

If the crime is committed upon a minor below the age of fourteen, the perpetrator shall be punished with an imprisonment of at least ten years.

Article 194-a provides an opportunity for the Public Prosecutor to make a claim to the Court, whenever an incest was committed upon a minor below the age of fourteen, to publish the effective Court decision or a brief from it, via mass media, with a certain victim's personal data protection.

**vi.** First of all, the abuse of school and educational settings, care, justice institutions, work places and abuse of any other kind of position is generally regulated in the Section XII of the CC of RM which refers to a criminal offence against official duty, more precisely in the Article 353 named as: "Abuse of an official duty or authority".

Namely, an official who by abusing his/her official position or authority, by exceeding his/her official authority or by non-performance of the official duty will procure for him/her self or for another person some benefits or will cause damage to another, shall be punished with an imprisonment from six months to three years.

This article refers more to a causing of property damage or procuring a property benefit or other form of benefits.

In regards to a children right's protection together with the abuse of the official duty and authority and their connection when a criminal offence is committed, article 189 of the Section XI of the Criminal Code regulates the statutory rape by abuse of position.

Namely, a person who by abusing his/her position will induce to a statutory rape or other sexual act another person who is in a state of inferiority or dependence after him/her or maltreats, intimidates that person or acts in a way of human dignity and human personality's humiliation, shall be punished with an imprisonment of at least five years.

Unfortunately, we cannot consider the first part of the Article as fully compatible with the question asked above.

As follows below, the same Article regulates cases when there is an abuse of position and duty, but only in regards to minors older than fourteen years. Nothing is mentioned about cases when a minor under the age of fourteen was sexually abused by a person misusing his/her position:

'A teacher, educator, adoptive parent, guardian, stepfather, doctor or some other person who by misusing his position commits statutory rape or some other sexual act upon a minor

older than fourteen years, who was entrusted to him for study, education, custody or care, shall be punished with imprisonment of at least ten years.’

This legal inanity may be upgraded by paying attention to the Article 188 of the same section, regulating sexual offences against minors under the age of fourteen. As item 2 of the Article indicates itself, the crime may be committed also by a person qualified in the same way as in the article mentioned above:

“If the crime is committed by a blood kin in a straight line or brother respectively sister, a teacher, educator, adoptive parent, tutor, stepfather, stepmother, a doctor or another person by misusing his position or while performing sexual violence, shall be punished with an imprisonment of at least ten years.”

There is one specific provision applied to these offenders by the Court. Namely, every perpetrator of these crimes will be sentenced with a ban for performing it’s profession, activity or duty in accordance with the Article 33, item 6 and Article 38-b.<sup>39</sup>

According to the Article 33, item 6, this penalty is considered to be a secondary penalty, which means that it cannot be given by the Court like a main sentence, but ONLY in addition to the imprisonment sentence or a probation sentence which determines an imprisonment sentence at the same time.

In the form of specific provision, it can be applied whether a crime of an official duty and authority’s abuse was committed and if based on the nature of the committed crime and circumstances under which the crime was committed, it may be expected that the perpetrator will abuse the activity again in order to repeat committing the crime.<sup>40</sup>

The duration of the penalty is determined always by the Court. It shall not be shorter than one and not longer than ten years, counting from the day of the legal effectiveness of the judgment. Moreover, the time spent in imprisonment does not count towards the duration of the ban.<sup>41</sup>

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<sup>39</sup> Criminal Code of the Republic of Macedonia, Section XIX, Article 188 (5) and Article 189 (3,4)

<sup>40</sup> Criminal Code of the Republic of Macedonia, Section III, Article 38-b, item 1

<sup>41</sup> Criminal Code of the Republic of Macedonia, Section III, Article 38-b, item 4

## 2.2 Child Prostitution

**vii.** The Republic of Macedonia is a party to the Council of Europe Convention on Action against trafficking in Human Beings. The state signed the Convention on 17 November 2005 and ratified it on 27 May 2009. The Convention was enforced on 1 September 2009.

**viii.** The Criminal Code of the Republic of Macedonia does not contain definition of the child prostitution. It only criminalizes the mediation in conducting prostitution like a crime against sexual freedom and sexual morality (section XIX, article 191) and trafficking in minors (section XXXIV, article 418-g) where the exploitation in meaning of prostitution is incorporated.

Nonetheless, there is an answer to this question on the strength of the International public law and principles.

The Republic of Macedonia ratified the UNICEF Convention on the rights of children in 1993.

The Republic of Macedonia also ratified the two optional Protocols on the UNICEF Convention on the rights of the children:

- the Optional Protocol on the involvement of children in armed conflicts
- the Optional Protocol on the sale of children, child prostitution and child pornography

According to the Article 118 of the Constitution of the Republic of Macedonia, every international act that is ratified under the conditions of the Constitution becomes a part of the internal law system and cannot be changed by any written law. In other words, the UNICEF Convention on rights of the children and the two optional protocols are considered to be a national legislation. In this context, the Second Optional Protocol on the sale of children, child prostitution and child pornography which was enforced on 11.07.2003, does provide definition for the offence of the 'child prostitution'.

Although the National Courts during criminal procedures do not make references very often to the international documents which are already ratified, we can make a reference now to the Second Optional Protocol thereto considering it like a part of the National legislation and answer the question properly. As given in the Article 1, item b of the Optional Protocol on the sale of children, child prostitution and child pornography, 'child prostitution' means the use of a child in sexual activities for remuneration or any other form of consideration.



The Criminal Code of the Republic of Macedonia in accordance with Article 4(3) of the Optional Protocol on the sale of children, child prostitution and child pornography took the necessary legislative measures to criminalize the conduct explained above, but it does not provides one and general definition of child prostitution on the basis of definition provided in this already ratified international document.

Thereby, we can only explain the compatibility of the definition provided in the Optional Protocol on the sale of children, child prostitution and child pornography with the one provided by the Lanzarote Convention.

#### COMPATIBILITY:

Lanzarote Convention definition provided:

“For the purpose of the present article, the term “child prostitution” shall mean the fact of using a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment, regardless if this payment, promise or consideration is made to a child or to a third person.”<sup>42</sup>

Optional Protocol on the sale of children, child prostitution and child pornography definition provided:

“Child Prostitution means the use of a child in sexual activities for remuneration or any other form of consideration.”<sup>43</sup>

In general, these two definitions provided are compatible. They both stress that child prostitution means the use of / fact of using a child for / in sexual activities.

As we can see, these are kind of linguistic differences which do not differ a lot. Apparently they do not change the definition’s entity, the sense of it.

In regards to the second part of definitions, they both explain the use of a child in sexual activities for remuneration or any other form of consideration.

The difference comes to a concrete definition provided in the Lanzarote Convention – it underlines the money like form of remuneration whereas for comparison the one in the

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<sup>42</sup> Law on ratification of the Lanzarote Convention, Article 19, item 2, Gazette of RM n.135, 08.10.2010

<sup>43</sup> Law on ratification of the Optional Protocol to the Convention on the rights of the child on the sale of children, child prostitution and child pornography, Article 2, item b, Gazette of RM n.44, 03.07. 2003

protocol says ‘for remuneration’ without explicitly stressing money like a remuneration form.

Furthermore, the Lanzarote Convention explicitly declares that the remuneration or consideration may not be only given, but promised as well. The definition of the Protocol does not specify whether the money (the remuneration or any other form of consideration) should be given, promised, or both in order to know if there was a child prostitution or not.

In similar way, Lanzarote’s definition emphasizes the role not only of the child, but of a third person as well. The Protocol does not specify anything: neither the forms in which the remuneration or consideration may be given or promised, neither if they should be given, only promised or given and promised at the same time, nor if they are given/promised to a child or a third person.

At the end, we cannot conclude more than this. Whether we consider a definition should be more general (so that many different cases may be subsumed under it) or if we consider it should be concrete, explicit and concise, these are those few differences which may mean more or less.

**ix.** The national legislation does criminalize both the recruiter and the user. As given in the section XXXIV, Article 418-g of the Criminal Code of the Republic of Macedonia regarding to trafficking in minors, both the recruiter and the user shall be punished if committing the crime.

In regards to the recruiter:

A person that recruits, transports, transfers, buys, sells, tucks away or accepts a minor due to exploitation by means of prostitution or any other form of sexual exploitation, pornography, forced labour or servicing, slavery, forced marriages, forced fertilization, unlawful adoption, or a similar relationship or illicit transplantation of human body parts, shall be punished with imprisonment of at least eight years.<sup>44</sup>

A person that will commit the crime from the item 1 by force, serious threat, misinformation or some other form of force, rape, deception, abuse of position or state of pregnancy, infirmity or physical or mental inability of another, or by giving and taking

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<sup>44</sup> Criminal Code of the Republic of Macedonia, SECTION XXXIV, Article 418-g, item 1

money or other benefit in order to get approval of a person controlling another person, shall be punished with an imprisonment of at least ten years.<sup>45</sup>

In regards to the user:

A person who uses or procures the sexual services or any other form of exploitation of a minor of whom he knew or ought to know that is a victim of trafficking in human beings, shall be punished with imprisonment of at least eight years.<sup>46</sup>

There is one more crime regulated in the CC of RM like a crime against sexual freedom and sexual morality, but it refers only to the mediation in conducting prostitution. This does not refer specifically to the child prostitution.

### **2.3 Child Pornography**

Child Pornography in General:

**x.** The Republic of Macedonia signed the Convention on Cybercrime on 23/11/2001 and ratified it on 15/09/2004. The Convention was enforced on 1/1/2005.

**xi.** Definition of child pornography is provided by the CC of RM. There is a special part of the Code, Section XIII, article 122 respectively, which gives an explanation of many different concepts used in the Code. Apparently, one of them is the child pornography. The term ‘child pornography’ is defined as follows:

“Child pornography shall mean pornographic material which visually shows an explicit sexual activities with minor, or an explicit sexual activities with a person looking like a minor, or real pictures which show an explicit sexual activities with a minor.”<sup>47</sup>

Definition provided in the Lanzarote Convention:

“For the purpose of the present article, the term “child pornography” shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes.”<sup>48</sup>

COMPATIBILITY:

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<sup>45</sup> Criminal Code of the Republic of Macedonia, SECTION XXXIV, article 418-g, item 2

<sup>46</sup> Criminal Code of the Republic of Macedonia, SECTION XXXIV, article 418-g, item 3

<sup>47</sup> Criminal Code of the Republic of Macedonia, Section XIII, article 122, item 24

<sup>48</sup> Law on ratification of the Lanzarote Convention, chapter VI, article 20(2), Gazette of the RM 135, 08.10. 2010

These two definitions are generally compatible in the first part that refers to the explanation of the material. It is a material that *visually* depicts a child engaged in sexually explicit conduct/shows explicit sexual activities with a minor.

Firstly, we see that the CC of the RM does not use the term ‘child’ but the term ‘minor’. We consider these terms to be synonyms yet there is a terminological difference.

A child in terms of the Lanzarote Convention is any person under the age of 18 years. Similarly, a child like victim of a crime in terms of the CC, shall mean a minor up to 18 years. It is the same with every other national law which provides a definition of a child.

Unfortunately, The CC of RM as well as the other laws is not concrete and explicit. There is not terminological compatibility. Namely, looking through national legislation, we notice the use of a few terms a: child, minor, juvenile, person who is not full of age, person up to 18 years, younger juvenile, an older juvenile respectively - younger major.<sup>49</sup>

Secondly, the CC does not specify whether the sexual activities in which a child is a part of, should be real or simulated, although it mentions afterwards ‘real pictures which shows sexual activities with a minor.’ Similarly, I am wondering what does the term ‘real pictures’ mean.

Furthermore, it also includes the term ‘a person who looks like a minor’, without explicitly explaining the meaning of that term.

At the end, nothing is said about depiction of a child’s sexual organs for sexual purposes.

**xii.** Yes, it is compatible. As it is required in the Article 20(1a) to (1f) of the Lanzarote Convention, the Republic of Macedonia did take the necessary legislative measures to ensure that every intentional conduct in regard to child pornography is criminalized in the Criminal Code of the Republic of Macedonia.

As follows, the article 193-a ‘production and distribution of child pornography’ of the CC of the RM:

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<sup>49</sup> Ministry of Justice, Comparative review of the legislation of the Republic of Macedonia with the Convention on the rights of children, p. 14, Skopje, may 2010

(1) A person who produces child pornography in order to distribute it, or he/she transports it or offers it or it makes the child pornography available otherwise, shall be punished with an imprisonment of at least five years.

(2) A person who obtains child pornography for him/herself or for another, or possesses child pornography, shall be punished with an imprisonment from five to eight years.

(3) If the crime from items (1) and (2) of this Article is committed using computer system or by any other means of mass communication, shall be punished with an imprisonment of at least eight years.

(4) If the crime from this Article is committed by juridical person, it shall be punished with a fine.

With regard to their compatibility, this Article criminalizes every conduct that is mentioned in the Lanzarote Convention.

**xiii.** The State has implemented a lot of measures for children protection. The First World Children Embassy Megjashi; UNICEF; the Commission of Children rights protection and the Children Parliament of the Republic of Macedonia, provide continuous children protection through their work. Moreover, the Ministry of labour and social justice has established a special register for people foredoomed for minor's sexual abuse and paedophilia by an effective juridical decision.

In regards to pornographic materials, the first control measures are noticeable in the last few years. Namely, this year a special consulting body on children protection from illegal contents, threatening and activities on internet, established within the Government of the Republic of Macedonia held a meeting for the first time. The project will seek to reduce the dangers and harmful effects on children and youth. In the upcoming period an opening of helpline is planned, which will help to increase the knowledge of parents and children for self-protection, as well as to guide every person who is willing to report child pornography on the Internet. Parents should use free software tools to protect children online, which can be purchased in any IT shop or downloaded from the Internet. They will be able to set parameters when using Internet by their children, time can be used as measure, as well as pages and the content which can be seen.

There are some key areas of concern covered by the project, including any illegal content, child pornography, online courting, hate speech and the protection of children. One of the tasks included in the project is formation of a Centre for Raising Awareness among the local

population. They will be responsible for creating national strategies to raise awareness among children, youth, parents and teachers. Its work will be coordinated by the National Internet Hotline Provider.

Furthermore, the national Commission for children rights of the RM did a special national program on children rights protection in RM (2005-2015). The sixth strategic aim of the Ministry of Justice and Ministry of Internal Affairs includes disabling media presentation of violence, pornography and inconvenient behaviour, respectively a development of appropriate guidelines for a child protection from information and material which are disadvantageous and destructive.

The State is a party to the Lanzarote Convention, but it did not use the reservation right that has been given to the parties in the Lanzarote Convention.<sup>50</sup>

**xiv.** Yes, it does. In Section XIX, article 193 (3) to (6) of the Criminal Code of the Republic of Macedonia, the State does criminalize both the intentional abuse of a minor and compelling of a minor to participate in pornographic performances.

At first, a person who will abuse a minor for making of audiovisual pictures or other items with pornographic content or for participating in a pornographic performance, as well as the one who participates in the performance, they both shall be punished with an imprisonment from three to five years.

Secondly, a person who will compel a minor for making and recording pictures or other items with pornographic content or for participating in a pornographic performance, shall be punished with an imprisonment of at least eight years.

Thirdly, if this crime is committed upon a minor below the age of fourteen, the perpetrator shall be punished with an imprisonment of at least four years.

Moreover, if the crime is committed by a juridical person, it shall be punished with a fine. All the objects used for committing the crime shall be taken away as well.

The Criminal Code does not specify the difference between recruitment and coercion, although it criminalizes the abuse of a minor for making of audiovisual pictures or other items with pornographic content or for participating in a pornographic performance and the

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<sup>50</sup> Law on ratification of the Lanzarote Convention, Gazette of the RM 135, 08.10. 2010

compel of a minor for making and recording pictures and other items with pornographic content, as well as for participating in pornographic performance. The abuse and compel are part of the crime named as: 'showing pornographic materials to a minor'.<sup>51</sup>

The term 'abuse' is not explained or defined. Additionally, the term 'compel', which refers to the term 'coercion', may be explained only in regards to compel like specific crime. Namely, the crime of compel belongs to the section of crimes against human rights and freedoms, not to the section of crimes against sexual freedom and sexual morality.

As a result of this, we can only use the definition provided in that Article and apply it afterwards for better understanding of what a coercion of a child for participating in pornographic performances would mean. Namely, a compel means compelling of a person by using force or serious threat, to do or not to do something, or to put up with something.

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In this sense, compel of a child for participating in pornographic performance would be any compelling of a child for participating in pornographic performance by using force<sup>53</sup> or serious threat.

The State's approach to the attendance of pornographic performances involving the participation of children includes taking different measures for prevention and intervention in cases of child pornography, through implementation of national strategies, plans, projects and trainings.

This year the Government will launch a project for protection of children and youth from illegal and harmful internet content which poses a threat to their proper development. The project will encompass measures and establishment of bodies involving representatives from the whole society, coordinated by the Ministry of Information Society and Administration.

The project will develop in four directions: establishment of a national centre for safer internet; development of a national programme and an action plan for prevention and protection of children and youth from internet abuse; enhancement of control and

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<sup>51</sup> Criminal Code of the Republic of Macedonia, SECTION XIX, article 192 (3) and (4)

<sup>52</sup> Criminal Code of the Republic of Macedonia, Section XV, article 139 (1)

<sup>53</sup> "A force shall also mean the use of hypnosis and stunning instruments in order to bring a person in a state of unconsciousness against his/her will or to incapacitate him/her and prevent resistance.", Criminal Code of the Republic of Macedonia, Section XIII, article 122 (18)

sanctioning; and state's accession to three international associations for protection of children from this type of threat (Safer Internet Programme of the European Commission, Insafe - network of Awareness Centres in 27 countries in the European Union, Norway, Iceland and Russia, and INHOPE - global network of internet hotlines).

Training on “Online child pornography” realized in the Ministry of Internal Affairs of the Republic of Macedonia (follows as MIA of RM), like a part of the bilateral cooperation between the MIA of RM and the Embassy of the Republic of France in RM, guided by French experts from the Department of repression of child pornography on the Internet, Mr. Sylvain Beck and Mr. Rezhis Vilet.

Action plan for prevention and handling of sexual abuse of children and paedophilia 2009-2012, with priorities like taking measures to prevent and sensitize the general public for this negative phenomenon as well as to assist and protect victims of sexual abuse and paedophilia, introduction of measures and treatment program for persons convicted of these offenses while serving the sentence and after completion of the sentence in order to prevent recidivism, establishment of a mechanism for the coordination of stakeholders from all areas of the prevention and handling of sexual abuse of children and paedophilia, establishment of continuous education of professionals to recognize and take protection measures, establishment of a single record, conduct monitoring and evaluation, promotion of international cooperation and implementation of all the international Conventions regarding the children rights and their protection, especially in the field of sexual abuse.<sup>54</sup>

Cooperation of the MIA of RM, NVOs, National Committee to combat human trafficking and illegal migration.

A strategy to combat Human Trafficking and Illegal Migration in the RM; National action plan to combat trafficking in human beings and Illegal Migration in the RM and an action plan to combat trafficking in children in the RM, defining the strategic goals, like prevention, support and protection of the victims and witnesses, international cooperation etc. <sup>55</sup>

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<sup>54</sup> Ministry of Labour and Social Justice, Action plan for prevention and handling of sexual abuse of children and pedophilia, 2009-2012 year, Skopje, 2009

<sup>55</sup> The Government of the Republic of Macedonia, National comitee to combat human trafficking and illegal migration in the republic of Macedonia, Skopje, March 2006



The State is a party to the Lanzarote Convention, but it has not used the reservation right that has been given in the Lanzarote Convention.<sup>56</sup>

## 2.4 Corruption of Children

**xv.** Yes, it does. Looking through the CC of RM, we find two different crimes belonging to the same section of crimes against sexual freedom and sexual morality, but both criminalizing the intentional causing of a child to witness sexual abuse or sexual activities, without necessarily having to participate. The first article refers to sexual satisfaction in advance of another. Actually, the second part (item 2) of the article refers to question asked. As follows:

(2) A person who performs a sexual act in front of a child, or who induces a child to perform such an act in front of him or in front of another, shall be punished with an imprisonment from three to five years.<sup>57</sup>

The second article refers to showing of pornographic materials to minor. By careful reading of its first item, we find that part which refers to intentional causing of a child to witness sexual activity:

(1) A person who sells, shows or by public presentation or in some other way makes available pictures, audio-visual or other objects with a pornographic content to a minor under the age of fourteen, or shows him a pornographic performance, shall be punished with an imprisonment from six months to three years.<sup>58</sup>

A pornographic performance is a sexual act. If you demonstrate pornographic performance to a child, by kind of analogy - that means you are causing of that child to witness such sexual activity.

We can relate the term “causing” to the term “abet” used in the CC of RM to describe the situation of intentionally causing of somebody to make a decision or strengthen the already made one for committing a crime. According to the article 23 of CC of RM, a person who

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<sup>56</sup> Law on ratification of the Lanzarote Convention, Gazette of the RM 135, 08.10. 2010

<sup>57</sup> The Criminal Code of the Republic of Macedonia, section XIX, article 190 (2)

<sup>58</sup> The Criminal Code of the Republic of Macedonia, section XIX, article 193 (1)

abets another intentionally to commit a crime, will be punished as if he had committed the crime himself.<sup>59</sup>

The abet or making a somebody's decision for committing a crime may be effectuated in different ways: by threat, force, bilk, seeming distraction from committing the crime etc. In short, any form of psychological influence may be used. The eventual person's vacillation may be also suspended by encouragement, promise prize, assistance while committing the crime, promise of crime's suppression, promise of preventing the disclose of the crime etc.<sup>60</sup>

The term "abet" is not defined in the CC of RM, but its meaning is being interpreted and explained and by the Macedonian legal theory.

## 2.5 Solicitation of Children for Sexual Purposes

**xvi.** The State criminalizes the "Allurement of a child under the age of fourteen to sexual intercourse or other sexual act." <sup>61</sup>

The age of the perpetrator is not specified. In other words, this crime may be committed by any perpetrator who may appear playing that role.

A general clause is used to describe the subject who's committing the crime. As already mentioned, these are called general crimes in criminal theory.<sup>62</sup>

Namely, a person who bamboozles a minor under the age of fourteen into statutory rape or other sexual act or child pornography production by using a computer networks communication devices or in other manner (and is scheduling a meeting as well) and a meeting with the minor is realized with such an intent, he/she shall be punished with an imprisonment from one to five years.

The CC of RM states the intent of the perpetrator to hold meeting with a minor at first and secondly, most importantly as well- it stresses at the end that the meeting must be held. Apparently if a meeting is not proposed and realized consequently, we cannot consider the crime as committed and to accuse the perpetrator afterwards.

Nothing is said about allurement of a minor older than fourteen years.

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<sup>59</sup> Academician Phd. Vlado Kambovski, Criminal Law-general part, p.366, Skopje, 2011

<sup>60</sup> Academician Phd. Vlado Kambovski, Criminal Law, general part, p.367, Skopje, 2011

<sup>61</sup> The Criminal Code of the Republic of Macedonia, section XIX, article 193-b

<sup>62</sup> Academician Phd. Vlado Kambovski, Criminal Law-general part, p.146, Skopje, 2011

**xvii.** The State has determined and regulated both the aid and abetment, as well as the attempt, but if considered generally. Namely, the CC of RM is divided into two sections: a general part and a special part. The special part is dedicated to specified crimes and sanctions provided for every different crime, the first part (the general one) is dedicated to criminal liability, sanctions and measures in general, rehabilitation, application of the criminal code, definitions part etc.<sup>63</sup> Therefore, the aid, abetment and the attempt to a crime are explained in the general part of the CC, so they may be applied to any of the crimes mentioned afterwards in the special part. Apparently to the activities mentioned in the subsections as well.

Thus if we apply those articles to the crimes mentioned in subsections a, b, c, d and e, we can conclude:

The aide: (in regard to every crime mentioned and explained above):

Like a person who assists<sup>64</sup> in the perpetration of a crime intentionally, an aide shall be punished as if he had committed the crime by himself or more mildly.<sup>65</sup>

Attempt: A person that intentionally starts the perpetration of a crime, but who does not complete it, shall be punished as for an attempted crime for which an imprisonment of five years or more severe punishment may be pronounced according to the law. For the attempt of every other crime, the perpetrator shall be punished only when the law explicitly prescribes the punishment of an attempt. The perpetrator shall be punished for an attempt within the limits of the punishment prescribed for the crime, and he may be punished more mildly.<sup>66</sup>

In other words, because an imprisonment of five years or more severe punishment is provided by the CC almost for every activity mentioned above, we can say that the attempt is always punishable in regards to these activities, with a few exceptions in cases of:

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<sup>63</sup> Academician Phd. Vlado Kambovski, Criminal Law general part, p.101, Skopje 2011

<sup>64</sup> For the meaning of the term “assistance” / “aid”: like an assistance of the crime will be considered especially: giving advice or instructions for committing the crime; making means available to the offender for committing the crime; removal of hindrances for perpetrating the crime; as well as giving promise for suppression of the crime, the offender, the means used for commitment of the crime, the traces or the items obtained by the crime, Criminal Code of the Republic of Macedonia, general part, Section II, article 24 (2)

<sup>65</sup> Criminal Code of the Republic of Macedonia, general part, section II, article 24 (1)

<sup>66</sup> Criminal Code of the Republic of Macedonia, general part, section II, article 19

- Performing a sexual act in front of a child, or inducing a child to perform such an act in front of him or in front of other;
- Enabling sexual services for profit;
- Mediation in prostitution by a legal entity;
- Procuring and enabling a minor to sexual acts by a legal entity;
- Showing a pornographic material or performance to a minor under the age of fourteen whether it was done through mass media or not;
- compelling a minor under the age of fourteen for making and recording pictures or other items with pornographic content or for participating in a pornographic performance, whether this crime was committed by an individual or by a legal entity;
- Producing and distribution of child pornography by a legal entity;
- Allurement of a child under the age of fourteen to sexual intercourse or other sexual act;
- Trafficking in minors by legal entity;

#### Abetting:

A person that intentionally abets another to commit a crime shall be punished as if he had perpetrated the crime by himself. If the person intentionally abets another to commit a crime, for which an imprisonment sentence of five years or a more severe sentence may be pronounced, and there is not even an attempt to commit a crime, shall be punished as for an attempted crime<sup>67</sup>.

According to this, abetting to any of the sexual activities mentioned in subsections above is punishable, but only in relation to the second part of the Article (item 2). Consequently, the perpetrator shall be punished always as for an attempted crime no matter if there was not even an attempt to commit the crime. This conclusion comes from the fact that all those crimes explained above are punishable with an imprisonment of five or more years.

The exceptions given above (Performing a sexual act in front of a child, or inducing a child to perform such an act in front of him or in front of another, Enabling sexual services for profit, Mediation in prostitution by a legal entity, Procuring and enabling a minor to sexual acts by a legal entity, Showing a pornographic material or performance to a minor under the age of fourteen whether it was done through mass media or not, Compelling a minor under

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<sup>67</sup> Criminal Code of the Republic of Macedonia, general part, article 23 (1) and (2)

the age of fourteen for making and recording pictures or other items with pornographic content or for participating in a pornographic performance, whether this crime was committed by an individual or by a legal entity, Producing and distribution of child pornography by a legal entity, Allurement of a child under the age of fourteen to sexual intercourse or other sexual act and Trafficking in minors by legal entity) are actually crimes of whose commitment the abettor will be punished as if he had committed the crime by himself.

This comes out from the fact the sanctions provided by the law for committing those crimes are less than an imprisonment of five years, thus they cannot and do not relate to the second part of the article, where the perpetrator shall be punished as for an attempted crime.

## 2.6 Corporate Liability

**xviii.** Yes, it does. Item 5 from the Second chapter of the CC of RM regulates the legal entities criminal liability. According to the CC of RM, legal entities are hold criminally liable when a crime is committed by a leading person, an employee or a representative.

- The criminal liability of the legal entity must be provided by the law
- The crime shall be committed by a leading person
- The crime shall be committed whether on behalf of the legal entity ( cases when the perpetrator appears like its interest representative ); in the expense of the legal entity ( the legal entity entails the consequences – legal and material ) and in its favour ( whenever the legal entity has gained immediate benefits from the activity of the leading person ).<sup>68</sup>

There are differences between the leading person liability and liability of the employers in regards to the conditions under which they are considered to be liable.

A legal entity is held criminally liable in cases that are stipulated in laws for crimes committed by a leading person, on behalf of, in the expense of or in favour of the legal entity.<sup>69</sup>

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<sup>68</sup> Academician Phd.Vlado Kambovski, special part, p.553, Skopje, 2011

<sup>69</sup> Criminal Code of the Republic of Macedonia, general part, section II, article 28-a (1)

These are conditions under which the legal entity is considered to be liable when a crime by leading person<sup>70</sup> has been committed. They're cumulative:

Conditions in regards to an employee or a representative are different. Namely, the first two are both cumulative with any of those given after them, started with 'if'. As follows:

- The crime shall be committed by an employee or a representative
- A significant propertied benefice shall be gained or significant propertied damage shall be caused
- And if:

The implementation of a conclusion, order or other decision or an approval given by the management body, governance body or supervisory body means commitment of a crime.

The crime is committed because of omission of an obligatory supervision by the management body, governance body or supervisory body.

The management body, governance body or supervisory body did not prevent the crime or concealed it or did not report the crime before instigating the criminal procedure against the perpetrator.<sup>71</sup>

Under these conditions provided by the criminal law, all the legal entities<sup>72</sup> are held criminally liable, with the exception of the State.

<sup>70</sup> About the term "leading person", the Criminal Code of the Republic of Macedonia, general part, section XIII, article 122 (7): "a person within the legal entity, who considering his/her function or based on special authorization in the legal entity, is entrusted with a certain circle of matters which concern the execution of legal regulations, or regulations that are enacted on the basis on a law or a general act of the legal entity, in the management, use and disposition of property, the management of the production or some other economic process, or the supervision over them. An official person is also considered to be a responsible person, when this concerns crimes where a responsible person is found to be perpetrator, and which crimes are not foreseen in the chapter on crimes against official duty, i.e. crimes by an official person foreseen in some other chapter of this Code. When this code specifically stipulates, a responsible person shall also be considered the person who performs a special function or an authorization or is entrusted to independently perform certain operations within the foreign legal entity, as well as the person which is a representative of the foreign legal entity within the Republic of Macedonia."

<sup>71</sup> Criminal Code of the Republic of Macedonia, general part, section II, article 28-a (2) / Academician Phd. Vlado Kambovski, Criminal Law, special part, p.554,555, Skopje, 2011

<sup>72</sup> About the term "legal entity", Criminal Code of the Republic of Macedonia, section XIII, article 122 (6): "A legal entity shall mean: the Republic of Macedonia, units of local self-government, political parties, public enterprises, companies, institutions and other associations, funds, financial organizations, and other organizations specified by law, which are registered as legal entities, and other communities and organizations to which have been recognized as having the property of a legal entity. A foreign legal entity shall mean: a public enterprise, institution, fund, bank, company or any other form of organization in accordance with the laws of a foreign country pertaining to the performance of economic, financial, banking, trade, service or other activities, and which has a headquarters in another country or a branch office in the Republic of Macedonia or has been founded as an international association, fund, bank or institution."

**xix.** Administrative liability of legal entities is anticipated in cases of committing administrative torts. Civil liability cannot be applied to legal entities, but only on individuals.

CC of RM provides criminal liability of legal entities. Actually, they are liable for committed torts. On the basis of their liability for committed torts they become liable for committed offences as well. At the end they become criminally liable. Their criminal liability is provided in the Novel from 2004, when a special system of punishments was established by the State.<sup>73</sup>

**xx.** No, it does not. The CC of RM provides parallel liability, which means that the corporate liability does not exclude the individual liability in any case. <sup>74</sup> Additionally, the legal entity is hold liable for committing a crime even if there are obstacles as a fact of matter or legal obstacles for determination of the perpetrator's criminal liability.<sup>75</sup>

## **2.7 Aggravating Circumstances**

**xxi.** Yes, it does. Generally, the aggravating circumstances may be found whenever an aggravating consequence was caused. The difference is, they must be found while committing the crime not afterwards like consequences which are caused. In this sense, causing of an aggravating consequence is regulated in the second chapter of the CC of RM which refers to the crime and criminal responsibility. Namely, when a severe consequence emanated from the committed crime and for which the law provides heavier punishment, the punishment may be pronounced only if the offender acted negligently in relation to this consequence.<sup>76</sup> They are diverse and always depend on the committed crime.

In case of crimes against sexual freedom and morality, in regards to children's rights, these aggravating circumstances can be found:

- Blood kinship in a straight line, brother or sister
- Perpetrator with capacity of: teacher, educator, adoptive parent, tutor, stepfather, stepmother, doctor or any other person by misusing his/her position

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<sup>73</sup> Academician Phd.Vlado Kambovski, special part, p.553, Skopje, 2011

<sup>74</sup> Criminal Code of the Republic of Macedonia, general part, section II, article 28-b (1) / Academician Phd. Vlado Kambovski, Criminal law-special part, p.556, Skopje, 2011

<sup>75</sup> Criminal Code of the Republic of Macedonia, general part, section II, article 28-b (2)

<sup>76</sup> The Criminal Code of the Republic of Macedonia, general part, section II, article 15

- Crime committed while performing family violence
- Misusing mental illness, mental disorder, helplessness, retarded mental development or other state because of which the child is incapable of resistance
- Severe body injury, death or some other heavier consequences are caused
- Crime is committed by several persons together
- Crime is committed in an especially cruel and degrading manner
- Misuse of position
- Involvement of a child
- Crime committed through mass media, computer system
- Crime committed upon a minor under the age of fourteen
- Crime committed by an official
- Crime committed by using force, serious threat, misinformation or some other form of force, by rape, deception, abuse of position or state of pregnancy, infirmity or physical or mental inability of another, or by giving and taking money or other benefit in order to get approval of a person controlling another person

There are differences regarding crimes where different aggravating circumstances may be applied, impact on the determination of the perpetrator's liability and sanctions provided by the law, which maintain different although heavier than usual. As follows:

- In case of a rape, with regards to a minors older than fourteen years, under the following aggravating circumstances, the perpetrator will not be punished with an imprisonment from three to ten years, but instead:

If a severe body injury, death or other severe consequences were caused, or the crime was perpetrated by several persons or in an especially cruel and degrading manner, the offender shall be punished with imprisonment of at least *four* years.<sup>77</sup>

- In case of sexual attack upon a minor under the age of fourteen committed under some aggravating circumstances, the perpetrator won't be usually given an imprisonment of at least eight years, but instead:

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<sup>77</sup> The Criminal Code of the Republic of Macedonia, special part, section XIX, article 186 (2)



If the crime is committed by a blood kin in a straight line or brother respectively sister, a teacher, educator, adoptive parent, tutor, stepfather, stepmother, a doctor or another person by misusing his position or while performing sexual violence, shall be punished with an imprisonment of at least ten years and will be also given a sentence by the court – banning the performance of professional job, activity or duty under the conditions from Article 38-b of the Code.<sup>78</sup>

The same punishment shall be also applied to a person who commits this crime by misusing his mental illness, mental disorder, helplessness, retarded mental development or some other state, because of which the child is incapable of resistance.<sup>79</sup>

If because of a severe body injury, death or some other severe consequences were caused, or the crime was perpetrated by several persons, or in an especially cruel and degrading manner, the offender shall be punished with imprisonment of at least ten years or with a life imprisonment.<sup>80</sup>

- In case of a statutory rape by misuse of position, under aggravating circumstances, which are misuse of position by a teacher, educator, adoptive parent, guardian, stepfather, doctor or some other person, when committing the crime upon a minor older than fourteen who was entrusted to him for study, education, custody or care:

The perpetrator shall be punished with an imprisonment of at least ten years ( instead of at least five), plus he will be sentenced by the Court with a ban to perform further professional job, activity or duty.<sup>81</sup>

- In case of satisfying sexual passions in front of another (involvement of a child):

If the perpetrator induces a child to exert sexual acts in front of the perpetrator himself or in front of another, instead of punished with a fine or an imprisonment up to one year, the perpetrator shall be punished with an imprisonment from three to five years.<sup>82</sup>

- In case of performing pornographic materials to a minor ( through mass media):

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<sup>78</sup> The Criminal Code of the Republic of Macedonia, special part, section XIX, article 188 (2) and (5)

<sup>79</sup> The Criminal Code of the Republic of Macedonia, special part, section XIX, article 188 (3)

<sup>80</sup> The Criminal Code of the Republic of Macedonia, special part, section XIX, article 188 (4)

<sup>81</sup> The Criminal Code of the Republic of Macedonia, special part, section XIX, article 189 (2) and (3)

<sup>82</sup> The Criminal Code of the Republic of Macedonia, special part, section XIX, article 190 (2)

If the crime is committed through mass media, the perpetrator shall be punished with an imprisonment from three to five years, instead of with an imprisonment from six months to three years.<sup>83</sup>

- In case of production and distribution of child pornography( use of computer system or any kind of mass communication):

A person who produces child pornography in order to distribute it, transports or offers or makes a child pornography available otherwise or obtains it for him/herself or for another, or possesses child pornography and if it is committed using computer system or by any other means of mass communication, shall be punished with an imprisonment of at least eight years, instead of at least five or from five to eight years.<sup>84</sup>

- In case of incest ( the age of the victim):

If the crime is committed upon a minor under the age of fourteen, the perpetrator shall be punished with an imprisonment of at least ten years, instead of with an imprisonment from five to ten years.<sup>85</sup>

- In case of trafficking in minors:

If the crime is committed by using force, serious threat, misinformation or some other form of force by rape, deception, abuse of position or state of pregnancy, infirmity or physical or mental inability of another, or by giving and taking money or other benefit in order to get approval of a person controlling another person, the perpetrator shall be punished with an imprisonment of at least ten years, instead of at least eight. The same punishment shall be applied whenever the crime is committed by an official during his/her professional job performance. <sup>86</sup>

## 2.8 Sanctions and Measures

**xxii.** From all different sanctions which are provided by the CC of RM, the above mentioned crimes are sanctioned generally with an imprisonment. This sanction which

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<sup>83</sup> The Criminal Code of the Republic of Macedonia, special part, section XIX, article 193 (2)

<sup>84</sup> The Criminal Code of the republic of Macedonia, special part, section XIX, article 193-a (3)

<sup>85</sup> The Criminal Code of the Republic of Macedonia, special part, section XIX, article 194 (2)

<sup>86</sup> The Criminal Code of the Republic of Macedonia, special part, section XIX, article 418-g (2) and (5)

includes deprivation of liberty is always pronounced like main sentence.<sup>87</sup> In general, the CC of RM for the above mentioned crimes, provides an imprisonment from six months up to life imprisonment. Its duration differs and always depends on the committed crime.

Namely, an imprisonment may not be shorter than thirty days, or longer than 15 years.<sup>88</sup> Nonetheless, there are crimes for which a life imprisonment sentence is prescribed. In those cases, the life imprisonment sentence may not be prescribed as the only main punishment and it cannot be pronounced for an offender who doesn't attain the age of twenty one at the time when the crime was committed. There is also an alternative for these crimes: an imprisonment of 20 years may be pronounced instead of a life imprisonment.<sup>89</sup>

The second sanction provided by the CC of RM is the fine, which appears to be pronounced every time one of the above mentioned crimes was committed by a legal entity.

According to the CC of RM, a fine may be applied either like a main or a secondary sentence. In the second case, it is pronounced together with an imprisonment sentence or together with a suspended sentence which establishes an imprisonment punishment.<sup>90</sup>

In regard to the crimes mentioned above, we can conclude that the fine is always provided like a main sentence.

So when pronounced like a main sentence, the fine is always pronounced in daily fines, where the number cannot be less than five and not more than 360 daily fines.<sup>91</sup>

The third and last sanction is a ban for performing profession, activity and duty. Namely, it can be pronounced only like a secondary sentence in addition to an imprisonment sentence or to a suspended sentence which establishes an imprisonment punishment.<sup>92</sup>

The court shall determine the duration of the ban. Anyway, it cannot be less than one or more than ten years from the day of the legal effectiveness of the judgment. Moreover, the time spent in imprisonment is not considered within the duration of the ban.<sup>93</sup>

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<sup>87</sup> The Criminal Code of the Republic of Macedonia, general part, section III, article 33 (2)

<sup>88</sup> The Criminal Code of the Republic of Macedonia, general part, section III, article 35 (1)

<sup>89</sup> The Criminal Code of the Republic of Macedonia, general part, section III, article 35 (1), (3) and (4)

<sup>90</sup> The Criminal Code of the Republic of Macedonia, general part, section III, article 33 (3)

<sup>91</sup> The Criminal Code of the Republic of Macedonia, general part, section III, article 38 (1)

<sup>92</sup> The Criminal Code of the Republic of Macedonia, general part, section III, article 33 (6)

<sup>93</sup> The Criminal Code of the Republic of Macedonia, general part, section III, article 38-b (4)

The extradition is regulated with the Law on International Cooperation in criminal matters (Official Gazette of the RM n. 07-3754/1 from 14/08/2010), section IV.

Extradition on the basis of an arrest warrant is allowed only for crimes for which the national legislation provides an imprisonment sentence of at least one year and it is permitted only for implementing of an effective imprisonment sentence pronounced, providing that the person has at least four months to accomplish the whole penalty. An extradition cannot occur for conducts which are not criminalized by the CC of the RM and are not for a crime committed before the extradition, which is not actually an object of the extradition request.<sup>94</sup> This stays as a rule except in two cases. The first one is when an approval is given by an authorized authority. The authorized authority also submits the necessary documents, together with a statement of the extradited person given on a minute book. The second case is when the extradited person did not left the country where he was extradited although he had a chance for that within 45 days after his/her release or has already left the country, but went back there again.<sup>95</sup>

The assumptions for an extradition's approval when the extradition is required from RM, conditions under which the extradition may be conducted and ways it is performed, are precisely stated and explained in the Law. This section incorporates part dedicated to cases when the extradition is required from the RM and one more separated part dedicated to cases of an extradition request to RM from a foreign country.

Demand for an extradition from RM cannot be submitted after 40 days from the day when the person was put in custody for the purposes of the extradition.<sup>96</sup> The decision over extradition is made by the Minister for Justice of the RM.<sup>97</sup>

An extradition is not allowed for political crimes or crimes in relation to those crimes. An internationally committed crime, crime of terrorism as well as an attempt on the president's life and the life of his family, are not considered as political crimes in this sense.<sup>98</sup>

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<sup>94</sup> Law on International Cooperation in criminal matters (Official Gazette of the RM n. 07-3754/1 from 14/08/2010), section IV, first part, article 50 and 51

<sup>95</sup> Law on International Cooperation in criminal matters (Official Gazette of the RM n. 07-3754/1 from 14/08/2010), section IV, first part, article 51

<sup>96</sup> Law on International Cooperation in criminal matters (Official Gazette of the RM n. 07-3754/1 from 14/08/2010), second part, article 63 (1)

<sup>97</sup> Law on International Cooperation in criminal matters (Official Gazette of the RM n. 07-3754/1 from 14/08/2010), second part, article 66 (1)

<sup>98</sup> Law on International Cooperation in criminal matters (Official Gazette of the RM n. 07-3754/1 from 14/08/2010),

This Law may not be applied in cases when an extradition is requested because of a military duties violation.<sup>99</sup>

An extradition for a crime of which a capital punishment is provided by the Law of a foreign country will not be performed if the country doesn't guarantee that the capital punishment will not occur.<sup>100</sup>

All in all, there are differences between cases when the extradition is requested by the RM or by a foreign country and those cases apparently are regulated more concretely in the Law mentioned above.

**xxiii.** Generally, yes. A lot of modifications in the CC of RM were made. Sanctions and measures are definitely determined more severe in comparison with those previously provided by the law. As a result of the approach of the State to make them compatible with all the Conventions and International documents it has ratified, they serve at the same time as kind of guarantee that human rights, particularly the rights of the children will get their protection on a higher level. Taking into consideration the fact that capital punishment is not permitted, the life sentence serves as a good substitute.

The only thing which I doubt for, are the sanctions provided for legal entities as well as for cases when heavier sanction for causing a damaging consequence may be pronounced. For an instance, what is the logic in pronouncement a fine like main sentence when a crime of production and distribution of child pornography was committed by a legal entity? That is not an effective sanction, more less a proportionate one with the accordance of the heaviness of the crime.

Furthermore, it is illogical to pronounce a heavier sanction for causing a damaging consequence only when the crime was committed by negligence. On the contrary, the perpetrator should be punished more rigorously, especially in cases for causing damaging consequences intentionally.

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second part, article 53

<sup>99</sup> Law on International Cooperation in criminal matters (Official Gazette of the RM n. 07-3754/1 from 14/08/2010), second part, article 54

<sup>100</sup> Law on International Cooperation in criminal matters (Official Gazette of the RM n. 07-3754/1 from 14/08/2010), second part, article 55

**xxiv.** The law provides fine like a main sentence when a crime by a legal entity has been committed. Its amount may not be less than 100.000 MKD and not more than 30.000.000 MKD.<sup>101</sup>

There are also eight more sanctions which may be also pronounced, but only like secondary. Those are: a ban for getting allowance, license, concession, authorization or other right provided by a special law; a ban for participation in public invocation procedure, assignment of a public provision contracts and contracts for public-private partnership; a ban for establishing new legal entities; a ban for the use of subventions and other advantageous credits; deprivation of an allowance, license, concession, authorization or other right provided by a special law; temporary ban for performing a specified activity; permanent ban for performing a specified activity or termination of its existence.<sup>102</sup>

Conditions under which a fine like a secondary sanction may be pronounced are precisely regulated in the CC of RM.<sup>103</sup>

Furthermore, the main sentence, as well as the secondary ones, is written in the electronic register of sanctions for committed crimes by the legal entities of the RM. The pronounced sentence have to be deleted from the register ex officio, provided that the main sentence has to be deleted three years after the accomplishment day of the punishment or three years after the obsolete punishment.<sup>104</sup>

While determining the punishment, the Court takes into consideration the balance sheet, profit and loss account of the legal entity, type of the activity and the crime's heaviness.<sup>105</sup>

There is a possibility of a milder punishment pronouncement in cases provided by the law, including: explicit determination by the Court, cases when an absolution was possible, but not effectuated and under some concessive circumstances when the aim of the punishment may be achieved with a milder sanction.<sup>106</sup>

At the end, the boundaries of the milder sanction pronouncement, absolution, determination of the fine, fine accomplishment, fine deferment, the confiscation and seizure,

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<sup>101</sup> The Criminal Code of the Republic of Macedonia, general part, section six-a, article 96-a (1) and (2)

<sup>102</sup> The Criminal Code of the Republic of Macedonia, general part, section six-a, article 96-b

<sup>103</sup> The Criminal Code of the Republic of Macedonia, general part, section six-a, article 96-c

<sup>104</sup> The Criminal Code of the Republic of Macedonia, general part, section six-a, article 96-g (1) and (2)

<sup>105</sup> The Criminal Code of the Republic of Macedonia, section six-a, article 96-f (1)

<sup>106</sup> The Criminal Code of the Republic of Macedonia, section six-a, article 96-h

as well as the obsolescence of the criminal prosecution and the accomplishment of the punishment are regulated further on in the CC.<sup>107</sup>

**xxv.** Yes, the State legislates seizure and confiscation of materials. Confiscation and seizure are regulated in the CC of RM. According to the text provided by the law, every property gain acquired by committing the crime in a direct or indirect way shall be confiscated with a Court decision. This is done in the same usual criminal procedure in which the criminal liability of the perpetrator is fortified.<sup>108</sup>

If there are some factual obstacles (e.g. the perpetrator is on the run or died) or some legal obstacles (e.g. the perpetrator is known, but he/she is a minor under the age of fourteen or enjoys immunity) because of which the usual criminal procedure may not be conducted properly, the Court makes a confiscation decision in a different procedure than usual one.<sup>109</sup>

In regard to the confiscation, the meaning of direct and indirect property gain is specified and explained further on in the CC's articles. These property gains will be also confiscated from third parties if those gains are acquired especially for them by committing the crime.<sup>110</sup> The term "third parties" used in this article refers to bona fide third parties. Consequently, if the third person did know or could know that the property is gained by committing a crime, that person is not treated like "a third person" by the law, but instead like a perpetrator of the crime "Concealment".<sup>111</sup>

In regards to seizure of the objects, there is an obligatory seizure and a facultative one. The first one refers to seizure of an object which appears like a result of the committed crime. Those cannot be kept or appropriated neither from the perpetrator nor from any third party. The objects intended for committing the crime or already used for it, no matter whose property they are (of the perpetrator or of a third party) must be seized, if the seizure serves the public safety interests or the interests of people's health or moral.<sup>112</sup>

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<sup>107</sup> The Criminal Code of the Republic of Macedonia, section six-a, article 96-I to article 96-n

<sup>108</sup> Criminal Code of the Republic of Macedonia, general part, section seven, article 97 (1) and (2)

<sup>109</sup> The Criminal Code of the Republic of Macedonia, general part, section seven., article 97 (3)

<sup>110</sup> The Criminal Code of the Republic of Macedonia, general part, section seven, article 98 (2)

<sup>111</sup> Academician Phd. Vlado Kambovski, Criminal law-special part, p.520, Skopje, 2011/Criminal Code of the Republic of Macedonia, section XXIII, article 261

<sup>112</sup> The Criminal Code of the Republic of Macedonia, section seven, article 100-a (1) and (2)

The facultative seizure also refers to the objects intended for or used for committing the crime. The difference is that those objects may be taken away only if there is any possibility or danger that they will be used again in such way.<sup>113</sup>

Protection of the third parties is provided by the CC of RM, which states that the objects that are in property of bona fide third parties will not be confiscated.<sup>114</sup> The term bona fide as used in the CC of RM, involves cases when the third party did not, could not know and was not required to know that those objects were actually intended or used for committing the crime.

According to the CC of RM, the property which is confiscated shall be given back to the person who has suffered damage. If there is no any person who suffered the damage, it becomes a property of the Republic of Macedonia.<sup>115</sup>

The funds for children protection are allocated by the Budget of the RM. With those funds the following shall be financed: the rights to the protection of children, the activity of public institutions for children established by the Government, construction, maintenance and equipping the facilities of those public institutions, program activities in certain forms of promotion and development of the activity and more.<sup>116</sup>

Moreover in the original text of the Law on Juvenile Justice there was a stipulation to set up a compensation fund in the amount of 2% of assets in the Budget of the Republic of Macedonia from fines imposed by the courts for crimes or offenses, and collected in the previous year. The purpose was an indemnification of a minor who is a victim or is corrupted by crimes of violence and other acts of individual or group violence. This legal decision was widely accepted and assessed as very positive benefit for the care and rehabilitation of the child victims. But with changes made in 2010) this fund was abolished. For this purpose, a different solution is provided. Namely, an allocation of funds within the budget of the Ministry of Justice (herein after will be mentioned as “Ministry”). The Ministry will adopt a program that will serve as a certain plan by previously acquired opinion of the State Council for Prevention of Juvenile Delinquency. However, these legal provisions are

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<sup>113</sup> The Criminal Code of the Republic of Macedonia, section seven, article 100-a (3)

<sup>114</sup> The Criminal Code of the Republic of Macedonia, section seven, article 100-a (3)

<sup>115</sup> The Criminal Code of the Republic of Macedonia, general part, section seven, article 98 (5)

<sup>116</sup> The Law on children protection of the Republic of Macedonia (Gazette n.98/2000) from 23.11.2000, section XII, article 109



still not implemented practically, the program by the Ministry is not made yet nor an opinion from the State Council for Prevention of Juvenile Delinquency is requested.<sup>117</sup>

**xvi.** The CC of RM provides the imprisonment like main sentence when a crime of sexual abuse against a child was committed. According to the form it appears its duration differs.

We can bring these rules by the CC of RM closely by giving a practical example from the criminal practice. Namely, a parent who abused his daughter sexually, permanently inflicting her grave bodily injures and threatened her with an attack over her life or body if she tells anybody about it, was sentenced to thirteen years of an imprisonment by the Criminal Court of the Republic of Macedonia, with an obligation to cover all the procedure's costs as well as to give a reparation for survived fear and pain to his daughter.<sup>118</sup>

The other punishment determined like secondary following the main one is the ban for performing profession, activity or duty.

The Law on children protection explicitly bans all the forms of children abuse and exploitation including the sexual one (child pornography, child prostitution), children sail, trafficking in children, physical or psychological violence upon children etc.<sup>119</sup> In fact, the legislator prescribes a penalty from 500 to 1500 euro for every infringer in sense of a children institution, agency or an individual who provides activities connected with children's upbringing and education.<sup>120</sup>

Additionally, there is a possibility provided by the Law on family for deprivation of performing the parental right. Namely, when the parent exploits or harshly leaves over his/her parental duties by means of sexual exploitation, physical or emotional violence upon the child, the Court with previously procured opinion by the Centre for Social Work, will make a decision as explained above in civil procedure.<sup>121</sup>

There are different measures included in the national policy of the Government like health protection, obligatory accommodation of the victims, psycho-social intervention and treatment, appropriate consulting body, continuous education, law protection and defence,

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<sup>117</sup> Republic of Macedonia, Ombudsman, Department on children rights protection, Report of the survey of the occurrences of sexual abuse and sexual exploitation of children, Skopje, June 2012

<sup>118</sup> Decision of the Primary Court Skopje I, verdict **XIII K.n.2746/08** from **28.01.2008**

<sup>119</sup> The Law on children protection of the Republic of Macedonia (Gazette n.170) from 29.12.2010, chapter I, article 9

<sup>120</sup> The Law on children protection of the Republic of Macedonia (Gazette n.170) from 29.12.2010, chapter XV, article 130

<sup>121</sup> The Law on Family (fair copy), section V, article 90

informing the persecution body when needed etc. applied in cases of violence within the family.<sup>122</sup>

Furthermore, there are also some projects like the one represented recently by the Government of the Republic of Macedonia, named as “Recognize the violence”, segregated for nursery school teachers in order to create a great perception of different symptoms and reactions of the child denoting that the child is a victim of any form of family violence, including the sexual abuse.

At the end, there is a form of traditional (non institutional) children protection like a part of the social protection system of the RM which is used like a measure for more than thirty years. Shortly explained, it gives the opportunity for children to get their proper care in a “foster family” whenever their growth and personal security are endangered within their real family. Placing children in foster families is used as a tool and resource in the policy and the process of de-institutionalization and the development of non institutional forms in the local community.

The role of foster families can contact all families who meet the legally prescribed conditions. Individuals or families who want to foster a child can address the Centre for Social Work which operates on the territory of their permanent residence.

Those families get remuneration in monthly amount of 5000 MKD from the Ministry of Labour and Social Work.

## 3 CRIMINAL PROCEDURE

### 3.1 Investigation

i. Macedonian legislation following the example of the European legislation, takes a step forward in finding suitable solutions and better course during the procedure when the victim of sexual abuse and human trafficking is a child-juvenile, which has not yet reached 18 years of age. The new Law on Criminal Procedure from 2010, offers a different approach and a whole range of measures taken in cases of this kind.

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<sup>122</sup> Minister on labour and social justice of the Republic of Macedonia, Rulebook on the enforcement and monitoring the execution of pronounced measures to protect the family and the victims of domestic violence undertaken by the Centre for Social Work and the manner of monitoring the measures imposed by the court, part I, article 6 – article 25

Primarily because the child sexual abuse criminal offence is a crime for which the Criminal Code provides for imprisonment of one to ten years<sup>123</sup> and a minimum sentence of eight years for trafficking of a juvenile, it is necessary to offer the victim, as a non-obligatory opportunity, an adviser on the expense of the state budget, before giving testimony or statement, or submitting property and legal claim, if there are severe psychological and physical damages or serious consequences of the crime,<sup>124</sup> as well as compensation for pecuniary and non-pecuniary damages from the state fund under the conditions and manner prescribed by special law, if the compensation of the damage cannot be provided by the convicted.<sup>125</sup> Furthermore, before the stage of investigation, i.e. the hearing of the victim, LCP provides the right for the victim to talk to a free adviser or attorney before the hearing, if it participates in the procedure as injured party,<sup>126</sup> given that juveniles are often economically dependent on their parents, this is an opportunity yet to fully exercise their rights at the expense of the state budget. When it comes to children as victims of sexual abuse or human trafficking, it is important for them to be examined by persons of the same sex in the police and in public prosecution,<sup>127</sup> in order to feel the closeness and establish a friendly relationship with the investigator, and thus to extract the greatest possible benefit from the examination itself. The child has the right not to answer questions regarding his personal life, questions that do not concern the criminal offence,<sup>128</sup> and has the right to require the examination to be conducted by audio-visual resources, that will later be used as evidence in the proceedings.<sup>129</sup> Last of the series of measures provided by the CC is the possibility to require exclusion of the public from the main hearing,<sup>130</sup> on the ground that the victim is a child-juvenile, upon which the opinions and reactions of the public could have a vast negative impact. The court, the public prosecutor and the police are obliged to announce all of the rights that the victim (juvenile) of the sexual assault criminal offence has, at least before the first examination, followed by compiling an official note or minutes.<sup>131</sup>

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<sup>123</sup> Article 188, paragraph 1 of the CC.

<sup>124</sup> Article 53, paragraph 3, point 1 of the LCP.

<sup>125</sup> Article 53, paragraph 3, point 2 of the LCP.

<sup>126</sup> Article 55, paragraph 1, point 1 of the LCP.

<sup>127</sup> Article 55, paragraph 1, point 2 of the LCP.

<sup>128</sup> Article 55, paragraph 1, point 3 of the LCP.

<sup>129</sup> Article 55, paragraph 1, point 4 of the LCP.

<sup>130</sup> Article 55, paragraph 1, point 5 of the LCP.

<sup>131</sup> Article 55, paragraph 2 of the LCP.

Given the fact that the children are categorized as vulnerable victims, CC provides special procedural protection measures in the second stage of the procedure, i.e. when giving the statement, and at all stages of further proceedings, in order to avoid possible adverse effects on the child's personality and development, and to work towards achieving the best interests of the child. What the Law on Juvenile Justice provides is that when the proceeding where the victim is juvenile is urgent,<sup>132</sup> which indicates that the procedure should be completed as soon as possible, in order to avoid any additional trauma to the child and fast recovery, and finally to be able to continue to function in the society as well as all its other peers. Furthermore, the juvenile victim can be heard as a witness only, if it does not adversely affect his physical and mental development and be heard not more than twice as a witness and, as an exception, a third time if that is required by the special circumstances of the case,<sup>133</sup> once again confirming the assumption that any unnecessary further questioning, causes repeated trauma and is a reminder of something that has a negative impact on the child's development and psychophysical condition. During the hearings the court is obliged to take account of the personal traits and characteristics of the juvenile, for the protection of his interests and for its proper development.<sup>134</sup> What is of particular importance is the presence of a psychologist, pedagogue or other expert<sup>135</sup> during the hearing, as to avoid any adverse consequences of the hearing itself, because the presence of these experts affect the safety of the victim and allows maintaining good mental condition, where the victim would give a true statement, without fear, knowing that there is someone who understands his/her position and is aware of what he/she is going through.

The whole range of special procedural protection measures is provided by CC and LJJ, in order to allow a correct and desirable course of the proceedings, where the victim /injured party will not face external influences while giving his/her statement, will feel secure and safe, and will be spared from judgment by the public (because the public is excluded from the process), where after the end of the trial the victim will be able to continue the normal course of life, just like any other citizen.

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<sup>132</sup> Article 138, paragraph 2 of the LCP.

<sup>133</sup> Article 138, paragraph 3 of the LCP.

<sup>134</sup> Article 138, paragraph 4 of the LCP.

<sup>135</sup> Article 138, paragraph 5 of the LCP.

**ii.** As for the investigation and the investigative measures being taken in order to detect the sexual abuse of children criminal offence, in the Republic of Macedonia there are no established, nor provided certain special units that independently take action, but those are undertaken by the police, often in covert operations, through continuous monitoring of suspected persons, as well as supervision over the victims themselves. Often, when operations are in the final stage, when most of the necessary information and evidence are collected, agents-provocateurs are being used in order to successfully complete the operations and capture the perpetrators of the act. However, it should be clear that the actions of the police, although usually successful, though are not sufficient, so the establishment of special units that would be specialized to detect specific offenses of this type is necessary, whose task would be faster and better detecting and preventing criminal offences, without major consequences.

**iii.** Investigation can begin in two ways. The first provides the beginning of the investigation with reporting the criminal offence to the police by the victim or the injured party, but often there are cases when the Public Prosecutor's Office has reasonable doubt, or when there are serious threats to the victim's life and personality, so the investigation is initiated at the request of the Public Prosecutor's Office, without the need of reporting by the victim.

Depending on whether there is other material evidence present, or only the statement of the victim can be found as material evidence, it can be determined whether the proceedings will continue even if injured parties withdraw their statements, or whether there are other relevant evidence sufficient for the process to continue. For example, if there's been pre-investigative measures conducted, and there is a photo documentation or audio-visual evidence, then the statement of the victims is not of great importance, even if the procedure is being withdrawn, the case will continue further, because PPPO has other material evidence which is quite sufficient for the further proceedings.

**iv.** When it comes to child sexual abuse criminal offence, where the victim is a child, as mentioned above, CC provides for imprisonment of the perpetrator of one to ten years,<sup>136</sup> and depending on how long the perpetrator of this criminal offence is convicted, there are different terms of obsolescence. If the conviction states more than one year of imprisonment, the term of obsolescence is three years from the commission of the criminal

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<sup>136</sup> Article 188, paragraph 1 of the CC.

offense,<sup>137</sup> and if the conviction states over three years of imprisonment, the term of obsolescence is five years from the commission of the criminal offence,<sup>138</sup> and if the sentence is more than five years of imprisonment, then the term of obsolescence is ten years from the commission of the criminal offence.<sup>139</sup> In case if no criminal proceedings are being instituted, the obsolescence of the criminal prosecution begins from the date when the criminal offence was committed,<sup>140</sup> and the obsolescence of the criminal prosecution starts when twice as much time is passed as the law requires for the obsolescence of the criminal prosecution.<sup>141</sup> Obsolescence of the criminal prosecution may be terminated in the following cases: obsolescence stops with every procedural action taken for prosecution of the perpetrator for a criminal offence,<sup>142</sup> obsolescence can also be terminated if the perpetrator at the time during the expiration period of obsolescence will commit serious criminal offence.<sup>143</sup> After each termination of the criminal prosecution, the obsolescence starts to run again.<sup>144</sup>

v. There are cases when the child's age cannot be precisely determined, usually because the child does not carry any identification documents or it is not registered in the police database. In this situation the authorities cannot be sure whether the person is a child-juvenile or an adult person. In this case, the authorities are obliged to take all necessary actions provided in cases where the victim is a child-juvenile, and these measures are used until the exact age of the victim is determined. In this way, the law prevents in case of lack of information by the authorities, and allows full protection of the victim / injured party.

vi. The Ministry of Interior Affairs of the Republic of Macedonia is authorized to collect and store data on the defendants. The Ministry is authorized to share, send and receive other information about defendants with competent institutions of other countries, with the border authorities, immigration authorities, for easier and faster mutual disclosure of the identity of the defendants and appropriate preparation of criminal charges. In whole process of storing, sending and receiving data on defendants, the Ministry is obliged to take account

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<sup>137</sup> Article 107, paragraph 55 of the CC.

<sup>138</sup> Article 107, paragraph 104 of the CC.

<sup>139</sup> Article 107, paragraph 3 of the CC.

<sup>140</sup> Article 108, paragraph 1 of the CC.

<sup>141</sup> Article 108, paragraph 6 of the CC.

<sup>142</sup> Article 108, paragraph 3 of the CC.

<sup>143</sup> Article 108, paragraph 4 of the CC.

<sup>144</sup> Article 108, paragraph 5 of the CC.

of personal data protection of the defendants and the victim, until the final verdict by the court, which would confirm or renounce that the defendant is guilty or innocent.

### 3.2 Complaint procedure

vii. In the Macedonian legislation, the participants in the criminal proceedings are provided with a secondary protection (complaint procedure) which is initiated by the Court of First Instance, the Court which rendered the first instance verdict, to higher (Court of Appeal). The role of the Court of First Instance in the event of a complaint procedure is to determine whether the complaint is prompt, permitted and in sufficient number of copies. Prompt complaint shall be a complaint which is submitted within 15 days after receipt of a copy of the verdict for each of the participants in the proceedings. Unpermitted complaint shall be a complaint submitted by a person who is not authorized for submitting a complaint or a person who renounced their complaint, or if it is determined cancelation of complaint, or if after the cancelation a complaint is once again submitted or if under the law a complaint is not permitted.<sup>145</sup> If the Council President of the Court of First Instance determines that the complaint is unprompted and unpermitted, it will be rejected with a decision.<sup>146</sup>

All parties have the right to complaint procedure, i.e. the parties, the counsel, the legal representative of the defendant and the injured party.<sup>147</sup> The injured party has the right to submit a complaint, i.e. to refute the verdict merely because the court's decision regarding the costs of the criminal proceedings.

LCP provides four grounds upon which the first instance verdict may be refuted. The first ground upon which the verdict may be refuted is due to essential violation of the provisions of the criminal procedure,<sup>148</sup> the second is due to a violation of the Criminal Code,<sup>149</sup> the third is due to an incorrect or incomplete establishment of the factual situation,<sup>150</sup> and the last is due to a decision on criminal sanctions, deprivation of property, costs of criminal

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<sup>145</sup> Article 374 of the LCP.

<sup>146</sup> Article 359, paragraph 2 of the LCP.

<sup>147</sup> Article 351, paragraph 1 of the LCP.

<sup>148</sup> Article 354, paragraph 1 of the LCP.

<sup>149</sup> Article 354, paragraph 2 of the LCP.

<sup>150</sup> Article 354, paragraph 3 of the LCP.

proceedings, property and legal requirements, as well as the decision to announce the verdict in print, radio or television media.<sup>151</sup>

**viii.** Children-victims have the right of protection and health care, psychosocial care, legal protection, as well as adequate social care and education.

When the accused of child sexual abuse criminal offence is the child's parent, the key role here is played by the Social Care Centre's properly trained professionals that will take care of the child.

## 4 COMPLEMENTARY MEASURES

**i.** The Republic of Macedonia makes efforts to protect children-victims of sexual abuse, protection that covers all important elements such as the legal framework, assessment of the situation, undertaking preventive measures, care for rehabilitation and reintegration into society, and protection of the best interests of children. Therefore, RM prepared an Action Plan for Combating Trafficking in Human Beings and Illegal Migration, a document that fully reflects the efforts of the Republic of Macedonia in the fight against children trafficking, which are responsibility of the country as a member of the United Nations and as a signatory of the Convention on the Rights of the Child, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which are international human rights documents of the Convention on the Rights of the Child, the UN Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children and the World Plan of Action. The Action Plan for prevention of trafficking of children aims to: promote the policy of the Republic of Macedonia in the combat against children trafficking and exploitation; legal solutions and policy to combat children trafficking to be created on the basis of relevant data from research; take preventive measures for reducing the causes and risks that lead to emergence and increase in the trafficking and exploitation of children; establish a set of

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<sup>151</sup> Article 354, paragraph 4 of the LCP.



minimum standard services that will provide assistance, protection, rehabilitation and reintegration of children-victims of trafficking with human beings.<sup>152</sup>

**ii.** Governmental organizations, in cooperation with the NGO sector are undertaking various activities in this area in terms of children's education, public awareness raising, training of special staff to deal with this problem, training of members of the media and their introduction to this problem and appropriate presentation of specific cases through the media, organizing preventive seminars in primary and secondary schools intended to inform children about this phenomenon, to promote and support SOS - telephone line and informative counselling centres. Often public debates take place, where despite the children as participants, their parents are included too, in order to be familiarized with this problem and to contribute towards better informing of their children through the process of education. There are many partners in the combat to prevent this comprehensive problem, among which the MLSP, MIA, MD, municipalities, NGOs and international organizations.

NGOs have a role in the procedures for human trafficking and these organizations undertake various activities in the area, such as preparation of flyers, brochures and posters that inform children about the potential risks. The main task of NGOs is to lobby and follow the implementation of the international human rights standards, as well as capacity building and support of the national NGO network against trafficking in human beings in the Republic of Macedonia.

**iii.** None.

**iv.** In the Republic of Macedonia an overall system has been established for rehabilitation and reintegration of children-victims of sexual abuse. This system gives a complete psychosocial support to the victims, by establishing rehabilitation centres and development, and implementation of appropriate programs for the reintegration of children-victims in the society. Physical, social and psychological consequences that the victims are facing and are caused by abuse and exploitation during the human trafficking process, impose a need for building programs for their protection and support. At the moment, in the Republic of Macedonia there are two shelters that provide care for victims of human trafficking. One of them is placed under the authority of the Ministry of Interior Affairs, while the other is

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<sup>152</sup> Action Plan for Combat against Children Trafficking in the Republic of Macedonia, 2009-2012 – Government of the Republic of Macedonia.

being managed by the NGO "Open Gate - La Strada". Also, there is a shelter intended for foreign victims of human trafficking and illegal migrants (Reception Centre for Foreigners) under state authority.

v. As one of the most effective prevention methods of human trafficking and sexual abuse of children in the RM, there is a SOS-phone line, which began its work in 2002 as a project of a non-governmental organization, which is actually the only phone service that offers information, counselling and assistance to citizens, trafficked persons and their families. This phone line is free, and can be used every day from 08:00 to 20:00. The purpose of this SOS line is to reduce the risk of human trafficking and sexual exploitation, by raising public awareness and providing information and assistance for the SOS customers.

Services and information obtained from the SOS-line are strictly personal, all data is protected and not to be passed to anyone, which strengthens the confidence of victims in this mechanism as a way of help.

### **III NATIONAL POLICY REGARDING CHILDREN**

i. In the past 5-6 years there is a significant increase in political discussion and activities regarding child abuse issues in Macedonia. 2004-2009 the Institute for Sociological, Political and Juridical Research, Ss Cyril and Methodius – Skopje, prepared a children sexual abuse study for R. Macedonia. In Macedonia since 1991 exists the First Children's Embassy in the World "Megjasi" which is very active. In 2008 they amended the Criminal Law and increased the penalty for paedophilia and incest. Now they are proposing and promoting a measure like chemical castration and "electronic bracelets" as a preventive measures against child abuse, which in the words of the Minister for Social Policy Spiro Ristovski, quoted by Balkan Insight " the method's are worthy of consideration" In 2008 the government prepared Action plan for prevention and handling of sexual abuse of children and paedophilia 2009-2012. The government also recently published the new protocol for handling cases of sexual abuse of children and paedophilia.. In 2012 report was written on the situation of children's rights in the Republic of Macedonia prepared by the National NGO Coalition on the Rights of the Child.

ii. Since 2008, there is significant increasing of the number of cases of sexual abuse reported in media. The general perception is that it is not result of the increased number of committed criminal works, but more due to the termination of the cycle of shame, fear of

stigmatization and traditional beliefs that it is a personal thing which remain to be held secretly in within the family. Most of the media now regularly follow and report such cases. Continuous media coverage of cases of sexual abuse of children contributes to recognition of this phenomenon. Nongovernmental organizations are increasingly involved in launching public awareness, create programs and funds to support victims and their families. The NGO's usually write reports and make project's like the report that was written on the situation of children's rights in the Republic of Macedonia prepared by the National NGO Coalition on the Rights of the Child and children sexual abuse study for R. Macedonia by the Institute for Sociological, Political and Juridical Research, Ss Cyril and Methodius – Skopje. The first children's embassy in the World "Megjasi" had an interesting media campaign raising awareness of the responsibility of parents like: "Did you hug your child today?"; "Did you tell your child today how much you love them?" and "Did you talk to your children today?". The government recently announced special register of convicted paedophiles that was publicly released.

First degree court	Number of convicted persons
Skopje	55
Stip	29
Kumanovo	26
Bitola	21
Kichevo	21
Veles	14
Prilep	12
Strumica	11
Kocani	7
Ohrid	6
Radovis	6
Struga	5

Negotino	4
Kratovo	4
Gostivar	3
Debar	2
Vinica	2
Gevgelija	1
Delcevo	1
Sveti Nikole	1
Total	231

iii. In Macedonia, there are no official estimates of government or other reliable data on the total number of children who are victims of sexual abuse or any other

forms of violence. Therefore, these crimes remain largely a hidden phenomenon. Lately, several studies were conducted on various aspects of Children sexual abuse, initiated by professionals who work with child victims. There are data collected by the Ombudsman, (NGO - Association for the Protection of the Rights of the Child; NGO -Megjasi, mostly NGO practice of protecting child victims), and clinical qualitative research conducted by psychiatrists who treat victims of sexual abuse (Raleva M. Boskovski M.). However, recent data indicate that nearly 70% of children aged 2-14 were exposed to at least one form of psychological or physical punishment by their parents or other family members.

Only in the ongoing year, January until August 2012, followed up by the Centre for Social Work. There were recorded 28 charges of paedophilia, while last year (2011) they recorded 13 charges is the report from the Ministry of Labour and Social Policy Spiro Ristovski given for the "mkdenes" web portal.

Data collection in the table included analysis content of 231 court rulings convict made by the courts for criminal offenses, defined as child sexual abuse committed between January 2004 and June 2009.

Totally from 2004 until 2012 excluding 2010 since we don't have any official data about that year, there are 272 reports of child abuse or attempted sexual abuse. I have underline that this is only the number of reported cases in the authorities. An important aspect that must

be taken into consideration when reviewing this research, which is pre-placed in this report, is that there are certain number of cases of sexual abuse of Children who are not registered - "Dark figure".

iv. Most of the campaign's that the government covers are attached in the Action plan for prevention and handling of sexual abuse of children and paedophilia 2009-2012. The most noticeable are: Sensitize and raise public awareness of the problem of child abuse and paedophilia, project which includes media campaigns to inform the general public, advertising material like plaques, leaflets, manuals, DVD and other visual material and informational and educational workshops to the general population; Encouraging the reporting of cases of child sexual abuse by opening an e-mail address for reporting child abuse and paedophilia and national SOS line for reporting cases of sexual abuse of children and paedophilia and establish a system for recording and reporting on cases of sexual abuse of children and paedophilia. The government recently promoted the protocol for handling cases of sexual abuse of children aims to provide an effective and successful cooperation of the competent authorities in raising the level of protection and assistance of children victims of sexual abuse and paedophilia, as well as help offenders in terms of behaviour change. This year a total of 150 schools across the country were conducting a training on the prevention of sexual abuse, while the website register of convicted paedophiles was visited by 150,000 citizens As part of the activities in the fight against the worst forms of child labour and combat sexual abuse of children, the First Children's Embassy in the World, celebrates November 19 as International Day for the protection of children from abuse and November 20 as the International Day of Children. The first children's embassy in the World "Megjasi" in association with the government had an interesting media campaign in video clips with significant results like "Did you hug your child today?" ; "Did you tell your child today how much you love them?" and "Did you talk to your children today?".

v. Since Macedonia is a conservative and traditional country, children's perspective in the past was little involved in the law making process. Back in 1990 not much was argued about child issues even though the issues were real and they existed. In the past years with the hard work of the NGO's mostly, children's perspective is considered in the law making process. First Children's Embassy in 2008 raised the level of intolerance toward child abusers, boosted the public opinion about the consequences that children suffer and seek increased penalties (minimum 8-10 years in prison) for the perpetrators of this serious crime including a sentence of life in prison. That same year the Assembly of the Republic of Macedonia

adopted a new Criminal Code which under article 188 is provided and the sentence of life in prison. Unfortunately, in the Republic of Macedonia, despite numerous attempts to improve the rights of children and numerous legislative amendments, the rights of children are still not fully protected. In some cases it is because of legislative omissions, but in some cases where there is a good legal framework omission is made in the implementation of the Act and in the words of the Helsinki Committee for Human Rights children's perspective is still very low represented and there is still much to be done.

**vi.** With the initiative of the First Children's Embassy in the World, in November 13, 2007 the Macedonian national coalition of civil society organizations for the protection of the rights of the child was established (informal coalition). The coalition was formed in order to better protect children and their rights, as well as best meet the requirements of the Committee on the Rights of the Child by the United Nations. The coalition is composed of 15 NGOs and NGO coalitions from Macedonia:

- Association for Health Education and Research "Hera" - Skopje;
- Women Civic Initiative "Antico" - Kicevo;
- Coalition "All for Fair Trials" - Skopje (a coalition of 17 NGOs);
- "Life Start" - Bitola;
- Youth Educational Forum - Skopje;
- Open Gate "La Strada" - Skopje;
- "Open the windows" - Skopje;
- First Children's Embassy in the World "Megjasi" - Skopje;
- Council for Prevention of Juvenile Delinquency - Kavadarci;
- HOPS "Healthy Options" - Skopje;
- Humanitarian Association "Mother" - Kumanovo;
- Humanitarian and Charitable Association of Roma in Macedonia "Moon" – Gostivar
- Center for Civic Initiative - Prilep;
- Center for Human Rights and Conflict Resolution - Skopje;
- Shelter Center – Skopje.

Committee on the Rights of the Child by the United Nations in its concluding observations regarding legislation advises the State to continue to complete the harmonization of national legislation with the provisions of the Convention in consultation with all relevant partners

and with broad participation of civil society. And while the Committee recommended to consult civil society, several important laws were implemented without wide consultation process involving all stakeholders, including civil society organizations. During the procedure, the adoption of certain laws of the members of the coalition was not consulted from the outset of the process.

## **IV OTHER**

We believe that all relevant data concerning the issue of protection of children against sexual; harassment and sexual abuse has already been stated and elaborated in detail.

## **V CONCLUSION**

By conducting such a vast and tiresome research about a rather delicate and sensitive matter, one gets to the conclusion that the general state is a positive one. Republic of Macedonia, although being a young country and a young democracy, really dedicates itself and works hard to improve and protect children's rights, and more specifically, the protection of children from sexual harassment.

A strong indicator of the country's dedication is the ratification of the Lanzarote Convention, which undoubtedly points to a developed conscious and willingness to improve the child's protection even further. It is important to stress that Republic of Macedonia is a signer of all relevant, mentioned, conventions from the Council of Europe and the United Nations. Having in mind that the Convention has just been put into power in RM, it remains to be seen whether the conventions statements will be enforced in real life situations, and whether the ratification will serve as a beacon to new changes towards improving the legislative.

Republic of Macedonia is working hard and makes great efforts to increase the effectiveness of the criminal law system, as well. When it comes to the protection of children and their rights, as already stated, RM has ratified nearly every international document and convention, and in accordance to these ratifications, a number of changes and additions to the criminal law system have been made. As a result, what it is noticeable is the increase of the sentences for crimes against sexual freedom and gender moral. The highest sentence is life imprisonment.

However, insufficient precision and clarity of some of criminal legal norms is where the criminal law system is lacking. As an example, in the case of rape/gender assault of a minor over the age of 14, the Criminal Code imposes the criminal act "gender assault against a minor who is not the age of 14". By this definition, the already mentioned situation cannot be applied. That is why under the court practices, the case will be filed under the general institute rape, that is, the offender will be charged for the criminal conduct "Rape" where it is not specified that the victim is a minor. Analogue to this the sentence is not more severe. It is the same regardless whether the victim is an adult or a minor.

When it comes to additional measures, Republic of Macedonia implements those via various legislative acts that do not have the force of law, like national strategies, action plans and rules of conduct. In order to improve child protection, the government conducts various projects like the opening of electronic registers and training of staff that work with the children that are victims of violence.

All that is left is to further improve the application of the formal legal acts. Without their full implementation, there won't be significant legal protection of children and their rights.

In the end, there are strong efforts currently under way in Republic of Macedonia that aims to protect children from sexual harassment not only via the existing legislative, but by also taking advantage of the NGO sector and their capabilities. They do that by trying to increase the level of awareness by conducting campaigns, programs and brochures and by establishing preventive measures and identification of potential risks. The NGO sector also needs to lobby hard towards implementation of the regulation from this legislative field, which would make for a more effective protection.





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**National Researchers:**

Andrada Ioana Rusan

Bianca Lambrino

Dana Ududec

Denisa Cristian

Ionut-Ovidiu Borlan

Oana Cojocaru

Paula Dora Calian

**National Academic Advisors:**

Sergiu Petrisor

Anamaria Florea

**National Coordinator:**

Sonia Vigdorovits

## I INTRODUCTION

### 1 GENERAL

#### Equal Rights

*i. Are there discrimination problems regarding sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status of men and women? Please quote official reports from National or International Institutions, reports from the main NGOs that are active in the country and/or Journalistic inquiries.*

#### The Discrimination of children in Romania

From the year 2000 Romania has a law <sup>1</sup> that sanctions the discrimination, The National Trustee for the Control of Discrimination functions from 2002 but the discriminating behaviors carry up and continue to be widely spread in the Romanian society the discrimination being such a common phenomenon that it is considered normal by a lot of Romanians. <sup>2</sup>

The analysis, “*Perceptions and attitudes concerning the discrimination in Romania*” unfolded between 27<sup>th</sup> of December and 11<sup>th</sup> of January 2012 by Opinion and Market Studying Center Romania (TNS CSOP Romania) for The national Trustee for the control of discrimination reveals that 49% of the Romanians think that the phenomenon of discrimination is very common in Romania. An even higher percentage of Romanians, 59%, believe that according to the opinions of the respondents they are represented by people of gipsy ethnicity, people with physical or mental disabilities, people infected with HIV/SIDA, homeless people, orphans and people addicted to drugs. Nevertheless, there are cases in which the discrimination is more difficult identified by the respondents. For example, only 27% of the

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<sup>1</sup> The Governmental Ordinance No. 137 from 31 August 2000, published in the OJR, No. 431, on 2<sup>nd</sup> September 2000, *last modified and republished* by the Law No. 76 from 1<sup>st</sup> April 2009, published in the OJR, No. 231, on 8<sup>th</sup> April 2009. The OJR will be named OJR from now onwards in this paper.

<sup>2</sup> For more information visit <http://www.crj.ro/Antidiscriminare/>, last viewed on the 25<sup>th</sup> October 2012.

Romanians do not consider that the refusal of a student to attend the religion class because he belongs to another religious cult represents a case of discrimination.<sup>3</sup>

### **I. The Discrimination of Children of gypsy ethnicity<sup>4</sup>**

The situation in which the gypsy children are today is regarded as a critical one because the majority live in a poor environment, especially the one at home. There are many of them who abandon their studies because their lack of money. However, there are some that decide to struggle and continue but, unfortunately, they are discriminated. It all begins with their placement in the back of the classroom, and it continues with verbal abuse from the colleagues and even from their teachers.

There have been several questionnaires applied to teachers, and the next lines were ascertained:

- The majority of the teachers believe and know that discrimination means violating a person's rights, but also, isolating them from the rest;
- Many of them confessed that they do not have acquaintances of gypsy ethnicity, and 39% who answered affirmatively say that their relationship with the target group is an open and relaxed one;
- After analyzing the answers, it seems that the main reasons for not going to school are their families and traditions;
- The majority of the teachers believe that the gypsy children are safe at school and are by no means discriminated in what concerns their grades;
- Many of the teachers declared that the only institutions that discriminate and also abuse the gypsy people are the police and the hospital; in their opinion the school and the city hall are the only institutions where the gypsy people are protected and treated equally;

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<sup>3</sup> <http://www.ivox.ro/blog/index.php/2012/studiu-2/problema-discriminarii-in-romania/> , last viewed on the 25<sup>th</sup> October 2012.

<sup>4</sup> This is a research done in the year 2011 on a group of 20 students of gypsy ethnicity, with ages between 15-19.

- The majority of the teachers believe that it would be better for their safety to not be around gypsy people anymore.

After applying questionnaires to students of gypsy ethnicity, the next lines were ascertained:

- The majority of the students of gypsy ethnicity do not feel discriminated;
- There have been also affirmative answers and those students declare that the members from their family helped them to overcome the situation;
- Many of the students have a good relationship with their family which encourages them to continue with their studies, while they do not consider the ethnicity as being a problem;
- The relationship with their teachers and colleagues is good;
- The students do not feel discriminated in what concerns their grades;
- Many of them believe that they are not discriminated in the public health service, but they are discriminated in school or in the local communities;
- The majority of them answered affirmatively when asked whether they want to continue with their studies.

After applying questionnaires to students of Romanian ethnicity, the next lines were ascertained:

- 44% of the students answered that they have acquaintances of gypsy ethnicity and, 56% say that they have no knowledge about the above mentioned ethnicity;
- When asked about the main reason that keep the gypsy children from continuing with their studies, the Romanian children believe that the community is guilty for this situation in a 46% proportion;
- Moreover, the students believe that the discrimination level in school is of 39%;
- When asked if they would feel safer in Romania if the gypsy students were missing, 25% answered *yes* and the same percentage answered *maybe*."

According to the information provided by the organization “Save the Children”<sup>5</sup> (“Salvati Copiii Romania” is a nongovernmental organization, public and non-profit, actively militating for children’s rights and child protection in Romania since 1990), the next were ascertained:

*“The children of gypsy ethnicity constitute a different risk category. Their nourishment is unbalanced, inadequate because of their low quality of life. Consequently, a large number of gypsy children are undernourished, anemic, or suffer from dystrophy. These diseases have a negative impact on their development as young students as their capacity of learning is seriously affected.*

*In what concerns their income, many families do not have members with a serious job, this leading to their starvation sometimes. Of course, in the majority of cases they cannot afford to pay for clothes, books, medicines, transport or any other things needed for the young students.”*

I think one example is enough, *“there was this family with two children that shared the same pair of shoes: the first one came in the morning and at noon he would go home and give the shoes to the other one in order to be able to come to school in the afternoon.”* (reported by a teacher from Balta Arsa, Botosani, Romania)

A number of 145 questionnaires were applied to the same number of gypsy children, and the following conclusions were obtained:

- In what concerns their possibility of solving their homework, the majority of the children do not have the necessary conditions for learning. 105 children declared that they share a room with brothers, sisters, grandparents, or parents and 17 of them live in the same room with the rest of their family. Consequently, they solve their homework while sitting on the floor, or on a chair;
- The majority of them believe that they suffer from hunger at all times, although only 15 of them admit it, their nourishment is insufficient and undiversified;
- 79 of them admit they argued with other children because they were verbally abused and sometimes even physically and, 14 of them have been accused of robbery at

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<sup>5</sup> <http://www.salvaticopiii.ro/> , last viewed on the 25<sup>th</sup> October 2012.

school, only 4 admitting the accusation. However, only some of them admit that they have been called gypsies, or that they are accused only based on their ethnicity.

## II. The Discrimination of physically or mentally disabled children

In March 2012, a number of 71.410 children with disabilities (medium, accentuated or severe) were registered in the records from the Complex Evaluation Services of General Office of Social Assistance and Child Care (DGASPC).<sup>6</sup> The following press sources have been analysed:

- According to the information received from the Organization “Save the Children”:

*“The evaluation of the children with disabilities from an early age represents a major problem. The small numbers of programmes and centers needed for an early intervention, the lack of human and material resources affects the chances of healing or at least helping these children. In order to be able to offer help to the children with disabilities it is absolutely necessary to act from an early age; once it is too late the whole process might not conclude with positive results.”<sup>7</sup>*

*“Although an improvement has been made concerning the life from the specialized institutions, there is still a lack of well-prepared personnel. This is the main reason why the educational process ends up with poor results, and the children are not prepared for an independent life. There are very few institutions where one can find speech therapists, psychologists or any other specialists in rehabilitation. Due to these conditions the majority of the disabled children will remain their whole life in public institutions, without the possibility of living a normal life.*

*The children that live in institutions are rarely seen in the public space because the rest of the community is rather reticent in what concerns their integration. In these conditions the children with disabilities will never be able to participate to public life. There are also children, not only adults that share a negative opinion about the ones with disabilities. According to a research done by Save the Children Romania, only 37% of the children would accept a disabled colleague in their classroom.”<sup>8</sup>*

- Online press article from *romaniailibera.ro*, April 2011

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<sup>6</sup> [http://www.copii.ro/alte\\_categorii.html](http://www.copii.ro/alte_categorii.html) , last viewed on the 25<sup>th</sup> October 2012.

<sup>7</sup> <http://www.salvaticopiii.ro/> , last viewed on the 25<sup>th</sup> October 2012.

<sup>8</sup> Ibid.



*“Autism now affects a child out of 110. However, the Romanian society does not seem prepared to fight in order to prevent or treat this disorder. Discrimination, the lack of tolerance, rejection, denial of healing chances are only some of the negative reactions that people have when they are asked about autism. The children that suffer from autism are usually stigmatized and rejected from kindergartens or schools, in this way being deprived of the most essential form of help.”<sup>9</sup>*

- Online press article from deBANAT.ro, August 2012

*“The children with disabilities have no right to play in the Children’s Park. This interdiction is well written in the instructions regarding the usage of the equipment from the park, which was recently rehabilitated for 2 million lei. However, this is not a new rule; it appears in many playgrounds since the last administration. The former administration and the present one will be reclaimed at the Council for Eliminating Discrimination because the parents of disabled children consider this rule as being one of the most outrageous forms of discrimination.”<sup>10</sup>*

- Online press article from Vip.net, August 2012

*„Being able to have access to the educational system is one of the most violated rights of the children that suffer from the Down syndrome. Because of the enormous psychological pressure that is being placed on the parents, due to the rejection they receive from every school and kindergarten, they prefer to keep their children home or to take them to special kindergartens, which are extremely rare.*

*If one goes to apply for a place in a classroom for his/ hers child, if he suffers from the Down syndrome, he will be immediately rejected. The usual reason for this rejection is the fact that the child will not be able to keep up with the rest of the class, even if he talks and he is able to learn how to read or write. Another reason that is used as an excuse is the reticent attitude of the other parents, or the lack of places in the classroom.”<sup>11</sup>*

- The European Centre for the Rights of Children with Disabilities:

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<sup>9</sup> <http://www.romanalibera.ro/stil-de-viata/sanatate/interviu-viata-unui-copil-autist-este-o-lupta-continua-cu-el-insusi-223274.html> , last viewed on the 25<sup>th</sup> October 2012.

<sup>10</sup> <http://www.debanat.ro/2012/08/revoltator-copiii-cu-dizabilitati-au-interzis-la-joaca-in-timisoara/> , last viewed on the 25<sup>th</sup> October 2012.

<sup>11</sup> [http://www.revistavip.net/Arhiva\\_RevistaVIP/\\_Accesul\\_la\\_educatie\\_este\\_unul\\_dintre\\_cele\\_mai\\_incalcate\\_drepturi\\_ale\\_copilor\\_cu\\_sindrom\\_Down\\_/14/1012/](http://www.revistavip.net/Arhiva_RevistaVIP/_Accesul_la_educatie_este_unul_dintre_cele_mai_incalcate_drepturi_ale_copilor_cu_sindrom_Down_/14/1012/) , last viewed on the 25<sup>th</sup> October 2012.

The European Centre for the Rights of Children with Disabilities (ECRCD) is a nongovernmental organization dedicated to promote the rights of the children with disabilities and to facilitate their access to assistance and protection.

*“A 7 years old boy and his mother from Hunedoara are being placed under terrible pressure in order to withdraw the boy from the school where he learns in the 1<sup>st</sup> grade, only because he suffers from the Down syndrome. The teachers and the principals are using every method possible in order to intimidate the mother and to force her to take her boy home. They usually send the boy home before the classes are over, they convince the other parents to reject him, and they use threats and do not integrate him in the daily activities in the classroom. More than this, the boy is used as a negative example no matter what he does.”<sup>12</sup>*

### III. The discrimination of children infected with the HIV virus

- Data collected according to information provided by the CIAO organization:

The Italian Committee of Associations and NGOs in Romania (CIAO) is an informal federation of associations and non-profit foundations. The committee has in its intern subordination a number of Italian-based associations and foundations which operate in Romania's social field. This committee has today a number of 18 members.

More than 7.200 children and young persons with ages between 15 and 19 are living with HIV. Less than 60% of the Romanian children with HIV are included in any educational system, despite of the fact that there are legal stipulations that ensure free and compulsory education until the 10<sup>th</sup> grade or until the age of 18. Those children that go to school are likely to suffer from isolation, abuse or rejection if the rest of their colleagues find out that they are infected with HIV.

The non-governmental organizations and the children that participated in this study have described many incidents of harassment from their classmates, threats from their parents and abuses from their teachers. In some cases the harassment was dangerous for the children's health, especially in cases when a teacher forced a student to spend hours outside during winter, or when a student fainted and no one helped him for a half an hour. Those who manage to finish the 8<sup>th</sup> grade are then exposed to a new set of difficulties when they

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<sup>12</sup> <http://www.cedcd.ro/media/comunicate/45,abuz-si-discriminare-in-intr-o-scoala-din-judetul-hunedoara/> , last viewed on the 25<sup>th</sup> October 2012.

sign up for professional schools that deal with cosmetics, tourism or babysitting because these are all domains in which the law asks for HIV tests.

In Romania there are very few programs that could offer help for their mental health. The psychiatry hospitals sometimes refuse to treat children or young people with HIV, even if they suffer from severe symptoms. More than this, the life conditions in these hospitals are very low and the patients' health would be in a greater risk.

In what concerns discrimination due to the HIV infection: 52.2% of the persons consider that they have been discriminated, 28, 7% believe that they have not been discriminated and 19.1% do not know if they found themselves in such a situation.

According to the studies, 7.5% of the persons declared that their confidentiality was infringed by their teachers, 7.5% by their neighbors, 5% by their relatives and 20% by different categories.<sup>13</sup>

- Project April – May 2011 “AIDS –What do we know and how do we use what we know?”

The representatives of the Local Public Health institution from the city of Iasi declare that there are 216 persons infested with the HIV virus, and 85 of them are children until the age of 15. A survey applied on 1000 students from Iasi shows that half of them would not mind if one of their classmates was infected with HIV. However, 60% of the students declare that they would not accept to sit next to an infected person.

54% of the students infected with HIV/AIDS believe that they were not discriminated. However, 84% of them say that they did not form a complaint when they were discriminated. This indicates that these students really believe that it is normal to be treated differently from those not infected with HIV.

40% of the students, who admit that they were discriminated, declare that the discrimination took place in a medical institution. 56% of the students declare that they have no knowledge

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<sup>13</sup> <http://www.ciaoromania.ro/wp-content/uploads/2012/06/Analisi-sulla-discriminazione-dei-giovani-affetti-dal-virus-HIV.pdf> , last viewed on the 25<sup>th</sup> October 2012.

of their rights and 44% do not know whom should they address in case of discrimination.”

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#### IV. The discrimination of homeless children

- According to a press article from **Russia Today**, September 2009<sup>15</sup>

The journalists admit that the number of homeless children has been decreasing due to the work of the charity organizations. However, the number of these children is still very large. Only in Bucharest, over 1000 children live on the streets.

In the following lines, a concrete situation of discrimination has been briefly analyzed:

Sandu is 14 years old and he is one of those children. He lives in a canal in Bucharest. “I lived here for 8 years. My father died and my mother remarried. I sleep here and during the day I wash cars in order to gain around 10 Euros.” Sandu does not make any plans for his future because he knows it is useless. “My sister died here recently, from an infection or something like that. Children are born and die in here. We are all going to be on the streets sometime. Does anyone care?” said Sandu.

The foreigners who founded foster care centers are complaining because of the indifference from the authorities. “There are no social care services, not even a system that could help these people with houses or financial support. The procedures are excessively bureaucratic and difficult to conclude” declares Ian Tilling, representative of a foster care centre.

The children that live on the streets, also known as homeless children, are deprived of their rights, and unfortunately also of their innocence. Many of them have health problems, including skin diseases, burns, or tuberculosis and hepatitis; not to mention the fact that all of them are malnourished. If this is not enough, a part of them are exposed to sexual abuse, usually starting with their own family and then on the streets. In addition, they suffer from physical abuse; 50% of the children that live on the streets of Bucharest admit that they have

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<sup>14</sup> <http://adolescentuldeazii.blogspot.ro/2011/05/sida-ce-stim-si-ce-facem-cu-ccca-ce.html> , last viewed on the 25<sup>th</sup> October 2012.

<sup>15</sup> The article was taken from the Romanian Media Trust – Realitatea – [http://www.realitatea.net/russia-today-copiii-strazii-sunt-o-problema-ignorata-de-statul-roman\\_616362.html#ixzz22gIZ36va](http://www.realitatea.net/russia-today-copiii-strazii-sunt-o-problema-ignorata-de-statul-roman_616362.html#ixzz22gIZ36va) , last viewed on the 25<sup>th</sup> October 2012.

been injured by others at least once. Many of these abandoned children begin to use drugs, solvents or even glue and paint.<sup>16</sup>

In 2012 „the installment of children that give up school is of 87%, while 25% of the children over 10 years old are illiterate because they never attended any educational institution.”<sup>17</sup>

## V. The discrimination of orphan children

Romanian mothers are on the first place in Europe for easily abandoning their children. At every six hours a new born baby is left in a Romanian hospital. Some of them manage to grow up and have a good life, but many of them do not. After they reach 18 years they have to leave the foster care centre and usually end up on the streets. Because they were not prepared to survive in a society, they cannot find a job and usually sleep in night shelters.<sup>18</sup>

In order to reveal the core of the problem, the following campaigns and press sources have been cited:

- Anti-discrimination campaign for the children who live in foster care centers, 2011:

*“Today is the beginning of a new week. With tears in my eyes, I wake up and go to school hoping that today will be a better day. I am very nervous because my classmates are always bullying me. They make jokes but the school teacher always defends me and punishes them. She is the one to whom I go when I need some advice. During the breaks they all call me “the orphan” so this is why I don’t want to play or talk to anyone. The bigger colleagues make fun of my clothes but they don’t know that these are the ones I receive from the centre. I finished my classes and I’m heading downtown. I see many children here, but I feel so alone. Oh, how I miss a family!”*

*“The national statistics show that many of the cases involving child abuse do not receive a court sentence. Only 10% of the abuses are actually reported. The victims are usually very scared, sometimes they are manipulated, blackmailed, especially the girls who feel embarrassed and ashamed. The children that live in foster care centers are seen as stigmatized and they wear that sign all their life. Many of them fear the day*

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<sup>16</sup> <http://www.imparte.ro/Ajutor/Protectia-copilului/Cum-le-putem-reda-copilarii-copiiilor-strazii-33.html> , last viewed on the 25<sup>th</sup> October 2012.

<sup>17</sup> <http://www.gazetanord-vest.ro/2012/06/04/peste-60-din-copiii-strazii-sunt-dependenti-de-alcool-si-aurolac/> , last viewed on the 25<sup>th</sup> October 2012.

<sup>18</sup> <http://depici.ro/familie/75-000-de-romani-vor-sa-afle-cand-se-schimba-legea-adoptiilor/> , last viewed on the 25<sup>th</sup> October 2012.

*when they will be 18 years old because they will have to leave the centre and to face the hard reality where no one will offer them a job, thus being forced to become homeless”<sup>19</sup> (excerpt from a child’s diary).*

Beginning with 1999, Charles Nelson and his co-workers kept track of 136 children and their behavior, after they were abandoned from birth and raised in a foster care centre from Bucharest. The name of the institution is not mentioned, but the next excerpt is a part of the description, published by Science News:

*“... A hard environment, in which the children spend hours and hours staring at a white wall, while they have to respect a rigorous set of activities. The children receive very little attention from the personnel.”<sup>20</sup>*

#### Press article – Romania TV, March 2012

According to the statistics the abandoning phenomenon is growing every year. For example, in 2011 the number of abandoned children grew with 180 since 2010. Many of the mothers choose to leave the baby where they gave birth to it. In 2012, 742 new born babies were left in the hospital, and in 2012 their number grew to 942. 445 of them were taken back from their parents.<sup>21</sup>

- According to Save the Children:

*Migration* had a very important impact. If it were to follow the official statistics from The National Authority for the Family Protection and the Children’s Rights (ANPFDC, in Romanian), at the end of 2008, 92.328 children were left at home, while their parents worked in another country. 53.125 of them had only one parent gone and 39.203 had both parents overseas. (The number includes also those 10.408 children from single-parent families who were left alone). According to these dates (valid for September 2009), 3398 children with parents who left abroad, ended up in the child protection service (670 living in residential centers and 544 in foster care).<sup>22</sup>

## **VI. The Discrimination of children who use drugs**

<sup>19</sup> <http://adolescentuldeazii.blogspot.ro/2011/05/blog-post.html> , last viewed on the 25<sup>th</sup> October 2012.

<sup>20</sup> <http://depici.ro/arhiva/experiment-pe-orfanii-din-romania-materia-lor-cenusie-este-redusa-traiesc-intr-un-meniu-spartan/> , last viewed on the 25<sup>th</sup> October 2012.

<sup>21</sup> [http://www.rtv.net/ingrijorator--tot-mai-multe-mame-isi-parasesc-copiii-la-nastere\\_20528.html#ixzz22gK48m2f](http://www.rtv.net/ingrijorator--tot-mai-multe-mame-isi-parasesc-copiii-la-nastere_20528.html#ixzz22gK48m2f), last viewed on the 25<sup>th</sup> October 2012.

<sup>22</sup> [http://www.salvaticopiii.ro/?id2=000600060005#Impactul\\_migratiei.html](http://www.salvaticopiii.ro/?id2=000600060005#Impactul_migratiei.html) , last viewed on the 25<sup>th</sup> October 2012.

Several campaigns and press releases were found as relevant to this issue:

- Say No to Drugs Campaign, 2009

The Romanian adolescents are more and more attracted into the world of drugs. It is a statement made by the doctors who cure heroin or cocaine addicts. Half of those who end up here have ages between 14 and 15 and are brought in by their parents.<sup>23</sup>

- Online press article, *North West Gazette*

The homeless children are usually drug addicts. In 2011, the Star Association monitored 120 children and adolescents, out of which 62% are drug addicts – especially alcohol and solvents, and their main job is prostitution (72%) or begging (8%).<sup>24</sup>

- Online press article, *Obiectiv de Vaslui*, May 2010

The number of children that use solvents as drugs is rapidly increasing. In Barlad, the central areas are full of adolescents that use this kind of drug in order to forget about food, cold, or home abuse. Their scattered and tormented life can be seen on their face, and their foggy eyes hide sad stories. The majority of them have parents, but their families are either separated or starving. These children are usually abused by their fathers and exploited by their mothers. In many cases they are not violent; they only hide their identity in order to beg for some money.

“If you buy me a pretzel I’ll tell you my name” – this is what a child told us while he was keeping a bag of solvent in his hand. I promised the pretzel if he would throw away that drug. It took a few minutes until I could see his green eyes, the eyes of a child that was ashamed of himself. “My name is Bogdan and I’m 17 years old” he told us, without any persuasion. His height betrayed his age, although his face features looked as if he had over 12. When I asked him why he takes drugs, he shook his shoulders and he could not give us an explanation. However, he firmly said that one day he will quit them. He continued by

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<sup>23</sup> <http://spunenudroguilor.com/tag/tineri> , last viewed on the 25<sup>th</sup> October 2012.

<sup>24</sup> <http://www.gazetanord-vest.ro/2012/06/04/peste-60-din-copiii-strazii-sunt-dependenti-de-alcool-si-aurolac/> , last viewed on the 25<sup>th</sup> October 2012.

saying that all of his friends do the same, even if they suffer from pain all over their body after they inhale the drug from the bag.

*“I hope you’re not from a newspaper because I will get beaten. I used to go to school some time ago but I quitted. My father beats me so hard, I’m scared of him. He does the same with my brothers. I usually run away from home and I come back only late at night. After I gave him the pretzel he hid it in his pocket and he started to get away from us. He stood for a while, and while whistling he got lost between the cars.”<sup>25</sup>*

- Online press article, Ziare.com, Mai 2010

Every week two children die because of an overdose, declared Cristian Ene - the leader of the Anti-Drug Association from Romania. He continued by saying that the statistics show only 35.000 drug consumers but in fact they are many more.<sup>26</sup>

## 1.2. Family Protection

*ii. What is the definition given to the term “family” in your national legislation or Constitution? What is the status of marriage? What is the average marital age of the population? Please quote official reports/ statistics from National or International Institutions or official statistics from Private Institutions or NGOs.*

At present, there is no Romanian legal instrument to comprise a somewhat official definition of the term “family”. However, there are a series of fundamental principals prevalent in this matter, from which the premises of such a definition could be inferred. These instruments are the Romanian Constitution<sup>27</sup> and the Romanian Civil Code.

The Romanian Constitution, within a Chapter devoted to the fundamental rights of the person, pledges “to respect and protect the intimate life, the family and the private life”.

In 1954, the Family Code came into force, and it comprised a body of norms regulating the family law matter. This nowadays altered with the 2011 adoption of the New Civil Code<sup>28</sup>, which presently comprises this matter and, as a consequence, abrogated the Family Code.

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<sup>25</sup> <http://www.obiectivdevaslui.ro/?q=node/7133> , last viewed on the 25<sup>th</sup> October 2012.

<sup>26</sup> <http://www.ziare.com/articole/cristian+ene+droguri+romania> , last viewed on the 25<sup>th</sup> October 2012.

<sup>27</sup> The law No. 429 / 2003, published in the OJR, No. 758, on 29<sup>th</sup> October 2003; it was republished and updated, by updating the names and giving the texts a new numbering, in the OJR No. 767, on 31<sup>st</sup> October 2003.

<sup>28</sup> The law No. 287 / 2009, published in the OJR No. 511, on 24<sup>th</sup> July 2009, lastly modified and republished in the OJR No. 505 from 15<sup>th</sup> July 2011.



Comparatively, the two instruments differ rather insignificantly at the level of general principles.

Thus, art. 258 alin. 1 of the New Civil Code states that “Family is based on freely consented marriage between spouses, on their equality, and also on their right and duty to ensure the upbringing and education of their children”, while art. 258 alin. 4 clarifies beyond any doubt that, by the term of spouses, we understand the man and the woman united through marriage.

Therefore, family, in view of the Romanian law, means a both natural and legal bond uniting the legally married male and female, along with their children, all of which have mutual and interdependent rights and obligations in consideration of this de facto and de jure reality, which is also awarded the protection of the State.

On the other hand, by means of a *per a contrario* interpretation, this definition some limitations also triggers to any idea of family:

First and foremost, no family can be created in the sense of Romanian law without lawful marriage between the two spouses. The marital status is a key feature of a person’s civil status, which can only be acquired at the end of a procedure expressly prescribed by the law. *Per a contrario*, no family in the legal sense can come into question when a man and a woman cohabit and act as a family, without being married. No matter how long they have dwelled in this manner, civil status cannot be achieved by means of acquisitive prescription.

<sup>29</sup>

Secondly, the two spouses are necessarily a man and a woman, therefore persons of opposite sex. In other words, a homosexual union is incompatible with the idea of family upheld by the Romanian law, which is also the most frequent position in other law systems as well. <sup>30</sup>

Thirdly, a union between man and woman also means a union between only one man and only one woman. The prohibition of bigamy is, again, a traditional view common the cvasi-totality developed States of the world.<sup>31</sup>

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<sup>29</sup> REGHINI Ionel, DIACONESCU Șerban, VASILESCU Paul, *Introducere în dreptul civil*, Sfera Juridică Press, Cluj-Napoca, 2008, p. 169-170.

<sup>30</sup> NOLAN C., LAURENCE W., LYNN D., *Fundamental Principles of Family Law*, William S. Hein & Co. Press, Buffalo, New York, 2006, p. 92- 120.

STASKY P., *Family Law: The essentials, Second Edition*, Thomson Press, 2003, p.3.

With a view to compensate the void of an official definition, multiple attempts at defining the concept can now be attributed to doctrine. These are two examples:

“Family is a complex social phenomenon, which most probably emerged as an optimum survival and development strategy amongst human groups; through ubiquity and respectability, it achieved the status of linking point between the individual and the society.”<sup>32</sup>

“Family is a biological reality – through the union realized between man and woman, and also through procreation; also, it is a social reality, because it represents the background of the life community and sum of interests of the members comprising it, united through the moral essence of marriage and through descendance from a unique model of human solidarity; it is also a juridical reality, being legally protected.”<sup>33</sup>

To draw a conclusion from the above-mentioned, there is an inextricable link between the two notions: marriage and family. That is, marriage is a prerequisite, a *sine qua non* condition towards the formation of a family in the sense of the Romanian law. This is the family duly benefitting from the utmost protection of the State, as a fundamental Constitutional provision upholds.

It shall be noted that a child benefits the same protection and rights whether he or she was born within a married couple or not. The old traditional point-of-view divided into, on one hand, a child from a legal marriage, and on the other hand, a child from outside a marriage, was abolished. Both children will benefit the same protection and rights, and in both cases the parental obligations are the same. Nevertheless, the notion of family is traditionally regarded to be forged by the marital status.

Presently, the minimum age for marriage in Romania is 18 years for both men and women. Though, this general rule is susceptible of an exception: in some extraordinary cases (e.g.: pregnancy) the two may be allowed to marry provided they are already at least 16 years of age. This allowance is subject to prior procurement of a series of authorizations, especially a medical authorization, and the consent of their parents or, if applicable, their legal representatives (tutors).<sup>34</sup>

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<sup>31</sup> WEISBERG D., *Family Law*, Second Edition, Wolters Kluwer Law & Business Press, 2008, p. 35.

<sup>32</sup> FLORIAN Emeșe, *Dreptul Familiei*, C.H. Beck Press, București, 2011, p.1.

<sup>33</sup> ALBU I., *Dreptul familiei*, E.D.P. Press, București, 1975, p. 7.

<sup>34</sup> Art. 272, parag. (2) Of the Romanian Civil Code.

This is the product of a legislative intervention dating back from 2007.<sup>35</sup> Prior to that moment, there was the same marital age, but with a slight supplement: the woman aged at least 16 could marry provided she had beforehand obtained a dispensation from her parents, while the woman aged 15 could marry with a dispensation from Autoritatea Tutelară (The Tutelary Authority – an institution subordinated to the local public authorities, which has a sum of attributions regarding the protection of the minor.<sup>36</sup>

However, while this is the minimum age at which marriage is legally allowed, the things differ significantly when it comes to the present-day average marital age in Romania. A recent survey<sup>37</sup> carried out by the National Institute of Statistics shows that, in the interim 2008-2009, the average marital age has been 26,6 for women in the urban environment, compared to 24,5 in the rural environment; when it comes to men, the average age was 29,3, respectively 28,7. A major difference can be undoubtedly observed since three decades ago. In 1985, the average marital age was 22 for women and 25, 7 for men.<sup>38</sup>

This decreasing trend does not maintain though when it comes to the rate of marriages per year. Fortunately enough, this rate has seen an unexpected revival since 2001, when it achieved its historical minimum of 5, 85% (per 1000 inhabitants). In 2007, it registered a spectacular growth of 8,78% (the same approximate value from 1990), by these means placing Romania in the first position of the European Community countries. Starting from the following year, the numbers started to diminish slightly once again.<sup>39</sup>

In other words, the data provided by the above-mentioned surveys is unfortunate, yet is in line with present-day realities in Europe and in the developing world as a whole.

### 1.3. Child Protection

*iii. What is the general status of children within the respective States' cultural and historical background? What is the general approach to children rights issues in the respective state? Is there a general concern regarding children/children rights? Were there/are there any violations that has been caught the eye of the media or the legislators?*

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<sup>35</sup> The law No. 288/2007, art. 1, pct.1, published in the OJR, No. 475, on 2<sup>nd</sup> February 2007.

<sup>36</sup> The Romanian Family Code, art. 4, published in the OJR, No. 15, on 18<sup>th</sup> April 1956.

<sup>37</sup> <http://www.frontpress.ro/2011/12/bomba-biologica-romanii-se-casatoresc-la-varste-tot-mai-inaintate.html>, last viewed on the 25<sup>th</sup> October 2012.

<sup>38</sup> <http://ebooks.unibuc.ro/StiintePOL/ralu/1-3-3.htm>, last viewed on the 25<sup>th</sup> October 2012.

<sup>39</sup> [http://nastase.files.wordpress.com/2009/12/date\\_familie.pdf](http://nastase.files.wordpress.com/2009/12/date_familie.pdf), last viewed on the 25<sup>th</sup> October 2012.

The status of children in Romania's cultural and historical background has known a rich and convoluted evolution. A century ago, the traditional Romanian family was represented by the rural family with plenty of children, more or less of all ages. Children were envisaged somewhat as a means of production, because they played a great contribution to agricultural chores starting from an early age. In one way, children were regarded as a wealth of one's homestead, because they basically entailed free extra labour force. On the other hand, the contrary way of seeing things was to perceive families with many children as rather poor and helpless, because of the hardship of giving each of them a decent dowry, and thus the correlating duty of arranging a good marriage for each.

The role of children in household chores was greater than that of performing supporting tasks, they did not only give a helping hand to their parents, they had duties and responsibilities of their own; these duties and responsibilities were tailored for each category of age – or so were they supposed, because in present day, we regard the vast majority of them as overwhelming for a child. Children less than 5 years of age were only given some rather supporting chores around the household, and usually not compelled to leave the household area without their parent, but once they have turned 5 or 6, they were already entrusted a herd of small animals, to get them to pasture in the nearby; by the time they were about 7, they were already given a flock of goats, sheep or even cows to get them to pasture in the meadows at the outskirts of the village – this was already a serious chore, because it entailed a large distance to be walked in bare foot, a great responsibility over the whole flock, and often it meant staying over the night alone in the meadows with the animals. This practice that would seem rather abominable in present-day society was a perfectly natural one in the 20-30's. As the children advanced in age, their role in the core agricultural chores grew significantly. By the time they were 10, they were already entrusted important agricultural tasks, such as harvesting, cropping, hay storage and even planting. At approximately 15 years of age – the girls, the boys a year or two later – they already started leaving the “family nest” for marriage. Despite their great labour-related responsibilities, their voice did not carry any weight when it came to family decision-making. Children and adults were no equals, children were not allowed to question the decisions of the pater

familias, and were not allowed to debate upon the tasks they were entrusted with <sup>40</sup>. Practically, any option other than to obey was non-existent.

Along with the process of industrialization and urbanisation, this attitude slightly altered. The children were allowed to go to school, but not without difficulty: they were still a great deal exploited in production. In other words, they could only go to school if they were able to do both of them – mingle school and work, and basically it was twice as hard for them as for adults.

Along with the modernisation of society, the status of the child has known an indubitable evolution. A lot of instruments for the protection of the rights of the child emerged; the most important being the UN Convention on the Rights of the Child (1989) <sup>41</sup>, and Romania had to stay in line with the shifting perspectives. The school became compulsory, minor labour was prohibited and any form of violence against the children – even as a means of correction – was prohibited and accordingly punished by the Criminal Code. The present-day tendency is for children to be encouraged to take their own decisions regarding their education and their future profession, and to be treated as equals by their parents and teachers. Voices of dissent also exist – the representatives of the older generation raise the issue that this sort of privileged treatment encourages children to disrespect their siblings and professors, to have a spoiled attitude and to the inevitable tendency to take everything for granted. It is a universally acknowledged fact that, in line with the tendencies in the rest

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<sup>40</sup> Romanian literature is rich in novels depicting this state of affairs. One of the most iconic novels is called “*Moromeții*” by Marin Preda (the book was originally published in 1955 (vol. I) and 1967 (vol. II)), which follows the drama of the large *Moromete* family on the way to its dissolution and irremediable erosion of the idea of traditional rural family. The book in itself is fictional, but entirely reality-based and vividly reflecting the realities of the inter-war period. Ilie Moromete is the archetype of a *pater familias* who clings to the illusion that he can preserve its traditional family united and the ownership of their land intact, but he ends up losing them both. Children-wise, the novel is interesting because it presents the children who disobey their father and wish to explore other options in life than working the land as the previous generations of ancestors: Ilie Moromete’s three great sons end up running to the capital in pursuit of their dream to start a business. However, perhaps the most interesting is the destiny of Niculae and the relationship between him and his father, because it depicts the peasant’s stance on education in the inter-war period. Niculae was dreaming of going to school and studying, which was absolutely no option for his father who kept ignoring him and sending him to pasture the geese. The child kept complaining for books and the permission to go to school, which his father always saw as a waste of time and resources, and Niculae’s desire was invariably at the bottom of his father’s list of priorities. Later on, Niculae will also leave the family and provide a superior education to himself. The novel is iconic because it depicts a dire reality of the past, that there was no real perspective upon education, and disobeying the plans of one’s parents, having other future plans, was unconceivable.

<sup>41</sup> Romania ratified this Convention, by adopting the implementing law No. 18 / 1991, published in the OJR No. 314, on 13<sup>th</sup> June 2001.

or the European Community, the number of children per family has sharply diminished. But the good part is the tendency to greater value the new-born and better provide for its future. Having fewer children, or even a single child, the parent's attention is better employed the attention towards the needs, emotions and future development of the child. Enlarging one's family for the sake of obtaining free labour force is an obsolete, unacceptable view in the contemporary society.

The general approach to children rights issues in Romania has known a significant alteration for the better in the last decades. Historically speaking, this shift in the general attitude has been triggered firstly, because of the breakdown of a long-standing and dire period of communism, in which concerns such as child protection would have appeared as ridiculous at most, and secondly, because of the adoption of legal instruments of protection, in line with those promoted by the developed countries.

The first step was made precisely in 1990, when Romania signed the International Convention on Children's Rights, and in the following years, additional supporting social policy and child welfare provisions have emerged. A very important step forward was represented by the attention devoted to children with disabilities: new provisions regarding education and social services catered for their needs have thus been established. Another very important legislative intervention was to prolong the maternity leave (from a ridiculously short interim of four months to the period of two years still applicable in present day).<sup>42</sup>

In addition, more NGOs have emerged and devoted their attention to providing effective programmes, with special focus to foster children, and, fortunately, the great majority of them had great success – foster families were trained, State foster homes were modernised, and this way child welfare systems have gradually raised to the level prescribed by the international instruments in the area <sup>43</sup> : The UN Convention on Children's rights, approved by the Romanian Parliament in 1991 (Law 26/1991) <sup>44</sup>; The Hague Convention on Child Kidnapping (Law 100/1992) <sup>45</sup>; The European Convention on the Legal Status of Children Born outside of a Marriage (Law 101/1992); The European Convention on Adoptions (Law

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<sup>42</sup> Law 18 / 1990, published in the OJR, No. 314, on 13<sup>th</sup> June 2001.

<sup>43</sup> ROTH Maria, *Children's Rights in Romania: Problems and Progress* - <http://www.scie-socialcareonline.org.uk/repository/fulltext/0065896.pdf> , last viewed on the 25<sup>th</sup> October 2012.

<sup>44</sup> Law 26 / 1991, published in the OJR, No. 54, on 19<sup>th</sup> March 1991.

<sup>45</sup> Law 100 / 1992, published in the OJR, No. 243, on 30<sup>th</sup> September 1992.

15/1993)<sup>46</sup>; The Hague Convention on Child Protection and Cooperation in the Area of Adoption (Law 84/1994).<sup>47</sup>

However, worryingly enough, during the next 8 years since the overthrow of the communist regime, the children have represented the mostly affected by poverty social category (even more than elderly). A Report carried out by the Institute for Quality of Life in 1997, entitled „For a society centred on the child”, showed that an astonishing number of 50% of the total number of children live in the poorest families of the country, which represent 30% of the total number of families. At the same time, 30% of the wealthiest families have only 15% of the total number of children. Abortion in 1990, only one year after the Communism, Romania with the scope of reducing the number of abandoned children. However, even though the number of new-born children has diminished by 38% between 1996 and 1989, the number of abandoned children increased.<sup>48</sup>

Despite the advancements made in the matter of institutionalised children and the improvement of Foster Homes legislation, the big problem of the following years consisted in the impressive number of children older than 18, previously reared in children’s homes, to whom no housing and employment arrangements were made. These so-called “graduates of Foster Homes”, who were compelled to leave Foster Homes upon turning 18, had no real future ahead of them and the consequences did not fail to emerge: unwanted pregnancies out of which premature and underweight children were born, due to the malnutrition and dire life condition of their mothers; moreover, the emotional neglect and the many abuses still going on in residential care, lead these children to deviant behaviour and petty crimes.

In the next years’ legislation, a series of measures have been set forward with an aim to address in some way or another these problems: the coordination of the Government’s strategy for implementing all matters that concern the protection of children’s rights; evaluation and monitoring of the activities concerning children’s rights; identification and protection of children in difficult situations (abused or neglected children); the general underlying principle of the best interest of the child; development of adequate support services for natural families (in order to prevent child abandonment, to train foster families

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<sup>46</sup> Law 15/1993, published in the OJR, Part I, no. 67, on 31<sup>st</sup> March 1993.

<sup>47</sup> Law 84/1994, published in the OJR, Part I, no. 289, on 21<sup>st</sup> October 1994.

<sup>48</sup> <http://www.scie-socialcareonline.org.uk/repository/fulltext/0065896.pdf>, last viewed on the 25<sup>th</sup> October 2012.

and to evaluate the needs of children); functional financial support mechanisms; cooperation with NGOs, provision and periodic evaluation of children's rights officers.

In other words, these measures have made a feasible reality out of the principle of the best interest of the child. However, these are big words and in order to see the change in the society time is needed and the difficulty of this task should never be undermined.

However, there is still a very long way ahead, because there is still a great deal of worrying facts that have caught the eye of the media in the recent years. An iconic case of the 90's was that of a five year old girl abused by her father <sup>49</sup>. Her grandma noticed the atrocity and a psychologist examined the girl immediately (in November 1996); she notified the local Tutelary Authority and the Police for child physical abuse and sexual molestation. Her mother, an emotionally imbalanced person, refused to understand the necessity of investigation, and the local authorities did not take action without the formal complaint of the mother, despite the fact that legally, anyone could make a complaint and the Police had the obligation to look into it. In March, her mother finally made the complaint that the girl had been raped by her father, which was later corroborated through medical investigation. A trial began, but the father was never compelled to live the homestead. A social worker from the service of the Direction of Children's Rights took over the case, but the girl and her younger sister were left with their abusive parent. In June, the girl was once again raped. Then, her mother and the social worker decided to act and because no relatives or foster families were found, the girls were taken in the Foster Home. In this period, the mother benefited from psychological counselling. While in the children's home, the father was allowed to visit his two daughters, and took advantage of the opportunity to repeatedly tell his daughter that she was the only one responsible for him being investigated into by the police. A divorce was pronounced between the parents and the mother was awarded custody. The abusive father was legally expelled from home and then shortly after sentenced to two years' imprisonment.

Since that had been his first offence, he was set free on parole and returned home with his former wife and two daughters. Shortly after, the younger child presented severe signs of post-traumatic stress disorder and the psychologist presumed that she had also been abused

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<sup>49</sup> ROTH Maria, *op. cit.*, last viewed on the 25<sup>th</sup> October 2012.



by her father. This case underlined the fact that the legislation protecting children from abuse still has significant loopholes and the consequences can be dramatic.

More than a decade after this case, things did not greatly improve – the most ubiquitous cases of child abuse still occur within the homestead. One of the prevalent concerns is that of the child mothers, who become pregnant at astonishingly young ages (10, 11 years) out of incestuous non-consented sexual relations. Children thus born are prone to abandonment, maltreatment, and often genetic disease.

The most recent case that has drawn a great deal of attention from the media these days was that of a thirteen year old girl infested with HIV, which was forced to prostitute in a seaside resort by a human trafficking band. She was caught by the police the same day and confessed to have had intercourse with two men who paid her for her services, of course without knowledge of her being infected with HIV <sup>50</sup>. The problematic issue is that the Police had to find a way to contact those two men and inform them about the danger they have exposed themselves to, in order to avoid the possibility of them further expanding the virus. Still, one of the great issues in such a situation is finding a fine-tuned balance between the right of one's person to remain unknown in such cases and the right of the authorities to provide public information (photos for example) about the cases in order to safeguard public sanity and the public interest.

To draw a conclusion, the two decades after the 89' Revolution have represented a period of powerful reform endeavours in the matter of social policy and child welfare, but there is still room for improvement and stringent problems need to be addressed; but the better way to find a solution is by also resorting to the aid of international and European instruments in this field.

#### **1.4. International obligations**

*iv. What is the relevant legislation regarding the implementation of international treaties? What is the relationship between State law and international treaties (dualistic or monalistic approach)? What is the date of ratification of United Nations Convention on Rights of the Child? Did the State make any reservations to the Convention? What is the general status of implementation?*

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<sup>50</sup> [http://www.tvrinfo.ro/o-minora-infectata-cu-hiv-a-fost-obligata-sa-practice-prostitutia-la-constantina\\_20329.html](http://www.tvrinfo.ro/o-minora-infectata-cu-hiv-a-fost-obligata-sa-practice-prostitutia-la-constantina_20329.html) , last viewed on the 25<sup>th</sup> October 2012.

The relevant legislation regarding the implementation of international treaties is the Romanian Constitution and according to article 11 from it, the treaties ratified by the Parliament are part of the national law. That means that Romania has opted for the *dualistic approach*. Paragraph 3 from article 11 states that if such a treaty is in contrary with the constitutional text his ratification will be made after the review of the Constitution, consequence of the supremacy of the Constitution principle." Our state, by the competent public authorities, is bound to meet in good faith its obligations under these treaties, which through ratification by the Parliament, are part of the national law".<sup>51</sup>

Romania has ratified the United Nations Convention on Rights of the Child by Law 18 from 27<sup>th</sup> September 1990 <sup>52</sup>. The state did not make any reservations to the Convention.

"In 1993, the Romanian Government created an inter-ministerial body, The National Committee for Child Protection (CNPC), charged with responsibility of co-ordinating activities in the interest of children and designing the Government strategy for child welfare, in particular the *National Plan of Action*. The Committee was also one of the key members of a multi-ministerial team responsible for monitoring of the implementation of the UN Convention of the Rights of the Child in Romania." <sup>53</sup> Also the Ministry of Family, Labour and Social protection runs a project, "Strengthening the capacity of the Ministry of Family, Labour and Social Protection to coordinate the implementation of the UN Convention for the rights of the child in Romania" with the purpose of implementing the Convention.<sup>54</sup>

*"In June 2004, the Parliament has adopted the legislative package on the protection of children's rights based on the principles of the European Convention on Human Rights and the UN Convention on children's rights, package which came into force on 1<sup>st</sup> January 2005 and which includes: Law 272 / 2004 regarding the protection and promotion of children's rights, Law 273 / 2004 regarding the legal status of adoption, Law 274 / 2004 regarding the establishment, organization and functioning of the Romanian Office for Adoptions and Law 275 / 2004 regarding the establishment of the National Authority for Children's Rights Protection."* <sup>55</sup>

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<sup>51</sup> CONSTANTINESCU Mihai, IORGOVAN Antonie, MURARU Ioan, TANASESCU Elena Simina, *Constitutia Romaniei revizuita , Comentarii si explicatii*, All Beck Press, Bucharest, 2004, p.13.

<sup>52</sup> Published in the OJR, No. 109, on 28<sup>th</sup> September 1990. The law was republished in the OJR No. 314, on 13<sup>th</sup> June 2001.

<sup>53</sup> National Report on the Follow-up to the World Summit for Children December 2000 .

<sup>54</sup> <http://www.infolegal.ro/mmfps-deruleaza-un-proiect-de-implementare-a-conventiei-onu-pentru-drepturile-copilului-in-romania/2012/04/18/> , last viewed on the 25<sup>th</sup> October 2012.

<sup>55</sup> For further information, visit [http://www.copii.ro/Files/Raport%20Geneva\\_200710164458906.pdf](http://www.copii.ro/Files/Raport%20Geneva_200710164458906.pdf) , last

## 1.5. European Obligations

*v. If the State is a EU Member, what is the general implementation process of the Directive 2011/92/EU of the European Parliament and the European Council of 13 December 2011? Please cite the internal legal instruments of the implementation.*

As stated in the Treaty establishing the European Community, “a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.<sup>56</sup> A directive is usually implemented through a law ratified by the Parliament or through other legal norms that under Romanian law have the same judicial power as a law<sup>57</sup>.

At the present time, according to the Ministry of Justice, which coordinates the implementation of the above-mentioned Directive, “part of it is transposed into present national legislation. There are still things that remain to be done, such as identifying the measures that impose the compliance with the rest of the aspects which have not been yet transposed”.<sup>58</sup> The deadline for the implementation of the Directive is 18<sup>th</sup> December 2013.

## 2 THE LANZAROTE CONVENTION

*i. When did the State ratify the European Convention on Human Rights?*

Romania ratified the European Convention of Human Rights on the 18<sup>th</sup> of May 1994<sup>59</sup>.

*ii. Is the state a party to the Lanzarote Convention? Date of signature and ratification? Did the country make any reservations to the Convention/opt out of any parts?*

viewed on the 25<sup>th</sup> October 2012.

"Romania and the UN Convention regarding children's rights" the 3<sup>rd</sup> and 4<sup>th</sup> periodic report from 2007.

<sup>56</sup> Chapter 2 – Provisions Common to several Institutions – art. 249 – [http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C\\_2002325EN.003301.html](http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html), last viewed on the 25<sup>th</sup> October 2012. For additional information, see, GYULA Fabian, *Drept Institutional Comunitar, Editia a III-a, revazuta si adaugita cu referiri la Tratatul de la Lisabona*, Hamangiu Press, Bucharest, 2010, p. 134 – 139.

<sup>57</sup> *Governmental Ordinances* – see, art. 108 of the Romanian Constitution. This is a very complex problem in our legal system and it is not the place for further discussions, so, for explanations see, DELEANU Ion, *Instituti si proceduri constitutionale – in dreptul roman si in dreptul comparat*, C. H. Beck Press, Bucharest, 2006, p. 666 and next.

<sup>58</sup> The official document of the Ministry of Justice, regarding this topic can be viewed at the following link : <http://www.google.ro/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&ved=0CFIQFjAH&url=http%3A%2F%2Fwww.just.ro%2FLinkClick.aspx%3Ffileticket%3DYhKbwUsR2CY%253D%26tabid%3D2304&ei=95GfUOHwJKjU4QSAwYHwDQ&usq=AFQjCNF2cj8bGleK918Ssrz4K-Zcxe19Fg&sig2=yxCJZEJ5sOxbKGozTaOZLw>, last viewed on the 10<sup>th</sup> November 2012.

<sup>59</sup> Law No. 30 / 30<sup>th</sup> May 1994, published in the OJR No. 135, on 31<sup>st</sup> May 1994. For further information about the additional Protocols - [http://www.cdep.ro/pls/legis/legis\\_pck.ftp\\_act?ida=5009](http://www.cdep.ro/pls/legis/legis_pck.ftp_act?ida=5009), last viewed on the 25<sup>th</sup> October 2012.

Romania became part of Lanzarote Convention on the 25<sup>th</sup> October 2007, signed at the same date. However, it was enforced by its publishing in the OJR on the 14<sup>th</sup> of December 2010. Romania made no reservation to the Convention.

*v. What is the rank of the Lanzarote Convention under your national legal order? Is there a legislation regarding its implementation? If so, indicate the source and if available, an English translation.*

Romania has a dualistic approach towards the international law and thus, any treaty or convention must be filtered and implemented by the Parliament through a law <sup>60</sup>. The Lanzarote Convention was adopted via a “ordinary law”, No. 252, from 14<sup>th</sup> December 2010 <sup>61</sup>, and thus, it is of second rank, after the constitutional laws. As implementation, Romania did it without any draft legislation or legislation regarding implementation. It is ratified without any reservation and it became an internal part of Romania’s legislation.

*vi. Does the legislation address all the issues within the Lanzarote Convention?*

To answer this question, the issues posed by the Lanzarote Convention must be first clarified, followed by a brief account of national implementation laws in order to tackle the problem.

The Convention deals with the sexual abuse of children and sexual exploitation of children, both of them being particularly serious forms of crime. Childhood sexual abuse is a traumatic event which can change a person forever, disrupting the physical, emotional, spiritual, intellectual and sexual development, influencing skills of cooperation and social interest, and its persistence undermines the core values of modern society and confidence in state institutions. The children often become victims of sexual abuse, due to their vulnerability, the result of various factors. Insufficient response of the mechanism for implementing the law contributes to the spread of these phenomena, and difficulties are exacerbated because of certain types of crimes that transcend national boundaries. Developments in information technology have also led to aggravation of these problems, facilitating production and distribution of child sexual abuse images and also offering offenders anonymity and spreading responsibility across jurisdictions.

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<sup>60</sup> Art. 11 and 20 of Romania’s Constitution.

<sup>61</sup> Published in the OJR, No. 885, on 29<sup>th</sup> December 2010.

Data from the Ministry of Labor, Family and Social Protection shows that in the first three months of 2011, almost 2,900 children were abused, neglected or exploited, 700 of them being subjected to physical, emotional and even sexual abuses. Physically abused children come from rural areas whereas emotional abused children live in cities. The same statistics also show that children aged between 10 and 13 years are most often abused and most abuses occur in the family. Psychologists say that most abused children at an early age, become abusers themselves in adulthood.<sup>62</sup>

That being the case, some changes and additions to the national legislation are imperative, in fields such as education, health, social protection and forces of order fields, also in criminal law and criminal procedure, as well as special legislation which incriminates facts that enter into the scope of the Convention such as: legislation on preventing and combating human trafficking, legislation on combating cyber-crime, legislation on preventing and fighting pornography.

In terms of international cooperation, Romania is to designate certain institutions to discharge certain obligations established under the Convention. In this matter, the following should be underlined:

-in accordance with art. 10 (2)(a) of the Lanzarote Convention, the designation of an independent national or local institution is required. These organisms should promote and fight for the children's rights. Therefore, it was decided that the Ombudsman should be designated as the national institution responsible for implementation of the same article on children's rights activities and the National Authority for Child Protection and Family to be designated as a national institution responsible for the implementation as regards activities designated to promote children's rights.

in accordance with art. 10 (2)(b) of the Lanzarote Convention, the designation of mechanisms for collecting and evaluating data in order to observe the phenomenon of sexual exploitation and sexual abuse on children, while protecting their personal data, is needed . In applying these statutory stipulations the National Authority for Child Protection and Family has been appointed as the institution responsible for data collection at national level for observing and evaluating the phenomenon of sexual exploitation and sexual abuse

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<sup>62</sup> <http://www.unicef.org/> , last viewed on the 25<sup>th</sup> October 2012.

committed against children, in compliance with personal data protection rules. This authority shall be active until will be set up an independent national institution shall be set up.<sup>63</sup>

in accordance with art. 37 (2) of the Lanzarote Convention, the designation of a single national authority for the collection and storage of data regarding the identity and genetic profile of the convicted persons for offenses specified in accordance with the Convention is required. In applying these forecasts the General Police Inspectorate within the Ministry of Administration and Interior has been appointed as responsible.

The Convention focuses on aspects of prevention and protection in the fight against all forms of sexual exploitation and sexual abuse against children and the establishment of certain special monitoring mechanism.

Precautions refer to the encouragement, protection and raising awareness about child rights among people who work regularly with children, among children and among the general public. It institutes the right offered to offenders which could commit an offence under the Convention, to benefit from effective measures so as to prevent the risk of committing other offences. Protection measures on the one hand refers to providing support for victims, their relatives and anyone else who deals with their care, and on the other hand to encourage anyone who knows or has suspicions about sexual exploitation or sexual abuse of a child to report them to the authorities.

Criminal law measures refer to criminalizing as offences the following: sexual abuse, child prostitution, child pornography, participation of children in pornographic performances, corruption and soliciting children for sexual purposes. These are also punishable when committed intentionally, aiding or abetting and attempt. Moreover, in criminal law procedure, rules establishing competence in relation to any delinquency specified in the Convention and rules regarding the investigation, prosecution and procedural law, are to be mentioned.

For implementation of the Convention, certain amendments to legislative acts that regulate the access to practicing professions involving regular contact with children are necessary.

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<sup>63</sup> Law No. 252 from 14/12/2010.

These include amendments to the following internal acts: the law 466/2004<sup>64</sup> on the status of social workers, law 213/2004<sup>65</sup> on the practice of psychology with the right to free practice setting, organization and functioning of psychologists in Romania, law 360/2004<sup>66</sup> on the status of police, law 128/1997<sup>67</sup> on the status of teachers-in the sense that the practice of these professions should be prohibited not only the people who are not registered in the database of criminal records but and those who have previously committed a delinquency under the Convention but rehabilitation has occurred under the Criminal Code, law 217/2003<sup>68</sup> for preventing and combating domestic violence, by giving procedural details so as to ease removal of the assumed delinquent of an offence under the Convention (when he is the father of the victim), establishing conditions in which child-victim should be removed from the family environment and conditions under which the abuser should be removed from this environment.

Implementation of Chapter VI " Material Criminal Law" and the Chapter VII " Investigation, Prosecution and Procedural Law " attract some changes to the special legislation (law 678/2001 on preventing and combating human trafficking, law 161/2003<sup>69</sup> on measures to ensure transparency in the exercise of public dignities, public functions and in business, preventing and sanctioning corruption, law 196/2003<sup>70</sup> on preventing and fighting pornography and the criminal code and criminal procedure code). These changes will focus on adapting, according with the stipulations of the Convention, the methods of criminalization of some crimes (prostitution and child pornography) and the criminalization of new offences (use of child prostitution, possession of child pornography, access to child pornography through information and communications technology, crimes related to participation of children in pornographic performances, mooring children for sexual purposes and others.

## II NATIONAL LEGISLATION

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<sup>64</sup> Published in the OJR, in 23/11/2004.

<sup>65</sup> Published in the OJR, in 01/06/2004.

<sup>66</sup> Published in the OJR, in 10/09/2004.

<sup>67</sup> Published in the OJR, in 16/07/1997.

<sup>68</sup> Published in the OJR, in 29/05/2003.

<sup>69</sup> Published in the OJR, in 21/04/2003.

<sup>70</sup> Published in the OJR, in 20/05/2003.

## 1 GENERAL PRINCIPLES OF THE JURISDICTION

*i. Please give us a brief history of the respective State and the governmental regime (Federal State/Central government?)*

Democracy has been the political regime of Romania since the 1989 Revolution that marked the fall of the Iron Curtain and the end of the totalitarian Communist Regime, that had been established since 1948. Romania became a member of the Council of Europe in 1993 and a member of the European Union in 2007. The current Constitution was adopted by referendum on December 8, 1991 <sup>71</sup> and revised in 2003 <sup>72</sup>, in the context of Romania's integration in the North Atlantic Treaty Organization and the European Union.

According to the first paragraph of the first Article of the Constitution, Romania is a “sovereign, unitary and indivisible national state”. These characteristics define Romania as a constitutional democracy and represent the fundamentals on which the form of government and the rule of law are built <sup>73</sup>. Consequently, the democracy is based on the principle of constitutional supremacy, meaning that the Constitution is placed at the top of the hierarchy of legal norms, and should be respected by every subsequent legally-binding act. Likewise, the compliance with the whole body of legal norms, including the Constitution, is mandatory <sup>74</sup>.

In addition, Romania pledges to safeguard human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism <sup>75</sup>, which are considered supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989 <sup>76</sup>. The Constitution <sup>77</sup> provides that Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion,

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<sup>71</sup> The Constitution of Romania was initially published in the OJR, No. 233, on 21<sup>st</sup> November 1991.

<sup>72</sup> See footnote No. 27.

<sup>73</sup> CONSTANTINESCU Mihai *et al*, *The Constitution of Romania Revised – comments and explanations* (Romanian: *Constituția României revizuită – comentarii și explicații*), ALL Beck Press, 2004, p. 1.

<sup>74</sup> Romanian Constitution, Art. 1, para. 5.

<sup>75</sup> Romanian Constitution, Art. 1, para. 3.

<sup>76</sup> *Ibid.*, pt. 4.

<sup>77</sup> Romanian Constitution, Art. 4.



political adherence, property or social origin, thus safeguarding right at the beginning the principle of non-discrimination.

As a further safeguard for constitutional democracy, the Supreme Law expressly enshrines the principle of the separation and balance of the legislative, executive and judicial powers. Apart from the three “classical” powers of the state, there are also public bodies that do not pertain to a certain branch, but ensure the effective collaboration between them: the Romanian Ombudsman, the Constitutional Court or the Court of Audit.

Romania is a Semi-Presidential Republic, run by a Central Government. Its territory is divided into 41 counties which are not autonomous, but run by local councils. The counties are further divided into cities and communes which have a local administration. The counties, cities and communes, have the power to enact legal norms of their own, through their own elected bodies, but are all subject to the obedience of the same laws enacted by the Parliament, legal norms enacted by the Government or, other central bodies, which prevail over the local ones.

So, to conclude, although there is a certain administrative decentralization, Romania remains, as provided by the Constitution, a sovereign, unitary and indivisible national state.

*ii. About the general approach of the National legislation to Human Rights, how does the State legislate Human Rights? Is there a “Bill of Rights” within the respective country or are human rights mentioned in the Constitution as fundamental principles? When was this Constitution/Bill of Rights created? Are there any specific provisions regarding Children Rights?*

The Constitution of Romania, adopted in 1991 and revised in 2003, safeguards Human Rights by two means: it provides a list of Fundamental Rights and Freedoms and it makes reference to International Treatises on Human Rights.

Firstly, Chapter II of the Constitution, entitled “Fundamental Rights and Freedoms” contains 21 articles safeguarding rights and freedoms that are also “traditionally” part of International Human Rights Documents. Such rights are: *Right to life, to physical and mental integrity, Personal and Family Privacy, Secrecy of Correspondence, Freedom of Expression, Right to Information, Right to Education, etc. .*

Secondly, Article 20 of the constitution stipulates that:

*“(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania*

*is a party to. (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions.”*

Consequently, the International Treatises regarding Human rights ratified by Romania represent a „block of constitutionality” together with the Romanian Constitution. Fundamental Rights and Freedoms provided by the Constitution are interpreted in conformity with the Human Rights Treatises. Where there are inconsistencies between those and the national law, the most favorable provisions shall take precedence.

It is also worth mentioning that Constitutional Article no. 11 provides rules regarding the relationship between national and international law. Any treaty ratified by the Parliament becomes part of the national law <sup>78</sup>, and, in order for this procedure to take place, the treatise must not contain provisions that are contrary the Romanian Constitution. Otherwise, the Constitution needs to be revised:

*“(1) The Romanian State pledges to fulfill as such and in good faith its obligations as deriving from the treaties it is a party to. (2) Treaties ratified by Parliament, according to the law, are part of national law. (3) If a treaty Romania is to become a party to comprise provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.”*

Romania is part of a series of International Human Rights Treatises which have become, by ratification, a part of national law. Such treatises include:

- The Charter of Fundamental Rights of the European Union<sup>79</sup>;
- The Convention for the Protection of Human Rights and Fundamental Freedoms (ratified by Romania on June 20, 1994)<sup>80</sup>;
- The International Covenant on Civil and Political Rights (ratified by Romania on October 31, 1974) <sup>81</sup>;

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<sup>78</sup> As we mentioned before, Romania embraced the *dualistic* approach towards the international law.

<sup>79</sup> Published in the Official Journal of the European Union, C 303, 14/12/2007 p. 0001 – 0016 2007 1214.

<sup>80</sup> Ratified by the Romanian Parliament through Law No. 30 / 1994 published in the OJR, No. 135, on 31<sup>st</sup> May 1994.

<sup>81</sup> Ratified by Romania through Decree No. 212 published in the OJR, No. 146 of 20<sup>th</sup> November 1974.

- The International Covenant on Economic, Social and Cultural Rights (ratified by Romania on October 31, 1974) <sup>82</sup>;

The protection of children's rights is directly mentioned in the Constitution in Article 49 entitled "Protection of Children and Young People":

*"(1) Children and young people shall enjoy special protection and assistance in the pursuit of their rights. (2) The State shall grant allowances for children and benefits for the care of ill or disabled children. Other forms of social protection for children and young people shall be established by law. (3) The exploitation of minors, their employment in activities that might be harmful to their health, or morals, or might endanger their life and normal development are prohibited. (4) Minors under the age of fifteen may not be employed for any paid labor. (5) The public authorities are bound to contribute to secure the conditions for the free participation of young people in the political, social, economic, cultural and sporting life of the country."*

At the same time, there are articles in the Romanian Fundamental Law that indirectly safeguard children's rights. These provisions are part of Chapter II, entitled "Fundamental Rights and Freedoms" and refer to aspect such as: protection of personal and family privacy, freedom of expression, right to education, right to protection of health etc.

In order to apply these principles established in the Constitution, the State has adopted a series of laws, regulating different aspects of children's life. These legally binding documents aim at elaborating on the Constitutional texts and creating legal mechanisms that ensure the effective protection and promotion of children's rights. The most important Romanian Laws that govern children's rights are:

- Law No. 1 / 2011 on National Education <sup>83</sup>;
- Law No. 217 / 2003 on Preventing and Combating Domestic Violence <sup>84</sup>;
- Law No. 273 / 2004 on the Legal Regime of Adoption <sup>85</sup>;
- Law no. 678 / 2001 on Preventing and Combating Human Trafficking <sup>86</sup>;

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<sup>82</sup> *Ibid.* .

<sup>83</sup> Published in the OJR, No. 108 of 10<sup>th</sup> January 2011.

<sup>84</sup> Published in the OJR, No. 367 on 29<sup>th</sup> May 2003.

<sup>85</sup> Republished in the OJR, No. 788 on 19<sup>th</sup> November 2009.

<sup>86</sup> Published in the OJR, No. 783 on 11<sup>th</sup> December 2001, modified by Emergency Governmental Ordinance

- Law no. 119 / 1997 on State Allowance for Children <sup>87</sup>.

As to jurisprudence, it is worth mentioning that in the Romanian justice system, court decisions are not viewed as sources of law. They are legally binding only for the parties involved in that particular court suite, and cannot apply to other situations, even if they are similar. Consequently, court decisions issued by judges in a certain case are not legally binding on other judges facing similar cases.

However, there are two exceptions to this rule:

- 1) *The decisions of the Constitutional Court of Romania*<sup>88</sup> (further referred to as the CCR). According to the law 47 / 1992, the decisions of the Constitutional Court are “generally binding and have effect only for the future.” These decisions target the domestic compliance of the laws with the Constitution.
- 2) *The recourses in the interest of the law issued by the High Court of Cassation and Justice*<sup>89</sup> (further referred to as the HCCJR). These types of court rulings are as well generally binding, but for the domestic courts. These decisions have the role of uniting a uneven jurisprudence regarding similar cases, which have been previously resolved in different manners, by Romanian courts.

To sum up, there are three main types of legally binding documents that safeguard and promote Human Rights and consequently Children’s Rights: International Treatises on Human Rights, The Romanian Constitution and National Laws. The Treatises signed by the State are ratified by Parliament – if they comply with the Constitution – and become part of domestic legislation. On the other hand, principles stated by the Constitution are further developed any applied by National Laws.

*iii. Are there specific judicial bodies which monitor the implementation of international and national human rights instruments (for example Constitutional Courts etc.)? Can individuals claim their constitutional rights*

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No. 41 / 2011 published in the OJR, No. 304 of 3<sup>rd</sup> May 2011.

<sup>87</sup> Published in the OJR, No. 149 of 11 July 1997.

<sup>88</sup> According to Art. 11, parag. 3 of the law no. 47 / 1992, republished in the OJR, No. 807 on 3<sup>rd</sup> December 2010.

<sup>89</sup> According to Art. 414<sup>2</sup> of the Criminal Procedure Code, republished in the OJR, No. 78, on 30<sup>th</sup> April 1997 and subsequently revised, and to the art. 329 of the Civil Procedure Code, republished in the OJR, No. 714, on 26<sup>th</sup> October 2010, the recourses in the interest of the law aim at ensuring a the “correct and unitary application of the law”. Moreover, both the codes enact that, “the ruling in the case of this type of recourse is legally binding upon every other court of law in Romania.” (Art. 414<sup>5</sup> parag. 4 of the Criminal Procedure Code and art. 330<sup>7</sup> of the Civil Procedure Code).

*directly (e.g. direct effect)? Is there a Constitutional Court? Is it possible to apply individually? If not, how can the individuals claim their constitutional rights in case of violation? Is there a system of hierarchy or other jurisdictions to ask before being able to go before Constitutional/Supreme Court? Please, briefly describe the application process.*

As described above, International Treatises on Human Rights are ratified by Parliament and thus become part of the national legislation. Consequently any human rights provision, stemming from an international document or national norm can be directly invoked before the domestic courts. *As an exception*, European Union Regulations have direct effect and confer rights that can be invoked before domestic court, without Parliament ratification.

For the protection of rights established by the national legal framework, the Constitution provides that *Justice shall be administered by the High Court of Cassation and Justice, and the other courts of law set up by law*<sup>90</sup>. Consequently, the High Court of Cassation and Justice is the sole supreme court of Romania, *responsible with the correct and unitary application of the law*. Justice is also accomplished through the other lower courts, established by the Law on Judicial Organization<sup>91</sup>: Courts of Appeal, Tribunals, Military Courts and First Instance Courts.

Against the decision of a court, the parties can exercise ways of appeal. The Supreme Law does not enshrine a principle of double jurisdiction. Nevertheless, such a principle is provided by Protocol no. 7 to the European Convention of Human Rights and refers only to criminal cases<sup>92</sup>.

The Romanian legal framework does not provide for a specific judicial body that monitors the implementation of international or national human rights instruments. However, there is a series of public institutions which, given their attributions, safeguard human rights.

The Constitutional Court of Romania *is the sole authority of constitutional jurisdiction in Romania, guarantying the supremacy of the Constitution*<sup>93</sup>. With relation to human rights provisions, the CCR has a series of powers, enshrined in the art. 146 of the Constitution, such as:

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<sup>90</sup> Romanian Constitution, Art. 126, parag. 1.

<sup>91</sup> Law No. 304 / 2004, published in the OJR, No. 567, on 29 June 2004, subsequently revised.

<sup>92</sup> CONSTANTINESCU Mihai *et al*, *op. cit.*, p.274.

<sup>93</sup> The establishment and functions of the Constitutional Court are provided by Constitutional Art. 142-147 and Law. no. 47 / 1992 on the Organization and Functioning of the Constitutional Court, republished in the OJR, No. 807 of 3<sup>rd</sup> December 2010.

*“ a) to adjudicate on the constitutionality of laws, before the promulgation thereof upon notification by the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the Advocate of the People, a number of at least 50 deputies or at least 25 senators, as well as ex officio, on initiatives to revise the Constitution; b) to adjudicate on the constitutionality of treaties or other international agreements, upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 senators; (...) d) to decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration; the objection as to the unconstitutionality may also be brought up directly by the Advocate of the People; “*

As a result, there are two main forms of constitutional review of national laws:

1. *A prior review* (before the promulgation of laws) and
2. *A subsequent review* (after the law's entry into force by means of unconstitutionality objections). When a national law does not comply with the Constitution, an individual can claim his/her constitutional rights using a procedure called “unconstitutionality objection”, if a series of conditions are met.

Firstly, the individual can raise the objection only if the alleged unconstitutional law applies directly to his/her specific situation during a trial before domestic courts. The objection can also be raised *ex officio* by the courts or by the Ombudsman. However, the CCR is not appealed directly by the individual, but through the decision of the Court where the initial trial is pending. This initial court decides if the objection is admissible and, if so, refers it to the CCR who further issues a decision on the constitutionality or unconstitutionality of the legal provisions brought before it. *The CCR's decision is generally binding and has effect both upon the initial trial and for the future.*

Another public body that safeguards fundamental rights in Romania is the Ombudsman, who is responsible with registering, investigating and addressing complaints filed by individuals against other public institutions <sup>94</sup>. Similarly, the National Council for Combating Discrimination <sup>95</sup> is another independent body that investigates and sanctions acts of discrimination.

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<sup>94</sup> Art. 58 – 60 of the Romanian Constitution.

<sup>95</sup> <http://www.cncd.org.ro/> , last viewed on the 25<sup>th</sup> October 2012.

*iv. Is there a Criminal Supreme Court? Please, briefly describe the criminal procedure.*

The Equivalent of a “Supreme Court” in Romania is the HCCJR <sup>96</sup> which is organized in a series of *sections*, including the Criminal Section. According to Art. 29 of the Criminal Procedure Code, the Criminal Section *tries in first instance* crimes committed by state officials such as Senators, Deputies, members of Government, etc. <sup>97</sup>, as well as other cases appointed by law.

At the same time, the HCCJR tries, *as a recourse court* <sup>98</sup>, recourses recourses against the criminal decisions passed, at first instance, by the courts of appeal and by the Military Court of Appeal, recourses against the criminal decisions passed, as appeal courts, by the courts of appeal and by the Military Court of Appeal and recourses against the criminal decisions passed, at first instance, by the criminal section of the Supreme Court of Justice, as well as in other case provided by the law.

Among its other attributions <sup>99</sup>, the HCCJR tries recourses in the interest of the law (ensuring the correct and unitary application of the law), action of cancellation and resolves competence conflicts in cases when the HCCJR is the common superior court, cases in which the course of justice is interrupted, removal requests and other cases specially provided by the law.

*v. What is the age of criminal liability? Are there any statistics available regarding children prisoners?*

According to Article 99 of the Romanian Criminal Code <sup>100</sup>, minors are not criminally liable under the age of 14. Minors between 14 and 16 years of age, they “shall be criminally responsible, only if it is proven that he/she committed the act in discernment.” And the

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<sup>96</sup> According to Art. 18 of Law No. 304 / 2004 on the Judicial Organization.

<sup>97</sup> Criminal Procedure Code, Art. 29 - The Supreme Court of Justice: 1. tries at first instance: a) the offences committed by senators and deputies; b) the offences committed by members of the Government; c) the offences committed by judges of the Constitutional Court, members, judges, prosecutors and financial controllers of the Court of Accounts, by the president of the Legislative Council and by the People's Advocate; d) the offences committed by marshals, admirals, generals and auditors; e) the offences committed by the chiefs of religious orders established under the law and by the other members of the High Clergy, who are at least bishops or the equivalent; f) the offences committed by judges and assistant magistrates of the Supreme Court of Justice, by the judges of the courts of appeal and of the Military Court of Appeal, as well as by the prosecutors of the prosecutor's offices attached to these courts; g) other cases falling under its competence, under the law.

<sup>98</sup> See Art. 29, para. 2 of the Criminal Procedure Code.

<sup>99</sup> See Art. 29, para. 3, 4 and 5 of the Criminal Procedure Code.

<sup>100</sup> Law No. 15 / 1968, published in the OJR, No. 79bis., on 21<sup>st</sup> June 1968, later modified and republished with the latest updates in the OJR No. 714, on 26<sup>th</sup> October 2010.

minor aged over 16 is criminally liable. Even if a person is criminally liable before 18 years, there are different rules applying to a minor, in opposition to a major person <sup>101</sup>.

The National Administration of Penitentiaries published a table <sup>102</sup> containing data on prison population in August 7, 2012. There are 471 minor detainees who are executing different penalty regimes, as follows: a. 82 are included in maximum security, closed, semi-open, open and preventiv arrest sections; b. 226 are included in Penitentiaries for minors and young offenders; c. 8 are included in Hospital Penitentiaries; d. 155 are included in Re-education Centers;

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

*i. How does the national legislation define the term “sexual activities”? Is it to be applied broadly or narrowly?*

Unfortunately, the national law never defined the term sexual activity. Our Criminal Code speaks of the terms “sexual act of any kind” when referring to the offences of sexual abuse or rape, and “acts of sexual perversion” when referring to the offences of sexual perversion but no further definition is given.

Thus, because it became clear that a separation had to be made in order to comply with the *lex certa* requirement, within the art. 7 of the European Convention of Human Rights <sup>103</sup>, the HCCJR had to judge a Recourse in the interest of law, submitted by the General Prosecutor of Romania.

It stated that:

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<sup>101</sup> For example, the sanction of imprisonment is halved. It is worth mentioning that *the New Criminal Code* (NCC – Law No. 286 / 2009, published in the OJR, No. 510, on 24<sup>th</sup> July 2009), finished and adopted but postponed as to entry into force, has abolished the classical imprisonment for minors. The whole system is redesigned in order to protect, adequately rehabilitate and teach the minors. There are two major types of punishment: non-custodial and custodial educative measures. The custodial educative measure is not synonym with the classical imprisonment and it is designed only for minors. For more information, see, *The New Criminal Code, The New Criminal Procedure code*, Hamangiu Press, Bucuresti 2011, p.40-46, or. TNCC – art. 113 – 134, as it is not the case for further discussions.

<sup>102</sup> National Administration of Penitentiaries website: <http://www.anp-just.ro/frame.php?page=dinamica.php>, last viewed on the 25<sup>th</sup> October 2012.

<sup>103</sup> For further information, see, CHIRITA Radu, *Conventia Europeana a drepturilor omului, Comentarii si explicatii. Editia 2-a*, C. H. Beck Press, Bucharest, 2008, p. 403 and the following. Also see, CEDO, hot. Kokkinakis v. Greece (Application no. 14307/88) ; hot. Cantoni (Application no. 17862/91) – [www.echr.coe.int](http://www.echr.coe.int), last viewed on the 25<sup>th</sup> October 2012.



The term “sexual act of any kind, as referred into art. 197 of the Criminal Code, means, any way of getting a sexual satisfaction, by using the sexual organ or by acting on it”.

The term “sexual perversion, as referred into art. 201 of the Criminal Code, means any way of obtaining a sexual satisfaction, aside the one obtained by a sexual act, of any kind. ”<sup>104</sup>

Thus, the term sexual perversion is to be interpreted broadly, or *lato sensu*, as it presents more possible hypotheses then the sexual act of any kind, which requires a penetration (of any kind, meaning, oral, normal or anal) of the victim.<sup>105</sup>

The sex of the victim is irrelevant, as both heterosexual and homosexual acts can be considered to be rape.

*ii. Does the law define and interpret the word “intentionally”? What is the criminal liability of an internationally committed crime of sexual abuse?*

Under the art. 19 of the Criminal Code „Guilt is the socially dangerous act that is committed intentionally or negligently.“ So, a criminal offence can be committed intentionally or by fault<sup>106</sup>.

The Offence is committed when the offender intentionally:

1. With what is known to be the “direct intention” – when the perpetrator foresees the outcome / result of his action, desires that particular result by committing the offence;
2. With what is known to be the “indirect intention” – when the perpetrator foresees the outcome / result of his action, and although it is not desired is knowingly accepted

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<sup>104</sup> HCCJR, Decision No. III/2005, published in the OJR, 867, on 27<sup>th</sup> September 2005.

<sup>105</sup> In the same orientation, see, BOGDAN Sergiu, *Drept penal, Partea speciala, Volumul I, Editia a II-a*, Editura Sfera Juridica, Cluj-Napoca, 2007, p.144 and 148.

<sup>106</sup> There is a third way of committing a criminal offence, by a intentional action over which a faulty misconduct and thus, a criminal consequence arises (for example: X is hitting somebody with the intention of causing only bruises. The victim, Y, because of the punch, falls on the street, hits his/her head and because of that, dies (or loses an eye)). The subsequent criminal misconduct (the death or the loss of the eye) is unintentional but must be punished if it represents a crime. For more about the topic, see, STRETEANU Florin, *Drept penal. Partea generala*, Rosetti Press, Bucuresti, 2003, p. 394 – 400.

So, if the direct intention presumes that the offender wishes the desired result, the indirect intention exists only when the offender can understand the result of his actions and he accepts the possibility of it to happen, even if he doesn't desire the result of the offence.

In what regards the criminal liability of an internationally committed crime of sexual abuse, the Criminal Code regulates that the penalty is imprisonment between 3 and 10 years and the interdiction of certain rights <sup>107</sup>.

*iii. What is the legal age for engaging in sexual activities? How are consensual sexual activities between minors regulated?*

In the Criminal Code in force, having consensual sexual intercourse with a minor under the age of 15 years represents the criminal offence under the art. 198 – Sexual intercourse with a minor.

Having consensual sexual intercourse with a minor between 15 – 18 years, is punishable only if the perpetrator is a guardian or trustee, a supervisor, career, teacher, educator, medical staff or has a certain authority or trust over the minor.

The Criminal Code in force does not state anything regarding the punishment for minors who have sexual intercourse with other minors, under the above mentioned legal ages (15, respectively 15-18). In theory, if the perpetrator is still a minor, the legal text would apply to him, and the punishment would have to halved, according to art. 109 of the Criminal Code. The doctrine generally regards this to be forced, and stated that, de *lex ferenda*, this provision had to change to be in tone with the french adopted model. This punishes the offence only if the perpetrator is a person above 18 years. <sup>108</sup>

It shall be duly noted that it remains for the judge to consider whether the sexual intercourse with a minor under 15 years of age represents a sexual abuse – art. 197, or a sexual intercourse with a minor – art. 198. It is considered that if the minor is de facto, unable to foresee the result of the sexual intercourse, than we have a problem of rape or sexual abuse. Per a contrario, the problem rests on the sexual intercourse criminal offence <sup>109</sup>.

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<sup>107</sup> Art. 197 parag. 1 of the Criminal Code.

<sup>108</sup> See, CIOCLEI Valerian apud. BOGDAN Sergiu, op. cit., pag. 154.

<sup>109</sup> For details, see, BOGDAN Sergiu, op. cit., pag. 153

*iv. How is the use of force, taking advantage of disability or threat regulated in regards to sexual offences against children?*

The use of force, taking advantage of disability or threat in regards to sexual offences against children is regulated differentiated regarding the age of the minor:

If the minor is under 15 years of age, the punishment can go up to 25 years (10-25) of imprisonment, and the interdiction of some rights.

If the minor is between 15 – 18 years of age, the punishment can go up to 10 years (3-10) of imprisonment, and the interdiction of some rights.

*v. How is the crime of “incest” regulated?*

The crime of „incest” is regulated in the article 203 of the Criminal Code which says that „Intercourse between relatives in direct line or between brothers and sisters is punished with imprisonment from 2 to 7 years.”

Thus, the crime of „incest” implies the existence of a certain person and a complex legal object. More specifically it regards not only the relations of sexual morality, but also the family relationships concerning moral and biological health of the family.

Incest means having *consensual* sexual intercourse between relatives in direct line or between brothers and sisters. *Per a contrario*, the lack of consent gives the intercourse at the same time two criminal charges: *incest* and *rape, or sexual abuse* <sup>110</sup>.

*vi. Are there any specific provisions regulating offenders who take advantage of school and educational settings, care and justice institutions, the work-place and the community?*

The crime committed by offenders who take advantage of school and educational settings, care and justice institutions, the work-place and the community is punishment by imprisonment from 5 to 18 years and interdiction of certain rights.

In conclusion these facts are seen as an aggravating circumstance and are punished more severely. Furthermore, there is no complaint required; the investigation can be started *ex officio*.

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<sup>110</sup> See, HCCJR, United Sections, Recourse in the interest of law, Decision No. 17 / 2008, published in the OJR, No. 866, on 22th December 2008.

## 2.2 Child Prostitution

*vii. Is the State a party to the Council of Europe Convention on Action against Human Trafficking? If yes, what is the date of ratification and signature? If not, is the State planning to ratify the Convention?*

Romania is a party to the Council of Europe Convention on Action against Human Trafficking since 16 May 2005 when the treaty was signed. It was ratified on 21 August 2006 and it entered into 1<sup>st</sup> February 2008.

Still, before these dates, Romania adopted the Law No. 678 / 2001 on preventing and combating human trafficking <sup>111</sup>, which has almost the same definition regarding the human trafficking issue.

This is so, because the Romanian law was inspired by the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime and the Protocol against the Smuggling of Migrants by Land, air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, adopted in New York on November 15, 2000 <sup>112</sup>, which represents roughly, in our view, the foundation of all subsequent acts taken against human trafficking.

viii. How does national legislation define “child prostitution”? Is it compatible with the definition in Article 19(2) of the Lanzarote Convention? Please comment.

The term “child prostitution” means the fact of using a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment, regardless if this payment, promise or consideration is made to the child or to a third person.

ix. Does national legislation criminalize both the recruiter (the person that coordinates the business of child prostitution) and the user (the person that pays to conduct sexual activities with children)?

According to the Romanian law, the recruiter is punishable for its acts for:

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<sup>111</sup> Published in the initial form, in the OJR, No. 783, on 11<sup>th</sup> December 2001, lastly modified through the law 230 / 2010, published in the OJR, No. 812, on 6<sup>th</sup> December 2010.

<sup>112</sup> UNITED NATIONS, A/RES/55/25 – [http://www.unodc.org/pdf/crime/a\\_res\\_55/res5525e.pdf](http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf) , last viewed on the 25<sup>th</sup> October 2012.

- i. Human trafficking, or
- ii. Pimping, depending the actual facts.

Regarding the user, there are two problems to discuss:

- iii. Criminal liability for using a trafficked minor.

If the user knows that he is benefitting from the services of a trafficked human being, he/she is punishable under the law 678 / 2001, with a criminal fine or imprisonment up to 3 years. *Per a contrario*, the user is not criminally punishable.<sup>113</sup>

- iv. Criminal liability for offences regarding the sexual life of the minor

If the perpetrator knowingly commits any of the sex crimes punished by the law, he/she must be held responsible and therefore, punished. In other words, if the user pays a human trafficking recruiter to have a minor do his house chores, then he is punishable under art. 14 of the law 678/2001. If the user pays the recruiter for the minor's sexual services, and he/she, is under 15 years of age, the user will be punished for engaging in a sexual act with a minor (art. 198 Criminal Code), aside using the services of a trafficked minor. If the act is not consented, then the user has to be punished for rape, or sexual abuse...etc.

## 2.3 Child Pornography

### c.1. Child Pornography in General:

*x. Is the State party to the Council of Europe Convention on Cybercrime? If yes, what is the date of ratification and signature? If not, is the State planning to ratify?*

Romania is party to the Council of Europe Convention on Cybercrime since 23<sup>rd</sup> November 2001. The treaty was ratified on 12<sup>th</sup> May 2004 and entered into force on 9<sup>th</sup> September 2004.

*xi. How does the national legislation define "child pornography"? Is it compatible with the definition in Article 20(2) of the Lanzarote Convention? Please comment.*

The Romanian legislation defines "child pornography" as any object, film, photograph, slide, logo or other visual material that display sexual conduct or posture with a pornographic

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<sup>113</sup> See art. 14 from the law 678 / 2001

character that show or involve persons under the age of 18, while the Lanzarote Convention defines child pornography as “any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes.”

“ They are compatible in a large extent, but a difference between these two definition is that Lanzarote Convention expands on types of sexually explicit conducts while Romanian criminal law doesn’t specify this. Another difference between these articles is about stating the phrase “child sexual organs“. The Lanzarote Convention is more accurate than Romanian legislation.

*xii. To whom does the State attribute the criminal liability to? Is it compatible with the Article 20(1.a) to (1.f)?*

The criminal liability is attributed to the perpetrator, which can be a person who produces child pornography for distributing, who offers or makes available child pornography, who distributes or transmits child pornography, who procures child pornography for oneself or for another person, who possess child pornography, who hold pornographic materials with minors in a media system or information data storage system, without right . Romanian legislation assumed most of the rules set by Lanzarote Convention.

*xiii. What is the control mechanism for pornographic materials? If the state is a party to the Lanzarote Convention, did the state use the reservation right that has been given to them in the Lanzarote Convention Article 20(3) and 20(4)?*

In Romania, the control mechanism for pornographic materials is National Authority for Communication. As mentioned in the beginning of this paper, Romania has made no reservations regarding the implementation of the Lanzarote Convention.

## c.2. Participation of a Child in Pornographic Performances:

*xiv. Does the State criminalize intentional conduct of making a child participate in pornographic performances? What is the State’s approach to the attendance of pornographic performances involving the participation of children? If the State is a party to the Lanzarote Convention, did the state use the reservation right stated in Article 21(2)?*

In Romanian legislation, the difference between recruitment and coercion is highlighted but not differentiated. Both are punished with prison from 2 to 7 years and the prohibition of some rights. It is certain that a criminal offence committed by coercion will be punished

more severe by a judge when individualizing the punishment. Yet again, Romania made no reservations upon implementation the Lanzarote Convention.

## 2.4 Corruption of Children

*xv. Does the State criminalize the intentional causing of a child to witness sexual abuse or sexual activities, without necessarily having to participate? How does the state define "causing"? Does it involve forcing, inducement, and promise?*

The current legal text does not criminalize the intentional causing of a child to witness sexual abuse or sexual activities, without necessarily having to participate. Under the offence of sexual corruption, the article 202 from the Criminal Code in force criminalizes only the obscene acts committed on a minor or in the presence of a minor. In the New Criminal Code <sup>114</sup> (named NCC from now on), which has not yet come into force, we can find the adjustment of the offence. In the article 221, under the title "sexual corruption of the minor", the intentional causing of a minor to support or to perform a sexual act is also criminalized. The text refers to a minor that is under the age of 13. The state does not define "causing".

Paragraph 1 of article 221 states in that "the commission of a sexual act, other than the one mentioned in article 220, against a minor who has not reached the age of 13 years, and also the determination of the minor to endure or to perform such an act, is punished with imprisonment of one to five years." In paragraph 3 the same text mentions "the sexual act of any kind, committed by an adult in the presence of a minor which has not reached the age of 13 years, is punished with imprisonment from 6 months to 2 years or with a fine". Also, in the next paragraph the article punishes with imprisonment from 3 months to 1 year or with a fine the determination of a minor, under the age of 13 years, by a major to assist at the committing of some acts with an exhibitionist character or to shows or performances in which sexual acts of any kind are committed, and also the giving of pornographic materials. The text adds that the acts mentioned in paragraph 1 are not penalized if the age difference between the offender and the minor, who has not reached the age of 13 years old, does not exceed 3 years.

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<sup>114</sup> Law No. 286 / 2009, published in the OJR, No. 510, on 24<sup>th</sup> July 2009

In the article 201 of the in force Criminal Code, we can find the offence of sexual perversion, which, if committed publicly, or produces a public scandal, can be punished with imprisonment from one to five years. Paragraph 2 of this article incriminates the sexual perversion acts committed with a minor, under 15 years of age <sup>115</sup>. The notion of acts of sexual perversion means any method of gaining a sexual satisfaction, other than those through a sexual act of any kind <sup>116</sup>. The text incriminates two different situations:

*a. The act was committed with a minor who has not reached the age of 15.*

*b. The act was committed by the victim's tutor, trustee, supervisor, carer, physician, professor or teacher, by taking advantage of his position or of his influence and authority on the victim, or by abusing the victim's trust, situations which the victim can only be a minor between 15 and 18 years old.* In this case the active subject is circumstantial (or special).

## 2.5 Solicitation of Children for Sexual Purposes

*xvi. How does the State criminalize intentional sexual gratification through information and communication technologies by an adult? Does it specify that the perpetrator should also propose a meeting with the potential child victim and come to the meeting place in order to be accused of committing this kind of crime (a.k.a. grooming)?*

The state does not criminalize in the current criminal law the intentional sexual gratification through information and communication technologies by an adult. It can be found in the article 222 of the NCC, which has not yet entered into force. In the new legal text the perpetrator should propose a meeting under a special purpose, *which is to commit one of the sexual acts mentioned in articles 220 (sexual act with a minor) and 221 (sexual corruption of a minor)*: an intercourse, an oral or anal sex and any other act of anal or vaginal penetration, any other sexual act and also the determination of a minor to endure or to perform such an act. The article refers to a minor, which has not reached the age of 13.

*xvii. Does the State criminalize aiding or abetting and attempting to the activities that have been mentioned in the subsection a, b, c, d and e?*

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<sup>115</sup> As the text incriminates the action of committing the perversions *with* a minor and not in the presence of him/her, we consider the text to be uninspired as this offence should sanction direct perversions that come to the knowledge of the minor, because of the perpetrator's action.

<sup>116</sup> HCCJR, the decision No. III/2005, published in the OJR No. 867, on 27<sup>th</sup> September 2005.



Yes, the state criminalizes aiding or abetting and attempting to the activities of sexual abuse, child prostitution, child pornography, corruption of children. Though, regarding the crime of child pornography, attempting is criminalized only through information technology.

## 2.6 Corporate Liability

*xviii. Does the State hold legal/moral persons (entities) such as commercial companies and associations liable when an action has been performed on their behalf by a person in a position at their entity? Is there a difference between leading persons (persons in position of authority) and regular employees being held liable? If yes, please describe the differences.*

Yes, the national legislation includes corporate liability. Basically, criminal liability may arise to any legal entity. Nevertheless there are some exceptions. Article 19<sup>1</sup> from the Criminal Code states under the title “the conditions of criminal liability of legal persons” that “legal persons with the exception of the state, the public authorities and the public institutions which are performing an activity that may not be the object of the private domain are held liable for the offences committed in achieving their object of activity or interest on behalf of the legal person, if the offence was committed with the form of guilt provided by the penal law”.

No, there is no difference between leading persons and regular employees. " The criminal liability of a moral persons can be engaged by any individual person of the legal entity administration, by any official in charge of the legal person, by any person under the authority of the legal person and even by any person having a fact relation or law relation with the legal entity and acting in achieving the activity object, or in the interest of the legal person and with the consent of it."<sup>117</sup>

*xix. What kind of liability does national legislation impose? Criminal, civil or administrative? Please explain.*

The national legislation imposes *criminal* and *administrative liability*. In chapter IV of Criminal Code we can find the following penalties applicable to legal entities: 1. the main sanction, the fine, and 2. the additional (complementary) sanctions. We will further insist on this topic, by

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<sup>117</sup> MITRACHE Constantin, MITRACHE Cristian, *Drept penal roman, Partea generala*, Universul juridic Press, Bucharest, 2010, p. 341.

complying with the structure of this paper, and thus, by answering question no. xxiv of Chapter II, Point 2.

If the actual actions committed, do not pose a serious and real social danger in order to become criminal offences, an *administrative liability* can be applied. Article 91 from the Criminal Code enumerates three sanctions, one of which is a pecuniary penalty: censure, censure and a warning, and, a fine between 10 and 1000 lei. These sanctions are distinct in nature. They are neither criminal offences nor contraventions (or non-criminal offences).

In addition, *civil liability* can be imposed, but not as a sanction, but rather for the moral and pecuniary prejudices suffered by the victim. It is a normal way of repairing the damages committed by the perpetrator.

xx. *Does national legislation exclude individual liability when there is a corporate liability?*

The national legislation *does not exclude individual liability* when there is a corporate liability. In the article 19<sup>1</sup> of the Criminal Code second paragraph it is mentioned, "the criminal liability of the moral person does not exclude the criminal liability of the individual who contributed, in any way, at committing the same crime".

## 2.7 Aggravating Circumstances

xxii. *Does the state accept any aggravating circumstances for the crimes that have been described above? (e.g. when the offence damaged physical health of the child) Please, write down these circumstances and explain, try to specify the different crimes if there are different aggravating rules applying.*

I. A. The Criminal Code includes some general legal aggravating circumstances, stipulated in article 75 from the Criminal Code (the "general/common part" of the code, meaning that they can apply to virtually, any criminal offence existing under the positive law of Romania), when the offence:

- is committed by three or more persons acting together; "This aggravating circumstance is realized whether all three persons are present or not at the scene, regardless of their contribution to the offence and unconcerned if they all are held liable or not." <sup>118</sup>

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<sup>118</sup> MITRACHE Constantin, MITRACHE Cristian, *op. cit.*, p.393.

- was committed with cruelty, when is accompanied by acts of violence against family members or committed by means or methods of public danger: “Committing the offence with cruelty requires a ferocity of the offender, a wilderness in committing the offence, following the provocation of a great suffering to the victim” <sup>119</sup>. By family member, the Criminal Code refers to “the husband or a close relative, which lives or homesteads together with the perpetrator”. <sup>120</sup> “The methods and means of public danger are the ones which endanger the lives of many people. Using such methods and means shows a heightened danger of the offender.” <sup>121</sup>

- was committed by a major with a minor: Article 28 from the Criminal Code states that the “circumstances related to a participant do not reflect on others” and that “factual circumstances are reflected upon participants, only to the extent that they have known or foreseen them”. “For this circumstance to be retained the major should be aware of the fact that he is cooperating with a minor; the error concerning the age of the minor, thinking that he is a major, removes the circumstance” <sup>122</sup>.

- was committed on the grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, political opinion, belief, wealth, social origin, disability, non-contagious chronic disease or HIV/SIDA:

- was committed for trivial/mean reasons: “In the criminal doctrine “trivial reasons” are considered those inner impulses contrary to morality as: revenge, thirst for illicit enrichment etc. This circumstance is personal and does not abridge on the participants”. <sup>123</sup>

- was committed in a state of drunkenness namely caused in order to commit the crime:

- was committed by a person who took advantage of a natural calamity; <sup>124</sup>

B. It is worth mentioning that the criminal law states that “other concrete circumstances that imprint the actions a serious and grave nature, can be retained by the judge, as general, judicial, aggravating circumstances” <sup>125</sup>

<sup>119</sup> Ibid. , p.394.

<sup>120</sup> Art. 149<sup>1</sup> of the Criminal Code.

<sup>121</sup> Ibid. , p.395.

<sup>122</sup> Ibid. , p.395.

<sup>123</sup> Ibid. , p.396. Also see, art. 28 of the Criminal Code.

<sup>124</sup> “Calamity means a disaster affecting a community; such a situation can occur as a result of events such as: earthquakes, floods, landslides, fires. For more details, see: CIOCLEI Valerian, *Drept penal. Partea speciala, Infractiuni contra patrimoniului*, C. H. Beck Press, Bucharest, 2011, p. 45.

<sup>125</sup> Art. 75, parag. 2 of the Criminal Code. These are not defined by the law, leaving the judge with the important task of appreciating these facts. A discussion about a *legal analogy against the perpetrator* could arise, but it is not the place for such an elaborate discussion.

II. A. The Criminal Code includes some special, legal, aggravating circumstances (meaning that they can be found in the “special part” of the Criminal Code, and thus, apply only to the specific criminal offence, not in general. They are named aggravated variants in Romanian law) regarding the offence of sexual abuse there are 5 different aggravating rules applying:

- the offence was committed by two or more people acting together; The article 144 from the Criminal Code states that by “committing an offence” the law means, committing a consumed offence <sup>126</sup> or a punishable attempt, regardless of the participation as an author, accomplice or instigator.

- the victim of the offence was in the care, education, protection or treatment of the offender;

- the victim of the offence is a family member; A decision of the HCCJR states that “the act of maintaining intercourse with a person of the opposite sex, family member and relative in direct line, or brother or sister, committed by coercion or by taking advantage of her inability to defend, or of her inability to express its will, represents *sexual abuse* and also the offence of *incest*, in concurrent crimes.” <sup>127</sup>

- the offence seriously caused grievous bodily harm or an injury health to the victim; The circumstantial element is represented by an injury that required medical care of more than 60 days or if one of the following consequences have been produced: the loss of a sense or an organ, their cease operation, a permanent physical or mental disability, disfigurement, abortion and endangering a person’s life.

- the offence caused the death or suicide of the victim; This offence is committed with the intention of committing the act of sexual abuse, but, without intending to cause the death or suicide of the victim. “A first way to commit this aggravation refers to the hypothesis where the victim's death is due to the violence to which it is subjected, in order to achieve her sexual coercion. In this way, the perpetrator applies violence in order to achieve intercourse, but he does not intend to murder the victim, her death being the result of the perpetrator's negligence. Another way to commit the crime refers to the hypothesis when the victim

<sup>126</sup> The actual offence, stipulated by law; example : killing the victim.

<sup>127</sup> HCCJR, United Sections, Recourse in the interest of law, Decision No. 17 / 2008, published in the OJR, No. 866, on 22th December 2008.

commits suicide, in order to avoid the intercourse or after the intercourse, because of the intercourse”<sup>128</sup>

B. The state accepts these aggravating circumstances also for the crime of sexual perversion when the offence was committed:

*- by the guardian, curator, supervisor, caregiver, physician, professor or teacher of the victim;*

In order for this circumstance to be applied it should be proved that the perpetrator took advantage of his relationship with the victim or he used the victim's trust, or his authority or influence he has on the victim, to commit the offence. This circumstance is applied only for the victims who are 15 - 18 years old.

*- by giving or offering money or other benefits to the minor victim;*

*- with the purpose of producing pornographic materials and when coercion is used;*

*- when the victim is unable to defend herself or to express her will, or by using coercion;*

*- resulted in serious bodily injury or health, death or suicide of the victim;*

C. And as for the offence of sexual intercourse with a minor the state applies the same circumstances mentioned above for sexual perversion.

If there are several aggravating circumstances that apply together, the following solutions have to arise :

- a. If there are, general and special aggravating circumstances both applying at the same time, only the special one will be applied, *if both circumstances are identical in nature*. This derives from applying two major principles :

- i. Non bis in idem<sup>129</sup>;

- ii. Lex specialis derogat legi generali<sup>130</sup>;

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<sup>128</sup> CIOCLEI Valerian, *op. cit.*, p.245.

<sup>129</sup> <http://legal-dictionary.thefreedictionary.com/non+bis+in+idem> , last viewed on the 25<sup>th</sup> October 2012.

- b. If there are, general and special aggravating circumstances both applying at the same time, *but different in nature*, then both will apply in the matter. <sup>131</sup>

III. The New Criminal Code contains some other general legal aggravating circumstances, like:

- the offence is committed by obviously taking advantage of the vulnerability status of the victim, due to the age, health, mental disability or other causes;

- when the offence was committed by a person who took advantage of the vulnerable condition of the injured person due to her age, health, disability or other causes;

As well as some special, legal aggravating circumstances, regarding the corruption of children:

- when the offence was committed in the family: In this case, although there is no consensus in the doctrine, regarding this matter, some saying that the circumstance refers to the classic definition of a family member, defined by art. 1491 of our Criminal Code <sup>132</sup>, we consider, amongst other authors <sup>133</sup>, that it refers to the family *lato sensu*. Per a contrario, the real protection intended would be theoretically and, the text would have mentioned the term "by a family member" and not "in the family". The notions of family member and close relative are different from the meaning of the terms used by the text "in the family".

- when the offence was committed with the purpose of producing pornographic materials;

"The meaning of the expression "pornographic materials" can be perceived through interpreting the dispositions of the Law 196 concerning the prevention and fight against pornography <sup>134</sup>. According to article 2, pornography refers to the obscene acts and to the materials that reproduce and spread such acts. The obscene materials are: objects, prints, photographs, holograms, drawings, writings, printed logos, publications, movies, audio and

<sup>130</sup> <http://encyclopedia.thefreedictionary.com/Lex+specialis+derogat+legi+generali> , last viewed on the 25<sup>th</sup> October 2012.

<sup>131</sup> For example, a sexual abuse is committed *by three or more persons acting together (general aggravating circumstance – art. 75 parag. 1, lit. a from the Criminal Code) and the offence caused the death or suicide of the victim (special aggravating circumstance/aggravated variants. – art. 197 parag. 3).*

<sup>132</sup> Regarding this assertion, see CIOCLEI Valerian, op. cit. .

<sup>133</sup> BOGDAN Sergiu, *Drept penal, Partea speciala, Volumul I, Editia a II-a*, Editura Sfera Juridica, Cluj-Napoca, 2007, p.172.

<sup>134</sup> Published in the OJR, No. 342, on 20<sup>th</sup> May 2003.

video recordings, commercials, programs and applications information, music, and any other forms of expression that shows or suggests an explicit sexual activity.

Therefore, pornographic materials can be identified with what the law defines as obscene acts. Theoretically, in order for the circumstance to be retained, it should be proved only the existence of the purpose, not its achievement. Practically, however, in order to prove the purpose it is necessary for the sexual act to be fixed on some medium or to have existed, at least, the technical conditions required for such fixation, in time of sexual intercourse with a minor."<sup>135</sup>

*- when the minor is in the care, shelter, education, protection or treatment of the perpetrator;*

## 2.8 Sanctions and Measures

*xxiii. How does the state sanction the above mentioned crimes? Is there a penalty including deprivation of liberty? How does the state legislate extradition?*

The crimes mentioned above are sanctioned exclusively with the penalty of deprivation of liberty and in the majority of cases there are mandatory complementary punishments such as prohibition of certain rights<sup>136</sup>. Given that all of the above-mentioned offences are punished with imprisonment exceeding one year, *extradition is admissible*. Furthermore, given that the sexual exploitation of children and child pornography are sanctioned with imprisonment exceeding three years, *regarding the European Arrest Warrant, they will not be subject to the condition of dual incrimination verification*.

*xxiv. Do you consider the sanctions effective, proportionate and dissuasive? Please comment.*

In my opinion I do consider the sanctions *effective, proportionate and dissuasive*. The limits of the punishments are determined enough and the judge has the possibility within the judicial individualization process to choose a punishment proportionate to the degree of seriousness of the offender and the committed offence.

*xxv. How does the state sanction the legal persons/moral entities? What kind of measures does it include?*

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<sup>135</sup> CIOCLEI Valerian, op. cit., p. 257.

<sup>136</sup> To be seen in the art. 64 of our Criminal Code.

As said before, legal persons/moral entities, except the State, public authorities and public institutions performing an activity that may not be the object of exercitation in the private sector, are criminally liable for offences committed in achieving the object of activity or in the interest or the name of the legal person/moral entity. Criminal liability of legal persons does not exclude criminal liability of individuals who contributed in any way to commit the same crimes.

Legal persons/moral entities who are responsible of committing crimes are punishable as follows <sup>137</sup>:

1. the main sanction is represented by *the criminal fine*;
2. the additional (complementary) sanctions are represented by:
  - a. *dissolution* of the legal person;
  - b. *suspension of activities* of the legal entity for a period of 3 months to one year or *suspend any activity* related to the legal person who committed the offence for a period for 3 months to 3 years;
  - c. *closure* of a number of working points of the legal person for a period of 3 months to 3 years;
  - d. *prohibition to participate in public acquisitions* procedures for a period of one to 3 years;
  - e. *displaying or disseminating the conviction decision*.

xxvi. Does the state legislate seizure and confiscation of materials, instruments... etc. used for committing the crime? Does the state protect bona fide third parties? Is there allocation of a special fund for financing prevention or intervention programmes in which these properties confiscated allocated?

The State does in fact legislate seizure and confiscation of materials, instruments and other objects that were used for committing the crime <sup>138</sup>. Third parties that did not know the origin of the goods resulted from committing the crimes or they did not know that the

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<sup>137</sup> See art. 53<sup>1</sup> of our Criminal Code.

<sup>138</sup> Art. 118 of our Criminal Code.



goods they borrowed will be used in committing the crimes, are protected, which means that the State will not seizure or confiscate those goods, but instead there will be *confiscated the monetary equivalent* of those goods from the perpetrator.

I do not know of any special fund. There is a high probability that there is no such thing.

xxvii. When the crime has been committed within the family or within the close environment of the child, how does the state react?

In case that the competent authorities (such as the General Directorate of Social Assistance and Child Protection) are notified regarding the possibility of a child abuse and they establish that there are reasonable grounds for that complaint, the director of the General Directorate of Social Assistance and Child Protection, with consent of the parents or legal representatives, may place the child in a special placement centre. If the parents or legal representatives of the child do not give their agreement, the General Directorate of Social Assistance and Child Protection can notice the court requesting issuance of a presidential ordinance <sup>139</sup> to place the child in a family, a foster parent or a residential service, licensed under the law.

In the proceedings regarding the issuance of a presidential ordinance may be given, *ex officio*, as evidence a written statement of the child allegedly abused. Child's statement may be registered under the law, through audio-video technology. Recordings are made mandatory with the assistance of a psychologist. The child's agreement is required for the recording of his statement. If the court deems necessary, may call the child in for a hearing that takes place in the council chamber in the presence of a psychologist and only after an initial preparation of the child in this regard.

## 3 CRIMINAL PROCEDURE

### 3.1 Investigation

*i. How is the principle of the "best interests of the child" applied during investigation of a crime as mentioned above? Is there a protective approach to the victims? What kind of measures has been taken? Is the victim*

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<sup>139</sup> The Presidential Ordinance is a special order issued by the court after completing a special procedure, provided by art. 581 of our Code of Civil Proceedings. *As opposed to the regular proceedings, this special procedure is characterized by emergency, and can be completed faster.*

*offered protection during the court proceedings? (such as appointing special representatives) If so, please indicate what kind of protective measures have been taken.*

During the investigation of a crime as mentioned above, the principle of the “best interests of the child” is applied *with priority*. Art. 2 paragraph 3 of Law no. 272 of 2004 <sup>140</sup> states that, the principle of the best interests of the child shall prevail in all actions and decisions concerning children. *People or institutions that are bound to this principle: the child’s parents or his legal guardians, any person whom he has been placed legally, public authorities and private bodies, and also it shall prevail in cases solved by the courts.*

The necessity to establish for child victims in cases of sexual abuse of special hearing conditions to reduce the number of hearings and traumatic effects on victims and increase the credibility of their statements while respecting their dignity results from the Recommendation Rec (2001) 16 on protecting children from sexual exploitation adopted by the Committee of Ministers on October 31, 2001, at the 771<sup>st</sup> meeting of the Ministers <sup>141</sup>.

“In our internal law, criminal procedural rules contain provisions relating to child victim only in adjacent” <sup>142</sup>. There is an obligation established by law, according to which the child’s parents or legal representatives must be *cited* to assist him.

If needed, psychological counseling to victims can be ensured by Protective Services of Victims and Social Reintegration of Offenders which operates besides every tribunal <sup>143</sup>. These psychological counseling are provided free of charge, on request, for victims of offences stated by the law <sup>144</sup>, especially in case of rape, sexual intercourse with a minor, sexual perversion and sexual corruption, offences of child maltreatment or in cases provided by Law no. 678 of 2001 on preventing and combating human trafficking.

The free psychological counseling services are provided for a period not exceeding three months and if the victims have not attained the age of 18 years, for a period of 6 months <sup>145</sup>. The request for granting free counseling service shall be filed with the Protection of Victims

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<sup>140</sup> Published in the OJR, No. 557 of 2004.

<sup>141</sup> [http://www.coe.ro/download\\_pdf.php?abs\\_path=documente\\_traduceri/documente/cj3.pdf](http://www.coe.ro/download_pdf.php?abs_path=documente_traduceri/documente/cj3.pdf) , last viewed on the 25<sup>th</sup> October 2012.

<sup>142</sup> LUCA Sofia, *The persons called to attend the hearing the child*, *apud*. PIVNICERU Mona-Maria, LUCA Cătălin (coordinators) *Guide in legal proceedings regarding hearings of the child*, Hamangiu Press, București 2009, p. 172.

<sup>143</sup> Art 7 of Law 211 / 2004, published in the OJR, No. 505 of 2004.

<sup>144</sup> Art. 8 of Law 211 / 2004, published in the OJR, No. 505 of 2004.

<sup>145</sup> Art. 9 of Law 211 / 2004, published in the OJR, No. 505 of 2004.

and Social Reintegration of Offenders and only after notifying the prosecution offices or the court on the offence.

Also, in cases of offences regarding human trafficking and domestic violence, the victims of these offences benefit in addition of special measures provided by our laws on preventing and combating human trafficking <sup>146</sup> and domestic violence <sup>147</sup>. Such examples are: temporary evacuation of the aggressor from the family home, whether it is the owner of the property, reintegration of victims and, where appropriate, children in the family home etc.

In case of conflict of interests between the child victim and his parents, the court can appoint special representatives in order to represent the child's interests during the proceedings <sup>148</sup>.

The victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings. Judges, prosecutors, police officers and agents must inform the victims of their crimes on: services and organizations that provide counseling or other forms of assistance, to victims, according to its needs, criminal investigation body to whom they can make a complaint, right to counsel and the institution where they can go to exercise this right, the conditions and procedure providing free legal assistance, rights of the injured party, the injured party and the civil party, the conditions and procedure for the benefit of the provisions regarding special protective measures of victims and witnesses, the conditions and procedure for granting financial compensation by the state.

During the ordinary criminal trial, a child is allowed in the courtroom only if he is at least 16 years. If necessary, he is called in to give a statement and after that he is removed from the courtroom.

*ii. Are there any special units for investigating the crimes mentioned above within the legal force? Are they authorised to carry out covert operations? Do they investigate and analyse child pornography materials?*

In general, within the criminal prosecution bodies, there isn't any special unit for investigating the crimes mentioned above. But, as in any prosecution office, there are

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<sup>146</sup> Art. 26 and the followings of Law 278 / 2001, published in the OJR, No. 783 of 2001.

<sup>147</sup> Art. 23 of Law 213 / 2003, published in the OJR, No. 370 of 2003.

<sup>148</sup> First Instance of Iasi, criminal decision no. 5962 of 2004, amended and became final through the criminal decision no. 686 of 2005 of the Iasi Tribunal. Save the Children Association from Iasi, Romania, *Juvenile justice in the best interests of children. Practices working with the child victim*, 2008, p. 23.

prosecutors who deal with a specific group of crimes, such as those above. However, there is a special unit which investigates and analyses child pornography materials, *but specifically only if they are related to a computer system*. Basically, the special unit investigates crimes regarding manufacturing in order to spread, providing or making available, distribution or transmission, purchase for himself or for another, child pornography through computer systems, or possession, without rights, of child pornography in a computer system or computer data storage means. This special unit is called Service to prevent and combat cyber-crime and operates within the Directorate for Investigating Organized Crime and Terrorism <sup>149</sup>, which is a criminal investigative service.

Any prosecution office is authorised to carry out *covert operations*, by using officers of the judicial police <sup>150</sup>. The authorisation is given by the prosecutor. However, provided by our Criminal Proceedings Code, undercover investigators are used only regarding specific crimes and only as an exception. *These crimes do not refer to those mentioned above, but only to human trafficking offences, which are part of these crimes which allow the usage of undercover investigators.*

However, as provided by art. 224<sup>1</sup> of our Criminal Proceedings Code, undercover investigators can also be used in another serious crime that cannot be discovered or whose perpetrators cannot be identified by other means. The terms “serious crime” can also refer to any other offence for which the law prescribes imprisonment and a special minimum of at least 5 years. But the majority of the crimes mentioned above consist of a special minimum beneath 5 years.

*iii. Is it required that the crime is reported in order to be investigated? Do the proceedings go on even in case of withdrawal from the statements?*

The victims of some offences such as sexual intercourse with a minor, sexual perversion and sexual corruption, offences of child maltreatment or those provided by Law No. 678 of 2001 <sup>151</sup> on preventing and combating human trafficking, who have not attained the age of 18 and those under interdiction <sup>152</sup> are not required to report the crime in order to be investigated. Therefore, the offences can be investigated *ex officio*.

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<sup>149</sup> Law 508 / 2004 on the establishment, organization and operation of the Public Ministry of the Directorate for Investigating Organized Crime and Terrorism, published in the OJR, No. 1089 of 2004.

<sup>150</sup> Art. 224<sup>1</sup> of our Cod of Criminal Proceedings.

<sup>151</sup> Published in the OJR no. 783 of 2001.

<sup>152</sup> Because of mental incapacity.

The legal representative of the minor or person under interdiction may notify law enforcement officials on the offence <sup>153</sup>. The proceedings go on even in case of withdrawal from the statements. It is necessary to bring to the attention of relevant bodies of law on the offence so it can be investigated. However, it does not require a special referral form as a condition of accountability. *Ex officio* investigations can also take place.

A notable exception is represented by the offence of rape, or sexual abuse. It shall be noted that this offence is investigated *ex officio*, only if the minor is under the age of 15. If the victim is a minor over 15 years or a major person, this offence will be investigated only if the victim submits a *prior complaint* <sup>154</sup>. Without this complaint, the investigation cannot start, or if it has started *ex officio*, it cannot go on, as it is, by law, terminated on the ground of not being acquired by the victim <sup>155</sup>. If the victim does indeed submit the above mentioned complaint, then the investigations can proceed.

It seems strange that such a serious offence has seemingly a loophole or at least a strange approach by our legislator so, the question arises: *was this a legal omission, or an intentional enactment?*

This probably represents an intentional enactment after all, because this offence is indeed extremely traumatic and the scars left by the perpetrator could with ease deepen, by taken this case to court, without the prior consent of the victim. Whether this measure was carefully thought out after all, and, weather it serves it' s final purpose – of protecting the victim – could be subject to a debate.

It shall be noted that the New Criminal Code has the same approach with the only difference that the age of 15 is replaced by the age of 16 <sup>156</sup>.

*iv. How long is the statute of limitation? When does it start? Can it be suspended?*

The period of the statute of limitations varies on each offence and depends according to the limits established by the law regarding the punishment.

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<sup>153</sup>Art. 15 paragraph 4 of Law no. 211 of 2004.

<sup>154</sup> This arises by taking a global approach of the art. 197 from our Criminal Code.

<sup>155</sup> Idem, art. 197 in junction witch art. 10, parag. 1, lif. f from our Criminal Procedure Code – lastly updated and revised and published in the OJR, No. 714, on 26<sup>th</sup> October 2010. More about this form of intimation: UDROIU Mihail, *Procedura Penala, Partea generala. Partea speciala, Editia a2-a*, C. H. Beck Press, Bucharest, 2011 , p. 348

<sup>156</sup> Art. 218 parag. 3 lit. c , in junction with art. 218 parag. 5, from the New Criminal Code.

in case of sexual abuse as provided by art. 18 paragraph 1. a of the Convention, the statute of limitation is *8 years*;

in case of engaging in sexual activities with a child where abuse is made of a recognised position of trust, authority or influence over the child, including within the family; or abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence the statute of limitation is same as above, *8 years*;

in case of engaging in sexual activities with a child where use is made of coercion, force or threats as in rape the statute of limitation is *up to 15 years* depending on the aggravating circumstances.

in case of recruiting a child into prostitution or causing a child to participate in prostitution the statute of limitation is *10 years*.

in case of coercing a child into prostitution or profiting from or otherwise exploiting a child for such purposes the statute of limitation is up to *15 years*.

in case of recruiting a child into participating in pornographic performances or causing a child to participate in such performances the statute of limitation is *10 years*.

in case of coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes the statute of limitation is *15 years*.

*The statute of limitation starts from the moment the offence is committed.* There are crimes that take longer for them to be consumed, as in to be considered as committed, such as in case of *continued offences* <sup>157</sup>. In these cases, the statute of limitations starts from the moment they are „exhausted“ <sup>158</sup>. It can be suspended or interrupted provided that the conditions are fulfilled <sup>159</sup>.

*v. How does the national legislation proceed when the age of the victim is not certain?*

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<sup>157</sup> *Continued offences* are, in the light of Romanian law, those offences that represent, taken aside, part of the same criminal offence, committed by the same person, at variable time intervals, by following the same criminal judgment. See, art. 41 parag. 2 from the Criminal Code, or, MITRACHE Constantin, MITRACHE Cristian, *op. cit.*, p. 258.

<sup>158</sup> MITRACHE Constantin, MITRACHE Cristian, *op. cit.*, p. 253 and 258-261.

<sup>159</sup> Art. 123 and 128 of our Code of Criminal Proceedings.

The uncertainty to the actual age of the victim does not prevent the initiation of criminal investigations. In cases of human trafficking, when the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his or her age <sup>160</sup>.

*vi. Who is responsible for recording and storing data for convicted offenders? Who do they relate to? Can and do these authorities transmit their data to other competent authorities in other states? Do the authorities respect protection of personal data rules?*

The General Inspectorate of Romanian Police of the Department of Internal Affairs is responsible for recording and storing data for convicted offenders <sup>161</sup>.

Specific data related to criminal offenders can be transmitted to other competent authorities in other states. The General Inspectorate of Romanian Police does in fact respect the personal data rules, as provided by Law no. 238 of 2009 <sup>162</sup> regulating personal data processing by structures / units of the Department of Internal Affairs in activities regarding prevention, investigation and combating crime and maintaining public order.

### 3.2 Complaint Procedure

**vii. How does the complaint procedure work in case of violations of Substantive Criminal Law? Are children allowed to present their individual complaint? What are the criteria for Communication to be accepted for examinations (e.g. written/oral)?**

Children, victims of exploitation, violence, abuse, neglect or improper treatment, themselves or any other person may present their individual complaints to the police. The crime can be reported to the police or prosecutor in writing or orally. Also, another authorised (in writing) person can be appointed to report the crime.

In case of oral complaint, children must present themselves in person to the police station. The police officer will transpose the complaint in writing, record it and ask the victims to sign it. Likewise, the complaints made in writing must be signed.

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<sup>160</sup> Art. 10 paragraph 3 of Council of Europe Convention on Action against Trafficking in Human Beings, ratified by Romania through Law no. 300 of 2006, published in the OJR, No. 622 of 2006.

<sup>161</sup> Art. 2 of Law no. 252 of 2010, published in the OJRno. 885 of 2010.

<sup>162</sup> Published in the OJR, No. 405 of 2009.

The complaint must include the name and surname, occupation, home address and a thorough description. In case that the perpetrator is known, his or her name must be included in the complaint, and also if there are any evidence related to the crime, they must be mentioned in the same complaint <sup>163</sup>.

Standard documents for drafting the complaints can be found at the police. They must be submitted in the Romanian language. If the victim does not speak the language, an interpreter will be provided, free of charge, for assistance.

*viii. What are the rules about legal representation of children, especially in the case of complaints against their parents? What are the rules of participation of minors in trials? (Protection of their names, prohibition of media etc.)*

If the child is requested to appear before the investigative bodies, he or she must be accompanied by a parent or guardian as a representative of the Probation Service.

In cases of rape, sexual intercourse with a minor, sexual perversion and sexual corruption, offences of child maltreatment or in cases provided by Law no. 678 of 2001 on preventing and combating human trafficking, the victims are provided, upon request, free legal assistance <sup>164</sup>.

The court may declare the hearing secret, if the trial in public hearing could harm the morality, dignity or private life of a person, such as in our case, the child.

In case of a complaint of a child against his parents, the judicial body has the authority to select a special representative, such as a guardian, in order to assist the child <sup>165</sup>.

If it is considered that the victim's life is endangered, as well as in other conditions provided by law, the prosecutor or the court may agree that the child to be heard by technical means without being physically present at the place where the body is under criminal investigation or the place where the court hearing is conducted. In addition, the prosecutor or the court may order the police to monitor the home or residence of the victim or to provide

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<sup>163</sup> See, art. 222 and 223 from the Criminal Procedure Code.

<sup>164</sup> Art. 14 of Law no. 211 of 2004, published in the OJRo. 505 of 2004.

<sup>165</sup> First Instance of Iasi, criminal decision no. 5962 of 2004, amended and became final through the criminal decision no. 686 of 2005 of the Iasi Tribunal. Save the Children Association from Iasi, Romania, *Juvenile justice in the best interests of children. Practices working with the child victim*, 2008, p. 23.



temporary residence and supervised, and to accompany him at the prosecution office or the court and back home <sup>166</sup>.

## 4 COMPLEMENTARY MEASURES

### **Preventive Measures**

*i. What kind of educational guarantees are given in relation to professionals working with children in the area of sexual exploitation and sexual abuse? What does the State do in order to assure these people are aware of these situations?*

In Romania, subjects such as civic education are taught in schools, through which teachers educate children about the types of perversions that they may be subjected to, if they do not follow strictly the advice of parents and teachers. Nationwide, various measures in the various ministries are also taken, through which education of the population is trying to fight against the existence of sexual abuse. These measures are widespread through the media tool, which informs the parents about how they can protect their children and about how they can fight against spreading of this type of crime. There are certain campaigns on TV and on the internet whose purpose is to prevent spreading of this kind of abuse of minors.

*ii. Does the State educate children regarding these issues? Does the State involve parents into this educative process?*

There are lots of social programmes established by the national government or by non-governmental associations, which provide support for victims, such as Save the Children Romania, a NGO, which offers free counseling for children and their parents. The Save the Children centers are located in the cities of Bucharest, Timisoara, Iasi, Suceava, Targu Mures, and also guarantee free help lines, which are aware of the confidentiality principles.<sup>167</sup>

*iii. Has the State created preventive intervention programmes for people who fear that they may commit the crime?*

Some prevention tools have been created in the online environment. Blocking certain websites might be seen as a precaution, but this measure is unable to help people who fear

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<sup>166</sup>Art. 77<sup>1</sup> of our Code of Criminal Proceedings.

<sup>167</sup> <http://www.salvaticopiii.ro/>

they might themselves commit crimes. Suppression of pages is ineffective, because the possible offenders can bring abusive online content to other servers located in jurisdictions where it is nearly impossible to interfere.

### **Protective Measures and Assistance to Victims**

*iv. Are there any social programmes to provide support for victims? How exactly do these programmes work?*

The Emotional, Behavioral and Educational Center for Children is a subsidiary of Save the Children and provides services such as: clinical, psychiatric and psychological assessment services, for children and adolescents, counseling and individual psychotherapy for children and adolescents, counseling and group psychotherapy for adolescents, individual counseling for parents, educational programs for parents, development programs of social and emotional skills for preschoolers and young school children, support groups for children and parent, social services. All services are free, offered in a friendly, accessible environment.

Other social programs are also put into practice, amongst which:

- training programs for professionals in health systems, education and social protection - psychiatrists, family doctors, nurses and clinical psychologists, school psychologists, family physicians and pediatricians, social workers, speech therapists are developed;
- materials for professionals who provide professional counseling and psychological intervention for children, adolescents and their families are being spread;
- informing activities, education and intervention in schools, for children, teachers and parents, designed to reduce the incidence of sexual behaviors are being carried out.

Within the therapeutic treatment, the members of the team will meet in the center with the child and his parents as well as outside the center - in school or kindergarten, with the child's teacher-, in class / group when for solving the problems of child's health is necessary and an intervention in the educational environment.

When the children's difficulties are maintained by their relevant socio-emotional absence and the lack of parenting skills, both children and parents can benefit from educational programs and / or therapeutic group programs.

*v. Are there any help lines in service of the victims? Are these help lines aware of the confidentiality principles?*

The helpline called *Children's Telephone* has been the best example of this kind, showing that between November 21, 2001 and October 31, 2012<sup>168</sup>, there were 39.291 telephone requests that demanded the intervention of public authorities. Out of these, 9.919 persons called about cases of abuse on children and 395 were cases of domestic violence.

*vi. How does the State assist victims when it comes to recovery? Are the intervention programmes (if there are any) aware of the possibility that these child victims could have sexual behaviour problems in the future? Does the State make sure to get the consent of the persons or inform them thoroughly about the intervention programmes?*

Romania has adopted, since 2004, a national plan- implemented by an Inter-Ministerial Working Group, with the purpose being that of combating sexual abuse and assisting the recovery of victims.<sup>169</sup>

The aim of the plan is to ensure the protection of every child, respecting its interests by reducing the risk he became victim of these types of abuse, such as involving children / youth in prostitution, pornography, prostitution. Implementing legislative act will be achieved through the participation of all relevant stakeholders in the field of child protection and related fields, creating the general framework of action to gradually reduce / stop the sexual exploitation of children for commercial purposes and to prevent it.

The plan has the following objectives:

- Development policies, national strategies and a legal framework to protect children / youth sexual abuse and their involvement in cases of sexual abuse and sexual exploitation for commercial purposes. Thus, secondary legislation will be approved for Child Protection that includes issues of child sexual abuse, exploitation for commercial purposes (including the sale / their internal and cross-border trafficking). It is also in the review, adjustment and completion of internal legal procedures so as to ensure real protection of the child, according to interest or higher, in accordance with international standards.

<sup>168</sup> The full Children's Telephone Statistics: <http://www.telefonulcopilului.ro/statistici> , last viewed on the 25<sup>th</sup> October 2012.

<sup>169</sup> <http://www.osce.org/odihr/14143>

- Building partnerships and collaboration between those responsible for child protection and family in order to sustain and develop a coherent, nationwide, to prevent and combat child sexual abuse, sexual exploitation, sale and trafficking of children and young. The National Authority for Child Protection and Adoption will coordinate a working group on this field, consisting of representatives of all institutions, nongovernmental organizations and of other relevant international bodies. The plan also provides for meeting this objective the organization of training courses and technical seminars, training of specialists for the purpose of reference of public services for child protection, education, health, police, justice, customs, prosecutors, tourism, mass-media.
- Romania's active involvement in regional and international policy to prevent sexual abuse against prostitution and child pornography, prostitution, child exploitation, sale and trafficking of their domestic and international commercial interests. This will be supported by regional and international actions to protect children / young people by providing informational support needed and will be introduced extraterritorial jurisdiction rules and sanctions across the national territory, citizens who have committed crimes of sexual exploitation of children and adolescents.
- Developing programs and projects to prevent sexual abuse of any form and in any medium, the involvement of children in prostitution, pornography and prostitution, as well as domestic and international sales and traffic for commercial sexual exploitation. For this purpose, will be created specialized resource centers will be developed programs to promote child rights in family education and support for families, special intervention to prevent domestic violence.
- Developing a coherent, unified, functional national / local services for the rehabilitation and social reintegration of children / teenagers abused and / or sexually exploited, system to ensure social and psychological services for children and family services counseling and psychotherapy, counseling services and immediate intervention oriented institutions, by establishing national telephone hotline with permanent program.
- Developing a system of evaluation and monitoring of cases of sexual abuse and sexual exploitation of children.

Another project, called "Developing the capacity to prevent and investigate cases of child pornography on the Internet in Romania" was set up by the Romanian police. Currently

used by 36 countries, the ICSE database (Internet Child Sexual Exploitation database) is using an imaging program identification, through which are compared details of the place where the offence occurred, so that connections can be made between series of images of the same offences or between images produced in the same place, which has more victims.

In this way you can get relevant information about the place where they made some images of child pornography on the Internet, which increases the chances of identifying victims and hold the perpetrators of these crimes.

"By implementing the project, 100 policemen were trained on methods to combat and prevent cases of child pornography on the internet, and a specialist in the Directorate for Combating Organized Crime conducted a training session at the headquarters of Interpol," said Florentine Robescu, Deputy General Inspector of Romanian Police.<sup>170</sup>

According to a survey to assess the campaign "You who accept you?", Conducted by the Office of Research at the Institute for Research and Prevention of Crime from 7 to 15 November 2011, on a sample of 904 middle school students, surfing the Internet (for 84.5% of them) is one of the main activities they engage in their spare time.

Conducted over a period of three years by the Romanian Police, in partnership with the National Police of Norway, the project "Capacity Development for preventing and investigating cases of child pornography on the Internet in Romania", worth 578,295 euros, was funded through the Financial Mechanism European Economic Area.<sup>171</sup>

### III NATIONAL POLICY REGARDING CHILDREN

#### *i. Is there a serious political discussion regarding the children in the respective country?*

At the State level, under the supervision of the Ministry of Labor, Family and Social Protection, the Directorate General for the Protection of the Child is the public authority that promotes and safeguards children's rights. The Directorate offers statistics on the general issue of abuse against children, and the specific case of sexual abuse<sup>172</sup>. Between January 1 and June 30, 2012, there were a total of 5.665 cases of abuse neglect and

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<sup>170</sup><http://www.curentul.ro/2012/>

<sup>171</sup><http://www.curentul.ro/>

<sup>172</sup> Statistics of the Directorate General for the Protection of the Child:  
[http://www.copii.ro/alte\\_categorii.html](http://www.copii.ro/alte_categorii.html) , last viewed on the 25<sup>th</sup> October 2012.

exploitation, out of which 292 were cases of sexual abuse and 24 of sexual exploitation. 182 cases of sexual abuse took place within the family.

A second example of a state authority that conducts activities in the area of sexual violence is the National Agency against Human Trafficking (ANITP in Romanian), which coordinates, evaluates and monitors the implementation of public policies regarding human trafficking. The Agency, falling under the Supervision of the Ministry of Administration and Interior, also functions as a mediator between victims of trafficking and the competent judicial authorities or the victims and the competent NGOs.

*ii. How has the awareness within the society regarding children's sexual abuse and exploitation been raised by committed NGOs and/or the State (use of official sources, documents, statistics...)?*

The Directorate General offers statistics on child abuse only for the past last 3 years:

- **2012:** 292 cases of sexual abuse, 24 cases of sexual exploitation;
- **2011:** 512 cases of sexual abuse, 48 cases of sexual exploitation;
- **2010:** 623 cases of sexual abuse, 59 cases of sexual exploitation;

As a total, since 2010, there have been 1427 cases of sexual abuse and 131 cases of sexual exploitation.

*iii. If the statistics are available, how many reporting have been done regarding children's sexual exploitation in last the 5 years (e.g. police records, court records etc.)?*

The statistics of the previous years have been detailed below:

- The official statistic for 2010 <sup>173</sup>: the trafficking of minors increased from the previous year (22,5% of the victims in 2009, to 27%); out of 482 victims of sexual exploitation, 226 were minors.
- The official statistic for 2009 <sup>174</sup>: out of 320 identified victims of sexual exploitation, 127 were minors.
- The official statistic for 2008 <sup>175</sup>: out of the 186 minors identified as victims of human trafficking, 74% were trafficked for sexual exploitation.

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<sup>173</sup> Evaluation of the situation of human trafficking in Romania in 2010:

<http://anitp.mai.gov.ro/ro/docs/studii/evaluare%202010.pdf> , last viewed on the 25<sup>th</sup> October 2012.

<sup>174</sup> Evaluation of the situation of human trafficking in Romania in 2009:

<http://anitp.mai.gov.ro/ro/docs/studii/evaluare%202009.pdf> , last viewed on the 25<sup>th</sup> October 2012.

- The official statistic for 2007 <sup>176</sup>: out of the 292 minors identified as victims of human trafficking, 75% were trafficked for sexual exploitation.

*iv. Are there any promotional campaigns in the State so far regarding these issues?*

To combat the phenomenon on human trafficking, the ANITP carries out public campaigns and provides a free of charge help telephone line where the Agency can be notified about cases of trafficking. An active campaign at the present moment is entitled “Me?! It can’t happen to me!” and it is aimed at raising awareness about human trafficking in Bucharest and the surrounding areas. “Your friend could be a Loverboy!” is another similar campaign where the Agency informs educational institutions and students about recruiting methods used by so-called “lover boys” <sup>177</sup>.

*v. How has the children’s perspective represented in the law making process?*

Lobbying for children’s rights in Romania is difficult especially because, firstly, the lobby activity has no legal ground in Romania and secondly, because of the lack of an established dialog structure between public authorities and NGOs. Another obstacle in the way of NGO involvement is represented by frequent changes of management in public bodies, which means that negotiations carried out with one stakeholder will need to be reopened with the newly appointed one.

Since 2001, SCR has been promoting the initiative establishing a “Children’s Advocate”, an independent public body that should promote and safeguard the interests of the child. In 2011, a Member of Parliament initiated an amendment to the Law governing the organization and functioning of the Ombudsman <sup>178</sup>, in order to create a special assistant of the Ombudsman which would promote children’s rights. However, this initiative was rejected by the Chamber of Senate in 2012. SCR was also actively involved in the revision <sup>179</sup>

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<sup>175</sup> Characteristics of minors identified as victims of human trafficking in 2008:

<http://anitp.mai.gov.ro/ro/docs/studii/minori20082009.pdf> , last viewed on the 25<sup>th</sup> October 2012.

<sup>176</sup> Report on the situation of human trafficking in Romania in 2007:

[http://anitp.mai.gov.ro/ro/docs/studii/raport\\_anual\\_2007.pdf](http://anitp.mai.gov.ro/ro/docs/studii/raport_anual_2007.pdf) , last viewed on the 25<sup>th</sup> October 2012.

<sup>177</sup> The term is taken from the Romanian movie *Loverboy*, with the theme centred around human trafficking. For more information visit [www.loverboy.ro](http://www.loverboy.ro) , last viewed on the 25<sup>th</sup> October 2012.

<sup>178</sup> Law no. 35/1997, republished in the Official Bulletin of Romania, Part I, no. 844 of 15 September 2004.

<sup>179</sup> In 2011, SCR sent Romanian Authorities a document requesting the revision of Law No. 272/2004:

[http://www.salvaticopiii.ro/?id2=000200090001#Propuneri de modificare a Legii 272/2004.html](http://www.salvaticopiii.ro/?id2=000200090001#Propuneri%20de%20modificare%20a%20Legii%20272/2004.html) , last viewed on the 25<sup>th</sup> October 2012.

of Law. No. 272 / 2004<sup>180</sup> on the protection and promotion of the rights of the child, suggesting amendments which represent the children's perspective. Such suggestions regarded the right to identity, protection of children whose parents are working abroad, mandatory school enrollment. Another area of the SCR activity is related to the development of three draft National Strategies on Early Education, Parental Education and Mental Health of the Child and Adolescent.

*vi. Who are the main national Non-Governmental Organisations working on the topic of children's rights? Does the State regulate (or not) their involvement in law making process?*

As for the non-governmental sector, one of the most active NGOs in promoting children's rights is Save the Children Romania (further referred to as SCR), developing programs in 39 cities all over Romania. The organization has been involved in both campaigns and legislative initiatives, which will be described as follows<sup>181</sup>.

The latest campaign initiated by SCR on the issue of children's abuse is called "Listen to their soul" (2011). The campaign promotes methods of raising and educating children, eliminating violence, abuse and neglect. Another popular campaign was carried out in 2005, "Beating is NOT sent from Heaven"<sup>182</sup>, promoting legal norms that forbid physical punishments on children.

Another NGO whose activities promote the rights and interests of the child is the Children's Telephone<sup>183</sup>. The organization implemented a telephone number (116 111) for the assistance of children. The services granted by the NGO refer to information and counseling on the respect of the rights of children or information on institutions that protect children's rights.

## IV OTHER

Problems other than the aforementioned legal and social ones could not be identified. Nevertheless, a great deal of the current situation is due to the lack of interest shown by

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<sup>180</sup> Published in the OJR, No. 557 on 23<sup>rd</sup> July 2004.

<sup>181</sup> The information regarding the activity of Save the Children Romania is based on an interview with Ms. Diana Stănculeanu, Program Coordinator on Violence Against Children at Save the Children Romania, conducted on August 29, 2012.

<sup>182</sup> Referring to a Romanian popular saying, when using violence with educational purposes.

<sup>183</sup> Official website: <http://www.telefonulcopilului.ro/>, last viewed on the 25<sup>th</sup> October 2012.



politicians, who always skip the problematic area of children's rights when presenting their political programs.

## V CONCLUSION

The aim of this report was to raise awareness towards the problem of sexual abuse against children and help the future prevention of this kind of offences.

Our research team has tried to portray the problem with regards to changes which took place on a legislative, social and educational level. During our research, we concluded the following:

- The Romanian state has ratified the Lanzarote Convention and has adopted it into its national legislation, making no further reservations to its text;
- The interest of the legislative power in Romania in creating a legal frame for the problem of sexual abuse of children has had a strong echo during the past years, with laws concerning trafficking, child pornography or child prostitution having been passed, this being the start of a preventive process. Furthermore, the upcoming entry into force of the New Criminal Code, which deals with many of sex-related offences against children will ease the process of bringing such cases to court;
- Although the legal frame is sufficient, its effectiveness is blocked by fundamental problems identified at a social level, such as the issues of discrimination, improper education, vulnerability of children and a high rate of human trafficking;
- The activity of NGOs in this field has been booming in the past years, leaving behind a growing social impact and contributing highly to educating the population, preventing crimes and helping the reintegration of the victims through special programs.

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**National Researchers:**

Tanyana Drozdova

Evgeniy Panin

Darya Pashkova

Olga Teben

**Academic Advisor:**

Alexander Salenko

**National Coordinator:**

Svetlana Vasilyeva

## I INTRODUCTION

### 1 GENERAL

i. Article 19 of the Russian Federation Constitution is devoted to the principle of equality and reveals its specific values. Part 1 of Article defines equality as equality before the law and the courts. Law as an act, taken in the form of the Constitution or the law is objectively necessary mean of formulating rights and freedoms. Therefore, it is important to promote equality in front of the law, as a general rule for all (equal scale), which defines individual freedom. Extremely essential to provide equality of everyone in front of the court, as the court is the most effective way to protect and restore human rights and freedoms in the case of a dispute or violation. It should be noted that the position of Part 1 of the equality of all in front of the law means that this principle applies to the citizens of the Russian Federation, foreign citizens and persons without citizenship.

Part 2 of the mentioned Article defines equality as the equality of man and citizen in possession of rights and freedoms. Here the duties of the state to guarantee this equality as a matter of the natural properties of the person, and his social traits. Among the natural properties of the person listed as gender, race, and nationality. Public signs include human language, origin, property and official status, place of residence, religious creed, beliefs, and participation in voluntary associations. These personality traits identified and protected in the Article, as the specifics of the Russian Federation are the multi-ethnic composition of the population, the existence of different races, the diversity of languages, religious confessions.

Meaning of Paragraph 2 of the Article also is in the fact that it takes into account a variety of properties of man. Thus human dignity receives legal protection from discrimination in accordance with Article 2 of the Universal Declaration of Human Rights, Article 2 of the International Covenants on Human Rights and Article 14 of the European Convention on Human Rights and Fundamental Freedoms. Lists the properties of the individual, in respect of which discrimination is prohibited, is not exhaustive. In Part 2 of the Article of the possibility of taking into account "other circumstances" that might occur in real life. The constitutional principle is protected in the Article 136 of the Criminal Code of the Russian Federation, according to which willfully violating the equal rights of citizens on account of race, nationality, religion, shall be punished by imprisonment or a fine.

Part 3 of the Article 19 of the Constitution states that men and women have equal rights and freedoms, which correspond to the Article 3 of the International Covenant on Civil and Political Rights. Part 3 of the Article 19 also points to the equal opportunities for men and women of their rights. This directive should be interpreted literally. Social significance of maternity and the role of women in procreation are universally recognized, so that a woman needs additional safeguards in this area. According to Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, the term "discrimination against women" means any distinction, exclusion or restriction made on the basis of gender, which is aimed at weakening or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. Historically, the principle of equality between men and women is well established in our public consciousness. However, during the formation of the new society, women are particularly vulnerable position. International benchmarks in the Convention defines the special danger of limiting women's access to health care, education, training and growth opportunities for employment standards, food, etc. In the current circumstances, the state is obliged by legislation, administrative action and the court to prevent possible cases of discrimination against women. As adopted on 8 January 1996 Government of the Russian Federation, improving the status of women in the Russian Federation is recognized that at the present time a number of violation of women's rights, the evidence of discrimination in Russia. Therefore formulated to overcome the problem of violations of the labor market, where there is a reduction in the professional status of women. Deterioration in nutrition and health is recognized. Separately was determined the problem of combating various forms of violence against women (in the family, manufacturing, and other areas of life), and sexual exploitation. Feature of the Article 19 is that its action is due to the action of all articles of the Constitution, which establishes specific freedom or human and civil right.

Some reports of discrimination in Russia.

Amnesty International has published a report on the rampant racism in Russia. This document summarizes the 43-page report, "Russian Federation: Violent racism"<sup>1</sup>.

Reports of racist attacks and killings of foreigners and ethnic minorities appear in Russia with shocking regularity, and the concern is that, as it seems, this is happening more and more often. Among the victims, who became known to "Amnesty International", are: students, asylum seekers and refugees from Africa and Asia, as well as people from the South Caucasus, South Asia, South-East and Central Asia, the Middle East and Latin America. However, residents of the Russian Federation are also in a group of risk of physical violence. At risk at all, who do not have typical Russian appearance, for example, persons belonging to ethnic groups from the North Caucasus, in particular, the Chechens, as well as representatives of the Jewish community, Gypsies and children of mixed marriages. Even persons of Russian nationality, regarded as sympathetic foreigners or members of ethnic minorities, such as fans of music styles "rap" or "reggae", representatives of other youth subcultures and fighters against racism, also suffered persecution because they are considered "non-patriots" and "traitors". Reported attacks in towns and cities throughout the Russian Federation. At present, Russian and foreign media have reported racist attacks almost daily. However, these attacks have taken place over the years.

Organizations and individuals in Russia, engaged in research and campaigning against racism, discrimination and other forms of xenophobia, also abused. "Amnesty International" has received numerous reports of threats, physical attacks and, in some cases, murder individuals involved in anti-racist activities, the authorities, aware of the threat hanging over them, took no action to protect them.

According to official statistics, there are about 150 "extremist groups" with over 5,000 members, while non-governmental organizations (NGOs) have suggested that the number of persons participating in more or less organized racist groups is much higher and can reach 50 thousand people.

The reaction of the Russian authorities to the problem of racist violence is grossly inadequate. In particular, police and prosecutors refused to recognize the racist nature of the attacks and killings, despite the presence of the Criminal Code of the Russian Federation

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<sup>1</sup> Index MA: EUR 46/022/2006, issued by Amnesty International in May 2006.

article providing for criminal penalties for crimes committed on racial grounds. Inability of the state to act with due diligence to prevent, investigate and punish crimes motivated by racial hatred and attacks against fighters with racism and experts, it seems, only strengthens the extreme xenophobia and neo-fascism in Russia. Although at present the authorities, including the various law enforcement agencies are increasingly aware of the existence of the problem of racist attacks on minorities, it seems that there is a comprehensive plan of action to combat racism and discrimination, including on the part of official representatives of the State.

Specified violent attacks should be considered as one of the most visible manifestations of intolerance and xenophobia, are deeply rooted in many areas of Russian society. As in all societies, government officials reflect the values of their society.

The research "Amnesty International" shows that in Russia, law enforcement officials and other government officials continue to use discriminatory practices. In particular, together with the fact that everyone, including the ethnic Russian, can be a victim of human rights violations at the hands of police officers, members of ethnic minorities, particularly people from the North Caucasus and Central Asia, as well as migrant workers are particularly vulnerable in the face of violations such as extortion, arbitrary arrests, torture and ill-treatment. This not only leads to a direct violation of human rights by the state, but also affects the ability of the state with due diligence to protect minorities and foreign citizens from abuse by racist groups. In particular, many of the victims of violent attacks do not report these crimes to the police, knowing the experience of other people who are treated with similar complaints, and then allegedly were charged by police in the fact that they themselves have provoked the attack. Other victims simply do not believe that the police will take any action to investigate the attacks. In Russia, discrimination in the enjoyment of economic, social and cultural rights is also a reality for ethnic minorities such as, for example, Gypsies.

In this atmosphere of violence and racist ideas spread more. While in 2004 the racist attacks were reported in 26 regions in 2005, such attacks have been observed in 36 regions. In this case, the perpetrators of such crimes, does not hide his racist motives. Racism is an attack on the very idea of universal human rights. It systematically denies certain people their full realization of human rights because of color, race, ethnicity, or nationality and origin. In accordance with the international law of human rights, Governments are obliged to fight discrimination in all its forms. Also they have an obligation to ensure that laws and public

institutions address the root causes and effects of discrimination and provide effective remedies to those who have been a violation of his fundamental right to an equivalent treatment.

"Amnesty International" calls on the Russian authorities to take immediate steps towards a comprehensive solution to the problems of racism, and offers a number of recommendations that produce specific actions to be taken. Among other things, it is necessary: the government to adopt a comprehensive plan of action to combat racism and discrimination in all spheres of Russian society to act - openly and often passionately and at all levels of government - against racism, to ensure that crimes reasonably considered racially motivated, qualified as such, and that the practice of the treatment crimes motivated by racial hatred as "hooliganism", to address deficiencies in the investigation and prosecution of racist attacks, including through the development of clear guidelines for law enforcement agencies, stopping the practice of discriminatory treatment in all its aspects in relation different ethnic groups of the state; effective measures be taken to protect the fighters against racism and witnesses in criminal proceedings who face threats to their security from non-state actors, and to ensure the full integration of the principles enshrined in the UN Declaration on Human Rights Defenders, in national law and human rights protection mechanisms, as well as to ensure their full implementation.

ii. Part 1 of Article 38 of the Russian Federation Constitution states: "Motherhood and childhood and the family are protected by the state." This is confirmed by expression in Russian law Declaration of Human Rights of 1948, Declaration of the Rights of the Child in 1959, the Convention on the Rights of the Child in 1989, adopted by the UN General Assembly. They state the need for special protection and assistance for motherhood, the legal protection of the family, create social conditions for its normal functioning, the harmonious development of every child in view of its physiological characteristics. In Article 38 states that the care, parenting - the equal right and duty of parents, as well as "able-bodied children over 18 years, to take care of their disabled parents."

The article stresses the guarantee of social security for the education of children, establishing pensions, encouraging forms of social welfare and charity (medical care, children without parental care in children's homes, boarding schools, the benefits to large families, foster families, etc.). The main legal acts governing family relationships are: Family Code (entered into force on March 1, 1996, the rules of international law and international treaties of the



Russian Federation in the field of family law are the part of family law of the Russian Federation), the Civil Code of the Russian Federation and other regulatory acts.

The concept of family in international law

International legal instruments, using the term "family"; however it does not contain definitions, referring to national legislation. Thus, in the International Labor Organization Convention N 156 on equal treatment and equal opportunities for men and women workers: workers with family responsibilities (Geneva, 3 June 1981) stated that the term "child dependent" and "the other next of kin member of the family, which is really in need of care or support" mean persons defined in each country in any manner consistent with national practice.

Approach to the definition of family in the Russian legislation

The concept of family has a social rather than legal in nature. In this regard, the concept of legal documents related to the establishment of the family circle of people that form its membership. Establishment of a circle of family members, in turn, depends on what content can be embedded in the concept of "family member". Circle of family members related to the rights and obligations defined in different ways depending on the purpose of regulation in various areas of law - family, civil, labor, etc. It is different in different legal institutions of one branch of the law (for example, housing and property rights). In the housing rights of family members means spouse employer, his children and parents. Other relatives, disabled dependents are recognized as members of the family, an employer if they are infused by, as members of his family with him and lead the overall economy. In exceptional cases, other persons may be deemed members of the family of the living space in the courts (Article 69 Labor Code of the Russian Federation). In the other way the range of family members determined in the pension legislation. Cohabitation with the deceased for a pension for survivor and co-farming significance is not. The main point here: who should have been aliment by the victim during its life by law in the succession law as their circle of family members?

The concept of family in the Family Code of the Russian Federation

In the Family Code of the Russian Federation is no common definition of family for the reason given above. Because of a different definition of the family in different areas of legislation inclusion of a definition of "family" in the Family Code and the establishment of an exhaustive list of family members could lead to a violation of their rights, or to increase

the number of unnecessary family members. However, the terms "family", "family member" is frequently used in the Family Code.

Understanding of these terms in the Family Code is set based on assumptions of the theory of family law. Family (in the legal sense) is defined as the constituency concerned moral and economic rights and obligations arising from the marriage, kinship, adoption or other forms of acceptance of children with a family. This definition does not take into account the fact of living together and maintaining a common household.

In accordance with Family Code specified rights and obligations arise between the following family members: spouses, parents, children, grandparents (grandmother) and grandchildren, sisters and brothers, stepfather (stepmother) and stepchildren (stepdaughter), as well as between those who accepted the education of children (adoptive parents, guardians, foster parents, actual teachers) and adopted children to their families. In this case, the respective rights and obligations arise in these cases in the Family Code and under the conditions set by them. As a rule, their occurrence is independent of the joint residence or location of any of the family members dependent on the other.

Family Code, in particular, a comprehensive list of individuals who have an obligation to provide funds for the needy members of the family:

1. Parents of minors and incapacitated adults and children in need;
2. Adult children against the disabled and needy parents;
3. Spouses (in the cases - and former spouses) in relation to each other;
4. Under certain conditions - brothers and sisters, grandparents and grandchildren against grandchildren against grandparents, foster child against the factual fosterers, stepchildren against the stepfather and stepmother.

Grandparents who have the necessary resources are required to maintain their minor grandchildren and disabled adult grandchildren who need help if they are not able to receive child support from their parents, and adult disabled children and also their spouses (former spouses). Grandchildren, in turn, are required to if they have the necessary funds to support their disabled need help grandparents (Art. 94-95 Family Code of the Russian Federation). Brothers and sisters are obliged to support their need help minors and disabled adults in need of brothers and sisters. This obligation does not arise if the brothers and sisters do not have sufficient resources to provide such assistance (see Art. 93, Family Code). Since the

duties of family members against each other are established by law - must be taken into account for tax purposes.

Family Code also uses the term "close relatives", meaning (Article 14 Family Code), parents and children, grandparents and grandchildren, full and half brothers and sisters. Further, the half brothers and sisters mean children having general or father or mother.

The concept of marriage in Family law

In recent decades, marriage in the sociological sense discussed in Russia mainly as a "union between men and women, by which regulates relations between genders and determines the position of the child in society," or as a "historically determined, authorized and regulated by society a form of relations between men and women, establishing their relationship to each other and to the children". In contemporary encyclopedic literature marriage describes, as a rule, as the family union of a man and a woman (matrimonial state) generating their rights and obligations in relations to one another and to their children.

However, in the Family Code there is no specific definition of marriage as a legal faction and one of the main institutions of Family law, which is quite natural, since the negative approach to regulatory consolidation of marriage was typical for a long time and for a previously effective family law in Russia, including three previous marriage and family code after Revolutionary period (1918, 1926 and 1969). As emphasized in contemporary legal literature, the lack of law-established definition of the marriage due to the fact that marriage is a difficult and complex social phenomenon, that is being under the influence of not only legal but also ethical, moral norms, and economic laws that be called into question the completeness of the definition of marriage only to the legal position, the more that "spiritual and physical elements of marriage, of course, cannot be subject to the law".

Logical way is further consideration of the individual characteristics of marriage in relation to the current legislation of different countries on the specific factual examples.

1) Marriage - a free, equal union of men and women of marriageable age who are not already married, contracted under the conditions and procedures established by law, and having to build a family.

2) Voluntary marriage - a principle established by international law, and all the domestic legal order. The essence of this principle is based on the independence and unfettered will of the persons entering into marriage (no emotional or physical violence), and is the full and free consent of the spouses of the parties. Unfortunately, not always outwardly express consent

to the marriage of one of the spouses meets his real intentions (in some countries, young men and women are still parents choose their candidate husband or wife). Also, given the fact that the right of any State shall determine the conditions necessary for the marriage, and the circumstances affecting the marriage, the spirit of volunteerism is not always fully realized. For example, the legislation of different countries there are no uniform regulations for marriage mentally ill or suffering from dementia that are not able to adequately assess their actions and their legal consequences. In addition, the laws of some foreign countries provide for marriage by proxy, that does contradict the requirement of personal appearance spouses in marriage and public expression of consent to marriage, necessary for the implementation of the principle of voluntariness. For example, Islamic law recognizes marriage, not only personally, but on behalf of, and in Spain and Italy, the legislation provides for the possibility of marriage by proxy in an emergency but not in the Russian Federation.<sup>2</sup>

3) Equality between spouses in a marriage means itself the equal rights and obligations of both husband and wife. In marriage is the equality of citizens, regardless of their nationality, race and religion. From a legal point of view, in most modern states this sign legislated. The essence of equality is that couples are raising children together, have equal rights to own, use and dispose of jointly acquired property during the marriage, both spouses are free to choose their occupation or profession, by mutual agreement settle all questions of family life.

4) One of the common characteristics of marriage is its purpose - a family. At the same time, in the modern world, the cases of detention “fake marriage”. Fake marriage is a sham marriage registration without the intention of either both parties or one of them to start a family. Sham marriage can be for various reasons: the prospect of living space, permanent registration, and devolution of property on death of an elderly spouse, a pension, and implementation of other selfish and other purposes. If the absence of intent to start a family will be proved – it is the grounds for annulment of the marriage in Russia.

5) Another sign is the appearance of marriage, the couple mutual personal and property rights and obligations. This feature is implemented in full measure only to marriage, duly registered in accordance with the law. Unregistered or the actual marriage (in Russian law -

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<sup>2</sup> Civil and commercial law of the foreign countries. Volume 2. Moscow, 2006. p.526.

cohabitation), defined as the relationship between partners, "spouse", not designed in accordance with the law in most countries is the emergence of mutual rights and obligations. However, there are certain exceptions. Thus, certain civil causes and consequences of legalized cohabitation with the conduct of the general economy. In most states a simple cohabitation after a certain period of living together allows the court to set a precedent of the presumption of legal marriage. According to the current Family Code, unregistered cohabitation men and women does not create rights and obligations of marriage. The rights of children born in legal marriage do not differ from the rights of children born out of marriage.

The rights and responsibilities of spouses arise from the date of state registration of marriage in the Civil Registry Office, where facts of birth, change of name - name - middle name, the death are also should be register.

The law sets out the legal terms and conditions of the marriage: the marriage required the personal presence of both parties to the marriage, the bride and groom should make mutual voluntary consent to enter into matrimony, and that is very important - they must be of marriageable age, which is set to 18 years. If there are valid reasons for local government may allow married persons aged 16 years, at their request. Reducing the age of consent as an exception to the specific circumstances of less than 16 years is included in the legislative competence of the Russian Federation. Marriage is registered, usually within a month after applying for the bride and groom, this period may be extended by the registry office for a month, or shortened to one day, as if you have special circumstances (pregnancy, childbirth, or other) Marriage shall be entered into on the day of application. Marriage is valid only if legal capacity of persons entering into a marriage. That is why the mentally ill, recognized as such by the court, have no the right to marry.

#### Child Protection

**iii.** May 31st, 2011 in Moscow All-Russian Public Opinion Research Center presents the data on which the problems of childhood Russians seem most important and how respondents rate the extent to which children's rights in various fields.

Russians believe that the best currently underway children's right to education: relevant index is 66 points. Also interviewed are satisfied with how respected the rights of children to freedom of expression and an opinion (54 points).

Several worse is the realization of the right to receive medical care (49 points), kindergarten (42 points). Most poorly implemented children's right today is the right to protection from violence and abuse (37 points) and the protection of information that is harmful to their health and moral development (30 points).

In the problems of childhood that Russians do not think is particularly acute, the degree of realization of the rights is generally high. Thus, the problem of children's education in kindergartens and schools concerned 14% of respondents, while the extent rate of the right to receive school respondents is the highest in comparison with the rest (66 points). At the same time, the index on visits to kindergartens is somewhat lower (42 points). Slightly below the level of implementation and the right to rest and leisure, and protection from violence in the family (42 and 37 points, respectively), and the corresponding problems are also not the most serious of these (they give a value of 14 and 13%, respectively).

The problems related to the legal right of children, are not among the most pressing issues of childhood. Thus, the child's right to schooling observed in the opinion of the respondents fairly complete (66 points), and, therefore, the problem of teaching children in schools is particularly acute for the Russians (she worries 14%). The same is the situation with the child's right to leisure: it is implemented adequately (42 points), and, therefore, the issue of children's leisure concern 14%. At the same time, the low level of implementation of the right of children to protection from violence (37 points) does not attract the appropriate public attention to this problem (which concerned only 13% of respondents).

What kind of children's problems, in your opinion, should be the focus of public attention in today's society? (close-ended question, up to 2 responses).

	2005	2009	2011
Alcoholism, drug abuse among children and adolescents	45	45	47
Infant and juvenile criminality	35	38	31
Low living standards of Russian families with children	29	20	27
Homeless and neglected children	21	21	18

Problems of children's education in kindergartens and schools	6	10	14
Problems of the organization of the free time of children	13	18	14
Violence against children in Russian families	6	11	13
Poor living conditions of orphans in institutions	8	5	9
Selfishness of the present society, the reluctance to have and raise children	5	5	6
Adoption of a child by Russian citizens	5	5	4
Adoptions of Russian children by foreign citizens	4	3	4
Other	0	1	1
No answer	2	3	2

Please rate how well (good) in our town / village sold children's right ... (close-ended question, 1 answer for each item)

	Fully realizing, without problems	Partly realizing	Not realizing (totally)	No answer	Index
Attendance of school	57	28	4	10	66
Free expression of thoughts	40	35	9	17	54
Own opinion	40	35	9	16	54
Medical care	23	53	17	8	49
Free time	14	54	23	9	42

Attendance of kindergarten	14	55	19	13	42
Protection from violence and abuse	11	49	25	15	37
Protection from the information that can be harmful to children's health or moral development	8	38	41	13	30

UNICEF Regional Advisor on Child Protection in Central and Eastern Europe and the CIS Jean-Claude Legrand brought in his speech statistics: 500 million to half a billion children in the world suffer from different forms of abuse, and in Europe one in five children in our day is by sexual abuse. Despite the fact that revealed themselves only 10-15 percent of the total number of crimes against child.<sup>3</sup>

Statistics on executed in Russia in juvenile crime is depressing. So, in 2002 launched more than 40,000 crimes against children. In 2006, at the hands of criminals already suffered 80,000 minors, and in 2008 - 100 thousand and 1.7 thousand were killed. More than 100,000 Russian children in 2009 were victims of crime, of which nearly two thousand were killed, said the Presidential Commissioner for Children's Rights Pavel Astakhov. For the last 2010 registered 384 the rape of children under the age of 14, 1766 facts seduction and corruption of children. 1519 infants remained unfound, 513 children of which are missing.

"In 2009, 108,000 children were victims of crimes, nearly 2,000 were killed. In 2009, child welfare authorities of the Russian Federation received 37,000 reports of children in conditions that threaten their lives and health, more than 6000 children have been taken

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<sup>3</sup> <http://www.rg.ru/2010/11/17/nasilie.html>



from parents due to these reports, "- said Astakhov at the Russian-French conference "Protection of children from violence".

According to the head of the Investigative Committee of the Russian Federation, the number of rapes of minors in recent years has grown significantly. Thus, the number of crimes under Article 134 of the Criminal Code ("Sexual intercourse and other sexual acts with a person under sixteen years of age") increased 30.8 times, according to Article 135 ("Sexual Abuse") - 3.6 times on the Article 242.1 ("Manufacturing and distribution of materials or objects with pornographic images of minors") - 10 times.

The judiciary has succeeded in breeding more pedophiles. Only two (!) of 36,000 offenders during this period received the maximum sentence. For maximum period of sentence and those who rape children. Have sexual intercourse with children without signs of abuse conditionally sentenced to 55 to 70 percent of all perverts. For the wickedness of children suspended sentence in the period up to 40 percent of child molesters. Only one of the two thousand prisoners in 2004-2009 molesters received the maximum term - three years in prison.

Investigative Committee and the Public Chamber have repeatedly raised the issue of the need to abolish parole for persons who have committed serious crimes against children. How many words are spoken of the need to create a single database for those who are likely to commit sexual offenses against children? But until now, talk remains talk. In the U.S.A., the police and the FBI account is worth more than 600,000 pedophiles; in Germany - about 200 thousand; in Russia, only 2.5 thousand, raising serious concerns about the intention of the authorities to deal with this dangerous phenomenon.

#### **iv. Legislation on implementation of International Treaties.**

Along with the international treaties of the Russian Federation Constitution incorporated into the legal system of the country generally recognized principles and norms of international law, but it has not defined their relationship to the other rules of the system. The Constitution of the Russian Federation 1993 consists following: "The generally recognized principles and norms of international law and the international treaties of the Russian Federation are a component part of its legal system. If an international treaty of the Russian Federation include other rules than those that stated by the State law, the rules of the international treaty are applicable" (Part 4 of Article 15). Thus, international treaties and

generally accepted principles and norms of international law are declared as part of the "legal system" but not the "system of law" of the Russian Federation.

There is no common understanding of the constitutional formula; the representatives of the theory of "transformation" argue that paragraph 4 of Article 15 of the Constitution of the Russian Federation is a "transformational rule of general nature" (S.V. Chernichenko) or acting as "an example of the general transformation in the Russian law" (V.A. Kalanda). Sometimes this constitutional provision is considered as an act of state legal limit of sovereignty.

In the literature, there are different views on the relations validity of customary international law and domestic law. G.M. Danilenko, referring to the practice of the Constitutional Court, concludes that "the generally recognized rules of international law have priority over domestic acts"<sup>4</sup>. Meanwhile, the position of the Constitutional Court, as expressed in the opinion of this Court Judge O. Tiunova, is somewhat different: "The Court considers that the generally recognized principles and norms of international law and international agreements, Russia has an advantage over national law in case of conflict of international law and legislation"<sup>5</sup>.

Paragraph 3 of Article 5 of the Federal Law "On International Treaties of the Russian Federation" by July 15, 1995, which provides that "the provisions of the officially published international treaties of the Russian Federation, which do not require the publication of internal regulations to operate in the Russian Federation itself. For the implementation of other provisions of the international treaties of the Russian Federation is taking the necessary legal acts. "Such a regulatory requirement contained in paragraph 2 of Art. 7 of the Civil Code of Russia in 1994, which establishes that international treaties of the Russian Federation shall apply to relations regulated by the Code, "directly, except in cases where an international treaty that its application requires the publication of a national act." In all these examples, the national law of Russia "permit" application of international agreements in the sphere of the state sovereignty of the Russian Federation, not "transform" them into the domestic law of the State.

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<sup>4</sup> Danilenko G.M. Implementation of International Law in the domestic legal system of Russia: the practice of the Constitutional Court of the Russian Federation // State and law. 1995. № 11. p. 123.

<sup>5</sup> Tiunov O.I. On the application of International Law by the Constitutional Court of the Russian Federation // the first scientific-practical conference on the issues of application of International Law of law enforcement authorities, 1996. p. 36.

According to Article 6 of the Federal Law "On International Treaties" agreement of the Russian Federation to be bound by an International Treaty may be expressed by:

- signing of the contract;
- exchange of instruments constituting a treaty;
- ratification of the treaty;
- approval of the contract;
- acceptance of the contract;
- accession to the treaty;
- use any other method of consent, which the contracting parties have agreed.

Solutions of consent to be bound by international treaties of the Russian Federation adopted by state authorities of the Russian Federation or the authorized organizations in accordance with their competence established by the Constitution of the Russian Federation, this Federal Law and other legislative acts of the Russian Federation

The law established a number of international treaties, which make quite dramatic changes in the law and subject to ratification:

- a) the performance of which requires a change in the existing or the adoption of new federal laws, as well as establishing rules other than those provided for by law;
- b) which are subject to the fundamental rights and freedoms of man and citizen;
- c) the territorial division of the Russian Federation and other countries, including agreements on the state border of the Russian Federation, as well as on the delimitation of the exclusive economic zone and continental shelf of the Russian Federation;
- d) on the basis of interstate relations on matters involving the defense of the Russian Federation, on disarmament and international arms control, on issues of international peace and security as well as peace treaties and agreements on collective security;
- e) the participation of the Russian Federation in international alliances, international organizations and other international associations, if such contracts provide for the transfer of a portion of his powers of the Russian Federation or a set of legally binding decisions of the Russian Federation.

Similarly, subject to ratification by the international treaties of the Russian Federation, at the conclusion of which the parties have agreed to ratification.

The relationship between national law and international treaties (dualistic or monistic approach).

In the first half of the twentieth century, in the legal doctrine there are three main points of view on the relationship between international and domestic law: two dualistic and monistic. The founders of the dualistic concept (G. Tripel, D. Anzilotti) considered international and domestic law as two different legal and equitable legal systems, the sources of which cannot compete with each other. "The relationship that the internal law, wrote G. Tripel unsuitable subject for international regulation and vice versa ... International and national law is not only different areas of law, but also the various law enforcement. These are two of the circle, which are closely linked, but never meet"<sup>6</sup>.

Supporters of monistic conception, by contrast, argued that international and national law are not differ significantly and should be considered as a manifestation of a single concept of law. According to them, the right covers the entire world and includes more specific separate systems located in a hierarchy. When one group of monists (A. Zorn, A. Lasson) upheld the view of the priority of domestic over international law, and the second (H. Kelsen, John Kuntz) justifies the idea that international law is the supreme law and order prevailing in world, and that its effect, therefore, "cannot be restricted in any way"<sup>7</sup>.

However, subsequent development of international relations shows the failure of monistic and dualistic conceptions in their original form.

On the other hand, it is clear that the theory of a single order, in which international law has precedence over national legal provisions, also not true. As noted by Charles Hyde, the essence of the theory of moderate dualism is to ensure that "the international and domestic law - a different legal system, but they are closely related: they can regulate the rules are the same items that complement each other and collide with each other".<sup>8</sup>

In the second half of the twentieth century, most scientists have come to a common understanding of the relationship between international and domestic law as two different

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<sup>6</sup> Quote by: Levin D.B. Actual problems of the theory of international law. Moscow, 1974. p. 195-196.

<sup>7</sup> Kelsen H. Principles of International Law. N.Y., 1967. p. 177.

<sup>8</sup> Hyde C. International law, its understanding and application by the United States. T. 1. Moscow, 1950. p. 199.

order, but work closely and in some way correlated with each other legal structures. A similar view was widespread in modern Russian international legal doctrine.

***The United Nations Convention on the Rights of the Child*** - an international legal instrument defining the rights of children in the participating States. The Convention on the Rights of the Child is the first and main international legal instrument binding on a wide range of children's rights. The document consists of 54 articles, detailing the individual rights of persons between the ages of birth to 18 years (if under applicable majority is attained earlier) to the full development of their abilities in an environment free from hunger and poverty, cruelty, exploitation and other forms of abuse. The Convention on the Rights of the Child was adopted by the UN General Assembly on 20 November 1989 and entered into force September 2, 1990.

#### Convention in Russia

- 1993 UN Committee on the Rights of the Child at its 62nd, 63rd and 64th meetings, on 21 and 22 January 1993, considered the report submitted in accordance with Article 44 of the initial report of the Russian Federation on the implementation of the Convention on the Rights of the Child and the relevant comments received.
- 1993 UN Committee on the Rights of the Child at its 62nd, 63rd and 64th meetings, on 21 and 22 January 1993, considered the report submitted in accordance with Article 44 of the initial report of the Russian Federation on the implementation of the Convention on the Rights of the Child and the relevant comments received.
- 1993 - The Government of the Russian Federation has adopted Decree № 848 of August 23, 1993, "On the implementation of the UN Convention on the Rights of the Child and the World Declaration on the Survival, Protection and Development of Children".
- 1993 - The Russian Government by the Decree № 1977 of October 23, 1993 approved the Regulation "On the Commission to coordinate activities related to the implementation of the UN Convention on the Rights of the Child and the World Declaration on the Survival, Protection and Development of Children in the Russian Federation" (commission existed until 2004, and since 2006 a government commission for minors and protection of their rights, as well as governmental Commission for children's Rights in the Russian Federation).

- 1998 - Approved the Second periodic report of the Russian Federation on the implementation of the Convention on the Rights of the Child and its Annex.
- 2002 - Approved the Third periodic report of the Russian Federation on the implementation of the UN Convention on the Rights of the Child (1998-2002.).
- 2006 - Committee on the Rights of the Child United Nations was given a report and made concluding remarks.

As the successor of the USSR, Russia has become a Party to the Convention on the Rights of the Child, ratified by August 16th, 1990. After ratification Russia led legislation in accordance with international obligations in the field of protection of children's rights. Federal Law "On Basic Guarantees of the Rights of the Child in the Russian Federation" from July 21st, 1998 repeats the provisions of the Convention. Family Code of the Russian Federation also devotes a chapter to children's rights.

v. The Russian Federation is not a Member of European Union.

## 2 THE LANZAROTE CONVENTION

i. The Russian Federation ratified the European Convention on Human Rights in May 5th 1998.

ii. October 1st, 2012 Russia joined the countries have signed the Convention for the Protection of children against sexual exploitation and sexual abuse. Signature in the document set in Strasbourg Permanent Representative of the Russian Federation to the Council of Europe - Alexander Alekseyev, the Department of Information and Foreign Ministry of the Russian Federation. "The signing of this international agreement is a testament to the strong political will to respect the rights of the child in the Russian Federation, to fight against pedophilia and child sexual exploitation. This initiative continues the line of the Russian authorities to ensure the well-being of children and youth, the creation of conditions for their normal development and security" – is said in the message.

**04.10.2012** The Russian government at the meeting will consider a bill to establish criminal liability for the use of sexual services of adolescents aged 16 to 18 years, according to the government press service. The draft federal law "On Amendments to the Criminal Code and Criminal Procedure Code of the Russian Federation," designed "to ensure the readiness of the Russian Federation" to meet the obligations under the Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse and the Optional Protocol

Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. In accordance with the Convention and the Optional Protocol, States Parties undertake to adopt the necessary measures to criminalize acts related to the services of "child prostitution". Moreover, according to the Convention, a child means any person under the age of 18. The bill proposes to add to the Criminal Code article establishing the criminal liability of a person less than 18 years of age, for the use of sex service from minors under the age of 16 to 18 years.

In addition, a draft federal law "On Amendments to Certain Legislative Acts of the Russian Federation in order to prevent child trafficking, exploitation, child prostitution, as well as activities related to the production and distribution of materials or objects with pornographic images of minors" is aimed at ensuring the readiness of the Russian Federation to fulfill certain obligations under the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and the Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse.

The Criminal Code of the Russian Federation establishes the responsibility of individuals for crimes such as child trafficking, exploitation of children, the use of a child for the production of pornographic materials, under the Optional Protocol and the Convention. However, the criminal law does not provide that the legal entity can be the subject for criminal liability. Therefore, it is proposed to be amended.

Federal Law "On Basic Guarantees of the Rights of the Child in the Russian Federation" is proposed to add definitions of "trafficking" and "exploitation of children", the situation on reference entities to the entities responsible for the violation of rights and legitimate interests of the child, as well as a new article "Measures to combat trafficking children and child exploitation, "which defines the framework for combating trafficking and exploitation of children, as well as the types of liability of natural and legal persons for offenses related to trafficking and exploitation of children. Code of administrative violations introduces new elements of offense - "Creating the conditions for a legal person trafficking or exploitation of children" and "Making a legal entity of materials or objects with pornographic images of minors and trafficking." In this case, as measures of administrative punishment for legal entities provides a fine in the amount of 800 thousand to 1 million rubles; to create the conditions for the sale of children, from 200 thousand to 500 thousand rubles; to create the conditions for the exploitation of children, from 50 thousand to 300 thousand rubles; for

the manufacture of materials with pornographic images of minors or administrative suspension of activity for up to 90 days.

The Convention is the first international instrument to establish different forms of sexual exploitation of children as a crime, including the operation of the family home and the use of force, threats and coercion. Preventive measures established by the Convention, including recruitment, training and awareness raising of persons working with children (Article 5), education of children, including the provision included in the primary and secondary school information for children about the dangers of sexual exploitation and sexual violence, as well as information about how to protect themselves, adapted to their evolving capacities (Article 6) as well as programs that provide individuals who fear that they might commit offenses established in accordance with this Convention, to take advantage, where possible, effective intervention programs or measures designed to evaluate and prevent the risk of committing a crime.

It also provides for the need for measures aimed at providing short-and long-term assistance to victims in their physical recovery and psychosocial rehabilitation, and takes the necessary legislative or other measures to encourage any person who owns or has in good faith suspicion of sexual exploitation or sexual violence against children and to report them to the competent authorities.

Each Party shall take the necessary legislative or other measures to ensure the criminalization of the following acts committed intentionally:

- a) Engage in activities of a sexual nature with a child who, according to the relevant provisions of national law, has not reached the legal age to engage in activities of a sexual nature;
- b) Engage in activities of a sexual nature with a child when:
  - Used coercion, force or threat, or
  - Has been an abuse of a recognized trust, authority or influence over the child, including within the family, or
  - Has been an abuse of a particularly vulnerable situation of the child, because of his limited mental and physical abilities, or in case of his subordinate position.



Each Party shall take the necessary legislative or other measures to ensure that the investigation and criminal proceedings were conducted with the best interests for the child and protection of his rights.

Each Party shall take the necessary legislative or other measures, with due regard to the rules governing the independence of the legal profession to ensure that all persons involved in the proceedings, including judges, prosecutors and lawyers, could receive training in child protection, as well as against sexual exploitation and sexual abuse of children.

With special impact on the rights and interests of children in the first place, the Convention covers the following aspects:

- Preventive and protective measures
- Help for children who are victims, and their families,
- Intervention programs and measures against the perpetrators of the crime,
- Crimes, including the aggravating circumstances, such as:
  - a) the offense caused serious physical or mental health of the victim;
  - b) the crime was preceded or accompanied by torture or acts of brutal violence;
  - c) the offense was committed against a particularly vulnerable victim;
  - d) the offense was committed by a family member, a person living with the child, or the person who abuse power;
  - e) The offense was committed by several persons acting together;
  - f) the offense was committed in an organized criminal group;
  - g) the offender has already been tried for the crimes of the same nature.
- Procedures for the investigation and trial, do not cause harm to the child,
- Collection and storage of national data on convicted sex offenders
- International cooperation
- Control mechanisms.

## **II NATIONAL LEGISLATION**

## 1 GENERAL PRINCIPLES OF THE JURISDICTION

i. Russian Federation is a federal state, comprising 83 federal subjects: republics, krais (territories), oblasts (provinces), autonomous okrugs (autonomous districts), autonomous oblast (autonomous province) and 2 federal cities ( Moscow and Saint-Petersburg). All subjects are equal according to the Constitution of the Russian Federation.

The Russian Federation is a semi-presidential republic.

The republican form of government was established by the Constitution of 1993. According to the article 1 of the Constitution, "The Russian Federation -- Russia is a democratic federal rule-of-law state with the republican form of government.

The balance of powers is organized in the way that neither the President, nor the Parliament has a monopoly on the formation of the government.

The President of the Russian Federation shall form the government and may take a decision of it is resignation (par.2 Article 117) .The State Duma shall approve the candidate to the post of the Chairman of the Government nominated by the President (par.1 Article 111). The State Duma may pass a motion of no confidence to the Government which leads to its resignation. (par. 2 Article 117)

However, in case the State Duma rejects three times the candidate for the post of the Chairman of the Government nominated by the President, the President shall appoint the Chairman of the Government, dissolve the State Duma and appoint new elections. (par. 4 Article 111). When the President rejects the motion of no confidence to the Government passed by the State Duma and the State Duma again expresses no-confidence to the Government of the Russian Federation within three months, the President of Russian Federation shall announce the resignation of the Government or dissolve the State Duma (par. 3 Article 117). There are several restrictions on the dissolution of the State Duma.

The President of the Russian Federation may be impeached by the Council of the Federation only on the ground of the charge of high treason or another grave crime confirmed by the findings of the Supreme Court of the Russian Federation on the presence of the elements of crime in the actions of the President of the Russian Federation and by the conclusion of the Constitution Court of the Russian Federation confirming that the rules of bringing the charge were observed.

According to the amendment to the Constitution introduced in 2008 the Government of the Russian Federation must provide the State Duma with the annual reports on the results of its work, including on issues raised by the State Duma.

**ii.** The legislative regulation of human rights in Russian Federation is put into effect by:

- Constitution of the Russian Federation
- Federative constitutional act (Federal constitutional law of Ombudsman of the Russian Federation)
- Federal laws (Federal Law on Basic Guarantees of the Rights of the Child in the Russian Federation, Federal Law on Protecting Children from Information Harmful to Their Health and Development<sup>7</sup>)
- Laws of Russian Federation
- Laws of federal subjects
- By-laws

The constitution of Russian Federation was passed in 1993.

The article 2 of the Constitution of the Russian Federation provides that “Man, his rights and freedoms are the supreme value. The recognition, observance and protection of the rights and freedoms of man and citizen shall be the obligation of the State.”

The Chapter 2 of the Constitution of the Russian Federation deals with rights and freedoms of man and citizen.

Bill of rights or other documents concerning human rights are not mentioned in the Constitution of the Russian Federation.

According to the Article 38 of the Constitution of the Russian Federation “maternity and childhood, and the family shall be protected by the State”. Care for children, their upbringing shall be equally the right and obligation of parents.

Under the article 43 of the Constitution parents or persons in law parents shall enable their children to receive a basic general education.

**iii.** The Constitutional court of Russia was founded in 1991.

According to the Federal constitutional law on Constitutional court of Russian Federation of 21.07.1994 no. 1-FKZ Constitutional court of Russian Federation, upon receipt of a

complain of violation of constitutional right and freedoms of citizens, examines the constitutionality of a law applied in the particular case for the purposes of protection of constitutional system, basic rights and freedoms of man and citizen, guaranteeing of supremacy of law and direct effect of the Constitution on the territory of Russian Federation.

Citizens may directly address a complaint for the protection of their right to the Constitutional Court of Russia. Those citizens, whose rights and freedoms are violated by the law applied in the particular case, associations of citizens and other bodies and person have a right to file an individual or collective complaint to the Constitutional court of Russia.

The complaint shall be made in a written form and signed by the authorized person (authorized persons). The federal constitutional law on the Constitutional court of Russian Federation stipulates what has to be specified in the complaint and what documents are to be attached to it. State duties are to be paid when filing a complaint to the Constitutional court of Russia.

As a rule, a person doesn't have to address to any other judicial bodies before addressing to the Constitutional court. However, it is not the case when the disputed rule of law is applied in a particular case that is being considered by another court.

**iv.** The Supreme Court of the Russian Federation is the court of this kind.

Criminal procedure – a legal activity of initiating, investigating, considering and resolving criminal cases.

The Russian criminal proceedings have two main stages – pre-trial procedure and court procedure.

Each of these comprises several steps:

1. Pre-trial procedure

- Initiating a criminal case
- Preliminary investigation

2. Court procedure

- Preparing the criminal case materials for a court session (is held either as a general procedure, or as a preliminary hearing)

- Proceedings in a court of general trial jurisdiction
- Proceedings in a court of appeal
- Execution of a sentence and other legal judgments
- Proceedings in a court of cassation
- Review proceedings
- Reopening the criminal case in view of new or newly discovered facts.

The three last steps are considered exclusive (extraordinary) as they are destined to review judgments that are final. The other steps are regular.

v. The minimum age of holding a person criminally liable in the Russian Federation is 16.

In part 2, Article 20 of the Criminal Code of the Russian Federation crime components are enlisted which lower the age of being criminally liable to 14. Thus, persons who have reached the age of 14 by the time of committing a crime can be held criminally liable for murder (Article 105), intended infliction of serious bodily injury (Article 111), intended infliction of average bodily injury (Article 112), kidnapping (Article 126), raping (article 131), sexual battery (Article 132), theft (Article 158), robbery (Article 161), assault with intent to rob (Article 162), extortion (Article 163), misappropriation of a car or any other vehicle with no intent of theft (Article 166), intended destruction or damage to property with aggravation (part 2 Article 167), act of terror (Article 205), hostage taking (Article 206), deliberately misleading account of an act of terror (Article 207), hooliganism under aggravated circumstances (Article 214), theft or extortion of arms, ammunition, explosive substances and items (Article 226), theft or extortion of narcotic drugs or psychotropic substances (Article 229), disablement of transport vehicles or lines of communications (Article 267).

This list is exhaustive. Persons who are under 16 can't be held criminally liable for acts beyond this list.

In accordance with article 15 of the federal law "On the system of preventing juvenile neglect and delinquency" minors over 11 can be placed in specialized closed fostering institutions on the decree of judge, if they can't be held criminally liable due to the fact that by the moment of committing a socially dangerous act they haven't reached the age that permits to hold them criminally liable.

This measure isn't one of criminal responsibility. The purpose of being held in the above mentioned institution is to provide psychological, medical and social rehabilitation to a minor, adjust their conduct and adapt them to a life in society.

According the Russia's Ministry of Interior report, in January-August 2012 each 20th investigated crime (4,9%) was committed by a minor or a minor has been an accessory to the crime.

As of the data for the end of 2010, there were 4400 people held in 62 fostering colonies for minors.

### ***Miscellaneous***

Are there any other legal or political issues that may be pertinent to your local situation concerning the problems raised? Please, note, that ELSA is not a political organization, consequently, you may only mention political issues that can influence the data you've provided.

### ***Juvenile justice***

An issue of introducing juvenile justice is acute in Russia, and finds a lot of opponents who often hold mass protests and other events. Many politicians and religious figures are against juvenile justice.

## **2 SUBSTANTIVE CRIMINAL LAW**

### **2.1 Sexual Abuse**

i. The objective aspect of sexual assault includes:

Act - sexual assault form sexual intercourse and sexual assault do not cause sexual intercourse, that is not accompanied by the introduction of the penis into a woman's vagina (forcible sodomy, lesbianism, forced oral-genital, anal-genital contact, other options forced sexual activity), and forcible sexual intercourse, if the active partner, to use violence, is a woman, alternative ways of committing acts: the use of violence or threat of violence against the victim or other persons, or the use of the helpless state of the victim.<sup>9</sup>

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<sup>9</sup> Criminal Law/Special Part / under reduction of I. V. Shishko. Moscow: "Prospect", 2012, p. 118 — 752

There is not enough information to answer on the question if definition wide or narrow applicable.

**ii.** The Russian Criminal Law has a definition of the word “intentionally”. However, there is no special article about the criminal liability of an internationally committed crime of sexual abuse. Thus, legislator considers all crimes of sexual abuse as internationally committed.

**iii.** To provide legal guarantees to protect minors from sexual abuse and sexual abuse by adults legislator has been established the Article 134 of the Criminal Code of the Russian Federation that criminalizes sexual intercourse, sodomy or lesbianism, committed by a person eighteen years of age with a person known to be under the age of sixteen years old. This Article is designed to protect the child from all forms of sexual abuse, to protect the sexual integrity of persons under a certain age, and due to the lack of physiological and social development of the non-sexual freedom.

Article 134 "Sexual intercourse and other sexual acts with a person under sixteen years of age" is distributed as follows:

1. Sexual intercourse with a person under sixteen years of age and sexual maturity, a person who has attained the age of eighteen years;
2. Sodomy or lesbianism with a person under sixteen years of age and sexual maturity, committed by a person eighteen years of age;
3. Acts stipulated in the first or second paragraph of this Article, committed with a person who has reached the age of twelve, but fewer than fourteen years old.

Note: A person who has committed an offense under the first paragraph shall be exempt from punishment by the court if it is established that the person and the offense ceased to be socially dangerous due to marriage with the victim (victims). If the age difference between the victim (victim) and the defendant (the defendant) is less than four years, the last sentence does not apply to imprisonment for committing an offense pursuant to the first paragraph or the first part of Article 135 of this Code.<sup>10</sup>

**iv.** Use of force, taking advantage of disability or threat regulated in regards to sexual offences against children - set in the Article 132: “Sexual battery”:

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<sup>10</sup> <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=138368>

“Sodomy, lesbianism or other sexual acts involving violence or threat of violence to the victim (victim) or other persons, or by using the helpless state of the victim”. And specially paragraph a), part 3 of Article 132: “Acts stipulated in the first or second paragraph of this Article, if they: a) committed against a minor (minor)”.

v. The case of “incest” included in the articles on sexual abuse in case if the person who committee sexual crime use dependent status of the minor. Thought, there is not enough information to answer properly on that question.

Liability of the parents: Parent infringing on the sexual integrity of their child, may be deprived of parental rights (Article 69 of the Family Code).

A parent does not fulfil the obligation to protect the rights of the child on sexual inviolability and sexual freedom, subject to administrative liability. The offense is considered by the Commission on Minors and the protection of their rights, and in case of fault of parents, they may be given a warning or they may be subject to an administrative fine of from 100 to 500 rubles (Article 5.35, Article 23.2 of the Code of Administrative Offences of the Russian Federation).

vi. There are no specific provisions regulating offenders who take advantage of school and educational settings, care and justice institutions, the work-place and the community. However mentioned cases are included in the general Article133 of the Criminal Code "Coercion to perform sexual acts":

"Forcing a person to sexual intercourse, sodomy, lesbianism or other acts of a sexual nature by means of blackmail, threats of destruction, damage or remove property or using material or other dependence of the victim"<sup>11</sup>.

## 2.2 Child Prostitution

vii. The Russian Federation is among the countries that have not signed or ratified the Council of Europe Convention on Action against Human Trafficking.

Supporters of ratification, agreeing that the Russian law and practice are not ready to apply the Convention on action against trafficking in persons at the national level, expressed the position that sign and ratify the need to create the conditions and incentives for legal

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<sup>11</sup> <http://www.consultant.ru>



regulation in the relevant areas of law. By ratifying the Convention, the Russian Federation will be obliged to increase the capacity of the state in the fight against human trafficking and slavery, in particular, will prosecute entities involved in the trade (agencies recruitment, matrimonial agencies, etc.). This will have to change the law. And also increase the responsibility of the state in this area, since the countries became the party of Convention, it requires to report annually to the Parliamentary Assembly and the Committee of Ministers of the Council of Europe of the measures by countries to combat human trafficking.

Opponents maintain the position of the primacy of the political, economic, legal, and practical preparation of the standards set forth by the Convention, and only then start the procedure of signing and ratification. In their view ratification now will not change anything, because Russia is not ready to comply with international obligations under the Convention. Report to the Parliamentary Assembly and the Committee of Ministers of the Council of Europe cannot be an effective means of combating trafficking in human beings, as any liability in case of unsatisfactory report is not provided.

In addition, according to the opponents of ratification, Russia has set up an adequate mechanism for combating trafficking. In particular, the Federal Law by December 8th, 2003 № 162-FZ to the Criminal Code introduced new offenses: trafficking (Article 127-1) and the use of slave labor (Article 127-2). In this case, the definition of „trafficking in persons“, given in Russian criminal law, is identical to the definition in the Convention.

**viii.** There is a special article about “child prostitution” in the Criminal Code of the Russian Federation. Part 3 of the Article 240 “Involvement in prostitution”: “Engaging in prostitution or forced to continue to engage in prostitution - an organized group or against a minor”<sup>12</sup>.

**ix.** In conjunction with the answer on a question above, national legislation criminalize both the recruiter and the user of child prostitution. However deferent article and different liability will be applied to recruiter and the user: activities of recruiter falls under the Article 133 “Coercion to perform sexual acts”; and user – under the Articles 131 132, 134, 135 of the Criminal Code<sup>13</sup>.

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<sup>12</sup> <http://www.consultant.ru/popular/ukrf/>

<sup>13</sup> <http://www.consultant.ru/popular/ukrf/>

Also there are some provisions, such as Article 6.12. of the Code of Administrative Offences that set administrative liability of “receiving income from prostitution, if that income is associated with the occupation of another person in prostitution”.

### 2.3 Child Pornography

**x.** The Russian Federation is not a party to the Council of Europe Convention on Cybercrime. Currently there is no official information if the State is planning to ratify Convention.

**xi.** The legal definition of pornography is presented in the Commentary to the Criminal Code of the Russian Federation under the editorship of the Chief Justice and the Attorney General of the Russian Federation (Article 242- 1 and Article 242-2):

1. Pornographic materials or items - items that prints obscene, extremely cynical display of sex and exciting sexual instincts.

2. Manufacturing pornography is printing in any way, drawing, modeling from life sex.

Unfortunately, this definition is not clear and does not give a detailed description of signs of pornography, leaving scope for subjective interpretation.

“Child pornography” (pornographic material involving minors) expert in the study of criminal cases is defined as the demonstration of sexual activity with a person under a certain age. Given the above criteria pornography involving a minor is defined as a detailed representation of the sexual parts of a child and sexual reproduction of an end in itself, as well as other acts of a sexual nature with his participation. Child is the person that obviously not of full age, that is, 18 years (Article 87 of the Criminal Code).

**xii.** In the current legislation provides for criminal liability for illegal manufacture or distribution of pornographic materials or objects (Articles 242, 242-1, 242-2 of the Criminal Code).

Article 242 “The illegal distribution of pornographic materials or objects” says following: “Illegal manufacture to distribution or advertising, distribution and advertising of pornographic materials or objects, as well as illegal trade in printed publications, films or videos, pictures, or other items of a pornographic nature - shall be punished punishable by a fine of one hundred thousand to three hundred thousand rubles or the salary or other income for a period of one to two years, or hard labor for a term not exceeding two years, or imprisonment for the same term.”

Article 242-1 "Production and distribution of materials or objects with pornographic images of minors":

1. Production, storage or movement across the State border of the Russian Federation for distribution, public display or advertising or distribution, public display or advertising materials or objects with pornographic images of known minors, as well as attracting known minors as performers to participate in entertainment pornographic events by the person of eighteen years old or older (adult), - shall be punishable by imprisonment for up to six years.

2. The same acts committed:

a) by a parent or other person to whom the law had responsibilities for the upbringing of a minor, a teacher or other employee of an educational, medical or other institution obligated to supervise the minor;

b) to the person known to be under the age of fourteen;

c) by a group of persons by prior conspiracy or by an organized group - shall be punished by imprisonment for a term of three to eight years.

Article 242-2. The use of a minor to the production of pornographic materials or objects (federal law from 29.02.2012 N 14-FZ)

1. Photo, film or video of a minor in order to manufacture and (or) distribution of pornographic materials or items or to attract a minor as an artist to participate in the entertainment of a pornographic nature, committed by a person eighteen years of age - punishable by imprisonment for a term of three to ten years with deprivation of the right to occupy certain positions or engage in certain activities for a term of fifteen years, or without it.

2. The same acts committed:

a) in respect of two or more persons;

b) a group of persons by prior conspiracy or by an organized group;

c) in respect of a person under the age of fourteen;

d) use of information and telecommunication networks (including the network "Internet"), - shall be punished by imprisonment for a term of eight to fifteen years with deprivation of the right to occupy certain positions or engage in certain activities for up to twenty years or without and with restriction of freedom for up to two years, or without it.

**xiii.** The Russian Federation do not use the reservation right that has been given in the Lanzarote Convention Article 20(3) and 20(4).

**xiv.** Criminal Law of the Russian Federation does not highlight and differentiate between recruitment and coercion. The Russian Federation do not use the reservation right stated in Article 21(2) of Lanzarote Convention.

## **2.4 Corruption of Children**

**xv.** Involvement of minors to participate in pornographic entertainment events as performers by the person of 18 years of age or older (adult) - is punishable by imprisonment for a term of 2 to 8 years (Article 242.1 of the Criminal Code).

## **2.5 Corporate Liability**

**xviii.** Currently there is no information about corporate liability for the sexual crimes against children.

## **2.6 Aggravating Circumstances**

**xxi.** If the child sexual acts were inflicted severe physical or mental injury, the sentence is not less than 5 years. If sexual acts against a child intentionally or unintentionally caused the death of a child, the term of imprisonment shall be 10 years to life in prison.

## **2.7 Sanctions and Measures**

**xxii.** Under Russian criminal law, sexual intercourse at least 18 years of age with a person known to be under 16 years of age, shall be punished with imprisonment for a term of 4 years, with a person known to be under the age of 14 - for a period of 3 to 7 years known to be under the age of 12 - for a period of 7 to 15 years, and if any of these actions committed by association, the penalty could range from 12 to 20 years in prison, also provides for an additional penalty of prohibition to hold certain positions or engage in certain activities its maximum period of 20 years (Article 134 of the Criminal Code of the Russian Federation).

The basic penalty for rape of a minor (Article 131 of the Criminal Code), or sexual assault against a minor or a minor (Article 132 of the Criminal Code) can be, depending on the age of the victim (the victim), and other circumstances, from 8 to 20 years in prison. Also allowed to use as an additional punishment of restriction of freedom for up to two years and deprivation of the right to occupy certain positions or engage in certain activities for up to 20 years.

For forcing a minor to perform sexual acts, liability arises under Article 133 of the Criminal Code. Penalty - a fine of up to 120,000 rubles or the salary or other income for a period of up to one year, or by compulsory work for a period of one hundred eighty to two hundred forty hours, or corrective works for the term up to two years, or imprisonment for up to 1 year.

In addition, the persecuted (with the same age restrictions) indecent assault (Article 135 of the Criminal Code, if the act is committed against a person under the age of 14 to 16 years, is punishable by a fine, restriction of liberty or imprisonment up to three years if the victim is less than 14 years - imprisonment for a term of 3 to 6 years if less than 12 - 5 to 12 years, with a group of a crime - from 7 to 15 years, it is also possible to implement a ban to occupy certain positions or engage in certain activities for a term up to 20 years ). Composition of sexual abuse is not defined in the Criminal Code, and must be proven in court.

Involvement of minors to participate in pornographic entertainment events as performers person under 18 years of age - is punishable by imprisonment for a period of 2 to 8 years; involvement of persons under 14 years - a period of 3 to 10 years with deprivation of the right to occupy certain positions or engage in certain activities for a term up to 15 years or without it (Article 242.1 of the Criminal Code).

Criminal responsibility for the production, circulation, public display and advertising materials or objects with pornographic images of minors is set by the Article 242.1 of the Criminal Code and carries the same punishment.

For a number of crimes (involving in prostitution, organization of prostitution) provides a more severe penalty if the offense is committed against or with the use of a minor (Article 240 of the Criminal Code - 3 to 8 years of imprisonment, and Article 241 - up to 6 years and if the offense is committed against a person known to be under the age of 14 - to 10 years in prison).

## 3 CRIMINAL PROCEDURE

### 3.1 Investigation

i. Determination of the best interests of the child - formal process with specific procedural safeguards, designed to determine the best interests of the child when making critical decisions affecting the child.

This principle applies as follows:

1. In juvenile suspects / accused of a crime - Criminal - Procedural Code of the Russian Federation provides specific guarantees in Chapter 50, "Criminal proceedings against minors". Moreover, the Plenum of the Supreme Court in its judgment of 01.02.2011. № 1 "On the judicial practice of law governing the particular criminal prosecution and punishment of minors", have analysed the case law, and pointed to the courts have RF including on strict observance of the rights of juveniles in the criminal case.

2. Relatively of juveniles, in respect of which are committed The offense is:

Necessary to mark, that in the Article 42 of of Criminal-Procedural Code of the Russian Federation is enshrined a concept - injured party, the as well are also enshrined rights of a person, a recognized to victims in the the criminal process. However, some articles of the Criminal Procedure Code secured additional safeguards for child victims (in particular Article 191 of the Criminal Procedure Code, which governs the particular interrogation of a minor victim or witness).

In addition, the Resolution of the Supreme Court on 29.06.2010 № 17 «On practice of application courts of the norms, regulating the participation of the victim in criminal legal proceedings» (claim 8 the named of the document and others) - receive an explanation relatively realization of the rights of the minor victim in criminal proceedings.

Thus, the principle of "the best interests of the child" best used in the investigation of crime.

In accordance with Section 3 of Part 1 of Article 11 of the Criminal Procedure Code - If there is sufficient evidence that the victim, witness or other participants in the criminal proceedings, as well as their close family members, relatives or close persons threatened with murder, violence , destruction or damage of property or other dangerous illegal acts, the court, the prosecutor, the head of the investigative body, the investigator, the investigator and the investigating body shall make, within its competence in respect of such persons the security measures provided for in Articles 166 part nine, 186, part two, part 193 eighth, 241, paragraph 4, of the second part of the fifth, and 278 of this Code, as well as other security measures provided for by the legislation of the Russian Federation.

Article 166 part of 9 of the Criminal-Procedural Code the Russian Federation provides: if necessary ensure the safety of victim, his representative, the witness, on their close relatives, relatives, and close persons the investigator is entitled in the protocol investigative action, in which involved injured party, the his representative or the witness, do not lead data about their of personality. In this case investigator, with the consent of the head of the

investigative body shall render a resolution, in which outlines the reasons the adoption of solutions on the Conservation of in the mystery of of these data, is indicated alias the participant of the investigative action and is driven specimen of his signatures which he will use in the protocols of investigative proceedings in which with his participation. Resolution of the placed in an envelope, who, after of this shall be sealed and shall be attached to criminal case. In cases, brook no delay, the above investigative action is could be produced on the basis of the investigator's resolution on the Conservation of in the mystery of of data about the personality the participant of the investigative action without obtaining the consent of the head the investigative body. In the present case decision of an investigator is transmitted the head of investigatory entities for verification of its legality and the reasonableness of shall promptly at occurrence real possibility for this.

Article 186 a part 2 of Criminal-Procedural Code provides: in the presence threats to commit of violence, extortion and other criminal acts in the respect to the victim, witness, or on their close relatives, relatives, close persons control and recording of telephone and other talks are admitted by written application the specified persons, and at absence of of such declaration by - on the basis of a judicial solutions.

Article 193 part 8 of Criminal-Procedural Code provides - In order to ensure the safety of the identifying presentment faces for identification parade by decision of of the investigator may be held in conditions precluding a visual surveillance the identifying identifiable.

Paragraph 4 of Part 2 of the Article 241 of the Criminal Procedure Code provides for closed-trial may be based on a determination or decision of the court in cases where: it is necessary for the safety of the trial participants, their immediate family, relatives or close persons.

Part 5 Article 278 Criminal Procedure Code provides: if necessary to ensure the safety of witnesses, his immediate family, relatives and friends of persons without disclosing the true court of the identity of the witness has the right to interrogate him in conditions that exclude the visual observation of the witness by other participants in the court proceedings, and the court issues a ruling or order.

Also note that there is a special Federal Law by August 20th, 2004 № 119 – "On state protection of victims, witnesses and other participants in criminal proceedings."

In accordance with Part 2 of Article 45 of the Criminal Procedure Code of the Russian Federation - to protect the rights and legitimate interests of victims who are minors, or in

physical or mental deprived of opportunities to defend their rights and interests, to the mandatory participation in a criminal case to involve them legal representatives or representatives.

According to Part 1 of Article 45 of the Criminal Procedure Code of the Russian Federation - the representatives of the victim may be a lawyer.

ii. At present, the investigation of crimes where the victims are minors, engaged in the Investigative Committee of the Russian Federation. (Paragraph "d", part 2 Article 151 Criminal Procedure Code - A preliminary investigation by investigators of the Investigative Committee of the Russian Federation in criminal cases of serious and very serious crimes committed by juveniles and juvenile).

The investigators of the Investigative Committee of the Russian Federation, in accordance with Article 13 of the Federal Law by August 12th, 1995 № 144-FZ "On Investigative Activities" are not entitled to conduct such operations.

According to this norm, the Russian Federation to carry out operational-search activities provide operational units of:

1. Internal Affairs of the Russian Federation.
2. The Federal Security Service.
3. Federal public protection.
4. Customs authorities of the Russian Federation.
5. Foreign Intelligence Service of the Russian Federation.
6. Federal Penitentiary Service.
7. Agencies to monitor traffic in narcotic drugs and psychotropic substances.

However, the investigator of the Investigation Committee of the Russian Federation within the framework of a criminal case under investigation may apply to the court for necessary monitoring and recording of telephone and other conversations, and for information about the connections between users and (or) the subscriber units.

Only the court is empowered to make a decision on the resolution of production of these investigations, in accordance with paragraphs 11, 12, part 2 of Article 29 of the Criminal Procedure Code.



Investigators Investigation Committee of the Russian Federation, with the assistance of the experts is conducting an investigation and analysis, including child pornography.

**iii.** In accordance with Part 5 of Article 20 of the Criminal Procedure Code of the Russian Federation - the crime set forth in Chapter 34 of the Criminal Code (for minors), refer to the public prosecution. Thus, in a statement about the crime on behalf of a minor is not required. Criminal case will be filed and investigated, if there was the fact of a crime against a minor.

If the name of the minor filed a declaration of committing a crime against him (in relation to Chapter 34 of the Criminal Code), even in the event of a subsequent rejection of the application, the investigation will continue.

**iv.** In accordance with Article 78 of the Criminal Code of the Russian Federation: the limitation period for a serious crime is ten years for committing a serious crime - fifteen years.

Specified period (statute of limitations) will be suspended if the offender has evaded the investigation or trial. In this case, the limitation period shall be resumed after the arrest of the said person or his appearance with a confession (part 3 of Article 78 of the Criminal Code)

The question of the application of time limits to a person who has committed a crime punishable by death or life imprisonment shall be decided by the court. If the court finds it possible to release the person from criminal responsibility in connection with the expiration of the limitation period, the death penalty and life imprisonment is not used (part 4 of Article 78 of the Criminal Code).

**v.** In this case, the age set by an expert examination.

In accordance with part 5 of Article 196 the Criminal Procedure Code of the Russian Federation - the appointment and conduct forensic analysis required if you want to establish the age of the suspect, the accused, when it is relevant to the criminal case, and the proof of his age, missing, or cause doubt.

**vi.** All information about the persons who committed the crime, or to attract ever to justice contained in the Information Center of the Ministry of Internal Affairs of the Russian Federation (by that authority is responsible).

### 3.2 Complaint Procedure

**vii.** According to Russian legislation, the term “complaint” as well as the examination of the complaint should be considered in two different aspects: first, as a complaint about the commitment of criminal act (the violation of substantive rules of criminal law), and, second, as a complaint itself, examined in appeal and cassational procedure (in this case, the violation of substantive rules of criminal law also takes place).

1. The procedure of reporting on a crime is established by the Criminal-Procedural Code of the Russian Federation.

Article 141. Report on a crime.

1. A report on a crime may be made either verbal or in writing.
2. A written report on a crime shall be signed by the applicant.
3. A verbal report on a crime shall be entered into the protocol, which shall be signed by the applicant and by the person who has accepted the given report. The protocol shall contain the data on the applicant, as well as on the documents, identifying the person of the applicant.
4. If a verbal communication on the crime is made during the performance of an investigative action or in the course of the judicial proceedings, it shall be entered, respectively, into the protocol of the investigative action or into the protocol of the court session.
5. If the applicant cannot attend in person when the protocol is compiled, his report shall be formalized in accordance with the procedure, established by Article 143 of the present Code.
6. The applicant shall be warned about the criminal liability for a deliberately false denunciation in conformity with Article 306 of the Criminal Code of the Russian Federation, about which a note, certified with the applicant's signature, shall be made in the protocol.
7. An anonymous report on the crime cannot serve as a reason for the institution of a criminal case.

Article 144. Procedure for Considering the Communication on a Crime

1. The inquirer, the body of inquiry, the investigator and the public prosecutor shall be obliged to accept and to check up the communication about any committed or prepared

crime and, within the scope of the competence established by the present Code, to take the decision on it within a term of not more than three days from the day when said communication came in. When checking a report on a crime, the body of inquiry, inquirer, investigator and prosecutor shall be entitled to demand carrying out documentary and audit inspections and to draw specialists to participation therein.

2. The communication about a crime in the mass media shall be checked up on the public prosecutor's orders by the body of inquiry or by the investigator. The editorial board and the editor in chief of the corresponding mass medium shall be obliged to hand over, on the demand of the public prosecutor, of the investigator or of the body of inquiry, the documents and materials, confirming the communication on the crime, which are at the disposal of the given mass medium, as well as the data on the person who has supplied the said information, with the exception of the cases when this person has given an assurance that the source of information shall be kept secret.

3. The public prosecutor, the head of the investigation department and the head of the body of inquiry shall have the right, upon a petition, respectively, of the investigator and of the inquirer, to extend the term, stipulated by the first part of the present Article, up to ten days, and where it is necessary to carry out documentary or audit inspections, the prosecutor shall have the right to extend this term up to thirty days on the petition of the investigator or inquirer.

4. The applicant shall be issued a document about accepting the communication on a crime with the information on the person who has accepted it and with an indication of the date and the hour of its acceptance.

5. Refusal to accept the communication on a crime may be appealed against with the public prosecutor or with the court in the procedure established by Articles 124 and 125 of the present Code.

6. A report from the victim on the criminal cases of the private prosecution shall be considered by the judge in accordance with Article 318 of the present Code. In cases, pointed out in Art 147 para.4 of the present Code, checking up the reports on crime should be carried out according to the rules of the present Article.

Proceedings of bringing and processing of a complaint in case of violation of rules of criminal law are established in the Criminal-Procedural Code of the Russian Federation: section 13 - proceedings in a court of the second instance; chapter 43 - statutory and

cassation appeals of judicial decisions, which have not come into legal force; chapter 44 - appeals proceedings for considering a criminal case; chapter 45 - cassation procedure for the consideration of a criminal case; chapter 45 para.1 - proceedings in a court of the appeal instance; section 15 - revision of the sentences, rulings and resolutions, which have come into legal force; chapter 48 - procedure at a supervisory agency; chapter 49 - resumption of the proceedings on a criminal case because of new or newly-revealed circumstances.

Admissibility criteria. Article 141 of the Criminal-Procedural Code of the Russian Federation.

1. A report on a crime may be made either verbal or in writing.
2. A written report on a crime shall be signed by the applicant.
3. A verbal report on a crime shall be entered into the protocol, which shall be signed by the applicant and by the person who has accepted the given report. The protocol shall contain the data on the applicant, as well as on the documents, identifying the person of the applicant.
4. If a verbal communication on the crime is made during the performance of an investigative action or in the course of the judicial proceedings, it shall be entered, respectively, into the protocol of the investigative action or into the protocol of the court session.
5. If the applicant cannot attend in person when the protocol is compiled, his report shall be formalized in accordance with the procedure, established by Article 143 of the present Code.

The appeal, cassatory, supervisory and other types of complaints must be submitted in written form.

**viii.** Article 45 para.2 To protect the rights and the lawful interests of the victims, who are the minor or who are deprived of the possibility to defend their rights and lawful interests on their own because of their physical or psychological condition, into an obligatory participation in the criminal case shall be involved their legal representatives or representatives.

Article 20 para.2. Criminal cases on crimes envisaged by Articles 115 and 116, by the first part of Article 129 and by Article 130 of the Criminal Code of the Russian Federation, are seen as criminal cases of private prosecution, are initiated only upon application from the victim or from his legal representative, and are subject to termination in connection with the

reconciliation of the victim with the accused. Reconciliation is seen as admissible until the court departs to the retiring room for passing the sentence.

Article 20 paragraph 3 „Criminal cases“ on crimes, envisaged in the first part of Article 131, the first part of Article 132, the first part of Article 136, the first part of Article 137, the first part of Article 138, the first part of Article 139, in Article 145, in the first part of Article 146 and in the first part of Article 147 of the Criminal Code of the Russian Federation, are seen as criminal cases of the private-public prosecution and are initiated only upon application from the victim, but are not subject to the termination in connection with the victim's reconciliation with the accused, with the exception of the cases envisaged in Article 25 of the present Code.

Article 20 paragraph 4 „The prosecutor“, as well as the investigator or the inquirer with the consent of the prosecutor, have the right to institute a criminal case on any crime mentioned in the second and third parts of this Article also in the absence of an application from the victim, if the given crime has been perpetrated with respect to a person, who is in the state of dependence or who is incapable of exercising on his own the rights he possesses for any other reasons, also when no information about the perpetrator of crime is given.

As can be seen from above, the State, represented by its law-enforcement authorities, acts as a legal representative of a minor, also in cases, when complaint was submitted against his parents (Child Protection Services may also represent a minor in criminal proceedings).

Criteria of minors' participation in criminal proceedings: the Criminal-Procedural Code of the Russian Federation does not establish any other provisions as mentioned above. In some particular cases, the participation of psychologist and schoolmaster alongside with the legal representative is required.

## 4 COMPLEMENTARY MEASURES

- i. At the time of the research there is no such information.
- ii. Superficially.
- iii. At the time of the research there is no such information.
- iv. At the time of the research there is no such information.
- v. At the time of the research there is no such information.
- vi. At the time of the research there is no such information.

### III NATIONAL POLICY REGARDING CHILDREN

i. Yes. In this regard, it has been approved the Commissioner for Children's Rights in 2009.

Especially growing concern among Russian politicians and lawyers increased number of cases of ill-treatment of adopted Russian children and the growing number of cases of confiscation of children from Russians in Finland.

For a discussion of these issues, from 1st to 3rd October 2012, Kazan hosted the VI All-Russian Congress of the Children's Rights in the Russian Federation. In the framework of the Congress will discuss the prospect of "Russia without orphans".

According to the Minister of Internal Affairs of Russia, Russia "is experiencing a third wave of unaccompanied minors after the Civil War and the Great Patriotic War." The rough data of the Ministry of the Interior, in 2005 in Russia, more than 700 thousand orphans, 2 million teenagers are illiterate; more than 6 million minors are socially disadvantaged. For every homeless have 2-3 neglected children. As a result, in 2004, Russia was noted more than 154 thousands of crimes committed by juveniles, as well as 60-70 thousand crimes committed by children under the age of criminal responsibility. For violations of the rule of law to the police delivered over one million minors. By early 2005, registered in the juvenile divisions of the Ministry of Internal Affairs of Russia consisted of more than 655,000 children and adolescents. These numbers are constantly growing.

Street children, destitute, can be commercially and criminal exploitation. Homeless children are involved in criminal areas (street work in hazardous conditions, prostitution, pornography business, trade of tobacco, alcoholic beverages, etc.) associated with the risk for health, psychological and social development.

From 1994 to 2002 1,9 -fold increase in the number of children of alcoholics; 3,3 times - substance abuse; 17,5 times - drug addiction.

The most important issue of childhood, from the point of view of 47% of Russians, is alcohol and drug abuse among children and adolescents. These data are presented in the study of the All-Russian Public Opinion Research Center.

In second place - children and juvenile delinquency (31%). The third most important problem - the low life expectancy of Russian families with children (27%).

Russians seem less acute issues such as street children (18%), the problem of child leisure (14%), education of children in kindergartens and schools (14%), violence against children (13%), poor living conditions of orphans in institutions (9%).

Completing the rating of children's issues selfishness of modern society's reluctance to have children and raise them (6%), the issue of adoption - both Russian and foreign citizens (4%).

The poll also showed that 20% of respondents with minor children, the most likely point to the urgency of the problem of raising children in kindergartens and schools. Those who have and juveniles, and adult children often express concern about the low standard of living of households with children (36%).

Russians believe that the best currently underway children's right to education: an appropriate index of child rights is 66 points. Also interviewed are satisfied with how respected the rights of children to freedom of expression and an opinion (54 points). Several worse is the realization of the right to receive medical care (49 points), kindergarten (42 points). Most poorly implemented today children's rights is the right to protection from violence and abuse (37 points) and the protection of information that is harmful to their health and moral development (30 points).

Index of child rights shows how well realized the rights of children enshrined by the Convention on the Rights of the Child. The higher the index value, the better the children's rights are realized in a specific area. The index is a number from 0 to 100 points.

Ombudsman for Children in its report for 2010 notes positive trends:

- Number of children each year join the army of orphans shrunk at 26, 2 % (compared with 2007). Over the past year, 101,017 people added the "new" (in 2007 - 136 790). However, this may be a consequence of a general demographic crisis.
- At 53, 1 % less children live in a directed orphan boarding.
- Increase in the number of children with learning disabilities. Developing inclusive education - a child with disabilities attending regular kindergarten school.
- In July, the President of Russia introduced to the State Duma amendments to the Labor Code, which prohibit the hiring of people with children who have a criminal record or is prosecuted for pedophilia.
- In 52 Russian regions had their own Ombudsman on Children's Rights. Totally - 70 in Russia.

- At 8,7 % reduction in overall number of crimes against children. Although it is still a big number - 97 159.
- Prepared a complete package of documents for the establishment of the National Center for Missing and injured children, the purpose of which - the professional rehabilitation of minor victims of violence.

Negative trends:

- Housing is a pressing issue for the orphans. In the queue for housing stand more than 100 thousand people.
- Continue the steady growth of sexual crimes, whose victims - children and adolescents. There were more than 9500, and for some compositions the number of crimes per year has almost doubled.
- There are still bad things with the device in a family of orphaned children with disabilities. Last year, 148-patient facilities of social services for children with disabilities contained 21,823 children.
- It remains alarming situation with child and adolescent suicide. According to the Ministry of Health in the year 985 people commit suicide, according to the Ombudsman for Children's Rights - 1800.<sup>14</sup>

In the report for 2011 was noted that in the last two years of service of the Commissioner considered 7,5 thousand applications from all regions of Russia; increasing of a number of applications for participation the Ombudsman in the courts for the protection of rights and legal interests.

In recent years, the number of orphans has decreased by 26,2%.

Positive outcome of the Ombudsman in the adoption of regional regulations, targeted programs, regional standards for the protection of the rights and interests of children, which resulted, in particular, the positive results in improving the rights of orphans, contained in institutions and transferred to reception and other substitute families; reduce network of children's orphanages.

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<sup>14</sup> (<http://www.rg.ru/2011/04/10/astakhov-poln.html>)



In July 2011 managed to sign a bilateral agreement on cooperation in the field of adoption between Russia and the U.S.A. Also was signed an agreement on cooperation in the field of child adoption between Russia and France.

The Constitutional Court of the Russian Federation, on the basis, in particular, the conclusion of the Commissioner of the President of the Russian Federation for Children's Rights, recognized the fundamental law of the respective country's law requiring airlines to install on all flights 50 % discount from the set tariff for the transportation of children.

The Constitutional Court, based on the conclusion of Ombudsman of the Russian Federation for Child Rights ruled that the Constitution of the Labor Code, be dismissed by the employer of his father, the sole breadwinner in a family who is raising young children, including - children under three years.

The Constitutional Court, based on the conclusion of Ombudsman of the Russian Federation for Child Rights ruled that certain articles of the Constitution of the Housing and Civil Code, as a result of which many families with minor children were deprived of housing and registration in the Russian Federation.

Problems of the children's rights protection are focused on the whole of Russia, and therefore the position of the Ombudsman for Children introduced in all its regions. Today the number of Children's Rights in the Russian Federation, more than the number of authorized children throughout the united Europe.

ii. "Sexual exploitation of children in the Russian Federation is a more serious problem than the sale of children, and both governmental and non-governmental agencies agree that in Russian society, prostitution became an acceptable way of life. According to reports, prostitution is widespread in business "- an excerpt from the Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Ms. Ofelia Calcetas-Santos, 2001.

The problem of sexual exploitation of children, the Russian began to pay attention not so long ago. In late September 2012 Russia signed a convention on the protection of children from sexual exploitation. Alexander Alexeyev, Russian Permanent Representative at the Council of Europe, did it in accordance with the order of Vladimir Putin - Russian President.

The ministry stressed that "the signing of this treaty Russia shows that she has a strong political will to respect the rights of the child in this country to deal with such unacceptable

phenomena of pedophilia and sexual exploitation of children. This initiative can be called a continuation of the line of the Russian authorities aimed at the welfare of children, adolescents and young people, and to create the necessary conditions for their normal development and a sense of security".

Most recently, in Saint Petersburg metro appeared Social Advertisement: "If the child will be met on time from school, he did not meet with disaster." In a broad sense it can be seen as directed against children falling into the hands of the exploiters.

Under the Russian law "On Advertising/Commercial", advertisement distributors are obliged to placing social advertising within 5% of broadcasting time (printed area) per year.

Advocacy on this issue with human rights organizations, such as the movement "Resistance."

- ▶ They coordinate specialized NGO, social centers, human rights organizations, who support victims of crime
- ▶ Spend Russia conference of human rights organizations that specialize in supporting victims of crime
- ▶ conducted in Moscow and the capitals of the federal districts socially oriented exhibition against crime and violence in society
- ▶ Initiate PR and advertising

Through education movement is engaged

- ▶ Organization and fielding specialized lectures and workshops for different segments of society (law enforcement officers, social workers, journalists, human rights activists, school children, students, etc.).
- ▶ Research work
  - Surveys
  - Research
  - Development of courses and programs, seminars and trainings
- ▶ Development and target distribution of thematic brochures, leaflets, flyers, posters (to the public).
- ▶ Publishing Projects

- Reference and information brochures ("To help the victim," "In the Witnesses," "To help the investigator", "To help the jury", etc.)
- Textbooks and manuals (for educational institutions of the Ministry of Internal Affairs of the Russian Federation)
- Materials and transcripts of conferences and seminars (and their subsequent distribution to target audiences: federal and regional executive and legislative authorities, law enforcement, etc.)
- Posters on the activities of public service and subject movement (to be placed in public places and in the divisions of law enforcement)
- Leaflets, flyers and other informational materials (information about the "hot" lines, city maps with crime-release sites and areas)
- Social advertising (TV, radio, print media, internet, outdoor advertising).

iii. Unfortunately, in Russia there are still exist transit, import and export of illegal exploitation of children.

- From 2000 to 2011, the number of crimes related to child pornography, sexual exploitation of children has increased in 10 times.
- According to official statistics, the victims of sexual abuse were more than 9,000 children.
- Higher risk in girls 14-16 years
- Those most at risk are vulnerable children and young people: orphans, street children, children from dysfunctional families.<sup>15</sup>

Type of the crime	Years								
	1997	1998	1999	2000	2001	2002	2003	2004	2005
Sexual intercourse with a person under 16 (14) years	542	349	194	160	146	175	203	751	1632
Sexual Abuse	1169	1653	884	697	583	762	841	1397	1562

<sup>15</sup> Information taken from the official site of UNICEF: <http://www.unicef.ru/events/news/347/>

Enticement of a minor to commit antisocial acts	551	703	853	482	418	411	355	Involving a minor into prostitution was qualified under part 3 of Article 240 of the Criminal Code	
	According to Article 151 of the Criminal Code was qualified to involve not only prostitution, but also in a number of other anti-social activities								
Involvement in prostitution	Involving a minor into prostitution qualify under Article 151 of the Criminal Code							276	390
								According to Article 240 of the Criminal Code that qualifies involvement in prostitution, not only minors, but also adults	
Trafficking in minors	74	35	28	37	16	10	21	Trafficking of minors has to be qualified under the Article 127-1 of the Criminal Code	
Human traffic	Articles do not exist							17	60
								According to Article 127-1 of the Criminal Code that qualifies trade not only minors, but also adults	
The organization and running brothels for prostitution (organization of prostitution)	109	124	130	145	165	241	356	976	1039
	According to Article 241 of the Criminal Code qualifies acts committed not only to minors, but also for adults								

	413	341	295	361	442	600	900	2433	2164
Illegal distribution of pornographic materials or items	According to Article 242 of the Criminal Code that qualified circulation of pornographic materials, regardless of age depicted							Turnover pornography depicting minors was qualified under Article 242-1 of the Criminal Code	
Manufacturing and trafficking of objects and materials with pornographic images of minors	Articles do not exist						0	30	54

The figures - the ratio of reported crime and the items for which the data were filed cases (because of the comments table) only indirectly reflect the state of the situation in the area of sexual exploitation of minors. Total volume in the table of offenses in total recorded crime has no more than one percent. At the same time, the expert evaluations and selected criminological research suggests otherwise. We present some well-known results:

- in 2004 in Russia victims of criminal offenses and accidents were 113 thousand minors;
- in the total mass of minors, victims of crime, victims of sexual abuse are 30%;
- in the 1980s in Russia every twentieth prostitute was a minor, in 2000 - one in eight, and in Moscow and St. Petersburg - one in five;
- the number of "street" children in Moscow from 30 to 50 thousand, 50-60% of them are children under the age of 13 years, the proportion engaged in prostitution, shooting porn among them is between 20% to 30%.<sup>16</sup>

iv. The Russian Federation has not developed social advertising. Also in Russia there is not enough attention to the problem of sexual exploitation of children. Only notable campaign was to transfer the petition to support the campaign "Stop the sexual exploitation of children and adolescents" in the Human Rights Council of the UN.

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<sup>16</sup> Информация взята из статьи Ю.Е. Пудовочкина «Сексуальная эксплуатация детей: оценка состояния и проблемы противодействия» ([http://sartraccc.ru/i.php?oper=read\\_file&filename=Pub/pudovochkin%2821-07-07%29.htm](http://sartraccc.ru/i.php?oper=read_file&filename=Pub/pudovochkin%2821-07-07%29.htm)).

September 29th, 2011 by representatives of The Body Shop ® and ECPAT International delivered a petition with 7 million signatures collected in the campaign "Stop the sexual exploitation of children and adolescents", the President of the Council of the UN Human Rights Ms. Laura Dupuy Lasserre, and called on all States early action to eradicate this problem.

In support of the campaign "Stop the sexual exploitation of children and adolescents" in 2010-2011 were collected more than 7 million signatures in 65 countries. In 35 member states campaigner The Body Shop ® and ECPAT managed to convey the collected petitions to the authorities and to discuss with their representatives steps to prevent this problem at the state level and to help affected children and adolescents.

In the 14 countries of the world the progress the campaign has led to changes in the legislation on the protection of minors from commercial sexual exploitation, include Malta, Denmark, Portugal, South Africa, Malaysia, Norway, Switzerland, Pakistan, Romania, Taiwan, Ireland, Indonesia, the Philippines and New Zealand.

v. The most important role in the protection of children's rights in the Russian Federation takes Ombudsman for Children's Rights. One of directions of its activities according to the Decree of the President of the Russian Federation on September 1st, 2009 № 986 "On the Commissioner of the President of the Russian Federation for the Rights of the Child" is legislative activity.

The main task of the Ombudsman on the Rights of the Child is improving the situation of children in the Russian Federation, the enforcement of the rights and freedoms of the children.

The Commissioner has been actively involved in public policy in the interests of children, strengthening the legal status of children in the Russian Federation, the improvement of the legislative, institutional and substantive safeguards the rights of children, the development of system proposals to the fullest realization of the basic, basic rights of the child in society.

The Commissioner also performs regularly with the proposals for changes in the Russian legislation in the following areas:

- Protection of children's rights to life and health (in particular, leisure and health, sanitary and epidemiological safety);
- Protecting the rights of children to education (especially in pre-school);

- Protecting the rights of children in the parents live;
- Protecting the rights of orphans and children left without parental care;
- toughening of the legislation to combat crimes against sexual integrity of minors.

A number of legislative initiatives developed with the assistance of the Commissioner: was passed by the State Duma and signed by the President, in particular, the federal law "On the protection of children from information harmful to their health and development", and the Federal Law "On Amendments to Certain Legislative Acts of the Russian Federation in connection with the adoption of the Federal Law "On Protection of children from information harmful to their health and development."

With the participation of the Commissioner of the President of the Russian Federation for Children's Rights has developed the following draft laws: the draft federal law "On amendments to some legislative acts in connection with the introduction of the Commissioner of the President of the Russian Federation for the Rights of the Child (on the list of the rights of the Commissioner of the President of the Russian Federation Rights of the child, providing for the exercise of his responsibilities) (prepared for the second reading), a project of the Federal Law "On Amendments to the Federal Law of April 6, 2011 № 64-FZ "On the administrative supervision of persons released from prison" (on the strengthening of the administrative supervision of persons released from prison, completed sentence for sexual offenses committed against minors).

In 2006 was established a Government Commission for minors and protection of their rights. One of its functions is to participate in the development and examination of draft regulations and federal programs related to the issues referred to the competence of the Commission.

vi. In Russia, there are non-profit organizations dedicated to the protection of child rights. Unfortunately, this is not the most popular activities of NGOs and the number of companies that specializes in the rights of the child is small.

1) Women's Union of Russia - Russian public non-governmental organization established in November 1990.

Women's Union of Russia unites voluntary women's councils, unions, associations, committees and clubs operating in the regions of Russia.

Union of Russian Women associated to the Department of Public Information of the United Nations, in special consultative status with the Economic and Social Council (ECOSOC), and is the holder of an honorary diploma UN "an ambassador of peace".

The governing body of the Union is the conference, which is held at least once every 5 years. In between conferences, permanent governing body is the Board of the Union, led by its chairman.

Activities of the Union of Women of Russia are carried out by the voluntary contributions of foundations, organizations and individuals, as well as their own business.

One of the main objectives of the Union of Women of Russia is to participate in shaping public policy on women, families and children.

To achieve these objectives, the Union cooperates with parties, movements and other civil society organizations advocating for democratic reforms in the country as well as the legislative and executive authorities.

Union performs its activities under the "Equality. Development. Peace in the XXI century ". This program includes 6 main routines, the priority is a program called "Strong family - stability of the state". Its essence is protection of family rights, child, and care for the material, moral, spiritual and moral well-being of the family, demographic problems.

The basis of the Union is the desire to contribute to the establishment of a secure, just civil society, to protect the rights and interests of women, family, children, and promote women to decision-making, their participation in public policy on the family, women, children, the formation of public opinion in favor of a policy of equal rights and equal opportunities for men and women, to promote dialogue and social partnership with government agencies at all levels.

2) Kaliningrad regional youth public organization «Tsunami» was established in August 23rd, 2001.

Its mission - to support actions and initiatives of young people, to create conditions for the development of civil society, the involvement of young people in issues affecting its interests, active citizenship among young people, the development of leadership qualities.

Main directions of activities:

- Protecting the rights of young people. In this direction, "Tsunami" has been active since the beginning of its existence, from 2001. The first and modest project in this



direction - "Notes on the rights of students" started the work in this direction. After was created a movie about the youth and the police; was provided trainings; mobile legal consultation started to work.

- International cooperation. Youth organization "Tsunami" has extensive experience in long-term cooperation with partners from EU countries - Poland, Lithuania, Latvia, Italy. In 2007 and 2010 "tsunami" and our Polish partner fund "Pogezaniya" became laureates of the "Neighborhood" and have been awarded for their contribution to the development of the Polish-Russian cooperation. Repeated implementation of joint projects was the key to developing long-term partnerships. Since 2007, the "Tsunami" is the information representative of the program "Youth in Action" of the European Union, the Russian Federation. Program "Youth in Action" makes an important contribution to the acquisition of competences and is a key instrument in providing young people with opportunities formal and informal education in the European context.
- The development of volunteering. The organization considers as very important direction - development of volunteering in the Kaliningrad region.

3) "For Human Rights" - the All-Russian public movement. One of the main activities is protection the rights of orphans.

Movement was established in 2009. All-Russian Public Movement "For Human Rights" started program "Social and legal assistance to children without parental care".

This program aims at providing free, qualified human rights and legal assistance to street children and their foster families on a whole range of problems relating to the protection of human rights, particularly for children affected by the illegal actions of child care, guardianship authorities and law enforcement agencies. The program also aims at establishing public control over the child care and monitoring of the situation on the Rights of street children in Russia.

4) The Association "Positive childhood". The main directions of its activity are:

- HIV and children
- Demography, families with children, malnutrition, housing, health
- Problems of Large Families
- Orphanage, orphanages, family arrangement

- Turn in kindergarten
- Education of Children and Youth

Regional public organization "The right of the child" (Moscow), together with the NGO "Doctors to Children" (St. Petersburg) and the magazine "Protect the Child" (Moscow) have decided to establish the Association of "Positive Childhood", which will unite the Russian public and government organizations for the protection of childhood and family, including groups and organizations of people living with HIV / AIDS.

This initiative is supported by the European Commission within the framework of the project "Positive Childhood", aimed at protecting the rights of children, equal life chances of children affected by HIV / AIDS and other problems.

In Russia today there are too many "negative" childhood, which was also a result of a catastrophic decline in the number of children: in 1998 there were 22 million students in 2010 – 12,8 million. Nowadays current objectives of the Association are:

- Establishment of a system of social services for the prevention of child abandonment, or child to help the family in difficult circumstances;
- Ensuring adequate nutrition of children in families with low incomes;
- Solving the most difficult housing problems of large families, orphans and the like;
- Elimination of queues in kindergartens and public organization of children's leisure.

Objectives of the Association "Positive Childhood" - promoting the development in Russia of civil initiatives for children and families, including those using internet resources and mechanisms of the Public Chamber, the development of systems of social control in the social sphere of mutual assistance in solving specific problems and to establish constructive cooperation of NGOs with local authorities, monitoring for the rights of children and families with children, including affected by HIV, the spread of best practices of networking, strengthening the organizational, programmatic and capacity of Russian NGO advocacy on the rights of children and families.

5) Regional public organization promoting the protection of children's rights "Right of the child."

Regional public organization "The right of the child" - is included in the union of the human rights organization "Russian Research Center for Human Rights", a member of the Coordination Council of the All-Russian Union of Public Associations "Civil Society -

Children of Russia", a member of the International Group of non-governmental organizations in support of the Convention on the Rights of the Child (Geneva).

Regional public organization "The right of the child" winner of the All-Russian competition of Mother Teresa "Childhood without violence and cruelty", was awarded the medal "For the protection of human rights" of the Ombudsman for Human Rights in the Russian Federation.

Activities of "Judicial Service to Children":

- Social and legal assistance to children in difficult situations (consultations, interaction with public authorities and administrative structures, involving the media);
- The provision of humanitarian assistance to child care centers.

"The right of the child to the family":

- Introduction of new models of organizing work to prevent family problems, child neglect and child abandonment, and the development of family-based education of orphans;
- Dissemination practices from Russian regions;
- Organizational and methodological support programs for orphaned children living in families of citizens over the holidays.

Educational activities:

- Conferences, organization of training courses and seminars;
- Brochures;
- Assistance in establishing of NGO for the protection of children's rights in the Russian regions.

Development and promotion of legislative initiatives aimed at implementing the recommendations of the Russian Federation Committee on the Rights of the Child:

- The creation of mechanisms to deal with complaints from children and enforcement of their rights, including system of "invading" the Public Inspectorate childcare;
- An introduction to the Russian Federation Justice for juveniles;
- Provision for the child's family;
- Attraction to the problems of child and family social initiatives and the development of social partnership.

## IV OTHER

## V CONCLUSION

The State Duma Committee on Family, Women and Children held parliamentary hearings on “Improving the legislation on the protection of children from sexual exploitation”.

The hearing was opened by Chairman of the State Duma - Sergei Naryshkin, who emphasized that the discussed topic of concern to all societies. “In today's world of sexual exploitation of children is seen as a serious security threat. We also know that this is a business that brings considerable income. And our country, there is unfortunately no exception” – said Naryshkin. The number of crimes against the sexual integrity of children continues to grow. Young children and adolescents engage in prostitution, increases circulation of pornographic material involving children.

To protect children and teenagers from threats of a sexual nature is necessary, according to the Chairman of the State Duma to adopt a set of legislative decisions. Naryshkin said that recently amended, increasing penalties for crimes against life and health and sexual integrity of minors, a ban on working with children for those convicted of offenses against minors, a law on administrative supervision, under which persons fall , convicted of crimes against children and adolescents.

Naryshkin said that legislative measures should be made to protect children, to develop a comprehensive with the help of community organizations.

Chairman of the State Duma Committee on Family, Women and Children - Elena Mizulina told the participants of the hearings on the bill, which came to the State Duma. She stated that it was necessary to amend the Code of Administrative Offences, which now there is a penalty for juvenile prostitutes. “Minors are subject to a sexual assault - is, above all, the victim of a crime”, - said the deputy.

E.Mizulina proposed an administrative responsibility for the promotion of homosexuality among minors. Also, in her view, is unacceptable when television broadcasts and films promoting same-sex relationships.

Deputy Chairman of the Investigative Committee of the Russian Federation Alexander Fedorov said that the current legal framework does not provide full protection of children from sexual exploitation and sexual abuse. But the legislative work (being done by deputies) brings the results.

According to the results, the meeting adopted a number of recommendations: the State Duma deputies should continue to work on improving the legislation concerning the protection of children from sexual exploitation and sexual abuse, to monitor legislation regulating relations in the sphere of the protection of children from sexual exploitation and sexual abuse.

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**National Coordinator**

Kristína Jakubíková

**National Advisor**

Marta Kolcunová

**National Researchers**

Richard Bednárík

Júlia Fújdaľová

Daniela Gažová

Ján Janák

Katarína Kesselová

Vladimíra Kováčová

Eliška Mancíková

Tomáš Pázmány

Radka Semancová

*The members of legal research group would like to thank following persons, organisations and institutions  
(alphabetically)*

Professional assistance:

Mgr. Jana Divincová (MLSAF SR)  
JUDr. Marián Giba, PhD., Comenius University  
Cpt. Mgr. Pavol Karnas, member of Police Force (Trnava)  
Mgr. Ing. Milan Kováč  
PhDr. Tatiana Kučová, Comenius University  
PhDr. Anna Lysá, CSc., Comenius University  
Mgr. Sylvia Mičková, Comenius University  
Mgr. Petra Uličná, PhD., Comenius University

Organisations and institutions:

Aspekt (feminist educational and publishing organisation)  
Centre Sunshine (non-profit organisation)  
Children of Slovakia Foundation  
Gate to life (civic association)  
Help to endangered children (civic association)  
Ľudovít Štúr Institute of Linguistics of the Slovak Academy of Sciences  
Ministry of Education, Science, Research and Sport of the Slovak Republic  
Ministry of Interior of the Slovak Republic  
Ministry of Justice of the Slovak Republic  
Ministry of Labour, Social Affairs and Family of the Slovak Republic  
Náruč – help to children in crisis (civic association)  
People against Racism (civic association)  
UNICEF

Translations:

Jozef Andraško	Denisa Kissaryová
Maroš Czako	Vladimíra Kováčová
Martina Činčárová	Tomáš Lipták
Kristína Gracíková	Lukáš Mareček
Mgr. Vladimír Grežo	Katarína Otčenášová
Katarína Horáčková	Zuzana Petrová
Ing. Katarína Kutáľková	Miroslava Solárová
Bc. Jana Jakubovová	Bc. Adam Šebesta
Mgr. Miriam Janečková	Bc. Jana Urbanová
Mgr. Kristína Jurkovičová	Bc. Zuzana Urbanová

*and others.*



**List of Abbreviations:**

<i>Anti-Discrimination Act</i>	Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, and on amending and supplementing certain other laws
<i>AP</i>	- Artificial person
<i>Centrum Slniečko</i>	- Centre Sunshine
<i>Civil Code</i>	- Act no. 40/1964 Coll.
<i>Constitution</i>	- Constitution of the Slovak Republic
<i>Constitutional Court</i>	- Constitutional Court of the Slovak Republic
<i>Code of Criminal Procedure</i>	- Act no. 301/2005 Coll.
<i>Committee</i>	- Committee on Children and Youth
<i>CRC</i>	- Convention on the Rights of Child
<i>CPPCaP</i>	- Centre of pedagogical and psychological counselling and prevention
<i>Criminal Code</i>	- Act no. 300/2005 Coll.
<i>Family Act</i>	- Act no. 36/2005 Coll. On Family and Amendment and Supplementation of Certain Acts
<i>General Prosecution</i>	- General Prosecution of the Slovak Republic
<i>Government</i>	- Government of the Slovak Republic
<i>MESRS SR</i>	- Ministry of Education, Science, Research and Sport of the Slovak Republic
<i>MLSAF SR</i>	- Ministry of Labour, Social Affairs and Family of the Slovak Republic
<i>NAP</i>	- National Action Plan for Children for the years 2009 – 2012
<i>NCSR</i>	- National Council of the Slovak Republic
<i>NGO</i>	- non-governmental organisation
<i>OZ Náruč</i>	- Civic Association Náruč – help to children in crisis
<i>Report of SNCHR</i>	- Report on observance of human rights including observance of the principle of equal treatment in the Slovak Republic in 2011
<i>School Act</i>	- Act no. 245/2008 Coll. on Upbringing and Education
<i>SNCHR</i>	- Slovak National Centre for Human Rights
<i>SR</i>	- Slovak Republic

*Summary Report* - Summary Report on gender equality situation in Slovakia in 2011

## I INTRODUCTION

### 1 GENERAL

#### i.

##### 1. Constitution of the Slovak Republic

The Slovak Republic, as declared in the Constitution of the Slovak Republic (hereinafter referred to as „the Constitution”) in Art. 1, subsection 1, is a democratic state respecting the rule of law. In this sense the Constitution ensures many fundamental rights and freedoms, which are

„guaranteed in the Slovak Republic to everyone regardless of sex, race, skin colour, language, beliefs and religion, political or other opinion, national or social origin, nationality or ethnic group, property, birth or other status. No one shall be damnified, derive an advantage or suffer disadvantage for these reasons.”<sup>1</sup>

The people are granted freedom and equality in dignity and rights.

##### 2. Anti-discrimination Act

Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, and on amending and supplementing certain other laws (hereinafter referred to as „Anti-Discrimination Act”) represents a part of the current Slovak legislation. According to the Anti-Discrimination Act the term discrimination includes direct and indirect discrimination, harassment, unjustified disciplinary action, as well as instruction to discriminate and incitement to it. Direct discrimination in this sense means „*any act or omission by which a person is treated less favourably than another person in a comparable situation is treated, would be treated or could be treated.*”<sup>2</sup> In contrast, indirect discrimination is characterized by external neutrality of discriminatory behaviour. Such behaviour is not obvious, often accepted by a

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<sup>1</sup> Constitutional Act no. 460/1992 Coll., Constitution of the Slovak Republic, as amended, Art. 12, subsection 2.

<sup>2</sup> Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, and on amending and supplementing certain other laws (Anti-discrimination Act), Sec. 2, subsection 3.

society, but still puts a person at disadvantage compared to another person. Another aspect included in discrimination is harassment, bothersome and inappropriate or offensive behaviour which may result in violation of human dignity, intimidation or humiliation. As for instruction to discriminate the relationship of superiority of one person over another is monitored and incitement is „*persuading, affirming or instigating a person to discriminate against a third person.*”<sup>3</sup> Under this Act, the burden of proof rests with the person accused of discriminatory behaviour. However, different treatment of individuals does not always have to mean discrimination.<sup>4</sup>

### 3. Action Plan

Action plans are designed to coordinate policy with respect to a certain group and define the measures and activities that shall ensure progress in specific areas. The latest include:

- National Action Plan of the Slovak Republic Regarding the Decade of Roma Inclusion 2005-2015
- Action Plan Preventing All Forms of Discrimination, Racism, Xenophobia, Anti-Semitism and Other Manifestations of Intolerance 2009-2011
- National Action Plan for Prevention and Elimination of Violence against Women for years 2009-2012
- National Action Plan for Children for years 2009-2012
- National Action Plan for Gender Equality for years 2012-2013

### 4. News and Reports

Several periodic reports on adhering to human rights in practice are issued. They are published by state authorities as well as non-governmental organisations (hereinafter referred to as „NGO”).

**A. Discrimination based on gender, respectively gender inequality remains an issue in the Slovak society.** According to the Summary Report on gender equality situation in Slovakia in 2011 (hereinafter referred to as „Summary Report”), the gender imbalance is

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<sup>3</sup> Ibid, Sec. 2 subsection 7.

<sup>4</sup> Ibid, Sec. 8, subsection 1: „*Discrimination is not different treatment, which is objectively justified by the nature of activities executed in employment, or circumstances under which these activities are carried out, if the extent or manner of such different treatment is appropriate and necessary in respect of these activities or circumstances under which they are carried out.*”

caused by various factors such as low level of education in human rights, traditional functioning of family based on gender differences, but also by a lack of services that create balance between work and family life.<sup>5</sup> The unequal treatment can be felt especially in the employment of women, particularly in wage differences. Alleviation and suppression of the problem has been slowed down by the current financial crisis.<sup>6</sup> According to the Summary Report, at the beginning of 2011, the gender pay gap stood nearly at 21%, which means that the average wage of women is only around 80% of the average wage of men

**B. A serious problem of gender equality represents psychological and physical violence against women.** Slovak National Centre for Human Rights (hereinafter referred to as „SNCHR”) in its Report on observance of human rights including observance of the principle of equal treatment in the Slovak Republic in 2011 (hereinafter referred to as „Report of SNCHR”) precisely identifies weaknesses in the system of solutions and prevention of domestic violence.<sup>7</sup>

**C. The third sector plays a major role in the struggle for gender equality.** Due to the different, yet still the same essence expressing, definition of the term „discrimination” that is available to the general public, Slovak citizens often do not understand what the real content of the term is. This was proved by results of qualitative research conducted by the Institute for Public Affairs in 2008.<sup>8</sup>

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<sup>5</sup> Ministry of Labour, Social Affairs and Family of the Slovak Republic: Summary report on gender equality situation in Slovakia in 2011. Economic and Social Council of the Slovak Republic, 2012. Quoted on: 1/8/2012, p. 1: „*Despite unquestionable progress in gender equality in Slovakia, there are still inequalities in almost all areas of private and public life.*”

Available at: [http://hsr.rokovania.sk/data/att/135321\\_subor.doc](http://hsr.rokovania.sk/data/att/135321_subor.doc)

<sup>6</sup> D. Balážová: Women and men are not equal even in a crisis. Pravda, 25/5/2012. Quoted on: 2/8/2012:

„*Pressure to provide income for households forces women to take a job below their level of education and skills.*”

Available at: [http://spravy.pravda.sk/zeny-a-muzi-nie-su-si-rovni-ani-v-krize-dxn/sk\\_domace.asp?c=A120525\\_095310\\_sk\\_domace\\_p23#ixzz1w6YWNhYf](http://spravy.pravda.sk/zeny-a-muzi-nie-su-si-rovni-ani-v-krize-dxn/sk_domace.asp?c=A120525_095310_sk_domace_p23#ixzz1w6YWNhYf)

<sup>7</sup> Slovak National Centre for Human Rights: Report on the observance of human rights, including the observance of the principle of equal treatment and rights of the child in the Slovak Republic in 2011. Slovak National Centre for Human Rights, 2012. Quoted on: 2/9/2012, p. 109: „*There is no crisis counseling, not even a free hotline for women experiencing violence. Slovakia still lacks a unified methodology and standards for working with people experiencing domestic violence and the establishment of interconnected competencies and responsibilities of institutions and individuals involved in activities such as support and protection from domestic violence (police, offices of labor, social affairs and family, medical clinics and specialized counseling centres).*”

Available at: [http://www.snspl.sk/CCMS/files/FINAL\\_Spr%C3%A1va\\_za\\_rok\\_2011-s\\_obsahom\\_20.4.2012-po\\_graf\\_%C3%BAprav.pdf](http://www.snspl.sk/CCMS/files/FINAL_Spr%C3%A1va_za_rok_2011-s_obsahom_20.4.2012-po_graf_%C3%BAprav.pdf)

<sup>8</sup> M. Sekulová - O. Gyarfášová: Do we know what the discrimination is? Institute for Public Affairs, 2008, Quoted on: 1/8/2012, p. 12: „*The research also pointed out the fact that the inaccessibility of the Slovak population to otherness of minorities and immigrants still persist, which affects the creation of various prejudices and stereotypes.*”

Available at: [http://www.ivo.sk/buxus/docs/vyskum/subor/Analyza\\_FG.pdf](http://www.ivo.sk/buxus/docs/vyskum/subor/Analyza_FG.pdf)

**D. The Slovak Republic is not a state with strong multicultural representation of nationalities.<sup>9</sup> Despite small ethnic and cultural diversity, disturbance occurs - mostly in relation to the two largest minorities, i.e. Hungarian and Roma..** While Slovak-Hungarian problems are mostly of political nature (Amendment Act no. 270/1995 Coll. on the State Language of the Slovak Republic, Amendment Act no. 40/1993 Coll. on State Citizenship of the Slovak Republic, and others) and the members of both nationalities inhabiting common areas often deny mutual hostility themselves, Slovak-Roma problems are more tense, especially in interpersonal relationships. Irena Bihariová, president of the civic association People against Racism, one of the Slovak NGOs combating racism and discrimination, in the Shadow Report 2010-2011 for ENAR (European Network Against Racism) in view of the situation of the Roma in Slovakia states: „*They are the principal target of society's aversion and even hatred and the most frequent victims of discriminatory practices. The so-called 'Roma issue' is frequently abused for scoring populist points virtually across the political spectrum and is a bottomless source of sensational news for the media.*”<sup>10</sup> Her arguments are based on real situations, examples and problems, which were investigated also on the international level, such as in the case of sterilization of a Roma woman, in which the European Court of Human Rights ruled that it was done illegally. In early 2010, this civic association monitored 114 sites and groups on the social network Facebook, with the observation that „*the most hateful attitudes in online discussions were based on insufficient knowledge of the legal aspects of racism and discrimination, lack of awareness of the problem and poor knowledge of meaning of the terms that were expressed in the discussions.*”<sup>11</sup>

**E. As a result of low religious diversity** (almost all registered churches and religious societies are based on the universal Christian values), **there are no significant problems in the coexistence of individual churches and religious communities in Slovakia.**<sup>12</sup>

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<sup>9</sup> Statistical Office of the Slovak Republic: Basic data from the Census of Population and Housing Census 2011, Population by nationality. Statistical Office of the SR, July 2012. Quoted on: 23/8/2012, p. 7. Available at: [http://www.scitanie2011.sk/wp-content/uploads/EV\\_n%C3%A1rodnos%C5%A5\\_12\\_7\\_v12.pdf](http://www.scitanie2011.sk/wp-content/uploads/EV_n%C3%A1rodnos%C5%A5_12_7_v12.pdf)

<sup>10</sup> I. Bihariová: ENAR Shadow report, Racism and related discriminatory practices in Slovakia. *European network against racism*, 2011. Quoted on: 24/7/2012, p. 8. Available at: <http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202010-11/23.%20Slovakia.pdf>

<sup>11</sup> I. Bihariová: Facebook 1939. *People Against Racism*, 2010. Quoted on: 1/9/2012, p. 1. Available at: <http://www.rasizmus.sk/facebook1939.pdf>

<sup>12</sup> Statistical Office of the Slovak Republic: Basic data from the Census of Population and Housing Census 2011, Population by religion. Statistical Office, July 2012, 23/8/2012, p. 7.

F. **Despite the fact that public opinion is changing in favor of LGBT community**, as proved by the results of a survey carried out by the Focus agency for organization Initiative Otherness<sup>13</sup>, **manifestations of indirect discrimination and hate speech remain**. People of the same sex are not allowed to register their partnership in Slovakia. Rainbow pride has been a public manifesto for improving the situation of LGBT rights since 2010. In 2012 the Government of the Slovak Republic (hereinafter referred to as „Government”) approved the establishment of Committee on the rights of lesbian, gay, bisexual, transgender and intersexual people.

G. According to **Amnesty International Annual Report 2012**,<sup>14</sup> the major areas of discrimination against Roma are: education, housing, forced sterilization, torture and ill-treatment. In the area of LGBT rights, the amendment of Slovak Labour Code, which extends protection against discrimination by adding prohibition of discrimination on the grounds of sexual orientation, is stressed.

## ii.

### 1. Family

Reference to the family and marriage can be found in the Constitution, specifically in Art. 41 subsection 1, which states that these two phenomena of human society are protected by law. Part of Slovak legislation is therefore Act no. 36/2005 Coll. On Family and Amendment and Supplementation of Certain Acts (hereinafter referred to as „Family Act”), which above all focuses on relationships between subjects in marriage and family. The Constitution also guarantees right to protection against unlawful interference into family life in Art. 19. Moreover, Slovak Criminal law mentions crimes against the Family and Youth in the second section of the third chapter of Criminal Code no. 300/2005 Coll. as amended (hereinafter referred to as „Criminal Code”), such as abandonment of a child, abduction, corruption of youth, neglect of child support, torment of close or entrusted person and bigamy.

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Available at: [http://www.scitanie2011.sk/wp-content/uploads/EV\\_v2-N%C3%A1bo%C5%BEensk%C3%A9-vyznanie.pdf](http://www.scitanie2011.sk/wp-content/uploads/EV_v2-N%C3%A1bo%C5%BEensk%C3%A9-vyznanie.pdf)

<sup>13</sup> Available at: [http://www.diskriminacia.sk/sites/default/files/Inakost\\_registr\\_partnerstva\\_7\\_2012.pdf](http://www.diskriminacia.sk/sites/default/files/Inakost_registr_partnerstva_7_2012.pdf)

<sup>14</sup> Amnesty International: Amnesty International Annual Report 2012.

Available at:

[http://www.amnesty.sk/article\\_files/Skratena%20verzia%20Vyrocn%C3%A9j%20spravy%20AI%202012%20SVK.PDF](http://www.amnesty.sk/article_files/Skratena%20verzia%20Vyrocn%C3%A9j%20spravy%20AI%202012%20SVK.PDF)

Interpretation of the term „family” is in Family Act derived from the term „marriage”, which is characterized by Slovak law as unique union between a man and a woman, created under certain conditions and circumstances, which do not exclude marriage, for the purpose of family foundation and proper upbringing of children. Family created by marriage like this is considered to be the basic cell of society and it is necessary to universally protect all of its forms.

## 2. Marriage

Bond of marriage in Slovakia can only exist between a man and a woman. In this union, man and woman are equal in both their rights and duties. The Slovak Republic did not enact any form of registered partnership between persons of the same gender by now. Research conducted by Agency Focus for Civic Association Initiative Otherness, ongoing throughout this year (2012), reflects significant change in the opinion of the Slovak population towards introduction of registered partnerships between persons of same gender, compared to similar research conducted in 2008.<sup>15</sup>

Pursuant to law of the Slovak Republic, the means of creation of marriage are facultative. Based on their voluntary and free decision, engaged couple may get married either by civil or ecclesiastical means, by consonant statement in front of self-regulatory body (Registry Office) or registered body of church or religious society accepted by the state. Other prerequisites are legal capacity, maturity (only on permission of the court it is possible to get married from the 16th year of life), unrelated relations, non-existent marital bond. Monogamy is indirectly enacted in Slovakia, since bigamy is according to Criminal Code punished by imprisonment, lasting up to 2 years. Marriage ends because of death or declared death of one of the spouses or, in reasonable cases, also because of divorce conducted by court on motion of one of the spouses. Court can declare marriage to be invalid or non-existent as well.

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<sup>15</sup> While 4 years ago disagreement in society prevailed, when agreeing and disagreeing inhabitants made up percentage ratio of 42:45, in present the trend turned and from 1026 respondents 47% agree, 38% are against. (Initiative Otherness: Number of supporters of registered partnerships is increasing, number of opponents is decreasing. *Iniciatíva Inakosť*, 14/8/2012. Quoted on: 25/8/2012. Available at [http://www.inakost.sk/index.php?page=clanok\\_detail&id=279](http://www.inakost.sk/index.php?page=clanok_detail&id=279)

Average age of a man entering into marriage in Slovakia was 32,42 years in 2011 (average age of a man entering into his first marriage was 30,28 years). Average age of brides in the same year was 29,34 years, average age of women, who entered into marriage for the first time, was 27,67 years. Recently, trend of increasing average age of men and women entering into marriage is visible.<sup>16</sup>

The data of Statistical Office of the Slovak Republic suggests that divorce rate in Slovakia has been showing increasing tendency and the highest rate was achieved in 2010, when 100 marriages accounted for 49 divorces. Strange phenomenon can be observed in average length of divorced marriages in recent years. While in 1993 it was 10,6 years, in 2009 it increased to 14,4 years.<sup>17</sup> Spokesman of Statistical Office of the Slovak Republic stated gradual increase of average length of marriage.<sup>18</sup>

	<b>Number of marriages</b>	<b>Number of divorced marriages</b>	<b>Index of divorce (divorces on 100 marriages)</b>	<b>Number of inhabitants in Slovakia</b>
<b>2012 Q1</b>	2641	2845	-	5404555
<b>2011</b>	25621	11102	43,33%	5404322
<b>2010</b>	25415	12015	47,28%	5435273
<b>2009</b>	26356	12671	48,08%	5424925
<b>2008</b>	28293	12675	44,80%	5412254
<b>2007</b>	27437	12174	44,37%	5400998
<b>2006</b>	25939	12716	49,02%	5393637

<sup>16</sup> State and movement of population in Slovak Republic in 2011, *Statistical Office of Slovak Republic*, Bratislava, 2012. Quoted on: 1/9/2012.

Available at: <http://portal.statistics.sk/showdoc.do?docid=17312>

<sup>17</sup> Family Counselling Centre: Divorce rate in Slovakia. *Family Counselling Centre*, 13/6/2011. Quoted on: 19/8/2012.

Available at: <http://www.rozvod-rozchod.sk/rozvodovost-na-slovensku/d-1082/p1=1026>

<sup>18</sup> M. Jánošík, TV News. Television Markíza, Bratislava, 19/8/2012: „Average length of divorced marriage is gradually increasing. In 2010, share of 10 and more years length of marriages represented 65% of total share of divorced marriages.”



<b>2005</b>	26149	11553	44,18%	5389180
<b>2000</b>	25903	9273	35,80%	5402547
<b>1990</b>	-	-	21,93%	5311000
<b>1989</b>	-	-	22,74%	5288000

Source: Statistical Office of the Slovak Republic<sup>19</sup>

### iii.

#### 1. History

In the historical and cultural point of view, children have always been considered to be the most sensitive part of the society, the necessary part of families and under the influence of religion (mostly Christianity) the „gifts of God”. Subordination and obedience to father originated from the patriarchal organization of families. The first state owned orphanage in Slovakia (part of the Hungarian empire) was established by Maria Theresa in 1763, moreover, in 1774 she legislated a compulsory school attendance for children at the age of 6 – 12 regardless of their gender, origin and residence. Orphanages were superseded by children's homes and substitute family custodies. The compulsory school attendance retains, however, nowadays its length is 10 years. Roles of parents in families are becoming more equal and so is the relationship between parent and children themselves. Such examples can be understood as the vindication of continuity of the interest of the society in children.

#### 2. Protection of Children Rights in the Present

The fundamental basis of the protection of children and their right is stipulated in the Art. 41<sup>20</sup> of the Constitution. The Slovak Republic is contracting party of the Convention on the Rights of Child (hereinafter referred to as „CRC”) that is the cornerstone of not only other international documents dealing with protection of rights of children but also Slovak legislation itself. Slovakia has ratified the First Optional Protocol to CRC on the involvement of children in armed conflict, the Second Optional Protocol to CRC on the sale

<sup>19</sup> Statistical Office of the Slovak Republic, Bratislava, 2012, 25/8/2012.

Available at: <http://www.statistics.sk/pls/elisw/MetaInfo.explorer?cmd=close&s=1002&ss=2>

<sup>20</sup> Constitutional Act no. 460/1992 Coll., Constitution of the Slovak Republic, as amended, Art. 41, subsection 1-5.

of children, child prostitution and child pornography and signed the Third Optional Protocol to CRC on a Communications Procedure. As a contracting party, Slovakia submits to the United Nations reports on fulfilment of obligations and on the measures adopted which ensure realization, protection, prevention of breaches and development of rights recognized in CRC. These obligations as well as final recommendations to the last submitted report are included in the National Action Plan for 2009 – 2012, the main task of which is to secure the development of the protection of the rights of a child.

During last years, the Slovak Republic has systematically worked on legislative as well as non-legislative elements of supporting the rights of a child in the meaning of CRC resulting in an encompassment of the principle of the best interests of a child in various domestic legislative codes. For instance, the Criminal Code, Act no. 301/2005 Coll. (hereinafter referred to as „Code of Criminal Procedure”), Act no. 40/1964 Coll. (hereinafter referred to as „Civil Code”), Family Act, Act no. 245/2008 Coll. on Upbringing and Education (hereinafter referred to as „School Act”), Act no. 305/2005 Coll. on Social and Legal Protection of Children and on Social Legal Guardianship and other acts. According to domestic legislation the state provides financial support to families with children.

Non-legislative activities supporting the protection and observance of the rights of child are mostly held under the auspices of the Ministry of Education, Science, Research and Sport of the Slovak Republic (hereinafter referred to as „MESRS SR”) by providing financial grants and subventions.<sup>21</sup>

In an effort to fulfil the obligations arising from CRC, the Committee on Children and Youth was established in March 2011 as the specialized body of the Government's Council for Human Rights, National Minorities and Gender Equity. Its activities are supposed to be, according to the decree of the Government no. 158/2011, secured by the Ministry of Labour, Social Affairs and Family of the Slovak Republic (hereinafter referred to as „MLSAF SR”).

SNCHR established by Act no. 308/1993 Coll. on Establishing the Slovak National Centre for Human Rights observes adhering to human rights and freedoms. Each year it releases a

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<sup>21</sup> E. Tomková, Section of the Regional Education of MESRS SR said: „Each year there are summons announced by the ministry for development projects of schools and school facilities to support education, healthy life-style, to increase the security at schools, accessibility and modernization of education.”

report on the level of protection of human rights in the Slovak Republic, including a special part dealing with the rights of children. According to the last report from 2011, the first contact place for children seeking observance of their rights is the Local Office of Labour, Social Affairs and Family.<sup>22</sup>

The Public Defender of Rights, so-called Ombudsman, protects fundamental rights and freedoms regardless of the age of claimant, therefore children are also allowed to apply for help.

The Centre for International Protection of Children and Youth was established by the MLSAF SR as the state administration body. Its sphere of activity according to Act no. 305/2005 Coll. on Social and Legal Protection of Children and on Social Legal Guardianship refers to execution of international conventions and legal acts of the European Union.

Part of society in relation to children agrees with the opinion that prohibits artificial interruption of pregnancy, presenting the argument that Art. 15 of the Constitution states: „*Everyone has the right to life. Human life is worth protection even before birth.*”<sup>23</sup> Abortion was legalized by Act no. 73/1986 Coll. on Artificial Interruption of Pregnancy, according to which the abortion can be done up to the 12<sup>th</sup> week of pregnancy.

The Slovak legislation allows since 2004, when „rescue nests” firstly emerged, to abandon unwanted child at the age of maximum 6 weeks. After placing of the child in the „rescue nest”, a signal to the 24 hour medical emergency office rings out and the employees take care of the child. The aim of „rescue nest” is to eliminate deaths of unwanted new-borns.

Despite all abovementioned activities of national bodies, institutions and organizations in the area of protection of the rights of a child, violations are still arising. One of the last examples is death of a 5 year old girl, whose body was found in an apartment occupied by her mother and step-father. For three years, no state authorities noticed the missing child,

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<sup>22</sup> Slovak National Centre for Human Rights: Report on observance of human rights including the principle of equal treatment and the rights of child in the Slovak Republic 2011. *Slovak National Centre for Human Rights*. Quoted on: 2/9/2012, p. 304. „*Local Offices of Labour, Social Affairs and Family secure the rights of child to its adequate mental and physical development in situations when the natural environment of the child does not secure this or is not able to.*”

Available at: [http://www.snslp.sk/CCMS/files/FINAL\\_Spr%C3%A1va\\_za\\_rok\\_2011-s\\_obsahom\\_20.4.2012-po\\_graf\\_%C3%BAprav.pdf](http://www.snslp.sk/CCMS/files/FINAL_Spr%C3%A1va_za_rok_2011-s_obsahom_20.4.2012-po_graf_%C3%BAprav.pdf)

<sup>23</sup> Constitutional Act no. 460/1992 Coll., Constitution of the Slovak Republic, as amended, Art. 15, subsection 1.

even through there is e.g. compulsory school attendance and the child was not enrolled in school or compulsory medical examination of children.<sup>24</sup> Another example is Elementary school with primary school in Šarišské Michaľany, where the segregation of Roma students took place. Legal action was brought against the school by the Advisory Centre for Human Rights to the District Court in Prešov. The judge held against the defendant, what caused media and social uproar, because these kinds of problems occur also in other parts of Slovakia. According to the judge's verdict, the activity of the school violates the Anti-Discrimination Act and the school is obliged to eliminate the unlawful situation until the next school year. The school appealed to the Regional Court, however, it upheld the District court's verdict on 30/10/2012.<sup>25</sup>

#### iv.

##### 1. International Treaties

The relationship of the Slovak Republic (hereinafter referred to as „SR”) and international treaties is expressed in the Constitution in Art. 7, subsection 4 and 5 and Art. 154c. According to Art. 7 the validity of international treaties<sup>26</sup> requires approval of the National Council of the Slovak Republic (hereinafter referred to as „NCSR”) before ratification. Taxatively listed types of international treaties<sup>27</sup> shall have precedence over the Slovak law. In approving the international treaty, the consent of the absolute majority of all Members of Parliament<sup>28</sup> shall be required. The Constitutional Court of the Slovak Republic (hereinafter referred to as „the Constitutional Court”) shall decide on conformity of international treaty with the Constitution and constitutional laws on a proposal of the President of the Slovak Republic or the Government. The proposal shall be submitted to the Constitutional Court

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<sup>24</sup> Quoted on: 10/11/2012.

Available at: <http://www.sme.sk/c/6537894/tri-roky-mrtve-dieta-nechybalo-socialke-mestu-policii-ani-lekarom.html>

<sup>25</sup> J. Lajčáková: Case of Elementary School in Šarišské Michaľany: Question is not whether segregation is acceptable but how to end segregation. *Minority Policy in Slovakia*, vol. 1/2012, 2012, p. 5.

<sup>26</sup> Constitutional Act no. 460/1992 Coll., Constitution of the Slovak Republic, as amended, Art. 7, subsection 4: „The validity of international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which a membership of the Slovak Republic in international organizations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary and international treaties which directly confer rights or impose duties on natural persons or artificial persons, require the approval of the National Council of the Slovak Republic before ratification.”

<sup>27</sup> Ibid, Art. 7, subsection 5: „International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or artificial persons and which were ratified and promulgated in the way laid down by law shall have precedence over laws.”

<sup>28</sup> Ibid, Art. 84, subsection 3.

prior to the presentation of a negotiated international treaty for discussion of the NCSR<sup>29</sup>. Art. 154c of the Constitution furthermore states that

„International treaties on human rights and fundamental freedoms which the Slovak Republic has ratified and were promulgated in the manner laid down by law before taking effect of this constitutional act, shall be a part of its legal order and shall have precedence over laws if they provide a greater scope of constitutional rights and freedoms.”

The Constitution amended by constitutional act no. 90/2001 Coll., was changed in favour of monist approach.<sup>30</sup> This approach prevails in theory and in practice, yet there are still dualist elements.

## 2. The Convention on the Rights of the Child

The Convention entered into force on 1/1/1993 since the Slovak Republic has been a sovereign state, however the state became a contracting party without reservations on 28/5/1993. Before 1993, the Convention was valid in the former Czech and Slovak Federal Republic (including the territory of the SR) since February 1991 (signed 30/9/1990, ratified on 7/1/1991).<sup>31 32</sup>

The Convention is one of the fundamental documents on the protection of children's rights in Slovakia, which significantly affects the level of national legislation and children's rights. Since Slovakia is a contracting party, it is bound by the obligations arising from the Convention. The reports<sup>33</sup> of achieving the realization of the obligations are submitted to the United Nations Committee on the Rights of the Child.

v. The Slovak Republic is a member state of European Union since 1/5/2004. According to the Constitution, „*the transposition of legally binding acts which require implementation shall be realized through an act or a regulation of the Government.*”<sup>34</sup> Art. 120, subsection 2 states that the Government shall also be authorized to issue regulations to ensure the execution of

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<sup>29</sup> Ibid, Art. 125a, subsection 2.

<sup>30</sup> E. Ottová: Legal Theory. Heureka, Šamorín, 2010, p. 251.

<sup>31</sup> Ministry of Labour, Social Affairs and Family of the Slovak Republic: Report, Quoted on: 1/9/2012, p. 1. Available at: <http://www.employment.gov.sk/sprava-o-prerokovani-vychodiskovej-spravy-sr.pdf>

<sup>32</sup> UNO: United Nations Treaty Collection. Quoted on: 1/9/2012. Available at: [http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-11&chapter=4&lang=en#6](http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en#6)

<sup>33</sup> The Slovak Republic has submitted 2 reports – in 1998 and 2006.

<sup>34</sup> Constitutional Act no. 460/1992 Coll., Constitution of the Slovak Republic, as amended, Art. 7 subsection 2.

international treaties.<sup>35</sup> According to the plan of legislative tasks of the Government the Directive 2011/93/EU of the European Parliament and of the Council of 13/12/2011 on combating the sexual abuse and sexual exploitation of children and child pornography shall be implemented in the Criminal Code within 31<sup>st</sup> October. However, so far the proposal, which shall amend the said code, has only been commented on in interdepartmental process.

## 2 THE LANZAROTE CONVENTION

i. The Convention for the Protection of Human Rights and Fundamental Freedoms was signed by the Czech and Slovak Federal Republic on 21/2/1991. The Czech and Slovak Federal Republic are also signatories of the additional protocols: The Convention was ratified by The Federal Assembly of the Czech and Slovak Federal Republic on 19/3/1992. In December 1992, before the dissolution of the Federal Republic, NCSR declared that the Slovak Republic would be considered a contracting party of the Convention, including former reservations and declarations made by the Federal Republic, since 1/1/1993, i.e. since the dissolution date.

ii. – v. – vi. – vii. – vii. The Government by its Decree no. 427 on 10/6/2009 agreed on signing of Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse from 25/10/2007 (hereinafter referred to as „Lanzarote Convention”) subject to ratification. The Slovak Republic signed Lanzarote Convention on 9/9/2009 at Council of Europe Conference of Ministers of Justice.

The Government, by its Decree no. 427 concerning the Lanzarote Convention, authorised the Vice President of the Government, the Minister of Justice in cooperation with Minister of Internal Affairs and General Prosecutor to carry out legal analysis of the convention and, if necessary, to submit a proposal for Government meeting regarding amendments necessary for its timely execution, till the second half of 2010 at latest.

After carrying out legal analysis and making necessary legislative arrangements ensuring the execution of Lanzarote Convention, proposal for its ratification was to be submitted to the Government meeting in the second half of 2011. Current Government listed ratification of Lanzarote Convention as one of its aims in National Action Plan for Children for years 2009-2012. Ratification was planned in October 2012. At present

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<sup>35</sup> Ibid, Art. 120, subsection 2.

„the Ministry of Justice of the Slovak Republic on the grounds of legal analysis provided by relevant government departments prepares complete legal analysis of the Lanzarote Convention and will submit in October 2012 to the Government meeting a proposal of amendments of the Criminal Code in force to fulfil implementation of relevant provisions of the Lanzarote Convention.”<sup>36</sup>

In the course of the interdepartmental comment procedure on a proposal to sign Lanzarote convention, General Prosecution of the Slovak Republic (hereinafter referred to as „General Prosecution”) had several comments to the *„legal prerequisites of the Slovak Republic to precise application of the concerned Convention.”*<sup>37</sup>

Objections to compatibility of Criminal Code concerned the following:

- The definition of the term child<sup>38</sup> - according to the Criminal Code a child is not a person younger than 18 years of age if she/he acquired full age by contracting marriage with the consent of the court of justice at the age of 16 years;
- Necessity to amend merits of the crime of corrupting morals<sup>39</sup> in relation to recruiting a child into passive participation in pornographic performances<sup>40</sup> or to witness sexual abuse or sexual activities, even without having to participate<sup>41</sup>;
- Adopting legal regulation concerning the so-called grooming – it is necessary to broaden merits of crimes of sexual abuse<sup>42</sup> and of the criminal offence of manufacturing child pornography;<sup>43</sup>
- Adopting a more strict sanction (in a form of aggravating circumstance) if the crime of sexual exploitation or sexual abuse is committed by a person close to the child.<sup>44</sup>

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<sup>36</sup> Reply of the Ministry of Justice of the Slovak Republic to the request for information from 9/8/2012. The proposal of amendments has as of 31/10/2012 not been submitted to the Government.

<sup>37</sup> Comment no. 1 of the General Prosecution of the Slovak Republic to the proposal of signature of Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse by the Slovak Republic

<sup>38</sup> Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, Article 3 paragraph a.

<sup>39</sup> Act no. 300/2005 Coll. as amended, Criminal Code, Sec. 372.

<sup>40</sup> Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, Article 21, subsection 1, paragraph a.

<sup>41</sup> Ibid, Article 22.

<sup>42</sup> Act no. 300/2005 Coll. as amended, Criminal Code, Sec. 201.

<sup>43</sup> Ibid, Sec. 368.

<sup>44</sup> Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse,

Objections to compatibility of the Code of Criminal Procedure concerned the following:

- Ensuring criminal proceedings are treated as priority and carried out without undue delay also in cases of protection of children against sexual exploitation and sexual abuse<sup>45</sup>;
- Ensuring that contact of the victims with perpetrators is avoided in the premises of the court or law enforcement agencies<sup>46</sup>;
- Production of videotapes from all interviews with a child made during criminal proceedings concerning sexual criminal offences including sexual exploitation.<sup>47</sup>

Due to aforementioned reasons General Prosecution considered signing of Lanzarote Convention as untimely. General Prosecution proposed discussion of potential amendments of the Criminal Code and the Code of Criminal Procedure with legal professionals from relevant branches of law to ensure that changes required by the Lanzarote Convention are compatible with Slovak Criminal law.<sup>48</sup> Additional legal analysis and proposals for amendment of relevant legislation are currently available only on pages of academic volumes.<sup>49</sup>

According to the proposal report of the Lanzarote Convention, it is an international presidential treaty consistent with Art. 7, subsection 4 of the Constitution, so in accordance with Art. 86, paragraph d) of the Constitution, Lanzarote Convention, is before its ratification subject to affirmation by NCSR. Ratification of Lanzarote Convention will follow only after taking necessary legislative measures ensuring its execution.<sup>50</sup>

## II NATIONAL LEGISLATION

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Article 28, paragraph a.

<sup>45</sup> Ibid, Article 30, point 3.

<sup>46</sup> Ibid, Article 31, point 1, paragraph g)

<sup>47</sup> Ibid, Article 35, point 2.

<sup>48</sup> Comment no. 11 of the General Prosecution of the Slovak Republic to the proposal of signature of Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse by the Slovak Republic

<sup>49</sup> J. Čentěš - M. Kolcunová: Minor as a Victim of Sexual Offence. In *Victims of Crime*, J. Záhora & R. Kert (eds), Eurokódex, Bratislava, 2010, p. 85-97.

<sup>50</sup> Proposal report of the Lanzarote Convention, submitted by the Deputy Prime Minister and the Minister of Justice to the Government of the Slovak Republic.



## 1 GENERAL PRINCIPLES OF THE JURISDICTION

i. In 1948 there was a communist coup and Communist Party gained dominant position in the country. In 1969 the Constitutional law on Czechoslovak Federation established the Slovak Socialist Republic which, along with Czech Socialist Republic, formed Czechoslovak Socialist Republic (CSSR). In 1989 there was a historically significant coup, the so-called Velvet Revolution which resulted in the democratization of situation in Czechoslovakia and the overthrow of the Communist regime. A period of political, business, economic and ownership changes typical for the transition from a socialist regime to a capitalist one followed. Society focused its attention to the principles of democracy and development of plurality of views that were previously suppressed. Views on the protection of fundamental human rights started to develop also differently. Dissolution of the Czech and Slovak Federal Republic, and since 1/1/1993 existence of separate states – the Slovak Republic and the Czech Republic, was reflection of growing voices calling for independence of Slovakia.

The Slovak Republic is a republic with democratic constitutional law organization and with parliamentary political system. Unicameral parliament is the supreme legislative body of the state. It has 150 members - deputies elected in democratic elections which are held (apart from the case of early elections) every 4 years. The electoral system for elections to the National Council of Slovak Republic is relative.

President is, along with Prime Minister and the Speaker of the Parliament, supreme constitutional authority in the state. The office of the President is rather formal, the second component of the executive - the government - is dominant. Classical structure of three-way division of power in the state is completed by the system of general courts and the Constitutional Court.

ii. The primary source of regulation of human rights in Slovakia is the Constitution. It was adopted in 1992 as a result of formation of SR and changes made in political and economic system of the state. In the hierarchy of legal regulations it is presented as the fundamental law of the supreme legal force whose basis are the principles of democracy and rule of law. The Constitution, apart from fundamental rights and freedoms stated in the second chapter of the Act, guarantees also political rights, rights of national minorities and ethnic groups, a group of economic, social and cultural rights, the right to protection of the environment and cultural heritage and, last but not least, the right to judicial and other legal protection. The issue of the protection of children's rights is most significant in section five of the

Constitution, which specifically in Art. 41 guarantees the right to legal protection of marriage, parenthood and family, the right to special protection of children and minors, equality of children born in and out of wedlock and child care and parental upbringing of children (which is the right of children and their parents). The following Art. 42 guarantees the right to education which is one of the few constitutional rights associated with the obligation of completion of school attendance, which has period determined by special law. The essence and purpose of the right to protection of family life, which can be in broad sense understood as a set overarching several of children's rights enforced in relation to their natural environment, is the protection from unauthorized interference in family life by a public body. Measures directed to active promotion of marriage represent a part of such protection.<sup>51</sup>

Charter of Fundamental Rights and Basic Freedoms is an important document enshrining fundamental rights and freedoms<sup>52</sup>. Despite criticized duplication of domestic law regulating the institute of Fundamental Rights and Freedoms, it remains in force and is an integral part of law and order of SR: „*Text of constitutional regulation of fundamental rights and freedoms contained in the Charter is comparable, but not identical with the text of the constitutional regulation of Fundamental Rights and Freedoms that is contained in Chapter II of the Constitution of the Slovak Republic.*”<sup>53</sup> Solution for potential problems in the application practice offers Art. 152, subsection 4 of the Constitution which states legal dominance of the Constitution in the interpretative level and thus prevents formation of complications in connection with dual regulation.

Charter of Fundamental Rights and Basic Freedoms also enshrines protection of parenthood and family and children's right to parental upbringing and care by identically expressed wording of the text compared to the Constitution.<sup>54</sup> It can therefore be stated, that the Constitution contains a catalogue of human rights with higher legal force that binds all bodies of the public authority and may be directly applied by courts, while equipped with the Constitutional Court. It can, within its authority, derogate legal regulations and individual

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<sup>51</sup> J. Svák – E. Cibulka: Constitutional law of SR – Special part. Eurokódex, 2009, p. 405.

<sup>52</sup> Adopted as constitutional law of Federal Assembly of the Czech and Slovak Federal Republic no. 23/1991 Coll. Adoption of the document precedes adoption of the Constitution.

<sup>53</sup> J. Jirásek: Charter and the present. Collection of contributions to the Constitutional law section presented at the international scientific conference Lawyer days of Olomouc 2010. OLOMOUC 2010, p. 151 – 166.

<sup>54</sup> Act no. 23/1991 Coll. implementing the Charter of fundamental Rights and Basic Freedoms as a constitutional law, Art. 32.

decisions of bodies of the public authority and therefore ensures the real application of mentioned catalogue contained in the Constitution.<sup>55</sup>

In relation to legal regulation of fundamental rights and freedoms of international treaties that have been ratified and promulgated in a manner laid down by a law before the Constitution came into effect, SR by its position expressed in the Constitution<sup>56</sup> respects them and gives them precedence over the law provided they guarantee greater scope of constitutional rights and freedoms.

The Constitution and the Charter of Fundamental Rights and Basic Freedoms both state the issue of protection of children's rights only generally, while more concrete description can be found in the legal regulations of lower legal force. International documents enjoy irreplaceable significance in relation to the issue of protection of children's rights. Since 1993, SR is one of the signatory countries of the CRC. Considering the wording of the constitutional text regarding international treaties on human rights and fundamental freedoms, which the legislator grants precedence over the law, provided they have been ratified and promulgated in the manner laid down by law,<sup>57</sup> we can state the leading position of the CRC in legal order of Slovak Republic.

### iii.

**A. *Judiciary*.** Based on Art. 46 of the Constitution it can be concluded that protection of human rights in Slovakia is either judicial or extra-judicial. „*Everyone may claim his or her right by procedures laid down by the law before an independent and impartial court or, in cases provided by a law, before other public authority of the Slovak Republic.*”<sup>58</sup> If a citizen believes, that he or she has been deprived of his or her fundamental right or freedom by a decision of a public administrative body, he or she may (in cases provided by law) turn to the court to have the lawfulness of such decision reviewed. Decisions of district courts may be reviewed by courts of higher instance (appeal courts) - regional courts. The Supreme Court of the Slovak Republic is the court of final review. The Constitutional Court which operates as an

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<sup>55</sup> J. Štiavnický: Constitutional law of the Slovak Republic after 35 years. Some notes. In: Constitutional law 20 years after the fall of communism, P. Příbelský (ed.), Aleš Čeněk s.r.o., Plzeň, 2011, p. 124.

<sup>56</sup> Constitutional Act no. 460/1992 Coll., Constitution of the Slovak Republic, as amended, Art. 154c, subsection 1.

<sup>57</sup> Ibid, Art. 7, subsection 5.

<sup>58</sup> Ibid, Art. 46, subsection 1.

independent judicial body protecting constitutionality plays a specific role in the field of human rights protection.<sup>59</sup>

The Constitutional Court convenes and decides, pursuant to Art. 127, subsection 1 of the Constitution of the Slovak Republic, upon motions submitted by natural or artificial persons, if complaining against breach of fundamental rights or freedoms, or human rights and fundamental freedoms accruing from international treaty ratified and promulgated in a manner laid down by law, unless the protection of these rights and freedoms does not come under discretion of another court.<sup>60</sup> Natural or artificial person is actively legitimated in filing a motion - that is they have the right to ask the Constitutional Court, within limits of specific constitutional protection, to procure within the complaint procedure the protection of fundamental rights and freedoms derived from the Constitution, or from human rights and fundamental freedoms ensured by international conventions on human rights.

Accordingly, a motion can not be submitted by a natural or artificial person, who complain against violation of fundamental rights and freedoms of another person, and not against the violation of their own rights and freedoms (except for a legal representative or a legal guardian appointed by court, who submits the motion in the name of the ward), and by not having previously fulfilled the condition of filing all possible appeals first. In case of a claimant who is a minor the motion is submitted by his or her legal representative. Representation of a natural person by attorney at law is within this procedure obligatory. If the claimant asks for a court appointed attorney and the conditions for condoning the court fee are met, the Constitutional Court will send the claimant to the Centre of Legal Aid.

The motion has to be submitted in writing and has to contain appropriate requisites as defined by law, list of infringed rights and a specified prayer. In this context it is needed to point out, that the Constitutional Court does not hold, in relation to general courts, higher instance position, so its task is not to examine purely the correctness or legitimacy of appealed verdicts. Its exclusive task is to examine the protection of constitutionally guaranteed rights and freedoms.<sup>61</sup> However, the submission of a motion is not classified as a

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<sup>59</sup> Ibid, Art. 124.

<sup>60</sup> The procedure on complaints from natural and artificial persons is regulated by the Act no. 38/1993 Coll., on the Organizational Structure of the Constitutional Court of the Slovak Republic and on the Proceedings Brought to the Court and on the Position of its Judges.

<sup>61</sup> Quoted on: 29/9/2012.

Available at:

time unlimited legal remedy for the protection of fundamental rights or freedoms. According to the Act no. 38/1993 Coll. on the Constitutional Court Sec. 53, subsection 3, a complaint may be filed within a period of two months from the day of entering into force of the decision or from the day when the injunction is issued or other encroachment is communicated.<sup>62</sup> The result of this procedure may be dismissal of the complaint on exclusive grounds, or admission for further proceeding. Consequently, it examines the violation of fundamental rights that were complained by the claimant, and in case of a positive verdict, it grants the complaint, and according to the circumstances of the case, it may decide on legal solution of protection of the complained rights.<sup>63</sup> There is no possibility of lodging an appeal against a decision of the Constitutional Court.<sup>64</sup>

CRC binds, according to the Article 44, contracting parties to regularly submit reports on the situation of the rights of the child to the United Nations Committee on Rights of the Child to have the report evaluated by its expert. On the basis of regularly submitted reports by Slovak delegation, the Committee on Rights of the Child addresses Slovakia a list of recommendations, that are supposed to implement the CRC more precisely, which also secures higher standard in children care.<sup>65</sup> One of the main points in the 2000 and 2007 final evaluation reports was the establishment of an independent institution for monitoring and securing the rights of the child, however, such an institution has still not been established in Slovakia.

**B. *Slovak National Centre for Human Rights*. SNCHR temporarily and partially monitors the protection of rights of children in Slovakia as one of many items on its agenda.**<sup>66</sup> SNCHR can be addressed by any natural or artificial person who believes that he

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<http://portal.concourt.sk/pages/viewpage.action?pageId=1277953#%281%29Sprievodcapod%C3%A1van%C3%ADms%C5%A5a%C5%BEost%C3%ADpod%C4%BEa%C4%8DI.127%C3%BAstavy-Akom%C3%B4%C5%BEe%C3%BAstavn%C3%BDs%C3%BAdrozhodn%C3%BA%C5%A5os%C5%A5a%C5%BEosti%3F>

<sup>62</sup> In 2011, 4277 complaints were submitted to the Constitutional Court of the Slovak Republic.

Available at:

[http://portal.concourt.sk/plugins/servlet/get/attachment/main/dokumenty\\_data/D\\_2012\\_5.pdf](http://portal.concourt.sk/plugins/servlet/get/attachment/main/dokumenty_data/D_2012_5.pdf)

<sup>63</sup> Act no. 38/1993 Coll., on the Organizational Structure of the Constitutional Court of the Slovak Republic and on the Proceedings Brought to the Court and on the Position of its Judges, as amended, Sec. 56 subsection 3.

<sup>64</sup> Constitutional Act no. 460/1992 Coll., Constitution of the Slovak Republic, as amended, Art. 133.

<sup>65</sup> Quoted on: 14/9/2012.

Available at: [http://www.unicef.sk/files/UNIECF\\_subory\\_web-mimo-obchodu/pripomienky\\_2007.pdf](http://www.unicef.sk/files/UNIECF_subory_web-mimo-obchodu/pripomienky_2007.pdf)

<sup>66</sup> The Slovak National Centre for Human Rights was established under Act no. 308/1993 Coll. on the Establishment of the Slovak National Centre for Human Rights based on the project of UN

or she was discriminated by action or lack of action of a public institution on any grounds. When submitting the application it is necessary for the claimant to fill in all necessary information and to hand over all relevant and related materials. One of the most important competences of SNCHR during proceedings concerning breach of the principle of equal treatment is the legal representation based on the right to an attorney. SNCHR may request information on adherence to human rights obligations from non-governmental organizations that work in the field of human rights and fundamental freedoms as well as the rights of a child, and may manage the process and the extent of the pertinent information provision.

**C. *The Public Defender of Rights.* The Public Defender of Rights has significant competences concerning protection of the rights of children.**<sup>67</sup> The institute of Ombudsman<sup>68</sup> was incorporated into the constitutional system of the Slovak Republic by constitutional act<sup>69</sup> coming into effect on 1/1/2002, with its status directly reflected in the Constitution of the Slovak Republic, as

„an independent body of the Slovak Republic which, within the scope and as laid down by law, protects basic rights and freedoms of natural and artificial persons in proceedings before public administration bodies and other bodies of public authority, if their conduct, decision-making, or lack of action, is in conflict with the legal order. In cases laid down by law, the Public Defender of Rights may participate in holding the persons working in the public administration bodies accountable, if those persons violated a basic human right or freedom of natural or artificial persons.”<sup>70</sup>

By enacting the constitutional act<sup>71</sup> in 2006 its scope was broadened by the right to submit a motion for commencement of proceeding to the Constitutional Court. In order to submit

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(SLO/94/AH/2) the establishment of a national institute for protection and support of human rights and on the basis of the Agreement between the United Nations and the Government of the Slovak Republic regarding the Establishment of the Slovak National Centre for Human Rights (published in Collection of Laws under no. 29/1995 Coll.) with the aim to implement and support modern system of protection of human rights in the Slovak Republic.

<sup>67</sup> Act no. 564/2001 Coll. on the Public Defender of Rights, as amended.

<sup>68</sup> In Slovakia a so-called „parliamentary model” of ombudsman is applied.

<sup>69</sup> Constitutional Act of the Slovak Republic no. 90/2001 Coll.

<sup>70</sup> Constitutional Act no. 460/1992 Coll., Constitution of the Slovak Republic, as amended, Art. 151a, subsection 1.

<sup>71</sup> Constitutional Act of the Slovak Republic no. 92/2006 Coll.

the latter motion, there has to be a precondition in the existence of a generally binding legal provision infringing fundamental right or freedom of a natural or artificial person.<sup>72</sup>

Anybody who believes that his fundamental rights and freedoms were infringed contrary to the legal order or principles of a democratic state and the rule of law in relation to the action, decision-making or lack of action of a public administration body can turn to the Public Defender of Rights. Participation of the NCSR in case of wider infringement of rights can be evaluated as a positive aspect.

„If the Public Defender of Rights finds facts indicating that an infringement of the fundamental right and freedom is significant or relates to higher number of persons, he can submit a special report to the National Council. This special report can also contain a proposal for the report to be discussed on the next plenary session of the National Council.”<sup>73</sup>

**D. *The Centre for International Legal Protection of Children and Youth.*** Another state's institution with nationwide competence is the Centre for International Legal Protection of Children and Youth<sup>74</sup>, which provides legal advice free of charge to natural persons. Its task is to ensure direct execution of international conventions and legal acts of the European Union that define its main tasks in three fundamental areas: enforcement of child support from abroad, wrongful removal or retention of a child, as well as assuring the right of a parent to access his child, and international adoption.<sup>75</sup>

**E. *Non-governmental organizations.*** Another important role in the protection of rights of children is performed by non-governmental organizations that work in fields where due to variety of reasons the state does not operate. One of these

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<sup>72</sup> Constitutional Act no. 460/1992 Coll., Constitution of the Slovak Republic, as amended, Art. 151a, subsection 2.

<sup>73</sup> Quoted on: 25/9/2010.

Available at: <http://www.vop.gov.sk/spravy-o-cinnosti>

<sup>74</sup> The Centre for International Legal Protection of Children and Youth was established by Ministry of Labour, Social Affairs and Family of the Slovak Republic as its directly managed state-budget organization, in order to assure and provide legal protection to children and youth in relation to outland with the effect from 1/2/1993. In 2012 a criminal complaint was filed against unknown offender in matter of child trafficking, breach of competence of a public agent and breach of duty of public agent.

<sup>75</sup> Quoted on: 3/10/2012.

Available at: <http://www.cipc.sk/index.php?appId=25>

organizations is the Children's Fund of the Slovak Republic<sup>76</sup>, established as an independent, apolitical, and volunteer association of citizens.

„The aim of the association is to protect the rights of the child, helping to build ideological, conceptual, and material conditions for health, social, educational and psychological care for children and youth in Slovakia. At the same time it carries out public-beneficial projects, but does not supplement the state's care for children and youth.”<sup>77</sup>

Through projects it draws attention mainly to the protection of rights of problematic, disadvantaged groups of children.

**iv.** Criminal cases are decided by general courts - district courts and regional courts. The Supreme Court of the Slovak Republic decides appeals against the decisions of these courts. The Specialized Criminal Court is a part of the hierarchy of courts in the Slovak Republic with its local jurisdiction for the entire territory of the Slovak Republic. It acts as a court of first instance and has a status of a regional court. The purpose of its establishment is better specialization and at the same time protection during proceedings concerning corruption offences, since it is breaking local ties that may affect the detection, investigation and possibly the entire proceeding process itself. The creation of the Specialized Criminal Court is bound to the ruling of the Constitutional Court<sup>78</sup> which states that previously existing Special Court was unconstitutional. The Specialized Criminal Court is established as a permanent court that continues in the work of the Special Court. It acts on the matters that fell within the jurisdiction of the Special Court and that have not been lawfully completed to the date of the Special Court's termination. Within its broad material scope falls crime of the first degree murder, deceitful practices in public procurement and public auction, forgery, fraudulent alteration and illicit manufacturing of money and securities as well as some other forms of corruption.

Procedural steps in the procedure against juveniles are regulated by the Code of Criminal Procedure and it is distinguished from the standard procedure by certain specifics that should increase positive educational impact on the juvenile. Since indictment, the law states

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<sup>76</sup> Civic association established on 12/5/1990 as a nationwide independent non-governmental organization with the aim to protect the rights of the child.

<sup>77</sup> Quoted on: 3/10/2012.

Available at: <http://www.dfsr.sk/13/#stanovystanovy1>

<sup>78</sup> Ruling of the Constitutional Court of the Slovak Republic: PL. ÚS 17/08 published on: 10/5/2009.



mandatory defence for juvenile, which lasts until the final outcome of the criminal prosecution is made and the juvenile can not give up this right. If the juvenile has not reached the age of 19 at the time of the main hearing or public meeting, the documents are being delivered not only to a juvenile and his counsel, but also to the state authority for youth care, juvenile's legal guardian, person with whom the juvenile lives in the same household, or appointed guardian. Juvenile's benefit is taken into consideration because it allows the use of the exemption from local jurisdiction. Competent court may delegate the case to the court, in which district the juvenile resides or to the court where the criminal proceedings concerning the juvenile's interests would be most effective.<sup>79</sup> The presence of the juvenile's defence attorney is necessary in the judicial proceeding and the main hearing or public meeting on the plea bargaining can not be held in the absence of the juvenile. The presence of the prosecutor is mandatory at the public meeting as well. The court excludes the public from the main hearing if it protects juvenile's interests. The presiding judge may also order the juvenile to leave the courtroom, if some part of the procedure could have a negative effect on juvenile's moral development. It is characteristic for the of the conclusion of the hearing, that the copy of the verdict is obligatory delivered to the state authority for youth care and to juvenile's legal guardian with whom the juvenile lives in the same household.

The legislator strengthens the juvenile's right to counsel by extending the circle of people who are entitled to make an appeal. The state authority of youth care, the prosecutor, the defence attorney and the legal guardian are all entitled to make an appeal for the juvenile's benefit, even against juvenile's will. The relatives of juvenile in direct line are also entitled to file a complaint against the court ruling for juvenile's benefit. Throughout the entire criminal proceeding, the educational purpose of the process is being monitored. To ensure that this primary purpose will be accomplished, people who are responsible for the investigation, the summary investigation and the decision making process should have life experiences with upbringing of the youth.<sup>80</sup> In accordance with subsection 2, this provision of Sec.347 will not be applied:

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<sup>79</sup> Act no. 301/2005 Coll. as amended, Code of Criminal Procedure, Sec. 341.

<sup>80</sup> Š. Minárik et al.: Code of Criminal Procedure. 2. edition, Iura edition, 2010, p. 867- 874.

a) in the criminal proceedings for offences that were committed by the accused before the age of 18, or for offences that were committed by the accused after the age of 18, if the law for the offence committed after the age of 18 provides the same or more severe punishment, or

b) if there is an indictment until after the age of 18 of the accused.

v. Criminal prosecution against juveniles is regulated by the Criminal Code. Age limit of criminal liability was reduced to 14 years of age. Shift in the age limit of criminal liability is reflection of the current state of juvenile's criminality. Juvenile is any person, who commits a crime after 14th year of age but is not older than 18 years.<sup>81</sup> The exception to this is crime of sexual abuse, where the age limit of criminal liability is set at 15 years of age.<sup>82</sup> To draw criminal liability the law imposes an obligation to thoroughly ascertain the level of intellectual and moral development of the juvenile. Moral development is compulsory checked on juveniles younger than 15 years, whereas concerning juveniles exceeding the age of 15 years only in case there are doubts about mental maturity of the juvenile. Thorough clarification of the level of moral development, control and cognitive abilities of an individual is not only important to choose appropriate measures to remedy the juvenile, but also to determine whether the offence committed is of small relevance, which would result in juvenile not being criminally liable.

During punishments of juveniles emphasis is primarily put on educational nature of the sentence, and therefore possibilities of taking a juvenile into custody are limited and applied only when necessary. „*Even if there are grounds for detention, accused juvenile may be taken into custody only if the purpose of custody cannot be reached otherwise.*”<sup>83</sup> The purpose of custody can be reached by measures that substitute custody, for example by assuming responsibility for correction of accused juvenile by an association of citizens or trustworthy person, alternatively by imposing proportionate obligations and restrictions, warranty, cash guarantee, by promise of the accused or supervision of probation or mediation officer, which in practice seems as the most effective. Educational purpose of juvenile's punishment is emphasized through obligation of law enforcement agencies or courts to examine in every stage of criminal proceeding, whether the purpose of custody cannot be replaced by one of abovementioned

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<sup>81</sup> Act no. 300/2005 Coll. as amended, Criminal Code, Sec. 94, subsection 1.

<sup>82</sup> Ibid, Sec. 201, subsection 1.

<sup>83</sup> Act no. 301/2005 Coll. as amended, Code of Criminal Procedure, Sec. 339.

measures.<sup>84</sup> Court is to some extent limited when choosing the type of punishment for juvenile, and may impose punishment of community service work, pecuniary penalty, forfeiture of a thing, prohibition to undertake certain activities, expulsion and imprisonment.

Brief overview of statistics:<sup>85</sup>

In 2011, number of convicted juveniles was 1711, the number of acts committed was 2413. Unconditional sentence of imprisonment was imposed in 148 cases, conditional imprisonment in 1029 cases, pecuniary penalty in 17 cases and in 236 cases other type of punishment was inflicted. <sup>86</sup>The percentage of juveniles in 2011 to the proportion of the total number of lawfully convicted persons was 5, 68 %. This is an increase of 0, 07 % compared to 2010 when it was 5, 61%.

From deflections in criminal proceedings in 2011 were used: conditional suspension of criminal proceedings (523x), discontinuance of prosecution (219x) and suspension of criminal proceedings (207x). Prosecutors concluded settlement with 139 juveniles accused and courts approved 756 plea bargainings of juveniles.

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. The Criminal Code, in general part or in particular part, neither specifies nor gives interpretation of the term „sexual activities“. The law uses the term „coitus”<sup>87</sup> and also operates with terms oral sex, anal sex, other sexual acts and other sexual abuse. Interpretation of the abovementioned terms is reserved by legislator for court jurisdiction. Individual activities fulfil the merits of different crimes.

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<sup>84</sup> Š. Minárik et al.: Code of Criminal Procedure. 2. edition, Iura edition, 2010.

<sup>85</sup> Statistical yearbook was created and processed by section informatics and project management, section of criminal law and section of civil law of Ministry of Justice of the Slovak Republic in collaboration with the Supreme Court of the Slovak Republic.

<sup>86</sup> Quoted on: 3/10/2012.

Available at: [http://www.justice.gov.sk/stat/roc/12/I/I\\_11\\_2011.pdf](http://www.justice.gov.sk/stat/roc/12/I/I_11_2011.pdf)

<sup>87</sup> R 6/1984: „*Coitus must be considered the conjugation of genitals of man and woman, while by conjugation the coitus is accomplished. According to judicial practice, even if male penis is only partially inserted into the female genital tract, the act is considered to be accomplished. The hymen does not have to be breached.*”

In practice, rape will be considered to be coitus and will be criminalized as sexual abuse - coitus with person under the age of 15 years. Under „other type of sexual abuse only more intensive interventions into sexual sphere are considered, e.g. palpation of genitals, breasts, osculation of genitals. One-time momentary touches through clothes do not apparently fulfil the material element of the crime.”<sup>88</sup>

Any act aimed at reaching sexual satisfaction or at least achieving excitement of the offender is considered as sexual abuse. The act is committed also if the offender does not reach the satisfaction. „Other type of sexual abuse” can be committed also by a person of the same gender, while „coitus” can be committed only on the person of different sex. The law does not distinguish the way by which the crime of sexual abuse is committed. „Coitus” is put on the same level as well as „other type of sexual abuse”.

ii. The term „intention/intentional” is defined in Sec.15 of the Criminal Code: „*Crime is committed intentionally if the offender a) wanted to breach or to jeopardize the interest protected by this Act in a manner stated in this Act, or b) knew, that his/her act can cause such breach or jeopardy, and in the event that he/she causes it, was familiar with it.*”

There is a lack of express requirement of intention in merits of sexual abuse. However, in compliance with Sec.17 of the Criminal Code: „*If this Act does not expressly stipulate that negligent culpability is sufficient, intentional culpability is necessary for criminal liability of an act committed by natural person.*”<sup>89</sup> Therefore, for committing the crime of sexual abuse culpability in the form of intention will be necessary.

Anyone, who fulfils the merits of the crime and is criminally liable, is also liable for committing the crime of sexual abuse. Liable is a sane person, who has reached the respective age for criminal liability. General age for criminal liability in Slovak Republic is 14 years. The legislator shifted the age limit for criminal liability in case of crime of sexual abuse to 15 years.

iii. There is a lack of regulation relating to sexual activities between persons under the age of 18 in the Criminal Code. Under Sec. 211 it is only possible to affect persons enabling them this conduct. In compliance with this provision, criminally liable is any person who, even negligently, exposes a person under the age of 18 years to the risk of debauchery by enticing

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<sup>88</sup> J. Čentěš et al.: Criminal Code with commentary. Quoted on: 29/8/2012.

Available at: [http://www.gjar-po.sk/~gajdos/treti\\_rocnik/nos/trestny\\_zakon\\_s\\_komentarom.pdf](http://www.gjar-po.sk/~gajdos/treti_rocnik/nos/trestny_zakon_s_komentarom.pdf)

<sup>89</sup> Act no. 300/2005 Coll. as amended, Criminal Code, Sec. 17.

such person to leading lewd or immoral life or enables such person to lead lewd or immoral life.

**iv.** Acts, during which minors are sexually abused by use of violence, by exploiting their disabilities or by threat of violence can be sanctioned in accordance with „terms of specific qualification” (Sec. 138-143 of the Criminal Code) and related merits of such crime. Where particular qualification criteria are fulfilled, the law allows to utilise a stricter penalty compared to the one imposed for fulfilling basic merits of a crime. For instance, the law allows to punish a perpetrator who commits the crime of sexual abuse by imprisonment of 7 to 12 years (Sec. 201, subsection 2), if this act is committed in a more serious manner, on a protected person, or because of specific motive (e.g. for hire, act of revenge, sexually motivated criminal offence). Violence or the threat of violence is considered to be „more serious manner of action” according to the law (Sec. 138, par. d). Section „Interpretation of terms” of the Criminal Code describes when is the crime committed by use of violence, or the threat of violence, as following:

„Crime is committed by violence if the offender uses physical violence against physical integrity of another person, or if it is committed against a person whom the offender induced into a state of helplessness by deception, or if the offender used violence against a thing of another.”<sup>90</sup> Furthermore „it is not a requirement that the person injured resists, e.g. when he/she is aware of physical prevalence of the perpetrator and due to the fear of more violence rather does not resist and fully subjects to the will of the perpetrator.”<sup>91</sup>

According to the Criminal Code, a sick person likewise falls into the category of protected persons. A sick person is defined by Sec. 127, subsection 6 as following:

„For the purposes of this Act, a sick person shall mean a person who suffers from a physical or a mental illness, even if temporary, at the time of the commission of the offence, regardless of whether such a person is temporary unfit for work, his fitness for work has been altered, is disabled or heavily disabled, while an intensity of such sickness or handicap corresponds to grievous bodily harm.”

**v.** The Criminal Code criminalises acts, where sexual intercourse occurs between relatives in the direct line or between siblings. Merits of crime of sexual intercourse between relatives

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<sup>90</sup> Ibid, Sec. 122 subsection 7.

<sup>91</sup> R 1/1980.

can be found under Sec. 203 of the Criminal Code. This „*provision protects moral principles of the society, which does not permit sexual intercourse between the closest relatives due to the scientifically proved knowledge about the biological threat to the offspring in the form of degeneration.*”<sup>92</sup> Nevertheless, this provision only criminalises the „sexual intercourse” and does not deal with „other sexual acts” or „other methods of sexual abuse”. This, however, does not exclude the supportive use of Sec. 201 (assuming that the person is less than 15 years old). Having regard to the foregoing, it shall be understood, that in order to use these provision of the Criminal Code in a correct and legal manner, relatives are to be understood as persons in the direct relative line only, thus relations between the ancestors and the offspring, as well as relations between siblings (brother - sister). Such relation is not established in adoption cases.

vi. Exploitation of another’s dependency is considered, according to Sec. 138 of the Criminal Code, to be an act of a more serious manner. A dependent person is, in accordance with Sec. 127, a person who depends on the perpetrator for his/her nutrition, education, material or other care or keeping. If the crime is committed against a protected person, including dependent person, custodial penalty increases. Persons under 18 years of age, who are entrusted to the perpetrator’s care, supervision, or if they are dependent persons, are explicitly protected by Sec. 202 of the Act.

E.g. protection of children in institutes for execution of protective upbringing and institutional care is secured by district and regional prosecutors, who, within their competence, carry out periodic reviews in such institutes. Among other things, complaints and suggestions of children are reviewed, as they may use boxes for anonymous queries for the prosecutor. The prosecutors also can lead interviews with them without the presence of a third person.<sup>93</sup>

## 2.2 Child prostitution

vii. The Slovak Republic is a party to the Council of Europe Convention on Action against Trafficking in Human Beings. The Slovak Republic became a signatory on 19/5/2006, ratified the convention on 27/3/2007 and on 1/2/2008 it entered into force. One of the

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<sup>92</sup> J. Čentéš et al.: Criminal Code with commentary. Quoted on: 29/8/2012.

Available at: [http://www.gjar-po.sk/~gajdos/treti\\_rocnik/nos/trestny\\_zakon\\_s\\_komentarom.pdf](http://www.gjar-po.sk/~gajdos/treti_rocnik/nos/trestny_zakon_s_komentarom.pdf)

<sup>93</sup> Continuous information on the performance of tasks under the National Action Plan for Children 2009-2012 for the prosecution department.

measures, which were adopted along with this convention to fight trafficking in human beings was a program called Berlin Proceedings and the National Program on the Fight Against Human Trafficking for the years 2011-2014.

**viii.** The term „child prostitution” is not defined in the Criminal Code. Prostitution is a sexual intercourse with another person or persons for remuneration. A sexual intercourse is to be understood as any manner of satisfaction of a sexual instinct on another person’s body, whether of the same or the opposite sex. It is, thus, a wider expression than coitus. Therefore, it includes a direct interconnection of genitals (coitus), but also oral sex, anal sex, various types of the so-called erotic massages practiced on genitals, use of vibrators or other apparatus used for satisfaction of sexual instinct etc. Such act leads to sexual satisfaction of another person, but it does not necessarily matter, whether such satisfaction is in that particular case reached.<sup>94</sup>

Within the framework of national legislation, it is possible to find the definition of child prostitution under Article 2 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, which was adopted and opened for adoption followed by ratification by a resolution of the General Assembly on 25/5/2000 and which entered into force on 18/1/2002. Article 2 of this Convention reads as follows: „*Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration.*”<sup>95</sup>

**ix.** Criminal regulation penalizes both of these subjects. According to Sec. 201 of the Criminal Code everyone, who commits coitus with a person younger than age of 15 years, or who that person sexually abuses any other way, will be punished with sanction of imprisonment of 3 years to 10 years (user). For the purpose of punishing the recruiter, Sec. 367 will be used, which regulates the crime of procuring:

(1) Any person who hires, solicits, seduces, exploits, elicits or offers another to engage in prostitution, or who profits from the proceeds of someone else’s prostitution, or enables prostitution to be practised, shall be liable to a term of imprisonment of up to 3 years.

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<sup>94</sup> J. Ivor et al.: Substantive Criminal Law, special part. Bratislava: Iura edition, 2010. p. 426.

<sup>95</sup> Quoted on: 15/8/2012.

Available at: [http://www.vop.gov.sk/files/File/Dokumenty/OP\\_predaj\\_deti.pdf](http://www.vop.gov.sk/files/File/Dokumenty/OP_predaj_deti.pdf)

(2) The offender shall be liable to a term of imprisonment of 1 to 5 years if he commits such offence acting in a more serious manner.

(3) The offender shall be liable to a term of imprisonment of 3 to 10 years if he commits the offence referred to in subsection 1 against a protected person.

(4) The offender shall be liable to a term of imprisonment of 7 to 12 years if he commits the offence referred to in subsection 1,

a) and obtains substantial benefit for himself or another through its commission,

b) as a member of a dangerous grouping, or

c) against a person under 15 years of age.

### **2.3 Child pornography**

x. Slovak Republic acceded to this Convention and signed it on 4/2/2005. It has been ratified on 8/1/2008.<sup>96</sup>

xi. According to the Sec. 132, subsection 3 of the Criminal Code the definition of child pornography reads as: For the purposes of this Act, child pornography shall mean pornographic material that visually depicts coitus, different act of sexual intercourse, or other conduct similar to sexual intercourse with a child, or naked parts of the child's body, and that it is designed to gratify sexual desire of another. The definition given in the Criminal Code does not exactly copy the definition of child pornography mentioned in Lanzarote Convention, but it is compatible to such extent that objective side of this crime is specified enough and thus taxatively defines actions, whose basic characteristic is abuse of a child. In Slovak legal system only pornography, which depicts a real child is penalized. Computer-generated child or for example modified pictures of children from animated fairy-tales are not penalized.

The Criminal Code differentiates between gaining of child to participate in pornographic performances and coercing a child into participation in pornographic performances. In basic merits mentioned in Sec. 368, subsection 1, the Criminal Code enables to impose sentence

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<sup>96</sup> Quoted on: 15/8/2012.

Available at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CL=ENG>



to the offender, who exploits, elicits, offers or otherwise abuses a child for manufacturing child pornography, or enables such abuse of a child, or otherwise participates in such manufacturing a term of imprisonment of 4 to 10 years. But in qualified merits mentioned in Sec. 368, subsection 2, the Criminal Code enables to impose sanction to the offender if he commits the offence referred to in Sec. 368, subsection 1 by more serious manner a term of imprisonment of 7 to 12 years. Acting in more serious manner is specified in Sec. 138 as follows:

Acting in a more serious manner shall mean that a criminal offence was committed

- a) with the use of a weapon, except for the criminal offences of the first degree murder pursuant to Sec. 144, the second degree murder pursuant to Sec. 145, killing pursuant to Sec. 147 and Sec. 148, homicide pursuant to Sec. 149, bodily harm pursuant to Sec. 155, Sec. 156 and Sec. 157,
- b) for a longer period of time,
- c) in a brutal and agonising manner,
- d) with the use of violence, the threat of imminent violence or the threat of other grievous harm,
- e) by housebreaking,
- f) by deception,
- g) taking advantage of another person's helplessness, inexperience, dependency or subordination,
- h) by breaching an important duty prescribed by law and connected with his employment, position or function,
- i) by an organised group, or
- j) against several persons.

**xii.** According to the Article 20 of the Lanzarote Convention concerning child pornography:

Each Party shall take necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalised:

- a. producing child pornography;
- b. offering or making child pornography available;

- c. distributing or transmitting child pornography;
- d. procuring child pornography for oneself or for another person;
- e. possessing of child pornography;
- f. knowingly obtaining access, through information and communication technologies, to child pornography.<sup>97</sup>

The Criminal Code prosecutes:

#### Sec. 368 - Manufacturing of Child Pornography:

- (1) Any person who exploits, elicits, offers or otherwise abuses a child for manufacturing child pornography, or enables such abuse of a child, or otherwise participates in such manufacturing, shall be liable to a term of imprisonment of 4 to 10 years.
- (2) The offender shall be liable to a term of imprisonment of 7 to 12 years if he commits the offence referred to in subsection 1
  - a) against a child under 12 years of age,
  - b) acting in a more serious manner, or
  - c) in public.

#### Sec. 369 - Dissemination of Child Pornography

- (1) Any person who disseminates, transports, procures, makes accessible or otherwise puts into distribution child pornography shall be liable to a term of imprisonment of 1 to 5 years.

#### Sec. 370 - Possession of Child Pornography

Any person who has child pornography in his possession shall be liable to a term of imprisonment of up to 2 years.

Slovak legislation is fully in accordance with the Article 20 (1,a-e) of the Lanzarote Convention. The only insufficiency that can be found is in the paragraph f, that aims to avoid for children to become victims of child pornography distributed through information or communication technologies, for example on the Internet. One way to prevent distribution of child pornography on the Internet is to block websites with unlawful content,

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<sup>97</sup> Available at: [http://www.coe.int/t/dghl/standardsetting/children/Source/LanzaroteConvention\\_svk.pdf](http://www.coe.int/t/dghl/standardsetting/children/Source/LanzaroteConvention_svk.pdf)

in our case with child pornography. However, we find that neither in Slovakia, nor in the EU, there is no direct legislation that would specifically define duties of operators in this regard.

**xiii.** Many experts believe that Slovakia is missing an effective control mechanism, by which it would be more effective to fight against child pornography, that is to increase the protection of children against sexual and other abuse. It is therefore said, that ratification of the Lanzarote Convention at our territory, could help to improve this situation, because it offers in its provisions a platform for better and more effective control.

Regarding the exception according to the Article 20(4), in our legislation there is no particular provision that would penalize access to the child pornography through the means of communication technologies, such as the Internet. Operators regulate the situation mainly through their self-regulatory initiatives. In 2009, the three biggest Slovak operators agreed upon blocking of unlawful websites containing child pornography in pursuance of a black list provided by the Internet Watch Foundation – renowned international organization monitoring the spreading of internet paedophilia. The company O2 Telefónica also established a nonstop helpline with phone number 0800 500 500, or consultations by sending an e-mail to [potrebujem@pomoc.sk](mailto:potrebujem@pomoc.sk). Orange also gives its clients an opportunity to warn about a website with content inappropriate for children and youth through an online form on the website [www.orange.sk](http://www.orange.sk) or costumer line 905.<sup>98</sup> Other protective measures include for example Stopline: *„National centre for reporting unlawful content or activity on the Internet that could endanger children and youth. Suggestions in the centre are analysed by specialists, who send suspicious websites from Slovakia for verification to the Police Force.”*<sup>99</sup>

The conditions of distribution of audiovisual works are governed by the Act no. 343/2007 Coll. on the Conditions of Registration, Public Distribution and Preservation of Audiovisual Works, Multimedia Works and Phonograms of Artistic Performances including Amendments and Supplements to certain other acts (Audiovisual Act) as amended. It also regulates protection of minors against distribution of works with pornographic character that is ensured by uniform labelling system of works by age suitability, in respect of its

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<sup>98</sup> Quoted on: 28/8/2012.

Available at: <http://www.euractiv.sk/bezpecny-internet/clanok/problem-detskej-pornografie-na-internete-sa-potlaca-ale-neriesi-017924>

<sup>99</sup> Ibid.

inaccessibility or inadequacy for minors. According to Sec. 20 of the Act no. 308/2000 Coll. on Broadcasting and Retransmission and on Amendments of the Act no. 195/2000 Coll. on Telecommunications, the provider of audiovisual media services is on request obliged to ensure, that this service and all of its elements, which can impair the physical, mental or moral development of minors, especially those that contain pornography or coarse unjustified violence, were available only in such way, that minors can not under normal circumstances hear or see this service on request and all of its elements. The broadcaster of a television programme service and the provider of audiovisual media service are on request obliged to establish and exercise an uniform labelling system stated by a special act – that is the Act no. 343/2007 Coll. The Criminal Code in Sec. 372 persecutes a person who exhibits or otherwise makes pornography accessible to persons under 18 years of age in a place accessible to such persons. It must be expressly stated on the website, that its content is not intended for persons younger than 18 years.

## **2.4 Corruption of Children**

**xv.** State criminalizes an intentional act that exposes a child to pornography. Such conduct is defined by the Criminal Code as corrupting morals and it is regulated in Sec. 371 (so-called hard pornography) and in Sec. 372 (so-called simple - any - pornography). Corrupting the morals of the youth (Sec. 211) may also be used. In Sec. 372 it is stated:

(1) Any person who

- a) offers, surrenders or makes pornography accessible to a person under 18 years of age, or
- b) exhibits or otherwise makes pornography accessible to persons under 18 years of age in a place accessible to such persons shall be liable to a term of imprisonment of up to 2 years.

Cases of acts covered by Sec. 372, subsection 1, that involve the use of fraudulent promises, incentives and coercion, can be found in the Criminal Code as a qualified merits of the crime of corrupting morals, referred to in Sec. 372, subsection 2. Consequence of such conduct will be increased custodial penalty, which will vary from 1 to 5 years.

## 2.5 Solicitation of Children for Sexual Purposes

**xvi.** The term „solicitation of children for sexual purposes” as defined in the Lanzarote Convention, can not be found in the current Slovak Criminal Code. It is not defined as a separate crime. Offender of „grooming” or „cyber grooming” can commit following offences by his conduct:<sup>100</sup>

- (1) **Trafficking in Human Beings** (Sec. 179 of the Criminal Code) – in subsection 2 imprisonment from 4 to 10 years.
- (2) **Restriction of personal freedom** (Sec. 183 of the Criminal Code) – in subsection 1 imprisonment from 6 months to 3 years.
- (3) **Extortion** (Sec. 189 of The Criminal Code) – in subsection 1 imprisonment from 2 to 6 years.
- (4) **Sexual Abuse** (Sec. 201 of the Criminal Code) – in subsection 1 imprisonment from 3 to 10 years.
- (5) **Manufacturing of Child Pornography** (Sec. 368 of the Criminal Code) – in subsection 1 imprisonment from 4 to 10 years.
- (6) **Serious Threats** (Sec. 360 of the Criminal Code) – in subsection 1 imprisonment up to 1 year.
- (7) **Dangerous Pursuit** (Sec. 360a of the Criminal Code) – in subsection 1 imprisonment of up to 1 year.
- (8) **Corrupting Morals of Youth** (Sec. 211 of the Criminal Code) – in subsection 1 imprisonment of up to 2 years.
- (9) **Corrupting Morals** (Sec. 371 of the Criminal Code) – in subsection 1 imprisonment of up to 2 years.

Due to the lack of legal regulation of „grooming” in the Slovak Republic, one of the most effective means in combat against this expanding type of criminality is effective prevention.

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<sup>100</sup> M. Vlachová.: Crime activities linked to internet criminality. E-Bezpečí. Quoted on: 29/8/2012. Available at: <http://cms.e-bezpeci.cz/content/view/226/6/lang,czech/>

It is mainly based on good and timely provision of information for teachers and students about the dangers of this web handling.<sup>101</sup>

**xvii.** Aiding and abetting (resp. help) are both subsumed, according to the Criminal Code, under participation in a crime. A person may be a participant in a completed crime, but for criminal liability preparation of a crime is also sufficient. Abettor is a person who instigated another person to commit a criminal offence.<sup>102</sup> The person, who assisted another person in committing a crime, particularly by procuring the means, removing the obstacles, providing an advice, strengthening the determination, making a promise of post crime assistance, is considered to be an aider.<sup>103</sup> Participation in any kind of intentional crime in the form of abetting however requires that the offender commits the crime, or at least tries to commit it under the influence of instruction.<sup>104</sup> Unless the Criminal Code states otherwise, the criminal liability of a participant (abettor, aider) shall be governed by the same provisions as the criminal liability of an offender.<sup>105</sup>

An attempt (to commit a crime) is a general form of crime and the offender has criminal liability for it even though he/she has not fulfilled all the elements of merits of certain crime.<sup>106</sup> Under valid Criminal Code attempted crime is punished by the same custodial penalty as the completed crime.<sup>107</sup>

## 2.6 Corporate Liability

**xviii.** In the Slovak Republic the main instrument for punishing artificial persons<sup>108</sup> (hereinafter referred to as „AP”) for unlawful acting is administrative law<sup>109</sup>. Within the administrative law we distinguish specific merits of administrative offences which can be

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<sup>101</sup> K. Kopecký: Cybergrooming – dangerous communication (study of the project E-Nebezpečí for teachers). Quoted on: 29/8/2012.

Available at: <http://www.e-nebezpeci.cz/index.php/ke-stazeni/category/4-materialy-pro-studium?download=5%3Akybergrooming-studie>

<sup>102</sup> Act no. 300/2005 Coll. as amended, Criminal Code, Sec. 21, subsection 1, paragraph b.

<sup>103</sup> Ibid, Sec. 21, subsection 1, paragraph d.

<sup>104</sup> R 62/1992

<sup>105</sup> Act no. 300/2005 Coll. as amended, Criminal Code, Sec. 21, subsection 2.

<sup>106</sup> J. Madliak et al: Substantive Criminal Law I., general part. Košice: University of Pavol Jozef Šafárik in Košice, 2010, p. 252.

<sup>107</sup> Act no. 300/2005 Coll. as amended, Criminal Code, Sec. 14, subsection 2.

<sup>108</sup> Legal provisions which deal with liability (criminal, corporate, civil) do not contain the definition of artificial person. Institute of artificial person is governed by Act no. 40/1964 Coll. as amended, Civil Code in Sec. 18 and following and Act no. 513/1991 Coll. as amended, Commercial Code, Sec. 56 and following.

<sup>109</sup> P. Potášch: Comparative perspectives of public offences. Eurokódex, Bratislava 2011, p. 248.

committed only by artificial person<sup>110</sup> and not by its employees, members and so on. Their breach of legal obligation is attributed to AP. Culpability is not an aspect of administrative offence of AP. It is sufficient that the AP has failed to make every effort to prevent the breach of legal obligation, which may be required of it and enforced. Administrative offences of AP are based on objective, absolute liability. The most common sanction for these offences is high financial fine. Some acts also provide other kinds of sanctions, such as forfeiture of a thing<sup>111</sup> or submission for suspension or dissolution of trading certificate<sup>112</sup>. Administrative offences are judged in administrative proceedings by administrative authorities (unless other acts state otherwise), while the principle of officiality applies concerning the initiation of the proceedings. AP can lead disciplinary proceedings against subordinate individuals.<sup>113</sup>

Under Sec. 6 of the Act no. 372/1990 Coll. on Offences AP can not commit an offence, since it states that *„for breach of a legal obligation imposed on a artificial person under this Act is liable a person who acts for the artificial person or should have acted, and in case of acting on a order, a person who gave the order.”*

**xix.** Attempts to introduction of criminal liability of AP go back to 2004, when the recodification of criminal law was prepared. The Government's bill regulating liability of AP, which should have established a possibility to impose punishments and protective measures as well, was not successful even after submission in 2005. Recodified Criminal Code entered into force without legal regulation of criminal liability of AP and enforcement of this regulation failed also during drafted amendments in 2006. Bill drafted by Ministry of Justice of the Slovak Republic in 2008 contained concept of „false” liability of AP, but the Government did not approved this material. In 2010 NCSR agreed with imposing quasi-criminal sanctions on AP and thus false liability of AP was brought into Slovak legal order.

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What is the reason of reluctance of Slovak law to accept criminal liability of AP? Frequent objection is that AP do not have their own will and without the will guilt can not exist, and

<sup>110</sup> Natural persons – entrepreneurs are treated in this group of offences the same way as artificial persons.

<sup>111</sup> Act no. 543/2002 Coll. on Protection of Nature and Landscape, as amended.

<sup>112</sup> Act no. 530/2011 Coll. on Excise Duty on Alcoholic Beverages, as amended.

<sup>113</sup> E.g. in case of violation of internal regulations.

<sup>114</sup> J. Zahora: Imposing penal sanctions on legal entities in the Slovak Republic. *Kriminalistika : čtvrtletník pro kriminalistickou teorii a praxi*, Vol. 43, no. 4, 2010, p. 291-298.

without the guilt there is no criminal liability. It was further pointed out that the concept of punishment is incompatible, which in addition of the purpose of protection also contains an element of retribution. Punishment of AP sanctions also innocent members (e.g. employees) of the AP. Violation of the principle *ne bis in idem* was also criticized, since, in accordance with administrative law, the imposition of fine does not effect criminal liability of AP or its employees. Furthermore, there are concerns that criminal liability of AP will be abused to discredit competitive AP.<sup>115</sup> Therefore, the legal regulation of criminal liability of AP was result of implementation of recommendations of international community or groupings of states (the European Union, OECD, the Council of Europe), rather than result of natural development of domestic law, which recognizes the principle *societas deliquere non potest*. There was particular requirement to recognize judgements of criminal nature of foreign authorities in matters of monetary penalties and forfeiture of property of AP by the authorities of the Slovak Republic. By not imposing criminal liability of AP an unreasonable disproportion would arise, resulting in the fact that execution of sanctions of criminal nature against AP could only take place if it was imposed by foreign authority. This justified the need to introduce execution of sanctions of criminal nature against AP not only by foreign, but also by Slovak authorities.

The Act no. 224/2010 Coll. introduces false criminal liability of AP. As of 1/9/2010, when an amendment of the Criminal Code entered into force, it is possible to sanction AP by instruments of criminal law, but not by direct punishments, only by protective measures. Particular natural person can be prosecuted as an individual person, e. g. employee of AP, if culpability is proved. Even though the liability of AP is applicable, during criminal proceedings the culpability of natural person is also investigated.

Despite the fact that the Slovak Republic is bound by several international regulations which establish wider scale of sanctions against AP (such as injunction of judicial supervision, judicial order to liquidation), the Criminal Code provides only two protective measures - seizure of monetary sum (Sec. 83a) and seizure of property (Sec. 83). Explanatory report does not exclude introduction of other protective measures depending on practice and further development of the legislation.

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<sup>115</sup> E.g. E. Burda: Why is criminal liability of artificial persons frightening? In *Dny práva – 2008*. Masarykova univerzita, Brno, 2008, p. 1683-1688.



**A. *Seizure of Monetary Sum.*** Seizure of monetary sum is facultative protective measure. The court can impose it on AP, if the crime was committed in accordance with:

- exercising the right to represent this AP;
- exercising the right to adopt decisions on behalf of this AP;
- exercising the right to exercise control within this AP or
- with neglect of oversight or due care in this AP.

The Act does not distinguish between exercising of the right (or more precisely between neglect of oversight) by persons with authority to act and common employees. However, the explanatory report conditions prosecutor's motion to impose protective measure upon finding, that: *„the supervision and control authorities neglected the supervision and control and consequently crime was committed by persons subordinated to artificial person or the authorities (fulfilling representing, decision and control tasks) committed the crime.“*

An attempt to commit a crime or participation in a crime is sufficient for imposition of protective measure. Artificial persons with bankruptcy immunity are excluded from the seizure of monetary sum and also cases, in which by the execution of protective measure the property of state or the European Union, foreign state's body or international organisation of public law would be affected. Furthermore, it is not possible to impose it in the event of expiration of criminality of offence by statute of limitations or as a result of effective regret.

The amount of seized monetary sum can range from 800 Euro to 1 660 000 Euro. To determine the amount, the court takes into account the severity of committed crime, the scope of the crime, obtained profit, caused damage, circumstances of commitment of the crime and consequences for artificial person.

**B. *Seizure of Property.*** The seizure of property is imposed by the court in connection with the same crimes as in the event of seizure of monetary sum. However, the condition is that AP acquired the property (or a part of it) by committing the crime or that AP gained income from criminal activity. Unlike the seizure of the monetary sum, which is imposed by the court facultatively, seizure of property is imposed obligatory. For imposition of seizure of property, attempt to commit a crime or participation in a crime, which is defined in Sec. 58, subsection 2, of the Criminal Code, is sufficient. This applies e.g. to the crime of manufacturing of child pornography, the crime of trafficking in children and other.

The same rules apply in the event of seizure of property as in the event of seizure of monetary sum, but the law extends the impossibility to impose the seizure of the property for liberation reasons. If it is possible to ensure the protection of the society without the seizure of AP's property, the court does not impose the seizure of the property, with respect to severity of committed crime, the scope of the crime, obtained profit, caused damage, circumstances of commitment of the crime, consequences for AP or other important public interest. In this case however, the court imposes a protective measure of seizure of monetary sum to AP. Important public interest as liberation reason is according to the explanatory report appropriate in cases when the imposition and execution of protective measure of seizure of property could cause the liquidation of substantial amount of jobs etc.

**C. Imposition of Protective Measures on Artificial Persons.** Prosecutor can file a motion for imposition of protective measure by seizure of monetary sum or by seizure of property within the indictment or separately<sup>116</sup>, because the liability of AP should not be connected with determination of liability of natural person<sup>117</sup>. The court is not bound by prosecutor's motion, concerning the type of protective measure and the amount of monetary sum. The Code of Criminal Procedure enables to impose the seizure of monetary sum and seizure of property also without the prosecutor's motion (Sec. 289, subsection 1 of the Code of Criminal Procedure).

The seizure of monetary sum and seizure of the property can not be imposed simultaneously. Paid or recovered monetary sum or seized property fall to state, if the court does not decide otherwise, on the basis of announced international treaty, by which the Slovak Republic is bound.<sup>118</sup> In the event of merger, fusion or split of the AP, the court imposes the seizure of monetary sum or seizure of property to legal successor of AP that ceased to exist.

As the Slovak Republic chose the path of an indirect criminal liability, AP does not have the status of person charged with a crime, but it has „weaker” status of person involved<sup>119</sup>,

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<sup>116</sup> Act no. 301/2005 Coll. as amended, Code of Criminal Procedure, Sec. 236.

<sup>117</sup> Explanatory report to Act no. 224/2010 Coll., which amends the Act No. 300/2005 Coll. Criminal Code as amended, p. 5.

<sup>118</sup> e.g. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on the Financing of Terrorism,

<sup>119</sup> J. Zahora: Imposing penal sanctions on legal entities in the Slovak Republic. *Kriminalistika : čtvrtletník pro kriminalistickou teorii a praxi*, Vol. 43, no. 4, 2010, p. 291-298.

however this shortcoming was compensated by extension of rights given to the involved person in criminal proceeding<sup>120</sup>.

Current regulation of indirect criminal liability of companies is met with sceptical views of most of the authors. It is considered to be a „half solution, which had to primarily satisfy the obligations of the Slovak Republic resulting from international conventions, while the result is in practice hardly applicable regulation.”<sup>121</sup>

**xx.** The Civil Code states, in its general liability clause, that everyone, including artificial persons, is liable for damage caused by breach of legal obligation. Culpable conduct of AP is culpable conduct of its statutory bodies, legal representatives, employees or members and other persons, who followed instructions of AP and were entitled to act on its behalf (e.g. based on authorization). These people may have caused the damage, but AP is liable. Liability of employee is, according to labour regulations, not affected, and the employer may apply employment sanction against him.<sup>122</sup> AP has the opportunity to prove lack of culpability on the part of its employees or members and thus exempt itself from liability for damages caused.

Prequisitions for AP's liability are:

- a) damage caused illegally by those used by AP in its activity, resp. chosen to carry out its activity (*culpa in eligendo*);
- b) the fact that the damage occurred in AP's activity. Within the framework of AP's activities is job performance, fulfilment of tasks relating to employment, operations directly related to it, as well as other activities with local, temporal and material relation to AP's activities.

The provision concerning general liability for damage caused may be used for accountability *ex contractu* as well as *ex delicto*, if particular case of damage caused is not covered by any other provision of the Civil Code on damages, which states specific conditions for liability for

<sup>120</sup> Mainly the right to comment on all facts and evidence, on which the motion for imposition of protective measure is based on.

<sup>121</sup> M. Suchý: Model of corporate culture as a promising model for solving the criminal liability of artificial persons. Created on 4/3/2012. Quoted on: 29/8/2012.

Available at: [http://www.ucps.sk/clanok-133-](http://www.ucps.sk/clanok-133-1826/Model_korporatnej_kultury_ako_perspektivny_model_riesenia_trestnopravnej_zodpovednosti_pravnickych_osob.html)

1826/Model\_korporatnej\_kultury\_ako\_perspektivny\_model\_riesenia\_trestnopravnej\_zodpovednosti\_pravnickych\_osob.html

<sup>122</sup> Act no. 311/2011 Coll. as amended, Labour Code, Sec. 179 subsection 1: „The employee is liable to the employer for damage that he caused by culpable breach of an obligation during work performance or in direct connection with it.”

damage caused (Sec. 421 and following) or if liability for damage caused is not specifically governed by other Act.

## 2.7 Aggravating Circumstances

**xxi.** When assessing aggravating circumstances according to the Criminal Code, it is necessary to differentiate between aggravating circumstances in Sec. 37 and qualified merits of individual crimes, for which there is higher custodial penalty.

Sec. 37 contains 13 circumstances, which are considered to be aggravating:

- a) the offender has committed the crime due to a particularly despicable reason,
- b) the offender has committed the crime as a retaliation against another person who, in dealing with the offender, fulfilled his obligations prescribed by law or another generally binding legal regulation, in particular against a pedagogic employee or technical employee,**
- c) the offender has committed the crime to prevent or obstruct the exercise of another person's fundamental rights and freedoms, or to facilitate or cover up another crime,
- d) the offender has committed the crime during a natural disaster or another extreme event seriously endangering the life or health of people, other fundamental rights and freedoms, constitutional system, property, public order or morality,
- e) the offender has abused his employment, occupation, function or position to obtain unlawful or disproportionate advantage,**
- f) the offender has committed the crime publicly,
- g) the offender has committed the crime in a place, which enjoys special protection under a generally binding legal regulation, in particular in the house or flat of another person,
- h) the offender has committed several crimes,
- i) the offender has used a person, who is not criminally liable to commit the crime,**
- j) the offender has lured a juvenile to commit the crime,**
- k) the offender has committed the crime as its organiser,
- l) the offender has committed the crime in association with foreign authority or foreign official, or

m) the offender was already convicted of a crime; the court, considering the nature of previous conviction, may decide not to consider it as an aggravating circumstance.

The significance of such legislation lies in the obligation „*of the court to take into account, when determining the sentence, the rate and degree of severity of mitigating and aggravating circumstances.*”<sup>123</sup> Therefore, these circumstances are assessed when the sentence is determined. In situations where aggravating circumstances outweigh the mitigating circumstances, minimum sentence increases by one-third, in cases when mitigating circumstances outweigh aggravating circumstances, maximum sentence is reduced by one-third.<sup>124</sup> In cases of individual crimes the situation is dealt with by qualified merits, where more serious manner of action or result of the crime is reflected and custodial penalty is appropriately increased.

A. **Sexual Abuse.** Merits of the crime of sexual abuse is defined in subsection 1 of Sec. 201 of Criminal Code as follows: „*Any person who has coitus with a person under 15 years of age, or who subjects such person to other sexual abuse.*” Following subsections define qualified merits for which higher custodial penalty is imposed.

First qualified merits in the case of sexual abuse are, when the crime was committed in a more serious manner; on a protected person or with a specific motive. Individual circumstances which may be regarded as acting in a more serious manner can be divided into 3 categories:

1. circumstances, which ease the perpetration of crime – e.g. use of weapon; housebreaking; or deception;
2. those that harm injured party in a greater degree – e.g. for a longer period of time or in an agonizing manner;
3. those that increase seriousness of the act – e.g. use of violence, threat of imminent violence or the threat of other grievous harm; taking advantage of distress, other persons inexperience, dependency or subordination or breaching of important duty prescribed by the law concerning offender's employment; position or function, or imposed on the offender by law, organised group, on several persons.<sup>125</sup>

<sup>123</sup> D. Mašpányová et al.: Substantive criminal law. Plzeň: Aleš Čenek, s.r.o., 2011, p. 168.

<sup>124</sup> Ibid.

<sup>125</sup> J. Ivor et al.: Substantive Criminal Law, special part. Bratislava: Iura edition, 2010, p. 11.

Definition of the term **protected persons** is a sum of persons which are provided with increased protection with regard to their social status or increased vulnerability. According to Sec. 139 of Criminal Code, child is included. **Specific motive** of perpetrator is described in Sec. 140 of Criminal Code. It includes cases when crime was committed as a felony for hire; as a form of revenge; with the intention to facilitate or cover up another crime; with intention to commit the crime of terrorism; because of national, ethnic or racial hate; with intention to publicly incite violence or hatred against group of persons or an individual for their affiliation to race, nation, nationality, colour of skin, ethnic group, family origin or religion if it constitutes a pretext for threatening on the aforementioned grounds or of sexual motive. Within the sexual motive „*the motion to commit the crime is in this case sexual satisfaction or sexual excitement.*”<sup>126</sup> However, in the case of here listed crimes sexual motive is not viewed as a special sort of motive since it is implied in the definition of these crimes.

Second qualified merits are applied if by committing of a grievous bodily harm was caused, and the last case, for which custodial penalty of 15 to 20 years is imposed is, if death of a person was caused by sexual abuse or if this crime was committed during emergency situation.

Basic merits of Sec. 202 protect a person under 18 years of age, which was incited to extramarital coitus or otherwise sexually abused by the perpetrator for reward or, if such a person has been placed under his care or custody or has been dependent on him. Acting in a more serious manner is if the crime was committed against a person under 18 years of age who was forced to such, due to obedience, pressure or threat.

B. **Child prostitution.** It is based on Sec. 367 - procuring and soliciting prostitution. Grounds that form qualified merits, and constitute increase of custodial penalty, can be divided into the following:

- 1) first ground is based on acting in a more serious manner, whereby the same individual circumstances are applied as in the case of sexual abuse;
- 2) second ground is if the crime was committed against a protected person;

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<sup>126</sup> Ibid. p. 25

- 3) third ground, providing the perpetrator obtains substantial benefit for himself or another; or as a member of dangerous grouping; or against a person under 15 years of age;
- 4) fourth ground - in case grievous bodily harm or death was caused.

C. ***Child pornography.*** In the case of *production* of child pornography following grounds constitute increase of custodial penalty:<sup>127</sup>

- a) act was committed against a child under 12 years of age; acting in a serious manner; or in public;
- b) perpetrator causes grievous bodily harm or death; or obtains substantial benefit by his actions;
- c) perpetrator causes grievous bodily harm or death to several persons; obtains large-scale benefit; or acts as a member of dangerous grouping.

In case of *distribution* of child pornography legal regulation is similar:

- a) act is committed in more serious manner; or in public;
- b) perpetrator obtains substantial benefit;
- c) perpetrator obtains large-scale benefit.

In case of *possession* of child pornography only basic merits of crime are applied.

D. ***Sexual corruption.*** Slovak criminal law lacks definition of a separate crime that would punish efforts to either meet a child with the intention of sexual intercourse via the Internet (online sexual corruption) or the crime of creating emotional relationship with a child with intention to lessen his/her restraints and allure the child to sexual contact or other related crimes (sexual grooming). In this case Sec. 211 of Criminal Code, whose merits concern corruption of morals of youth, could be used. According to subsection 1, any person who entices a person younger than 18 years of age to leading a lewd or immoral life (paragraph a); enables such a person to lead a lewd or immoral life (paragraph b) and other, may be punished. Aggravating circumstance in this crime is if it was committed with specific motive or in a more serious manner.

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<sup>127</sup> Grounds are categorised in relation to custodial penalty that can be imposed.

## 2.8 Sanctions and Measures

### xxii. - xxiii.

#### 1. Sexual Abuse, Child Pornography, Child Prostitution and Sexual Corruption

A. **Sexual Abuse.** Within the framework of *basic* merits as amended in subsection 1, Sec. 201 of the Criminal Code, it is possible to impose penalty of imprisonment of 3 to 10 years. In case of the *qualified* merits which are applicable if the act is committed in more serious manner, with a specific motive or on a protected person, where, according to Sec. 139 of the Criminal Code children, dependent person (family) or close person belong, it is possible to impose imprisonment sentence of 7 to 12 years. Perpetrator is subject to the imprisonment of 12 to 15 years if he causes grievous bodily harm, and the highest possible custodial penalty is in the range of 15 to 20 years if the crime was committed in an emergency situation or death of the victim was caused.

According to the *basic* merits of Sec. 202, if a person under 18 years of age was incited to extramarital coitus for reward or by a person who supervises that person or takes care of her in other way, the imprisonment sentence of 1 to 5 years may be imposed. Within the framework of the *qualified* merits, that is, when the act was committed on a person younger than 18 years, who was forced to allow such acts out of obedience, pressure or due to the threat, the sentence of imprisonment is increased to 2 to 8 years.

B. **Child Prostitution.** Child prostitution is partially dealt with in Sec. 367 of the Criminal Code. Similarly, in case the crime is committed against a child, within the meaning of the Criminal Code on a protected person, the custodial penalty is increased to 3 to 10 years (originally 3 years) of imprisonment. In three specific cases the custodial penalty increases to 7 to 12 years, and that is if by the act a substantial benefit was obtained, if the act was committed by a member of a dangerous grouping or against a person younger than 15 years of age. If the act leads to the death of the victim, or grievous bodily harm, custodial penalty of 10 to 15 years is imposed.

C. **Child Pornography.** Concerning child pornography, the length of the imprisonment is related to individual stages, in which the perpetrator is involved. Specifically: manufacturing, dissemination, possession of child pornography and corrupting morals.

#### *I. Manufacturing (Sec. 368):*

- 4 - 10 years (basic merits);



- 7 to 12 years (committed on a child younger than 12 years, publicly or in a more serious manner);
- 10 to 15 years (if the perpetrator causes grievous bodily harm or death; gains substantial benefit);
- 12 to 20 years (if the perpetrator causes grievous bodily harm or death to more persons; gains a large-scale benefit; as a member of a dangerous grouping).

*II. Dissemination (Sec. 369):*

- 1 to 5 years (basic penalty, which applies if someone disseminates, transports, procures or enables access to child pornography);
- 3 to 8 years (if the crime is committed publicly or in a more serious manner);
- 4 to 10 years (if the perpetrator gains a substantial benefit);
- 7 to 12 years (if the perpetrator gains a large-scale benefit).

*III. Possession (Sec. 370):*

- up to 2 years.

*IV. Corrupting Morals (Sec. 371):*

- up to 2 years (basic merits);
- 1 to 5 years (in case of the crime committed publicly or in a more serious manner);
- 3 to 8 years (if the perpetrator gains a substantial benefit).

*V. Endangering of morality (Sec. 372):*

- up to 2 years (a person, who offers, leaves or sells to a person younger than 18 years or at a location available to such persons);
- 1 to 5 years (if the crime is committed publicly or in a more serious manner);
- 3 to 8 years (if the perpetrator gains a substantial benefit for himself or for another, or if the pornography displays disrespect to a human being and violence, or when sexual intercourse with animal or other sexual pathological practices are displayed).

D. **Sexual Corruption.** In contrast to other legal orders, the Slovak Criminal Code does not contain a crime that persecutes a sole attempt to contact a child with the aim to sexually abuse or to have sexual intercourse. In case of Sec. 211- corrupting morals of youth,

the court can impose a penalty of imprisonment up to 2 years. Within the framework of *qualified* merits (a more serious manner of acting, specific motive), the length of the imprisonment can range from 6 months to 5 years.

In cases of the above mentioned crimes, the sanctions may be considered sufficient and fulfilling the purpose of sanctions as such. In the Directive 2011/93/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, which replaces Council Framework Decision 2004/68/JHA, it is stated:

„In particular, the level of criminal penalties should be increased so that they are proportionate, effective and dissuasive. To determine the degree of seriousness and attach penalties proportionate to it, consideration is given to different factors which may intervene in very different sorts of offences, like the degree of harm to the victim, the level of culpability of the offender and the level of risk posed to society.”<sup>128</sup>

In Slovakia, sanctions are amended using the indicated method, having regard to all the factors increasing the severity of the act and the impact on the victims or the society, within the meaning of Sec. 34, subsection 4, of the Criminal Code:

„When determining the type and the degree of the penalty, the court shall consider in particular the manner in which the act was committed and its consequence, culpability, motive, aggravating circumstances, mitigating circumstances and the offender, his/her personal situation and rehabilitation potential.”

According to the opinion of several prosecutors who deal with the present topic, the criminal sanctions as established by the Criminal Code are sufficient, and in some cases even excessively severe. Sanctions gradually increase, depending on the severity of the act of the perpetrator, or depending on the impact of such act (death, health condition) and the court has enough space to impose sanctions that reflect the person and the act accordingly (e.g. in case of sexual abuse under the basic merits 3 to 10 years; under qualified merits 7 to 12 years; if the perpetrator caused death 15 to 20 years, etc.).

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<sup>128</sup> Quoted on: 15/10/2012.

Available at:

<http://www.google.sk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCsQFjAB&url=http%3A%2F%2Fwww.europarl.europa.eu%2Foeil%2Fpopups%2Fprintficheglobal.pdf%3Fid%3D584949%26l%3Den&ei=BxyUUJ7DNNDMtAaXnoHwBA&usg=AFQjCNEycO-1HD7BRjqRH9VAjHqWxosjiQ>

## 2. Extradition

The main source of law governing extradition is the Code of Criminal Procedure (Sec. 489 - Sec. 514). Extradition procedure can be divided into three main categories: requesting extradition of the person from abroad, extradition to abroad and simplified extradition proceedings.

A. The Ministry of Justice of the Slovak Republic may ***request extradition*** of an accused person from abroad in accordance with Sec. 489, subsection 1, at the request of the court that issued the warrant of arrest. The condition for commencement of this procedure is issuing of the warrant of arrest - the international warrant of arrest that may be issued for the purpose of criminal prosecution or execution of imprisonment.

The situations in which the court shall not issue an international warrant of arrest are: if it anticipates imposition of sentence other than unsuspended sentence of imprisonment, if it anticipates imposition of unsuspended sentence of imprisonment shorter than four months, if the prison sentence or its remainder to be enforced is shorter than four months, if by extradition the Slovak Republic would incur expenses or suffer consequences disproportionate to the public interest or if the extradition of the person concerned shall cause this person a detriment disproportionate to the significance of criminal proceeding or to the consequences of crime, mainly by taking into account the age, social status or family circumstances of the said person.<sup>129</sup>

If the matter is urgent, there is the possibility to request foreign authorities for provisional arrest of the accused. The actual physical takeover of the person is performed by the Department of Police that shall hand over the person to the court that issued the international warrant of arrest without postponement.<sup>130</sup> Judge is obliged to interrogate the accused within 48 hours of handover and in particularly serious cases within 72 hours and decide on custody.

B. The acceptance of ***requests from foreign authorities to extradite*** a person from the Slovak Republic appertains to the Ministry of Justice of the Slovak Republic. During extradition several principles are applied e.g. the principle of dual criminality under which the extradition is admissible if the act is also punishable under law of the Slovak Republic

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<sup>129</sup> Act no. 301/2005 Coll. as amended, Code of Criminal Procedure, Sec. 492.

<sup>130</sup> J. Ivor at al.: Criminal Procedural Law. Bratislava: Iura edition, 2010, p. 861.

and the maximum sentence is at least 1 year (Sec. 499, subsection 1 of the Code of Criminal Procedure). In case of already imposed sentence or its remainder, this has to be longer than four months (Sec. 499, subsection 2 of the Code of Criminal Procedure).

Cases in which the extradition is unacceptable are defined by Sec. 501 of the Code of Criminal Procedure as follows:

- if the person involved is the citizen of the Slovak Republic, unless the obligation to extradite own nationals is established by law, international treaty or a decision of an international organization, by which the Slovak Republic is bound (regarding e.g. extradition to the International Criminal Court or the specific provisions of the European warrant of arrest, which was implemented in the EU Member States),

- if the person involved requested asylum in the Slovak Republic, or if they were granted asylum or subsidiary protection within the scope of protection granted to such person by a special regulation or international treaty; this does not apply if the person involved has repeatedly requested asylum in the Slovak Republic and if such request has been lawfully decided upon,

- if the criminal prosecution or execution of imprisonment are, according to the Slovak legal order, barred,

- if the offence for which the extradition is requested is considered a crime only under the law of the requesting state and not under the law of the Slovak Republic,

- if the crime for which the extradition is requested has political or military nature,

- if the crime was committed in the territory of the Slovak Republic, unless, due to the specific circumstances of the commission of the offence, priority shall be given to the criminal prosecution in the requesting State, for reasons of establishment of the facts, the degree of punishment or the enforcement of the sentence,

- if the person has already been lawfully convicted or acquitted of the offence for which the extradition is requested by the Slovak court, or

- if the person requested to be extradited was not criminally liable for the offence at the time of its commission, or if there are other reasons excluding their criminal liability.

Extradition procedure itself is divided into three stages: preliminary investigation by the regional prosecutor, the decision of the Regional Court on the admissibility of the extradition and the decision of the Minister of Justice on granting permission for extradition.

In the event that the Minister of Justice refuses to grant permission for extradition, criminal prosecution continues under the law of the Slovak Republic.

B. The legal basis for the *simplified extradition proceedings* is Sec. 503 of the Code of Criminal Procedure. The condition for its application is the consent of the requested person. The prosecutor shall take minutes of the consent and after the preliminary investigation proposal for taking the said person into custody for extradition shall be submitted to the court.<sup>131</sup>

The abovementioned information relate to the international warrant of arrest and international law as such. As the Slovak Republic is the member state of the European Union, legislation governing the European warrant of arrest cannot be ignored. The source of law here is the Act no. 154/2010 Coll. on the European Arrest Warrant. „*In practical terms, the competent judicial authority in any member state of The European Union shall issue the European arrest warrant, and subsequently the executive departments of the police in said member states shall ensure actions aiming towards the detection of a person.*”<sup>132</sup> After detection and seizure of a person the competent judicial authorities of the particular states decide whether the person shall or shall not be extradited for the criminal prosecution to the country that has issued the warrant. Statistics on the use of this tool are available on the website of the Ministry of Interior of the Slovak Republic.<sup>133</sup>

**xxiv.** The Criminal Code regulates indirect liability of artificial persons, the subject of which is the introduction of quasi-criminal sanctions - protective measures, seizure of monetary sum and seizure of property (Sec. 33 f, g), but no longer a collective criminal liability.

There is positive and negative determination of the possibility to impose *seizure of a monetary sum* in the Act. Positive determination lies in the possibility to impose this kind of protective measure if the participation in crime is in connection with the exercise of the right to represent the AP; to make decisions on its behalf; to carry out the control within the AP or in relation to negligence concerning supervision or due diligence within it. Negative definition lies in the inability to impose this type of protective measures on AP whose conditions cannot be arranged under the Act no. 7/2005 Coll. on Bankruptcy and

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<sup>131</sup> J. Ivor at al.: Criminal Procedural Law. Bratislava: Iura edition, 2010, p. 865.

<sup>132</sup> Quoted on: 18/8/2012.

Available at: <http://www.minv.sk/?EZR>

<sup>133</sup> Ibid.

Restructuring as amended. In comparison to the seizure of a property it is to be noted that in this case the court has an option to impose such a measure, it is not a duty, but in the case of seizure of property under Sec. 83b, there is an obligation to impose it in exhaustively illustrated crimes.

Positive determination of *seizure of a property* is defined similarly. Protective measures may be imposed, if there is participation in crime in connection with exercising of the right to represent AP; to make decisions on its behalf; to carry out the control within the AP or in relation to negligence concerning supervision or due diligence within it and also the crime committed, is established in Sec. 58, subsection 2 or 3; however, it is important to note, that this **includes the crimes of procuring and soliciting prostitution according to Sec. 367subsection 3, the crime of manufacturing of child pornography under Sec. 368, dissemination of child pornography under Sec. 369, the crime of corrupting morals according to Sec. 372subsection 2 or 3.** Unlike the previous case, seizure of property cannot be imposed on an AP whose situation cannot be arranged under the Act on Bankruptcy and Restructuring. Further, the court is not obliged to impose the measure of seizure of property in the case if the protection of society (with regard to the seriousness, extent of the offence, gained benefit, caused damage, circumstances) can be ensured even without imposing the measure. In such a case, the court shall impose the protective measure of seizure of monetary sum on the AP. The Slovak Republic shall become the owner of the seized monetary sum or property.

**xxv.** *Seizure of an item* is legal institute known to Slovak legal order, which empowers a member of Police Force of the Slovak Republic and Customs Officer of the Slovak Republic to seize an item. The procedure is regulated in particular legal acts, e.g. Sec. 21 of Act no. 171/1993 Coll. on the Police Force:

„Police officer is authorized to seize an item to carry out necessary actions if he suspects the item is related to the commission of a crime or minor offence and the seizure of item is necessary for investigation of facts of the case or in criminal proceedings for the decision of law enforcement agencies or for decision in proceedings concerning minor offence; or the item is in search for by police of a foreign state.”

After seizure of an item, police issues written acknowledgement with item description to the person from which the item was withheld without delay. Seizure may last maximum 90 days. If ascertained that the item may be related to a commissioned crime, member of Police Force is obliged to hand over the seized item without delay to competent law enforcement

agency or to competent public authority to decide on the minor offence. Temporary safekeeping of the item is provided by competent policeman or prosecutor.<sup>134</sup>

When the *item* is no more required for the needs of criminal proceedings, it is *returned* pursuant to Sec. 97 and Sec. 98 of the Code of Criminal Procedure. According to Sec. 97, if the item „*is not needed for additional proceedings and if it cannot be forfeited or confiscated, the item shall be returned to person who gave it or from whom it was taken or to person whom it was seized from pursuant to special act.*” If another person claims a property right to the item, it is returned to its proper owner or to a person, which has undeniable property right to that item (lien by operation of law). If there are doubts about the right of this person, the said person is referred with their claim to civil judicial proceedings. If the item decays quickly, it can be sold and obtained sum will be subject of custody.

According to Sec. 98 of the Code of Criminal Procedure: „*If the accused has given an item or had been deprived of an item that was or might have been obtained in crime, or was used to commit a crime, and it is not known to whom it belongs or whereabouts of the aggrieved party are unknown, the description of the item is publicly declared.*” Basically, it deals with situations when seized, withdrawn items were obtained in crime and are owned by another person. The public notice shall be made in a way that ensures the most effective finding of the aggrieved party, who can apply within 6 months. Item is returned back to the person accused upon their request if it was not acquired in crime and if no claim was submitted pursuant to issued public notice. Item of insignificant value or without a value can be destroyed.

Pursuant to Sec. 60 of the Criminal Code there is a possibility to impose the sanction of forfeiture of assets. Penalty can be imposed in case of 4 events: item was used for commission of crime; was designated for commission of crime; was obtained by means of crime or as a reward for commission of a crime; or in case item was acquired in exchange for another item acquired by means of crime. If item cannot be identified or is inaccessible, the court may impose forfeiture of item of similar value. The term item includes proceeds of crime and this sanction may be imposed only on item owned by the perpetrator. The owner of the item is in most cases state, if international treaty does not provide otherwise.

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<sup>134</sup> J. Ivor et al.: Criminal Procedural Law. Bratislava: Iura edition, 2010, p. 360.

Protection of *bona fide third parties* is not directly stipulated in Acts., however with regard to comprehensive legal regulation, e.g. in the case of return of an item or penalty of forfeiture of assets, rights of third parties in general are not breached since after the end of investigation the item is returned to its owner, and in case the person is not the owner, public authority tries to find its owner. In the event that person is aggrieved by obtaining an item from perpetrator, they can claim damages in civil judicial proceedings. Particular provisions regulating seizure of items (Sec. 83 of Criminal Code – protective measures) and penalty of forfeiture of item (Sec. 60 of the Criminal Code – as an imposed penalty) strictly define cases allowing for indefinite seizure of item:

A. **Penalty of forfeiture of item** affects perpetrator of crime (items obtained by means of theft cannot be subject to this penalty due to lack of ownership of perpetrator) in these events: item was used or designated to commission of a crime; item has been acquired through crime or as a reward for commission of a crime; or in the event the item concerned was obtained in exchange for items obtained in relation to crimes as listed above.

B. **Seizure of item** may be imposed in five cases (Sec. 83, subsection 1 of the Criminal code) if concerned property falls under category of property eligible for forfeiture (subsection 1 of Sec. 60 of the Criminal Code, in exact terms: „*The Court shall impose seizure of item if penalty of forfeiture of item pursuant to subsection 1 of Sec. 60 has not been imposed.*”):

1. if item belongs to a person who cannot be prosecuted or sentenced,
2. if item belongs to perpetrator whose punishment has been waived; or to perpetrator whose criminal prosecution has been stopped; or to the perpetrator whose prosecution was conditionally stopped, or the perpetrator whose prosecution was stopped due to the conclusion of a conciliation agreement,
3. it consists of goods that are not marked with control stamps or goods that were not subjected to other technical control measures required by generally binding legal acts for taxation purposes,
4. the circumstances of the case justify the presumption that the item could be used as a financial source for terrorism,
5. it is necessary with regard to the security of people or property or other similar general interests.



In cases 3 to 5, the item can be confiscated from whomever, not only from the perpetrator. The owner of the item is state, if international treaty does not provide otherwise.<sup>135</sup>

#### 5. Crimes Committed within Family

In Sec. 203 of the Criminal Code, specific crime, which punishes sexual intercourse between relatives, is regulated. Commission of voluntary sexual intercourse is the only case falling under these merits.<sup>136</sup> In case of intercourse with a relative in direct line, the person may be punished by imprisonment up to 2 years. If the victim is a protected person, which includes a child, the sentence of imprisonment of 1 to 5 years may be imposed.

A. ***Sexual Abuse***. In the case of sexual abuse of persons under 15 years, the State provides increased custodial penalty if the crime is committed within the family. The basic custodial penalty for the offence under Sec. 201 subsection 1 of the Criminal Code is 3 to 10 years. If it is an offence committed against a protected person, which also includes close person (e.g. a relative in direct line as well as adoptive parent), the custodial penalty shall increase to 7 to 12 years of imprisonment. It is similar in Sec. 202, which already protects persons under 18 years of age.

B. ***Child prostitution***. Also in the case of the crime of child prostitution, the legislator increased custodial penalty if the crime was committed within family or among close persons. Pursuant to Sec. 367, which regulates the crime of procuring and soliciting prostitution, the basic custodial penalty is maximum up to 3 years. If the crime was committed against a protected person (child, dependent person, close person), the custodial penalty increases to 3 to 10 years. Regarding a person less than 15 years, according to subsection 4, the custodial penalty ranges from 7 to 12 years.

C. ***Child pornography***. In the case of manufacturing of child pornography, the legislator does not distinguish whether a child is in a family relationship to the offender or not, but generally provides protection to children. The higher custodial penalty, of 7 to 12 years, is used if the offence was committed against a child who is under 12 years. Even in dissemination and possession of child pornography and corrupting morals, it is not distinguished in what relationship respective persons are.

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<sup>135</sup> J. Ivor et al.: Substantive Criminal Law, general part. Bratislava: Iura edition, 2010, p. 460.

<sup>136</sup> J. Ivor et al.: Substantive Criminal Law, special part. Bratislava: Iura edition, 2010, p. 115.

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

i. After a crime is reported, the evidence is collected to confirm or disprove the facts stated in the complaint. If there is a suspicion that the crime was committed, (for example if the child carries physical signs of violence), suspect's personal freedom may be restricted and the evidence is executed. It includes e.g. body examination, which is regulated by Sec. 155 of the Code of Criminal Procedure. Everyone has to be subject to body examination, if it is necessary to find the traces or consequences of the crime. If the examination is not done by a doctor, it can only be done by a person of the same sex.

If the child carries physical signs of the violence, e.g. scratches or bruises, they are photographically documented. If there is evidence suggesting that a person has committed a crime, proposal to file motion for custody is submitted to District Prosecutor's Office. In case the accused person is not taken into custody, the judge can decide, for preliminary proceeding, on appropriate restrictions (e.g. prohibition to approach the victim) pursuant to Sec. 80 of the Code of Criminal Procedure.<sup>137</sup>

Protective measures include e.g. providing welfare officer and child psychologist who will provide assistance to the child and child's parents. If the parent is the abuser, the other parent is informed about possibility to apply to the court for preliminary measure to prohibit contact with the child.<sup>138</sup> The Police can prevent the contact of the suspect with the child, only by placing the suspect to preliminary detention, together with filing motion for their prosecution in custody, however the presumption of innocence must be implemented.<sup>139</sup>

If possible, in case of interrogation of a minor, the Police Force uses rooms specially adapted for it.<sup>140</sup>

In practice, NGOs are repeatedly confronted with situations, where, in order to solve cases as soon as possible, the opinions of children are considered marginal, or not considered at all. Statement of the child is not considered to be sufficiently credible, it is attributed as

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<sup>137</sup> The court may decide similarly if conditional sentence of imprisonment was imposed on the perpetrator.

<sup>138</sup> The proposal may be submitted by anyone in accordance with Act no. 40/1964 Coll. as amended, Civil Code.

<sup>139</sup> Information was provided by cpt. Mgr. Pavol Karnas (member of Police Force in Trnava).

<sup>140</sup> One is e.g. in the District Directorate of Police Force Bratislava IV.

prone to exaggerate the facts and its testimony is disputed. Also, problems arise in cooperation of departments, e.g. one case is investigated by several of them, but they are not connected and all have different regulations and procedures.<sup>141</sup>

ii. There are no special units that investigate the crimes of sexual abuse and sexual exploitation of children. In each District Directorate of Police Force there are investigators in the Department of the Criminal Police who, among other crimes, investigate crimes in this field. They are methodically managed by the Presidium of Police Force which at the same time gives them evidence received from abroad or criminal complaints. In each District Directorate of Police Force, two criminalists are in charge with searching for criminal activity in the area of child pornography. However, they also have other responsibilities, what may adversely affect their ability to submit the motions. Even at the Presidium of Police Force there is no specialized division focused on investigation of sexual abuse and sexual exploitation of children.

According to Sec. 113 of the Code of Criminal Procedure, secret tracking of person or thing can be allowed during criminal proceeding on intentional crime, if it can be reasonably assumed, that such tracking will detect facts relevant to criminal proceeding. Details are regulated by following subsections of Sec. 113. The law also allows the use of an agent. According to Sec. 10, subsection 20 of the Code of Criminal Procedure this person contributes to the detection, identification and conviction of perpetrators. The law also regulates details on who can be an agent, agent's rights and obligations and conditions of use of an agent.

iii. The Code of Criminal Procedure is based on the principle of legality and officiality. Crime that is not reported may be detected for example by operational police action or by child helpline. Law enforcement agencies are required to take action immediately after commission of a crime is detected. Crimes of sexual abuse, child prostitution and crimes in the field of child pornography do not fall under Sec. 211 of the Code of Criminal

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<sup>141</sup> The situation in the field of protection of children from violence from the perspective of NGO focused on assistance to tortured, abused and neglected children. Analysis of civic association Náruč – Help to children in crisis presented at the meeting of the Committee on Children and Youth in October 2012.

Procedure<sup>142</sup>, so even in the event of withdrawal of statements, the consent of the victim is not required for further proceedings.

iv. According to Sec. 87 of the Criminal Code, the culpability expires after certain period of time, which is determined by individual crime.<sup>143</sup> For sexual abuse of children, child prostitution and crimes concerning child pornography, it can be maximum of 20 years. For corrupting morals of persons under the age of 18 years, it can be maximum of 10 years. Specific statute of limitation depends e.g. on the age of the victim or the seriousness of the perpetrator's act. When prosecuting juveniles, statute of limitation can be maximum of 5 years.

Statute of limitation begins to run from the moment the crime was committed, if the effect of the crime is also required, statute of limitation shall start from the moment it occurred. For continuing and multiple crimes it shall start after the last attack, thus after completion of the crime. For attempt of committing a crime or planning a crime, it shall start after completion of the highest developmental stage, in case of participation it shall start after completion of a crime by the main perpetrator. For perpetual crimes, statute of limitation shall start from the moment of removal of illegal situation which constitutes merits of a crime.<sup>144</sup> According to Sec. 9 of the Code of Criminal Procedure the prosecution cannot begin, and if it has already begun, it cannot be continued and must be stopped, if it is barred.

Criminal Code (Sec. 87) also states periods of time that are not to be counted into the statute of limitation, e.g. time, during which the perpetrator stayed abroad with the intention of avoiding prosecution. Subsection 3 regulates the interruption of statute of limitation of criminal prosecution as follows:

- (a) by the beginning of an indictment for a crime, which is subject to the limitation, as well as by subsequent acts of law enforcement agencies, a judge in preliminary proceeding or a court leading to the criminal prosecution of the offender, or
- (b) if the offender commits an intentional crime during the limitation period.

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<sup>142</sup> The provision states cases, in which it is possible to start criminal prosecution or to continue criminal proceeding only with the consent of aggrieved party.

<sup>143</sup> Statute of limitation depends on the custodial penalty for the said crime. The more serious the crime, the longer statute of limitation.

<sup>144</sup> J. Ivor. et al.: Substantive Criminal Law, general part. Bratislava: Iura edition, 2010, p. 336.

Under subsection 4, the new limitation period starts by interruption of the limitation period. The Slovak Criminal Code does not recognize suspension of statute of limitation.

v. If the age of the victim is not certain, the child's appearance is examined. E.g. paediatrician or a sexologist is asked for expert opinion.<sup>145</sup>

vi. The Police Force keeps internal records on individual offenders. With the permission and password, the database can be also accessed by other members of the Police Force. Information from abroad is provided by the so-called liaison officers. People who have access to this data are screened in order to be acquainted with classified matters and facts. There is also a national SIRENE<sup>146</sup> bureau in Slovakia, which provides for the exchange of information and personal data in Schengen Information System. Based on membership in the European Union, Police Force makes information and personal data available to member state's authorities for the prevention and detection of crimes. It can also provide information to other international authority or third country if it is e.g. in the interests of the person concerned, or because of other important public interest. When processing data, Police Force must ensure the protection of the person's privacy.<sup>147</sup>

Registry of convictions of offenders is managed by the General Prosecution. It contains data on persons who have been legally convicted in criminal proceedings by the courts; persons in whose cases the criminal prosecution was conditionally stopped by court or prosecutor; persons in whose cases a conciliation agreement was approved and criminal prosecution was suspended by court or prosecutor; following decisions or measures, related to previous data and other facts relevant to criminal proceeding.

### 3.2 Complaint procedure

vii. Even a minor<sup>148</sup> has by law guaranteed right to turn to the law enforcement agencies, in case he believes his rights are violated or threatened. These agencies are obliged to ensure the presence of the said person's legal representative, legal guardian, pedagogic operative or an authority of legal protection of children and social legal guardianship during questioning.

<sup>145</sup> E.g. when dealing with pornography, firstly it is assessed whether the material is pornographic and if so, whether the victim is a child.

<sup>146</sup> Supplementary Information REquest at the National Entries.

<sup>147</sup> Act no. 171/1993 Coll. on the Police Force, as amended.

<sup>148</sup> According to Sec. 9 of the Act no. 40/1964 Coll. as amended, Civil Code, the children have limited capacity for legal action. Capacity is restricted only to such legal actions that are by their nature appropriate to intellectual and mental maturity corresponding to the child's age.

If the criminal proceeding is initiated after child's criminal complaint, the victim is questioned under the same conditions as witness – aggrieved party.

According to the Code of Criminal Procedure, the rights of a person with limited capacity are carried out by their legal representative, who may also authorize to representation an organization that assists victims of crimes. Law enforcement agency is obliged to provide to the child, in writing and at the very first proceeding, information on their rights in a criminal proceeding and information on the organizations that assist aggrieved parties (including services that are provided by them).<sup>149</sup>

In case of underage witnesses, a personal questioning is acceptable, as well as use of technical equipment for audio and video transmission. A testimony may be replaced also with reading of the minutes of questioning.

**viii.** If the offender is the parent of the child, he cannot exercise the rights of the child as his legal representative. In this case, the judge shall appoint, on prosecutor's motion, a guardian for the child for the preliminary proceeding (it is often a public authority or an authorized representative of an organization that assists aggrieved parties).<sup>150</sup>

According to the Code of Criminal Procedure, the court holds the main trial essentially publicly. Pursuant to Sec. 249, subsection 3 of the Code of Criminal Procedure, the public may be excluded from the main trial e.g. if it is required by important interest of the aggrieved party (in some cases of a witness, for the purposes of protection of morality or integrity of involved persons). The law enforcement agencies shall particularly ensure the protection of a personality and privacy of minors, juveniles and aggrieved parties, whose personal data are not disclosed.

According to Sec. 127 of the Code of Criminal Procedure every person has the duty to comply with summons to appear by law enforcement agencies and court, and testify as witness on anything that is known to him on the crime, as well as on the perpetrator or on the circumstances that are significant for the purposes of criminal proceedings. The Code of Criminal Procedure exhaustively states in Sec. 130 cases, in which it is possible to withhold

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<sup>149</sup> A. Magvašiová – D. Švábyová: Criminal liability of juveniles and protection of minor victims according to the new criminal codes. In: Youth and criminality: Volume. Nitra: Constantine the Philosopher University in Nitra, 2006, p.66-76.

<sup>150</sup> Ibid.

testimony.<sup>151</sup> Questioning may be realized with technical equipment for audio and video transmission.<sup>152</sup> The Code of Criminal Procedure in Sec. 135, subsection 1 furthermore states:

“If the person examined as a witness is under 15 years of age and the examination concerns matters whose recollection could, given the witness's age, have a negative influence on his mental and moral development, the examination shall be conducted with utmost consideration, and care shall be taken not to have to repeat, if possible, the examination in the subsequent proceedings. An education specialist or a person with expertise in juvenile education who, taking into account the object of examination and the level of mental development of the interviewed person, shall contribute to the proper conduct of examination, may be taken up. If the presence of the legal guardian of the witness could contribute to a proper course of the examination, he shall be summoned to be present during the examination.”

The Code of Criminal Procedure also takes into account the age of the person questioned in further subsections of Sec. 135. It provides e.g. that in the subsequent proceedings, such person is to be examined only when it is strictly necessary, examination may be replaced by reading of minutes of examination or his examination shall be made with the help of technical equipment for audio and video transmission, by reading of minutes of examination or his examination shall be made with the help of technical equipment for audio and video transmission, as to make sure, that questioning in the subsequent proceedings is only exceptional. According to Sec. 261 of the Code of Criminal Procedure in case of questioning of a person younger than 15 years of age, the presiding judge may decide that the questioning of a witness will be carried out by himself.

The Code of Criminal Procedure also governs situations when it is not possible to take witness into the oath (in Sec. 267). It is a witness:

- (a) who has not attained his 14th year of age when questioned,
- (b) who, with regard of his mental and physical conditions, fails to understand the nature and importance of the oath properly.

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<sup>151</sup> The right to withhold testimony applies e.g. to the relative in direct line, sibling etc.

<sup>152</sup> Act no. 300/2005 Coll. as amended, Criminal Code, Sec. 134, subsection 1.

## 4 COMPLEMENTARY MEASURES

### i.

A. **School.** Part of the methodological guidelines for teachers concerning upbringing to marriage and parenting is also the issue of sexual abuse and sexual violence against children.<sup>153</sup> The teachers are instructed about forms, displays and procedures for detection of sexual abuse. The issue of sexual abuse prevention is thoroughly described, including description and instruction to various educational games with pupils, which serve as prevention against sexual abuse. In the methodological guidelines, there is also reference to other literature on the subject as well as contacts to Non-Governmental organizations, which children can turn to (their publication is recommended).

There are also Pedagogical Organizational Directions for the years 2012/2013 representing general recommendations for schools, school facilities, local and state administration authorities operating in education, involving also prevention, protection and safety, where in the part „Security and prevention”, specifically in point 1, an instruction is stated to:

„Accordingly to the Convention on the Rights of the Child continuously monitor behaviour of children and youth and its changes. In cases of grounded suspicion concerning violation or their healthy personal development, or abuse, to immediately ensure their active protection.”<sup>154</sup>

Within the framework of prevention, schools cooperate with the police and the prosecution service. Projects for children and youth (e.g. games and lectures) are organized with the help of members of the Police Force who teach them how not to become a victim of a crime, and prosecutors who read lectures for the pupils.

B. **The police.** Police investigators are trained to deal with cases in general (there is no specialization). In practice, however, one may show more extensive knowledge in certain area and he/she will be assigned more cases of similar nature. There are also professional

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<sup>153</sup> L. Rovňanová - I. Lukšík - E. Lukšíková: Methodological manual of sexual education at second stage of primary schools within the framework of curricula on education to marriage and parenthood. Organisation for planned parenthood, 2007. Quoted on: 31/8/2012.

Available at: [http://www.rodicovstvo.sk/sexedu/Metodicka\\_prirucka\\_pre\\_ucitelov.pdf](http://www.rodicovstvo.sk/sexedu/Metodicka_prirucka_pre_ucitelov.pdf)

<sup>154</sup> Ministry of Education, Science, Research and Sport of the Slovak Republic, Pedagogical Organizational Directions for school years 2012/2013, Bratislava 2012, p. 12.



improvement courses organized by Academy of Police Force in Bratislava.<sup>155</sup> However, topics change and they are not repeated every year.

C. ***Prosecution Service and the Judiciary.*** Education of the judges, prosecutors and court officials is provided by independent Judicial Academy, which was established by the Act no. 548/2003 Coll. on Judicial Academy. Trainings are voluntary and within educational activities workshops on protection of children are organized. Decree no. 6/2008 of the General Prosecutor of the Slovak Republic introduces specific prosecutors specialized in criminal activities of juveniles and crimes against children. These prosecutors are obliged to regularly attend various trainings<sup>156</sup> that are provided by the Judicial Academy as well as internally by the Office of the General Prosecutor of the Slovak Republic.

D. ***Other.*** Doctors, nurses, midwives and health care assistants receive training on children's rights in the basic study program and this knowledge is extended in special study programs. They are also instructed by the Ministry of Health of the Slovak Republic on how to proceed when reporting suspected sexual abuse of persons under the age of 18. The social workers who work with Roma children often don't receive any training concerning rights of children.<sup>157</sup>

ii. In the Slovak Republic the educational process in elementary and secondary schools involves also the concept of upbringing to marriage and parenting, main goal of which is to develop basic knowledge and responsible attitudes among pupils in the area of partnership and parenthood in accordance with scientific knowledge and ethical standards. The initial starting material for the creation of upbringing to marriage and parenthood was the Concept of the State Family Policy (Decree of the Government No. 389/1996), Complex Program of the HIV/AIDS Infection prevention (Decree No. 390/1996 and National Program of Health Support 659/1991). This concept implies also the issues of sexual upbringing

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<sup>155</sup> For example in 2010, there was training organized on the topic of domestic violence. Lectors from civic association Help to Endangered Children also participated in this course.

Available at: <http://www.akademiapz.sk/sites/default/files/vyrocn.pdf>

<sup>156</sup> Focused e.g. on the communication with children or interrogation of juveniles.

<sup>157</sup> Information on the course and results of the evaluation of the Council of Europe project „Evaluation of policies on participation of children and youth” Quoted on: 3/10/2012.

Available at: <http://www.employment.gov.sk>

instructed in the curriculum of primary and secondary schools for the year 1994 (No. 4028/94-212).<sup>158</sup>

The theme of upbringing to marriage and parenthood is instructed in several classes, however the key role is played by ethics and religion education classes. This education is also present in subjects as civics and biology, as well as in extracurricular educational activities which are organized between teachers and pupils. The school management, in cooperation with the teachers, governs, coordinates and controls realization of this concept, which includes sexual education in teaching process. The children are also given, in an appropriate form, information on sexual abuse, what it is and how to safeguard themselves against it. It is also recommended for schools to publish various contacts for helplines, which children could contact, as well as to watch over their updating.<sup>159</sup>

In addition also non-profit organizations operate in schools, which, with the help of the state, educate children on the prevention of sexual abuse. Civic association Labyrint, dedicated to prevention of sexual abuse of boys and girls, organizes preventive programmes for the 3<sup>rd</sup> and the 4<sup>th</sup> classes of elementary schools, aimed at girls and boys, teachers and parents of children. It also contains programmes for parents of children who already took part in a preventive programme and a programme for teachers and educators. Implementation of these activities into the educational process by the third sector represents a certain support of education of children in this area by the state.<sup>160</sup>

Within the framework of methodological guidelines for education and training to parenthood, specifically in the area of sexual abuse, the parents are not included into the educational process itself, which takes place within the teaching time in school. However, in the relation to the general prevention, parents are involved in non-educational activities, if the school organizes them, or they are informed about the issue at parental meetings, or there are special seminars organized for them with the help of NGOs.

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<sup>158</sup> Ministry of Education, Science, Research and Sport of the Slovak Republic: Upbringing to marriage and parenthood – curriculum. National Institute for Education, 2011. Quoted on: 31/8/2012.

Available at:

[http://www.statpedu.sk/files/documents/svp/1stzs/iscsed1/ine\\_dokumenty/vychova\\_k\\_manzelstvu.pdf](http://www.statpedu.sk/files/documents/svp/1stzs/iscsed1/ine_dokumenty/vychova_k_manzelstvu.pdf)

<sup>159</sup> Ibid., p. 86

<sup>160</sup> OZ Labyrint: Projects, 2012. Quoted on: 31/8/2012.

Available at: <http://www.oz-labyrint.sk/projekty/>

iii. In the Slovak Republic there are currently no specialized programmes supported by the state for persons, who might be potential perpetrators of sexual abuse of children and of sexual violence against children. There is general prevention of criminality in Slovak Republic, which is carried out on different levels of administration and which follows to some extent territorial and administrative division of the Slovak Republic. It is the nation-wide (the Slovak Republic), regional (districts) and local level (cities, communes and their parts) prevention of criminality, while on all the above mentioned levels - state organs, organs of self-government and NGOs operate as well.<sup>161</sup>

Programmes and measures that evaluate and prevent the risks of crime commission against family and youth and other crimes, which constitute serious violations of children's rights, are included in the Strategy on prevention of criminality and other anti-social activities for the years 2012-2015. The strategy was approved by the Government's Decree No. 807 from 14/12/2011. It contains general as well as specific strategies and tasks, however, without any concrete programmes and concepts in the area of programmes for potential offenders of sexual abuse and/or violence.<sup>162</sup>

Act No. 583/2008 Coll. on Prevention of Criminality and Other Anti-social Activity as amended regulates organization and scope of public authorities (the Government, ministries and other central state authorities, district authorities and other local state authorities, etc.) in the area of criminal prevention, and also regulates granting of subsidies from the state budget to finance projects in this area.

iv. Victims can find help in the centres of pedagogical and psychological counselling and prevention (hereinafter referred to as „CPPCaP“). CPPCaP provides services of methodical, advisory and informative nature for children, their parents and pedagogic employees of schools. CPPCaP are legal entities covered by the Department of Education, providing free professional services. The basic framework of CPPCaP activities is governed by the School Act and the Decree of MESRS SR No. 325/2008 Coll. on School Facilities of Educational Counselling and Prevention. CPPCaP closely cooperates with other institutions and experts, mainly from the fields of education, health, social affairs and family, possibly other

<sup>161</sup> J. Bubelíni: Prevention of Criminality, Ministry of Interior of the Slovak Republic, 2002. Quoted on: 31/8/2012.

<sup>162</sup> The Government of the Slovak Republic: Proposal of strategy on prevention of criminality and other antisocial activities in the Slovak Republic for years 2012-2015. 2011. Quoted on: 31/8/2012. Available at: <http://www.minv.sk/?urovne-realizacie-preventivnych-aktivit>

departments.<sup>163</sup> Parents with children, children themselves or those who have suspicion that their classmate or friend is a victim of sexual abuse, may all seek psychological help. Some centres provide information on sexual abuse directly aimed at children with phone number and contact e-mail on their websites.<sup>164</sup>

Important assistance to the victims is provided by the third sector. There are no special organizations focused exclusively on assistance to victims of sexual violence and sexual abuse, however, help is provided by many organizations that assist to victims of violence or those that generally focus on assistance to children at risk, e.g. People in need<sup>165</sup> or the centre Hope.<sup>166</sup> Majority of these organizations provide help for ill-treated, abused and neglected children through crisis accommodation, crisis intervention, by providing psychological, social and legal counselling, and various short-term and long-term therapies. Their crisis centres providing specialized intervention programs for children are established with substantial assistance of foreign foundations and the EU. They have to comply with conditions of MLSAF SR and pass accreditation process.<sup>167</sup>

There are also individuals that offer individual help within third level of undergraduate studies, to the victims of sexual abuse in childhood - therefore aimed at adults at the time of seeking help.<sup>168</sup> These people are given an opportunity to seek assistance, whether in the form of stay in a facility run by the Catholic Church or through conversations, in order to be relieved from the childhood trauma, or at least to reduce it, if they did not find help at the time or were rejected help.

v. There are several helplines in the Slovak Republic, where victims can turn to. Anonymity is guaranteed by all of them.

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<sup>163</sup> Centre of pedagogical and psychological counselling and prevention: Who we are. 2012. Quoted on: 31/8/2012.

Available at: <http://www.cpppap.sk/o-poradni/kto-sme/>

<sup>164</sup> Centre of pedagogical and psychological counselling and prevention: What to do when... 2010. Quoted on: 31/8/2012.

Available at: [http://www.pppoprad.sk/index.php?option=com\\_content&view=article&id=29&Itemid=22](http://www.pppoprad.sk/index.php?option=com_content&view=article&id=29&Itemid=22)

<sup>165</sup> People in Need Slovak Republic: Contacts to assisting organizations. 2012. Quoted on: 31/8/2012.

Available at: [http://www.clovekvtsni.sk/upload/File/OSL/kontakty\\_pomahajuce\\_organizacie.pdf](http://www.clovekvtsni.sk/upload/File/OSL/kontakty_pomahajuce_organizacie.pdf)

<sup>166</sup> See also: <http://nanicmama.sme.sk/poradne-pre-tyrane-zeny-a-obete-nasilia>

<sup>167</sup> Crises centres are also established by cities and self-governing regions, however these are not subject to accreditation and centrally registered e.g. by MLSAF SR as crises centres of NGOs. Also, there are no national quality standards of work that would bind the centres.

<sup>168</sup> Mgr. S. Michančová: Help for victims of sexual abuse. The word among us. 2012. Quoted on: 31/8/2012.

Available at: <http://www.smn.sk/index.php?cislo=0403&sekcia=clanky&smn=20030306.html>

*The Police helpline* provides general counselling in the area of criminal activity and security (since sexual abuse is a crime, counsel is provided in this area as well). *Line of child trust* is a nation-wide free phone line. Organizationally, the line is a part of the Children's University Hospital in Košice, which cooperates with the civic association Society of Children's Friends – Li(e)nka during its activity. Although the helpline is not specifically focused on sexual abuse or violence, great part of the medical and social problems still comprises calls on violence. Many of them are of information and preventive nature, others are solved by crisis intervention. Within these calls, several groups of callers can be identified:

- clients, who need information,
- clients, who are in the situation of violence and seek concrete advice and help,
- clients, who experienced trauma from violence in the past,
- adults, who report child abuse.<sup>169</sup>

Centrum Slniečko (The centre Sunshine, non-profit organisation) runs *Child rescue line*. Free phone line is to assist to children and youth with various problems, e.g. problems with teenage years or school problems, as well as serious problems of distress, abuse, bullying and addiction. It operates free of charge from all phone networks in Slovakia (fixed and mobile) in the work days from 15:00-20:00.<sup>170</sup>

*Line of youth trust* operates non-stop and is focused on a wide scope of problems including sexual abuse. Furthermore, there is *UNICEF Bratislava helpline* and many other general helplines. It may be noted that specialized lines aimed at helping victims of sexual violence do not exist, however, generally the network of helplines is very good and phone help is available to all victims with access to a fixed phone line or mobile phone.

**vi.** Although the assistance and protection of sexual abuse victims is one of the priority areas of support in social services development and support of implementation of legal protection measures involving children and social legal guardianship for the year 2012, which were reported by MLSAF SR, there are no state programs to support victims of sexual abuse. The main coordinators of activities of NGOs in Slovakia focused on prevention of child abuse,

<sup>169</sup> Line of child trust: About Line of child trust. 2012. Quoted on: 31/8/2012. Available at: <http://www.linkadeti.sk/o-linke>

<sup>170</sup> Centrum Slniečko, n. o.: Child rescue line. 2009. Quoted on: 31/8/2012. Available at: <http://www.centrumslniecko.sk/sk/detska-linka-zachrany>

on child victims of violence and on adhering to the child rights are the non-profit organisation Centrum Slniečko (The Centre Sunshine), established in 1998, civic association Náruč (Žilina) – pomoc det'om v kríze (Náruč - help to children in crisis), civic association Centrum Nádej (Centre Hope) and other similar organizations.<sup>171</sup>

### III NATIONAL POLICY REGARDING CHILDREN

#### i.

A. **National Action Plan.** The Slovak Republic is devoted to protection of children against sexual abuse in a broader context, e.g. by creation and realization of various documents through its authorities. One of these publications is National Action Plan:

I. National Action Plan for Children for the years 2002 – 2004. MLSAF SR developed this plan and defined basic tasks related to the protection of children's rights. However, it poorly defined measurable indicators, therefore information about its implementation does not provide any relevant data on the results and impacts of the implemented tasks.

II. Period of the years 2005 – 2007. In these years, several important measures were approved and implemented, number of which significantly influenced the field of protection of children's rights. These changes relate to the areas of family law, criminal law, legal protection of children and social legal guardianship, anti-discrimination, tax law, the protection of children against violence in mass media, employment of juveniles, unaccompanied minors, health and nutrition of children and youth and in the field of education.

As an example Ministry of Culture of the Slovak Republic may be mentioned, which, in the area of protection against violence in mass media, increased surveillance over producers and distributors, who have an obligation to determine age appropriateness of the program. Slovak Trade Inspection oversees the fulfilling of access restriction for minors under the age of 18 to audiovisual works intended for adults. By 2009, several other departmental pilot projects were realized.

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<sup>171</sup> Public Health Authority of the Slovak Republic: Child Abuse. 2009. Quoted on: 31/8/2012. Available at: [http://www.uvzsr.sk/index.php?option=com\\_content&view=article&id=370:tyranie-deti&catid=63:deti-a-mlade&Itemid=70](http://www.uvzsr.sk/index.php?option=com_content&view=article&id=370:tyranie-deti&catid=63:deti-a-mlade&Itemid=70)

III. National Action Plan for Children for the years 2009 – 2012 (hereinafter referred to as „NAP”). This plan is based mainly on the CRC, National Action plan for Children for the years 2002 – 2005, but also from a brief review of progress in the years 2005 – 2007, from Concluding Observations of the UN Committee on the Rights of the Child to Slovakia's first report on implementation of CRC in 2000 and also from Concluding Observations of UN Committee on the Rights of the Child to second periodical report of the Slovak Republic on implementation of the CRC in 2007.

In the development of the NAP the representatives of the following responsible departments took part: General Prosecutor's Office of the Slovak Republic, the Public Defender of Rights, representatives of SNCHR, Office of the Plenipotentiary for Roma Communities, self-governments and non-state subjects operating in the said area.

The primary objective of the NAP is: *„to ensure through defined tasks and measures achieving of progress in the field of children's rights recognized by the Convention on the Rights of the Child and progress in their use.”*

NAP was developed as an open document that contains basic tasks for the period 2009 – 2012. Initial review and update of its tasks was scheduled for 2010 for the previous year, with subsequent regular annual evaluation and updating. The proposed time period presumes its evaluation in 2013, so that it becomes the basis for the Concluding Observations of the UN Committee on the Rights of the Child.

NAP anticipates participation of children in fulfilling its tasks and comprises the tasks leading to creation of space, where child's opinion is explored and relevant information is provided, so the children may in the future actively participate in and comment on policies that affect them.

NAP is ideologically divided into different areas, which are: Policy coordination and independent mechanisms for the protection of children's rights; Crucial and specific tasks and measures; Education, upbringing, leisure and cultural activities; Children and family, family environment and alternative care; Health, health care and nutrition of children; Social and other measures improving living standards of children and family; Special protective measures.

Part of the assignment is the date of execution and responsibility, if the nature of the task allows it, method of performance and securing of financial resources for its realization. Responsible and co-responsible departments are responsible for monitoring of the

effectiveness of the assigned task and its evaluation, which includes specification of the achieved results.

NAP anticipated creation of Committee of Ministers for Children as a national authority for coordination of policies on the protection of children rights and also creation of independent institution for children rights protection: „Children's Ombudsman”<sup>172</sup>.

**B. *National Programs, Strategies, Conceptions and Action Plans.*** There are several basic documents related to the children rights, which are listed for information purposes according to the basic areas:

- Education, upbringing, leisure and cultural activities – The concept of pedagogical-psychological counselling system and its implementation to practice;
- Anti-discrimination plans - Action Plan for the Prevention of All Forms of Discrimination, Racism, Xenophobia, Anti-Semitism and Other Expressions of Intolerance;
- Children and family, family environment and alternative care - National Action Plan for Prevention and Elimination of Violence against Women and in Families 2005 – 2008;
- Health, health care and nutrition of children – National Mental Health Programme;
- Social and other measures improving the standard of living of children and family – Migration Policy Concept;
- Special protective precautions – National Program for the Fight against the Drugs.

According to the Decree of the Government no. 479/2012, national strategy on protection of human rights shall be prepared until March 2013.

**C. *Committee on Children and Youth.*** Predecessor of this institution was Committee of Ministers for Children, established in 2009. Committee on Children and Youth (hereinafter referred to as „the Committee”) is a specialized body of the Government's Council for Human Rights, National Minorities and Gender Equity in the sphere of children and youth. It was established by a Government decree in 2011. The Committee is governed mainly by the principle of the best interest of the child, non-discrimination and children participation. Members include representatives of non-governmental organisations and the committee can

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<sup>172</sup> Ministry of Labour, Social Affairs and Family of the Slovak Republic. National action plan for children for years 2009 – 2012.



submit motion to the Government to e.g. take certain needed measures. The Committee meets as needed, especially before the meeting of the abovementioned Council of the Government of the Slovak Republic. Its meetings are public.

The scope of the Committee is to report suggestions to the Council of the Government of the Slovak Republic to increase the level of support, protection and adhering to the rights of the children and youth; processing of draft opinions and decrees to the proposed Acts, generally binding legal regulations, as well as government, departmental and other non-legislative measures; encourages research activities; cooperates with trade unions and institutions, ministries, NGOs, children organizations and other bodies; monitors the fulfilling of tasks given by NAP and submits the annual deduction to Council of the Government of the Slovak Republic along with proposal for its update.<sup>173</sup>

D. *Children's Ombudsman*. One of the tasks that the Slovak Republic had to ensure was establishment of separate, independent mechanism for receiving and reviewing complaints of children or those on their behalf, and also monitoring of the CRC implementation. Establishment of a new special institution of children's rights defender seemed to be counterproductive, so public defender of children's rights was to become a part of the Office of the Public Defender of Rights of the Slovak Republic, which was established in 2001.

However, there is a Child Ombudsman, a peer to peer project realized by the Office of the Public Defender of Rights of the Slovak Republic. Activities of the Public Defender of Rights include investigation of children's opinions and their problems, receiving of complaints of minors or their legal representatives, if they believe that children's rights were not respected and issuing statements on current issues in the field of children's rights. He has the right to publish and publicly point out to the illegality or other deficiencies he has encountered and cooperates with pupils' self-government. Child Ombudsman is a child, who is contact person for classmates and the spokesperson of children in society.

An example of the Public Defender of Rights activity is the creation of the website that is easily understandable for children, where children can learn about their rights and how to

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<sup>173</sup> Ministry of Labour, Social Affairs and Family of the Slovak Republic. Committee on children and youth. 02/11/2011. Quoted on: 23/8/2012.

Available at: <http://www.employment.gov.sk/vybor-pre-deti-a-mladez.html>

ask for help. There is a section „Our advice” that helps children to ask for advice or help properly. It is divided into four sub-sections addressing various fundamental areas. That includes „You and the family”, „You and the school”, „You, society and the state”, „You and other problems”. In individual parts, there are examples of common problems and their solutions. If the problem of the child is not presented, every child can seek help of the Ombudsman, who, if it is within his competence, tries to help to the child himself or asks for help responsible authority or organization.<sup>174</sup>

ii. In Slovakia, there has been no relevant research determining the cases of sexual abuse of children so far. According to available information, e.g. provided by MLSAF SR, it can be assumed that the number of detected cases of child torture, sexual abuse or sexual exploitation in 2010 did not exceed a few hundred,<sup>175</sup> although the number of children in Slovak Republic, under the age of 14, was in 2011, according to the Statistical Office of the Slovak Republic, over 825 000.<sup>176</sup>

Some information is provided also in annual report of the General Prosecution, according to which 235 persons were sentenced for sexual abuse of children under the age of 15; 73 persons were sentenced for sexual abuse of children under the age of 18; 1605 persons were sentenced for corrupting morals of the youth; 12 persons were sentenced for procuring and soliciting prostitution (regardless of the victim's age); 6 persons were sentenced for production of child pornography; 10 persons were sentenced for dissemination of child pornography; 8 persons were sentenced for possession of child pornography; 2 persons were sentenced for corrupting morals by the so-called hard pornography and one person was sentenced for corrupting morals by the so-called simple pornography.

iii.

A: ***Do you know what your child is doing?*** „Do you know what your child is doing?” is one of the communication campaigns, which is organized under the auspices of the Ministry of Interior of the Slovak Republic since the beginning of 2012. One way of implementing it is an exhibition of children's posters in public places. The best poster expressing current

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<sup>174</sup> Children's Ombudsman. Quoted on: 17/8/2012.

Available at: <http://www.detskyombudsman.sk/>

<sup>175</sup> The situation in the field of protection of children from violence from the perspective of NGO focused on assistance to the tortured, abused and neglected children. Analysis of civic association Náruč – Help to children in crisis presented at the meeting of the Committee on Children and Youth in October 2012.

<sup>176</sup> Available at: <http://portal.statistics.sk/files/tab-5.pdf>

risks has been selected by the competent committee and citizens. At the end of the campaign publication containing advices for parents about raising their children should be released.<sup>177</sup>

B. ***Kisses are not on command.*** Kisses are not on command is a book, supplemented by a painting book with the same title. This book represents a special contribution to the prevention of child sexual abuse, which by visual examples demonstrates the situations, which are to be introduced to children in an appropriate way considering their age and experience.<sup>178</sup>

C. ***Touches are not on command.*** A book and a painting book with the same title helps children to realise where boundaries lie and this way contributes to prevention of sexual violence. The book deals with pleasant touches, suspicious touches and uncomfortable ones as well. Both books are also for adults to help them think about the boundaries of education towards obedience and respect for authorities.<sup>179</sup>

D. ***Zodpovedne.sk*** (Responsibly.sk). Slovak Awareness Centre teaches children how to use new online technologies responsibly and safely. It produces educational materials, initiates activities and social events, preventive trainings of teachers, parents and other people working with children. The Centre deals with intolerance, games and gambling, sexuality on the internet, cyberbullying etc.<sup>180</sup>

E. ***We are not for sale.*** „We are not for sale” is a guide for professional staff of helping professions on the issue of violence against children with special emphasis on the issue of commercial sexual exploitation of children, which was published as a result of cooperation of MESRS SR and Ministry of Health of the Slovak Republic within the framework of National Program for Children and Youth Care in Slovak Republic for the years 2008-2015. The aim of this publication is to inform the public about the issue of violence against children with special emphasis on commercial sexual exploitation of children and its social seriousness, and about services for children at risk with a particular focus on vulnerable groups of children.

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<sup>177</sup> Ministry of Interior of the Slovak Republic: Do you know what your child is doing? On billboard. Quoted on: 26/8/2012.

Available at: <http://www.minv.sk/?viete-co-teraz-robi-vase-dieta-v-uliciach>

<sup>178</sup> M. Mebes.: Kisses are not on command. Aspekt, 2007. 24 p.

<sup>179</sup> M. Mebes.: Touches are not on command. Aspekt, 1998, 24 p.

<sup>180</sup> Quoted on: 19/10/2012. Available at: [http://zodpovedne.sk/kapitola\\_ostatne.php?cl=english\\_language](http://zodpovedne.sk/kapitola_ostatne.php?cl=english_language)

This guide is divided into following chapters: 1. Children and violence, 2. Commercial sexual exploitation of children, 3. Specific psychological development features of children and youth, 4. Diagnostics of children in cases of commercial sexual exploitation, 5. Commercial sexual exploitation of children and school, 6. The importance of parenting – positive parenthood, 7. Specific features of preventive programmes realization, 8. Perspectives of integrated multidisciplinary, respectively interdepartmental, cooperation in prevention and interventive activities related to cases of sexual abuse of children.

The Ministry of Health of the Slovak Republic cooperated also with Research Institute for Child Psychology and Pathopsychology which, by processing the latest scientific information on the issue of protecting children against violence and neglect, with special emphasis on the issue of commercial sexual exploitation, created informational leaflets for children (6-11 years) and youth (12-18 years), posters and also cooperated in creating the abovementioned guide.<sup>181</sup>

F. ***Pilot research in the field of commercial sexual exploitation of children.*** National Society for the Prevention of Criminality, Criminal Law and Judiciary in 2007 carried out a pilot research in the field of commercial sexual exploitation of children, aimed to map the attitudes, ideas and personal experiences of children with behaviour defined as commercial sexual exploitation of children. This research was aimed at obtaining information on sex education, sexual violence, working with the PC and Internet and questions about prostitution and pornography. The research was carried out in primary schools in Žilina region, where it was attended by pupils of 9th class in the form of an anonymous questionnaire. The results of this research have been used in the creation of educational programmes, developing of prevention strategies, specific educational programmes and manuals focusing on the prevention of commercial sexual exploitation of children.<sup>182</sup>

iv. Slovak Secretariat of the Committee of Ministers for children created in 2011 the country evaluation team, which was composed of the representatives of the Slovak ministries,

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<sup>181</sup> A. Mátel et al.: We are not for sale – guide for professional staff of helping professions on the issue of violence against children with special emphasis on the issue of commercial sexual exploitation of children. In. Social pathology and social work intervention. Volume from international scientific conference. 2011 Bratislava: St. Elizabeth College of Health and Social Work. 464 p.

<sup>182</sup> Research projects – pilot research in the field of commercial sexual exploitation of children 16/2/2007. Quoted on: 31/8/2012.

Available at: <http://www.crime-justice.sk/pilotny.htm>

General Prosecution, NGOs dealing with children's and youth's rights, advisory body of the Government's Council for Roma Communities, the Slovak Ombudsman, Association of Towns and Municipalities of Slovakia, Autonomous Regions SK8 Association, the Youth Council of Slovakia, the Experts of Statistical Office of the Slovak Republic, Slovak Centre for Human Rights, Information Centre of Council of Europe and the Office of the Deputy Prime Minister for Human Rights and Minorities of the Slovak Republic and the target group of six children aged 9-17 years coming from different backgrounds. The aim was to find out how the right of children to be heard is respected while getting feedback from the children.

In March of the same year also an online survey was conducted, which was attended by more than six thousand children from all over Slovakia, to find out what was the children's experience with participation in various areas and situations.

According to another survey from 2009, the children knew of human rights, but were dissatisfied with the extent and amount of information that is provided to them.<sup>183</sup>

v. Non-Governmental Organisations may participate in the legislative process e.g. by submitting public comments, by representing the public on so-called contradiction proceedings, by appearing in front of parliamentary committees, by commenting on the draft law, or even directly in the creation of articulated act.<sup>184</sup>

There are several organizations and associations dedicated to the children's rights protection in the Slovak Republic. However, many of them deal with the issue of child sexual abuse marginally only. NGO Centrum Slniečko (The centre Sunshine, non-profit organisation) is one of the few organizations whose primary activity is to protect children against sexual abuse. Civic Association Náruč – Pomoc det'om v kríze (Náruč - help to children in crisis) is special in its particular approach in the investigation of sexual abuse of children.

A. **Centrum Slniečko, n.o.** Non-profit Organisation Centrum Slniečko, n.o. (hereinafter referred to as „Centrum Slniečko”) aims to provide generally beneficial services to tortured, abused and neglected children, victims of domestic violence, bullying, sexual assault and also

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<sup>183</sup> Information on the course and results of the evaluation of the Council of Europe project „Evaluation of policies on participation of children and youth” Quoted on: 3/10/2012.  
Available at: <http://www.employment.gov.sk>

<sup>184</sup> However, the right of legislative initiative belongs only to the Government of the Slovak Republic, Members of Parliament, or committees of the National Council.

contributes to an effective and comprehensive solution of these problems. It provides its services in the following activities.

1. Crisis centre Centrum Slniečko. It provides comprehensive professional assistance and support to tortured and abused children, children in crisis life situations, victims of domestic violence and battered and abused children, by providing accommodation, nutrition, special counselling, education, special pedagogical and psychological counselling as well as professional diagnosis and therapy (playful therapy, filial therapy).
2. Shelter Safe House. It is social service facility for mothers and their children after crisis intervention, who for financial reasons can not become independent.
3. Centre for counselling, advocacy and prevention. It offers measures of social protection and social guardianship, social counselling, social prevention, crisis intervention, therapy and other.
4. Child rescue line. It is a free helpline for children and young people with various problems. It is available from all phone networks in Slovakia on weekdays from 15:00 to 20:00. The employees of Child rescue line are not in personal contact with the children but they can arrange or provide contacts to various institutions that can help them.
5. Low-threshold day centre for children and family. Its target group are individuals, children and families with children, which are threatened by social exclusion, or have limited ability to integrate into society. This centre provides to children active use of leisure time in with innovative, playful methods.
6. Creative workshop for clients. The purpose of this workshop is to provide clients with relief and to overcome difficult life situations and gather new strength by creating various products. Products created in this workshop are then offered for sale to the general public.<sup>185</sup>

B. **Civic Association Náruč – Pomoc deťom v kríze.** The mission of Civic Association Náruč –help to children in crisis (hereinafter referred to as „OZ Náruč”) is to help tortured, abused and neglected children, tortured women and families at risk of domestic violence. OZ Náruč is designed for children, which were exposed to sexual abuse, cruelty or indolence in their own families. OZ Náruč operates in ten basic programs:

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<sup>185</sup> Centre Sunshine, n.o. Quoted on: 30/8/2012.  
Available at: <http://www.centrumslniecko.sk/sk/>

1. Child Crisis Centre Náruč, Žilina – Zádubnie. It provides comprehensive care to tortured, abused and neglected children (crisis intervention – immediate intervention in cases where there is a threat to life or health of the child; psychological, social and special pedagogical diagnosis; professional psychological, social and pedagogical care; nutrition, accommodation, clothing; providing education; providing health care; recreational and physical activities, sport activities; games and relaxation activities).
2. Counselling for abused women: Counselling and Training Centre Náruč Čadca.
3. Programmes for families threatened by domestic violence.
4. Counselling for foster families of former clients of the Children Crisis Centre Náruč.
5. Trainings, seminars and courses for frontline employees and other helping professions (teachers, paediatricians, social employees, psychologists, judges, police officers).
6. Prevention of child torture, abuse and neglect for pupils of primary and secondary schools.
7. Development of volunteering.
8. Raising public awareness about the problems of domestic violence (information campaigns, brochures, leaflets, contributions to the media).
9. Publication and translation of materials focused on problems of domestic violence, sexual abuse of children and commercial sexual exploitation.
10. Activities which lead to system changes aimed at improving the position of victims of domestic violence.

Into the Child Crisis Centre Náruč there are placed mainly children who had to be removed from their family environment due to an acute hazard. Age range for clients is from 3 to 18 years, but children aged 3 to 14 years are preferred. The age limit is irrelevant, in the case that children should be placed in a crisis centre with his mother. A child gets into a crisis centre on the basis of a preliminary court decision, upon an agreement with the parents or other legal representatives. OZ Náruč cooperates with departments of social protection at the Local Offices of Labour, Social Affairs and Family, doctors, teachers, courts, prosecution, police and other professionals working with children and their families.

In cases of torture and sexual abuse of children, and to facilitate its investigation, an investigation room was created in Child Crisis Centre Náruč, which is equipped to match the needs of children, to take into account their interests and respect their communication skills.

It allows gentle questioning of children with help of camera, one-way mirror and transfer of video and audio recording into an adjacent room. This room is also used for therapeutic work with children.

OZ Náruč organizes variety of day camps, residential summer camps, benefit concerts and other projects for children.<sup>186</sup>

## **IV OTHER**

In October 2011, the NCSR voted on whether to approve expansion of the European Financial Stability Fund. This was controversial topic in Slovakia and disagreements were even between the coalition of parties in the Government, so the Prime minister at the time asked for vote of confidence. However, the motion has not passed. In the following days the fund was approved but new, snap elections were called in March 2012. The party Direction-Social Democracy gained absolute majority with only seven seats short to unilaterally amend the Constitution. This was the first time any party won an absolute majority in the independent Slovakia.

Prior to the election several scandals erupted – mainly Gorilla scandal, named after the Slovak Secret Service wiretap file, which is said to contain information about corruption at the highest level in the Government. Leaked Gorilla file lead to mass political protests at the beginning of 2012, when e.g. in January 2012 several thousand people marched in front of the Presidential Palace.

## **V CONCLUSION**

Protection against discrimination in Slovakia is regulated in the Constitution as well as other Acts. National Action Plans and strategies aim to coordinate policies in specific areas and several of them concern human rights, Roma minority, prevention of discrimination and children rights. Considerable problems arise in Roma community, especially in marginalized settlements, where children often live in unsanitary conditions, as well as other parts of Slovakia, where rights to education of Roma children are violated. This and other factors may lead to situations, when Roma children are particularly vulnerable, because of education

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<sup>186</sup> Civic Association Náruč – Help to children in crisis. Quoted on: 29/8/2012.  
Available at: <http://www.naruc.sk/index.htm>



deficit and poverty, and may become victims of sexual abuse and sexual exploitation. Slovakia struggles with Roma situation on several levels (e.g. criminality).

Slovak Republic is a party to the Convention on the Rights of Child, the Convention for the Protection of Human Rights and Fundamental Freedoms and signatory of the Lanzarote Convention. As of 11/11/2012, the Lanzarote Convention has not been ratified. Several state bodies e.g. General Prosecution had comments and considered the signing untimely, mainly due to needed amendments of Criminal Code and Code of Criminal Procedure.

The protection of human rights is secured by courts, as well as other agencies, e.g. Slovak National Centre for Human Rights or the Public Defender of Rights. There is no Children's Ombudsman yet, however, the creation of one is planned.

Criminal liability of children is set on 14 years (15 years in case of sexual abuse). There are also several terms which are used in law in regard to children. In some cases, there are differences between children younger than 12 years, 14 years, 15 years and 18 years. For children between 14 -18 years the term „juvenile” is used, while in other cases „minor“ is any person under 18 years of age. The differences are e.g. higher custodial penalty if crime is committed against a child younger than 15 years. Also, a child according to the Criminal Code, is not a person younger than 18 years of age if she/he acquired full age by contracting marriage with the consent of the court at the age of 16 years.

Crimes of sexual abuse of children, child prostitution, manufacturing, dissemination or possession of child pornography, incest or corruption of children are all regulated by the Criminal Code. Concerning the crime of child prostitution both recruiter and user are penalized. The term „child prostitution” is not defined in the Criminal Code, however higher custodial penalty is imposed e.g. if the crime of procuring has been committed against a person under 15 years of age.

There is no crime of „solicitation of children for sexual purposes” as defined in the Lanzarote Convention. Grooming or cyber grooming can be punished pursuant to other sections of the Criminal Code. Also passive participation of children in pornographic performances or witnessing of sexual abuse or sexual activities without participating is not regulated. Pornographic material on the internet is governed by Audiovisual Act as well as by self-regulatory initiatives of Slovak operators.

Incest regulates voluntary sexual intercourse only with relative in direct line (not with an adoptive parent). If the crimes of sexual abuse and child prostitution are committed within

the family, higher custodial penalty is imposed, regardless of blood ties. In cases of manufacturing, dissemination or possession of child pornography, the legislator does not distinguish whether a child is in a family relationship with the offender or not.

In case that there are aggravating circumstances, minimum sentence for the crime may be increased by one-third. There are also qualified merits of each individual crime, for which there is a higher custodial penalty, e.g. if the crime was committed in a more serious manner, on a protected person, in public, if grievous bodily harm or death was caused etc. (there are also stricter penalties for use of force, abuse of disability or abuse of perpetrator's position). Therefore, if qualified merits of crime are met and there are also aggravating circumstances, minimum sentence for said crime may be increased further. Statute of limitation varies in each individual crime.

Artificial persons are subjects of indirect criminal liability and protective measures can be imposed e.g. seizure of monetary sum or seizure of property. They are subjects of administrative liability, for which usually a high financial fine is imposed and civil liability. In this case artificial person may apply employment sanction against an employee.

Code of Criminal Procedure states how the children shall be protected during investigation of a crime and also during court proceedings, e.g. avoidance of unnecessary repetition of questioning, exclusion the public from the main hearing, etc. Also, the consent of victim is not required for further proceedings if a crime is reported. It may be done so by the child, police, child helpline etc.

There are no special units within the Police Force that investigate only the crimes of sexual abuse and sexual exploitation of children. However, there are prosecutors specializing on criminal activity of juveniles and crimes against children.

Teachers are provided information on how to detect sexual abuse e.g. by methodological guidelines or pedagogical-organizational instructions. Schools also cooperate with police, prosecution or NGOs and organize games and lectures for children to teach them about sexual abuse. General information on sexual education is provided to pupils during classes (ethics or religion class) that also teach them about marriage and parenting. Medical staff is provided information e.g. in the form of instructions by the Ministry of Health of the Slovak Republic. The importance to educate professionals working with children is stressed also in analysis of civic association Náruč.

There are currently no specialized state programs for potential perpetrators of sexual abuse or sexual violence against children. However, there are programs for general prevention of criminality. Support to child victims is provided by Centres of pedagogical and psychological counselling and prevention, third sector and also individuals within third level of undergraduate studies.

Third sector and state bodies both run several free helplines, publish materials, distribute leaflets and organize information campaigns. NGOs also provide support to victims in the form of crisis centres, shelter safe houses, centres for counselling and advocacy, etc. Also, need for campaigns that will soften the society to the violence against children is voiced (there are e.g. cases when violence is not reported because it is usual in certain family, etc.).<sup>187</sup>

Committee on Children and Youth reports suggestions to the Government's Council for Human Rights, National Minorities and Gender Equity, which can be further submitted to the Government. The Committee on its special meeting e.g. suggested that a strategy on the protection of children against violence is created.

There is no relevant research determining the cases of sexual abuse of children. Some information is provided by General Prosecution in the form of statistics of persons sentenced for crimes against children or by number of cases detected by MLSAF SR.

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<sup>187</sup> The situation in the field of protection of children from violence from the perspective of NGO focused on assistance to tortured, abused and neglected children. Analysis of civic association Náruč – Help to children in crisis presented at the meeting of the Committee on Children and Youth in October 2012.

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**National Coordinator:**

Eva Kmetec

**National Researchers:**

Mateja Apohal

Tadeja Apat

Kristina Čufar

Kristina Gomboc

Aleš Poje

Rok Kršmanc

Eva Kmetec

**National Academic Advisor:**

prof. dr. Katja Filipčič

## I INTRODUCTION

### 1 GENERAL

#### Equal Rights

- i. **Are there discrimination problems regarding sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status of men and women?**

#### *National (and other) minorities, discrimination regarding national and social origin*

There are two constitutionally recognised minorities in Slovenia: both autochthonous – Italian and Hungarian: for them, Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*)<sup>1</sup> declares special rights (for preservation of their national identity, use of their own languages in official matters, the right to education and schooling in their own languages, the right to foster relations with their nations of origin and their respective countries) which they can exercise in geographical areas where they live.<sup>2</sup> Bilingual schooling (including majority and minority pupils) is considered as an example of good practice.<sup>3</sup> The Ombudsman is pleased with legislation and he reports that no complaints were detected.<sup>4</sup>

The Constitution recognises another minority community: Roma community – this community is not a typical national minority, but it is granted a special status. Concerning discrimination regarding national (and other – not constitutionally recognised) minorities, practically all of the petitions addressed to the Ombudsman were regarding the problematic of Roma and Sinti communities. The Constitution addresses their rights in Article 65 (Status and Special Rights of the Romany Community in Slovenia): "The status and special rights of the Romany community living in Slovenia shall be regulated by law."<sup>5</sup> Their status is also

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<sup>1</sup> Ustava Republike Slovenije (Constitution of the Republic of Slovenia) - URS, Official Gazette RS, No. 33/1991.

<sup>2</sup> Article 64 URS.

<sup>3</sup> Report on minority education in Slovenia; Institute for Ethnic Studies; Klopčič, V. and Novak Lukanovič, S.; 2004.

<sup>4</sup> Human rights Ombudsman (Varuh človekovih pravic): Annual Report 2011 (Letno poročilo Varuha človekovih pravic 2011, p. 47-48.

<sup>5</sup> Article 65 URS.

regulated by law – namely, the Roma Community Act (*Zakon o romski skupnosti v Republiki Sloveniji*)<sup>6</sup>. These problems are also an example of discrimination regarding social origin. We face multiple problems, mostly originated from residential, communal, environmental and social problems of members of the Roma community: many of its members are residing in illegally built villages, without access to drinking water and other communal services, in great poverty. These communities are experiencing high rates of unemployment, crime, children not attending schools regularly (raising suspicion of child neglect) and teenage pregnancies (which in cases of mothers under 15 years of age there is suspicion of sexual assault on minor – statutory rape). Ombudsman reports that there is some progress in the efforts made to improve the life and the possibilities for members of Roma community, that are facing many prejudices due to their specific way of life, which is different from the majority of the population. The main problem is that responsibilities are passed between local authorities – seeking solutions at the state level and vice versa – leaving problems unresolved. This issue, due to its complexity and high levels of prejudices amongst the majority of the population, will probably remain an endless process of improving social and living conditions for Roma. The problems related to this minority are addressed by the Annual Reports of the Ombudsman every year.<sup>7</sup>

### ***Rights of disabled***

Rights of disabled are protected by the Constitution (Article 52), granting them right to special protection, work-training, education and active life within community, all financed by public funds.<sup>8</sup> Ombudsman reports that disabled are facing problems when attempting to exercise their constitutional rights and he advises that suitable legislation should be passed in order to enable full enforcement<sup>9</sup> of the Convention of the Rights of Persons with Disabilities<sup>10</sup>, which was ratified by Slovenia in April in 2002.

### ***"The erased"***

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<sup>6</sup> Zakon o romski skupnosti v Republiki Sloveniji (ZromS-1): Official Gazette RS (Uradni list RS), No. 33/2007.

<sup>7</sup> Human rights Ombudsman: Annual Report 2011, p. 46-67.

<sup>8</sup> Article 52 URS.

<sup>9</sup> Human rights Ombudsman: Annual Report 2011, p. 67-70.

<sup>10</sup> Konvencija o pravicah invalidov, Official Gazette RS, No. 37/2008.

The problematic of the so-called “erased” represents the gravest systemic act of discrimination in Slovenia, dating back to the dissolution of the SFRY and the consequent independence of Slovenia. After the declaration of independence (June 25<sup>th</sup> 1991) all citizens of Socialistic Republic of Slovenia were automatically granted citizenship of the new Republic of Slovenia, while citizens of other former SFRY republics, registered as permanent residents, had six months to request it. Those (25,671 people according to the report of MNZ from 2009<sup>11</sup> 21% of them were children<sup>12</sup>) who failed to acquire citizenship for whatever reason, were removed from the Register of Permanent Residents (*Register stalnega prebivalstva*) on February 26<sup>th</sup> 1992 by local authorities, acting on the bases of unpublished internal instructions of the Ministry of Interior (*Ministerstvo za notranje zadeve*, MNZ) – arbitrarily and illegally. The erased were denied any legal status, they became illegal residents unable to obtain documents, hold jobs, travel or exercise any social rights.<sup>13</sup> This problematic has been a hot political topic in Slovenia in past 20 years; though the Constitutional Court found the erasure unconstitutional,<sup>14</sup> populist rhetoric about enemies of state, traitors etc. was always present, blocking any serious attempts at repairing the unbearable situation. “/.../ several non-governmental organisations, including Amnesty International and Helsinki Monitor, and the Slovenian Human Rights Ombudsman issued reports drawing attention to the situation of the “erased”.”<sup>15</sup>

The Grand Chamber of the European Court of Human Rights delivered a judgment on June 26<sup>th</sup> 2012. It is a pilot judgment granting damages to 6 plaintiffs, but it is also a general condemnation of this behaviour as a mass violation of the European Convention of Humans Rights (violations of Article 8 regarding private and family life, Article 13 regarding effective legal remedy and Article 14 regarding discrimination). Besides granting damages to the plaintiffs, the Court also ordered Slovenia to set up an ad hoc mechanism for recognition of compensations to the erased.<sup>16</sup>

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<sup>11</sup> Case of Kurić and others v. Slovenia (Application no. 26828/06), par. 69.

<sup>12</sup> <http://www.mirovni-institut.si/izbrisani/statistike/>, (last visited 18.7.2012).

<sup>13</sup> <http://www.mirovni-institut.si/izbrisani/opis-izbrisa/>, (last visited 18.7.2012).

<sup>14</sup> U-I-284/94 and U-I-246/02.

<sup>15</sup> Case of Kurić and others v. Slovenia (Application no. 26828/06), par. 39.

<sup>16</sup> Case of Kurić and others v. Slovenia (Application no. 26828/06).



NGOs and human rights activists welcomed the judgment.<sup>17</sup> The Government did not, as is to be expected. It is too early to draw any conclusions regarding the situation and its further development but such a complex issue is bound to take time and willingness of the authorities; personal agony of the erased itself is sadly beyond repair, even if the damages were to be astronomical.

### ***Sexual orientation***

LGBT (lesbian, gay, bisexual, transsexual) persons are another group constantly facing different forms of discrimination in different fields. They are, however, protected by the Constitution, which is granting equal human rights and fundamental freedoms to all, irrespective of their personal circumstance.<sup>18</sup> Though marriage is reserved for heterosexuals, same-sex partners can register their union: this area is regulated by Registration of Same-Sex Civil Partnership Act (*Zakon o registraciji istospolne partnerske skupnosti – ZRIPS*)<sup>19</sup> which is relevant in the matters of “procedure and conditions of the registration of same-sex civil partnership, legal consequences of such registration, the manner of termination of the registered civil partnership, the relationship between civil partners on termination of the registered same-sex civil partnership”<sup>20</sup>. According to ZRIPS, same-sex partnership is a relationship between two women or two men, who registered as civil partners.<sup>21</sup> Although the process of registration is different to that of marriage (it’s more bureaucratic and conducted by the administrative units), it creates a similar legal status as the one between partners of different sex: *“By virtue of civil partnership registration civil partners have the right to subsistence and maintenance, the right to jointly owned property and regulation of property relations within civil partnership, the occupancy right, the right to inherit a part of jointly owned property from the deceased partner and the right to obtain information about the health condition of the sick partner and to visit him or her in the healthcare institutions.; Civil partners are bound to mutual respect, trust and assistance.”*<sup>22</sup>

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<sup>17</sup> "Civil Initiative of the Erased Residents, the Peace Institute, Unione Forense per la tutela dei diritti umani and Amnesty International Slovenia": <http://www.mirovni-institut.si/izbrisani/en/ruling-of-the-european-court-of-human-rights-2012/>, (last visited 18.7.2012).

<sup>18</sup> 14. URS.

<sup>19</sup> Zakon o registraciji istospolne partnerske skupnosti (Registration of Same-Sex Civil Partnership Act) – ZRIPS; Official Gazette RS, No. 65/2005, 55/2009.

<sup>20</sup> 1. ZRIPS.

<sup>21</sup> 2. ZRIPS.

<sup>22</sup> 8. ZRIPS.

Concerning acts of discrimination, typical examples are education (firstly because this topic is considered a taboo and isn't included in learning process and secondly because of verbal and physical abuse of LGBT youth by their peers)<sup>23</sup>; the field of employment<sup>24</sup>; healthcare (cases of doctors who consider homosexuality a disease; mild, because is based solely on a questioner distributed among donors, but highly controversial prohibition of blood donation for gay man).<sup>25</sup> There is also a problem of violence – physical and verbal – based solely on sexual orientation, which often remains unreported.<sup>26</sup> Discrimination in the mentioned areas remains largely undetected due to the fact that LGBT people fear to report to authorities because of the high levels of prejudices in society.

These prejudices were manifested clearly during the referendum campaign<sup>27</sup> for new family law legislation (Family Code) which proposed a new, broader definition of family (basing it on the child instead on man-woman relationship). The referendum and the rejected bill are worth mentioning because they showed that the "average voter" prefers a conservative definition of family (that was one of the main points of the campaign against – to keep the family as god supposedly intended it to be, ignoring the social reality, on which the proposal was drafted). Since the referendum campaign was bound to focus on rejection of homosexual part of population (especially their aspirations for the possibility of forming a family) and all forms of non-traditional families, Slovenian Parliament (*Državni Zbor Republike Slovenije*) requested the Constitutional Court (*Ustavno sodišče Republike Slovenije* – US RS) to decide whether it would be constitutional to hold referendum on the issue (majority voting on the rights of minority). The Constitutional Court decided that the referendum was complying with Constitutional provisions.<sup>28</sup>

However, the overall situation for LGBT persons is less grim compared to other countries in the region (West Balkans – ex. SFRY). A Gay pride parade in capital Ljubljana is

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<sup>23</sup> Posledice diskriminacije na družbeno, politično in socialno vključenost mladih v Sloveniji: analiza glede na spol, spolno usmerjenost ter etnično pripadnost; Švab, A. (project leader); Ljubljana; 2008; p.: 80-88.

<sup>24</sup> Ibid, p.: 88-93.

<sup>25</sup> Ibid, p.: 97-103.

<sup>26</sup> Ibid, p.: 106-121.

<sup>27</sup> Referendum was hold on the 23.3.2012 (Official Gazette RS, No. 10/2012, results in Official Gazette RS, No. 28/2012); data released by The State Electoral Commission (Državna volilna komisja) show turnout of 30.31% of voters: 45.45% YES, 54.55% NO.

<sup>28</sup> U-II-3/11-22.

organised every year since 2001<sup>29</sup>, it is accepted as a traditional event and not troubled by violent outbursts.

### ***Other discrimination detected by Ombudsman***

In total, Ombudsman received 49 complaints regarding discrimination in 2011 – 24 regarding the rights of minorities (Roma community), 9 regarding discrimination in the field of employment (rights of disabled) and 5 regarding equal opportunities of sexes. Ombudsman is recommending adopting statutory solutions that would be in accordance with the EU's legal order and would guarantee independence and autonomy of the specialized authorities for protection against discrimination.<sup>30</sup>

### **Family Protection**

- ii. **What is the definition given to the term “family” in your national legislation or Constitution? What is the status of marriage? What is the average marital age of the population?**

#### ***Definition of family***

Basic policies regarding family (family protection) are included in the Constitution of the Republic of Slovenia<sup>31</sup> starting from Article 53 (Marriage and the Family): *"Marriage is based on the equality of spouses. Marriages shall be solemnised before an empowered state authority.; Marriage and the legal relations within it and the family, as well as those within an extramarital union, shall be regulated by law.; The state shall protect the family, motherhood, fatherhood, children, and young people and shall create the necessary conditions for such protection."*<sup>32</sup>, continuing with Article 54 (Rights and Duties of Parents): *"Parents have the right and duty to maintain, educate, and raise their children. This right and duty may be revoked or restricted only for such reasons as are provided by law in order to protect the child's interests.; Children born out of wedlock have the same rights as children born within it."*<sup>33</sup>, Article 55 (Freedom of Choice in Childbearing)<sup>34</sup> and

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<sup>29</sup> [http://www.ljubljana.pride.org/?page\\_id=41](http://www.ljubljana.pride.org/?page_id=41), (last visited 10.10.2012).

<sup>30</sup> Human rights Ombudsman: Annual Report 2011, p. 46.

<sup>31</sup> Ustava Republike Slovenije (URS), Official Gazette RS, No. 33/1991.

<sup>32</sup> Article 53 URS.

<sup>33</sup> Article 54 URS.

<sup>34</sup> Article 55 URS.

Article 56 (Rights of Children)<sup>35</sup>. Constitution is oriented towards defining general guidelines for further legislation, thus focused on proclaiming state's dedication to international standards of human rights.

Definitions themselves can be found in the legislation on this particular field, the Marriage and Family Relations Act (*Zakon o zakonski zvezi in družinskih razmerjih – ZZZDR*)<sup>36</sup>. In Article 2 the definition of family is the following: family is living union of the parents and the children, especially protected on the bases of child protection<sup>37</sup>.

### ***Status of marriage***

Marriage is defined in Article 3 ZZZDR as a legally regulated living union of husband and wife. This article also defines the meaning of marriage as a start-point of conceiving family.<sup>38</sup> Marriage is based on the equality of partners and their free will (both in case of marriage and its dissolution). Legal age for marriage is 18 years (legal capacity is also a condition; but there are certain cases when people under 18 – at least 15 years old can get married, but only with permission of social services), marriage is only possible between two people of different sexes, who aren't already married or directly related.<sup>39</sup> Consensual union of partners is also legally regulated: long lasting unions between two people who decided not to get married entails the same legal consequences as marriage (given that partners could legally marry).<sup>40</sup> Such a union is recognized by law as equivalent to marriage in every respect,<sup>41</sup> which means that all the rules regarding the relationship between partners, property, dissolution, etc. that are regulated by ZZZDR in the chapter “Marriage”<sup>42</sup> are applicable to durable living community of a man and a woman who have not concluded marriage.

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<sup>35</sup> Article 56 URS.

<sup>36</sup> *Zakon o zakonski zvezi in družinskih razmerjih – ZZZDR*, (Marriage and Family Relations Act), Official Gazette SRS, No. 15/1976, 1/1989; Official Gazette RS, No. 64/2001, 16/2004; Odl. US, 16/2004, 90/2011.

<sup>37</sup> Article 2 ZZZDR.

<sup>38</sup> Article 3 ZZZDR.

<sup>39</sup> Articles 16-24 ZZZDR.

<sup>40</sup> Article 12 ZZZDR.

<sup>41</sup> Article 12 ZZZDR.

<sup>42</sup> Articles 13-85 ZZZDR.

The bill mentioned is regulating most aspects of family and child protection, relations, etc. It is quite conservative, partially due to its age (it was passed in 1976); for years Family Law specialists were preparing a new bill with a more modern and integral approach to the matter (Family Code): it included a new definition of family (which put the child at the centre as the constituent of the family itself) and many other changes. However these were rejected by the voters during the referendum in 2012<sup>43</sup> and the previous definitions were maintained.

### *Average marital age*

Data for 2011 released by The Statistical Office of Republic of Slovenia (*Statistični urad RS – SURS*) shows that average marital age of women was 31.2 years (or 29.1 years for women getting married for the first time) and 34 (or 31.4 – first marriage) years for men.

For comparison<sup>44</sup>:

Table 1: Average marital age

YEAR	1980	1990	2000	2010	2011
men	27,5	28,7	31,4	33,7	34,0
women	24,1	25,4	28,4	30,8	31,2
Getting married for the first time:					
Men	25,5	26,6	29,4	31,2	31,4
women	22,5	23,8	26,6	28,6	29,1

In 2011, 56.8% of all children born in Slovenia were born out of wedlock. For comparison:<sup>45</sup>

<sup>43</sup> Referendum was hold on the 23.3.2012 (Official Gazette RS, No. 10/2012, results in Official Gazette RS, No. 28/2012); data released by The State Electoral Commission (Državna volilna komisija) show turnout of 30.31% of voters: 45.45% YES, 54.55% NO.

<sup>44</sup> All data considering marital age (including those in the table below) were obtained from The Statistical Office of Republic of Slovenia.

Tabele 2: Born out of wedlock

YEAR	1981	1991	2001	2010	2011
Born alive out of wedlock (%)	14,1	26,4	39,4	55,7	56,8

We can observe a trend of growing of the average marital age. More than half of the live-born children's parents weren't married – the percentage is also expected to grow. Legal marriage is obviously not any kind of condition for starting family in eyes of future parents.

### Child Protection

- iii. **What is the general status of children within the respective States' cultural and historical background? What is the general approach to children rights issues in the respective state? Is there a general concern regarding children/children rights? Were there/are there any violations that has been caught the eye of the media or the legislators?**

#### *General status of children within cultural and historical background*

Cultural and historical background of this issue in Slovenia is not dramatically different from that of the region. Before the World Wars and industrialisation, population mainly depended on agriculture and children were considered farm-workforce. Education was secondary and only few lucky and talented had the opportunity to pursue the “respected” professions (such as lawyer or a priest). The influence of the Catholic Church was relevant: as elsewhere, it had sole authority on questions of family, morals, etc. As a consequence there were cases of illegitimate (“bastard”) children and their mothers were scrutinized and mocked.

In the modern society, the status of children changed exceedingly. Accordingly with opinions represented in sociological literature of some critical authors, we can say that today a child is a “little king or queen”, subject/object of great affection of the parents

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<sup>45</sup> All data (including those in the table below) were obtained from The Statistical Office of Republic of Slovenia.

who would do anything to please their children. One could argue though, that children are still “little slaves”, no longer in the context of physical labour, but in the context of their parents’ expectations (such as success in school etc.). Parents see their children as an investment (both material and emotional) and, accordingly with general trend of a growing preoccupation in all fields of society, parents are hysterically afraid for their children lives and are demanding constant and strict supervision over them: which is evident to anyone, since fences and video-surveillance around kindergartens and schools are very common. The greatest of fears is, of course, the fear of paedophilia: always lurking in every parent’s nightmare – it is a stranger, a pervert, never one of “us”, but one of “them” – evil and soulless monster, deserving no less than death or at least castration. In this abyss of moral panic, targeting the outsider (perhaps a priest or a teacher: parents learnt fast not to trust outsiders who pretend to “be in”), the problem of abuse in the circle of nuclear family is known – but it is never “our” family and it remains more or less a taboo.<sup>46</sup>

### ***General approach to children rights issues***

The Constitution of RS proclaims a focus on the protection of children’s rights: *“Children shall enjoy special protection and care. Children shall enjoy human rights and fundamental freedoms consistent with their age and maturity. Children shall be guaranteed special protection from economic, social, physical, mental, or other exploitation and abuse. Such protection shall be regulated by law; Children and minors who are not cared for by their parents, who have no parents or who are without proper family care shall enjoy the special protection of the state. Their position shall be regulated by law.”*<sup>47</sup> Slovenia is also bound by the Convention on Rights of the Child<sup>48</sup> which was taken into account when the Constitution was drafted.

The detailed regulation on children rights is to be found in laws. Of great importance are laws regulating social aspects, granting children basic conditions for a healthy development. A quick overview of relevant legislation: Parental Protection and Family

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<sup>46</sup> Similar conclusions can be found in: Kanduč; *Onkraj zločina in kazni*; Ljubljana; 2003; Študentska založba; p.: 228-266.

<sup>47</sup> Article 56 URS.

<sup>48</sup> *Zakon o ratifikaciji Konvencije Združenih narodov o otrokovih pravicah*; Official Gazette RS – International Treaties, No. 9/1992.

Benefits Act (*Zakon o starševskem varstvu in družinskih prejemkih* – ZSDP-C)<sup>49</sup> regulating insurance for parental protection and related rights, family benefits, conditions and the procedure for exercising rights – all of these rights are child-related; Health Care and Health Insurance Act (*Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju* – ZZVZZ-L)<sup>50</sup> regulating healthcare and insurance for children; Social Assistance Act (*Zakon o socialnem varstvu* – ZVS-D)<sup>51</sup>; Pension and Disability Insurance Act (*Zakon o pokojninskem in invalidskem zavarovanju* – ZPIZ-1)<sup>52</sup> granting children who lost their parents a family pension until 18 years of age (or until 26 years of age for persons in process of education).

Another important aspect is publicly organised education, which is also granted by the Constitution: "Freedom of education shall be guaranteed; Primary education is compulsory and shall be financed with public funds; The state shall create the opportunities for citizens to obtain a proper education."<sup>53</sup> Slovenia has a well-developed system of pre-school education, regulated by Nursery Schools Act (*Zakon o vrtcih* – ZVrt)<sup>54</sup>. It is based on equal possibilities of access to educational care services for pre-school children and a free choice of educational care programmes. Pre-school education takes place in public and private kindergartens. Primary education is provided by elementary schools, elementary schools with adapted curriculums (for children with special needs) and institutions for the education of children and young people with

<sup>49</sup> *Zakon o starševskem varstvu in družinskih prejemkih* (Parental Protection and Family Benefits Act) – ZSDP-C; Official Gazette RS, No. 97/2001 (ZSDP), 76/2003 (ZSDP-A), 47/2006 (ZSDP-B), 114/2006, 10/2008 (ZSDP-C), 62/2010.

<sup>50</sup> *Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju* (Health Care and Health Insurance Act) – ZZVZZ-L; Official Gazette RS, No.: 9/1992 (ZZVZZ), 13/1993 (ZZVZZ-A), 9/1996 (ZZVZZ-B), 29/1998 (ZZVZZ-C), 6/1999 (ZZVZZ-D), 56/1999, 99/2001 (ZZVZZ-E), 42/2002, 60/2002 (ZZVZZ-F), 126/2003 (ZZVZZ-G), 76/2005 (ZZVZZ-H), 38/2006 (ZZVZZ-I), 11420/06, 91/2007 (ZZVZZ-J), 76/2008 (ZZVZZ-K), 62/2010, 87/2011 (ZZVZZ-L), 40/2012.

<sup>51</sup> *Zakon o socialnem varstvu* (Social Assistance Act) – ZSV-D; Official Gazette RS, No.: 54/1992 (ZSV), 56/1992, 13/1993, 42/1994, 1/1999, 41/1999 (ZVS-A), 36/2000, 54/2000, 26/2001 (ZVS-B), 110/2002, 2/2004 (ZVS-C), 7/2004, 21/2006, 105/2006 (ZVS-D), 61/2010, 62/2010, 57/2012.

<sup>52</sup> *Zakon o pokojninskem in invalidskem zavarovanju* (Pension and Disability Insurance Act) – ZPIZ-1; Official Gazette RS, No.: 72/2000, 81/2000, 124/2000, 109/2001, 83/2002, 108/2002, 110/2002, 112/2002, 26/2003-UPB1, 40/2003, 63/2003, 63/2003, 133/2003, 135/2003, 2/2004, 20/2004, 54/2004, 63/2004, 136/2004, 68/2005, 72/2005, 104/2005, 69/2006, 109/2006, 112/2006, 114/2006, 91/2007, 10/2008, 98/2009, 27/2010, 38/2010, 61/2010, 79/2010, 94/2010, 84/2011, 94/2011, 105/2011, 110/2011, 40/2012, 55/2012.

<sup>53</sup> Article 57 URS.

<sup>54</sup> *Zakon o vrtcih* (Nursery Schools Act) – ZVrt; Official Gazette RS, No. 12/1996, 44/2000, 78/2003, 72/2005, 25/2008, 98/2009, 36/2010, 62/2010, 94/2010, 40/2012.



special needs and is regulated by the Elementary Schools Act (*Zakon o osnovni šoli – ZOs*)<sup>55</sup>. The proportion of pupils completing elementary school is around 98.5%.<sup>56</sup> Secondary education is also equally accessible to all children and the compulsory curriculum is free.

Welfare, healthcare, public education, etc., even when not directly linked only to children, enable development of society in which at least some (if not equal) opportunities are available to all. The situation in Slovenia is quite decent, but in light of austerity-mania, system is likely to progress backwards instead of forwards – since the process of disintegration of welfare state is just beginning, it is too early to comment, but widening gap between "the rich" and "the poor" it is bringing is to have its imprint on the rights of the children since they depend greatly on the social status of their parents.

### ***Concern regarding children/children rights***

There seem to be a general concern regarding children (and their rights), since most people react emotionally to this issue. The rights of the children are an important topic in civil society in general. There are also many NGOs and civil society groups advocating for children rights (from many different aspects). The basic aims of the Convention on the Rights of the Child are included in a broad spectrum of legislation, policy and programmes in the areas of social assistance and services, health, education and sport, family policy, employment, culture, internal affairs and justice, which enable the implementation of children's rights as defined by the Convention.<sup>57</sup>

- iv. **International obligations: What is the relevant legislation regarding the implementation of international treaties? What is the relationship between State law and international treaties (dualistic or monalistic approach)? What is the date of ratification of United Nations Convention on Rights of the Child? Did the State make any reservations to the Convention? What is the general status of implementation?**

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<sup>55</sup> *Zakon o osnovni šoli* (Elementary schools Act)– ZOs; Official Gazette RS, No. 12/1996, 33/1997, 59/2001, 71/2004, 53/2005, 60/2006, 63/2006, 102/2007, 107/2010, 87/2011.

<sup>56</sup> Report on the Implementation in Slovenia of the Measures of the World Summit for Children, p. 35-41.

<sup>57</sup> Report on the Implementation in Slovenia of the Measures of the World Summit for Children.

***Relevant legislation regarding the implementation of international treaties***

The Constitution of Republic of Slovenia says at Article 8: "Laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly".<sup>58</sup> Furthermore, Constitution is regulating the hierarchy of legal norms, stating international law above laws of the state (Article 153/2): "Laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general legal acts must also be in conformity with other ratified treaties".<sup>59</sup> For prevention of situation of collision between the Constitution and international treaties, the Constitutional Court issued an opinion on conformity (Article 160/2): "In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The National Assembly is bound by the opinion of the Constitutional Court".<sup>60</sup>

More detailed provisions are to be found in Foreign Affairs Act (*Zakon o zunanjih zadevah*)<sup>61</sup>: it regulates all relevant issues regarding international treaties (definitions, procedures, ratification, etc). The process of negotiations etc. is conducted by the Ministry of Foreign Affairs (*Ministerstvo za zunanje zadeve* - MZZ), ratification itself is conducted by the National Assembly, or in some cases, the Government.<sup>62</sup> It also regulates the situation of collision between international treaty and Slovenian law/other regulation: in this case, the Government is obliged to either change the law (most common solution) or withdraw the participation in the international treaty. Until this process is completed, international treaty remains in use.<sup>63</sup>

***Relationship between State law and international treaties***

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<sup>58</sup> Article 8 URS.

<sup>59</sup> Article 153/2 URS.

<sup>60</sup> Article 160/2 URS.

<sup>61</sup> *Zakon o zunanjih zadevah* – ZZZ-1 Official Gazette RS, No. 45/2001; 78/2003 (ZZZ-1A); 76/2008 (ZZZ-1B); 108/2009 (ZZZ-1C).

<sup>62</sup> Articles 69-87 ZZZ-1C.

<sup>63</sup> Article 87 ZZZ-1C.

Regarding the relationship between State law and international treaties, Slovenia is leaning towards dualistic approach. Considering that in most countries, neither monistic or dualistic approach appears in pure form, we could describe Slovenian approach as a softer version of dualism<sup>64</sup>, more concretely as adoption<sup>65</sup> of international treaty, granting it direct legal consequence, since no special transformation of international norm is needed (National Assembly passes it as a bill, but without any changes to the original text). Once norm is adopted it is applied directly.<sup>66</sup>

### ***Convention on Rights of the Child***

The Convention was ratified by former SFRY<sup>67</sup> on December 14<sup>th</sup> 1990. Accordingly with the rules of succession<sup>68</sup>, Republic of Slovenia is the legal successor of the treaty, effective date being July 1<sup>st</sup> 1992<sup>69</sup>. Reservation was made upon succession: "The Republic of Slovenia reserves the right not to apply paragraph 1 of article 9 of the Convention since the internal legislation of the Republic of Slovenia provides for the right of competent authorities (centres for social work) to determine on separation of a child from his/her parents without a previous judicial review"<sup>70</sup>. Reservation was withdrawn in 1999.<sup>71</sup>

Slovenia also ratified Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict<sup>72</sup> and Optional Protocol to the

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<sup>64</sup> D. Türk: Temelji mednarodnega prava. Ljubljana; 2007; p. 71.

<sup>65</sup> D. Türk: Temelji mednarodnega prava. Ljubljana; 2007; p. 75.

<sup>66</sup> D. Türk: Temelji mednarodnega prava. Ljubljana; 2007; p. 71.

<sup>67</sup> Zakon o ratifikaciji konvencije Združenih narodov o otrokovih pravicah; Official Gazette SFRY – International Treaties No. 15/1990.

<sup>68</sup> Akt o potrditvi nasledstva glede konvencij, statutov in drugih mednarodnih sporazumov, ki predstavljajo akt o ustanovitvi mednarodnih organizacij; Official Gazette RS – International Treaties, No. 9/1992.

<sup>69</sup> Zakon o ratifikaciji Konvencije Združenih narodov o otrokovih pravicah; Official Gazette RS – International Treaties, No. 9/1992.

<sup>70</sup> Multilateral Treaties deposited with the Secretary-General, Status as at 31 December 1992, United Nations, New York, 1993, p.193.

<sup>71</sup> Official Gazette RS – International Treaties, No. 5/1999.

<sup>72</sup> Official Gazette RS – International Treaties, No. 23-94/2004. (Reservation: "In compliance with Article 3, Paragraph 2, of the Optional Protocol, the Republic of Slovenia declares that the minimum age at which it will permit voluntary recruitment into its national armed forces is 18 years. The minimum age shall apply equally to men and women. By phasing out the recruitment system and introducing professional military service, the contractual reserve forces and service in the national armed forces shall be voluntary and regulated by a contract between the two parties.").

Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography<sup>73</sup>.

### ***General status of implementation***

In Slovenia the United Nations Convention on the Rights of the Child is applied directly.<sup>74</sup> It was also included in the Constitution in the chapter related to human rights and fundamental freedoms and children's rights.<sup>75</sup> General conditions for its realization are established by constitutionally granted rule of law, social state, democratic pluralism and a parliamentary democracy.<sup>76</sup> Human Rights Ombudsman is responsible for supervision of children's rights and also works on awareness and education of general public, children and youth on these issues.

The Committee on the Rights of the Child in its consideration of the Slovene periodical report<sup>77</sup> states that progress has been made in the area of protection of the rights of the child. It welcomes constructive approach to the matter and recognizes that some positive legislative changes had been made.<sup>78</sup> It does however suggest further improvements to various fields that would strengthen the protection of all aspects of rights of the child. In this it emphasizes that the gap exists between law and practice, and that legislative changes that otherwise mean significant improvement, need more effective measures for their implementation. It recommends to develop systematic and on-going training programs on human rights, including children's rights, for all persons working for and with children (e.g. judges, lawyers, law enforcement officials, civil servants, local government officials, teachers, health personnel and especially children themselves) and also encourages Slovenia to strengthen its cooperation with NGOs and involve NGOs and other sectors of civil society working with and for children more systematically throughout all stages of the implementation of the Convention and to improve the financing of NGOs while respecting their autonomy.<sup>79</sup> Slovenia has since adopted Guidelines for drafting reports on behalf of Republic Slovenia and

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<sup>73</sup> Official Gazette RS – International Treaties, No. 23-94/2004.

<sup>74</sup> According to Article 8 URS.

<sup>75</sup> Articles 14-65 URS.

<sup>76</sup> Articles 1-13 URS.

<sup>77</sup> CRC/C/15/Add.230.

<sup>78</sup> CRC/C/15/Add.230; p. 1-2.

<sup>79</sup> CRC/C/15/Add.230; p. 2-4.

implementation of structurally related human rights activities (*Smernice za pripravo poročil Republike Slovenije in izvedbo sorodnih mednarodnih aktivnosti na področju človekovih pravic ter obravnavo poročil mednarodnih nadzornih organov*).<sup>80</sup> It also works on educating both children and adults who work with them on the issues of the rights of the child.<sup>81</sup> The Committee is calling attention to discrimination of Roma children, urging Slovenia to improve their living conditions, participation in schooling and healthcare available to them.<sup>82</sup> The Committee recommends that a special children's ombudsperson or at least a specialized deputy within the Human Rights Ombudsman's Office should be established.<sup>83</sup> Slovenia decided for the second option and appointed Ombudsman's deputy who is specialized for areas of rights of the child and social security.<sup>84</sup> The Committee also advised to improve the collection of statistical data – though extensive, the Committee noted that the data are not always sufficiently disaggregated by vulnerable groups.<sup>85</sup> Slovenia is recognizing the problem – that large number of data is collected but by different institutions, which is enabling their perfect statistical treatment. To address this problem a new selection of statistical indicators that will allow proper monitoring of progress in achieving the goals for the benefit of children, is in progress.<sup>86</sup>

**v. European Obligations: If the State is an EU Member, what is the general implementation process of the Directive 2011/93/EU of the European Parliament and the European Council of 13 December 2011? Please cite the internal legal instruments of the implementation.**

Slovenia is a EU Member State, thus it proceeded with the implementation of the Directive 2011/93/EU. To harmonize national legislation, appropriate changes were applied to many articles in the chapter "Criminal offences against sexual liberty" of the Criminal Code (*Kazenski zakonik* - KZ-1)<sup>87</sup>: Articles 170, 173a, 175, 176, 178, 179, 181, 186, 187, 189, 192,

<sup>80</sup> Tretje periodično poročilo Republike Slovenije h konvenciji o otrokovih pravicah, p. 6.

<sup>81</sup> Tretje periodično poročilo Republike Slovenije h konvenciji o otrokovih pravicah, p. 14-17.

<sup>82</sup> CRC/C/15/Add.230; p. 4-5; 8-9.

<sup>83</sup> CRC/C/15/Add.230; p. 2.

<sup>84</sup> Tretje periodično poročilo Republike Slovenije h konvenciji o otrokovih pravicah, p. 5.

<sup>85</sup> CRC/C/15/Add.230; p. 3.

<sup>86</sup> Tretje periodično poročilo Republike Slovenije h konvenciji o otrokovih pravicah, p. 13.

<sup>87</sup> Kazenski zakonik (Criminal Code)– KZ-1; Official Gazette RS, No. 55/2008 (KZ-1), 66/2008, 39/2009 (KZ-1A), 91/2011 (KZ-1B), 50/2012 (KZ-1-UPB2).

199 were altered.<sup>88</sup> Since the Directive also affects criminal liability of legal persons, special legislation regarding this issue was also adjusted: Liability of Legal Persons for Criminal Offences Act (*Zakon o odgovornosti pravnih oseb za kazniva dejanja* - ZOPOKD-B)<sup>89</sup>: Article 25 was changed.

## 2 THE LANZAROTE CONVENTION

### xxiii. When did the State ratify the European Convention on Human Rights?

Slovenia ratified the European Convention on Human rights on 28 June 1994.

### xxiv. Is the state a party to the Lanzarote Convention? Date of signature and ratification? Did the country make any reservations to the Convention/opt out of any parts?

The Lanzarote convention, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse entered into force on the 1<sup>st</sup> July 2010 with regard to the 5 member states which ratified it. Slovenia is also a party to the Lanzarote convention. The date of signature of this convention is 25 October 2007. We are still waiting for ratification of the Lanzarote convention.

#### *If not ratified:*

### xxv. Does the State plan to ratify the convention? If so, what is the plan for the ratification and when can this ratification is being expected? If not, what are the obstacles hindering a ratification?

Slovenia is expecting the ratification and implementation of the Lanzarote convention as soon as possible. The main obstacle of ratification may be that we do not talk about this topic so often as we should and that is also one of the reasons that in 2012 our Legal research group decided to take part in One in Five campaign, the Council of Europe

<sup>88</sup> Zakon o spremembah in dopolnitvah Kazenskega zakonika (KZ-1B); Official Gazette RS, No.: 91/2011.

<sup>89</sup> Zakon o odgovornosti pravnih oseb za kazniva dejanja (Liability of Legal Persons for Criminal Offences Act)- ZOPOKD-B; Official Gazette RS, No. 59/1999 (ZOPOKD), 12/2000, 50/2004 (ZOPOKD-A), 65/2008 (ZOPOKD-B).

Campaign to stop sexual violence against children. We hope that our research and also researches of other groups will make the ratification and implementation of the Lanzarote convention easier.

In 2012 Criminal law was already adapted to the Convention, namely, we adopted a new Article 173.a, "Grooming", saying that whoever person under the age of fifteen years, through information and communication technologies addresses a meeting in order to make sexual assault against him or by making images, audio, or other items of a pornographic or otherwise sexually explicit material, and this proposal has been followed by concrete actions to achieve the meeting, shall be punished with imprisonment up to one year.

Slovenia also participated in Regional conference in Croatia where the stop to sexual violence against children - ratifying and implementing the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse – was discussed. This Regional Conference was in October 2011.<sup>90</sup>

**xxvi. What would be the rank of the Lanzarote Convention under the State's national legal order when ratified?**

According to our constitution, The Constitution of the Republic of Slovenia, laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly.<sup>91</sup>

## **II NATIONAL LEGISLATION**

### **1 GENERAL PRINCIPLES OF THE JURISDICTION**

**xi. Please give us a brief history of the respective State and the governmental regime (Federal State/Central government?)**

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<sup>90</sup> <http://www.coe.int/t/dg3/children/childrenconference/DraftProgramme.pdf>, (last visited 11.9.2012).

<sup>91</sup> Ustava Republike Slovenije (URS), Official Gazette RS, No. 33/1991.

The Republic of Slovenia lies at the heart of Europe is a small country in size (covering about 20.000 km<sup>2</sup>) and population (2 million inhabitants), located at a major crossroads in Central Europe, where Roman, German and Slavic culture meet. Slovenian territory was part of the [Roman Empire](#) and it was devastated by Barbarian incursions in [late Antiquity](#) and [Early Middle Ages](#), since the main route from the [Pannonian plain](#) to [Italy](#) ran through present-day Slovenia. [Alpine Slavs](#), ancestors of modern-day [Slovenes](#) settled the area in the late 6th Century A.D. The [Holy Roman Empire](#) controlled the land for nearly 1000 years, and between the mid 14th century and 1918 most of Slovenia was under [Habsburg](#) power. In 1918, Slovenes joined [Yugoslavia](#), while the west of the country was annexed to [Italy](#). Between 1945 and 1990, [Slovenia](#) was under Yugoslav Communist regime. The country gained its independence from [Yugoslavia](#) in June 1991, and is today a modern state and a member of the [European Union](#) and [NATO](#). Slovenia became an EU member on 1 May 2004.

The Republic of Slovenia is a parliamentary representative democratic republic since 25 June 1991 with central government. Under the Constitution, Slovenia is a democratic republic and a social state governed by law. The state's authority is based on the principle of the separation of legislative, executive and judicial powers, with a parliamentary system of government. The highest legislative authority is the National Assembly (90 deputies), which has the right to enact laws. Elections to the National Assembly are held every four years.

- xii. **About the general approach of the National legislation to Human Rights, how does the State legislate Human Rights? Is there a “Bill of Rights” within the respective country or are human rights mentioned in the Constitution as fundamental principles? When was this Constitution/Bill of Rights created? Are there any specific provisions regarding Children Rights?**

As the Constitution states, “Slovenia is a state of all its citizens, and is founded on the permanent and inalienable right of the Slovenian nation to self-determination.” It rests on the foundations of the legal system, which is based on respect for human rights and fundamental freedoms, on the principle of a legal and socially just state. This means that we do not have »Bill of rights« as we have human rights mentioned in the Constitution as fundamental freedoms.



The Constitution of the Republic of Slovenia is the fundamental law of Republic of Slovenia and it was adopted by the Slovenian National Assembly on December 23, 1991. Children rights are mentioned also in the Constitution in Article 56:

»Children shall enjoy special protection and care. Children shall enjoy human rights and fundamental freedoms consistent with their age and maturity. Children shall be guaranteed special protection from economic, social, physical, mental or other exploitation and abuse. Such protection shall be regulated by law. Children and minors who are not cared for by their parents, who have no parents or who are without proper family care shall enjoy the special protection of the state. Their position shall be regulated by law.«<sup>92</sup>

- xiii. **Are there specific judicial bodies which monitor the implementation of international and national human rights instruments (for example Constitutional Courts etc.)? Can individuals claim their constitutional rights directly (e.g. direct effect)? Is there a Constitutional Court? Is it possible to apply individually? If not, how can the individuals claim their constitutional rights in case of violation? Is there a system of hierarchy or other jurisdictions to ask before being able to go before Constitutional/Supreme Court? Please, briefly describe the application process.**

Under the Constitution, the Republic of Slovenia has an Ombudsman whose responsibility is the protection of human rights and fundamental freedoms in relation to state authorities, local authorities, and persons in public office. The Ombudsman is proposed by the President of the Republic and elected by the National Assembly by a two-thirds majority vote for a period of six years, and the possibility of another term. A two-thirds majority vote gives the Ombudsman the necessary legitimacy imperative for his/her work. The Ombudsman reports to the National Assembly annually. The annual reports have become an important reflection of the situation regarding basic human rights and freedoms in Slovenia. The law allows the Ombudsman or anyone else to initiate proceedings against violations of human rights.

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<sup>92</sup> Ustava Republike Slovenije (URS), Official Gazette RS, No. 33/1991.

In Slovenia the Constitutional Court is the highest authority with regard to the protection of constitutionality, legality, human rights and basic freedoms. It may act as a negative legislature and abrogate an act or part of an act. Constitutional Judges are appointed by the National Assembly following nominations from the President of the Republic.

Proceedings before the Constitutional Court are regulated by law (Constitutional Court Act). The law determines who may require the initiation of proceedings before the Constitutional Court.

The request may be made by the National Assembly, at least one third of members of the National Assembly, the Council of State, the government, the court, the public prosecutor, the Bank of Slovenia, the Court of Auditors, if a question of the constitutionality and legality is in relation to proceedings conducted by them, the Ombudsman in connection with an individual case, representative bodies of local communities, if rights are threatened local communities, representative trade unions of the country, where workers' rights are threatened.

Anyone who demonstrates legal interest may request the initiation of proceedings before the Constitutional Court.

Interest in bringing the initiative is given, if a regulation or general act issued for the exercise of public powers, which review the petitioner, directly interferes with their rights, legal interests, or legal status.

The Constitutional Court decides by a majority vote of all its judges, unless otherwise provided for individual cases by the Constitution or law. The Constitutional Court may decide whether to initiate proceedings following a constitutional complaint with fewer judges as provided by law.<sup>93</sup>

**xiv. Is there a Criminal Supreme Court? Please, briefly describe the criminal procedure.**

We do not have a Supreme criminal court in Slovenia, but criminal department at Supreme Court. For the first instance local and district courts are competent. In the second stage, in

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<sup>93</sup> Ustava Republike Slovenije (URS), Official Gazette RS, No. 33/1991.

the event of an appeal against a decision at first instance and in some other cases, higher courts are competent. On top of the pyramid there is a Supreme Court, the highest court in the country.

Slovenian criminal procedure consists of four phases: the pre-trial procedure, the filing of the charges (indictment), the trial and the judicial review procedures (appeal against judgments of the court of first instance and the so-called extraordinary remedies). Pre-trial procedure consists of two parts: preliminary proceedings (with the police as the *dominus litis*) and the investigation phase as the predominantly judicial phase, with the investigating judge in charge.

The criminal procedure usually starts with the filing of a report of an offence to the police or state prosecutor. After the police investigation (usually informal interviews with the suspect and witnesses, the investigation of the scene of the crime, the examination of the real evidence, search of the premises, etc.) the matter is transferred to the state prosecutor. The state prosecutor decides whether there is a well-grounded suspicion. If yes, a call for a formal investigation is issued (in cases of serious or complex criminal offences), or the so-called direct indictment is filed.

In case the investigating judge starts the investigation, the investigation is conducted with the purpose of gathering evidences for the prosecutor to decide whether to file an indictment or drop the case. The investigating judge, who is bound by the inquisitorial maxim, conducts the investigation at his or her own initiative. In the investigation phase, the investigating judge has most of the investigative powers, although he or she may transfer these to the police for the execution of certain investigative acts.

After the investigation phase is concluded, the file is submitted to the state prosecutor who may decide to file an indictment, consider the matter in an alternative way or to drop the case. After filing the indictment, the defendant or the trial judge may file an objection to the charging document if in his or her view there are no grounds to proceed. The objection is then decided by a panel of three judges. When the indictment becomes final the case is submitted to trial.

The trial is organized mostly in the accusatorial manner; however, the court is bound to seek the truth. The trial closes after the pronouncement of the judgment, which can be a finding of guilt, acquittal or rejection of the charge. If there is no appeal, the judgment becomes

final in fifteen days after the judgment has been served on the accused in regular proceedings and after eight days after summary proceedings. The appeal may be filed by the accused, certain of his or her relatives, the state prosecutor and the injured party. The appeal is decided by the court of second instance. The final judgment may also be reviewed, usually by the Supreme Court, through extraordinary legal remedies.<sup>94</sup>

**xv. What is the age of criminal liability? Are there any statistics available regarding children prisoners?**

Offenders can be divided into five categories:

- 1.) Children below the age of 14 may not be held criminally liable.
- 2.) Juveniles who at the time of the commission of an offence had reached the age of 14 but not yet 16 (*minors*) are criminally liable, but only educational measures may be applied. Safety measures (with the exception of a prohibition to engage in certain occupations) may also be ordered.
- 3.) Juveniles who at the time of the commission of an offence had reached the age of 16 but not yet 18 (so-called "*older juveniles*") are criminally liable. In general educational measures may be applied, but in exceptional cases the court may impose juvenile detention or a fine. In addition a driving license may be revoked and banishment from the country may be imposed as accessory sentences. Also all safety measures except for a prohibition to engage in certain occupations may be ordered.
- 4.) In case the offender is a so-called "*young adult*", i.e. he or she has committed an offence as an adult but has not yet reached the age of twenty-one by the end of the trial, the court may instead of imposing an imprisonment sentence, order that he or she be placed under the supervision of the social services or may impose any institutional measure (these two are educational measures primarily reserved for juveniles).

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<sup>94</sup> K. Šugman: Criminal Justice System in Europe and North America, 2004: <http://www.heuni.fi/uploads/fnxdt.pdf>.

5.) Adult offenders.<sup>95</sup>

Slovene courts sentence only less than 2% of juvenile offenders to prison while approximately 6% are placed into institutions for residential treatment. The comparison with other European countries leads to the conclusion that Slovenia is one of the countries with the lowest share of juveniles in prison or pre-trial detention.

A juvenile prison sentence can only be imposed in the case of a serious offence (for which a sentence of five years or more is prescribed). When a prison sentence is imposed the judge needs to explain why an educational measure would not be appropriate. We can conclude that Slovenia has taken into account the recommendations as stipulated in international documents as regards the purpose of a prison sentence for juveniles: rehabilitation and not punishment.

Even though a prison sentence of up to ten years can be imposed in Slovenia, in the period between 2001 and 2007 this sentence was only imposed on a single juvenile offender, while 73% of the imprisoned juveniles received prison sentences of up to two years.

Only a low percentage of juvenile prisoners serve the entire sentence, most of them are released on probation before the full sentence runs out. Once the juvenile serves one third of his sentence a special Ministry of Justice committee makes the decision regarding probation release. Between 2001 and 2007, 43 juveniles were released from juvenile prison; only six of them served their entire sentences, 29 were released on probation on average six months before their full sentence.<sup>96</sup>

There is one (older) statistic, regarding juveniles prisoners:

Table 3: Juveniles on whom an educational measure or a sentence was imposed, by type of measure or sentence, 1980–2000.

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<sup>95</sup> Ibid.

<sup>96</sup> K. Filipčič: Deprivation of liberty of juveniles in Slovenia.

Year	Total	Reprimand (%)	Instructions and prohibitions* (%)	Supervision by a social assistance institution (%)	Commitment to a juvenile institution (%)	Juven. Prison (%)	Fine* * (%)
1980	856	36.4	-	39.5	13.8	1.1	-
1985	1098	48.6	-	33.1	7.9	1.0	-
1990	997	58.3	-	28.8	6.1	0.3	-
1995	499	58.1	2.8	29.3	8.2	1.4	0.2
1996	500	53.4	9.6	29.8	5.6	0.6	1.0
1997	617	42.8	16.2	33.5	5.8	0.2	1.5
1998	636	35.2	15.4	39.5	7.9	0.1	1.9
1999	706	33.6	18.4	40.4	5.1	0.5	1.8
2000	591	29.5	22.7	40.8	4.6	1.5	0.8

\* Introduced by the Criminal Code in 1995.

Sources:

– Statistical Office of the Republic of Slovenia, 2001.

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

lviii. **How does the national legislation define the term “sexual activities”? Is it to be applied broadly or narrowly?**

Slovenian law does not directly define the term “sexual activities”. The only terms used in the Articles 170, 172, 173 and 174 of Slovenian Criminal Code are sexual intercourse, sexual behaviour and sexual act. In his Commentary of the Criminal Code Mitja Deisinger defines sexual intercourse as a natural merging of female and male genitals. The concept of sexual act by definition covers all actions where the sexual urges are being met using the body of the victim but are not sexual intercourse. “This includes all insertions of the male sexual organ (if the perpetrator is male) in the body of the sexual partner (male or female), that are similar to sexual intercourse, such as anal sexual intercourse, oral sexual intercourse, intercourse using the breasts, thighs, etc. and all other actions where the intent is to sexually satisfy the perpetrator (male or female), such as the touching of the genitals (without attempt of rape, masturbation of the victim, or forcing the victim into masturbation of the perpetrator, invasion of the victim’s genitals and similar behaviour.”<sup>97</sup>

This means all actions committed by the perpetrator where the intention is sexual arousal or satisfaction of the perpetrator’s sexual urges and which include physical touching of the bodies or body parts of the perpetrator and the victim.<sup>98</sup>

<sup>97</sup> M. Deisinger: Kazenski zakonik s komentarjem (Criminal Code with Commentar, special section), GV Založba, Ljubljana 2002, p. 244.

<sup>98</sup> M. Deisinger: Kazenski zakonik s komentarjem (Criminal Code with Commentary, special section), GV

From this we can conclude that the term “sexual activities” has a broad definition and usage.

**lix. Does the law define and interpret the word “intentionally”? What is the criminal liability of an intentionally committed crime of sexual abuse?**

Slovenian Criminal Code defines the word “intent” in Article 25 as:

“A criminal offence shall be committed with intent if the perpetrator was aware of his act and wanted to perform it, or was aware that an unlawful consequence might result from his conduct but he nevertheless let such consequence to occur.”

Slovenian Criminal Code protects children from sexual behaviour and other various sexual contacts with numerous types of criminalization. These crimes are defined in Chapter 19, entitled Criminal Offences against Sexual Integrity, and in Chapter 21, entitled Criminal Offences against Marriage, Family, and Youth. In the general part of the Criminal Code the Slovenian criminal law defines the term child as any person under the age of fourteen.

Article 21 of Slovenian Criminal Code states the following: “Any person who committed a criminal offence when he was under the age of 14 years (a child), cannot be a perpetrator of a criminal offence.”

With this provision the age limit of criminal responsibility is set at the age of 14.

Slovenian criminal law protects all persons under the age of 15 from any sexual behaviour and other sexual contact, and protects all underage persons, that is persons under the age of 18 from Exploitation through Prostitution (Article 175) and Incest (Article 195). An important limitation exists in the event of Sexual Assault on a Person Below Fifteen Years of Age (Article 173) and crime of recruiting persons under the age of fifteen for sexual purposes (Article 173 a), since in the event of the act being committed with a person of appropriate age and mental capacity, illegality is not an issue.

**lx. What is the legal age for engaging in sexual activities? How are consensual sexual activities between minors regulated?**

The legal age for consensual participation in sexual behaviour is fifteen. Consensual sexual acts among persons under the age of fifteen or among underage persons are not specifically governed by law, but are also not illegal.

**lxi. How is the use of force, taking advantage of disability or threat regulated in regards to sexual offences against children?**

Use of force, taking advantage of a disabled person or threat in the case of sexual intercourse or any other sexual act towards a person under the age of fifteen is considered a major crime of rape or sexual violence.

The first paragraph of Article 173 of Slovenian Criminal Code states the following: “Whoever has sexual intercourse or performs any lewd act with a person of the same or opposite sex under the age of fifteen years shall be sentenced to imprisonment for not less than three and not more than eight years.”

The second paragraph of Article 173 defines the major crime of sexual assault on a person under the age of fifteen as: “Whoever commits the offence under the preceding paragraph against the defenceless person under the age of fifteen or by threatening him/her with imminent attack on life or limb shall be sentenced to imprisonment for not less than five and not more than fifteen years.”

Legal indicators of a criminal offence in the second paragraph of Article 173 are the same as legal indicators of the criminal offence of rape from paragraph one of Article 170 and the legal indicators of the criminal offence of sexual violence from paragraph one of Article 171, except that in the case of paragraph two of Article 173 the person in question is under the age of fifteen. Use of force in order to achieve sexual intercourse with a person aged fifteen or over is defined as general criminal offence of rape.

The perpetrator of such an offence can be either male or female, but the offence can only be committed intentionally. The perpetrator must be aware of the fact that the victim is under fifteen years of age.

**lxii. How is the crime of “incest” regulated?**

The crime of incest is defined in Slovenian Criminal Law in Article 195 of the Criminal Code, in Chapter 21 – Offences against Marriage, Family, and Youth. Article 195 states the



following: “An adult who has sexual intercourse with an underage lineal relative or underage brother or sister shall be sentenced to imprisonment for not more than two years.”

Incest is punishable only if the male or female involved is the father, mother, grandfather or grandmother of the underage person, or their brother or sister.

In order for the criminal offence of incest to be committed, sexual intercourse must take place between a male and a female, and can only be done intentionally. The perpetrator must be aware of the fact that they are having sexual intercourse with an underage linear relative, or their own brother or sister. In the case of an actual mistake, such as in the case where the perpetrator is unaware of any family relationship, as in the case of half-siblings not knowing each other, or when a father has sexual intercourse with his daughter in the dark under the impression of having intercourse with a different female, or when a illegitimate father is unaware of his daughter etc., the criminal offence of incest is not an issue.

Linear relatives can, given the relationship in this Article (sexual intercourse of an adult perpetrator with an underage relative), only be the underage (under the age of eighteen) son, daughter, grandson, granddaughter, etc. of the perpetrator. Half-siblings are included in the terms brother or sister of the perpetrator. Whether or not the relationship is legitimate or illegitimate is of no importance.

Sexual intercourse between underage blood relatives is not punishable by law. Sexual intercourse between blood relatives of age is also not punishable by law.

The criminal offence of incest is defined as sexual intercourse between an adult perpetrator and an underage person, who are related to each other by blood. If force is used as a mean of achieving sexual intercourse and the victim is over the age of fifteen, the charge will be the crime of rape. If the victim is under the age of fifteen, the charge will be qualified as a criminal offence of sexual assault on a person under the age of fifteen.

**lxiii. Are there any specific provisions regulating offenders who take advantage of school and educational settings, care and justice institutions, the workplace and the community?**

The third paragraph of Article 173 of the Criminal Code states the following: “A teacher, educator, guardian, adoptive parent, parent, priest, doctor or any other person who through the abuse of his position has sexual intercourse or performs any lewd act with a person

under the age of fifteen and whom he is entrusted to teach, educate, protect or care for shall be sentenced to imprisonment for not less than three and not more than ten years.”

This is considered a severe form of sexual assault on a person under the age of fifteen, considering the privileged position of the perpetrator. The perpetrator can be the child’s teacher, educator, guardian, adoptive parent, parent (mother or father), priest, doctor or any other person in the position of authority over the child. This is a person who abuses their privileged position of authority. The abuse is shown primarily through abuse of the position of authority through awarding or promising any material or other gains, or through threats of worsening the child’s position if the child should refuse the sexual intercourse.<sup>99</sup>

## 2.2 Child Prostitution

- lxiv. Is the State a party to the Council of Europe Convention on Action against Human Trafficking? If yes, what is the date of ratification and signature? If not, is the State planning to ratify the Convention?**

The Republic of Slovenia is party to the agreement of the Convention of the Council of Europe on Action against Trafficking in Human Beings. The convention was signed on April 3<sup>rd</sup> 2006 and ratified on September 3<sup>rd</sup> 2009. In Slovenia, the convention entered into force on January 1<sup>st</sup> 2010.

- lxv. How does national legislation define “child prostitution”? Is it compatible with the definition in Article 19(2) of the Lanzarote Convention? Please comment.**

Slovenian Criminal Code does not directly define child prostitution. However it does criminalize exploitation through prostitution in Article 175, and states: “Whoever participates for exploitative purposes in the prostitution of another or instructs, obtains or encourages another to engage in prostitution with force, threats or deception shall be given a prison sentence of between three months and five years.”

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<sup>99</sup> M. Deisinger: Kazenski zakonik s komentarjem (Criminal Code with Commentary, special section), GV Založba, Ljubljana 2002, p.256.

In the second paragraph of the same Article it defines the qualified form as: “If an offence from the preceding paragraph is committed against a minor, against more than one person or as part of a criminal organisation, the perpetrator shall be given a prison sentence of between one and ten years.”

- lxvi. **Does national legislation criminalize both the recruiter (the person that coordinates the business of child prostitution) and the user (the person that pays to conduct sexual activities with children)?**

According to Slovenian criminal law, both the recruiter and the user of childhood prostitution shall be penalized for their offences, as is stated in the second paragraph of Article 175 of the Criminal Code.

### 2.3 Child Pornography

#### *Child Pornography in General:*

- lxvii. **Is the State party to the Council of Europe Convention on Cybercrime? If yes, what is the date of ratification and signature? If not, is the State planning to ratify?**

The Republic of Slovenia is party to the agreement of the Convention of the Council of Europe on Cybercrime. The convention was signed on July 24<sup>th</sup> 2002 and ratified on September 8<sup>th</sup> 2004. In Slovenia, the convention entered into force on January 1<sup>st</sup> 2005.

- lxviii. **How does the national legislation define “child pornography”? Is it compatible with the definition in Article 20(2) of the Lanzarote Convention? Please comment.**

Slovenian Criminal Code does not directly define the term “child pornography” as the term is defined in the second paragraph of Article 20 of the Lanzarote Convention. Legal theory and case-law complement this concept.

- lxix. **To whom does the State attribute the criminal liability to? Is it compatible with the Article 20(1.a) to (1.f)?**

The Criminal Code criminalizes any public exhibition, production, possession or distribution of pornographic material and penalizes whoever sells, presents or publicly exhibits

documents, pictures or audio-visual or other items of a pornographic nature to a person under fifteen years of age, enables them to gain access to these in any other way or shows them a pornographic or other sexual performance (first paragraph of Article 176). A prison sentence of between six months and five years shall be given to whoever abuses a minor in order to produce pictures or audio-visual or other items of a pornographic or other sexual nature, or uses them in a pornographic or other sexual performance or is knowingly present at such performance (second paragraph of Article 176). The third paragraph of the same Article sets the same punishment for anyone who for themselves or others produces, distributes, sells, imports, exports or otherwise supplies pornographic or other sexual material depicting minors or their realistic images, or possesses such material, or uses access to such material using information and communication technologies, or discloses the identity of a minor in such material. In Slovenia the most common term used for such material is material which includes sexual abuse and sexual exploitation of children.

**lxx. What is the control mechanism for pornographic materials? If the state is a party to the Lanzarote Convention, did the state use the reservation right that has been given to them in the Lanzarote Convention Article 20(3) and 20(4)?**

The Republic of Slovenia is party to the Lanzarote Convention, but has not ratified it yet.

In Slovenia, we have a website called Spletno oko (Web Eye) which collects anonymous tips of child pornography (and hate speech) online and forwards them to the prosecuting authorities. Reporting persons can report allegedly illegal content by first filling in a short reporting form where they can state the address of the website where the content was found. After that qualified reviewers of the hotline Spletno oko go through the report, and if they judge that the site indeed has allegedly illegal content, they forward it to the prosecuting authorities. If the site in question is hosted on a Slovenian server, the problem is addressed by the police. At the same time the hotline informs the host provider of the existence of illegal content on the server, as instructed by the police. If the site in question is hosted on a foreign server, the report is sent to the Interpol via the Slovenian police, as well as the Inhop

(an umbrella organization for online hotlines dealing with illegal content on the internet.) hotline in the country where the host server featuring the illegal content is located.<sup>100</sup>

Children and other minors are additionally protected from pornographic exploitation with the Mass Media Act<sup>101</sup>. In Article 84 it is stated that it is illegal for television stations to broadcast pornography if such broadcast could seriously damage mental, moral or physical development of children or other minors. However, television stations can broadcast informative and educational programmes as well as artistic audio-visual works which include sexual scenes, if such scenes do not violate the basic aesthetic and moral criteria approved by the publisher. Televised scenes including sexuality can also be broadcast as part of other shows under the condition that the content does not violate the aesthetic or moral criteria. Programmes or works that include sexual scenes must be clearly designated by a visual symbol; prior to the presentation an audio and visual warning must be given that such programming is not suitable for persons under the age of fifteen.

In paragraph eight of Article 84, which concerns itself with pornographic content in printed publication, the Mass Media Act states that such publications may only be offered in a way that the children and minors cannot see and buy them. Access to pornographic contents in electronic publications must be limited, by means of appropriate technical protection, in such a way that children and minors cannot access them.

***Participation of a Child in Pornographic Performances:***

**lxxi. Does the State criminalize intentional conduct of making a child participate in pornographic performances? Does the State highlight and differentiate between recruitment and coercion? What is the State's approach to the attendance of pornographic performances involving the participation of children? If the State is a party to the Lanzarote Convention, did the state use the reservation right stated in Article 21(2)?**

Any action of recruiting or encouraging minors to participate in pornographic or other sexual presentations is determined as a criminal offence, as is stated in the second paragraph

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<sup>100</sup> <https://www.spletno-oko.si/>, (last visited 10.9.2012).

<sup>101</sup> Mass Media Act, State Administration Act, Official Gazette RS, No. 110/2006.

of Article 176 the Criminal Code of the Republic of Slovenia. The second paragraph of Article 176 states that whoever uses force, threat, fraud, transgression or abuse of power, recruitment, solicitation or for the purposes of exploitation recruits or encourages a minor to participate in the production of pictures, audio-visual or other pornographic material or other material with sexual content, or for participation in such pornographic or other presentation, or knowingly attending such a presentation shall be given a prison sentence of between six months to eight years.

## 2.4 Corruption of Children

- lxxii. Does the State criminalize the intentional causing of a child to witness sexual abuse or sexual activities, without necessarily having to participate? How does the state define “causing”? Does it involve forcing, inducement, and promise?**

The Criminal Code criminalizes the presentation of pornographic or other sexual material to a person under the age of fifteen, as is stated in the first paragraph of Article 176. It is not necessary for the person under the age of fifteen to actively participate, nor is it required that the perpetrator use force, abetting or promise, for such an action to be considered a criminal offence. If the underage person or persons do participate in these offences, the perpetrator shall be punished according to the second paragraph of Article 176, which states a more severe punishment of a prison sentence of between six months to eight years.

## 2.5 Solicitation of Children for Sexual Purposes

- lxxiii. How does the State criminalize intentional sexual gratification through information and communication technologies by an adult? Does it specify that the perpetrator should also propose a meeting with the potential child victim and come to the meeting place in order to be accused of committing this kind of crime (a.k.a. grooming)?**

In Article 173.a of the Slovenian Criminal Code any soliciting of persons under the age of fifteen for sexual purposes is criminalized. The first paragraph of this Article states that any person who exhorts a person under the age of fifteen using information or communication technologies to meet with the intent of having sexual intercourse or performing any other sexual act, or with the intent to participate in the production of pictures, audio visual or

other pornographic or other sexual content, shall be sentenced to imprisonment of up to one year (paragraph one of Article 173.a). The exhortation must be followed by concrete actions taken to realize the purpose of the meeting, which means not only showing up for the meeting but also various other actions.

**lxxiv. Does the State criminalize aiding or abetting and attempting to the activities that have been mentioned in the subsection a, b, c, d and e?**

When it comes to aiding, abetting and attempting to the activities, all actions mentioned in the general provision of the Criminal Code are criminalized by the State.

In Slovenia, a person who began but did not accomplish an intentional criminal offence shall be penalized if the offence in question is punishable by law with a sentence of three or more years in prison. Other offences may be included in this if the law states that the attempt itself shall be punishable (paragraph one of Article 23 of the Criminal Code).

The perpetrator shall be penalized for the attempt within the limits of the penalties prescribed for the offence, which may also be reduced (paragraph two of Article 23 of the Criminal Code).

Any person who intentionally solicits another person to commit a criminal offence shall be punished as if he himself had committed it (paragraph one of Article 37 of the Criminal Code).

Any person who intentionally supports another person in the committing of a criminal offence shall be punished as if he himself had committed it, or his sentence shall be reduced, as the case may be (paragraph one of Article 38 of the Criminal Code).

Support in the committing of a criminal offence shall be deemed to be constituted, in the main, by the following: counselling or instructing the perpetrator on how to carry out the criminal offence; providing the perpetrator with instruments of criminal offence or removing the obstacles for the committing of criminal offence; a priori promises to conceal the perpetrator's criminal offence or any traces thereof; instruments of the criminal offence or objects gained through the committing of criminal offence (paragraph two of Article 38 of the Criminal Code).

A prison sentence of over three years is required for most offences against sexual integrity which are punishable by law, and therefore the attempt itself is also punishable, with the exception of the criminal offence of soliciting persons under the age of fifteen for sexual purposes, for which the perpetrator shall be given a prison sentence of up to one year (paragraph one of Article 173.a), and the criminal offence of presenting pornographic material to a person under the age of fifteen (paragraph one of Article 176).

## 2.6 Corporate Liability

- lxxv. Does the State hold legal/moral persons (entities) such as commercial companies and associations liable when an action has been performed on their behalf by a person in a position at their entity? Is there a difference between leading persons (persons in position of authority) and regular employees being held liable? If yes, please describe the differences.**
- lxxvi. What kind of liability does national legislation impose? Criminal, civil or administrative? Please explain.**
- lxxvii. Does national legislation exclude individual liability when there is a corporate liability?**

In Slovenia legal persons are liable for actions performed on their behalf by a natural person. Liability of legal persons for criminal offences is regulated by Liability of Legal Persons for Criminal Offences Act (Zakon o odgovornosti pravnih oseb za kazniva dejanja - ZOPOKD-)<sup>102</sup>. It regulates criminal offences in accordance with Article 42 of Criminal Code (Kazenski zakonik - KZ-1)<sup>103</sup> which states that special law shall regulate liability of legal persons and list the criminal offences for which they can be held responsible, the conditions for liability and sanctions; Article 42 KZ-1 includes basic guidelines for this special legislation (ZOPOKD), thus defining criminal offence of legal person: "Criminal liability shall be imposed on a legal person for criminal offences, which the perpetrator commits in his name, on his behalf or in his favour, providing that the statute, which regulates liability of legal persons for criminal offences, determines that the legal person is liable for the

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<sup>102</sup> Zakon o odgovornosti pravnih oseb za kazniva dejanja (Liability of Legal Persons for Criminal Offences Act) - ZOPOKD-B; Official Gazette RS, No. 59/1999 (ZOPOKD), 12/2000, 50/2004 (ZOPOKD-A), 65/2008 (ZOPOKD-B).

<sup>103</sup> Kazenski zakonik (Criminal Code)– KZ-1; Official Gazette RS, No. 55/2008 (KZ-1), 66/2008, 39/2009 (KZ-1A), 91/2011 (KZ-1B), 50/2012 (KZ-1-UPB2).



criminal offence in question."<sup>104</sup> A closer look at ZOPOKD- shows the details of liability: that a "legal person shall also be liable for a criminal offence if the perpetrator is not criminally liable for the committed criminal offence"<sup>105</sup>; that in the case of negligence, legal person is only liable when "its management or supervisory bodies have omitted due supervision of the legality of the actions of employees subordinate to them"<sup>106</sup> and that in such cases legal person may be given a reduced sentence<sup>107</sup>; and, "if a legal person has no other body besides the perpetrator who could lead or supervise the perpetrator, the legal person shall be liable for the committed criminal offence within the limits of the perpetrator's guilt."<sup>108</sup>

There is a difference between leading persons (persons in position of authority) and regular employees being held liable, according to ZOPOKD as it is defining ground for legal person's liability: "If the committed criminal offence means carrying out an unlawful resolution, order or endorsement of its management or supervisory bodies; If its management or supervisory bodies influenced the perpetrator or enabled him to commit the criminal offence; If it has at its disposal unlawfully obtained property benefit or uses objects obtained through a criminal offence; If its management or supervisory bodies have omitted due supervision of the legality of the actions of employees subordinate to them."<sup>109</sup> Obviously only the leading persons are considered to be able to act in the name of, on behalf of or in favour of the legal person, while regular workers can only be abused by them to achieve unlawful goal. As far as regular workers go, legal person who employ them is liable for them, as is evident from civil legislation: Code of Obligations (Obligacijski zakonik – OZ)<sup>110</sup> as it is defining employer liability: "The legal or natural person with whom an employee was working at the time the damage was inflicted shall be liable for damage inflicted on a third person by an employee during work or in connection with work, unless it is shown that the employee acted as was necessary under the given circumstances."<sup>111</sup>, but if

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<sup>104</sup> Article 42/1 KZ-1B.

<sup>105</sup> Article 5/1 ZOPOKD-B.

<sup>106</sup> Article 4/4 ZOPOKD-B.

<sup>107</sup> Article 5/3 ZOPOKD-B.

<sup>108</sup> Article 5/4 ZOPOKD-B.

<sup>109</sup> Article 4/1,2,3,4 ZOPOKD-B.

<sup>110</sup> Obligacijski zakonik (Code of Obligations) – OZ; Official Gazette RS, No. 83/2001, 32/2004, 28/2006 (U-I-300/04-25), 40/2007.

<sup>111</sup> Article 147/1 OZ.

the worker acted intentionally, the injured party can sue him directly.<sup>112</sup> But this goes for civil damages; in case of criminal offences legal person is liable criminally only for actions of leading (natural) persons and only civilly for damages originating from acts of regular employees – but when they acted intentionally or out of gross negligence, legal person can reimburse the sum paid out from the employee.<sup>113</sup>

Regarding the kind of liability legislation imposes: that depends on the nature of offence: when it is criminal and can be summed under the rules of ZOPOKD, liability of legal person is criminal; when offence is civil – meaning breaking law of obligations, legal person responsible is liable civilly and can be sued in civil court. Generally, legal person is *de iure* a person – which means that liability follows in case "it" breaks the law (the law is broken on its behalf) – criminal offence means criminal liability and civil offence civil liability; but due to its elusive nature there are special rules to help determine its will, establish intent etc.

As it goes for individual liability, Slovene laws recognize the problem of natural person hiding behind the legal one. This problem is addressed in Companies Act (*Zakon o gospodarskih družbah – ZGD-1*)<sup>114</sup> in Article 8 (Disregard of the legal person), which states that though primarily liability lies with legal person, natural person may also be liable for its liabilities alongside it: "if they abused the company as a legal person in order to attain an aim which is forbidden to them as individuals; if they abused the company as a legal person thereby causing damage to their creditors; if in violation of the law they used the assets of the company as a legal person as their own personal assets; if for their own benefit or for the benefit of some other person they reduced the assets of the company even if they knew or should have known that the company would not be capable of meeting its liabilities to third persons."<sup>115</sup> This is the way that company law is addressing abuse of legal person.

As it goes for criminal liability both KZ-1 and ZOPOKD clearly state, that liability of legal person does not exclude the liability of natural person: "Criminal liability of legal persons shall not exclude liability of natural persons as perpetrators, instigators or aides in the same

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<sup>112</sup> Article 147/2 OZ.

<sup>113</sup> Article 147/3 OZ.

<sup>114</sup> *Zakon o gospodarskih družbah* (Companies Act) – ZGD-1; Official Gazette RS, No. 42/2006, 60/2006, 26/2007, 33/2007, 67/2007, 10/2008, 58/2008, 42/2009, 33/2011, 91/2011, 32/2012, 57/2012.

<sup>115</sup> Article 8/1 ZGD-1.

criminal offence."<sup>116</sup> and "The liability of a legal person does not preclude the criminal liability of natural persons or responsible persons for committed criminal offence."<sup>117</sup> So, individual liability is in no way excluded by the liability of legal person.

## 2.7 Aggravating Circumstances

**lxxviii. Does the state accept any aggravating circumstances for the crimes that have been described above? (e.g. when the offence damaged physical health of the child) Please, write down these circumstances and explain, try to specify the different crimes if there are different aggravating rules applying.**

Examples of aggravating circumstances can be found in the Slovenian Criminal Code. Article 170 states in paragraph two that if the criminal offence of rape has been committed in a cruel or extremely humiliating manner or successively by several perpetrators, the perpetrator(s) shall be sentenced to imprisonment for not less than three and not more than fifteen years. Without these aggravating circumstances, the punishment intended for this offence is imprisonment for one to ten years. Same provisions can be found in paragraph 171 concerning the criminal act of sexual violence. A more severe punishment can be ordered to a person in the case of the criminal offence of sexual assault on a defenceless person under the age of fifteen, or if the perpetrator used either force or threat of direct attack on the life or body of the victim. This type of offence shall be punished with imprisonment for no less than five and no more than fifteen years. In the case of criminal offence of exploitation through prostitution (Article 175), a more severe punishment shall be adjudicated if the offence is committed against a minor, against more than one person or as part of a criminal organisation. The perpetrator in this case shall be given a prison sentence of between one and ten years. Aggravating circumstances can also be found in the case of the criminal offence of any public exhibition, production, possession or distribution of pornographic material, where the perpetrator(s) shall be penalized more severely if the offence was committed as part of a criminal organisation concerning itself with such criminal behaviour.

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<sup>116</sup> Article 42/2 KZ-1B.

<sup>117</sup> Article 5/2 ZOPOKD-B.

The law stipulates a higher penalty in case of the following circumstances:

- If the criminal offence was committed multiple times;
- If the criminal offence was committed by more persons acting together;
- If the criminal offence was committed against a person who is defenceless due to special circumstances;
- If either force or threat of direct attack on the life or body of the victim was used;
- If the criminal offence was committed in a cruel or extremely humiliating manner.

The aforementioned provisions show that all criminal offences against sexual integrity include a provision that presumes a more severe punishment if one or more aggravating circumstances are present.

## 2.8 Sanctions and Measures

**lxxix. How does the state sanction the above mentioned crimes? Is there a penalty including deprivation of liberty? How does the state legislate extradition?**

Whoever has sexual intercourse or performs any lewd act with a person of the same or opposite sex under the age of fifteen years shall be sentenced to imprisonment for not less than three and not more than eight years.

Whoever commits the offence under the preceding paragraph against the defenceless person under the age of fifteen or by threatening him/her with imminent attack on life or limb shall be sentenced to imprisonment for not less than five and not more than fifteen years.

A teacher, educator, guardian, adoptive parent, parent, priest, doctor or any other person who through the abuse of his position has sexual intercourse or performs any lewd act with a person under the age of fifteen and whom he is entrusted to teach, educate, protect or care for shall be sentenced to imprisonment for not less than three and not more than ten years.

Whoever, under previous circumstances violates the sexual integrity of the person under the age of fifteen years shall be sentenced to imprisonment for not more than five years.

Whoever sells, presents or publicly exhibits documents, pictures or audiovisual or other items of a pornographic nature to a person under fifteen years of age, enables them to gain access to these in any other way or shows them a pornographic or other sexual performance shall be given a fine or a prison sentence of up to two years.

Whoever abuses a minor in order to produce pictures or audiovisual or other items of a pornographic or other sexual nature, or uses them in a pornographic or other sexual performance or is knowingly present at such performance, shall be given a prison sentence of between six months and five years.

Whoever produces, distributes, sells, imports or exports pornographic or other sexual material depicting minors or their realistic images, supplies it in any other way, or possesses such material, or discloses the identity of a minor in such material shall be subject to the same sentence.<sup>118</sup>

The preconditions for extradition in Slovenia are:

- 1.) that person whose extradition is requested is not a citizen of the Republic of Slovenia, except in instances defined by an international treaty binding on the Republic of Slovenia;
- 2.) that the act which prompted the request for extradition was not committed in the territory of the Republic of Slovenia against the Republic or a Slovenian citizen;
- 3.) that the act which prompted the request for extradition is a criminal offence within the meaning of domestic and foreign law alike;
- 4.) that under the domestic law criminal prosecution or the execution of punishment was not statute-barred before the alien was detained or interrogated as the accused;
- 5.) that the alien whose extradition is requested has not been convicted of the same offence by the domestic court or has not been acquitted under a final decision of the domestic court, or the charge against him has been rejected by a final decision, or that in the Republic of Slovenia criminal proceedings have not been instituted against the alien for the same offence

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<sup>118</sup> Kazenski zakonik – KZ-1B; Official Gazette RS, No. 55/2008 (KZ-1), 66/2008, 39/2009 (KZ-1A), 91/2011 (KZ-1B), 50/2012 (KZ-1-UPB2).

committed against the Republic of Slovenia, and - in the event that criminal proceedings have been instituted for an offence committed against a citizen of the Republic of Slovenia - that the indemnification claim of the injured party has been secured;

6.) that the identity of the person whose extradition is requested has been established;

7.) that there is sufficient evidence to suspect that the alien whose extradition is requested has committed a criminal offence, or that a finally binding judgement exists thereon.<sup>119</sup>

**lxxx. Do you consider the sanctions effective, proportionate and dissuasive?  
Please comment.**

According to the penalties described crimes are among the most serious offenses. In jail the perpetrators are involved in special treatment, have limited output. As for all the other offenses - only penalties cannot prevent and reduce crime, but also other measures are necessary.

**lxxxi. How does the state sanction the legal persons/moral entities? What kind of measures does it include?**

Sanctions and measures for legal persons: fine, deprivation of property, termination of the legal person.<sup>120</sup>

**lxxxii. Does the state legislate seizure and confiscation of materials, instruments... etc. used for committing the crime? Does the state protect *bona fide* third parties? Is there allocation of a special fund for financing prevention or intervention programmes in which these properties confiscated allocated?**

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<sup>119</sup> Zakon o kazenskem postopku (Criminal Procedure Act) - ZKP-K; Official Gazette RS, No. 63/94 (ZKP), 70/94 (ZKP), 72/98 (ZKP-A), 6/99 (ZKP-B), 66/2000 (ZKP-C), 111/01 (ZKP-D), 110/02 (ZDT-B), 56/03 (ZKP-E), 43/04 (ZKP-F), 101/05 (ZKP-G), 14/07 (ZKP-H), 40/07 (ZDT-E), 102/07 (ZSKZDČEU), 23/08 (ZBPP-B), 68/08 (ZKP-I), 77/09 (ZKP-J), 58/11 (ZDT-1), 91/11 (ZKP-K).

<sup>120</sup> Zakon o odgovornosti pravnih oseb za kazniva dejanja (Liability of Legal Persons for Criminal Offences Act) - ZOPOKD-B; Official Gazette RS, No. 59/1999 (ZOPOKD), 12/2000, 50/2004 (ZOPOKD-A), 65/2008 (ZOPOKD-B).

The legislation of seizure and confiscation is determined in Criminal Procedure Act<sup>121</sup>(*Zakon o kazenskem postopku*), to be more exact in the Article 220, that says that objects which must be seized under the Criminal Code, or which may prove to be evidence for criminal procedure, shall be seized and delivered to the court for safekeeping or secured in some other way. Custodians of such objects shall be bound to hand them over at the request of the court. A custodian who declines to deliver the objects may be fined and if after being fined he/she still refuses to deliver them, he/she may be arrested. The detention shall last until the objects have been delivered or until the end of criminal proceedings, but no longer than one month.

Objects used or intended to be used, or gained through the committing of a criminal offence may be confiscated if they belong to the perpetrator (Article 73 of Criminal Code).

Criminal Code in the fifth paragraph of Article 176 also states that pornographic or other sexual material shall be seized or its use appropriately disabled.

More exact rules handling of seized things are determined in State prosecutor regulations (*Državnotožilski red - DTR*)<sup>122</sup>.

When the police prepares a criminal charge on the basis of a criminal complaint hands it together with the seizure and confiscated items to the Prosecutor (148 (9) ZKP) or files a report if there were no grounds for criminal charges (148 (10) ZKP) the district prosecutor and the team lead in Kdp subscriber records of seized cash in local or foreign currency to a specification of the treasures such as gold and articles of gold and other precious metals and other valuable items, such as miscellaneous securities, tax and postage stamps, lottery tickets and the like and in the subscriber Cd (Corpus delicti) and any other items seized (139 DTR). The head of the register Cd and Kdp is obliged to keep items seized in the hand or in a well-protected area of Public Prosecutions (141DTR). The Attorney General dealing with file managers issue register in duplicate a written order that the seized items delivered to the court when applying for investigation or indictment, if necessary, at the time of proposal for

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<sup>121</sup> Zakon o kazenskem postopku ((Criminal Procedure Act) - ZKP-K; Official Gazette RS, No. 63/94 (ZKP), 70/94 (ZKP), 72/98 (ZKP-A), 6/99 (ZKP-B), 66/2000 (ZKP-C), 111/01 (ZKP-D), 110/02 (ZDT-B), 56/03 (ZKP-E), 43/04 (ZKP-F), 101/05 (ZKP-G), 14/07 (ZKP-H), 40/07 (ZDT-E), 102/07 (ZSKZDČEU), 23/08 (ZBPP-B), 68/08(ZKP-I), 77/09(ZKP-J), 58/11 (ZDT-1), 91/11 (ZKP-K).

<sup>122</sup> Državnotožilski red (Stateprosecutor regulations)- DTR; Official Gazette RS, No. 58/11.

each investigative activities. If the prosecutor dismisses the charge, the public prosecutor will decide on the seized objects, so that the competent authority shall be returned to the victim or beneficiary, to send them to a museum or probate Criminal Court to the commission to destroy or carry out the procedure as told the Criminal Procedure Act (142 DTR).

There are no exceptions about bona fide third parties in ZKP. Article 220 applies to all.

Slovenia has no special fund for financing prevention or intervention programmes.

**lxxxiii. When the crime has been committed within the family or within the close environment of the child, how does the state react?**

Police is usually the first intervenient called to protect the victim of domestic violence against direct danger and aware of the possible forms of assistance. Police may prohibit causing a specific place or person.

A special duty of the state is to take care of children, when parents fail to do it. To this the state is bounded by many international documents and internal instruments. We perceive family violence as criminal offences and offences against public order and peace.

Everybody in society is obligated to help the weaker, beaten and suffering partners, even more to children, the victims of violence in family, if not professionally at least to moral duty. Although rare individual specialists and some nongovernmental organisations are warning that in spite of adoption of the new law on disabling family violence and changes of criminal code, the previous system still does not completely correspond to rescuing and disabling domestic violence.

Deficiencies are being shown especially in unrelated activities of institutions, that are solving the individual case lead procedures and they disregard the work and measures of others. Although the main concern in this problems is ascribed to police and they have the major part of responsibility, such system is sentenced to inefficiency or even to ruin.

Police and social work centre can interfere to powers that are allowing immediate removal of the victim from dangerous environment.

With that police prevents further threat and establishes safety and with that they make possible to other institutions access to the family. These institutions should help to establish



dignified life to all members of the family and abolish harmful and violent behaviour. In preventing the family violence an appropriate approach is the one that is based on work and help to victims and producer of violence. To the latter, on the model of other European states offers such procedures and therapies, they will voluntarily decide and they will be active at correction of their violent behaviour.<sup>123</sup>

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

- xvii. **How is the principle of the “best interests of the child” applied during investigation of a crime as mentioned above? Is there a protective approach to the victims? What kind of measures has been taken? Is the victim offered protection during the court proceedings? (such as appointing special representatives) If so, please indicate what kind of protective measures have been taken.**

The principle of «best interests of the child» is not specifically defined in the Slovenian criminal law. Which institutes are designed to serving this principle is also not determined. However, we can find several measures included in the Code for the purpose of legal protection of children and reducing secondary victimization in the course of criminal proceedings. The Criminal Procedure Act mentions several measures that can be applied in the cases of criminal offences against sexual integrity, criminal offence of neglect of minors and cruel treatment or the criminal offence of trafficking in human beings. One of the most important measures that serve the principle of «best interests of the child» is undoubtedly the institute of a representative of the underage victim in criminal proceedings concerning criminal offences. The underage victim of violence must have a representative during the entire criminal procedure. If the victim does not choose a representative, the court does so for them. The main role of the representative is to care for the underage victim's rights, protect their integrity during all court hearings and to take care of any legal and property claims. The representative plays an important role in the criminal procedure because he or she helps the victim understand the procedural acts, explains the legal position and warns

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<sup>123</sup> A. Krenk: Država in reševanje nasilja v družini v Sloveniji in Evropi, magistrsko delo, 2011.

the victim of their rights, which are also exercised during the procedure by the representative on behalf of the victim. In addition to the representative the victim is also entitled to a so-called person of trust who is present throughout the pre-trial and criminal proceedings. The person of trust is most commonly a parent or other close relative of the victim.

In addition to the institute of representation, another way to strengthen the principle of «best interests of the child» is a provision of the Criminal Procedure Act which states that the accused may not be present during the questioning of witnesses younger than 15 who are victims of a victim of criminal offences against sexual integrity, criminal offence of neglect of minors and cruel treatment or the criminal offence of trafficking in human beings, as is stated in paragraph 4 of Article 178 of the Criminal Procedure Act. This serves to prevent any negative effects on the victim during the hearing during the time of the criminal proceedings. The Criminal Procedure Act regulates another important provision relating to the questioning of a victim and protects the child from a hearing which could influence negatively the psychophysical integrity of a child or cause further victimization. This provision states that a person under the age of fifteen, who was a victim of the aforementioned criminal offences, may not be subject to a questioning during the main trial. A child is questioned by the investigating judge, and his statement is read at the main trial. The questionings are conducted in the presence of an expert and often take place in so-called “friendly rooms” which are specially equipped for the questionings of children and are located outside the main court building. This arrangement prevents repetitions or the questionings of the child and consequentially adding to the victimization of the child.

The prohibition of a questioning of a child in the presence of the perpetrator and the prohibition of a questioning of a child at the main trial are not the only provisions set by the Criminal Procedure Act which reinforce the best interests of the child. In 2003 the legislature changed the provision relating to trade secrets, which showed greatly that the protection of children’s interests is more important than the protection of trade secrets. Article 236 of the Criminal Procedure Act states that any council, doctor, social worker, psychologist or any other person who becomes privy to facts which should remain private, cannot invoke the protection of trade secrecy if the facts in question concern the criminal offence against sexual integrity, criminal offence of neglect of minors and cruel treatment or the criminal offence of trafficking in human beings.

Even though the aforementioned provisions contribute to the realization of the principle of «best interests of the child», they are themselves not sufficient when it comes to explosion to secondary victimization. That is why several changes are currently being prepared in this field, some of which are already being used experimentally. We are already familiar with cases of victim hearings which are being recorded audio-visually for the purpose of preventing repetitions of court hearings and reducing the number of questionings to one questioning. The hearing should be recorded in the presence of the investigative judge and the recording should be played at the main trial. Changes can also be expected in the field of the role of the representative. In addition to offering representation and legal assistance the representative should also act as a person of trust to the child, offering psychological assistance when dealing with trauma caused by either the criminal act itself or by the criminal procedure. Other legislative proposals of change include: introduction of a reduced or accelerated legal procedure, organization of a support network for the mothers of children who have been victims to criminal actions, changing certain rules of evidence and the introduction of an anatomical doll on which the child could point out what had happened.

So-called multidisciplinary teams made up of respected experts from the fields of prosecution, health care, social services and the police also contribute greatly to protection of children and their interests. Their main role is to protect the children and their rights, to provide professional assistance to the children and to immediately take the necessary measurements that could prevent further trauma and negative consequences for the child. These teams of experts are put together by Social Work Centres which function under the Ministry of Labour, Family and Social Affairs and are publicly certified to implement child protection measures. Their goal is to exchange information between various public authorities and organizations, if more than one is trying to provide assistance to the victim by various scopes of action at the same time, as well as coordination of different activities of the people involved and the familiarization of the victim with all possible options and means of assistance available.<sup>124</sup> Due to incomplete instructions given by the Ministry and the ambiguity of the legislation such multidisciplinary teams are not a common occurrence in practice in the cases where the aforementioned criminal offences are concerned. Future

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<sup>124</sup> Article 6 of Rules on police cooperation with other agencies and organizations in the detection and prevention of domestic violence.

changes to the legislation will definitely need to regulate the position and operation of such teams in a more precise and detailed manner.

Social work centres play a primary role in the protection of the victim of crime. Their task is to provide first social aid and personal assistance to the victim of crime, as well as to the family of the victim. Social work centres take the following actions:

- They educate of expert therapists who treat families and children who have been victims of violence;
- Implement measures for removal of violent individuals from the family;
- Find a space for the victims to resort to (Safe Houses, Maternity Homes ...);
- Offer financial social assistance to the victims of violence;
- Take preventive measures and measures for early recognition and detection of violent behaviour.

Another important contribution to the various forms of assistance for victims of violence was made by non-governmental organisations such as Key Society, White Ring, Society against Sexual Abuse of Children, and many others.

Slovenian investigative authorities realize the importance of a wholesome approach to the protection and assistance of victims of the aforementioned criminal offences. Due to special vulnerability of children and their personal characteristics, a successful outcome of a criminal prosecution in the case of criminal offences against sexual integrity and domestic violence may be compromised when the victim is forced to testify under circumstances which cause further trauma when facing the accused. Slovenian Criminal Law pays special attention to witnesses – victims of crime, and therefore provides three institutes which comprehensively regulate the protection of and assistance to victims:<sup>125</sup>

- Basic police protection;

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<sup>125</sup> G. Klemenčič: Zaščita prič v kazenskih postopkih v luči sodne prakse Evropskega sodišča za človekove pravice, (Witness Protection in Criminal Proceedings in Court Practice of the European Court of Human rights) v Odvetniška šola, Odvetniška zbornica Slovenije, Ljubljana 2007, p.105.

- Case-procedural safety measures (safety measures in criminal proceedings);
- Out-of-process (non-judicial) protection measures.

In our criminal legal system, characterized by a mixed type of procedure, the position of the witness (especially a child) is better than in the American system. This is because in Slovenia, a judge can take charge of the hearing of a child and thusly prevent any pressure from being put on the child. The principle of search for material truth makes the judge responsible for the investigation of the matter, which makes the child witness not a “hostile witness”, but merely a contributing witness used for clarification of matters.<sup>126</sup>

The area of witness protection is regulated in most detail by the Criminal Procedure Act. Individual provisions are in place to ensure protection and anonymity of witnesses (child witnesses are especially well taken care of). The aforementioned provisions (the prohibition of a questioning of a person under the age of fifteen in the presence of the perpetrator and the prohibition of a direct questioning of a person under the age of fifteen) have been put in place especially for the protection of children. The Criminal Procedure Act also states that the public may not be present during an examination of a person under the age of fourteen. The public may also be excluded from the trial or a part thereof if so required by the interests of protecting secrets, maintaining law and order, by moral considerations, the protection of the personal or family life of the defendant or the injured party, protection of the interests of minors, and if in the opinion of the panel a public trial would be prejudicial to the interests of justice (Article 295 of The Criminal Procedure Act).

The changes to the Criminal Procedure Act in 2004 contributed greatly to the area of witness protection. Article 240.a of the Act states that in the cases where disclosure of personal data or a complete identity of a certain witness could threaten the life and body of the witness, the life or body of their immediate family or of persons proposed by the witness, the court may order one or more measures to protect the witness or their immediate family. These shall be ordered in writing by the investigating judge at the request of the state prosecutor, the witness, the injured party, the defendant, his legal representatives and counsel, or *ex officio*.

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<sup>126</sup> K. Šugman: Otrok žrtev – otrok priča v kazenskem postopku (Child Victim – Child Witness in Criminal Proceedings), *Revija za kriminalistiko in kriminologijo*, 51(3), 2010, p. 210.

The protective measures include the deletion of all or certain data from the criminal file, the marking of all or some of the data as an official secret, the assignment of a pseudonym to the witness, and the taking of testimony using technical devices (protective screen, devices for disguising the voice, transmission of sound from separate premises and other similar technical devices).

Even though the criminal legislation does not contain many provisions concerning witness protection and their rights, there are some provisions that do just that. These are primarily measures ensuring an uninterrupted and undisturbed criminal procedure, but which also provide protection for the witness. Examples of such measures are detention, a ban on a specific place or person, and eviction from common housing.

In Addition to the Criminal Procedure Act, the area of witness protection is also regulated by the Law on Witness Protection. It establishes the conditions and procedures for the protection of witnesses and other persons in need of protection involved in the criminal procedure. Protection of vulnerable persons is ensured in pre-trial proceedings, as well as during and after criminal proceedings. Protective measures include: relocation of a person, modified documents, concealment of identity for the purpose of legal proceedings, change of identity, use of video or telephone conference, and other measures.

In Slovenian legislation, the rights of the accused are still more protected than the rights of the victim. But some significant changes in the area of witness protection during criminal proceedings have happened in the past couple of years. By adopting the Law on Witness Protection in 2005, Slovenia has taken a great step towards improving witness protection regulations. With this, more effective criminal procedures and a lesser degree of secondary victimization of victims can be achieved.

**xviii. Are there any special units for investigating the crimes mentioned above within the legal force? Are they authorised to carry out covert operations? Do they investigate and analyse child pornography materials?**

Crime investigation is under police jurisdiction. Criminal legislation does not allow any authorities not part of the state administration to investigate crime or gather evidence, neither does it issue public permissions to carry out such acts. In the cases of crimes concerning children or other minors, the authority in charge of investigation and gathering evidence is the Juvenile Crime Section, which is part of the General Crime Division at the

Criminal Police Directorate. In addition to dealing with crimes concerning children and other minors and the removal of minors, the Juvenile Crime Section also deals with child abuse and family violence.

**xix. Is it required that the crime is reported in order to be investigated? Do the proceedings go on even in case of withdrawal from the statements?**

In Slovenia the criminal proceedings are initiated at the request of the authorised prosecutor. In cases involving offences liable to prosecution *ex officio*, the public prosecutor shall be the authorised prosecutor. In cases involving offences liable to private prosecution a private prosecutor shall be the authorised prosecutor (Article 19 of the Criminal Procedure Act). The public prosecutor shall be bound to institute criminal prosecution if there is reasonable suspicion that a criminal offence liable to prosecution *ex officio* has been committed (Article 20 of the Criminal Procedure Act). The criminal offence against sexual integrity, criminal offence of neglect of minors and cruel treatment or the criminal offence of trafficking in human beings are all prosecuted *ex officio*. The victim may act as prosecutor in the cases where the public prosecutor thinks that the reasons for starting or continuing of criminal proceedings are insufficient. The Criminal Procedure Act states that all state agencies and organisations having public authority shall be bound to report criminal offences liable to public prosecution of which they have been informed or which were brought to their notice in some other way (Article 145 of the Criminal Procedure Act). All other persons who come into contact with such information are also bound to report it. When there is reason to suspect that a criminal offence which should be prosecuted *ex officio* has been committed, the police are bound to do everything necessary for a successful conduct of criminal proceedings. The proceedings can therefore start if a charge was given, or merely on the basis of suspicious information pointing to a criminal offence that should be prosecuted *ex officio*. A report to the police or the prosecution can be submitted by a) the victim of a crime, b) public authorities or organizations with public authority, c) any other person who becomes aware of information about a violent event, which is by law punishable by imprisonment of three or more years. As of 2008, this also goes for persons otherwise covered by the obligations of professional secrecy. Article 236 of the Criminal Procedure Act states that any counsel, doctor, social worker, psychologist or another person who has in the exercising of his profession become aware of facts that should otherwise remain secret, is not exempt from questioning in the cases of criminal offences mentioned above.

The police are therefore required to initiate the investigative actions even if the victim did not report the crime, or even if the victim did not want to start criminal proceedings. Additionally, the public prosecutor cannot stop proceedings if the victim's statement is revoked, since the proceedings begun under reasonable suspicion of a criminal offence must continue *ex officio*.

**xx. How long is the statute of limitation? When does it start? Can it be suspended?**

Provisions on limitations of criminal prosecution and the limitation period have seen significant changes and additions in 1999. Article 90 of the Slovenian Criminal Code states that the time limit for statute of limitations in criminal offences against sexual integrity and criminal offences against marriage, family or youth, committed against a minor, shall begin when the injured person becomes an adult (paragraph 3). The time limit itself depends on the prison sentence prescribed for the individual criminal offence. Criminal prosecution is barred from taking place:

- 1.) Fifty years from the committing of a criminal offence, for which a prison sentence of thirty years may be imposed under the statute unless non-applicability of statute of limitations applies to the offence;
- 2.) Thirty years from the committing of a criminal offence, for which a prison sentence of over ten years may be imposed under the statute;
- 3.) Twenty years from the committing of a criminal offence, for which a prison sentence of over five years may be imposed under the statute;
- 4.) Ten years from the committing of a criminal offence, for which a prison sentence of over one year may be imposed under the statute;
- 5.) Six years from the committing of a criminal offence, for which a prison sentence of up to one year or a fine may be imposed under the statute.

If more than one sentence is prescribed for a criminal offence, the time limit referring to the most severe sentence shall apply to the offence in question.



Slovenian criminal law also states that the statute of limitation shall be suspended for the time when the prosecution may not be initiated or continued, or when the perpetrator is unreachable for state authorities. The statute of limitation shall be interrupted if the perpetrator commits a further criminal offence of the same or greater seriousness before such a period has ended; after an interruption a new period of limitation shall start.

**xxi. How does the national legislation proceed when the age of the victim is not certain?**

Slovenian legislation does not specifically determine the rules for criminal proceedings in cases where the child's age is unknown or undetermined. Because criminal offences against sexual integrity, criminal offence of neglect of minors and cruel treatment or the criminal offence of trafficking in human beings are prosecuted *ex officio*, the age of the child is not relevant at the initiation of investigative action. Only the probability of the victim being a child matters. Investigative authorities collect information on the child's age in the pre-trial proceedings. Not knowing the child's age is more important when it comes to the enforcement of some measures for the protection of children which depend on the child's reaching age fourteen or fifteen. Examples of such measures are the prohibition of a questioning of a person under the age of fifteen in the presence of the perpetrator, the prohibition of a questioning of a person under the age of fifteen at the main trial, and the prohibition of the presence of the public at the questioning of a victim under the age of fourteen. The age of the child is an important legal qualification in the determination of illegality of a sexual act. The Article 173 of the Criminal Code states that having sexual intercourse or performing any lewd act with a person under the age of fifteen is a criminal offence, punishable by imprisonment for not less than three and not more than eight years.

**xxii. Who is responsible for recording and storing data for convicted offenders? Who do they relate to? Can and do these authorities transmit their data to other competent authorities in other states? Do the authorities respect protection of personal data rules?**

The data on judgements and convicted felons are kept in the criminal records and are not available to the public. The law lays down specific conditions on when the data from the criminal records can be accessed. Institutions and associations responsible for children, their wellbeing and education can access the data in the criminal records even for convictions of

previously deleted criminal offences. The records, kept by the Ministry of Justice, consist of personal data on criminal offenders, data on convictions, security measures, conditional sentencing, judicial admonitions and convictions where the person on whom a criminal record is kept was pardoned, and their legal consequences, as well as any subsequent amendments to convictions of persons on whom a criminal record is kept, and data on executed sentences and erasures of unjustified conviction (article 3 of the Rules on Criminal Records). The following data is entered into the record, which is confidential and governed by an electronic data processing system:

1. Name and surname, maiden name for females, nickname and possible fake name, date of birth;
2. Registration number;
3. Administrative unit, municipality and place of birth of the convict, as well as country if the convict was born abroad;
4. Citizenship;
5. Place of permanent or temporary residence listing the address at the time of the conviction;a
6. Title and address of the court, as well as country for courts abroad, number and date of the decision of the court of the first instance, date of finalization or date of the decision of the higher court, if the decision of the court of the first instance was changed;
7. Lawful name of the criminal offence with an indication of the paragraph and article of the law used;
8. Type of punishment or corrective or protective measures which is entered into the record, indicating the duration of the sentence imposed;
9. Any changes concerning the data entered indicating the authority responsible for the decision and the data on the decision.

The police run a similar database. Police records for criminal offences keep two types of records for the field of crime:

- Record of offenses
- Records of persons involved in crimes

The records are interconnected and contain data on the criminal offenses, suspects and other information about criminality. In addition to the aforementioned records the police are also in charge of other databases that could help them do their job. The information is collected, processed, stored, forwarded and used in accordance with the Personal Data Protection Act.

Another organization within the General Police Department concerning itself with personal data protection is the Data Protection centre.

The police may, if this is necessary in order to carry out legally determined police tasks, communicate collected personal and other data to foreign authorities or international organisations at their request or upon their own initiative, provided that the principle of reciprocity exists. Before personal data are communicated to the authorities from the preceding paragraph, the police must be assured that the country to which the data are being sent has a regulated personal data protection system and that the body of a foreign country or international organisation will use personal data only for statutory purposes (article 54 of the Police Act).

Communication of data to foreign authorities is under the jurisdiction of the Criminal Police Directorate, which represents the National Central Bureau of Interpol and Europol for Slovenia. The sharing of data is under the jurisdiction of the International Operations Division within the Department of International Police Cooperation at the General Police Department.

### **3.2 Complaint Procedure**

- xxiii. **How does the complaint procedure work in case of violations of Substantive Criminal Law? Are children allowed to present their individual complaint? What are the criteria for Communication to be accepted for examinations (e.g. written/oral)?**

Substantive criminal law violations may occur:

1. If the action, which is the subject of criminal proceedings, is criminal
2. If circumstances excluding criminal liability exist
3. If circumstances excluding criminal prosecution exist
  - Criminal prosecution is barred
  - Criminal prosecution is terminated due to amnesty or pardon
  - The subject is already *res judicata*
4. If a law, which should not be used, was used in the case of the criminal offence, subject to prosecution
5. If the decision of the sentence exceeded the court's rights according to the law
6. If provisions on detention and release from prison have been violated.

The appeal shall be filed with the court which rendered the judgment in first instance. If the appeal fulfils all the conditions (is allowed, filed on time by the eligible person and includes all legal components), it is submitted to the second instance court. If the court finds that, although the material facts were properly determined in the judgement of the court of first instance, a different judgement should have been passed, it can modify the existing judgement (Article 394 of the Criminal Procedure Act). Our legal system therefore allows the Second Instance Court to correct errors in the application of substantive law and amend the judgment of the Court of First Instance.<sup>127</sup>

The right to appeal is widely set in the Slovenian legislation. It is ensured by the Constitution of the Republic of Slovenia, which states that everyone shall be guaranteed the right to appeal or to any other legal remedy against the decisions of courts and other state authorities, local community authorities and bearers of public authority by which his rights, duties or legal interests are determined (article 25 of the Constitution). Any court decision can be subject to appeal without any formal requirements from the applicant (especially if the appeal is submitted by an applicant without a representative).

The court must enable any minor of fifteen years of age, capable of understanding the meaning and legal consequences of his actions, to independently perform procedural acts.

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<sup>127</sup> Z. Fišer: Preliminary Commentary to the Criminal Procedure Act (Uvodni komentar k zakonu o kazenskem postopku), p. 156.

The legal guardian may only perform procedural acts as long as the minor doesn't take over, stating so verbally. A minor under the age of fifteen or a minor who the court does not consider capable of understanding the meaning and legal consequences of his actions is represented by a legal representative. If the interests of the minor and his legal representative conflict, the court appoints a special representative. The court may also do that if it finds that it is necessary for the child's safety, considering the circumstances of the case. In conclusion, the court is obligated to submit a written order, which may be appealed, to a minor over the age of fifteen, who has expressed his opinion during the proceedings.

The appeal is submitted in writing or verbally on record. The appeal in for is simple enough for any citizen to write, even without advocate, representative or legal education. The law states that the appeal must include:

- The ruling which is being appealed;
- Reason for challenging the decision;
- Explanation of the appeal;
- Suggestion to either change of fully or partially annul the judgement;
- The signature of the applicant.

If the appeal does not have all the necessary components, the applicant must resubmit, or the court will deny it. If the applicant is a child, it is important that he or she have an advocate who looks out for their best interest.

**xxiv. What are the rules about legal representation of children, especially in the case of complaints against their parents? What are the rules of participation of minors in trials? (Protection of their names, prohibition of media etc.)**

An underage victim has a right to a person of trust, which is chosen by the victim, to be present at the pre-trial and criminal proceedings. Most commonly this is a parent, but conflicts may arise during the proceedings. In that case the court appoints a special advocate. This is also done in all other cases where the court decides the decision is in the child's best interests. In addition to the person of trust, the child is also entitled to a representative who is concerned with the victim's rights and protection of integrity. The legislature introduced this institute to provide special care for the child and prevent

secondary victimization. The role of the representative is especially important when the child and the parents are in conflict and when the parents put their own interests in front of those of the child.

Criminal law regulates the presence of children at the main trial especially to prevent secondary victimization. During a questioning of a child under the age of fourteen, who is a witness in a criminal proceeding, the public may not be present. The public may also be excluded when the exclusion serves the best interests of the child.

Provisions of prohibition of a questioning of a child in the presence of the perpetrator and the prohibition of a questioning of a child at the main trial are also in place for the protection of the child. A child who is a witness can be additionally protected with implementation of one or more protective measures. Measures intended for witnesses who may be in danger because of their cooperation are: modified documents, non-disclosure of personal data and control of database queries, disguising the victim's identity for the purposes of the court proceedings, and other.

Whoever publishes personal details of a child who is party to a judicial, administrative, or any other proceedings, or publishes other information which would be relevant to establishing the child's identity, shall be punished by a fine or sentenced to imprisonment for not more than three years (paragraph 2 of Article 287 of the Criminal Code).

## 4 COMPLEMENTARY MEASURES

### Preventive Measures

- xix. What kind of educational guarantees are given in relation to professionals working with children in the area of sexual exploitation and sexual abuse? What does the State do in order to assure these people are aware of these situations?**

Professionals who deal with children are educated on the problem of sexual abuse. Their knowledge is gained through conferences, round tables, seminars and other training. These are organized by either the State or other non-governmental organizations which cover this particular area.

In April 2012 a now eleventh two-day conference entitled “Violence against Children – Do We Understand It?” was organized by the General Police Directorate and the Association of State Prosecutors of Slovenia in collaboration with the Centre for Judicial Training. Representatives of the police force and the legal profession as well as prosecutors attended the event, where they discussed the problematic of violence and sexual abuse and addressed topic from the fields of psychology, psychotherapy, social work and litigation.<sup>128</sup>

In 2011, the Ministry of Internal Affairs and the police in collaboration with non-governmental organizations organized a campaign dedicated to raising awareness of the sexual exploitation of children using the slogan “Some secrets must not remain hidden”. Training for police officers, detectives who deal with sexual abuse, and non-governmental organisations volunteers was organized as part of the campaign, among other activities.<sup>129</sup>

Another form of professional training intended for professionals in education is a programme called CAP (Children Assault Prevention). CAP is a programme of primary prevention. It includes workshops for children as well as presentations for the parents and the staff of schools, kindergartens and institutions. The goal of the programme is to familiarize parents and the staff of schools, kindergartens and institutions with information on abuse and violence against children.

**xx. Does the State educate children regarding these issues? Does the State involve parents into this educative process?**

The State uses various campaigns, projects and the media to raise awareness and educate children on the topic of sexual violence.

In 2006 the Ministry of Labour, Family and Social Affairs together with the Ministry of Education, Science, Culture and Sports organized a project entitled “We, the adults, are here to help you” for the first time. As part of the project a brochure containing key information on various types of violence, how to recognize it and where to go for help was given out to elementary school children. A school lesson was dedicated exclusively to the issue of violence and the different types of help.

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<sup>128</sup><http://www.policija.si/index.php/component/content/article/35-sporocila-za-javnost/62533-odprt-posvet-strokovnjakov-o-tem-ali-e-razumemo-nasilje-nad-otroki>, (last visited 20.9.2012).

<sup>129</sup> [http://www.mnz.gov.si/nc/si/medijsko\\_sredisce/novica/article/12027/7244/](http://www.mnz.gov.si/nc/si/medijsko_sredisce/novica/article/12027/7244/), (last visited 20.9.2012).

A group for juvenile crime, which is a part of the Police Directorate of Ljubljana, designed a comic book entitled “Now what, officer Beno?”, which is intended for children aged 8 to 10. Police officers from a local police station, along with the teachers, organized workshops for children where they used the comic book, whose main character is officer Beno, and tried to portray the work of the police, police officers and how their role is not always repressive. Through the comic book stories the children were also acquainted with the various types of violence and received information on where to go for help in times of crisis.

As we have already mentioned, the Ministry of Internal Affairs and the police in collaboration with non-governmental organizations organized a campaign using the slogan “Some secrets must not remain hidden”. A booklet written by the writer Goran Vojnovič also entitled “Some secrets must not remain hidden” was issued as part of the campaign. The purpose of the booklet was to educate elementary school children on when touches and actions become abuse, and on the necessity to speak up about these events. Additionally, posters and leaflets as well as a radio and television commercial were prepared as part of the campaign.

Social work centres within their local jurisdiction often organizes workshops at schools where children are educated on sexuality and sexual abuse.

Parents are not directly included in the educational process. They receive the information mainly from their children and the public media.

**xxi. Has the State created preventive intervention programmes for people who fear that they may commit the crime?**

The Republic of Slovenia has created no preventive intervention programmes for people who fear that they may commit a crime.

**Protective Measures and Assistance to Victims**

**xxii. Are there any social programmes to provide support for victims? How exactly do these programmes work?**

Social assistance of various types and forms takes place within the Ministry of Labour, Family and Social Affairs:

- An assistance network in form of maternity homes, safe houses and shelters;



- A network of crisis centres for the youth;
- A network of coordinators for the prevention of violence;
- A network of various specialized therapeutic programmes for short-term day or full-day care for children who have been robbed of a normal family life, as well as for children and other minors who experience violence or sexual abuse;
- A network of various specialized therapeutic programmes providing psychosocial help for children and families with the goal of finding solutions for personal problems;
- A network for short-term day or full-day care for children and other minors who have been robbed of a normal family life, and specialized prevention programmes intended for children and other minors with development issues, which provide regional coverage according to statistical regions;
- A network of teams for telephone counselling for children, other minors and other persons experiencing a personal crisis (TOM Telephone, Peter Klepec Telephone ...).<sup>130</sup>

Despite all the forms of social assistance listed above, provided by the State, the majority of social assistance programmes dedicated to helping victims still functions within non-governmental organizations which are financed by public tenders issued by either various Ministries or municipalities. Social assistance is provided by the Association against Sexual Abuse, Emma Institute, Society for Non-violent Communication, the White Ring of Slovenia and several other associations which concern themselves with the issue of violence and sexual abuse.

**xxiii. Are there any help lines in service of the victims? Are these help lines aware of the confidentiality principles?**

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<sup>130</sup> J. Zloković, O. Dečman Dobrnjič: *Zaprte oči ne vidijo zla: trpinčenje, zanemarjanje in spolna zloraba otrok – odgovornost družine in šole* (Closed Eyes See No Evil: Maltreatment, Neglect and Sexual Abuse of Children – a Responsibility of Schools and Families), Zavod Republike Slovenije za šolstvo, Ljubljana, 2007, p.192,193.

We have special anonymous telephone hotlines intended to provide assistance for victims, which abide to the rules of privacy and protection of personal data. Records on personal documentation are kept.

The Ministry of Labour, Family and Social Affairs organized a free helpline (080 1552) called the Peter Klepec Telephone, which can be used by children and other minors in case of exposure to violence as part of the “We, the adults, are here to help you” project. Callers can talk to a professional who tries to direct them to finding possible solutions to the problem.

In addition to the aforementioned helpline we also know other anonymous non-governmental helplines dedicated to helping victims, for example TOM Telephone, the SOS telephone hotline for women and children who have been victims to violence, the Association against Sexual Abuse telephone hotline, the Emma Institute and the Help Centre for Victims of Violence hotlines, as well as several others.

**xxiv. How does the State assist victims when it comes to recovery? Are the intervention programmes (if there are any) aware of the possibility that these child victims could have sexual behaviour problems in the future? Does the State make sure to get the consent of the persons or inform them thoroughly about the intervention programmes?**

The State assists the victims of violence and sexual abuse through the aforementioned social programmes, which are mostly part of social work centres. These employ professional coordinators who provide support for victims of violence, help set up and organize a general team on a local level and ensure inclusion of individual experts in the crisis teams. Other types of assistance are also offered as part of the social work centres, such as first social aid, providing assistance for families for their home, providing assistance for families at their home, social services offering various types of assistance and counselling when it comes to finding help, and other programmes within and outside the social work centres.<sup>131</sup> The victim is also offered personal assistance and is directed to find personal help such as

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<sup>131</sup> J. Zloković, O. Dečman Dobrnjič: *Zaprte oči ne vidijo zla: trpinčenje, zanemarjanje in spolna zloraba otrok – odgovornost družine in šole* (Closed Eyes See No Evil: Maltreatment, Neglect and Sexual Abuse of Children – a Responsibility of Schools and Families), Zavod Republike Slovenije za šolstvo, Ljubljana, 2007, p.192,193.

psychotherapy outside the centres. Victims can also use maternity homes, safe houses and shelters. Minors can find help at crisis centres where they can go in times of crisis, when leaving their current environment is required.

Often the assistance provided by the State is insufficient or the victims are badly informed on their options of finding help. That is why the help often falls to their immediate environment, which forces the victim to seek assistance. Non-governmental organisations also play a significant role in form of individual personal counselling, help groups, helplines and online assistance on websites and forums. They also offer social advocacy, legal assistance and material assistance as well as provide escorts to various institutions for the victims.

### **III NATIONAL POLICY REGARDING CHILDREN**

**xiii. Is there a serious political discussion regarding the children in the respective country?**

There was a serious political discussion regarding the children in Slovenia during the proposal of new Family Code, mostly in 2010 and 2011. Main purpose of this reform of the Family Code is improving the legal and factual situation of children, regardless of the form of the family they live in. Currently, there is no noticeable political discussion regarding children.

**xiv. How has the awareness within the society regarding children's sexual abuse and exploitation been raised by committed NGOs and/or the State (use of official sources, documents, statistics...)?**

There are some regular programs/conferences/brochures/etc. organised or prepared by NGOs or the State that help to raise awareness about children's sexual abuse: conference about internet children abuse in October 2012 in Ljubljana, organised by Web eye, Safer Internet Centre in collaboration with the Criminal Police Directorate at the General Police and the Association of Informatics and Telecommunications; yearly statistics about sexual abuse and exploitation prepared by Statistical Office of the Republic of Slovenia, etc.

To prevent violence, provide effective assistance in cases of violence against children and successfully raise awareness of this issue has been created a partnership between the

Ministries of Labour, Family and Social Affairs and of Education and Sport in March 2006 for the first time carried out a joint project titled "Adults are here to help you "for all primary school students in Slovenia."<sup>132</sup>

**xv. If the statistics are available, how many reporting have been done regarding children's sexual exploitation in last the 5 years (e.g. police records, court records etc.)?**

There are some statistics from 2007. Then Social work centres treated 4,012 children who have experienced violence in the Slovenia: 1316 on suspicion of mishandling, 1098 due to neglect, 814 of them were victims of psychological and physical violence 369 victims, 266 children were treated for a suspected criminal offense applications and 149, because they were victims of sexual abuse.<sup>133</sup>

There is also one informative table from Statistical office of the Republic of Slovenia, number of criminal defendants accused and convicted against sexual assault on a child (less than 15 years old):

Table 4: Criminal defendants accused and convicted against sexual assault on a child (less than 15 years old).

Year	2006	2007	2008	2009
# of defendants	145	155	141	118
# of accused	86	80	74	64
# of convicted	59	57	57	42

**xvi. Are there any promotional campaigns in the State so far regarding these issues?**

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[http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti\\_\\_pdf/nk\\_peter\\_klepec\\_mediji.pdf](http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti__pdf/nk_peter_klepec_mediji.pdf)

<sup>133</sup>[http://www.mzz.gov.si/fileadmin/pageuploads/Zunanja\\_politika/CP/Zbornik/II.\\_OP\\_CAT\\_AC\\_-\\_Uvodno\\_porocilo\\_RS\\_h\\_Konvenciji.pdf](http://www.mzz.gov.si/fileadmin/pageuploads/Zunanja_politika/CP/Zbornik/II._OP_CAT_AC_-_Uvodno_porocilo_RS_h_Konvenciji.pdf), (last visited 20.9.2012).

Yes, Ministry of the Interior and the police, in cooperation with non-governmental organisations prepare campaign in October 2011, designed to raise awareness of sexual abuse of children.

xvii. **How has the children's perspective represented in the law making process?**

There is no children's perspective represented in our law making process.

xviii. **Who are the main national Non-Governmental Organisations working on the topic of children's rights? Does the State regulate (or not) their involvement in law making process?**

Main national Non-Governmental Organisations working on the topic of children's rights in Slovenia are:

- Association for nonviolence with SOS telephone for women and children, victims of violence;
- Association against sexual violence- users are children that may be victims of all forms of harassment, sexual assault, domestic violence and bullying;
- White collar Slovenia - psychosocial and legal assistance to victims of crime, educational programs for professional staff who work with victims, informing the public of the whole spectrum of assistance, preventive action, preparation of legislative proposals to improve the situation of victims, protection and presentation of victims' rights, cooperation with governmental and non-governmental organizations, material assistance to victims, networking with similar organizations and involvement in an international network of services for victims of crime.

Involvement of non-governmental organisations in law making process is not significant.

## **IV OTHER**

**Are there any other legal or political issues that might be relevant in the respective country? Please keep in mind that ELSA is a non-political organisation, hence only political issues which might affect the data you have provided should have been mentioned here.**

In Slovenian jurisprudence there are many known cases in which an allegation of sexual abuse of the children is used as a method of clients in divorce litigations to cause damage to opposite client. Preventive measures, which are immediately taken, break the contact between the parent accused of sexual abuse and the child that is alleged victim. Protection of the children is utilized on a way that the child and the accused parent become victims of a false accusation. These kind of false allegations of sexual abuse have occurred 40 to 60 times per year and are in the vast majority proven to be false<sup>134</sup>. This is distorted system of protection against child abuse.

Usually, this pattern appears in process of terminating marriage with divorce, when are both spouse trying to get the custody of the child. In the meantime he has to live in the middle in hostile environment. Sadly in some divorces attorneys suggest such an option.

If parents do not come to agreement on the maintenance of joint children by their own or with the help of social work centre, the court reaches decision in non-legal procedure, unless it decides on contact together with disputes concerning the care and upbringing of children in this cases decides in legal procedure as says Article 106(4) of Marriage and Family Relations Act (*Zakon o zakonski zvezi in družinskih razmerjih-ZZZDR*)<sup>135</sup>. The main motive is the child's interest in promoting the child's development, support and emotional attachment. The court also account principle of continuity of child development, in order to continue the current situation in life and it would not be necessary to change the environment and schools. If both are suitable to care for the child, the decision depends on the opinion of the child and review of the social work centre as Marriage and Family Relations Act proscribes in Article 106(7).

At that time the court, who has jurisdiction for the current process in which one of the parents were accused of sexual abuse, usually triggers proceedings before a criminal court and immediately withdrawn or restrict contacts, as is required when any suspicion that threats interests of the child such as mental stress, physical and mental development occur as proscribed in Article 106(5) ZZZDR. Court has to decide between the right of a father to

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<sup>134</sup> R. Praprotnik, 'Jutri se lahko tudi vi prebudite kot pedofil..', in Dnevnik.si, Saturday, 28.11.2009, [http://www.dnevnik.si/tiskane\\_izdaje/objektiv/1042318688](http://www.dnevnik.si/tiskane_izdaje/objektiv/1042318688), (last visited 8.9.2012).

<sup>135</sup> *Zakon o zakonski zvezi in družinskih razmerjih –ZZZDR* (Marriage and Family Relations Act), Official Gazette SRS, No. 15/1976, 1/1989; Official Gazette RS, No. 64/2001, 16/2004; Odl. US, 16/2004, 90/2011.

have contacts with the child and the interests of the child which might be re-exposed to sexual assault.

In addition to immediately enforce interim measures to suspend contacts, the court has the possibility of ordering contacts under the supervision of the premises of the Centre for Social Work, accompanied by a social worker. This option is because of its unnatural note proven harmful to the relationship between children and parents.

The Convention on the Rights of the Child in the Article 9 says that the State has a duty to ensure that children are not separated from the family except in cases where the proceedings found it necessary to defend the interest of the child, especially when it comes to abuse or neglect of the child by the parents, or when in the event that the parents are living separately and it's not yet decided about children's residence. It also states that the child in such cases has the right to contacts with the other parent, unless it is contrary to the child's best interests.<sup>136</sup>

The Court, therefore, has full authority under Slovenian law and the Convention on the Rights of the Child to limit contact in the child's best interests, but the question is, how much time should be maintained in such condition, taking into consideration the length of the Slovenian judicial proceedings and the consequences that such an injunction is left on the relationship between the accused parents and the child. Interim measures to suspend contacts cannot be challenged by regular legal means and is directly enforceable, the European countries are now also under the Brussels Regulation IIa<sup>137</sup>. Proceedings before a criminal and family section on the court can be pulled from two to four years, although the rate of such procedures is essential. Marriage and Family Relations Act in Article 10<sup>138</sup> notes that these matters are addressed as a priority. As well as the European Convention on the exercise of children's rights<sup>139</sup> in the paragraph 7 to judicial authority imposes a duty to respond quickly. Unfortunately, in Slovenian jurisprudence has been proved countless times that the slowness of our courts considered fatal to the relationship between the parent and the child.

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<sup>136</sup> Convention on the Rights of the Child, paragraph 9.

<sup>137</sup> Bruseljska uredba IIa (Brussels Regulation IIa) - 2201/03.

<sup>138</sup> Article 10 ZZZDR.

<sup>139</sup> European Convention on the exercise of children's rights.

Interests of the child are extremely endangered in the proceedings of collecting evidence through investigation and criminal proceedings are derived on base of Criminal Procedure Act<sup>140</sup> (*Zakon o kazenskem postopku*). Different expertise opinions in the same process can be contradictory and conflicting. In addition, children are exposed to psychological physical irritation. Since the court is obliged to consider child's opinion, there is also considerable pressure on the child and manipulations of all kinds, from both parents. The importance of the child's opinion of our law is also determinated in Article 106(7) ZZZDR that prescribes child's opinion in divorce proceedings that are running separately of criminal proceedings, to be very carefully considered if the child is able to understand its meaning or implications, if he tells it on its own or by the trustee. Also the Convention on the Rights of the Child in Article 6 demands of the judicial authority's responsibility to have enough information to decide to take the right decision in the interests of the child and to make possible to the child to express their views and take it under consideration.

A further problem in such cases is this, that these false charges and not prosecuted but simply overlooked although it's a criminal offense which is punishable by imprisonment for up to two years by Criminal Code (*Kazenski zakonik*) in Article 289(1).

The increasingly common problem of false allegations of sexual abuse in conflict between spouses, and also the abuse of criminal proceedings has been pointed out to the court in Strasbourg. European Court of Justice ordered 6,000 € penalty to Slovenia, where father's rights were violated due to false allegations of sexual abuse, who after three years of proceedings proved to be untrue. And this case is not the only one.

However, none of the Slovenian governments, until now, had any attention to fix this problem. Even though in 2011, Parliament affirmed a new Family Code, which would indirectly through mediation and shorter deadlines effect on the earlier resolution of this kind of situations. The Family Code was unfortunately rejected by the people.

## V CONCLUSION

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<sup>140</sup> Zakon o kazenskem postopku (Criminal Procedure Act)- ZKP-K; Official Gazette RS, No. 63/94 (ZKP), 70/94 (ZKP), 72/98 (ZKP-A), 6/99 (ZKP-B), 66/2000 (ZKP-C), 111/01 (ZKP-D), 110/02 (ZDT-B), 56/03 (ZKP-E), 43/04 (ZKP-F), 101/05 (ZKP-G), 14/07 (ZKP-H), 40/07 (ZDT-E), 102/07 (ZSKZDČEU), 23/08 (ZBPP-B), 68/08 (ZKP-I), 77/09 (ZKP-J), 58/11 (ZDT-1), 91/11 (ZKP-K).



Slovenia is a signatory to the Council of Europe's Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. The Convention was signed on the 25 October 2007. The Republic of Slovenia is progressively adapting its legislation to the Convention; in June 2012, it has adopted an amendment to the Criminal Code, where, among other things, a new offence has been introduced in the chapter Criminal Offences against Sexual Integrity: Communication with a person younger than 15 years for sexual purposes, or child grooming. In other aspects, Slovenian criminal law is quite compatible with the Lanzarote Convention. The Slovenian Criminal Code protects children under 15, and in some cases also those under 18, with numerous criminal provisions. In Slovenia, the following is considered a criminal offence: sexual assault on a person younger than 15 years; communication with a person younger than 15 years for sexual purposes, or child grooming; violation of sexual integrity by abuse of position; prostitution; presentation, manufacturing, possession and distribution of pornographic materials; and incest. According to the prescribed punishment, the actions listed above are among the most serious offences.

Even in the very process of investigation and prosecution, there are some measures in the criminal law that pursue the principle of »the best interests of the child«. To avoid deepening the trauma experienced by the child as much as possible, there are specific rules on interviews with child victims under 15 years of age. During criminal proceedings, an obligatory special representative of a minor victim plays an important role. If the victim does not choose a representative, a lawyer is appointed by the court. The representative defends the minor's rights and protects their integrity during the procedure. In addition, multidisciplinary teams consisting of experts from the police, prosecution, health and social care also contribute greatly to the protection of a child and its interests during criminal proceedings. Such teams are put together by social work centres operating under the auspices of the Ministry of Labour, Family and Social Affairs, and have the public powers to take the necessary measures to protect children and their rights.

Furthermore, non-governmental organisations working together with state authorities play a vital role in preventing sexual abuse and assisting victims. Most social victim-aid programs operate primarily within the context of non-governmental organizations, which provide actual help such as individual counselling, support groups, assistance over the phone and via websites or online forums, provide social advocacy, accompaniment to a variety of institutions, legal advice and material help. Apart from the state, the non-governmental

organizations have an important role in educating and raising the awareness of employees as well as children and the general public on the problem of sexual abuse and sexual violence.

Slovenia has made great efforts to implement the legislative and other measures necessary to protect children and prevent all forms of sexual exploitation and sexual abuse of children. However, some legislative measures are sometimes not implemented the way they should be.

Sexual abuse is a problem of society and not only a problem of an individual. The future of the victim often depends on his or her surroundings, which is why all of us, not only individual institutions, need to try hard to help the victims and protect children from such heinous crimes as sexual abuse.

## ACKNOWLEDGEMENTS

We wish to thank various people for their contribution to this project; Mr. Anton Toni Klančnik, Ms. Katja Bašič, Ms. Melita Dobnikar for their help in collecting the plant data for our research.

Special thanks should be given to Professor Katja Filipčič, our academic advisor for her professional guidance, useful critiques and valuable support.

We would also like to offer our special thanks our translators Maša Dolanc and Teja Šošteršič.



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**National Coordinator**

Sara Sanz Aldea

**National Researchers**

Daniel Ares Rodríguez

José Ignacio Bernardo Iglesias

Ángela Bolívar

Enric Cano Romero

Nunilo Fernández García

Raquel González Menchón

Alba Rodríguez Menéndez

Emma Rodríguez Montes

Ana Segura Jiménez

Eloy Serrano Arce

**National Academic Advisor**

Patricia Tapia Ballesteros

## I INTRODUCTION

### 1 GENERAL

#### **i. Roma Community:**

Historically the Roma community has been one of the most discriminated ethnic in the Spanish society. In Spain there are around 800,000 mainly located in Andalusia, Extremadura, Madrid, Catalonia and Valencia. These data have been published by the Ministry of Health and Social and Equality Policy in its report 'Social Diagnostic of the Roma Community in Spain'.

Roma people have significant difficulties in accessing education. Thus, illiteracy rates are around 70% in the people above 16 years old belonging this collective, being this rate higher in the case of women. The reasons which justify this trend are eminently cultural, but also it is influenced by the situation of Roma children who are required to collaborate in the occupations of their parents.

Regarding the labour market, the Roma have access to precarious and temporary jobs. Roma women have more difficulties to obtain stable jobs. Only 51.8% of citizens belonging to this ethnic group have paid employment, facing to 81.6% which is achieved by the rest of the Spanish population.

One of the effects of discrimination of Roma is related to housing. Although the presence of shanty towns has decreased in the past few years, 12% of the population of this ethnic group is still living in substandard housing. Accessing to rent is complicated because of the discrimination which these people are suffering. On the other hand, the urban planning of many cities leads to the formation of specific Roma ghettos.

#### **Immigrants:**

In Spain there is a total of 5.711.040 immigrants registered in the Public Offices. This makes it the second European Country with highest rate of immigrants, just after Germany. The 58% of them come from less developed nations. Their salary is 42.8% lower than the one which perceives national citizens.

Although in our country the number of people who say they are in favor of immigration is almost 89%, nearly three out of ten Spanish citizens understand that immigrants who are in a situation of long-term unemployment should leave the country. Data obtained from the

information collected in the 2010 survey of the Bertelsmann Foundation, entitled "The Spanish perception of diversity and immigration." The report also confirms that almost 67% of respondents consider that the number of immigrants in Spain is "high". An Institute INJUVE report of 2008 has reflected the view that young Spanish people have of immigrants. 44% of respondents see more advantages than disadvantages in living with foreigners, while those who believe that the damages outweigh the benefits are 38%. The main disadvantages are that immigration is take jobs (31%), crime and insecurity cause (23%), there is no control (6%) and accept work for low wages (6%). Also of concern to young Spanish that immigrants do not adapt to our customs (5%) have more help foreign citizens (4%) and collapsing public services (2%).

The percentage of people who have felt discriminated among immigrants is four times that of the natives, especially among those under 24 years. Discriminatory behaviours are detected frequently in access to housing and when looking for a job. There are numerous reports of young Moroccans who have difficulties accessing to bars, entertainment venues, restaurants ... But there is a particular immigrant group punished by immigration: the Ecuadorians. They are the ones who suffered more abuse on the street. They also claim to have more difficulties in accessing employment, and they ensure that suffer frequently rough treatment by police authorities.

It is common to link immigrants with the lack of security and committing crimes in cities. However, while the immigrant population increased by 86.5% between 2002 and 2006, the crime rate per capita has fallen to 22%.

### **People with disabilities:**

According to data from the Survey of Disability, Personal Autonomy and dependency situations of 2008, about 9% of the Spanish population has a disability, that is, more than 4.1 million people. Citizens with disabilities face major exclusion situations, especially in employment and education. In Spain, 5% of people claim to have witnessed acts of discrimination against this group.

The major obstacles exist in access to public spaces and the labour market. And, according to data from the National Statistics Institute, the Spanish half say they feel fairly or very uncomfortable in the presence of a disabled person. A majority of the citizens of this country, namely 89.5%, recognizes, however, that people with disabilities face barriers to access public transport, 73.2% in hotels and restaurants and 74.1% all amenities.

To overcome this historical situation of inequality, several standards have been adopted in the years of democracy and should be mentioned in Law 13/1982 of the Social Integration of the Disabled and the Law 51/2003, of December, 2, equal opportunities, non-discrimination and universal accessibility for people with disabilities. More recently approved a new text, Law 49/2007 of December, 26, establishing the system of offenses and penalties relating to equal opportunities, non-discrimination and universal accessibility for people with disabilities

### **Women discriminated in Spain:**

According to the report *"Women and men in Spain"*, of the National Institute of Statistics, in 2008 the rate of women in compulsory education was 48.5%, which increased to 51.5% in further education.

The average gross annual salary of a woman in Spain is about, according to the *"Report on equal pay"*, the UGT union, to 78.1% male. The differences are seen also in the total number of women who hold leadership positions in our country. Information published by the newspaper *ABC* on March 8, 2012, titled *"The directors, pending for women"*, indicate that only 24% of management positions are held by women, although these represent 51% graduate of posts. One in three companies in Spain does not have any women in leadership positions. According to the newspaper *El País* in an interview published on April 16, 2012, entitled *"A wall tie against women managers"*, in Spain women engaged in responsible charge private companies charge about a third less than their male counterparts.

### **Discrimination for reasons of sexual orientation.**

According to the *Eurobarometer of Discrimination 2008*, 48% of the citizens of this country understand that discrimination against homosexuals is widespread. The 47.5% that the Spanish are little or not tolerant to homosexuality. Some 13% of people understand that homosexuality is a disease and should be treated as such. Another 22.2% think it is unnatural. 23% think that gay people should not be entitled to the same rights as heterosexuals and 42.1% believe that same-sex couples should not have the same facilities as heterosexuals to adopt children 30% have little or no sympathy for gay people, the same percentage of people who show concern in the case of having a gay son.

But if the case of homosexuals is delicate, the situation is no better when it comes to transsexuals. This fact has tried corrected the approval of Law 3/2007, which allows citizens to change gender in the Civil Registry. However, Malaga University has produced a report,



commissioned by the Federation of Lesbians, Gays, Transsexuals and Bisexuals. The study, based on the results of this survey, reveals, among other things, that 48% of people who participated in it have prostituted. 55.9% also states have had problems in their work environment after making public his transsexualism.

But if the situation is delicate to older transsexuals, discrimination cases are accentuated in adolescents. Thus, the study notes that while the average in which children discover their transsexualism is 10.8 years, most choose not to communicate until he was 18.

ii. There is no specific description of the term "*family*" in the Spanish legal system. This is a contingent concept that changes with the social reality of the moment. During the Franco dictatorship, extramarital children were not included in the family. However, the progress of democracy and the promulgation of the Spanish Constitution have led to a new understanding of family relationships, formulating new principles that have completely altered the legal regulation of this matter.

The wording of Article 39.2 of the Constitution meant the removal of the situations of inequality between marriage and children conceived outside of the marriage relationship. Similarly, Article 32.1 establishes the principle of equality between men and women toward marriage.

Regulation of the family and marriage is established in the Civil Code. In its Article 67 contains the obligation to protect family relationships. The interests of the children are a priority. In Article 154 Title VII, based on parent-child relationships, the Code requires that parental authority is exercised always to the benefit of the children, which means "*watch over them, keep company, feed them, educate them and provide them comprehensive training "and" represent and manage their goods*". In the subsequent provision, it points out the obligations of children regarding their parents. Specifically, it cites the duty of obedience and respect, as well as to collaborate, to the extent possible, to support the dependents. In addition, section 158 requires the judge to take all measures to prevent the child from being exposed to a hazard or serious injuries.

Our legal system also recognizes the figures of foster care and adoption. The first one would be the inclusion, temporary or permanent, of a child in a family other than the biological, but without losing the child's relationship with their family of origin. The situation is similar in the case of adoption, with the exception that in this case the child loses all ties with her biological family. Both figures are described and regulated in Chapter V, first and second

sections of Title VII of the Civil Code. The creation of Law 13/2005 recognizes this possibility also to homosexual people.

The Civil Code dedicates its Title IV of Book I to the regulation of marriage. Law 13/2005, which was mentioned before, meant a great novelty in the regulation, including the possibility that the marriage can be contracted by people of the same sex, in a situation of full equality to heterosexual couples. According to Article 45, the marriage will have free and voluntary character. However, Articles 46 and 47 determine prohibitions, more or less intense, to marry. In example, they would not be able to do contract marriage non emancipated minors and those who are linked with another previous marriage. According to Article 47 may not marry each other *"straight relatives of consanguinity or adoption, collaterals to the third degree and convicted of wilful death of the spouse of any of them."* However, Article 48 recognizes certain qualifications in these general prohibitions, establishing the possibility of judicial dispensation in cases of children under 16 years and of consanguinity. It also notes that the Ministry of Justice may authorize a marriage even if wilful death of the former spouse. It is recognized under Article 49, effectiveness to the rites of marriage under those confessions that have agreements with Spain in this regard.

The Civil Code recognizes in Article 67 the equal rights and obligations of spouses. Thus, under Article 68, must respect and help each other, in addition to acting in the interests of the family. They are also required to *"live together, be faithful and help each other"*, and also to collaborate in achieving equitable housework.

Regarding forms of marriage dissolution or suspension, the Code includes the separation, that is, the "suspension of the common life of the spouses." This formula does not involve the dissolution of marriage. That is precisely the main difference with the divorce, in which marriage is permanently discontinued. The nullity involves the absence of marriage and its effect goes back to the time of conclusion of the alleged link. Marriage, therefore, would not have ever existed.

In 2011 in Spain held a total of 161.345 marriages. This figure confirms a trend that has continued in recent years. With respect to the previous period, the total marriages was 4.4% lower.

Regarding the average age of marriage celebration, there has been a gradual delay. In 1980 the average age at which marriage contracted in Spain was 24 years for women and 26 for men, today that number has increased to 30 years for boys and 32 girls. Particularly relevant

is the case of Roma children, traditionally used to marry at age 14, pursuant to the provisions in Article 48 of the Civil Code, which allows marriage between non emancipated minors subject to receiving immunity from court judge, and after listening to the child and their parents or guardians. Nevertheless, at present, mostly Roma decide to marry later, once they have turned 16.

Only 15 children under 17 were married in 2009, but the number of girls who married in this age group increased to 162.

It has also increased the number of marriage dissolutions. Thus, in 2011 the figure rose to 110,651. The formula for finding the most common bonds of marriage is divorce, which represented about 93.6% of marital breakdown, far ahead of separations (6.2%) and nullity (0.1). The duration of the marriage was a mean of 15.7 years. Of particular concern is the case of marriage dissolutions in couples with children. While 42.8% of marriages dissolved in 2011 had no children, 48.4% had only minor children, 3.9% in children under economic dependence and 4.9% children under and older dependents. In these cases, the statistics tell us that the children eventually end up in the custody of their mothers; this is so in 81.7% of cases. Only 5.2% of children were under the custody of their parents, and 12.3% under joint custody. With regard their maintenance, the Civil Code refers to Article 143, which requires the provision of food to the spouses and the ascending and descending, in Spain 57.2% of marriage dissolutions had assigned alimony, taken in 85.9% of cases by parents, at 5.1% to 9% and mother both spouses.

Regarding the average age of birth in Spain in 2011 was 32.0 for Spanish people and 28.8 for foreigners. A fact of particular concern in the situation of many Spanish children: nearly 30,000 women under age 20 become pregnant in Spain, with the particular impact which this may cause for the proper personal development of children.

**iii.** The child was seen in different ways throughout history. There was a time. When the child was seen as 'small adults', they children were unknown. Then there are two diametrically Opposed Ways of Seeing Children as 'intrinsically bad' or 'good Essentially'. The child, before modernity, was small adult Considered gear was part of a society and educated to be an adult, to help preserve the social group. To disintegrate the cohesion gaze turns to the single subject. That conception within the child begins to September as a subject, as being true can perceive the World Differently to adult.

The term 'child' has not taken its modern sense until the seventeenth century. Before, They Knew not Distinguish the different ages, and the term child Applied Often even to adolescents of 18 years. Just add the nineteenth century the 'baby'.

This conquest of the child has been gradual and not Until the early twentieth century, with the Contributions of cognitive psychology and psychoanalysis, with the concepts of evolutionary development, with an eye towards children to discover the origins of complex characters, with the fullness of historical consciousness of man, Is that the notion of child Reaches configured as a status worthy of being watched and Studied from all disciplines. Modern knowledge privileged childhood as an object of scientific research and social intervention and had the effect of an extension of the look on children, Which Became The Most important stage in the life of human beings.

While concerned with understanding scientific disciplines and learn more about the child and the stages of their evolutionary development, the Social and Economic situation was resulting in the emergence of the notion of children as property, I was seen as inferior, whose destination should be controlled by adults was required conformist and passive attitude, and is valued only for their ability to work. This arose the need to create laws to Regulate Child Labour.

In the context of the Interests of the Child, the Convention on the Rights of the Child Provides protection in any Work That Hinders Their full development and places children and adolescents as the main recipients of social policies. This makes clear the Economic survival of the family cannot be an excuse for child labour. It is at children and adolescents are family competent fill gaps.

100 years ago, children had a significant Presence and workforce in Industrialized Countries (in some cases up to 50%), working workdays to 13 hours a day.

Between the 30s and 50s behaviourism that what really counts ruled in development is what comes from outside: learning. Psychology sailing Between Two alternatives: the child comes into this world endowed with innate structures and has its own Mechanisms for the development of the same or the child is a 'tabula rasa' u all, it acquires in Contact with the medium.

We have spent the concept of 'child' as a small man preparing for life, the concept of the child's mind is like a blank slate, on which everything is written. Today, we can say that the child has its own dignity itself as Autonomy and Such, and not in preparation for something.

About Spain issues of rights of children have Ratified the Convention on the Rights of the Child adopted by the United Nations on November 20, 1989, was Ratified by Spain in 1990 and Became part of our legislation, existing Commitment Ratified Countries have That it to Report to the United Nations on its Implementation every three years.

The Committee of UN experts Considered the second report of Spain

(CRC/C/70/Add.9), submitted on October 12, 1998, at its 798th and 799th meetings (CRC/C/SR.798 and 799) held at the UN Headquarters in New York on 4 June 2002, and adopted at its 804th meeting, held on June 7, 2002, the concluding observations. Therefore, Spain is fully Committed to the safety of children and punishing sexual abuse and rape and abuse more severely abuse inflicted on children and adolescents so I can see typified in the Spanish Penal Code in Chapter II, sexual abuse of Articles 181 and 182 and Chapter II A, of the abuses and Assaults under thirteen in article 183 and 183 bis, chapter III, of sexual harassment in Article 184 CP.

The Spanish are aware and greatly Concerned about the health and safety of children, Usually most are Encouraged to curb abuses That harm children's development and Their integration and even mental health creating insecurities and fears, believe it is important to Stop These crimes with harsher penalties and Whenever These Situations and report it is important to educate children and parents also.

There have been cases of Human Rights Violations that attracted the attention of the Media.

**iv.** The Regulations Which Attracts the matter to Ensure the Implementation of international treaties aid the Council of Europe as an institutional framework to the Committee of Ministers of the Council of Europe Convention presented a preliminary draft was submitted to the That Consultative Assembly for opinion. Based on the rights members of the Universal Declaration of Human Rights United Nations is where a group of rights as the prohibition minimal contained in Article 4 paragraph 2 of forced or compulsory labour and other restricted rights group and A third group of rights under other protocols.

The Convention on the Rights of the Child United Nations on 20 November 1989 adopted a milestone in the history of childhood and the recognition of their rights.

The very development of paediatrics is also a relatively recent, barely a century in our country. That recall the first children's hospital in Spain, Hospital of the Infant Jesus of Madrid, was inaugurated in 1877.

Considering child as every human being below the age of 18 is another of the key elements to analyze the problems of children and adolescents and their care needs. The child is subjected to continuous biological changes (somatic growth and development), psychological (intellectual and emotional maturity) and social (Autonomy, responsibility, expanding the circle of relationships ...) that will affect your health or the onset of disease. Consideration of childhood as a specific population needs Group with biological, psycho-social and protection also is a recent infantile.

The health and social care is a basic right of citizenship.

The Universal Declaration of Human Rights, of 10 December 1948, states in Article 25 that:

1. Everyone has the right to necessary medical care and social services.
2. Motherhood and childhood are entitled to special care and assistance.

All children, born in wedlock whether or out of wedlock, Shall enjoy the same social protection.

Systems of basic rights protection initially instructed the domestic law of each State, through the Mechanisms for protection under the Constitutions of each of these (and possibly some constitutional rules later). However, this view openly restricted in the recognition of basic rights was later superseded by a phenomenon they call "internationalization of human rights", which operated after the Second World War.

The failure of the law to Provide Adequate Safeguards for the protection of basic rights, and the assumption of some organs Alleged or state Authorities in some Countries About What Should be Understood as a "fundamental right" That was the incentive allowed the United ADOPTED as the Need to Implement a supranational system That is Effective and binding on the protection of basic rights.

Initially, This primitive conception adopted by a few states (in Europe) was suppressed by Fought and others, citing as grounds his "self-determination" in Resolving Conflicts Their internal, international law must be limited to conflict resolution in nature exterior. This criterion was exceeded, as noted by Professor Gomez Perez: "Public International Law Established as one of its essential purpose the protection of human rights and step by step, from the outlawing of the slave trade by the treaties of Vienna in 1815, Until the Charter and the United Nations Universal Declaration of Human Rights adopted by the UN General

Assembly on December 10, 1948, was devoting a progressive international law has been giving more and better systems to protect these rights.

This protection has been given by both universal and regional schemes. Thus, the Universal Declaration of Human Rights is a universal type instrument in the United Nations system that, although not a treaty but a resolution of the General Assembly, is a source of law is an essential foundation of all UN system in this area.

Predominantly and besides this Universal Declaration, the Universal System is Comprised of the International Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights (both December 1996) and the Optional Protocol to the Covenant on Civil and Political Rights, International Also law has created Mechanisms to Protect Human Rights and Special Procedures for this.

But, in turn, have created regional systems Such as Europe, Whose origin is put at the 1950 Convention, Developed through several additional protocols, and American regional system, Comprising all countries party to the That Are Charter of the Organization of American States and the American Convention of Human Rights in San José, Costa Rica " However, This fact That infuses the progressive nature of human rights in the international arena was not Assumed by States peacefully, Even When They have Ratified and Assumed the obligation of These binding international law of human rights against any provision of law, statutory or constitutional Either nature.

Importantly, This obligation, if not implicit in some international treaties on Human Rights is part of ius cogens of international law, Which has been exhibited in various statements issued by international courts of human rights protection, Restricting ourselves to the purpose of this paper to the Inter-American System of Human Rights Protection.

The Convention on the Rights of the Child was adopted by 193 States, so far unprecedented in the field of human rights. Spain made no reservation to the Convention and Ratified in 1990. It is important to draw attention to the international context in which it is born, with a variety of Situations and at a time when to finding That Suffered and children suffer enormous Difficulties and Injustices. It was clear That the Limitations in Protecting Their health, education or Preventing access to (and Prevent) its development, and That children were (and are) subject to abuse and exploitation through prostitution or harmful work or Recruited for Military Purposes, or Victims of war.

The Convention on the Rights of the Child is part of the legal system, so you can claim compliance to the Authorities. It is important to emphasize that the rights in the Convention are recognized that rights are part of our domestic law. The overall level of implementation is inadequate.

v. Spain uses three legal instruments on admission, selection and award. Firstly the compliance with the formal requirements, deadlines, and data compliance requirements will be monitored. In the second study the specific proposals that have been send, and third applicant's ability to carry out the project: financial sufficiency, and other administrative capacity.

In the final section of the organizers Stated that "The European Community pursues an equal opportunities policy, Therefore, either particularly encouraged to submit proposals or participate in the presentation." It is a very respectful consideration, but not more than that, because not prioritized in any way that kind of request.

## 2 THE LANZAROTE CONVENTION

vi. The European Convention on Human Rights was adopted by the Council of Europe in 1950, being enforceable by the Contracting States since 1953. Despite of this fact, Spain did not form part of it until 4<sup>th</sup> October 1979, when it was ratified. The reason of this time lapse, since its adoption until its ratification, was that from 1939 to 1975 Spain had been a dictatorial State where no public freedoms were recognized, and massive fundamental rights violations were committed almost every day. Therefore, Spain did not respect the rights set in the Convention, and, as it can be concluded, it could not be part of it because it would be contradictory with the own Convention.

In 1975 there was a breach in the existing system; General Francisco Franco, the one who had been its maximum leader during thirty six years, deceased. During this period of time public freedoms were not recognized for the citizens neither were any kind of right. This fact supposed the end of the regimen, its excision, and the beginning of a new historical stage known as 'The Transition', not being common agreement about its length, depend its end of different important facts. This period is characterized by the transformation of the totalitarian State into a democratic and social State of Law throughout progressive changes in time.



One of these changes, the most important of all, is the creation of the Spanish Constitution in 1978, establishing the fundamental pillars of the system. It recognizes a set of Fundamental Human Rights; some of them were already collected in the European Convention on Human Rights. The Convention should respect what is established in the Constitution in order to make it part of the domestic legal order. This was not a problem because as it was explained before, the own Fundamental Law promulgates a set of Fundamental Rights which in any case are contradictory with those content in the European Convention on Human Rights, therefore, it could be part of Spanish law since its ratification.

**vii.** The Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse of the Council of Europe, also known as the Lanzarote Convention, is an International Treaty promoted by the Council of Europe in 2007 legally binding to the Contracting States which signed it.

The primary goal of this legal text is preventing the commission of sexual offences whose victims are children, promoting cooperation between States through establishing the achievement of common goals in order to protect the rights of the victims of sexual exploitation and sexual abuse. The Convention introduces new crime legal conceptions, such as grooming, which must be pursued by the Contracting States, as well as preliminary measures and protective measures to the victims in order to prevent those offences.

Spain is part of the Lanzarote Convention since its ratification, on 12<sup>th</sup> March 2009, entering into force on 1<sup>st</sup> December 2010, and formulating a Declaration in relation to Gibraltar situation in the Convention which will be explained later.<sup>141</sup>

**viii.** The Lanzarote Convention is an International Treaty and therefore is part of the Spanish legal order since its adoption, always once it is checked it accomplishes with the constitutional formalities.

As each International Treaty, the Convention is a primary source of legislation so it has legal range. It has a special position in relation with the law due to the fact it has passive force facing it, this means that International Treaties cannot be modified by the law, according to article 96 of the Spanish Constitution.

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<sup>141</sup>. Ratification Instrument of The Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse of the Council of Europe, made in Lanzarote 25<sup>th</sup> October 2007

The regulation for the International Treaties' celebration and its subsequent incorporation to the Spanish legislative body is established in articles 93-96 of the Fundamental Law. These articles impose different requirements, procedures and limits, depending of the type of Treaty which may be celebrated. In example, article 93 is referred to those treaties which may be part of Spanish legislation constituted within an international organization of integration which assumes the exercise of State powers, as it is the Directives' case, created by the European Union different institutions. In the current case, the Convention has been promoted by the Council of Europe which is an international organization of cooperation so that is not applicable.

Article 94 of the Constitution imposes an important limit to the State Government's freedom: it is required to inform or, depends of the case, needs the authorization of the Parliament in order to celebrate International Treaties with specific content.

The Lanzarote Convention somehow affects to Fundamental Rights because it contains criminal and child protection measures, thing which has to be taken into consideration. For this reason, Parliament had to known about the ratification of this Convention, although it has not any disposition which may be opposite to what is established in the Constitutional Act. If there was that case, article 95 of the same Act reflexes its supremacy disposing as a requirement its reform if an International Treaty with contrary content wants to be approved.

There is no implementing legislation in relation to an specific law, as it would be the case of European legal transpositions, because the Convention binds to its accomplishment since its entering into force. Despite of this fact, in 2010 the Criminal Code was reformed, being the Lanzarote Convention principles enshrined.

**ix.** The Criminal Code reform created specific offences in which is related to children protection in sexual crimes field. This legislation contains the majority of the Convention principles in Substantive Criminal Law (grooming, children pornography, etc.) Furthermore, apart from the Spanish ratification of the Convention, one of the main reasons which lead to reform the Criminal Law was the need of transposition to the domestic legal order of one

Council Decision<sup>142</sup>, communitarian legal instrument which is binding directly to all Member States in all its elements.

When Criminal Code reform entered into force meant, particularly, under thirteen years old protection strengthened, creating specific criminal offences. Before 2010 reform when the criminal offences passive subject was a minor of thirteen it was an aggravating to the own crime but after the reform, when the victim is under that age, this has his own substantively, not being considered as an aggravating anymore but an independent act, which due to the passive subject age has as consequence higher imprisonment. Thus, child sexual indemnity has higher protection. Apart of this, special aggravations are introduced when the minor would be in special situation of vulnerability, and always when he is under the age of four, when the crime was collectively committed, within a criminal organization, using intimidation, force or violence or when there would be superiority abuse, kinship or a relationship of trust between victim and criminal.

It is also created a new offence which is directed to that person who through tricks and telematic media tries to meet an under thirteen child with sexual purposes, grooming in order to make the victim participate in pornographic spectacles and aggravations in crimes that already existed, like is the case of prostitution and storage and distribution of child pornography. New Criminal Code redaction also covers legal person liability when they would be active subjects in mentioned crimes, establishing penalties of fine making dependent their amount to the type of crime committed.

On the other hand, apart from the specific penalties set, ancillary penalties can be applied, as it is the case of deprivation of parental rights penalty. In the end, the aim of these penalties is give more protection to the victim under-age and preventing recidivism when those crimes would be committed in the minor's circle of trust.

x. Although there is legislation related to Lanzarote Convention principles, it is important pointing out that law bills are discussed in the Congress of the Deputies, one of the Spanish legislative bodies. The Criminal Law is an Organic Law due to its special content and according to what is established in article 81 of the Constitutional Text, it is required absolute majority of this body in order to approve, modify or derogate it. Therefore, it was

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<sup>142</sup>Council Decision 2004/68/JAI of 22<sup>th</sup> December 2003 related to fighting against children sexual exploitation and sexual abuse

needed a majority in the Congress to 2010 reform. This body is formed by deputies elected by citizens periodically each four years. In order to study and promote the reform a specific commission<sup>143</sup> was created and it was formed by deputies who belonged to different political groups and who may count with the help of experts in the fields they are trying to rule.

The Convention is domestic law since its entering into force so that could be applied directly but the criminal reform was necessary to give it more effectiveness due to the fact that the Convention itself does not create offences but establishes obligations of general accomplishment to the Contracting States, leaving them freedom to establish their penalties, aggravations and what is needed to ensure those obligations.

**xi.** Spain has not make any reservation to the Convention but it has make a declaration related to Gibraltar situation, which being in Spanish territory is depending in its external relationships to the United Kingdom, even conserving its local autonomy. Spain declares that in the case that Gibraltar would apply Lanzarote Convention in its territory, this would be within its local independence power, in its interim competences, not modifying in any kind of way its dependence to United Kingdom. The reason of this is to avoid potential competences and/or jurisdiction conflicts between Spain and United Kingdom which may arise if Gibraltar applies the treaty.

## **II NATIONAL LEGISLATION**

### **1 GENERAL PRINCIPLES OF THE JURISDICTION**

**i.** Hispania was the name the Romans gave to Spain. In the years of power Octavio Augusto, there were created three provinces in the Iberian Peninsula: Andalusia, Tarragona and the Lusitania.

In the late V would begin the crisis of the Roman Empire. With the decline of the oligarchies of Rome came the barbarians. These recovered territorial unit who had defended their predecessors. However, with the arrival of the eighth century the first signs of decline in the Peninsula Visigoth pushed Muslim troops to take control of the territory of the former Roman Hispania. In just over three years, the entire peninsula, except for some northern mountainous regions, subject to the dominion over peoples from North Africa.

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<sup>143</sup> Commission of Justice about the Bill of Organic Law which modifies Law 10/1995

Nevertheless, the new visitors respected the particularities of all faiths that inhabited this new territorial entity called Al Andalus.

The remains of the Visigoth army that had resisted the clashes with Muslim troops concentrated in the northern peninsula. From there orchestrated the "Reconquista", expanding the domains Plateau Christians, given the weakness of the Arab Caliphate.

In 1212, with the battle of Las Navas de Tolosa, came the final decline of the Peninsula Hispanic-African domain. There arose two crowns that were Aragon and Castile. In 1410 Isabel I of Castile and Ferdinand I of Aragon married, which de facto meant the union of the two kingdoms. This created the so-called Universal Spanish monarchy, which extended his dominions to American and European regions, and ended with the diversity of kingdoms that made up the peninsula. This situation lasted until the death of Philip II in the late sixteenth century. With the death without issue of Charles III opened a succession showdown. Austria, Holland and Britain defended Charles of Hapsburg in his ascent to the throne of Spain, while France had chosen Philip of Anjou. The victory fell on the side of the latter. Felipe V, as well be renamed, repealed the charters and the Courts of the Kingdoms of the Crown of Aragon, Charles of Hapsburg ally in the War of Succession. Already with Carlos III in power became enlightened despotism, an absolute monarchy that sought the advancement and progress of Spain turning to the right.

Between 1793 and 1808 the republican troops from France invaded the Spanish territory. The Spanish people's response was immediate. While fighting war unfolded, in Cadiz, a group of men of liberal spirit marked the first Spanish Constitution adopted in 1812. However, when Fernando VIII returned from exile ended with the ambitions and restored the previous liberal political order. During these turbulent times of constant struggle between liberalism and absolutism, the Spanish territories in America began their emancipation process.

In the nineteenth century Carlist Wars sparked calls, again faced liberals and absolutists. The victory clinched the first throne to a Regent Maria Cristina, for convenience related to the thesis of the bourgeoisie, a new social class that emerged strongly in the Spanish political landscape. During this stage the political parties were born, differentiated between moderate and progressive.

In the span of time between the years 1868 and 1874, with the crisis of moderate governments and to leave the country by the Regent Maria Cristina, came Sexenio liberal,

still recognizing, however, the monarchy as a form government, in the shape of Amadeo of Savoy. That is until 1873, when Spain was established in the First Republic, who favoured a decentralized state model and an advanced system of liberties. The republican project failed, and in 1874 revived the monarchy. The Spanish throne was occupied by Alfonso XII, who in 1876 would establish a new constitution. The two major parties, the liberal and the conservative, alternated in power through a shift system and despotism.

In 1898, following the Spanish-American War called, Spain lost its colonies in Cuba, Puerto Rico and the Philippines, for the benefit of the United States. The two-party model established by Cánovas disappeared with the birth of nationalist parties and a new social class, the proletariat.

After the failure of the military actions in North Africa, Spain entered a period of depression, exacerbated by social stress in which Spain was immersed. Then, in 1921, the military dictatorship of Miguel Primo de Rivera. With the failure of centralized and military objectives, the end of the dictatorship was accelerated. Another soldier, Damaso Berenguer, took power, but also failed, causing the decline and disappearance of the monarchy of Alfonso XIII.

In 1931 the Second Republic was established. This was a democratic regime in which the tensions between the two Spains were growing increasingly. So much that in 1936 civil war broke out dividing the country into two halves, one was a Republican and the other that of the rebels, also known as "*the national side*."

The war ended with the victory of the latter, which in 1939 led to the birth of a new dictatorship that lasted for nearly 40 years. Gone are the political parties, developed a model national-catholic and limited civil rights. In the decade of the 50s there was an opening on a regime that led to the technocracy. Later, in 1955, in an attempt to get closer to the positions of the democratic powers, Spain is part of the UN, and in the mid 70's General Franco died, and with him all the regime he headed. Then a transition to democracy started, which resulted in the adoption of a new constitution, signed in 1978. This is a text of a liberal, enshrining a model of market economy and a form of government known as "*parliamentary monarchy*". The standard has become the top of the Spanish legal system.

It also established the so-called state of autonomies, a unique model in the world that bears some similarities to federal systems. This follows from the wording of Article 2, which states that "*The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible*

*homeland of all Spanish, and recognizes and guarantees the right to autonomy of the nationalities and regions it is composed and the solidarity among them all."*

In 1982 Spain joined NATO, and in 1986 joins the European Communities, now the European Union.

ii. Human rights do not have an explicit provision in Spanish law. The Spanish Constitution, in Articles 14 to 29, recognizes a set of principles and civil rights to citizens. These are called fundamental rights, although starting from the foundation of natural law, have certain differences with the so-called human rights. Fundamental rights would be a positivization a series of human rights that the Constitution has taken as reference and inspiring its legal structure, and which enjoy special protection, since it requires a larger majority to reform them. In its preamble our Constitution is set as the objective *"to protect all Spanish and peoples of Spain in the exercise of human rights, their cultures and traditions, languages and institutions."* Then, in Article 10, which gives access to Title I of the Constitution, the Constitution specifically required to *"read all the rules that affect the fundamental rights and freedoms recognized in accordance with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain"*. This gives a "supra legal" value to international treaties that prevents the national legislature may contravene the commitments made by our country in terms of human rights.

In addition, the Spanish Constitution protects human rights in Article 81.1, under which for concreteness and delimitation of such guarantees is necessary fundamental organic law. This means that approval requires an absolute majority in parliament. Article 53.1 EC law reserves to the complementary development of fundamental rights. The Constitutional Court has already clarified that it should not *identify "the generic concept of law with the most restricted of General Law or Law passed by general state organs."* Thus in its Sentence 37/1981 the High Court recognizes the legislative bodies of the Autonomous Communities certain powers in the development of fundamental rights. So, said, *"When the statute does not affect the basic conditions of such exercise, may be enacted by the autonomous communities to which their laws legislative competence conferred on a subject whose regulation necessarily implies the exercise of constitutionally guaranteed rights."*

Our Constitution also describes an instrument that grants certain legislative powers to the executive branch. The Regulation is a legal concept applicable in cases of extraordinary and urgent need which has the force of law. In the case that the regulations would rule fundamental rights, the Constitutional Court has stated in its Sentence 127/1994 the following: *"In addition, any legal discipline that" affect "fundamental rights is not constitutionally required*

*to be approved by Law, but a "regulation" of such rights inevitably enters the reservation of Art. 81.1 of the Constitution, rather than in the ordinary legal reserve of art. 53.1-when "develop" the Constitution and directly essential to the definition of the fundamental right, either in direct regulation, general and global thereof or in partial or sector, but also on essential aspects of right, and no, partial, or less directly aimed at contributing to the definition and legal definition of the right".* This means that the Act shall be a regulation of the essential fundamental right, while the ordinary law and regulation would take care of those complementary elements of it.

As noted, there is as such none an express declaration of human rights in our legal system, beyond those mentioned indirect references. However, we can indeed speak of various sectorial rules that are responsible for developing the various rights under the Constitution and international treaties. Also of Article 10.2 must mention, pursuant to which the provisions on fundamental rights shall be interpreted in accordance with the Universal Declaration of Human Rights and other international treaties signed by Spain. This does not mean that the rights recognized in international law are integrated directly into our Constitutional legal order. That is, do not become constitutional canon while the Constitution does not expressly mentioned, but *"requires interpreting the relevant provisions of this according to the content of such treaties or conventions, so that in practice this becomes content somehow constitutionally declared in the content of the rights and freedoms set forth in chapter two of title I of our Constitution"* (Sentence of the Constitutional Court 36/1991, of 14 February). Some of these international agreements to which Article 10.2 refers are the Pact on Civil and Political Rights in New York, the Covenant on Economic, Social and Cultural Rights, both of 1966, the European Social Charter of 1961, and the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, among many others.

Neither there are just allusions to children's rights within the Spanish Constitution of 1978, beyond the rights attributed generally to other citizens in Title I. It is only recognized in Article 39 the protection that parents and the public authorities have to give to minors. In the fourth paragraph, the aforementioned article notes that *"children shall enjoy the protection provided by international agreements which safeguard their rights."* Spain has signed several international treaties on Human Rights. Example is the International Covenant on Civil and Political Rights, signed in New York on December 19, 1966. In particular, in matters relating to the rights of children, it seems that Article 39.4 and described us back to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on



November 20, 1989, which in Article 19.1 states that *"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of harm or injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including abuse sexual, while the child is in the custody of their parents, legal guardian or any other person who has the care"*.

However, the Organic Law 1/1996, of January 15, Protection of Minors, partially amending the Civil Code and the Civil Procedure Act devotes itself to a number of specific provisions for the protection of rights of children. This piece of legislation is developing and complementing the regulation of the rights of children performed by the Convention on the Rights of the Child of 20 November 1989, and the European Charter on the Rights of the Child. The Spanish legal text enshrines the interests of children as paramount, ahead of other legitimate interests with which they could attend, also regulate the status of adoptions of foreign children and foster care by public administrations of homeless children.

We cannot forget the Law 5/2000, of 12 January, regulating criminal responsibility of minors, which has basically punitive character and it is oriented to education, prevention and social reintegration of children.

The direct and effective protection of children has been transferred to the Autonomous Regions. There also autonomic regulation related to the subject, although not all regions have developed specific rules correctly about systems of protection and assistance to children. Some regions have developed the matter itself are Andalusia, Madrid, Castilla La-Mancha, Extremadura, Aragon, etc.

**iii.** Spain has a Constitutional Court, governed by Title IX of the Constitution. It consists of 12 members appointed by the King, four by the Congress by a majority of 3/5, four by the Senate, two by the Government and two by the General Council of the Judiciary. This is a court that, among its extensive features guarantor of the Constitution, has recognized the special expertise of the resolution of the constitutional complaints, a peculiar form of challenge to all those acts of state that may involve a violation of rights and freedoms enshrined in Articles 15 and 30.2 of the Constitution. It is a subsidiary instrument, since it is necessary previously exhausted all other instruments, for the same purpose, the law makes available.

Article 41.2 of the Organic Law 2/1979 of 3 October, the Constitutional Court, identifies individuals who may have committed the violation of the rights protected by the application for protection. Specifically speaks of the authorities and their staff, regardless of their

belonging to the State, the Autonomous Communities or any other public entity territorial, corporate or institutional. It may be worthless acts of law, rules, or assault acts of government or acts or omissions of the judiciary. In the first case, to proceed the filing of the appeal is required within three months of the act is held firmly under the Statutes and Regulations of the legislature. If it is an administrative act, it must have been previously exhausted its challenge in the ordinary courts. In the latter case, it is imperative that resources have been filed to challenge court order specific to each application for protection before.

The procedure is described in Articles 48 to 58 of the Organic Law of the Constitutional Court. The person shall submit an application to the Registry of the Court which clearly described the events and the constitutional principles that are believed injured. Assistance is required Barrister and Solicitor, in accordance with article 81.1 LOTC. Section of the Court unanimously decided in the admission or rejection of the application process, depending on whether or not it meets the formal requirements (Article 50. Organic Law of the Constitutional Court). If problems are remediable defect of nature opens a cure period, out of which the claim is deemed rejected.

When the Board has completed this process, the Court shall hear the organ whose act allegedly injurious to fundamental rights, the plaintiffs, the people appeared in court in previous proceedings and the public prosecutor to formulate their arguments. Subsequently, the court shall issue a ruling which shall be binding, *res judicata* and *erga omnes*, as guaranteed by Articles 51 and 52 of the Organic Law of the Constitutional Court.

But ordinary measures of protection of individuals against possible violations of human rights are found in the ordinary courts. As we know, in our legal system there are five different court systems, civil order, in charge of knowledge of all matters that come not by law assigned to another court order, the criminal, who will judge all the cases of crimes and misdemeanours, the social order, where all known issues with state guarantees social and contentious-administrative one, for possible conflicts between government and a private person.

In each of these there are various jurisdictional courts. Each court will know, in the same order, with concrete matters assigned by law. Article 53.2 recognizes the protection of fundamental rights of special character, preferential and summary. This is a special procedure, which can be formulated only in cases of violation of the rights to which allude Articles 14 to 29 of the Spanish Constitution. It is a preferred method because the matter

will be treated as a priority. On the other hand, is summary because tighter deadlines and procedures would be simplified. There are numerous sectorial laws governing that procedure for the protection of fundamental rights within the jurisdictional order that we mentioned before.

#### *iv. The Supreme Court*

In Spain there is a Supreme Court. It is the highest court in all respects, except in regard to constitutional rights and guarantees, whose competence is attributed to the Constitutional Court. It consists of five regular and four special rooms. The former include the First Chamber of the Civil, the Second Chamber, Criminal, the Third Chamber of Administrative Litigation, the Fourth Chamber, of the social and the Fifth Chamber of the Military. ECCC would be a Court of Jurisdictional Disputes, a Chamber of Jurisdictional Disputes, a Board Conflict of Competition and a Special Chamber.

The Chief Justice will turn the General Council of the Judiciary, the body responsible for ensuring the independence of judges and courts.

#### *The criminal procedure*

The Spanish Legal Order recognizes no single model of criminal procedure. Depending on the criminal act that is deemed criminal procedures are articulated. In this presentation we will focus on the ordinary procedure and the abbreviated, being the most common, and treat others superficially.

##### *I. The process of "habeas corpus" (regulated by the Organic Law 6/1984)*

It is to ensure the detained citizen access to the courts for those deciding on the legality of his detention. Know of such procedures trial courts, which rule within a maximum of 24 hours of admission of demand. No need legal advice or attorney.

##### *II. The trial of offenses (Book VI of the Criminal Procedure Act)*

They weigh facts which, by its low gravity, are constitutive lack. Additionally a civil action may be brought to demand compensation for damages caused heritage. This is a fundamentally oral procedure, which does not require the presence of an attorney or a lawyer. The assistance of the prosecution is required only in those cases where criminal offenses are prosecuted ex officio.

##### *III. The abbreviated procedure (Title II of Book IV of the Criminal Procedure Act)*

Whose crimes are prosecuted by imprisonment not to exceed 9 years? It starts by a complaint from an individual, a police report or investigations instituted by the public prosecutor. It required the assistance of a lawyer. This procedure consists of three phases:

a) Hearing phase. The magistrate will conduct an investigation to ascertain the facts and make the accusation. Precautionary measures may be taken to ensure the protection of the parties.

b) Intermediate phase: The magistrate decides whether or not the opening of the trial. The parties may submit an indictment; request the file of the case or the practice of complementary measures. When the judge has agreed to the opening of the trial the defendant may prepare a statement of defence.

c) Trial: At this stage we present the evidence that the parties have requested in their letters of accusation and defence. On grounds the judge pronounce sentence, unable to impose a sentence higher than requested by the prosecution and convict him of a crime other than that is the subject of the process. Given this statement may be filed, within 10 days, an appeal to a higher court.

#### *IV. The ordinary procedure*

It is applied to offenses whose imprisonment exceeding nine years. Instruction handles the magistrate court and prosecutorial jurisdiction for that purpose, which in most cases is usually the Provincial Court. It consists of three phases:

a) Pre-trial or trial proceedings (Title IV of Book II of the Criminal Procedure Act): The aim is to clarify the facts and investigate potential liabilities. This phase is secret. Only interested parties can access the proceedings, unless the judge has decreed a gag for them too. By indictment charged to the judicial authority subject committing a crime and present a summary conclusion to the body responsible for prosecuting the facts.

b) Intermediate phase: This deliberative body may confirm or reverse the order of summary conclusion. If it is confirmed, this could be an acquittal (file actions) or the opening of the trial. In the latter case, the file will be forwarded to the Public Prosecutor. The parties shall submit a statement of qualifications which reflect the facts in the indictment, the crime that his opinion exist and aggravating circumstances, mitigating or extenuating that may arise.

c) Trial (regulated in Book III of the Criminal Procedure Act): tests suggested by the parties in the original score may be accepted or rejected. If accepted, you will receive a probationary

phase to allow the parties to modify the content of their written classifications. Subsequently they will be exhibited in an oral report reflecting their findings. The accused will have the last word. Once this phase, the judge will sentence, against which there is an appeal to the Supreme Court.

*The appeal in criminal matters*

The appeal is governed by Chapter V of Law 1/2000. It can occur when a statement opposes the Supreme Court's jurisprudence or resolve questions and issues on which there is no peaceful doctrine in the provincial courts. It is one of the powers which Article 57 of the Organic Law of the Judiciary recognizes the Second Chamber of the Supreme Court.

v. The Organic Law 5/2000, of 12 January, regulating criminal responsibility of minors, has determined, in its first article that the minimum age for the existence of criminal responsibility is 14 years. This piece of legislation is applicable only to citizens at the time of commission of the offense with less than 18 years. It also requires public authorities, particularly the prosecutor, to ensure children's rights. With the entry into force of the Organic Law 5/2000 establishing a juvenile court, to prosecute those causes that are the subjects involved as recognized in Article 1 of this rule. The execution of the judgments of these courts is the responsibility of the Autonomous Communities

*Statistics (Data from the National Statistics Institute in 2010)*

In 2010 there have been 18,238 minors' convictions as final judgments submitted to the Register of Judgments Juvenile Criminal Responsibility. This is an increase of about 3.8% over the previous year. 84.1% of those convicted were male, while 15.9% were female. Of these, 76.1% are Spanish, while the remaining 23.9% are foreigners, representing, in the latter case, an increase of 1.5% over the previous year.

Most juvenile has committed a single criminal offense. Only one in three has incurred more than one.

The autonomous city of Ceuta and some autonomous communities such as La Rioja and the Balearic Islands recorded the highest rates of juvenile offenders. At the other end, Madrid, Catalonia and Navarre had the lowest levels.

Regarding criminal offenses in 2010 have registered a total of 31,061, representing an increase of 4.8% over the previous year. The faults were 64.7% and 35.3% crimes. The

offenses include theft (39.2%), injuries (11.8%) and crimes against road safety (11.2%). The most frequent errors were those made against property (62.3%) and against people (32.6%)

By sex, men commit 89% of the faults and 78.9% of the crimes. The figure falls to 11% and 21.1% of faults of crimes in the case of women.

The number of juvenile offenses has slightly fallen down in Spain from 76.3% to 74.8%. By contrast, the number of offenses committed by foreign minors in Spanish territory rises from 23.7% to 25.2%.

The autonomous city of Ceuta, the communities of La Rioja and the Basque Country with the highest rates of crime, while Madrid, Castilla - La Mancha and Catalonia the lowest.

More punitive measures applied by the Spanish judges have been on probation (34.7%), providing the benefit of the community (21.1%), and the realization of socio-educational tasks (12.5%)

With increasing age of the offender, judges tend to impose further conducting socio-educational tasks to the detriment of probation.

Internment in closed more often applies to foreign children (6%) than for domestic (1.4%). The trend is similar in the case of detention in semi-open (14.5% vs. 10.5%)

With the approval in 2000 of the Children Act opened the door to the Autonomous Communities may order the administration of juvenile detention centres to private entities. Today, this situation has been adopted for autonomy in 73% of cases. We require that foundations are required entrusted with the operation of the centre are non-profit.

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. The regulation of the sexual crimes in children has been very affected for the 2010 reform of the Spanish Criminal Code affected. This modification is a response to the indispensable adaptation to the Decisión Marco 2004/68/JAI del Consejo, de 22 diciembre 2003, *relativa a*

*la lucha contra la explotación sexual de los niños y la pornografía infantil*<sup>144</sup>, known as Convenio de Lanzarote.

From then on the basic conduct for the crime of sexual abuse in children under 13, precept 183.1 of Criminal Code, is meant to be “any kind of acts that attempt against minor sexual indemnity” but without any kind of violation or intimidation because in that case it would be considered as a case of “sexual assault”, precept. 183.2. Hence, “The typical conduct” of sexual abuses in children under 13 years is any kind of conducts that affects to the sexual indemnity of the child, including any type of acts from kisses in mouth or neck to touching or molestations in child’s sexual organs. That means, in professor’s MONGE FERNÁNDEZ words “every action by which the perpetrator pretends to get the person [child] involved in a sexual context”.

On the other hand, jurisprudence had already produced (before the amendment of the year 2010) a series of criteria for the interpretation of the former articles regulating this crime when the “legal good” to protect was honesty or sexual freedom and thus says the STS 7849/1998 by saying that “the violation of sexual freedom is committed when trying to satisfy the sexual instinct by touching”<sup>145</sup>, of the most diverse nature, carried out in the body of a child under twelve years of one sex or the other, provided that such touching affect erogenous zones or to nearby. Looking for the criterion to distinguish between acts punishable and which are not, can be considered actions that an adult person would reasonably consider as interference in the area of sexual intimacy susceptible to be rejected if not give its free 'consent'. In this regard the judgment considers breach conduct consistent processing in “repeatedly kissing cheeks and trying to kiss, unsuccessfully, on the lips, caress in the knees and thighs with the claim to unequivocally reach the genitals of an 11 year old girl”.

ii. No article mentions expressly the “intentionality” as such but some sectors of the doctrine, the Professor MONGE FERNÁNDEZ for example, considers that “types of

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<sup>144</sup> Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=201&CM=1&DF=&CL=ENG>

<sup>145</sup> STS 7849/1998, December 22th, FJ 4: <http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=3171945&links=&optimize=20030830&publicinterface=true> This jurisprudence has been repeated among other statements by the ATS 5662/2003 y STS 6731/2002.

sexual abuse require intent, i.e. both knowledge about the sexual nature of the act and the age or status of the victim, and the willingness to run it"<sup>146</sup>". The realization of the punishable conduct (sexual abuse of a minor) in a reckless or negligent manner (i.e., not malicious) is not covered by the code and therefore could not punish you (article 12 of the Criminal Code).

**iii.** The Spanish Code does not define a specific age from which it is legal to participate in sexual activities. However, following the reform of the year 2010 be considered well legal protected "sexual indemnity" of children under 13 years, any type of sexual activity with children younger than 13 years was completely prohibited.

When the child is in the range between 13 and 16 years, the regulation is unclear since article 182 worth only the conduct of intercourse if it has mediated deception. In this sense must also be taken into account that marriage in Spain can be carried out from the age of 14 in certain cases and with judicial waiver (article 48 of the Civil Code).

From the age of 16 there is no doubt that children already can participate in sexual activities giving their consent.

**iv.** These three situations are treated differently in the Spanish criminal code. The appearance of the element of force or the threat would make the conduct ceases to be considered 'abuse' and was to be considered as "aggression" in the article 183.2 and punished with the highest punishment (for this penalty is of 2 to 6 years and for that of 5 to 10 years in prison).

On the other hand, the use of disability it would be placed within the aggravating factors common to both typical behaviour (abuse and aggression). It would have room in the intellectual or physical underdevelopment of the victim that it had been placed in a State of total helplessness that collects article 183.4 to) and would be considered an element that can occur in both cases and its effect is that the fixing of the penalty has to be in the upper half of the respective (the case for abuse of 4 to 6 and the aggressions of 7 and a half to 10).

**v.** There is no specific regulation for the crime of incest but if that referred to the situation that a family member abuse of a child as an aggravating cause to crimes of aggression and

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<sup>146</sup> MONGE FERNÁNDEZ (2010) *El menor ante los abusos y agresiones sexuales*, Anuario de Justicia de Menores; nº10



abuse (says the article 183.4 d literally). The penalty of the crime of abuse will be settle in its upper half when, for the execution of the crime, responsible for has charger a relationship of superiority or kinship, as parent, or brother, by nature or adoption, or allied with the victim.

**vi.** As in the previous case, this possibility is included among the aggravating factors common to crimes of abuse and assault of children doing the penalty that applies in the top half. The wording of the article points out that the penalty will be worsen "when the guilty any charger of its authority, agent of this, or any public official". The doctrine has in general considered this aggravation is based on increased confidence that public servants can awaken in children, which facilitates its attraction and implies fewer risks. Its broad wording included on the one hand the forces of order ("authority or agent of the authority": police, civil guards, etc.) and all charges of public nature (all those that work carried out by public institutions: teachers, principals, coaches, sports, etc.).

Also it is worth mentioning in this regard article 184 of the code on sexual harassment as to this given in "the area of a relationship working, teaching or provision of services, continuous or habitual". In this case the typical conduct punishable is the request for favors of a sexual nature, for himself or for a third party in the above environments and the penalty would go from 3 to 5 months in prison or a fine of 6 to 10 months. If in addition there is the element of abuse of occupational, educational or hierarchical superiority, the penalty increases 5 to 7 months in prison or 10 to 14 months fine. Also in this case the special vulnerability of the victim by reason of age, illness or mental situation is considered aggravating.

## 2.2 Child Prostitution

**vii.** Spain is part of the Council of Europe Convention on Action Against Trafficking in Human Beings. The treaty was signed on July 9, 2008 and was published in the BOE No. 219, dated Thursday, September 10, 2009, Section I. Page 76 453.

**viii.** It is difficult to define the terms child pornography and child prostitution, as there is no unanimous doctrine about it, yet we include them in behaviours called "sexual exploitation", finding some common characteristics:

"a) coercing a minor into prostitution or into participating in pornographic performances, or profiting from or in any way exploit a child for such purposes.

- b) recruiting a child into prostitution or into participating in pornographic shows
- c) Practice sexual activities with a child using one of the following means:

- Make use of coercion, force or threat;
- To offer money or other forms of compensation or return for care to be provided to engaging in sexual activities;
- Abuse of a recognized position of trust, authority or influence over the child.”<sup>147</sup>

We found, in Spanish law, two typical behaviours that define child prostitution: The first, contained in the Criminal Code art.187.1 provided that, induce, encourage, promote or facilitate prostitution (known as favouring prostitution of minor) such acts encourage the practice of prostitution in a direct way.<sup>148</sup> Also coincides with a certain profit obtained by that person while not purely economic, as might be the person to incite prostitution with a vengeance without enriching mobile directly<sup>149</sup>. Also, as stated by the doctrine of the Supreme Court, it can constitute the offense of prostitution as inductor the customer whose payment is crucial for the child to undergo a qualitative change in their sex life in addition to their lustful mood. In second place is punishable in the same way the attitude of the request, accept or obtain remuneration or promise sex with minors, this pay or promise have an immediate economic content, directly or not. Penalties are provided of one to five years and a fine of twelve to twenty four months in its objective form, but the second point of the aforementioned article provides an aggravating factor that increases the penalty to imprisonment for 4-6 years if the victim is less than 13 years.

Besides this crime admits the existence of a possible fraud to the person promoting prostitution but not worrying to find out whether it is a minor or not, taking the risk to profit so be it. Referring the matter of maintaining sexual relationship with the child, the

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<sup>147</sup> Article 2 of the Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ L 13, 20.1.2004 p. 45) Article 11 of that repealing Joint Action 97/154/JHA, which had defined as sexual exploitation:

- a) Persuading or coercing a child to engage in any unlawful sexual activity
- b) The exploitative use of children in prostitution or other unlawful sexual practices
- c) The exploitative use of children in pornographic performances and materials, including the production, sale and distribution or other forms of trafficking in such material, and possession of such material

<sup>148</sup> This type of behavior does not include indirect collaboration (see cleaning lady in a prostitution house) as stated in the "case Arny" STS of December 9, 1999

<sup>149</sup> Vives Antón. T.S., Orts Berenguer. E. Derecho Penal 3rd edition. Tirant lo Blanch 2010.

STS of 14 May 1997 states that will prove as any other cause of responsibility. With regard to aggravating circumstances, throughout this report we will discuss it in depth.

By the time, the preparatory acts of crime are not typified, although it is possible a punishment for those involved in human trafficking for prostitution (not in isolated cases), by promoting or favouring crime of illegal immigration workers. And it can turn a crime of child abduction if the transfer is made by the responsible (guardian, conservator ...) with intent to commit a crime of prostitution on the child below. And the complication in detecting these cases is such that the law aims to characterize the crime as mere activity by the difficulty of proving any results.

While the Lanzarote Convention provides that, for child prostitution means purposes of the Convention, "the fact of using a child for sexual activities in exchange for money or the promise of money, or any other form of remuneration, payment or advantage, whether or not the same is available to the child or a third person." Falls relatively to the offense contained in the Criminal Code in Spanish refers to the induction, promotion or to favour this kind of activities. Just as the Convention mentions, to offer money or the promise thereof, or any other way to see the child rewarded activity. There are found obvious signs that the Spanish legislator has adapted and included in the law, the intentions and purposes promoted by international law.

**ix.** Regarding the authorship of this type of crime, the Spanish legal system frames crimes against minors, both a third person, as an adult who has an intercourse with the victim. This is one of the differences with Article 188, which provides for the prostitution of an adult, as the latter does not criminalize activity that keeps the sexual relationship with the taxpayer. The reason is that the doctrine and jurisprudence understand that the price paid by the customer has enough strength to motivate the minor or incompetent and therefore promoting prostitution.<sup>150</sup> There settled other precedents such as the agreement of the Supreme Court (2nd) of February 9, 2005, which proclaims that only being an active subject of the type of corruption of minors under Article 189.4 CP<sup>151</sup>, which pursues of third party regarding the typical behaviour. Finally APRCP 2008<sup>152</sup> provides for criminal punishment of

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<sup>150</sup> Supreme Court Agreement, 12th of December

<sup>151</sup> Criminal Court

<sup>152</sup> Preliminary partial modification of existing Criminal Code, approved by the Council of Ministers on 07.13.2006

those who seek, accept or obtain remuneration or promise, a sexual relationship with minor<sup>153</sup>, somehow trying to approach the European policy, in particular the Framework Decision 2004 / 68/JAI Council. The victim is always the child who is protected from conduct that may affect normal development, particularly in sexual sphere.

### 2.3 Child Pornography

x. By the time and place when the Convention was stated, Spain was represented, and it proceeded through the Plenipotentiary for signature and ratification. It dates from November 23, 2001, being the place the city of Budapest (Hungary).

xi. There is no unanimity in the design of child pornography. Thus we see as UN defines child pornography as "any representation, by whatever means, of a child engaged in explicit sexual activity, real or simulated, or any representation of the sexual parts of a child for primarily sexual<sup>154</sup> purposes", while the Council of the European Union believes "pornographic material that depicts or visually depicts:

- i. A real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or pubic area of a child, or
- ii. A real person appearing to be a child involved or engaged in the conduct mentioned in subsection ii, or;
- iii. Realistic images of a non-existent child involved or engaged in the conduct mentioned in subsection<sup>155</sup> i."

For its part, the Council of Europe branded as pornographic "any material that shows a minor well developed in a sexually explicit conduct, or a person who is a minor apparently developing sexually explicit conduct or realistic images representing a minor developing a

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<sup>153</sup> Article 187.1 Spanish Criminal Code

<sup>154</sup> Annex II of the Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and the use of children in pornography, of May 16, 2000 (A / 54/L.84)

<sup>155</sup> 2004/68/JHA Framework Decision of the Council of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ L 13, 20.1.2004 p. 45)

sexually explicit conduct.”<sup>156</sup> Turn used the terms "any visual or auditory materials that employs a minor in a sexual context."<sup>157</sup>

However, we cannot admit that any representation of a naked child in the abstract is to be considered child pornography. The same social logic is observed in photographs took by parents or relatives to the children of the house naked. Drawing the line between innocent records and criminally reprehensible conduct can be a daunting task sometimes. In this vein, the law gives a resounding answer: The key is that the material focuses on sexual behaviour, sexual organs or their sexuality<sup>158</sup> and there are enough precedents to support this position.<sup>159</sup>

Considering the above, we can approach the term child pornography within certain limits as key features, such as:

1. It is a visual representation, where they reign as media:
  - a. Photographs
  - b. Videos and DVD's
  - c. Telephone: cases in which the child keeps dialling telephone conversations with sexual content<sup>160</sup>

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<sup>156</sup> Recommendation (2001) 16 of the Committee of Ministers of the Council of Europe of 31 October 2001 on the protection of children against child exploitation

<sup>157</sup> In 1989, based on Recommendation R (91) 11 and Report of the European Committee on crime problem.

<sup>158</sup> De la Rosa Cortina, J.M., “Los delitos de pornografía infantil, aspectos penales, procesales y criminológicos”, Tirant lo Blanch, Valencia 2011, p. 41

<sup>159</sup> The Judgment of the Provincial Court of Álava, Section 2, No. 376/2008, of December 2 determines that "a picture from a daughter coming out of the shower may not be considered pornographic material, but when the image is focused repeatedly on an exact body part no doubt becomes pornography. The defendant cannot give a reasonable explanation about the zoom at the trial ...".

La Sentencia de la Audiencia Provincial de Alicante, sección 3ª, nº 239/2009, de 5 de mayo lidia con un acusado que aprovechando que la víctima, menor de edad, estaba dormida, empleó su teléfono móvil para tomar fotografías de su torso desnudo (sin mostrar la cara), los genitales a corta distancia y muy explícitamente. La misma concluye que *“las imágenes sin reserva reputan su contenido como explícita y exclusivamente sexual, sin que pueda vislumbrarse ninguna otra finalidad de su producción o tenencia, ni artística ni documental, ni científica ni como valor de recuerdo afectivo personal, lo que permite calificar las repetidas fotos como material pornográfico”*.

The Judgment of the Provincial Court of Alicante, section 3, No 239/2009 of May 5 deals with a defendant who taking advantage that the victim, a minor, was asleep, he used his mobile phone to take pictures of her topless (without showing the face), genitals at close range and very explicitly. It concludes that "the images are said unreserved and explicit content and sexual only, without any other purpose may glimpse of their production or possession, or artistic or documentary, or scientific value nor as personnel affective memory, which allows qualifying repeated pictures as pornographic material."

<sup>160</sup> Vid. Mantovani, F., “Il Delitti di prostituzione e di pornografia”, pp.28 y ss

d. Internet: Current Trojan Horse for the dissemination of child pornography and complicated control stands as the middle star to paedophiles and regular users of this type of pornography.

2. Real: see a true and authentic nature, we mean the same by "explicit child pornography", this being one in which directly involved a minor or incompetent or being subject to film exhibition.<sup>161</sup>

It always base themselves exclusively lewd content aimed at sexual arousal rudely and lack serious literary, artistic or educational, as noted by the Supreme Court Decision No. 803/2010 of 30 September.<sup>162</sup>

For now we can draw on the "obscene graphical representation that addresses the sexual impulse excitation, comprising all forms of manifestation of communication."<sup>163</sup> It should be mentioned also, one of the biggest problems facing the regulatory framework relating to child pornography, which is none other than the simulated child pornography. We talk about that hypothetical situation where the minor or incompetent is not so; clear is the example of an adult, which produced substantial modification technology fully resembles a minor maintaining active sexual behaviour prohibited by the law.<sup>164</sup>

You must check previously used barrier that gives visual representation, since the difference in the consideration or not as child pornography, is crucial. No action could compare photography to observe the genitals of a child by the medical staff; as well we would if it did a paedophile. We will have to meet the rules set by Lanning to exempt typicality, who are

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<sup>161</sup> Lorenzo Morillas.D., "Análisis Dogmático y Criminológico de los delitos de pornografía infantil", Dykinson, Madrid 2003, pp. 68 y ss

<sup>162</sup> President: Berdugo y Gómez de la Torre, Juan Ramón

<sup>163</sup> Madrigal Martínez-Pereda, Consuelo. Los delitos contra la libertad sexual, en Cuadernos de la Guardia Civil, num 15, 1996

<sup>164</sup> We identified two types within simulated child pornography: Technique Pornography means "starring adults posing as minors by very different means or procedures (retouching photographs or films consisting of removing pubic hair or facial features softening, employment of clothing for teenagers). We are faced with an adult posing as minor generate getting the impression that indeed it is. Child pornography is artificial in the pornographic representation involving a minor or disabled on a pattern created totally unrealistic. Pseudo pornography or virtual child pornography is an intermediate figure between pornography riding technique and artificial. We talked about the case of imaging partially created fictitious traits or characteristics of a real pattern-on-identifiable minor or incompetent. Certainly any child makes a representation so it cannot be taken as child pornography, on the other hand we cannot forget that the right to privacy, self-image and to honor the child supposedly represented are substantially affected. We talked about a controversial assumption that threatens the legal system is so problematic that provide effective protection to the injured child.

none other than the professional application of the material and the concordance of use with this professional application.<sup>165</sup>

In any case, the legally protected regarding a child aspires to "ensure maximum protection for those under age."<sup>166</sup> It welcomes in this perspective several rights: the right to self-image, the right to form free decisiveness (sexual indemnity)<sup>167</sup>, the dignity of the human person and for children in general<sup>168</sup>.

**xii.** Law 15/2003, of 25 November, amending Law 10/1995 of November 23, introduced amendments to the Criminal Code which provide, for the first time in Spain, the offense of possession of pornographic material. The penalties for having pornographic pictures, videos, real images, digitized, electronic files, etc., whose production employs a minor of 18 years will lead to the imprisonment of up to one year. It also incorporates the offense of producing, selling and distributing pseudo pornography, this as mentioned, is where pornographic material was not used directly but use less his image or voice altered or modified.

Penalties, on the other hand, increased up to four years in prison for inmates punished for the production, sale or distribution of pornography, which appear and are intended for children under 18, one aggravating it the fact that the child is under 13 years, for which the penalty will be of four years' imprisonment, to be eight years in prison. The so-called P2P programs do very complex combat this problem given its characteristics. They employ of decentralized structures makes identification harder in case of web pages or e-mails.

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<sup>165</sup> Following this line, it is necessary to clarify the issue of the age of the victim as sheds regulation shall mean any victim of child pornography under eighteen, attend or not consent. However we cannot forget that the Budapest Convention considered as minor a person who does not exceed 18 years and yet leaves complete freedom to depart States so that they can set the limit at 16 years. Other provisions of this Convention binding on states, pose a posteriori the hypothetical problem of conduct that is perpetrated in Spain (where the legal system protects the child up to 18 years) and whose material is produced in a country in which the conduct of minors is atypical. Article 23.4 e) of the Judicial Power in Spain, indemnity shielding minors, is no longer what it was since the reform which occurred by Organic Law 1/2009, of 3 November.

<sup>166</sup> Pérez Luño, Antonio Enrique "La protección de los datos personales del menor en Internet" *Revista española de Protección de datos*, nº5 julio-diciembre de 2008. pp 43

<sup>167</sup> De la Rosa Cortina.Jm pp 56

<sup>168</sup> Stresses the Consultation 3/2006 of the Attorney General, which states: "the types of articles 189.1 b) and 189.2, unlike the kind of art. 189.1 q) do not protect personal goods, but the safety of children in the abstract and dignity, advancing the protection barriers and attacking the danger inherent in behaviors that can promote specific practices by pedophiles on children."

The diffusion through these programs is very different from simply sending a file containing child pornography. For this reason some authors call this activity as passive diffusion. The operation of these programs creates a folder or exchange-incoming-my shared folder that stores the downloaded material but also turn back shares on the same, except that the user avoid, thus creating a multiplier effect.<sup>169</sup>

Both the Supreme Court and the majority of this conduct doctrine located within art.189.1 b). However, there is no clear case law about unity, since there are many statements that accuse the lack of proportionality in applying this type to a clearly active and wilful conduct, as a passive, whose intent is difficult to prove. For instance, the STS No. 105/2009, of 30 January<sup>170</sup>. It currently provides verification of the Criminal Code in relation to its compatibility with paragraphs 1-1f Article 20 of the Lanzarote Convention.

o. Possession: This conduct is criminalized in Article 189.2 of the Criminal Code, establishing as active subject "who for their own use possess pornographic material whose production had been used minors or incompetents." No to the reform included made by Law 15/2003, and was, however, subject to parliamentary debate<sup>171</sup>. However, this claim held both the FD 2004/68/JHA as the Budapest Convention, and even the Council of Europe<sup>172</sup>. This crime is known solitary offense between doctrine and jurisprudence<sup>173</sup> and their supposed persecution operate on demand for child pornography material to thereby eliminate supply-just as they in turn preserves the dignity of the child as a legal protected object<sup>174</sup>.

Also, is the emergence of more serious future behaviours performed by the offender, and is that a large number of paedophiles and pederasts who possess such material ultimately end producing its own new child pornographic material<sup>175</sup>. A new problem is now launched by Internet, and that is the consumption through on-line display; it focused Lanzarote

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<sup>169</sup> SAP Las Palmas sec.6ª nº35/2008, de 31 de marzo

<sup>170</sup> President: Sánchez Melgar, Julián

<sup>171</sup> The PNV and Socialist parliamentary groups proposed the deletion of this provision in separate amendments.

<sup>172</sup> Recommendation R (91) 11 of the Committee of Ministers of Council of Europe member states on sexual exploitation, pornography, prostitution and trafficking of children and young

<sup>173</sup> STS nº 1055/2009, November 3rd

<sup>174</sup> Autores como De la Rosa Cortina, Lanning, Gómez Tomillo y Morales Prats sostienen esta postura

<sup>175</sup> ACPI: Pornografía Infantil y prostitución, "Consecuencias", Acción contra la pornografía infantil



Convention<sup>176</sup> by providing that each party shall adopt such legislative or other measures necessary to criminalize (...) f ) access to child pornography, and knowingly using information technologies and communication. So far Spain has not made any regulations regarding this tenor.

o. Pornography Pseudo Traffic or morphing: Located in Art. 189.7, condemning the conduct of "who produces, sells, distributes, exhibits or offering pornographic material by any means and not having been used directly minor or incompetent, his voice is used or altered or modified image." It was also introduced by the Law 15/2003, which punishes the dissemination of pornographic material in his possession at any case, even when not directly acting on any minor. The difference of this unique type with respect from the rest is that affects both their freedom and sexual indemnity (except as a kind of danger), but affects their right to honor<sup>177</sup>, privacy<sup>178</sup>, self-image and dignity<sup>179</sup>. Although the minor itself is not used, it is actually there voice, or image technically manipulated.

There are three different ways of expression:

- I. Images altered and sexualized bodies, like the image of a child in a swimsuit that is removed the garment using computer programs;
- II. Separate images in one picture, like a child's hand superimposed on a penis of an adult;
- III. Photomontages, some of which represent a minor and others have sexual content.<sup>180</sup>

The penalty under the Penal Code for this behaviour involves the imprisonment of three months to one year or a fine of three months to two years. Virtual Pornography and Pornography or Technical: True typicality lacking at present, however, there are few provisions effective advocates criminalization. The Framework Decision 2004/68/JHA<sup>181</sup>,

<sup>176</sup> On its 20.1.f)

<sup>177</sup> The basis of this argument is found in art. 4.3 of Organic Law 1/1996 of 15 January on Child Protection stipulates that *"trespass is considered the right to honor, personal and family privacy and image of the child, any use of their image or name in the media that may involve damage to her honor or reputation, or that is contrary to their interests, even if it has the consent of the child or their legal representatives"*

<sup>178</sup> The privacy is affected as STS 1641/2000, of 23 October [RJ 2000 \ 8791] by the field invasion of privacy and as stated by the STC 692/1997, of December 2 [RTC 1982 \ 73], or redoubt is an area in which other penetrating closure

<sup>179</sup> Promulgated in art. 18 of the Spanish Constitution of 1978

<sup>180</sup> Krone, Tony. A typology of Online Child Pornography Offending. Trends and issues in crime and criminal justice. No. 279 Australian Government Australian Institute of Criminology. June 2004

<sup>181</sup> Article 1 b iii regarding 1 b) i) *"realistic images of a non-existent child (...) involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or pubic area of a child"*

or the Budapest Convention<sup>182</sup> are an example, and therefore the repeated exclusion of this behaviour in our Penal Code is a breach of the first, according to several authors, ostensibly as a result of the protection of freedom expression, although it could hardly be understood in any case a child pornography as well protected by freedom of expression. Typing is justified on the basis that these materials may constitute a provocation to commit sexual abuse of minors and the exaltation of paedophile behaviour, which could in turn contribute to the acceptance of these behaviours and generally attack the dignity of childhood. Data show an increase in sexual addiction to children caused by virtual pornography, not to mention at any time that such claims Berglet<sup>183</sup>, it will soon be impossible to distinguish between real images and CGI.

At this point it is necessary to mention the victim's consent. We can affirm for the moment the total irrelevance of its consent in our legal system, and the reason is that "the legally protected for this crime is none other than the sexual indemnity of minors, meaning their psychological well-being, as a necessary condition for proper and normal sexual training process, which is prevalent in these people, on sexual freedom, since by age or disability, these people need adequate protection for lack of maturity needed to decide responsibly on this type of behaviour can become severely condition the rest of his life, which is indifferent to criminal legal effect, the minor or incompetent consent to be used for this type of behaviour."<sup>184</sup>

Although the Framework Decision of the Council of Europe 2004/68/JHA<sup>185</sup> envisages criminal responsibility exclude the production of pornographic images when the child had reached the age of sexual consent, the consent of both mediate and use of such iconography was strictly private, this possibility remains denied by the Spanish government.

Away from the main perpetrator of the crime or actor, there are other subjects whose activity (or lack thereof) can be decisive in child pornography offenses.

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<sup>182</sup> Art.9 "*nonexistent realistic images of children in sexually explicit conduct and images of people seem minor in sexually explicit conduct.*" Anyway lets states make exceptions.

<sup>183</sup> Bergelt Kelley: Stimulation by simulation: is there really any difference between actual and child pornography? Capital University Law Review 2003. pp 587

<sup>184</sup> STS n° 796/2007 October, 1st

<sup>185</sup> Art. 3 b)

We have to mention even a possible liability of Internet service providers. Currently, there is a law of Services of the Information Society and Electronic Trade<sup>186</sup> which involves securing them to civil, criminal and administrative, in case of violation of the principles set by law (including that of the protection of children and young people), the State may take the necessary measures to prevent the continuation of such activity.

Although the responsibility tends to focus on the owner of the website, sometimes also extends to service providers, administrators and others, as noted by the instruction of the Attorney General of the State 2/2006 and Directive 2000 / 31/CE, on June 8, the European Parliament and the Council. And so it is recommended about a possible default mode commission.

In real terms it is necessary to point the difficulty of limiting half as impressive as the Internet, it is necessary to use new legislative techniques that protect the child from the potential dangers that this scenario offers, but at the same time respecting the freedom that has characterized Internet since its birth. Only few authors advocate for getting more management and control of web pages in the form of registration or identification. At the moment it looks like that will be the way forward for European countries.

It is common during the procedure, the use of the defendant of the excuse of error. And this can be invoked in several ways: On the one hand the defendant can argue a type error regarding the download or on the age of the persons appearing in the material<sup>187</sup>, would be as to the circumstances in case and as stated in the SAP Las Palmas, SEC. 6th of October 8, 2010, based on the amount of material being found defendant's belongings. Often the argument of an accidental discharge, alleging seeking adult pornography and random and involuntary discharge of material involving minors, although it will be impossible to deny the fraud in the conduct if there are multiple files<sup>188</sup>, there is some organization of the same or are stored in storage units, nor will be accepted if repeatedly downloaded files or terminology has been used unambiguously referred to child pornography as search criteria. It in turn relies on a mistake as to the minority<sup>189</sup>, but as a rule it is relatively easy to remove

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<sup>186</sup> Law 34/2002 of July

<sup>187</sup> De la Rosa Cortina, pp 189

<sup>188</sup> The Judgment of the Provincial Court of Madrid, sec. 7th, No. 51/2009, of 5 May precludes the application of error based on the storage of more than 6000 photographic archives with minors appearing.

<sup>189</sup> The judgment of the Provincial Court of Barcelona, sect. 10th No 76/2006 of 20 December denies the occurrence of this error, it takes as fact that defendant announced his interlocutors "but I like younger

this claim by the mere observation of the material<sup>190</sup>. It could also be argued in terms of error diffusion, but basically it is assumed successful only in cases where the subject assets have a very limited knowledge of computers and therefore do not know the mechanics of running the programs known as peer to peer<sup>191</sup>. In other cases it is considered that the "repeated use Emule program let the user know that it is a specific tool for file sharing between users.<sup>192</sup>" The truth is that it is difficult to sense in these cases because the Supreme Court itself has ruled out the application of the rate automatically by the mere fact of using a p2p program<sup>193</sup>. We finally found the error of prohibition, which is based on ignorance of possession of child pornography, is a crime. But the possibility of success of it is also unlikely given the social obviousness is not even necessary that the defendant know the existence of a penal code that punishes such behaviour so you know that the activity in question is culturally forbidden.

**xiii.** The main mechanism of used currently by all States is none other than the mere collaboration and cooperation between them. As well, the fact of maintaining good relationships with online server providers is useful, as they can establish stringent filters that hinder or prevent access to various web pages that promote pornographic, and thus prevent the web can be seen.

The awareness of the users of internet services provides us, as those are potential recipients of that pornography. Also, Internet users can make use of what are known as "hot line", which are nothing but telephone lines that link with the police to alert websites that contain pornographic material.

Meanwhile, the National Police and Civil Guard have various means of tracking to network non-catalogued those websites that display or provide access to pornography. The previous section, one would expect that Spain is using the right of reservation contained

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children", and sent petitions expressly stated "I just want kids under 12, adults only if there are children involved, " " I want babies, send me babies "that were then met by sending only files that contained images of minors.

<sup>190</sup> The judgment of the Provincial Court of Álava, secc. 2nd no 376/2008 de 2 December sets "his version is not credible, because everyone knows by the sexual development of a woman whether or not this is minor. If the woman's body appears without breasts or without pubic hair, it's easy for anyone to infer that it is a girl ..."

<sup>191</sup> The judgment of the Supreme Court no 446/2010, of 13 April supports this error because the defendant is a truck driver, has no computer skills and it was he who installed the program, he could not accept voluntary dissemination

<sup>192</sup> The Judgment of the Provincial Court of Guipúzcoa, sec. 1ª, no 72/2009 de 26 February

<sup>193</sup> De la Rosa Cortina, Jm., pp 199.

in paragraphs 3 and 4 of Article 20. However, the results for fighting child pornography could be deduced about anything, because Spain is ranked number two in the ranking of the states in which most circulating pornography.

**xiv.** Article 189.1.a) points out that the Spanish State will sanction any person "who captures or uses images of minors or incapable with exhibitionist or pornographic purposes, whether public or private, or to make any kind of pornographic material, whatever its medium, or finances any of these activities or profits with them." So the answer to the question is yes.

Paragraph 4 of the same article could be understood remarking a difference related with coercion as the text says that "to involve a minor or incompetent ..." what one can deduce that some pressure, regardless of the tricks used to such. Indeed, it has been applied to the minor or incompetent to get their will constrict.

Thus, these two sections make the differentiation in recruitment and coercion concerned, because the first paragraph a) of Article 189 mentions recruitment or use of children or incompetent. Paragraph 4 of that article, as already mentioned, refers rather to the action of engaging or have the minor or incompetent to participate in pornographic performances.

## **2.4 Corruption of Children**

**xv.** The inclusion of the named type of corruption of minors has been criticized for a long time, (though certainly it no longer receives that designation) as being that is intended to punish conduct that escape other rules, sometimes it is not understood as some of these acts may be sanctioned by a more specific rule.

This chapter also we can see again that the Criminal Code, again protects children under 18 years, as it did with the child pornography offenses previously analyzed and the indemnity related to the conditions for the exercise of a free sexuality. Somehow the legislator understood that art. 189.4 CP<sup>194</sup> responds to the emergence of new forms of perpetration (i.e. Internet) and a legislator's will is not to miss any form of possible offence in this field, to the extent of getting a detriment of legal certainty by the lack of clearness on our dictates.

On the other hand we worked on the same line to cover all sides with the inclusion on the principle of universal justice (art. 23.4 LOPJ) of crimes relating to prostitution and

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<sup>194</sup> Introduced by the reform done by LO 11/1999

corruption of minors and disabled and the illegal or clandestine immigration that we all know<sup>195</sup> is very linked in many cases with sexual exploitation<sup>196</sup>.

Currently and after the amendment of Art. 23.4 LOPJ, operated by the Organic Law 1/2009, of 3th November, its protection is drastically reduced assuming a delay in this matter.

## 2.5 Solicitation of Children for Sexual Purposes

**xvi.** The offense of grooming was inserted in the Criminal Code Article 183bis, under the amendment made in 2010<sup>197</sup>. A while now, the emergence of new technologies and mass access to the Internet have allowed the proliferation of behaviours designed to contact minors to engage in situations that threaten their sexual indemnity<sup>198</sup>. It is known as well that new information and communication technologies have become essential social tools for many people now, that use them as a means of entertainment and personal development<sup>199</sup>.

National Statistics Institute data<sup>200</sup> states that 1 in 3 young people regularly use social networks; in fact the majority of people using these media are between 14 and 25 years (about 30%). The point is that this large number of users of such a young age do not know in most cases the impact of the use of Internet networks, being the major problem the dissemination of material, that with just one click, could appear anywhere around the world.

Basically we know that this behaviour involves an adult and a child, with whom the adult contacts in order to gain their trust and end up getting him/her in sexual situations. It is important to point that, the behaviours of these adults, themselves, are atypical and, while not trespassing the limits of any of the offenses that protect sexual indemnity, they are not punishable. Its nature rather corresponds to acts preparatory to the commission of any of the crimes already covered by our criminal sexual, not existing then as an autonomous figure itself<sup>201</sup>.

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<sup>195</sup> Provided by the art 318 bis.2 Criminal Code

<sup>196</sup> Álvarez García, F.Javier. P.481

<sup>197</sup> Organic Law 5/2010, of June (BOE 23 June) of Amendment of the Criminal Code

<sup>198</sup> Luis Torres González “¿Existe el delito de Grooming o ciber acoso sexual infantil?: una aproximación desde la óptica jurídico-penal (especial referencia al proyecto de ley que modifica el artículo 366 quáter del Código Penal)”. P.1

<sup>199</sup> INTECO

<sup>200</sup> Year 2008

<sup>201</sup> Luis Torres González” P.2

We can identify several stages in the grooming offense<sup>202</sup>:

1. Beginning of a phase of friendship. Refers to making contact with the child to know their tastes, preferences and create a friendly relationship with the object, reaching confidence as much as possible.
2. Beginning of phase of relationship. Often includes personal and intimate confessions between the child and the bully. Thus, the confidence gained is consolidated and deepened the minor in information about his life, tastes and customs.
3. Sexual component. Often includes explanations of terms specifically sexual and minors request their participation in acts of a sexual nature, image recording or taking pictures.

In Spain the decision to punish the grooming offense is relatively recent. The legislator's choice led to cover all conduct that would be directed, using any communications technology, to the commission of any offense described in sections 178 to 183 and 189 of the Penal Code peninsular. The political basis of the above crime, on the one hand lies in contributing to the enhancement of the level of protection of victims more vulnerable and, on the other, the need to transpose the Framework Decision 2004/68/JHA of The Council of Europe, 22 December 2003 on combating the sexual exploitation of children and child pornography.<sup>203</sup>

For the Spanish legislature is clear that in cases of sexual offenses committed against minors, protecting the legally acquires a special dimension for the highest content of unfair that these behaviours mean. It also justifies the extension of the use of Internet and information technology and communication with child sexual purposes has highlighted the need to punish criminal conduct by an adult develops through such means to gain the trust child to arrange meetings for sex-related concessions. Given the above, it was determined that a new Article 183a is regulated by the internationally known as "child grooming", also anticipating severe penalties when approaching the lower is obtained through coercion, intimidation or deception.<sup>204</sup>

Stresses that the behaviours are to be performed using a technological medium as a vehicle by which to hold a meeting concrete conduct prohibited by law. Although it must be

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<sup>202</sup> INTECO: Guía Legal sobre Ciberbullying y Cibergrooming. Observatorio de la seguridad de la Información.

<sup>203</sup> Luis Torres González P.4

<sup>204</sup> Luis Torres González P.4

accompanied by material acts leading to rapprochement. Currently in Spain there are a number of entities, including its programs, including prevention, awareness and combating grooming. Some examples are Alia2 Foundation, Protégés INTECO, Pantallas Amigas, Cobertura Protegemenores or government campaign "quenoteladen".<sup>205</sup>

**xvii.** Far from the main perpetrator of the crime or actor, there are other subjects whose activity (or lack thereof) can be decisive in child pornography offenses. We should note the offense of the omission by parents or similar (guardians, keepers ...) preventing the continuation of pornographic activities by children in their care. This type is regulated in art.189.5 and involves the intervention of the Public Prosecutor to deprive offenders of parental rights, guardianship, custody or foster care to offenders.

In turn there is the mention of a possible liability of Internet service providers. Currently, there is a law of Services of the Information Society and Electronic Commerce<sup>206</sup> which involves securing them to civil, criminal and administrative, in case of violation of the principles set by law (including that of the protection of children and young people), the State may take the necessary measures to prevent the continuation of such activity.

Although the responsibility tends to focus on the owner of the website, sometimes also extends to service providers, administrators and others, as noted by the instruction of the Attorney General of the State 2/2006 and Directive 2000 / 31/CE, on June 8, the European Parliament and the Council. And so it is recommended about a possible default mode commission. In real terms it is necessary to point to the difficulty of limiting the Internet, it is necessary to use new legislative techniques that protect the child from the potential dangers that this scenario offers, but at the same time respecting the freedom that has characterized Internet since its birth. Regarding pornography offenses is necessary to refer to some of the consequences that the perpetrator may experience after the commission of a child pornography offense, applicable in turn, as we have seen, on child prostitution offenses

It involves the disqualification for the exercise of parental authority, as a result of art. 192.2 CP. In these cases it is at the discretion of the judge or court reasoned imposes the disqualification penalty for the exercise of rights of custody. However, the rights of the child

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<sup>205</sup> <http://www.quenoteladen.es>

<sup>206</sup> Law 34/2002 11 July



who is the holder on the prisoner will subsist in any way. Finally after the reform with the LO 5/2010, of June 22 we had introduced the penalty of deprivation of parental rights, as directed by the Lanzarote Convention.<sup>207</sup> Another consequence is the imposition of accessory penalty of disqualification for official duties, or the exercise of any trade or profession that may be related to minors, also reflected in Article 192 of the Penal Code, and also drawn by the Lanzarote Convention<sup>208</sup>.

Finally, Article 127 finds the incidental consequence of confiscation of equipment and supplies. Would have to proceed to the seizure of computer equipment used a supporting images or videos<sup>209</sup>. With regard to the authorship of this type of crime, the Spanish crimes against children, both third mediating and the one who practices a sexual intercourse are considered liable at this point. There is no punishment by the time for the preparatory acts of crime, although it is possible that the punishment is involved in human trafficking for prostitution (something quite common), by promoting or favouring crime of illegal immigration workers<sup>210</sup>. And it can turn a crime of child abduction if the transfer is made by the responsible (guardian, conservator ...) with intent to commit a crime of prostitution on the child below<sup>211</sup>. The complication in detecting these cases is such that the law aims to characterize the crime as mere activity by the difficulty of proving any results.

It is obvious by Legislator protective's attitude, that the victim in this crime will always be a minor be as in fact, it contains atypical activities when perpetrated against an adult. This may prosecute some conducts which do not contain physical contact with the victim, and thus part of the doctrine considers therefore the inapplicability of the types of sexual assault and abuse. <sup>212</sup>Also welcomes the conduct of an activity a priori considered as prostitution, not bounded by price, where the offence of prostitution cannot be applied. About the modality omission, collected by point 5 of art.189CP, decides on who, must and do not avoid the

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<sup>207</sup> Art. 27.4: Each part may take further action on the perpetrators, as the withdrawal of parental rights

<sup>208</sup> The art. 5.3states that each Party shall in accordance with its domestic law, take the necessary legislative measures to ensure that conditions of access to professions that entail regular contact with children to ensure that applicants exercising these professions have not been convicted for acts sexual exploitation and abuse of children

<sup>209</sup> De la Rosa Cortina, Jm. pp 175

<sup>210</sup> Contained in art. 313 Criminal Code

<sup>211</sup> Contained in arts. 223 to 225 bis of Criminal Code

<sup>212</sup> As the Judgment of the Supreme Court No 1342/2003 of 20 October, which considers the offense does not concur when the adult induce minors to mutual masturbation, without prejudice to the possibility of appreciating other criminal offense

situation of prostitution and corruption of minors<sup>213</sup>, foreseeing a greater punishment than for improper failure and being widely criticized by part of the Doctrine<sup>214</sup>.

## 2.6 Corporate Liability

**xviii.** The Spanish Criminal Code does not have a general provision which attributed criminal responsibility for legal persons for the offences of violence or abuse against minors. There is only a provision, article 189 bis, which penalizes the conduct of legal persons who commit any of the activities referred to in chapter V (crimes relating to prostitution and corruption of minors). In this regard the article itself refers to the definition of legal person which makes the code itself in article 31 which attaches criminal liability to legal persons when crimes "on your behalf or on behalf of them and to their advantage" by its administrators and legal representatives in fact or in law as well as when such crimes are discussed "in the exercise of social activities and account and benefit from the same", by those who remain subject to the authority of the natural persons referred to in the preceding paragraph, has been carried out the facts by not being exercised on them proper control served the concrete circumstances of the case".

In this case if that we can see a distinction between "representatives legal and administrators in fact or in law" of the rest of the employees since the first answer in double way, by acts which commented on behalf or for the benefit of the legal person as well as for not exercising proper control on those subject to their authority in the development of social activities of the legal person.

For the rest of offences covered by the 8th of offences against sexual freedom and indemnity (abuse, violence,...) there is no provision or specific mention that specific reference to the liability of legal persons, and in principle seems logical that such liability is not established as natural persons are that perform behaviours (actions) punishable under Chapter VIII of the Code.

**xix.** The responsibility that is imposed is criminal in principle, but the same court may also determine the liability for damages. The actor may however, reserve civil action so that civil liability for damages, to be determined in the civil jurisdiction. In addition in the case of *the*

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<sup>213</sup> Judgment of the Supreme Court no 1029/1996, of 18 December

<sup>214</sup> Álvarez García, F Javier P 514

*rights of parental authority, guardianship, conservatorship, guard, employment or public office or exercise of the profession or occupation or deprivation of parental authority* they may be prosecuted by the criminal judge<sup>215</sup>.

**xx.** Criminal responsibility in the Spanish legal system is always individual. However it also contemplates the possibility that, as we have seen, is made responsible for in addition to a legal person. But so that it can be so, should be considered guilty the individual who actually committed the crime. In cases of prostitution and corruption of minors, article 189 bis says that the realization of one of these activities within the framework, described in a "social activity" of a legal person the responsibility would fall on it; (but the penalty would be more or less serious depending on what will be the penalty assigned to the individual (for example, article 189bis 1.a) if the offence committed by the person has provided a term of imprisonment of more than five years, the penalty for the legal person shall be a fine of three to five times of the benefit). That is, that there is a dual responsibility: the individual person for the crime itself and the legal person by "protected".

## **2.7 Aggravating Circumstances**

**xxi.** The Spanish Penal Code, approved by Organic Law 10/1995 of 23 November, includes several aggravating circumstances in relation to the crimes against sexual freedom and indemnity. They are regulated in Title VIII.

First of all, it must be distinguished between aggravating circumstances applicable to offenses that criminalize attacks against sexual indemnity of minors who are under 13 years old<sup>216</sup> and aggravating circumstances applicable to crimes that can be committed when the victim is over 13 years old but still a minor or an adult<sup>217</sup>.

There are five specific aggravating circumstances set out in article 180 Penal Code. They are explained below. These circumstances are applicable to offenses of sexual assault (art.178) and rape (art.179). They only apply if the minor is over 13 years old. Otherwise it will be covered by article 183.4.

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<sup>215</sup> Artículos 192 y 193 del Código Penal.

<sup>216</sup> Set out in third and fourth paragraph of article 183 and article 183 BIS,

<sup>217</sup> Articles 180, 181.5, 182.2, 184.3, 187, 189.3 CP

a) *“Violence or intimidation particularly degrading or humiliating”*. It does not refer to sexual acts which are already humiliating, insulting and degrading but to violence or intimidation used in its execution<sup>218</sup>. This circumstance will only be noticeable when violence or intimidation exceeds clearly the levels of crime itself<sup>219</sup>. So, what is punished is the plus of unlawfulness that represents the “modus operandi” of the perpetrator when the concrete and specific actions, considered in their own objectivity, represent a qualified disregard for the dignity of the victim<sup>220</sup>. For example, the Spanish Supreme Court appreciated this circumstance in the case of a 17-year-old, anal and vaginally raped simultaneously<sup>221</sup>.

b) *“Crime committed by the joint action of two or more people”*. It requires concerted action but does not require that everyone performs all elements of the type. It is enough if each of the participants runs any of them. For example, some of them hold the minor while other threatens him/her and finally another one sexually assaults him/her.

c) *“Victim particularly vulnerable because of his/ her age, illness, disability or status”*

d) *“Perpetrator takes advantage of a superiority or kinship’s relationship, being ascendant, descendant or brother, by nature or adoption with the victim in order to execute the crime”*.

e) *“Perpetrator uses weapons or other equally dangerous means capable of causing death or any of the injuries listed in articles 149 and 150 Penal Code”*.<sup>222</sup> This circumstance is applicable without prejudice to the penalty that may apply for death or injuries. The Spanish Supreme Court has ruled out the automatic assessment of this aggravation in all cases where the weapon is used just for intimidating, and the perpetrator just displays it. Otherwise, it may cause a breach of the principle “non bis in idem” to describe the facts as sexual assault (involving violence or intimidation) and as aggravated assault considering the intimidation caused by the exhibition of weapon<sup>223</sup>. The legislator specifies the use of the weapon in the potential of causing death or particular gravity injury, so it is not enough that used means are dangerous, it is needed that their use in the concrete action may cause such results.

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<sup>218</sup> STS 530/2001

<sup>219</sup> Legal basis 3º STS 1422/2011

<sup>220</sup> Legal basis 2º STS 709/2010

<sup>221</sup> Legal basis 3º STS 1005/2009

<sup>222</sup> Worthlessness or major organ loss, deprivation of a sense, deformities, sterility and impotence, severe somatic or mental diseases and genital mutilation.

<sup>223</sup> Legal basis 2º y 3º STS 722/2001, Legal basis 2º STS 1202/2003, STS 606/2011

Therefore, what matters is not the instrument but how it is used<sup>224</sup>. This aggravating circumstance has been appreciated in cases when the perpetrator used the weapon against a vital area of the victim's body. The essential in this is that, not yet materialized aggression; the victim feared for his/her life or limb and not just for his/her sexual freedom or indemnity.

If two or more of these aggravating circumstances come together, the penalties will be imposed in the upper half.

Article 181, paragraph 5° increases the penalty for the crime of sexual abuse, punished in the upper half in the event of aggravating circumstance 3<sup>rd</sup> (*vulnerability of the victim*) or 4<sup>th</sup> (*take advantage of relationship of superiority*) provided by article 180. It also increases the penalty, imposed in the upper half, in the event of aggravating circumstance 3<sup>rd</sup> or 4<sup>th</sup> of art.180, when in a deceitful way; the perpetrator performs sexual acts with a minor over thirteen and under sixteen (article 182), crime traditionally known as “fraudulent rape”.

In Chapter II BIS, added to the Spanish Penal Code by the Organic Law 5/2010, of 22 June, which explicitly criminalize abuse and sexual assault when the victim is under thirteen years old, it has been included specific aggravating circumstances and has been excluded the application of other crimes and their aggravating circumstances set out in Title VIII when the victim is under 13 years old.

In the third paragraph of article 183 is provided an aggravation for the crime of sexual abuse (art.183.1) and sexual assault (art.183.2) to a minor who is under 13 years old, when the attack consists of vaginal intercourse, anal or oral or introduction of bodily members or objects for any of the two first places. It may be punished in the first case with imprisonment from eight to twelve years and with imprisonment from twelve to fifteen years in the second case.

Furthermore, in the fourth paragraph of article 183 is established a list of aggravating circumstances to the conducts described in the first three paragraphs, raising the corresponding imprisonment in the upper half. They are:

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<sup>224</sup> Legal basis 7° STS 1667/2002

f) “When the low intellectual and physical development of the victim has placed him/her in a situation of complete helplessness and, in any case, when the victim is under 4 years old”. The explicit definition of this aggravating circumstance is partly due to the policy on crime. Events such as “Mari Luz Case”<sup>225</sup> placed great importance on the media and public debate to the discussion about whether to increase the penalties, even more, because of the vulnerability of the victim.

g) “*Offense committed by the joint action of two or more people*”. It must be interpreted in the same way that the art.180’s aggravating circumstance cited above.

h) “*Violence or intimidation exercised involves particularly degrading or humiliating*”. It must be interpreted in the same way that the art.180’s aggravating circumstance cited above.

i) “Perpetrator takes advantage of a superiority or kinship’s relationship, being ascendant, descendant or brother, by nature or adoption with the victim in order to execute the crime”. The existence of this aggravating circumstance is justified by the greater psychological damage to the victim involved in a sexual assault by a family member.

j) “*Perpetrator endangers child’s life*”. This aggravating circumstance sets the offense as a real danger, besides protecting child’s sexual indemnity, their life. Perpetrator should be aware that his actions had endangered child’s life. The reckless endangered are atypical.

k) “Offense committed within an organization or a criminal group engaged in the conduct of such activities”. It is understood according to article 570 BIS Penal Code<sup>226</sup>:

*“The group consists of more than two people in a stable or indefinitely way, that in a concerted and coordinated way, share various tasks in order to commit crimes”*

In this aggravating circumstance it is not required that the perpetrator takes part in the organization, but simply that they serve him/her to commit the crime.

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<sup>225</sup> “Mari Luz Case” A 5-year-old girl was killed in January 2008. Her murderer had execution of a conviction for a crime of minors’ sexual abuse pending by virtue of which he should have been imprisoned in the date on which the crime was committed

<sup>226</sup> For comparison, article 1 of Joint Action 98/733/JHA adopted by the EU Council on December 21, 1998, criminal organizations means: “*A structured association of more than two people, established over a period of time and acting in concert to commit offenses punishable by a custodial sentence or a security measure of imprisonment of up to 4 years at least or a more serious penalty; regardless of whether such offenses are an end in themselves or a measure of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authority*”

l) *“Perpetrator takes advantage of condition of authority, agent or public official”*. The application of this circumstance requires, first of all, the official status to be real and, moreover, that this condition is used expressly to commit the crime. Its assessment implies the imposition of the penalty of general disqualification for six to twelve years.

Article 183 BIS Penal Code criminalizes “Child grooming” establishing that penalties will be imposed at the upper half for that offense when the approach to children under 13 years old is obtained through coercion, intimidation or deception.

Afterwards, it is defined sexual harassment and in article 184, paragraph 3º higher penalties are if the conditions of article 184.1 (*basic type of sexual harassment*) and 184.2 (*qualified type of sexual harassment*), the victim is particularly vulnerable by reason of age, illness or situation.

Prostitution of minors is criminalized in article 187. They are specific aggravating circumstances: victim is younger than 13 years old, perpetrator takes advantage of the condition of authority, agent or public official and perpetrator that belongs to an organization or association, including transitory, which engages in the conduct of such activities.

The crime of minors’ corruption is punished in article 189, involving the use of minors in exhibitionist spectacle or for the manufacture of pornographic material which is then disseminated. In the third paragraph, six aggravating circumstances of this offense are set out:

m) *“Use of children who are under thirteen”*. As this offense is not explicitly mentioned in Chapter II BIS (crimes of abuse and sexual assault under thirteen years old), there is no distinction for it meanwhile the victim is older or younger than thirteen years old, so it has been created this specific aggravating circumstance.

n) *“Acts are a particularly degrading or humiliating”*. This is assessed in view of the special nature of the events that accentuate the negative connotation. Events must be executed in order to cause a special feeling of humiliation to the victim. The degrading or abusive nature is to be said, not the sexual act performed by the offender (itself demeaning) but the violence or intimidation employed especially humiliating for execution. The Spanish Supreme Court has

understood, for example, that recording a sexual encounter with a minor, in which the adult defecates over the child, has to be considered as particularly degrading or humiliating<sup>227</sup>.

o) *“Acts have particularly gravity by virtue of the economic value of the pornographic material”*. The existence of this aggravating circumstance is controversial. Noteworthy that an offense which does not require profit for its commission, has constructed an aggravation from economic value of files. The existence of websites where the content is charged for downloading or fixing any kind of monetary compensation for free access to objectionable material exchanged, has introduced an economic element that justifies, in obviously serious situations, the application of this circumstance. The jurisprudence<sup>228</sup> has required several requirements for the assessment of this situation: 1-The expert determination of the economic value of the files; 2-The files have a transcendent economic relevance; 3-Constancy of lucrative purpose by the accused, who must obtain or be willing to obtain economic benefit derived from files’ sale or exchange.

p) *“Pornographic material depicts children being victims of physical or sexual violence”*. There are referred to two kinds of violence alternatively: One, equivalent material strength and another coincident with the nature of the act or sexual acts performed, likely to arouse a greater degree of satisfaction of this kind, for example, sadism<sup>229</sup>. Sexual violence has a physical component that is not directly addressed to break the will or consent of the victim but it must be seen in the area of sexual behaviour, itself disproportionate, abnormal or excessive. Spanish Supreme Court’s sentence 1098/2010 (Legal Basis 3º) means sexual violence as actions or forcing situations comparable to rape or children’s sexual assault cases in which children are bound hand and foot, assumptions of special subjection and restraint that excess of the “simple” sex with a minor. Spanish Supreme Court’s sentence 1377/2011 (Legal Basis 3º) has understood that this circumstance existed in a pornographic video featured a four-year-old boy who was back with the chest on the bed, with his legs spread and tied while an adult anally penetrated him. It has also been understood that this aggravation existed in cases that the disproportion between perpetrator’s sexual organs and his victim’s was significant<sup>230</sup>.

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<sup>227</sup> Legal Basis 3º STS 803/2010

<sup>228</sup> Legal Basis 4º STS 674/2010

<sup>229</sup> Legal Basis 6º STS 588/2010

<sup>230</sup> STS 30/2011



r) *“Perpetrator belongs to an organization or association, even transitory, which engages in the conduct of such activities”*. The jurisprudence<sup>231</sup> requires several demands: 1-Joint action of two or more people, related to each other, with division of responsibilities and a structured and hierarchical basis, more or less formal, to which the perpetrator “belongs”, i.e, in which participates continuously and not performs just occasional collaboration. 2-Use of a structured network likewise to have some intention of continuing, despite the precept of not requiring a duration or stability given. The simple temporal association suffice, but if it is something more than the execution of a particular criminal operation. 3-Offenses can survive and be independent of the individual performance of each of the group members; 4-Use of suitable material for the purpose of coordinating their respective performances; 5-That all of this tends to promote greater ease of committing the offense, also offering special difficulties both for the prevention and prosecution of crime. Spanish Supreme Court’s sentence 1444/2004 understood that this aggravating circumstance must be applicable in the event that, through internet, a plurality of users in “the virtual meeting place”, coordinate their actions to enhance opportunities for consumption of harmful images to minors’ rights and allowing further dissemination to others outside the organized group.

s) *“Perpetrator is an ascendant, guardian, teacher or any person, who in fact or in law, takes care of the minor”*.

## 2.8 Sanctions and Measures

**xxii.** The Spanish Penal Code punishes previously described crimes with different sanctions. Only imprisonment can be imposed to punish behaviours that the legislator considered serious. In other cases, sentence of prison can be either alternated or combined with a fine.

The penalties for some of the crimes that are most relevant to our study will be analyzed now.

Article 178, which regulates minors older than 13 or adult’s sexual assault, provides imprisonment’s penalties of 1-5 years. This conduct is punished with imprisonment from 5 to 10 years if there are any of the aggravating circumstances listed in that article.

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<sup>231</sup> STS 1444/2004

Continuing with the analysis, rape of children older than 13 years old or adult is punished in article 179 with imprisonment for 6-12 years<sup>232</sup>.

Sexual abuse of children is a crime for which the Spanish Penal Code establishes an alternative penalty: prison sentence of 1-3 years or a fine of 18-24 months. However, if the abuse consists in sexual intercourse the only punishment is imprisonment of 4-10 years. Besides, if there is article 180's aggravating circumstance 3<sup>rd</sup> or 4<sup>th</sup>, penalties are imposed in the upper half.

However, sexual abuse of a minor under 13 years always is punished with imprisonment (for 2-6 years), like sexual assault of a minor under 13 years (imprisonment for 5 to 10 years). Moreover, crime known as "Child Grooming" (article 183 BIS) is punishable by alternative imprisonment 1-3 years or a fine of 12-24 months.

Sexual harassment is punishable by imprisonment of 3-5 months or a fine of 6-10 months. When the victim is particularly vulnerable because of their age, illness or situation, in one hand, basic offense is punished with alternative penalties: imprisonment of 5-7 months or a fine of 10-14 months, in the other hand aggravated offense is punished with imprisonment of 6 months to 1 year.

Exhibitionism and sexual provocation to minors is punishable by imprisonment from 6 months to 1 year or a fine of 12-24 months, in article 185. The display of pornographic material to minors is punishable in article 186 with the same penalties.

Then, the crime of prostitution of minors, provided in article 187, carries a cumulative penalty: prison of 1-5 years and a fine of 12 to 24 months. If the victim is under 13 years; imprisonment is imposed for 4-6 years. Pimping minors (article 188 second paragraph) carries imprisonment for 4-6 years and if it has been employed with minors under thirteen years, imprisonment for 5-10 years. And finally, corruption of minors (art.189) is punished with imprisonment for 1-5 years.

In Spain, active extradition<sup>233</sup> may be only requested in relation to Spanish citizens who have committed crimes in Spain and they have taken refuge in a foreign country; Spanish citizens who have committed crimes (attacks against the external security of Spain) abroad and have

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<sup>232</sup> Note that the maximum sentence exceeds two years the minimum sentence of intentional homicide.

<sup>233</sup> Title VI, articles 824-833 of Criminal Procedure Act

taken refuge in a third country and foreigners who have committed crimes which must be tried in Spain but they have been refugee in other country than that of which they are nationals.

Furthermore, active extradition only proceeds in cases determined in treaties which are in force between Spain and the state in whose territory the person is claimed. Failing treaty, extradition proceeds under customary law in force in that state or in the absence of both cases, when extradition is appropriate under the principle of reciprocity.

Prosecutors in High Court or Supreme Court, ask the judge or court who is hearing the case, to propose to Spanish government to request the active extradition. Extradition's request will be made by Spanish government through the Ministry of Justice to its namesake of the state where the defendant is located. In some cases, the extradition may be requested directly by the judge or court hearing the case by virtue of treaty in force.

About passive extradition<sup>234</sup>, it can be said that it will only be granted by Spain by virtue of the principle of reciprocity and the committed offense<sup>235</sup>.

Extradition's request will be made through diplomatic channel. If this channel is not used, the Ministry of Justice of the requesting state writes the Spanish Ministry of Justice. Then, the Spanish Ministry of Justice, within a period of eight days from the day following receipt of the extradition request, will raise the Spanish government the reasoned proposal about whether continue the judicial extradition proceedings. Spanish government will take its decision within 15 days.<sup>236</sup>

Finally, the Spanish government decides the person's delivery or to deny it according to the principle of reciprocity or reasons of security, public order or other essential interest to Spain. There is no appeal against the decision agreed by Spanish government.

**xxiii.** It seems to be reasonable to look up in official statistics on the subject in order to assess the effectiveness and the dissuasive effect of the penalties provided in Spanish Penal Code to punish offenses against child sexual indemnity.

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<sup>234</sup> Law 4/1985 March 21, Passive Extradition.

<sup>235</sup> Extradition may be only granted for offenses for which Spanish and requesting state's law provides a penalty of not less than one year of imprisonment in its maximum or when the request was entered to the enforcement order to a penalty of not less than four months' imprisonment according to Spanish law.

<sup>236</sup> If they agree to proceeding through the courts, a extremely complex proceeding begins, in which the judge at whose disposal are put the defendant, will solve by reasoned order on the admissibility of extradition.

The National Statistics Institute develops a convicted people's statistical since 1998. This is a social demographic and criminological study of convicted by final sentence. Variables studied are data on the offender (sex, age and nationality), data on crime and punishment data. Its scope is national and regional. Its frequency is annual.

Convicted for crimes against sexual freedom and indemnity amounted to 981 according to statistics in 1998 in Spain. Next year, it suffered a slight decrease to the number of 974 but it increased in 2000 with 993, decreased again in 2001 (949) and increased significantly in the following years: 1057 people were convicted in 2002, in 2003 they were 1147 and in 2004, they were 1286. Largest increase over the previous year was in 2007, when 2246 people were convicted for such crimes, increasing by 924 convicted people over 2006. The maximum occurred in 2009 when it reached the figure of 2624.

The study comes to the year 2010, when 2428 people were convicted (which, nonetheless, accounts for 0,9% of all convicted of committing crimes in Spain) Admittedly, the increase may be due to factors such as an increase in reports of these crimes, the greater effectiveness of the Spanish Security Forces in pursuing this kind of crime or more accurate work of the Prosecution and individual allegations when exercising prosecution and not just a mere increase in the commission of these crimes. Having only data through 2010, the statistics do not allow us to assess the effect that these crimes had in the commission of the Penal Code's reform by the Organic Law 5/2010, June 22 as it entered into force on December 23, 2010. This reform, among other things, increased the maximum penalty for sexual assault in a year and introduced Chapter II BIS clearly to criminalize abuse and sexual assaults on children under thirteen.

However, the most important variable when assessing the effectiveness of the penalty is the repetition of the offense. In 1998, there were 108 repeat offenders of the 981 total convicted of crimes against sexual freedom and indemnity, which represents an 11% recidivism. Until 2003, the proportion of recidivists was stable but the same year, it suffered a very considerable increase: Recidivism for crimes against sexual freedom and indemnity rose to an alarming 66,17% of all convicted and next year reached its maximum in a 73,62%. In 2005, there was a sharp descent to return to the proportions of 1998, around 10-11%. There are only available data until 2006. In view of these data, we should consider that, with few exceptions, the rate of recidivism in crimes against sexual freedom and indemnity in Spain is not very high despite what the media can suggest in punctual cases.

In light of these data, it can be stated that the penalties for crimes against sexual freedom and indemnity are effective because recidivism rates in the commission of the offense are not high, so it seems that is accomplished, in most cases, the social reintegration of convicted for these crimes. Besides, the latest reform of the Penal Code in 2010, introduced the figure of probation<sup>237</sup> for those convicted to imprisonment for crimes against sexual freedom and indemnity that runs as a security measure after the imprisonment and whose duration will be 5 to 10 years if the offense was serious and 1 to 5 years if the offense was less serious.

Nevertheless, sanctions do not seem to be entirely dissuasive because generally, there has been a successive increase of convictions for crimes against sexual freedom and indemnity over the years except for specific and slight decreases.

Finally, proportionality of sanctions should be mentioned. It is necessary the severity of the imposed sanction to be proportionate to the seriousness of the crime. The General Council of the Judiciary, on its report in the latest reform of the Penal Code, noted that increased cases for crimes against sexual freedom and indemnity was not justify itself to increase penalties. That is not consistent with the principle of proportionality.

After the reform, there are considerable problems of proportionality. For example between the crime of rape of minors under 13 years old (art.183 paragraph 3º) and the crime of murder (art.138). First of them is punishable by 12-15 years in prison and second, is punishable by 10-15 years in prison. Therefore, offense of rape can reach more penalty than murder which damages life.

**xxiv.** Legal persons are criminally responsible for crimes committed by their legal representatives and administrators of fact or law in their name or on behalf of them and for their benefit. In article 189 BIS Penal Code<sup>238</sup> is provided that when a legal person is responsible for the crime of prostitution of minors, it will be punished by the following sanctions:

a) There is a fine of three to five times the profit made, if the offense is planning a prison sentence of more than five years when it is performed by an individual.

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<sup>237</sup> Article 192, paragraph 1º Penal Code

<sup>238</sup> Added by the Organic Law 5/2010, June 22

- b) There is a fine of two to fourfold of the profit made, if the offense is planning a prison sentence of more than two years to a maximum of five years when an individual performs.
- c) There is a fine of two to three times the profit made in other cases.

In addition, Courts may impose other penalties contained in article 33 paragraph 7 Penal Code such as legal person's dissolution which produces the definitive loss of its legal personality; suspension of legal person's activities for a period not exceeding 5 years; closure of premises and facilities for a period not exceeding 5 years; permanent or temporary ban (not exceeding 15 years) to conduct future activities in the exercise of which the legal person has committed, aided or concealed the offense; disqualification to hold public subsidies, contracts with the public sector and to enjoy benefits or tax incentives or Social Security for a period not exceeding 15 years or receivership of the entire corporation or any of its sections to safeguard the workers and creditors' rights for a period not exceeding 5 years.

**xxv.** <sup>239</sup> The confiscation of materials and implements used in the commission of the crime is imposed as a consequence of the principal penalty but it's not a penalty itself, because it does not respond to any of the penalties' purposes (prevention through motivation or compensation). Confiscation appears in article 127 Penal Code that says:

*“Any penalty imposed for an offense or misdemeanour will entail the loss of the effects that come from them and goods, means or instruments with which the crime has been prepared or executed, as well as the proceeds of crime or misdemeanour”*

At the end of this article, it is stressed that the confiscation will take place unless the effects belong to a *bona fide* third party not responsible for the offense and who has obtained them legally, so it can be said that Spanish legislation protects the *bona fide* in these cases.

According to paragraph 5° of article 127, confiscated effects will be sold if they are in lawful commerce and the gotten money will be applied to cover the offender's liabilities if the law does not provide otherwise. If they are not in lawful commerce, they will be given the fate that is in prescribed provisions and, failing that, they will render useless.

Moreover, currently there is not an intervention program that can be allocated to the assets seized by the commission of sexual offenses against minors, similar to Fund of assets seized by drug trafficking and related crimes, regulated by Law 17/2003, 29 May and created for

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<sup>239</sup> Santiago Mir Puig, *Derecho Penal. Parte General*, Editorial Reppertor, 8° edición, 2009, pgs. 775 a 777.

the purpose of affecting the assets seized in drug trafficking offenses to drug prevention programs, assistance to drug addicts, intensification and improvement of prevention actions and international cooperation in the matter. There is also a Fund of assets seized by human trafficking.

**xxvi.** If a sexual offense against a child has been committed within his/her family, Spanish criminal law reacts forcefully. Article 189 paragraph 5<sup>th</sup> creates an offense that occurs when a person is the holder of parental authority, guardianship, custody or placement of a child and being informed the child's prostitution or corruption, he/she does not do his/her best to prevent the child to continue in this state. There are alternative penalties of imprisonment of 3-6 months or a fine of 6-12 months.

More generally, in the second paragraph of article 192 Penal Code, it is provided that if the parents, guardians, conservators, teachers or any other person in charge of the child, take part as perpetrator or accomplice of one of the sexual offenses against children, they will be punished with the penalties provided to the offense, in the upper half unless this circumstance is already specifically contained in the crime type in question<sup>240</sup>.

Furthermore, Judge or Court, as provided in paragraph 3 of same article 192, will be able to impose the penalty of disqualification for the exercise of custody's rights, guardianship, and conservatorship for a time from six months to six years.

## 3 CRIMINAL PROCEDURE

### 3.1 Investigation

**i.** The principle of best interests of the child is one of the most significant manifestations of the movement to protect children's rights, which reaches throughout the twentieth century and has its climax in the International Convention on the Rights of the Child. As it is known, both the Convention and the rest of the Spanish law advocate the best interests of the child, giving it ownership of human rights and the exercise of those whose reasoning is able to exercise, too, a series of legal guarantees in the field of process. Indeed, the Criminal Law is no stranger to these guarantees, especially when it is incardinated on protecting the rights of legal precious: life, physical integrity, freedom, sexual indemnity, heritage, etc.

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<sup>240</sup> Art. 180.1.4º, 181.5, 182.2, 183.4 d), 189.3 f).

The guarantees of protection of minors involved in criminal proceedings operate in a manner not unlike other adult victims. Regarding the child as victim, he is no stranger to the traditional secondary victimization resulting from the shortcomings of our system, as it has been to point out the best doctrine. So while the accused was surrounded by a set of procedural safeguards that facilitate while clarifying their status, the victim does not have a defined role within the process<sup>241</sup>. What happens is that these adverse effects of the so-called second victimization reach its peak when the victim is a minor. However, in recent years is being reduced as far as possible this victimization. It was through the Organic Law 14/1999, of June 9, when significantly addressed the new role they had to play minor victims in criminal proceedings. They started to take care of the details concerning the statement of the child in the trial stage whilst minimizing or eliminating as far as possible, the child's physical match with her attacker in the same room. Along with this possibility (i.e., the output of the defendant's room during the testimony of the child, or the location of the witness at another time), there is also the option to prevent eye contact between victim and defendant in the same room<sup>242</sup>. That point is set out by article 731 bis of the Criminal Procedure Act.

Criminal addresses this issue at the plenary stage<sup>243</sup>, while Article 325 of the Act<sup>244</sup> deals with ensuring guarantees identical phase. Regarding the content of the declaration, the doctrine of the Supreme Court is considering versions borrowed from the victim as part of a crime with a measure of hiding such as crimes against sexual freedom may themselves constitute proof office, with the added difficulty of its destruction by the prosecution<sup>245</sup>.

**ii.** In our criminal justice system, the protection of victims in the criminal investigation conducted by the Office of Children call. Juvenile Prosecutors play a crucial role in the investigation stage of the proceedings committed by and against juveniles, and its main function is regulated in Article 12.m) of the Organic Statute of the Public Prosecution<sup>246</sup>.

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<sup>241</sup> Victor Moreno Catena and Valentin Cortés Domínguez. "Criminal Procedure Law". Tirant Lo Blach, 4th Edition.

<sup>242</sup> The Sentence of the Criminal Chamber of the Supreme Court of 12 September 2002 was a leading case regarding the legality of placing a screen between defendant and the child victim in the framework of a process for crimes against sexual freedom .

<sup>243</sup> Also known as trial.

<sup>244</sup> A law is, the Criminal Procedure Act, very dated, dating from 1882, and whose repeated attempts to change have failed, producing only specific reforms.

<sup>245</sup> Sentences of the Criminal Chamber of the Supreme Court of September 28, 1988, to May 26, 1992, to October 11, 1995, and May 25, 2004, among others.

<sup>246</sup> Vid. Law 50/1981 of 30 December, regulating the Organic Statute of the Public Prosecution.



Prosecutors Minor, and his superior, the Prosecutor of the Juvenile Hall Coordinator of the General Attorney, dealing with issues where children are victim or aggressor. In addition, the act also prosecutors of Victims of the Provincial Prosecutor, coordinated by the Managing Board Attorney for the protection of victims in criminal proceedings. As stated in Instruction 3/2008, of 30 July, on the Prosecutor Coordinator Juvenile Hall and Juvenile Sections, the spirit of its activity is in "practice proceedings referred to in art. 5 EOMF<sup>247</sup>, and intervene directly or through instructions given to the juvenile units in those criminal or civil proceedings of special importance appreciated by the General Attorney, relating to juvenile offenses or proceedings relating to child protection. "

Regarding operations in secrecy, our system does not recognize the actions of these bodies covertly. However, it is recognized by the jurisprudence of the agent undercover, and this is always a member of the Security Forces of the State. Law 5/1999, of 13 January<sup>248</sup>, it introduced in Article 282 bis of the Criminal Procedure Act, endorsed by the European Court of Human Rights on 15 June 1992<sup>249</sup>. In addition to complying with current legislation, obviously, prescriptive, the undercover agent must obtain judicial authorization when fundamental rights are at stake for the person.

Regarding the investigation of child pornography, is undoubtedly one of the most common ways to combat this type of crime. It is sometimes necessary prior penetration in the home of alleged offender, which, as is known, only possible after refusing the dweller in *flagrante delicto* or under judicial authorization<sup>250</sup>. Other times, and thanks to advances in technology, it is possible to reach computer scans and to the alleged offender.

iii. In general it is considering an earlier stage, for scientific purposes, before the call instruction, is the research phase itself, which can last years, especially in some complex crimes. Therefore, it is not necessary in the case of a continuing offense for purposes of Article 74 of the Penal Code to get going research. However, in order to initiate an investigation, as an act of judgment (a complaint, an arrest, detention decree, etc ...), it is sometimes necessary for the offense to take the form of continued, precisely to acquire the

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<sup>247</sup> Organic Statute of the Public Prosecution, which was discussed above.

<sup>248</sup> Law 5/1999, of January 13, to amend the Criminal Procedure Act regarding improvement of action research related to drug trafficking and other serious illegal activities.

<sup>249</sup> Subject "Ludi"

<sup>250</sup> Article 18.2 of our Constitution.

penal punishment. Consider, for example, in a crime of sexual harassment, in the family, where it is very difficult to begin the investigation with the first touching without consent<sup>251</sup>.

On the other hand, it must be stated in the semi-public nature of these crimes. Unlike most of our Criminal Code offenses, which enjoy public nature of crimes, these are not such, and their differentiation makes them adopt its own characteristics that are especially in the initiation of the procedure. As stated in article 191 of the Penal Code, for the initiation of the process, it is necessary the complaint of the victim, not the rule operating public offenses under which the prosecution alone can activate the initiation of proceedings. Now, as the same article points out, this is not valid exception to allow the forgiveness of the offended extinguish criminal liability, and it is designed to avoid possible pressure from the accused or his environment further clouding the already on their particular vulnerability of a victim of such attacks. Notwithstanding the foregoing, the final paragraph of Article 191.1 of the Code excludes crimes against children produced thirteen years of the category of crimes semi-public integrated into the general classification of public offenses, and thus sufficing performance of the prosecution to start the procedure. Therefore, and according to the general rule of public offenses on the withdrawal of complaints, declarations or other acts initiator of the procedure, these actions alone will not get the stay of the criminal proceedings.

**iv.** According to Article 132.1 of the Penal Code, crimes against sexual freedom and indemnity contemplated a range of limitations, ranging from early twenties, when the maximum penalty prescribed for the offense is imprisonment of fifteen or more years, five years. This section is appropriate to affirm the specificity with which is studied in relation to sexual offenses, not lead, as unnecessary, in the periods of limitation generally. Limitation periods are twenty, fifteen, ten and five years, depending on penalty prescribed for offenses in the Criminal Code. Thus, a crime of violation of Article 183.3 of the Penal Code, punishable twelve years, would a prescription for fifteen years. However, a corruption offense under Article 187 of the Penal Code, punishable by three years, would have a five-year limitation.

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<sup>251</sup> This note habituality further complicate the work of the instructor called "touching surprise", of such legal subtlety that led to create a own jurisprudence. Vid. Sentence of the Criminal Chamber of the Supreme Court of 18 December 2007.

As set out in Article 132, the prescription starts to run "from the day on which the offense punishable". In criminal cases permanent, continuous or requiring habitual, it shall be counted from the day of the last offense. However, as a protective measure, being underage victims, deadlines definitely counted from the day when the child reached the age of majority, and if dies before, from the time of death.

As for the suspension of the prescription, the new Article 132.2<sup>252</sup> of the Criminal Code allows for a maximum period of six months, if not lack offense<sup>253</sup> and, if through the process complaint or suit is brought against one or more persons allegedly responsible for the illegal acts. If in this time the body falls resolution aimed at continuing the investigation against such persons, interruption, and no suspension of prescription means retroactively produced from the filing of the complaint or denunciation. Otherwise, the computation of the prescription continue from the filing of the complaint or denunciation.

v. The age of the victim may be vital to face criminal proceedings for an offense against sexual freedom. As is known, the crimes committed against children under thirteen years have a greater criminal reproach, hence its importance. Sometimes it is difficult to determine the age of the child, either by language problems, homelessness, slurred speech, lack of identity documents, etc ... In such cases, allowing the law are evidence of a medical nature, as orthopantomography<sup>254</sup> radiation-proof-teeth, or other similar tests, such as bone radiographs.

vi. Corresponds to the Central Registry of Criminals, which depends on the General Administrative Record to support judicial activities, the Ministry of Justice. Especially it is noted in that Register a footnote should be added if the victim is a minor, for crimes against sexual freedom and indemnity.

This information is often transmitted to other countries, not only in the field of the European Arrest Warrant and Surrender<sup>255</sup>, but administrative constraints of a more bureaucratic, more routine. For example, in a simple request for certification of criminal, much in demand in other countries before signing an employment contract, you must go to

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<sup>252</sup> After the reform through the Organic Law 5/2010, of June 22.

<sup>253</sup> In that case the maximum would be two months of suspension of prescription.

<sup>254</sup> Test October 20, 2009 (Case "Alakrana").

<sup>255</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

the Central Registry of Criminals, so that they connect with the country foreign internal criminal policy data. Anyway, note that this information although exhaustive to the absolute limits, are usually very respectful of Law 15/1999 of 15 December on Personal Data Protection.

### 3.2 Complaint Procedure

**vii.** The initiation of criminal proceedings can occur in two distinct forms, of its own motion or at the request of a party. Regarding the initiation request, this can be accomplished through a complaint or grievance. The complainant may be a person other than the victim, if it is minor, being a relative or guardian who will perform his complaint. As can be seen, unlike earlier times, there is no anonymous accusations. It should be stressed that the complaint is not, in itself, a way to initiate the procedure, since it corresponds to the appropriate authority (judge or magistrate, prosecutor or member of the Security Forces of the State) this job opening. On the other hand, we must also influence the informal complaint, which may be in writing, in form approved or not, through the internet or even orally.

Unlike the complaint, if the complaint is itself a form to initiate the process. That is why it is also required a certain formality, is in writing, and even necessary to have the same legal services attorney and solicitor. In the complaint, the complainant must identify the child's guardian, on your behalf, if that is the victim, the defendant and the court to which it is directed, and the classification of the facts provided, noting the day, hour, month and scene allegedly criminal. The same is also necessary to make the request for proposals investigative body and firm lawyer and attorney, which ratified and the contents thereof. It should be noted especially the difference between the indictments and called the lawsuit itself, because the former is itself a further procedural stage where there is no longer a defendant only true, but at least formally charged, and is sought against him the penalty is deemed appropriate by the prosecution.

**viii.** In accordance with Articles 6 and following of the Code of Civil Procedure<sup>256</sup>, governing supplementary representation in all types of processes, parents or guardians are placed in the role of the child victim, as much as possible, especially at the time of

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<sup>256</sup> Law 1/2000, of January 7, on Civil Procedure.

presentation of the complaint, and above all, of the complaint. Once late in the process, there is, of course, replace the declaration of the child by the parent, both during training and in plenary. However, as we said, the child may be protected by physical barriers separating with their abuser, or state in different places or at different times<sup>257</sup>. As for the advertising of the process, the restriction is directed especially to prevent undue stress on the child's name in the media, in cases generally very rugged and media. While in camera is a great achievement in this field, the use of the name, location and other details of the child by the media is looking to avoid that usually remains common practice in our country.

#### 4 COMPLEMENTARY MEASURES

i. In Spain, first analyzing the education sector, the level of teaching in both childhood and primary education, there is not in the curriculum any subject related to child sexual abuse. So teachers can only access training of these characteristics through extension courses are made occasionally in some University, but certainly not the general tone of Spanish universities offer courses of this nature. As for access to an official position of the education system, understood as public school worker in the service of the State Administration, it is not necessary to pass any subject or course about prevention or treatment of child sexual abuse.

The same applies to other professionals working with children, as may be paediatricians or psychologists that are not included in their university training any subject that involved, at least directly, child or teenagers abuse. In a similar situation are social workers.

Although, outside academic level, State Administration, and especially of the Autonomous Communities, offers specific courses on the subject matter, but bear in mind that since it is not a required course for access to these professions, carry them out depend on the goodwill of the various aforementioned professionals, if deemed necessary for proper formation.

A good example of a specific course may be the Aspacia program, elaborated in Valladolid in March 2011, which is aimed primarily at police, health centre workers and social service professionals, to acquire detection mechanisms at risk to enable a quick and effective intervention in cases of child sexual abuse. But the realization of this type of course varies from one to another professional area, and from one to another Autonomous Community, making it impossible to provide a standard overview state-wide.

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<sup>257</sup> Vid. As regards the principle of "best interests of the child".

As for state action, basically boils down to awareness campaigns, attempts to promote coordinated activities across territories that have competencies in protection, and fund specific training programs and co-financed by the Autonomous Communities in some cases treatment centres that exist in different areas.

ii. The answer is No. There is not any subject that addresses the issue of sexual abuse in any of the stages of education: Nursery, primary, secondary or high school. As I mentioned earlier about how professional training, there are specific days in which they are involved children, parents, or both together, to explain about the subject matter, , but given the small number of these campaigns we can qualify as exceptional..

To highlight a program that has been implemented in Spain and has been successful, include those carried out by Save the Children Spain, through the funding of the initiative of the European Commission: Daphne.

One of the coordinators of Save the Children Spain, Elena Hayward, said that in Spain is increasing awareness of the problem of child sexual abuse, including making some prevention programs. Although there are few programs that have been evaluated, Hayward presented two that have actually been tested, and I present below as an example of what might be the next steps in the future in Spain:

1 - Project Name: Prevention of child sexual abuse<sup>258</sup>:

Presenter: Amaia del Campo, a psychologist and professor at the University of Salamanca.

The project was evaluated before and after the sessions on track of 8 months and a final meeting with teachers acting as observers.

As for the final results, the experimental group reported a significant increase in both knowledge and skills. 97% of children felt safer, and 95% were satisfied with the program.

Teachers reported that they had not appreciated disciplinary problems or fear among children. They found that 71% helped their fellows more and 86% felt more confident.

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<sup>258</sup> The project developed information guides for parents and educators and lesson plans for kindergarten, primary and secondary. Participants included 82 children, 254 mothers and 26 fathers. First were divided the children into an experimental group and two control groups. The experimental group had two training sessions on child sexual abuse. One of the control groups was given a sex education program, and the other group was not intervention of any kind. 70% of parents took part in the program, a higher proportion than expected, this shows that parents are not a barrier to educating children on these issues.

98% of parents felt they knew more about the subject of sexual abuse.

2 - Name of Project: 'Ep! Badis No! '(Hey, be careful!)<sup>259</sup>:

Presenters: José Manuel Alonso Rodriguez Varea and Josep Roca, both from the University of Barcelona.

The feedback of the training sessions for professionals shows that 92% of participants found them interesting and 83% original and innovative; 89% rate the speakers of the courses as good or very good, and a similar proportion would recommend the course to other colleagues. 77% of participants wanted to keep in touch with the program.

Besides, children also increased their knowledge of child sexual abuse. It is studying the possibility of extending the project to other cities.

iii. Preventive intervention, meaning the established formal and evenly to all the Spanish territory, doesn't exist. Since no criminal record can be ordered when you apply for a job, as in other countries, as the background for these crimes are not public and cannot be communicated.

No track people who have committed such offenses. There are only a few treatment programs in prisons, linked to rehabilitation. Any other preventive intervention does not exist in Spain.

But we cannot forget the penalties that may be imposed on perpetrators found guilty of child sexual abuse, , Including probation, imposed separately or in addition to a prison sentence, such penalty fulfils a special preventive function, beyond the punitive function accompanying penalties as definition<sup>260</sup>

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<sup>259</sup> This is an European Community Programme for the Prevention of child sexual abuse and other mistreatment.

This pilot project aims to help children and adults to develop simple protective measures to prevent child sexual abuse. It is implemented through a local team, which provides support to families and involves teachers and health professionals, and institutions and local authorities including the police. The Centre for Research on Health and Welfare of Catalonia has carried out an assessment, based on questionnaires completed by all participating groups.

<sup>260</sup> As set out in Article 106.1 of the Spanish Penal Code, probation consist of the submission of the sentenced to judicial review through compliance one or more of the following measures The obligation to be always reachable by electronic devices, the regular reporting in place that the judge or court set, to communicate, each change of place of residence or place of job. And the prohibition of approaching the victim, or contact her. Also, as a general preventive measures, not focused on recidivism against the same victim, include the prohibition of performing certain activities that may offer or provide the opportunity to commit crimes of a

Taking into account that a large number of perpetrators are minors, there are some re-education programs for young sex offenders in reformatories and juvenile centres. Specifically a program developed by Save The Children, funded by the Daphne Programme of European Union Commission, supported by the Ministry of Labour and Social Affairs of Spain, But again only offers challenges and expectations, there is nothing regulated state-wide, so it all depends on the goodwill of the directors of these centres, and the specific programs developed on regional level.

As measure of not recidivism in Spain, as in other Latin American countries and Russia,

It is applied voluntary chemical castration for recidivist rapists or sexual abusers. This measure is not a punishment, but remains fully available to the defendant to undergo this treatment, this needs to be assessed by experts as it is specially designed for those inmates who cannot suppress their sexual instincts, and they decide to end with it *motu proprio*.

**iv.** In this sense, Spain scrupulously complies guidelines Lanzarote Convention, which in Article 13, provides an example of the child support mechanisms, the establishing a phone line.

There is a phone number in each Autonomous Community which depends of the Ministry of Social Welfare.

Almost all regional governments manage this service through the foundation ANAR (Assistance to Children and Adolescents at Risk). This line has been operating since 1994, and covers not only cases of child sexual abuse, but includes all types of abuse or neglect that may suffer the minors, since often a situation of sexual threat to the child brings with other crimes. ANAR Public Foundation is under the Ministry of Education, Social Policy and Sport, which checks its annual accounts for the purpose of complete transparency in management.

This foundation also operates, in addition to the whole Spanish State, in other countries, mainly in Latin America, made through telephone supporting at number 900 20 20 10, a helpdesk quick, direct and confidential for child or teenager who requests it. This line

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similar nature. Required to participate in training programs, labour, cultural, sexual education or similar obligation and/or to follow a medical control treatment.



operates 24 hours a day, 365 days a year. There is also the e-mail ANAR that serves the same purpose, but the increased workload for the foundation is still, by far, the phone calls.

The phone ANAR Aid Child and Adolescent Risk recorded 195,547 calls in 2011, 20 percent more than last year. Of these, 32 percent had to do with a child-related violence in all its forms: neglect, sexual abuse, and bullying or gender violence, among others.

Regarding the *modus operandi* of this service, we can say that the main objective of Phone ANAR is to provide children and teens a safe and confidential space, where they feel heard and respected, and where they can freely express what happens to try to find alternatives together with them.

To ensure that the child is helped with the utmost professionalism is essential that all psychologists, counsellors, both recruited as volunteers and university interns go through a process of theoretical and practical training that prepares them for the attention of ANAR Phone. The training course is taught by psychologists, lawyers and social workers, from a multidisciplinary approach. The 34-hour theoretical course is complemented by the practice of co-listening, which is that the volunteer sees and hears how an experienced counsellor psychologist handles calls from children and adolescents to later start guide with supervision, so as to ensure proper care. (See footnote 2 for course content).

Sometimes children and young people need to have several calls before your problem. Therapeutic skills of the psychologists' team are essential to detect conditions that are hidden, giving children and adolescents' security to face their fears.

When is required a specialized intervention comes into operation the social department and/or the legal department:

### **Social Department**

There are certain situations in which the solution of the problem of the child needs to activate the network resources within their municipality, autonomy or anywhere in Spain.

Depending on the need raised, it initiates contact with Social Services, Child Protection, Health Centres, First Reception Centres, other NGOs, etc.

### **Legal Department**

It advises on the laws and the rights of children and adolescents, adapting to the language and understanding of the child. When an adult is willing to help the child, you will explain the legal steps to follow.

When is necessary, working in close cooperation with the competent authorities as Juvenile Prosecutor, Police and Civil Guard.

However this unit throughout the Spanish territory has recently lost, while in 20 European Union countries have 116111 awarded to the same entity to provide telephone support to minors.

Three Autonomous Communities independently managed it: Castilla-La Mancha, Valencia and the Basque Country. "It is incomprehensible. Meaning is lost harmonize this issue, declared of social interest," said Benjamin Ballesteros, director Anar Foundation Programs. In the Valencian Community will serve the young in need through a call center) managed by the GCS company that "manages only linked with the social lines, such as the Elderly or the Woman one" as said a spokesman for the Valencian Community. In the Basque Country will Agintzari who attend children, a cooperative made up of specialists in education, psychology, education and social work. And in Castilla-La Mancha, the phone will continue managed (so from 1999) by Aserco, an association of graduates in Law and Psychology.

From Anar emphasize that this supposes a problem: "The track is broken" when a young use the service from an online community where Anar manages, and then calls from one of the other regions. "We have a database of all calls. Way, who come to us again not have to repeat their story," explains Luis Estebarez, Director of the Anar Phone.

The other two communities that offer an alternative line are Andalusia through 900 851 818, seeks to provide a rapid and effective response to child abuse and child sexual abuse. This phone does not operate 24 hours a day and has shorter hours, especially on weekends and holidays.

The Community of Madrid has adopted the operational in most of the European Union, the aforementioned 116,111, offering a service similar to this.

v. In the field of protection, we highlight the Plan III against Sexual Exploitation of Children and Adolescents 2010-2013. This Plan was prepared by the Department of Families and Children, dependent of Ministry of Health, Social Policy and Equality.

This project specifies a number of operational measures in the field of knowledge of reality, social awareness and protection for victims. . Each of these proposals is responsible, or to a government department, secretary general, directorate or other administrative levels, or the Autonomous Communities. It is also noted as a partner, normally, NGOs, the Observer for Children, or any other administrative body.

Because of the broad content of the Plan, the large number of proposals and the difference between them make impossible a summary of them in a workspace is as small as this report<sup>261</sup>.

vi. Again no state programs, responsibility for childcare correspond to the Autonomous Communities that are responsible for deciding whether create treatment centres for victims.

Some AACC have them, some do not. Just as some ACs train professionals to work in these centers, and others not.

As for the funding of these centres or recovery programs, some Communities allocate funds directly, while others make collaboration agreements with various NGOs or associations, which co-finance these projects.

At this point, although it not directs or monitors these plans, the State does support these resources through complementary funding. The Ministry of Health co-funds through Income Tax funds and so-called "pilots" of NGOs and associations, several centres state wide, because if not, funded only by the AACC would not hold.

However there is a serious problem: most of the centres are dependent or part of the system of child protection that acts only with children who are declared in distress or danger. What does this mean about the abuse? These centres can only serve child victims of domestic abuse who lack of family support, or other abuse situations that put them in a situation of helplessness requiring institutions to assume their care. But if the child is abused by her teacher, for example, believes that parents are their guardians and managers charge to seek therapeutic help for the child, neither the state nor the Communities give it, and must pay the child's own family. In this second case, although most centres performed an assessment or survey of the psychological state of the victim not carried out nor finance their treatment. To do it, victims have to go to any of the private centres that exist in Spain.

About the psychological damage that may have been victims and the resulting trauma that causes sexual problems in the future, must stress that in public centres the victim assistance

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<sup>261</sup> For checking the Plan III against Sexual Exploitation of Children and Adolescents 2010-2013, can do so through the PDF document contained in the following link:  
<<http://www.observatoriodelainfancia.msps.es/productos/docs/IIIPESIDefinitivo.pdf>>

is provided by professional staff, who have the proper training and certainly will be aware of this problem.

And finally, logically calls the consent of the victim for attending to these centres, not the State by itself, but the Autonomous Communities in the exercise of its powers.

### III NATIONAL POLICY REGARDING CHILDREN

i. In 1990 Spain joined in the protection of children's rights through the ratification of the United Nations Convention on the Rights of the Child (UNC). Although this supposed an important legal reform, it is necessary to recall what UNICEF highlights: "Rules by themselves are not enough and, to the initial emphasis on the legal and normative reforms to adapt the national legislation to the UNC, must be added changes in other significant areas of the public action to strengthen and to improve the effective exercise of the rights throughout the public policies"<sup>262</sup>

In this area, Spain has made some progress, as evidenced by the last report of the Committee on the Rights of the Child, reflected in the UNICEF's official page<sup>263</sup>, although there is still a need for further improvements. This involves that there is some concern about children's rights, as revealed by National Strategic Children and Young People's Plans.

Well, only a National Strategic Children and Young People's Plan, the one on 2006-2009, which is characterised by its imprecise and abstract objectives. The Ministry of the Presidency planned to approve another one for 2011-2014, but finally it didn't take place. Also, the electronic newspaper Europa Press<sup>264</sup> published the news referred to the request made by the Congress for a National Strategic Children and Young People's Plan 2012-2015, from which it can be drawn that, though there is some concern in advocacy for children, there is not a serious political discussion regarding the children in Spain.

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<sup>262</sup> "Las políticas públicas y la infancia en España: evolución, impactos y percepciones" UNICEF Spain, February 2011.

<sup>263</sup> UNICEF's official page, available in: [http://www.UNICEF.es/sites/www.UNICEF.es/files/Informe\\_Infancia\\_Espana\\_2010\\_UNICEF.pdf](http://www.UNICEF.es/sites/www.UNICEF.es/files/Informe_Infancia_Espana_2010_UNICEF.pdf)

<sup>264</sup> News published in Europapress, available in: <http://www.europapress.es/epsocial/politica-social/noticia-congreso-insta-gobierno-aprobar-nuevo-plan-infancia-adolescencia-2015-colaboracion-ccaa-20120508171056.html>

ii. Although in Spain there is not a serious political discussion regarding children, there have been several actions to improve public awareness about child abuse and sexual exploitation, which have been developed mainly by organisations as: UNICEF, Platform of Childhood Organisations, Spanish Red Cross, Federation of Associations to Prevent Child Abuse, etc.

Furthermore, the State integrates in its Administration a range of bodies aimed at this kind of actions too, as: the general Direction of Families and Childhood (Ministry of Labour and Social affairs), Ministry of Education and Science, Ministry of Health and Consumption, Institute of Youth, Spanish Federation of Municipalities and Provinces, Childhood Observatory (Ministry of Health, Social affairs and Equality), etc.

Some of the activities taking place have been these:

-UNICEF produces reports about the impact of the economic crisis on children<sup>265</sup>; about their rights<sup>266</sup>; it also carries out campaigns, as the current collection of signatures for the sake of childhood as the poorest group<sup>267</sup>; it also organizes lectures and conferences to involve society in this subject.

-Platform of Childhood: it develops campaigns for the raise of awareness about children's rights and its infringement; it promotes the dialogue with children and youth, allowing their involvement on social networks, dedicated to the knowledge of their own rights; it promotes the comprehension of the National Strategic Children and Young People's Plans<sup>268</sup>.

-Spanish Red Cross: it works with children in social difficulties, promoting their improvement and adaptation with programs such as "Hospitalized childhood", support classes, online bulletins on social vulnerability, etc.

-Federation of Associations to Prevent Child Abuse: it develops campaigns about prevention and awareness related with childhood and adolescence; it disseminates

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<sup>265</sup> "Childhood in Spain. The impact of the economic crisis", available in: [https://www.UNICEF.es/sites/www.UNICEF.es/files/Infancia\\_2012\\_2013\\_final.pdf](https://www.UNICEF.es/sites/www.UNICEF.es/files/Infancia_2012_2013_final.pdf)

<sup>266</sup> "Childhood in Spain. 20 years from the United Nations Convention on the Rights of the Child: remaining challenges" available in: [http://www.UNICEF.es/sites/www.UNICEF.es/files/Informe\\_Infancia\\_Espana\\_2010\\_UNICEF.pdf](http://www.UNICEF.es/sites/www.UNICEF.es/files/Informe_Infancia_Espana_2010_UNICEF.pdf)

<sup>267</sup> Collection of signs in: <http://www.UNICEF.es/cooperacion-internacional/actua/movilizar-por-la-infancia>

<sup>268</sup> Platform of Childhood's official page, available in: [plataformadeinfancia.org](http://plataformadeinfancia.org)

information related to with child abuse for its detection; it elaborates reports related to child abuse too; it promotes the achievement of policies directed to the improvement of the childhood and youth<sup>269</sup>. The Federation of Associations to Prevent Child Abuse is an organisation that launches a huge awareness labour. An important part of it is taken up by social networks, which allow a big data dissemination<sup>270</sup>.

In the State, for its part, it is noteworthy the Childhood Observatory, which is assigned to the Ministry of Health, Social Services and Equality. It has the burden of fostering the public policies related to childhood and youth, and it conducts researches to prevent problems in this field, it publishes studies and issues periodical reports to improve the rights of childhood and adolescents. All this is developed through the preparation of electronic documents which promotes information about the situation of the childhood and youth, such as “Childhood in figures”, “Edition of the Universal Day of Children Rights 2011”, “National Strategic Children and Young People’s Plans. Adapted version for boys and girls”, etc<sup>271</sup>

The job of the State in this area focuses primarily on the formulation of public policies of action, its debate and its reflection on the national or autonomic rules<sup>272</sup>, as well as in the collaboration with organisations dedicated to subjects such as ill-treatment and sexual abuse of children. In addition, the relevance of Plan of Action to Combat the Sexual Exploitation of Children and Adolescents, directed to the public awareness about this kind of crimes and to form professionals in this area (prominent is the III Plan of Action to Combat the Sexual Exploitation of Children and Adolescents<sup>273</sup>).

**iii.** News coverage has not been so wide as (although there are not statistics) a consultation study realized by Save the Children to boys and girls during the II Plan of Action against the Children Sexual Exploitation revealed that a 50% of respondents didn’t have clear ideas

<sup>269</sup> Federation of Associations to Prevent Child Abuse official page, available in: [http://www.fapmi.es/imagenes/secciones1/ExeSum\\_Programs\\_2011\\_DEF.pdf](http://www.fapmi.es/imagenes/secciones1/ExeSum_Programs_2011_DEF.pdf)

<sup>270</sup> An example is data dissemination through the social network Facebook, available in: [https://www.facebook.com/pages/Todos-contra-el-Maltrato-Infantil/144332125593990?v=wall&ref=ts\\_y](https://www.facebook.com/pages/Todos-contra-el-Maltrato-Infantil/144332125593990?v=wall&ref=ts_y)  
<http://todoscontraelmaltratoinfantil.blogspot.com.es/>

<sup>271</sup> Informative materials about childhood and Routh, available in: <http://www.observatoriodelainfancia.msssi.gob.es/productos/home.htm>

<sup>272</sup> As an example to this point, the official web of “Childhood Platform” offers a series of news concerning politic activities related to the improvement of the situation of childhood and youth.

<sup>273</sup> Action taken on the implementation of the III Plan of Actino to combat the Sexual Exploitation of Children and Adolescents, available in page 31 of: <http://www.observatoriodelainfancia.msssi.gob.es/productos/pdf/IIIPESIDefinitivo.pdf>

about such important terms as “human rights, childhood rights, freedom”, etc; and a 70% had heard a bit or nothing about sexual abuse and sexual exploitation of children.

The next table elaborated by the Childhood Observatory shows the evolution of the facts known by the different crimes linked to the sexual exploitation:

Kind of fact (AC3)	2006	2007	2008	2009
Child Pornography	392	677	1197	1134
Illegal adoption	4	11	14	5
Corruption of minors/disabled	201	255	272	264
Total	597	543	1483	1403

iv. There are some campaigns that the State develops in collaboration with organisations dedicated to the ill-treatment and sexual abuse of children. So, in collaboration with Federation of Associations to Prevent Child Abuse, the State has conducted a campaign called “My well-being is your responsibility. Don’t forget it”, which is formed by several state campaigns throughout some years:

-I and II State Campaign for the Prevention of Child Ill-treatment (2008): “It hurts, doesn’t it? If it hurts, denounce it”, in collaboration with the Ministry of Education, Social Policy and Sports.<sup>274</sup>

-III State Campaign for the Prevention of Child Ill-treatment (2009): “All Against the child ill-treatment”, in collaboration with the Ministry of Health and Social Policy:<sup>275</sup>

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<sup>274</sup> Second State Campaign for the Prevention of Child Ill-treatment (2008), available in: [http://www.fapmi.es/imagenes/subsecciones1/MBETR\\_2008\\_04\\_Memoria.pdf](http://www.fapmi.es/imagenes/subsecciones1/MBETR_2008_04_Memoria.pdf). This campaign was conducted specially by the image and the slogan, for a month. On the report made by the Federation of Associations to Prevent Child Abuse about this campaign contains some testimonies of children who have been victims of abuse and ill-treatment, and the importance of the media.

<sup>275</sup> Third State Campaign for the Prevention of Child Ill-Treatment (2009), available in:

-IV State Campaign for the Prevention of Child Ill-treatment (2010): “20 proposals for the improvement of the attention to childhood and adolescence in Spain“, in collaboration with the Ministry of Health and Social Policy.<sup>276</sup>

-V State Campaign for the Prevention of Child Ill-Treatment (2011): “You are not alone, don’t be afraid. You are not alone, break the silence”, with the support of the Ministry of Health, Social Policy and Equality.<sup>277</sup>

v. In the Spanish law making process it is very important the superior interests of the child. Based on that is the system of children and youth protection. In this way, it is relevant the Organic Law 1/1996, 15<sup>th</sup> January, about Minor Legal Protection, which modified partially the Civil Code and the Civil Procedure Law, with which the minor is more protected due to the automatic assumption of the safeguarding of the minor when he/she is on a situation of very little protection of children by the public competent entity.

This is a result of the pressure exerted by public institutions dedicated to the minor’s protection, as the Ombudsman, the State Attorney and several associations dealing with minors, to bring in line the legislation to the reality of the child as an active subject, participative and creative, with capacity to modify their own personal and social environment; participate in the research and satisfaction of their needs and in the satisfaction of the needs of others.

Due to this, the expression “to be heart if he/she had enough judgement” has been generalised in all that cases which affect the minor in our legal system. This involves that the minor’s needs appear as the centre of rights and protection that the Law recognises them.

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[http://www.fapmi.es/imagenes/subsecciones1/MBETR\\_2009\\_00\\_a\\_Documento%20de%20Presentaci%C3%B3n.pdf](http://www.fapmi.es/imagenes/subsecciones1/MBETR_2009_00_a_Documento%20de%20Presentaci%C3%B3n.pdf). This campaign was brought about through the web and media. It is a “reminder-campaign”, without a fixed period, in which the e-mail was essential, together with media.

<sup>276</sup> Fourth State Campaign for the Prevention of Child Ill-Treatment (2010): it is directed mainly to incise on the politic area. In the X State Congress of Abuse Childhood, this generated a report whose title is the same of this fourth campaign. This way intended to give the advices that the Federation of Associations to Prevent Child Abuse with regard to the National Strategic Children and Young People’s Plan, to the Plan of Action to Combat the Sexual Exploitation of Children and Adolescents and the Plan of Action to Combat the Sexual Exploitation of Children and Adolescents (processed in 2011).

<sup>277</sup> Fifth State Campaign for the Prevention of Child Ill-Treatment (2011) available in: [http://www.fapmi.es/imagenes/subsecciones1/MBETR\\_2011\\_RESilenc\\_Email\\_01\\_17-06-11\\_CAS.pdf](http://www.fapmi.es/imagenes/subsecciones1/MBETR_2011_RESilenc_Email_01_17-06-11_CAS.pdf). This campaign wants to insist on the public opinion, to eradicate the permissibility of child ill-treatment, and to encourage its victims to denunciate it. Again, its diffusion uses Internet as the main tool, through social networks and e-mail.



The general principal is that any performance will take into account the minor interest as the guiding principle, avoiding interfering in their school, social or working life. So, the well-being and the security of the minor is searched in any moment. The agility and immediacy is needed in every process which affects to a minor to avoid him/her the unnecessary prejudices due to the rigidity of the process. The intervention of the Public prosecutor (who is the minor and unable representative) has also been enforced<sup>278</sup>.

In this enforcement the superior interest of the minor, the Plan of Action to Combat the Sexual Exploitation of Children and Adolescents (2010-2013) has an important place, because it protects the four general principles of the Convention on the Rights of the Child: the survival and development of children, the equality, the participation in the issues which affect them and the superior interest of the minor. For this, many times it is necessary to protect their identity and privacy<sup>279</sup>.

It is very important to meet what the Criminal Code (modified recently by the Organic Law 5/2010, 22th June, which increases the minor's protection at improving the sexual assaults and abuse committed against children under thirteen) says to understand the child situation in the Spanish legislative process. For this, it adds a new chapter: "Abuses and sexual assaults to children under thirteen years old", alongside an increase of the penalties laid down in these cases.

Therefore, the protection sphere is extended when categorized the *Child grooming* and the penalties of certain crimes against minors have been enforced<sup>280</sup>.

vi. The main Spanish NGO which work in the subject of children rights are: UNICEF, Save the Children, Cáritas and the Federation of Associations to Prevent Child Abuse. Its implication in the legislative process is not regulated by the State. So its only possible way of participating is doing an encouragement about the subject, denounce any aspect of childhood which is yet needed of legislation, in such a way that any parliamentary group presents a non legal proposition to the outset of Congress by the legal way<sup>281</sup>.

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<sup>278</sup> Organic Law 1/1996, 15<sup>th</sup> January, of Minor Legal Protection which modifies partially the Civil Code and the Civil Procedure Law.

<sup>279</sup> Plan of Action to Combat the Sexual Exploitation of Children and Adolescents (2010-2013).

<sup>280</sup> This is developed in "Substantive Criminal Law" on this report.

<sup>281</sup> An example of this process, available in:  
[http://www.savethechildren.es/det\\_notyprensa.php?id=438&seccion=Not](http://www.savethechildren.es/det_notyprensa.php?id=438&seccion=Not)

## IV OTHER

## V CONCLUSION

The communities susceptible of being discriminated in Spain in education, employment and accommodation matters are: the Roma community, the immigrants, the homosexuals and transsexuals, people with disabilities and women.

There is not a concrete term of 'family' in our legal system. From the rights and obligations of the holders of guardianship and the children submitted to it, which are the same for adopted children, children born within a matrimony or outside it, we can infer that family is a social group in which each member from its status, cooperate within its possibilities to fulfill its family's duties, in a framework of respectful coexistence, being the children obliged to obey their parents and being the parents obliged to feed and educate their children.

Heterosexual and homosexual matrimony in Spain involves equal rights and obligations between the married couple such as the duty of respect and mutual help, the duty of living together and the duty of being faithful. The average age to contract a marriage has noticeably postponed, being of 30 years old for men, 32 for women and 16 for Roma people. The number of divorces continues increasing.

In Spain the child is conceived as a human being whose autonomy and dignity have to be preserved to guarantee its comprehensive development. Child is considered a holder of rights and legal guarantees. Spain is committed with the prevention of children's mistreatment and an evidence of that is its ratification of the United Nations International Convention on the Rights of the Child in 1990. The principle of the superior interest of the child means that we have to preserve its well-being and security, speeding the process up so that the child does not suffer more than necessary. Secondary victimization is decreasing avoiding the physical coincidence between the victim and its aggressor.

The Lanzarote Convention or the Council of Europe Convention for the Protection of Children against the Sexual Abuse and Sexual Exploitation became into force in Spain the 1st December 2010. It influenced the reform of our Criminal Code in 2010, introducing new preventive measures against children's sexual crimes and new crimes such as grooming and the sexual abuse and sexual assault against children under 13.

The History of Spain is based on a succession of invasions of foreign populations with authoritarian governments that submitted native population until the promulgation of the

Spanish Constitution in 1978 that establishes a stable democratic government with intense international relations.

Fundamental rights are established among the articles 14-29 of our Constitution. Although there is not an express declaration of human rights in our legal system, the Universal Declaration on Human Rights and other international treaties signed by Spain have supra-legal force.

The protection procedure of fundamental rights is special, preferential and summary. It starts in ordinary via, being accepted the extraordinary protection appeal to the Constitutional Court –guarantor organ of the Constitution- when the ordinary via is over. The Supreme Court is the superior legal organ in every jurisdictional order.

The minimum age of criminal responsibility is stated in 14. The judicial condemns against minors offenders have recently grown up but they are non-habitual offenders.

The Attorneys General Office deals with the cases where the child is victim or aggressor. The process generally starts at the instance of the party and the Attorneys General Office starts the process in case the sexual crimes are against children under 13. If the victim is a minor, the report will have to be presented by its parents or its tutor. If the age of the minor is unknown, it can be ascertained by a medical proof. In these processes advertising is restricted, although sometimes the media does not respect these restrictions damaging the victim. The prescription period is taken into consideration from 18 years old onwards with the possibility of suspension for a short period of time.

The person in charge of the Central Register of Criminals and Rebels depends on Ministry of Justice and it contains the certificates of criminal records that are personal. There is a general respect to the rule 15/1999 of protection of personal data. The sexual crimes against minors are stated among the articles 182-189 of the Criminal Code: sexual abuse and sexual aggression against children under 13, grooming against children under 13, prostitution and corruption of minors under 18 and pornography against minors under 18.

The sanctions punishing these crimes are: prison from 1 to 15 years, fine from 1 to 2 years and supervised freedom. The number of judicial sentences has increased but the number of sexual crimes against minors has not decreased. The recidivism is not very high, around 11%, despite of Media has created the perception of a high rate of recidivism in these crimes. There is a worrying lack of proportionality between these crimes and their sanction, because the attack against children's sexual freedom and sexual indemnity is put on the same

level to the attack against children's life, essential legal good so that the rest of legal goods the law protects can exist. The supervised freedom fulfils a preventive function of recidivism of the condemned by sexual crimes and it is implemented once prison has finished. The chemical castration for recidivist rapists is voluntary. The deprivation of guardianship is implemented if the sexual crime against the minor has happened within the family.

The complementary measures undertaken are: campaigns to raise public awareness, reports about children's mistreatment and proposals of improvement, action policies and voluntary monographic trainings of professionals.

There is a free telephone number to assist children in the whole national territory managed by Fundación ANAR from 1994 against children's mistreatment and negligence depending on Ministry of Education. It is operative 24 hours 365 days a year and the team consisting of psychologists, lawyers and social workers is in charge of listening to minors' victims of mistreatment or negligence and providing them free social and legal assistance.

The III Plan against Children and Teenagers' Sexual Exploitation (PESIA) implemented during 2010-2013 from the General Direction of Families and Equality depending on the Ministry of Health, is responsible for the knowledge of the reality, for rendering protection to the victims and for raising public awareness, including proposals for improvement from the NGOs participating.

The autonomous regions have assumed the competence on childhood, so they are responsible for the creation, direction and supervision of centres of victims' assistance and the running of the training programs addressed to professionals that are not working in the whole national territory. The State co-finances these centres that can only accommodate children declared in risk or neglect situation, that is to say, in case the crime occurs within the family. The rest of children's victims of sexual violence crimes whose parents support them have to pay for the treatments costs of private centres.

Nowadays, in the national policies there is a kind of concern about children's rights that is reflected in the Strategic National Plans about Childhood and Adolescence (PENIA) for 2006-2009. So far there is just one plan with imprecise and abstract objectives and there is not a real discussion on childhood in Spain. Moreover, the information cover is limited and Spanish population does not have the concepts of human rights, childhood, children's sexual abuse and sexual exploitation very clear.

There are lots of NGOs in Spain that are coping with public awareness actions about children's mistreatment and children's sexual exploitation -UNICEF, POI, Cruz Roja, FAPMI-ECPAT Spain, Fundación Alia2, etc.- and organs from the Central Government – Ministry of Education and Ministry of Health, Youth Institute, Childhood's Observatory, General Direction of Families and Equality, etc. The main NGOs in Spain are UNICEF, Save the Children, Cáritas and FAPMI, that nevertheless have a limited participation in the legislative procedure, as it is not regulated by the State and as it is limited to the attraction of the parliamentary groups to a concrete aspect about childhood so that they start the legislative procedure to reform specific issues without going beyond.

**Recommended measures to be undertaken:**

- Integrating the communities which can be discriminated in society, facilitating their access to education, accommodation and labour market in equal opportunities as the rest of the population.
- Spreading awareness campaigns on child's violence to all the inhabitants of the national territory, involving them according to their occupation and making especial emphasis in youth sector.
- Innovating in the field of sanctions and other measures against children's sexual violence and the ensurance of their implementation to increase their dissuasive effectiveness and reduce crime.
- Imposing more proportional sanctions with respect to children's sexual freedom and indemnity and children's lives.
- Establishing a more clear demarcation of ranges of age in sexual crimes against minors, distinguishing among the crimes against minors under 18 and the crimes against people over 18.
- Speeding the criminal process up to avoid the secondary victimization, that is to say, the victim suffers more than necessary to clarify the facts and pass a sentence.
- Stating an effective equality among the kinds of victims that can receive a free or co-financed treatment in public centers runned by the autonomous governments.
- Regulating and extending the NGOs participation in the Spanish legal procedure, as they have reports on reality, professionals with expertise on childhood and a more direct contact with population.
- Encouraging States to listen, support and link people working in favour of children's rights in the entire world, so that exchanging different knowledge and resources, we fight against this kind of criminality with a bigger efficiency and scope, because children's mistreatment is an international problem with an international solution.

- Creating and spreading a compulsory national training program about children caring made by an independent multidisciplinary team addressed to professionals who work in contact with children, to guarantee the well-treatment and their ordinary development.
- Establishing 18 years old as the unitarian limit of over age, to extend the number of minors protected by sexual crimes such as child pornography and States promoting the creation of an International Code of Best Practices that can benefit the international community.
- Including the children's violence issue within de political and media discussion.
- Investing more efficiently in education, particularly in human rights and children's rights awareness, because the more educated population especially in values, rights and duties, the more progress and the less problems in society.
- Implementing more legal research groups in universities connecting them to international children and youth parliaments and real parliaments.



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**National Researchers**

Märta Ahlén

Isabelle Hörnfeldt

Camilla Lyrsell

Anna Olsson

Cecilia Rosberg Gustavsson

Tahmina Sahibli

Ellinore Wallström

**Academic Advisor**

Amanda Bertilsdotter Nilsson, Lawyer, ECPAT Sverige

**National Coordinator**

Josefine Petersen

## I INTRODUCTION

### 1 GENERAL

i. The question of whether national discrimination exists or not is quite complicated to answer. When searching through information on the subject, i.e. reports, studies, research reviews from Governmental committees, the Equality Ombudsman (DO)<sup>282</sup> and social authorities such as The National Board of Health and Welfare,<sup>283</sup> a *general* societal problem can be recognized to exist in Sweden *where unfavorable treatment is pursued on all discrimination grounds*.

For example, and to begin with, in light of the National Board of Health and Welfare's publication "*Unequal conditions for health and care - Equality Perspective on Health Care*",<sup>284</sup> the answer to the question of the existence of national discrimination is "yes".<sup>285</sup> The report focused on conditions within the healthcare sector, providing descriptions on the discrimination situation for groups based on age, gender, disability, education, social status, country of birth, religion and sexual orientation. The investigator concluded, based on interviews with representatives of patient organizations, results of national patient surveys, and the 2011 issues of the Equality Ombudsman (DO), *that there is evidence that discrimination is not unusual*.<sup>286</sup>

In *The Inquiry on Health, care and structural discrimination*<sup>287</sup> it was stated that it is when investigating the patients' experiences of treatment in the health care sector that not infrequently discriminating behavior emerges in its "hidden shape". "Hidden" in the sense the discriminating treatment is inexplicit, indirect or incidental – due to being considered

<sup>282</sup> The Equality Ombudsman. <http://www.do.se/> (Retrieved 2012-09-25). SFS 2008:568 *the law on the Equality Ombudsman*, Stockholm, the Department of Justice.

<sup>283</sup> The National Board of Health Care. <http://www.socialstyrelsen.se/english>. This is the National Board of Healthcare. 2012. <http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/18611/2012-2-21.pdf> (Retrieved 2012-09-25).

<sup>284</sup> The National Board of Healthcare. *Ojämlika villkor för hälsa och vård – Jämlikhetsperspektiv på hälso- och sjukvården* [Unequal conditions for health and care - Equality Perspective on Health Care]. Stockholm. 2011. <http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/18546/2011-12-30.pdf> (Retrieved 2012-09-25).

<sup>285</sup> The publication originated in a Governmental assignment to provide a description of the current equality situation in the health care sector with regards to groups of age, sex, disability, education, social status, country of birth, religious affiliation and sexual orientation, cit. p. 20.

<sup>286</sup> cit. p. 16

<sup>287</sup> Swedish Government Official Reports. SOU 2006:78. *Hälsa, vård och strukturell diskriminering*. Stockholm, Ministry of Employment, 2006

“normal” or “pursuant to standard” in certain social structures or specific institutional contexts. The inquiry exemplified how this hidden discrimination manifested itself in the daily care routines by asking: “how are healthcare resources distributed among different patients? Who is chatted with and how? Who is greeted with a smile? Who asks you if you need something to eat or drink? Who is bypassed in the care queue because their names are difficult to pronounce? Who is allowed to receive visits from family and friends?”<sup>288</sup>

An additional sector of society which has been admitted to inspection under a critical microscope in search of prevailing discrimination tendencies – more especially on ethnic and religious grounds – is the judiciary. The sector-oriented investigation “*Is justice fair? Ten perspectives on discrimination against ethnic and religious minorities in the justice system*”<sup>289</sup> exemplified and commented discriminatory ills and malfunctions in all parts of the legal chain – that is from police surveillance operations, the reporting of the offences to the police and the criminal investigation, to witness situations, the drafting of judgments and choices of verdicts and sanctions. In the report professor Christian Diesen refers to the conclusions from a foregoing research project, “Equality before the law”,<sup>290</sup> which admitted unequal treatment due to a variety of misconceptions of characteristics following class, age, gender, sex, disability, sexual orientation, political views and country of birth, and e.g. supported that unfavorable treatment of persons of foreign origin occurs in the judiciary.<sup>291</sup> For example in the case of an assault – a crime whose necessary prerequisites is that the threat was made “in a manner likely to cause serious fear to the threatened” – it has been found to be easier for the police, prosecutors and courts to understand that the person threatened in fact was scared, and that the threatening evoked such “serious fear” when the threat has been uttered by a foreigner.<sup>292</sup>

The structural discrimination has yet again, in another seven selected sectors of society, been subjected to further focus and review by *the Investigation on structural discrimination*, which was commissioned in 2003 to compile, analyze, and supplement already available knowledge and

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<sup>288</sup> Cit. p. 115

<sup>289</sup> SOU 2006:30. Utredningen om makt, integration och strukturell diskriminering. *Är rättvisan rättvis? Tio perspektiv på diskriminering av etniska och religiösa minoriteter inom rättssystemet: rapport*. [Is justice fair? Ten perspectives on discrimination against ethnic and religious minorities in the justice system]. Stockholm: Fritze.

<sup>290</sup> Diesen, C, Lernestedt, C, Lindholm, T. & Pettersson, T. *Likhet inför lagen*. Stockholm, Natur och Kultur. 2005

<sup>291</sup> SOU 2006:30 p. 183

<sup>292</sup> Cit. p. 191 f.

research regarding the existence of discrimination based mainly on ethnic and religious affiliation.<sup>293</sup> In 2005, the investigation reported their conclusions in the Inquiry "*The blue-yellow glasshouse – structural discrimination in Sweden*".<sup>294</sup> The Inquiry conclusions<sup>295</sup> were confirmed by *the Investigation on Power, integration and structural discrimination*,<sup>296</sup> which was also mandated<sup>297</sup> to identify and map the root causes of institutional discrimination based on ethnic and religious affiliation.

Taken together the mentioned publications indicate a paradigm shift where the discrimination phenomenon is focused upon as *institutional*, and it is found that the combating actions, accordingly, ought to be designed to change prevailing discriminatory *structures*, not the deviant, individual behavior patterns of a few "racist bad apples".<sup>298</sup> In general the mentioned investigations acknowledge that *the Swedish society is far from a fair one*, in which deplorable, isolated expressions of discrimination only on an exceptional basis might occur at the individual level (individual discrimination). On the contrary, the discrimination of today in Sweden is *systematic*, a result of societal institutions' routine enforcement of practices, attitudes, norms and traditions which has become "normalized" and amount to discriminatory expressions at each perfunctory application of rules onto anyone who was not a template for the standard's establishment.

ii. Initially it can be said that no universal consensus reigns on the term "family". The term is also lacking a formal definition in Sweden, although a number of family law terms naturally have been defined. Regarding the terms mother and father, e.g., the Children and

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<sup>293</sup> Committee directive 2003:118. *Strukturell diskriminering på grund av etnisk eller religiös tillhörighet*. [Structural discrimination on grounds of ethnic or religious affiliation]. Stockholm, Ministry of Justice.

<sup>294</sup> SOU 2005:56. Utredningen om strukturell diskriminering, *Det blågula glasbuset – strukturell diskriminering i Sverige...* [The blue-yellow glasshouse – structural discrimination in Sweden]. Stockholm: Fritze.

<sup>295</sup> See the summary section, p. 41 ff.

<sup>296</sup> SOU 2005:41, 2005:69, 2005:112, 2006:21 and 2006:30. Utredningen om Makt, integration och strukturell diskriminering. *Bortom Vi och Dom - Teoretiska reflektioner om makt, integration och strukturell diskriminering*. [Beyond Us and Them - Theoretical reflections on power, integration and structural discrimination]. *Sverige inifrån - Röster om etnisk diskriminering*. [Sweden from within - Voices of ethnic discrimination]. *Demokrati på svenska? Om strukturell diskriminering och politiskt deltagande*. [Democracy in Swedish? About structural discrimination and political participation]. *Mediernas vi och dom - Mediernas betydelse för den strukturella diskrimineringen*. [Media's us and them – media's relevance to structural discrimination]. *Är rättvisan rättvis? Tio perspektiv på diskriminering av etniska och religiösa minoriteter inom rättssystemet*. [Is justice fair? Ten perspectives on discrimination against ethnic and religious minorities in the justice system]. Stockholm, Ministry of Employment.

<sup>297</sup> By a Governmental ruling on April 22nd 2004.

<sup>298</sup> SOU 2005:56 p. 380 ff.

Parents Code<sup>299</sup> provides articles whose prerequisites, if met, constitute legal mother- or fatherhood. For example, following only from the marital bond between a man and a woman giving birth, the husband is presumed to be the child's *father*, and receives legal status – is legally *defined* – as the child's parent at the time of birth.<sup>300</sup>

To get hold of the family concept, once and for all, one could approach the phenomenon from a different angle – that is by recognising that, depending on the biological, ancestral, or couple relation between individuals (the dispositive fact) there comes in addition a *specific treatment* (the legal consequence) that indicates “familiarity”. The coming of certain rights and obligations (legal consequences) thus would be the receipt or the confirmation of *family* bonds. Rather than frame different human group configurations, and from existing kinship, ties of blood or togetherness try to seek where the boundaries for the “real family” lies, one should thus look at the specific treatment that may come with these various bands. Professor J. Schiratzki accurately states that: “in relationships family-related rights and obligations [the legal consequences that the authors understand as indications of a family] often enter gradually”.<sup>301</sup> The full legal effect of the couple’s relationships’ enters, in its turn, like a staircase: first with the establishment of the relationship whilst living apart, then the transition to cohabitation, the birth of children and last with marriage. An example can be given of gay partners, for whom registered Partnership was instituted in 1994. With this, the *same* legal effects – in the sense of right to marital property etc. – were obtained as in marriage – and consequently this couple constellation would not, when it comes to family related (or family indicating) rights, be regarded as less of a family than the other.

In summary, therefore, the term “family” is most easily encircled from the “family-related rights and obligations” that gradually arise as a partner relationship progresses “up the ladder”.

Regarding the “status of marriage” it can be noted that an influential value, channelled through the relevant family laws of the early 1900s,<sup>302</sup> was that *the formal marriage* would take

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<sup>299</sup> Swedish Code of Statutes. SFS 1949:381. *Föräldrabalken* [The Children and Parents Code]. Stockholm, Ministry of Justice L2.

<sup>300</sup> Cit. Chapter 1, § 1

<sup>301</sup> Schiratzki, J. *Barnrättens grunder* [The Basics on Children’s Rights]. 3<sup>rd</sup> ed. Stockholm: Studentlitteratur, 2006. p.45 ff.

<sup>302</sup> Agell, A. *Äktenskap, Samboende, Partnerskap* [Marriage Cohabitation, Partnership]. 3<sup>rd</sup> ed. Uppsala: Iustus, 2004. p. 14

priority as cohabitation form. The fixed ideological goal, that the legitimate marital relations must be safeguarded, was, for example, realized when certain marital effects (e.g. right to marital property), formerly following combinations of betrothal, marriage vows, and sexual intercourse, was abolished from the legislation in 1915 – being replaced by tort liability for the contractor who was found mainly responsible for the breaking of betrothal (The Marital Code Chapter 1, § 3).<sup>303</sup> The legislature's ideological ambition to curb illegitimate relations not only took the expression that marital effects were exclusively reserved for the regular marriage; in addition, *children* have been used as a tool for the achievement of the legislator's ambition in the sense that illegitimate children have had to bear the consequences of their frivolous parents faults by thus earning a bad legal position (denial of children's right to inheritance if born out of wedlock by divorced parents etc.).<sup>304</sup>

A paradigm shift occurred, however, as a result of the appointment of the 1969 parliamentary committee *Family law experts*<sup>305</sup>. The convening was prompted by “changing social conditions and new ethical values”, identified by the reporting cabinet minister in the bill following the legislative changes proposed by the preceding 1956 *Family Law Committee*<sup>306</sup>, and considered appropriate to result in a more radical revision of marriage laws. In the name of consistency the Minister of Justice already in the directives<sup>307</sup> to the *Family law experts* thus stated that the family and marriage law should be *neutral* to different cohabitation patterns. In other words, the legislature no longer had support to implement the earlier ideological goal to single out *one* legitimate form for human coexistence.<sup>308</sup> In the bill following the *Family law experts'* final investigation in 1972 the reporting cabinet minister stated that: "there is (...) evidence which suggests that in recent years it has become more common for men and women to start a family without getting married. The marriage rate has fallen".<sup>309</sup>

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<sup>303</sup> A. a.

<sup>304</sup> A. a. p.716. Schiratzki p.16.

<sup>305</sup> Final Investigation SOU 1972:41. Familjelagssakkunniga [Family Law experts]. *Familj och äktenskap 1* [Family and marriage 1].

<sup>306</sup> SOU 1964:34 and SOU 1964:35. Family Law Committee. *Äktenskapsrätt*. [Marriage law]. Stockholm, Ministry of Justice.

<sup>307</sup> SOU 1972:41 p. 57 ff.

<sup>308</sup> SvJT 1984 s. 728.

<sup>309</sup> Nytt Juridiskt Arkiv (NJA) II [New Legal Archive] 1973 s.114. Family Law Experts. *Familjelagstiftning*. [Family legislation].

The conditions for the formation of families and relationships have, consequently, in recent decades undergone changes. Not least this can be seen in marriage statistics in which, as already mentioned, the number of marriages "peaked" in 1966 (closer to 61,101)<sup>310</sup> but then - apart from normal fluctuations - continuously has declined<sup>311</sup> in favor of cohabitation without marriage.<sup>312</sup> The self-sufficient woman can provide a large part of the explanation: she no longer has economic reasons neither *to marry* nor to later *renounce divorce* – financially she can manage on her own.<sup>313</sup> Regarding cohabitation, it is known today to be the most common starting point on a road which, eventually, could end in children and/or marriage.<sup>314</sup>

A concrete manifestation of the described 1970s marriage law reform work, which says something about how the marriage status indeed has changed, is the liberalization of the divorce institute. An aspect of the early 1900s' safeguarding of the legitimate marriage was of course not only to create a legal culture in which marriage was favored; naturally the target was for the marriage to be lifelong and offset its dissolution through the mediation of a priest or civil mediator and, in reference to modern standards, rather orthodox prerequisites to permit divorce initiated only by *one* spouse.<sup>315</sup> One aim for the family law experts' work was therefore to liberalize the regulatory framework and, discarding the so-called principle of disunion,<sup>316</sup> create an order where a single spouse's desire for divorce came to be respected as sufficient reason to dissolve the marriage.<sup>317</sup> The dramatical decrease in

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<sup>310</sup> Statistics Sweden began to operate under the name "*Tabellverket*" 1749. Statistics on the number of marriages per year thus is available from the same year: Statistics Sweden. Demography – Population, births, deaths, immigration and emigration, married, divorced 1749 – 2011. 2012. [http://www.scb.se/Pages/TableAndChart\\_\\_\\_\\_26046.aspx](http://www.scb.se/Pages/TableAndChart____26046.aspx). For line charts in a century perspective, see [http://www.scb.se/Pages/Article\\_\\_\\_\\_333977.aspx](http://www.scb.se/Pages/Article____333977.aspx) (both retrieved 2012-10-10).

<sup>311</sup> With the exception of the "extreme year" in 1989 which registered 108,919 marriages. This followed the *änkepensionens* abolition in January 1990 after which, however, because of generous transition rules, women born in 1944 and previously was granted continuing widow's pension *on condition of marriage*.

<sup>312</sup> Agell, Anders. *Äktenskap, Samboende, Partnerskap*. p. 15

<sup>313</sup> *Nytt Juridiskt Arkiv* (NJA) II [New Legal Archive] 1973 s. 118

<sup>314</sup> Statistics Sweden. *Sambo, barn, gift, isär? Parbildning och separationer bland förstagångsföräldrar* [Partner, children, married, separated? Togetherness and separations among first-time parents]. 2012. [http://www.scb.se/statistik/\\_publikationer/BE0701\\_2012A01\\_BR\\_BE51BR1201.pdf](http://www.scb.se/statistik/_publikationer/BE0701_2012A01_BR_BE51BR1201.pdf) (Retrieved 2012-09-26)

<sup>315</sup> SvJT 1984 s. 718 f.

<sup>316</sup> *Ibidem*.

<sup>317</sup> SvJT 1984 s. 715

marriage since the peak in the 1960s has, consequently, also come with an increased propensity to divorce<sup>318</sup>

Finally, it should be said that the marriages that still come about do so at a higher average age than before: the average marital age in 2011 was 33.1 years for women and 35.6 years for men who married for the first time. This means a substantial increase in the average age since the late 1960's.<sup>319</sup>

iii. Initially something ought to be said about the interpretation of the question at hand. Regarding *the Child's status, historically and culturally*, the report authors have assumed that a transformation in family *laws* correlate to and reflects the contemporary, general *societal* progress – and the status of the child as part of this. Thus, particular reformations in family *law* – affecting or changing the child's *legal* status – have been presumed to be a gateway to the development of society and the child's *social* status.

Generally speaking - no claim to continuity and context – it is feasible to disconnect and highlight a number of fragments or moments in legal history as evidence of what has been the child's social status. The child's status has overall been dependent on the reigning religiously colored morality norms and family traditions. An image of the child's low status emerges particularly when comparing children in and of wedlock: at the time of the Reformation the subject of Government intervention, such as poor relief, often were unmarried mothers with illegitimate children and poor children without family.<sup>320</sup>

As a starting point has been chosen a time period as far back as the source material allows: Sweden in the 1500s, in the transition from Catholicism to Protestantism (The Reformation) when the Church impact on family life grew.<sup>321</sup> In the reformed Sweden the Lutheran doctrine was to be upheld by the Church through the sacred upbringing in the Lutheran

<sup>318</sup> Agell, Anders. Individ, familj, stat [Individual, family, state] *Svensk Juristtidning* [Swedish Law Journal], 69(1984): 715-739. (SvJT 1984 p. 715). Statistics Sweden. Demography – Population, births, deaths, immigration and emigration, married, divorced 1749 – 2011. 2012.  
[http://www.scb.se/Pages/TableAndChart\\_\\_\\_\\_26046.aspx](http://www.scb.se/Pages/TableAndChart____26046.aspx) (Retrieved 2012-09-26)

Statistics Sweden. Plain with multiple marriages in a lifetime. 2012.

<sup>319</sup> Statistics Sweden. Plain with multiple marriages in a lifetime. 2012.  
[http://www.scb.se/Pages/Article\\_\\_\\_\\_333977.aspx](http://www.scb.se/Pages/Article____333977.aspx) (Retrieved 2012-09-26)

<sup>320</sup> Schiratzki p. 13 f.

<sup>321</sup> Janson, S; Jernbro, C; Långberg B & The Children's Welfare Foundation. *Kroppslig bestraffning och annan kränkning av barn i Sverige – en nationell kartläggning 2011*. [Corporal punishment and other violations of children in Sweden - A national survey in 2011]. 2011. Karlstad: Karlstad University, 2011. p. 27  
[http://www.allmannabarnhuset.se/data/files/B\\_cker\\_PDF/Kroppslig\\_bestraftning\\_webb.pdf](http://www.allmannabarnhuset.se/data/files/B_cker_PDF/Kroppslig_bestraftning_webb.pdf). (Retrieved 2012-10-10)



faith, with the Bible as guiding principle.<sup>322</sup> One aspect of the Lutheran orthodoxy was the so-called Small Catechism and its House Rules, providing that power and authority in the home were centralized to the good man (*bonus pater familias*).<sup>323</sup>

A fundamental tool, available to the family man in order to uphold God's law within the household was the corporal punishment of the child (*aga*). *Aga* will henceforth be used as an example enlightening the changing societal attitudes to children's social and legal status at large, from the time mentioned to the present.

It is remarkable - and something which tells a lot about the withholding of the child's legal rights and its mere status as an object of its parents "godly upbringing" - that from Kristopher's law in the 1400s and all the way to its successor, the law of 1734, there were no statutory provisions providing a clue to *how* the punishment ought to be executed.<sup>324</sup> The act of 1734 provided only an ultimate line to the exercise of *aga*: "accidental manslaughter" (*våda dråp*) - which was punishable *by a fine*.<sup>325</sup> Due to this it would seem as if a license to, with modern terminology, child abuse was given, as long as it didn't have a lethal consequence.<sup>326</sup> We know, however, by the existence of e.g. the *Lego Charter or Servant Charter* (*Legostadga*) of 1664 and the oldest preserved *Charter for children schools* (*Skolstadga*) of the same century that *aga* was not at the mercy of complete arbitrariness and that the master/magistrate, teacher etc., did not have full discretion to physically reprimand children. Instead - if at all necessary - one should exercise a reasonable, appropriate, modest *aga*. For example, it was stipulated in the latter charter that the causing of physical damage was punishable.<sup>327</sup> To beat the child in the head, puff their cheeks, turn their noses, pinch their ears, tear or pull their hair, kick or knock them down, was completely forbidden and

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<sup>322</sup> Ibid

<sup>323</sup> Stadin, Kekke. *Stånd och Genus i stormaktstidens Sverige* [State and Gender in the Great Power period of Sweden]. Lund: Nordic Academic Press, 2004. p. 17 ff.

<sup>324</sup> Bergenlöv, Eva. *Drabbade barn: Aga och barnmisshandel i Sverige från reformationen till nutid* [Affected children: Aga and child abuse in Sweden from the Reformation to the Present]. Lund: Nordic Academic Press, 2009. p. 30

<sup>325</sup> SOU 2001:18. The Committee on Child Abuse. *Barn och misshandel - En rapport om kroppslig bestraffning och annan misshandel i Sverige vid slutet av 1900-talet* [Children and abuse - a report on corporal punishment and other ill-treatment in Sweden at the end of the 1900s]. Stockholm: Fritze p. 21 f.

<sup>326</sup> Bergenlöv p. 32 f

<sup>327</sup> Cit. p. 54

corporal punishment reserved solely for those children whose misdeeds and wrongdoings was considered an "evil outflow of the mind".<sup>328</sup>

Notably, however, is that the mentioned Lego or Servant statute was applicable to situations in which children - which were not unusual in this era – took service in *another* household; similarly the School charter regulated the situation when the *teacher* would come to *aga someone else's* child. In general, contrary to an otherwise extensive case law spoken of in so called *stads- och tänkeböcker* (urban books) during the 1500s, there is little material to interpret the *parent's* authority to *aga their own* children and what could constitute an illegitimate exercise of the parental fostering responsibility.<sup>329</sup> Examples indicating that a gradual regulation was coming about, as a result of corporal punishment increasingly being called into question can be found in the second half of the 1880s. Though jurisdiction inside the home was not established at this time either, the questioning of school *aga* by the so called elementary school inspectors yet resulted in a stipulation that corporal punishment by no means was to be distributed in anger, by reckless violence, but with "loving seriousness and with correction for the offender's age and individuality".<sup>330</sup> From the development in the early 1900s may further be mentioned that the 1920 Children in marriage Act provided in particular that "if it is needed for the raising of the child, the parents are entitled to chasten it in a way which with respect to the child's age and other factors is considered appropriate."<sup>331</sup> The case law of this era brings to discussion what was included in the "lawful parental right to chasten with the purpose of rearing the child" – but judging e.g. by two cases from the Supreme Court of Sweden in 1918 and 1922 it seems the tone still is strongly permissive since the cases end in acquitting judgments of the nurse respectively the father who "chastised" using corporal punishment.<sup>332</sup> The trend is symptomatic for most of the 1900s: changes in the Penal Code in 1957, *equating aga with assault* whilst discarding the exemption previously applied for chastening parents, and in the Elementary school charter in 1958, preceded a total prohibition.

Somewhere in the development, after having had countless of children badly fared; getting their personal and integrity claims violated, a turning point was however reached. This began

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<sup>328</sup> Cit. p. 32 f.

<sup>329</sup> Cit. p. 31

<sup>330</sup> Janson, Jernbro, Långberg s. 27 and SOU 2001:18 p. 21

<sup>331</sup> The 1920 Children in Marriage Act, quoted in SOU 2001:18 p.22

<sup>332</sup> See NJA 1918 s. 508 and NJA 1922 s. 271

with the 1966 legislative amendment whereby the Children and Parents Code provision *was deleted* which thus far had justified the corporal punishment of a child by its parent. *An explicit prohibition* of tangible reprimands was however not included in the Parental Code; *aga* was still to be equated with assault under the Criminal Code. By Governmental authority a committee was summoned in 1977 to investigate whether there should be such a prohibition of corporal punishment of children should be introduced in the Children and Parents Code.<sup>333</sup> This would in 1979 lead to Sweden, as the first country in the world, enacting a law prohibiting corporal punishment *in the home*.<sup>334</sup> To the Children and Parents Code Chapter 6, § 1 the following was added: "Children are entitled to care, security and a good upbringing. Children should be treated with respect for their person and individuality and may not be subjected to corporal punishment or other degrading treatment".<sup>335</sup>

Regarding "the general approach to children's rights issues", one of the Governmental long-term goals is to ensure full respect for human rights, including children's rights, in Sweden.<sup>336</sup> To address – or approach – this goal the Government has, for example, adopted national action plans for human rights, the last for the period 2006-2009,<sup>337</sup> in order to advise relevant activities and to coordinate and develop the same.<sup>338</sup> Work for a sequel to that is aimed to be completed this autumn.<sup>339</sup>

With specific regards to the rights of children, the general assumption is that efforts towards the realization of children's rights are "an ongoing process to improve both the law and application, where it is important that all relevant actors at national and local level are

<sup>333</sup> SOU 1978:10. The Investigation on the rights of the children. *Barnets rätt 1. Om förbud mot aga* [The Rights of the Child 1. On the prohibition of corporal punishment]. Stockholm: Fritze.

<sup>334</sup> NJA II 1979 s. 472: prop. 1978/79:67. *Förbud mot aga* [Prohibition of aga]. Stockholm, Ministry of justice.

<sup>335</sup> SOU 2001:18 p. 22

<sup>336</sup> Report S2012.007 *Sveriges femte periodiska rapport till FN:s kommitté för barnets rättigheter om barnkonventionens genomförande under 2007–2012*. [Sweden's fifth periodic report to the UN Committee on the Rights of the Child on the implementation of the Convention of the rights of the child during 2007-2012]. Stockholm, Ministry of Health and Social Affairs. p. 4.  
<http://www.regeringen.se/content/1/c6/19/67/53/ab232d0b.pdf> (retrieved 2012-10-02)

<sup>337</sup> Skrivelse [Official Letter] 2005/06:95 *En nationell handlingsplan för de mänskliga rättigheterna 2006–2009*. [A national action plan for Human Rights 2006-2009]. Stockholm, Ministry of Employment.

<sup>338</sup> As was welcomed, though the Committee noted with regret the absence of a specific national plan of action on *children*, by the Committee on the Rights of the Child, 51st session, *Consideration of reports submitted by states parties under article 44 of the Convention, concluding observations: Sweden*. (CRC/C/SWE/CO/4). 12 June 2009. p. 2. <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-SWE-CO-4.pdf> (Retrieved 2012-10-02).

<sup>339</sup> Report S2012.007 p. 4

governed by common principles".<sup>340</sup> Through the ratification of the United Nations Convention on the Rights of the Child (henceforth: the Convention) in 1990 and its Optional Protocols in 2003 and 2006 (more about the status of the Convention, as to date of ratification; status of national legislation by incorporation or realisation through transformation etc., in question iv.) the Convention is recognized as the compilation which the actions of public institutions', courts', administrative agencies', legislative bodies' and social welfare agencies' must comply with. <sup>341</sup> The Convention shall thus be obeyed in all matters affecting children and the principle of the best interest of the child must be given prominence in all activities with children.<sup>342</sup> In other words it could be said that *there is no other way to legislatively or administratively approach children's rights issues than in the manner proclaimed in the Convention*, such as this, through transformation, has been expressed in Swedish law and is construed by courts and law enforcement authorities.<sup>343</sup>

The Government has assigned a practical tool for ensuring the Convention's impact in Sweden, provided to public sector actors at national, regional and local level in their law enforcement community activities on children and youth: the Government's proposed Strategy for the Realization of the Convention on the Rights of the Child, which was approved by the Parliament in December 2010, <sup>344</sup> replacing its predecessor from 1999. The strategy, in short, constitutes a policy manifesting how to concretely approach children's rights issues, that is, in selection, by systematic legislative action, "family services" in the

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<sup>340</sup> A. a. p. 5

<sup>341</sup> It's another thing that the UN Children's Rights Committee, in its concluding observations in 2009 on Sweden's implementation of the CRC, expressed concern that the coordination and coherence of efforts on behalf of children at both central and local levels were inadequate, and that large disparities remained between municipalities, counties and regions concerning the implementation of the Convention. Committee on the rights of the Child, (CRC/C/SWE/CO/4), June 12<sup>th</sup> 2009, p. 3.

<sup>342</sup> The Committee has, furthermore, pronounced concern about the fact that the principle of the best interests of the child is not sufficiently implemented in practice, in the administrative spheres – especially in the asylum processes where the best interests of asylum-seekers and migrant children are not sufficiently taken into consideration. Cit. p. 6.

<sup>343</sup> An evaluation of the internal law's compliance with the Convention was latest executed in 2011, publicized in the Minisrty Publication Series (Ds) 2011:37, Hur svensk lagstiftning och praxis överensstämmer med rättigheterna i barnkonventionen- en kartläggning [How Swedish legislation and practice correspond with the rights in the Convention on the rights of the child-a survey]. Stockholm, Ministry of Health and Social Affairs. [Http://www.regeringen.se/content/1/c6/17/99/83/69/af5451.pdf](http://www.regeringen.se/content/1/c6/17/99/83/69/af5451.pdf) (Retrieved 2012-10-02)

<sup>344</sup> Report 2010/11:SoU3, Strategi för att stärka barnets rättigheter i Sverige [Strategy to strengthen children's rights in Sweden]. Stockholm, committee on Health and Social Affairs. [http://www.riksdagen.se/sv/Dokument-Lagar/Utskottens-dokument/Betankanden/2011Strategi-for-att-starka\\_GY01SoU3/](http://www.riksdagen.se/sv/Dokument-Lagar/Utskottens-dokument/Betankanden/2011Strategi-for-att-starka_GY01SoU3/) (Retrieved 2012-10-02). Proposition 2009/10:232 *Strategi för att stärka barnets rättigheter i Sverige* [Strategy to strengthen children's rights in Sweden]. Stockholm, Minisrty of health and Social Affairs. [Http://www.riksdagen.se/sv/Dokument-Lagar/Forslag/Propositioner-och-skrivelser/Strategi-for-att-starka-barnet\\_GX03232/?text=true](http://www.riksdagen.se/sv/Dokument-Lagar/Forslag/Propositioner-och-skrivelser/Strategi-for-att-starka-barnet_GX03232/?text=true) (Retrieved 2012-10-02)

sense of parental education and support, skill developing initiatives, evaluation of children's living conditions and follow-up activities of decisions and actions affecting children.<sup>345</sup>

For reasons of space it will not be possible to give an account of *every* mentioned way of approaching children's rights issues; the report authors therefor have focused on the Legislator in the enactment of certain laws – the *legal* approach - as well as their legally secure enforcement. As mentioned, the Convention is set to be *transformed* into Swedish national law; thus, in the following the authors will give a few examples on how the matter of ensuring the implementation of children's rights has been realized in using the Governmental "tool of law".

The authors therewith have made the assumption that the adoption of a law is not only a reflection of an "isolated" Governmental mind and the single Governmental choice of approaching children's rights, but also captures that of the society – *the societal choice of approach* – which the state by virtue of the people's foremost representative is set to realize, and which is exercised by the parliament when it passes a Governmental bill to law.

One way in which children's rights have been sought to be legally provided for is the recognition that the child must get the opportunity to be heard and express its will in, e.g., a custody investigation following the Social and Health rules.<sup>346</sup> The legislator has, furthermore, with law e.g. marked to be incumbent upon parents, social welfare committees, authorities and their employees etc. a corresponding legal responsibility to ensure children's rights by reporting suspected abusive behavior towards them.<sup>347</sup> This follows today from the Children and Parents Code Chapter 6, § 1 and the Social Services Act Chapter 14, § 1, as well as from a number of special provisions for specific sectors, such as the Health and Medical Care Act and the Education Act, which, by reference to the Social Services Act makes the latter applicable to the executives within the sectorial industry. Numerous sectors of society, public and private, thus have been submitted to a responsibility to report suspected abuse within a family that could mean that a child is mistreated.

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<sup>345</sup> Report S2012.007 p. 5

<sup>346</sup> Something which also must be ensured within the family, schools, institutions, courts and administrative bodies – and which the UN Committee on the Rights of the Child has urged Sweden to ensure, firstly by promoting and facilitating children's *participation* in all matters affecting them whilst being *respected* for their views, and secondly by making sure that adults who work with children are providing the latter the opportunities to do so, and are giving their views due weight. Committee on the Rights of the Child, (CRC/C/SWE/CO/4), 2009, p. 7.

<sup>347</sup> Janson & Jernbro p. 52

According to the UN Committee on the Rights of the Child (henceforth: the CRC) one of the areas *lacking* in formal legal protection is that of the children without a residence permit, who needs to get their right to education and health- and medical care – that is medical examination, treatment and care with complementary and alternative medicine – accurately secured by law.<sup>348</sup> The rights of children without residence permit have been extensively debated in Sweden in recent years (more to this subject under the section “other”).<sup>349</sup> In the Governmental report 2011 to the CRC it was furthermore stated that:” it is estimated that the Swedish legislation generally agrees with the CRC, *but its enforcement must be further ensured* [author’s italics].”<sup>350</sup> That being said: it is obvious that, despite a well-developed and ambitious *formal* legal protection, the rights provided by law must be afforded a legally secure practical impact – so that every child's right is catered for in each concrete situation.<sup>351</sup>

In order to answer the question of whether or not there is a national "general concern" on children's rights, once more, focus will be fixed upon the 1979 prohibition of corporal punishment (aga). The Committee on Child Abuse - a parliamentary commission with the task of describing the development of child abuse and seeking its explanations –<sup>352</sup> presented in 2001 a compilation of completed (statistical) surveys of what has been the general attitude towards corporal punishment is and since 1965<sup>353</sup>.

In summary, the Committee on Child Abuse showed a decrease in the proportion of Swedish people who kept aga as an indispensable tool in the raising of children. This is

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<sup>348</sup> Ds 2011:37 p. 20

<sup>349</sup> SOU 2007:34 and SOU 2010:5 (currently processed in the Government Offices). Utredningen om rätt till utbildning m.m. för barn som håller sig undan verkställighet av beslut om avvisning eller utvisning [The Investigation on the right to education etc. for children who withhold from enforcement of decisions to refuse entry to Sweden and expulsion]. *Skolgång för barn som skall avvisas eller utvisas* [Schooling for Children to be refused entry in Sweden or expulsion] respectively *Skolgång för alla barn* [Schooling for all children]. Stockholm: Fritze. SOU 2011:48 Utredningen om vård för papperslösa m.fl. [The study on health care for undocumented migrants et. al] *Vård efter behov och på lika villkor – en mänsklig rättighet* [Care as needed and on equal terms - a human right]. Stockholm: Fritze.

<sup>350</sup> S2012.007 p. 1

<sup>351</sup> Ds 2011:37, *Hur svensk lagstiftning och praxis överensstämmer med rättigheterna i barnkonventionen - en kartläggning* [How the Swedish legislation and practice correspond with the rights in the CRC - a survey]. Stockholm, Ministry of Health and Social Affairs. 2011. Underlining the key significance of the Convention on the Rights of the Child compliance with applicable statutory regulation; thereto identifying that the biggest challenge is to ensure that children are not attributed only a formal protection, but is guaranteed their rights *in practice*.

<sup>352</sup> Dir.1998:105 Barnmisshandel och därmed sammanhängande frågor [Child abuse and related issues]. Stockholm, Ministry of Health and Social Affairs.

<sup>353</sup> According to a Gallup poll from 1965, 53 procent of the Swedish population found that corporal punishment was an indispensable tool in child rearing, SOU 2001:18 p. 58

further supported by the national surveys of children's and parents' experiences and attitudes towards physical punishment and other degrading treatment which, on behalf of the Government, were conducted and published 2011 by the Children's welfare foundation.<sup>354</sup> On the basis of two national surveys the publication pointed out that: "The positive attitude to corporal punishment declined significantly from the mid-1960s until the mid-1990s. Since then it has fluctuated between seven and eight percent of the parents."<sup>355</sup>

The Committee against Corporal Punishment of Children (aga) also dwelt on *the children's* attitudes to aga and corporal punishment as a sanction to misconduct, defiance and disobedience. The Committee annotated the reviewed surveys<sup>356</sup> in terms of: "The reason for this strong [negative, the authors' note] attitude change of school children in the latter part of the 1990s, we certainly do not know anything. However, it is clear that children today are much more aware of their rights than before due to the education they receive in school and by voluntary organizations on the UN Convention on the Rights of the Child."<sup>357</sup> The extensive change in attitudes regarding corporal punishment is thus assigned, albeit speculative, to a similarly altered teaching agenda established in the Swedish schools, which includes children's rights – and ultimately has created a "children's concern" on their Rights *in general*. In the name of consistency, the corresponding reduction in the number of adults in support of corporal punishment must be taken as a pretext that, here too, there has been established a concern on the rights of the child *in general*.

In the Children's Welfare Foundation's publication it was also established that an increasing number of reports of suspected child abuse are received by the police today and have been so since the mid-1980s. Regarding the increase of reports in, the 1990s and, the 2000s, the National Council for Crime Prevention has, in 2000<sup>358</sup> and 2011<sup>359</sup> respectively, issued in depth studies. With the support of these the publication explains that the increasing number of complaints are due to the greater propensity of preschools', schools', social services' and

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<sup>354</sup> Janson et. al.

<sup>355</sup> Cit. p. 12

<sup>356</sup> Statistics Swedens Middle School respectively High School Survey 2000

<sup>357</sup> SOU 2001:18 p. 59

<sup>358</sup> The National Council for Crime Prevention. *Barnmisshandel - En kartläggning av polisanmäld misshandel av små barn* [Child abuse - A survey of reported assault of young children to the police]. Report 2000:15. Stockholm: National Council for Crime, 2000.

<sup>359</sup> The National Council for Crime Prevention. *Den polisanmälda barnmisshandeln – utvecklingen fram till 2009*. [Child abuse reported to the police – development until 2009]. Report 2011:16. Stockholm: The National Council for Crime Prevention, 2011.

health care institutions' to report suspected child abuse to the police, and mainly concern vulnerability and neglect at home – i.e. not physically harmful assault.<sup>360</sup> This was also the National Council for Crime Prevention's own conclusion.<sup>361</sup>

iv) The relevant legislation regarding the implementation of international treaties is the 10<sup>th</sup> Chapter of the Instrument of Government.<sup>362</sup> According to the §§ 1-4 the Swedish Government is entitled to make agreements with foreign states or international organisations – with the reservation that a parliamentary approval is needed if the agreement will require *changes* in legislation, *annulment* of law or *making* of law. Sweden is a part to the Vienna Convention and practices ratification as a method of restraint in accordance with its article 14.<sup>363</sup>

On the matter of the implementation of international treaties into national legislation Sweden conforms to a dualistic principle. Thus, the treaties must be *incorporated* (that is, when the “authentic treaty text” is stated, in national legislation, to be Swedish law and thus directly applicable) or *transformed* (that is by adapting/harmonizing legislation to meet the requirements of the treaty text) in order to be applicable by courts and authorities in the adjudication process. The latter method requires gradual and continuous adaptation of national law as Conventions need to be interpreted in the light of changing social conditions and development.

The Swedish ratification of the Convention of the Rights of the Child was dated June 1990,<sup>364</sup> without reservations, after a parliamentary decision.<sup>365</sup> The Convention and its two

<sup>360</sup> Janson, Jernbro, Långberg p. 11

<sup>361</sup> Report 2000:15 p. 49. The National Council for Crime Prevention composed the report at the request of the 2000 Committee on Child Abuse, which discuss the report results in SOU 2001:18, p. 33 ff.

<sup>362</sup> SFS 1974:152. *Regeringsformen* [The Instrument of Government]. Stockholm, Ministry of Justice.

<sup>363</sup> The 1969 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organisations. Proposition 1987/88:47 *Om godkännande av Wienkonventionen den 21 mars 1986 om traktaträtten mellan stater och internationella organisationer eller internationella organisationer emellan* [for approval of the Vienna Convention on 21 March 1986 on the Law of Treaties between States and international organizations or between international organizations]. Stockholm, Ministry of Justice.

<sup>364</sup> United Nations: United Nations Treaty Office. 2012.  
[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)  
(Retrieved 2012-09-26).

<sup>365</sup> Sweden's International agreements (SÖ) 1990:20 *Fakultativt protokoll till konventionen den 20 november 1989 (SÖ 1990:20) om barnets rättigheter om försäljning av barn, barnprostitution och barnpornografi*. Stockholm, Ministry of Foreign Affairs. Proposition. 1989/90:107 and report 1989/90:SoU28 *Om godkännande av FN-konventionen om barnets rättigheter* [on the approval of the UN Convention on the rights of the Child]. Stockholm, Ministry of Health and Social Affairs.



Optional Protocols have been transformed into Swedish law.<sup>366</sup> In Sweden, there is a current discussion on the *incorporation* of the Convention, following the CRC's exhortation. The Office of the Children's Ombudsman has in a letter to the Government (2009) urged the Government to appoint a Commission to do a broad review on whether the Swedish legislation and practice reflect the Convention's provisions and consider whether the whole of the Convention should be given legal status as law. Also the Delegation for the Protection of Human Rights in Sweden has suggested that the Government should assemble a Commission to investigate the appropriateness of incorporating more Conventions (regarding the Lanzarote Convention, see the following chapter 2) into Swedish law, including the CRC).<sup>367</sup> In October 2012 the Swedish Government has finally decided to investigate the incorporation of the Convention (more regarding this investigation in chapter III, question i)).

v) Article 27 of the directive 2011/92/EU of the European Parliament and the European Council of 13 December 2011 reads: "*Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 December 2013*". No such laws etc. have entered into force, nor has any investigatory work, foregoing law enactment, reached the public light.

## 2 THE LANZAROTE CONVENTION

i) Sweden ratified the European Convention on Human Rights 1952-02-04<sup>368</sup> and it was incorporated into Swedish law 1953-09-03.<sup>369</sup>

ii) Sweden signed the Lanzarote Convention 2007-10-25. Sweden has however not ratified the Convention yet.<sup>370</sup>

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<sup>366</sup> Rapport 2012. *Sveriges femte periodiska rapport till FN:s kommitté för barnets rättigheter om barnkonventionens genomförande under 2007–2012* [Sweden's fifth periodic report to the UN Committee on the Rights of the implementation of the CRC]. Stockholm, Ministry of Health and Social Affairs. p.6.

<sup>367</sup> SOU 2010:70. The Delegation for Human Rights in Sweden. *Ny struktur för skydd av mänskliga rättigheter* [New structure for the protection of human rights]. Stockholm: Fritze.

<sup>368</sup> <http://Conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=Swe&MA=999&SI=2&CM=3&CL=ENG>, (Retrieved 2012-09-23).

<sup>369</sup> Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.

<sup>370</sup> <http://Conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=8&DF=23/09/2012&CL=ENG>, Retrived 2012.09.23)

iii) There are plans to ratify the Lanzarote Convention in Sweden. The question of whether Sweden should ratify the Convention was examined and evaluated in a Government report<sup>371</sup> from 2010. The report concludes that Sweden should ratify the Convention and it states that to be able to reach the goals within the Convention some changes have to be made in Swedish law. These changes have to be made before a ratification of the Convention is possible.<sup>372</sup>

The report states that these changes would be presented in a Government bill in January 2012.<sup>373</sup> However the Government bill has not been fully processed. The question why Sweden so far has not ratified the Convention was discussed as late as June 2012 in a parliament discussion.<sup>374</sup> The answer from the Government was that the Government bill is still in the making. Furthermore, the Government states that the process is taking longer time due to the Government wanting to enable a good result and to make sure that Swedish law will follow the Lanzarote Convention when it has been ratified.

iv) According to the Vienna Convention on the Law of Treaties, 1969, Sweden is bound to follow the Convention after ratifying it.<sup>375</sup> According to article 27 in the Vienna Convention on the Law of Treaties, Sweden may not invoke the provisions of national law as a justification if Sweden fails to fulfill the obligations of the Convention. Sweden is also bound to interpret national law in the light of international agreements. However it takes further measures to be able to invoke the Lanzarote Convention fully into Swedish law. This measure could for example be a transformation of the Convention or an incorporation of the Convention. After such a measure the Convention would get the rank between constitutional law and national law.

## II NATIONAL LEGISLATION

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<sup>371</sup> SOU 2010:71 "Sexualbrottslagstiftningen – utvärdering och reformförslag".

<sup>372</sup> SOU 2010:71 "Sexualbrottslagstiftningen – utvärdering och reformförslag". s. 483.

<sup>373</sup> SOU 2010:71 "Sexualbrottslagstiftningen – utvärdering och reformförslag". s. 483.

<sup>374</sup> <http://www.riksdagen.se/sv/Debatter--beslut/Debatter-och-beslut-om-forslag/Arendedebatter/?did=GZ01UU17&doctype=bet>, (Retrieved 2012-08-27).

<sup>375</sup> Vienna Convention on the Law of Treaties, 1969, art 14.

## 1 GENERAL PRINCIPLES OF THE JURISDICTION

i. The Swedish system of Government is based on general elections that are held every fourth year. People have the possibility to vote on a political party to represent them in the Swedish Parliament (Riksdagen), county councils and municipalities.

The Parliament is Sweden's primary representative form and consists of 349 members. The Parliament is, since 1971, a unicameral (one-chamber) parliament. It is the Government that governs the country but it is accountable to the Parliament. The prime minister is appointed by the Parliament and he on his part is responsible of forming a Government. The Government, not the head of state (which is the monarch), is empowered under the constitution to make decisions. The Government is to implement the decisions of the Parliament and take initiatives to new laws on which the Parliament later decides.<sup>376</sup>

ii. The Swedish Constitution, the Instrument of Government, mentions human rights in its Chapter 2, § 19 which refers to the European Convention on Human Rights and Fundamental Freedoms (henceforth ECHR). The paragraph states that legislation cannot be passed if in conflict with ECHR. The Instrument of Government as we know it today was created in 1974 and ECHR was incorporated into Swedish law in 1994.<sup>377</sup> Children are mentioned as a group for example in article 5 ECHR but not in the Swedish constitution itself.

iii. There is no appointed Constitutional court. Individuals can claim their rights through direct effect. It is possible to turn to the Ombudsman for Justice (JO). The ombudsman is to ensure that official authorities follow the laws while exercising public authority.<sup>378</sup>

iv) First of all, the police conduct a preliminary investigation, which is led by a police officer or a prosecutor. The preliminary investigation may result in a prosecution and there will then be a trial at the District Court, the first instance.<sup>379</sup>

The judgment can be appealed by both parties to the Court of Appeal. In practice the Court of Appeal is the actual highest instance in many cases, but formally the Supreme Court is of

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<sup>376</sup> [http://www.sweden.se/eng/Home/Society/Government-politics/Facts/Swedish-System-of-Government/#idx\\_3](http://www.sweden.se/eng/Home/Society/Government-politics/Facts/Swedish-System-of-Government/#idx_3) 2012-08-14.

<sup>377</sup> Instrument of Government.

<sup>378</sup> <http://www.jo.se/Page.aspx?Language=en> 2012-08-14.

<sup>379</sup> <http://domstol.se/Funktioner/English/Legal-proceedings/Trials-in-criminal-cases/> (Retrieved 2012-08-15.)

highest instance. For a case to appear in the Supreme Court it must have a leave to appeal which is given if the judgment from the Supreme Court could provide a precedent.<sup>380</sup>

v. Penal Code, Chapter 1, § 6 states that for children under the age of 15 years the sanction cannot be imprisonment.<sup>381</sup>

The Swedish National Council for Crime Prevention produces the national official crime statistics. The agency has been in existence since 1974. Its statistics show that there were no children under the age of 18 sentenced to serving time in prison during 2011.<sup>382</sup>

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. In 2005 the term sexual intercourse was replaced by the term sexual activities throughout the Penal Code Chapter 6 about sexual crimes. The Government of Sweden aimed the new term to be equal to sexual intercourse but comprise much more. To be defined as a sexual act, there should be a reasonably lasting physical touching of either the other's genitals or the other's body with the perpetrators' own genitals.<sup>383</sup> However even acts, which do not include a lasting physical touching, can be comprised by the term, if the act has had a substantial sexual character and has been aimed to violate the victim's sexual integrity. Other circumstances, for example if the sexual act has occurred at a repeated number of times, should be taken into consideration.<sup>384</sup> The sexual act must have consisted in sexual intercourse or another sexual act, which with respect to the nature of the violation and other circumstances, is comparable to sexual intercourse. Crucial for comparison is the sexual nature of the violation and not the sexual act itself.<sup>385</sup>

Acts as having vaginal, oral and anal intercourse, or entering fingers, objects or a fist into a woman's genitals or a person's anus or masturbating in front of another person are within

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<sup>380</sup> <http://domstol.se/Funktioner/English/Legal-proceedings/Trials-in-criminal-cases/Appeal/> (Retrieved 2012-08-16.)

<sup>381</sup> Penal Code Chapter 1 § 6.

<sup>382</sup> <http://www.bra.se/bra/statistik/440/2011/440la-2011.html> (Retrieved 2012-08-16.)

<sup>383</sup> Swedish Official Government Reports, SOU 2010:71 p.55, Sexualbrottsutredningen, Sexualbrottslagstiftningen- utvärdering och reformförslag, [Law on Sexual offences- evaluation and a reform suggestion] Stockholm: Fritze.

<sup>384</sup> Proposition 2004/05:45. *En ny sexualbrottslagstiftning*, [A new law on sexual offences], Stockholm, Justitiedepartementet. p.32.

<sup>385</sup> SOU 2010:71 p.59 op.cit.

the concept of sexual activities. Acts with sexual character where direct contact is prevented by clothes are also comprised by the term. An example is if the perpetrator touches another person sexually or makes another person masturbate at the same time as he or she is masturbating. Even acts that do not individually reach the level of sexual activity can together, as a whole, be seen as one. What characterizes these acts is the perpetrator's use of the victim's body for sexual satisfaction.<sup>386</sup>

An example is a case from the Supreme Court of Sweden; the perpetrator had taken of the sleeping victim's underwear, touched her body and her genitals and parted her labium. The perpetrator had subsequently masturbated, standing in front of the sleeping woman.<sup>387</sup>

The term 'sexual activities' has to be applied broadly, which is the Government's purpose of changing the previous term of sexual intercourse. The broad interpretation given in the new term was considered necessary by the Government to avoid that reprehensible acts fall outside of the criminal area.<sup>388</sup> The term of sexual activities is broad enough to include the sexual activities covered by the Optional Protocol.<sup>389</sup>

ii. There is no definition of "intention" in the Swedish legislation but the development in doctrine and case law has helped clarifying the term. There are three forms of intention, which are direct intention, indirect intention and negligent intention.

Direct intention requires a purpose or a meaning with the act, for example, when the perpetrator intends to kill a certain person.<sup>390</sup> Any form of intention is acceptable for criminal liability to the extent that direct intention is not demanded.

Indirect intention is when something happens as a by product of the perpetrators act. These effects are not intended, even though the perpetrator is aware of them being sequel to his or her actions. The perpetrator might lack intention with his or her acts or intend something other than the criminal effects.<sup>391</sup>

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<sup>386</sup> SOU 2010:71 p.56 op.cit.

<sup>387</sup> Nytt Juridiskt Arkiv (NJA) 1996 p.418, [New Legal Archive]

<sup>388</sup> SOU 2010:71 p.55. op.cit.

<sup>389</sup> ECPAT Int. Global Monitoring Report on Sweden, 2006, p.18.

<sup>390</sup> Holmqvist, Lena et al. *Brottsbalken en kommentar part 1*, Nordstedts juridik, Vällingby, 2009, p.1:14,

<sup>391</sup> Holmqvist, p.1:15.

The third form of intention is negligent intention. In a case from 2004, the Supreme Court stated that negligent intention is applicable if the perpetrator has realized the risks of the effects of his or her actions and been negligent about it.<sup>392</sup>

Intention is implicit if nothing else is stated. The legislator does not repeat this criterion in every article. Instead, if negligence is sufficient for criminal liability, and intention is not required, it must be stated explicitly in the article.<sup>393</sup>

An act will be considered as a crime only if it is committed intentionally, unless otherwise is specifically provided. Has the offence been committed in self-inflicted intoxication or if the perpetrator by own fault is temporarily from his or her right mind, shall not lead on the offence not been considered as a crime.<sup>394</sup>

Intention is required in crimes concerning sexual abuse of children. But there are some crimes, where in certain respects carelessness is also sufficient for responsibility. Criminal liability will be sentenced even in cases where the perpetrator didn't realize but had reasons to assume that the victim was a minor.<sup>395</sup> The article requires somewhat high rate of carelessness. The perpetrator will not be sentenced to crime if the minor has a body development, which makes her or him seem older or if the perpetrator did not have any reason to be alert. However, if such carelessness cannot be proven, other regulations that do not have these age requirements may be applied.<sup>396</sup> This regulation should be applied with caution, which is emphasized by Council on Legislation.

An example is a case from the Sodertälje District Court where three of five perpetrators denied that they knew about the age of the minor. However, the Court found that they had reasons to assume her being under the age of 18, because she was still in high school.<sup>397</sup>

The criminal liability and the sanctions are dealt with below in h. Sanctions.

**iii.** The legal age for engaging in sexual activities is 15 years.<sup>398</sup> In cases regarding minors above that age the Penal Code chapter 6, § 5<sup>399</sup>, which regulates sexual exploitation of

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<sup>392</sup> Holmqvist, p.1:16.

<sup>393</sup> Holmqvist, p.1:12.

<sup>394</sup> SFS 1994:458. *Penal Code*, Chapter 1 §2.

<sup>395</sup> SFS 2005:90. *Penal Code*, Chapter 6, §13.

<sup>396</sup> Berggren et al. *Penal Code* (2012-07-03 Zetee) comment to chapter 6, §13

<sup>397</sup> Sodertälje District Court, TR, Case number :B 14554-11. The judicial decision was announced 2012-03-02

<sup>398</sup> SFS 2005:90 *Penal Code*, Chapter 6, §4.

<sup>399</sup> SFS 2005:90. *Penal Code*, Chapter 6, §5.

minors, is applicable. This article comprises crimes, described in Penal Code chapter 6, § 4 paragraphs one and two, i.e. rape of children, but which are less grave. As an example, the Government bill gives a sixteen year old and a fourteen year old, who have a close and good relationship with each other and participate in a mutual and voluntary sexual activity.<sup>400</sup>

An act, which is voluntary and mutual and where the child is close to the age of sexual right of self-determination, shall not be sentenced as child rape but instead as sexual exploitation of children.<sup>401</sup> There is however a special discharge rule in Penal Code chapter 6, § 14<sup>402</sup> when it is obvious that no abuse has happened.<sup>403</sup> It is applicable on cases of sexual exploitation of children in accordance with Penal Code chapter 6, § 5 and sexual abuse of children in accordance with chapter 6, § 6, paragraph 1.<sup>404</sup> The rule concerns mainly children under the age of 15 who have come far in their maturity and are closer to sexual self-determination. It applies primarily to situations where there are entirely voluntary contacts between adolescents that differ slightly in age and development.

There is a case from Svea Court of Appeal where a 27year old had had sexual intercourse with a child who would have her 15<sup>th</sup> birthday the day after. The Court decided that the perpetrator could have thought that the intercourse was voluntary even though the child said otherwise. Because of this and the child's age close to sexual self-determination the perpetrator was sentenced to eight months of prison for sexual exploitation of a child.<sup>405</sup>

**iv)** A person who has sexual intercourse with a child under the age of 15 or carries out a sexual act with a child that with regard to the nature of the violation and other circumstances are comparable to sexual intercourse, will be convicted of child rape to imprisonment for a minimum of two and a maximum of six years. The same applies to anyone who commits an act referred to against a child who has turned fifteen but not eighteen and who is a descendant of the perpetrator or under the instruction of, or has a similar relationship to the perpetrator, or for whose care or supervision the perpetrator shall be responsible because of an authority's decision.<sup>406</sup>

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<sup>400</sup> SOU 2010:71 p.69.

<sup>401</sup> Holmqvist, p.6:31.

<sup>402</sup> SFS 2009:343, *Penal Code*, Chapter 6, §14.

<sup>403</sup> Proposition. 2004/05:45 p.77.

<sup>404</sup> Proposition. 2004/05:45 p.116.

<sup>405</sup> Svea Court of Appeal, HovR case nr: B9904-11.

<sup>406</sup> SFS 2005:90, *Penal Code*, Chapter 6, §4.

Anyone who performs a sexual act other than as described above with a child under the age of 15, or with a child who has turned 15 but not 18 and with whom the perpetrator has a relationship shall be sentenced for sexual abuse of a child to imprisonment not exceeding two years.<sup>407</sup>

The articles above do not require any threat or force, i.e. these are not a prerequisite for responsibility. Regardless of anything, sexual abuse is always to be considered as a serious injury to the child's integrity. Even in the absence of any threat or force, the child can still experience the adult as threatening.<sup>408</sup>

"In Government's opinion, the abuse of power and ruthlessness, which the perpetrator makes himself or herself guilty against the child, weighs in these cases as heavy as an exercise of such violence as required under the corresponding provision of rape".<sup>409</sup>

In the Government bill states that a child can never consent to sexual activities and consequently eliminates the argumentation of the child's participation without any force.<sup>410</sup> It is not of any importance whether it is the perpetrator or the child who is the active one in the sexual act.<sup>411</sup> Sexual activity with children under the age of is always to be considered as rape, regardless of the circumstances.<sup>412</sup>

There is an exception to this rule though. If the offence is less grave and the child is almost 15 years old, the act can be sentenced as sexual exploitation. The level of maturity of the child and his or her ability to understand his or her actions is of importance in that case.<sup>413</sup> This is stated by the Supreme Court in a case where a 25 year old male had had sexual intercourse with a 13 year old female.<sup>414</sup> The intercourse was mutual and had been planned by both of them. In this case the girl's age, maturity, voluntariness and ability to understand her own actions was considered as relevant factors for the assessment of the crime. The man was therefore convicted to sexual exploitation of a child instead of rape of a child.

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<sup>407</sup> SFS 2005:90, *Penal Code*, Chapter 6, §6.

<sup>408</sup> Proposition. 2004/05:45 p.143.

<sup>409</sup> Proposition. 2004/05:45 p.69.

<sup>410</sup> Proposition. 2004/05:45 p.70.

<sup>411</sup> SOU 2010:71 p.67.

<sup>412</sup> SFS 2005:90, *Penal Code*, Chapter 6, §4.

<sup>413</sup> Berggren et al. Penal Code, (2012-07-03 Zetee) comment to chapter 6, §5.

<sup>414</sup> Nytt Juridiskt Arkiv NJA 2006 s. 79 [New Legal Archive]



Even though force and threat is not a prerequisite for criminal liability, it does have an effect on the seriousness of the crime.<sup>415</sup> See question xxi below.

v. A person who has sex with his or her own children or their descendants will be convicted of sexual intercourse with a descendant to imprisonment not exceeding two years. A person, who has sexual intercourse with a sibling, will be sentenced for sex with a sibling to imprisonment not exceeding one year. This does not apply to the person induced to the act by unlawful coercion or otherwise improperly.<sup>416</sup>

There must be a biological relationship between the parties for the provision to be applicable, i.e. the rule does not apply to adoptive and stepchildren relationships.<sup>417</sup> If the descendant is younger than 18 years, Penal Code Chapter 6, § 4 paragraph 2 is to be applied instead.<sup>418</sup>

Observe that only sexual intercourse, and no other sexual activity, is criminalized by the article. The article includes only vaginal intercourse and it is sufficient with a woman's and a man's genitals touching to be defined as intercourse.<sup>419</sup> However, sexual intercourse cannot occur between people of the same sex in accordance with the Penal Code.

For offences relating to sexual intercourse with a descendant only the older party shall be sentenced. As regards the crime intercourse with a sibling however, both parties are held responsible.<sup>420</sup> By siblings, the article refers to full siblings. It is not enough that the parties have one mutual parent.<sup>421</sup> If the parties are not aware of their relationship they are free from liability.<sup>422</sup>

vi. A job applicant shall submit extract from the criminal records registry and suspicion registry to the employer, if it concerns working in a home or accommodation for children, in accordance with the Act (2007:171) concerning control of registry of personnel in such home or accommodation that accepts children. The act applies to the persons offered

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<sup>415</sup> Holmqvist, p.6:27.

<sup>416</sup> SFS 2005:90, *Penal Code*, Chapter 6, §7.

<sup>417</sup> Proposition. 2004/05:45 p.83.

<sup>418</sup> Berggren et al. Penal Code (2012-07-03 Zeteo) comment to chapter 6, §7.

<sup>419</sup> Berggren et al. Penal Code (2012-07-03 Zeteo) comment to chapter 6, §7.

<sup>420</sup> Proposition. 2004/05:45 p.82.

<sup>421</sup> Berggren et al. Penal Code (2012-07-03 Zeteo) comment to chapter 6, §7.

<sup>422</sup> Holmqvist, p.6:38.

employments, assignments, internships and similar.<sup>423</sup> Sweden has, however, not introduced a ban on hiring someone who has been convicted of any of the offences, which has been criticized by the representatives of the Office of the Children's Ombudsman.<sup>424</sup> The legislature would not limit the employer's freedom to employ by imposing a ban of such character and motivates it as follows:

“To legislate on occupational ban would, in our opinion, not be an appropriate path to follow in the light of both the labour tradition and with regard to the possibilities of a perpetrator's rehabilitation and reintegration into society. Therefore, it is up to the employer to determine if the person concerned will be employed”.<sup>425</sup>

An employer's capacity to make a responsible decision on hiring someone convicted of sexual offences against a child was not disputed in the report.

There is a new case about a kindergarten teacher who is suspected of aggravated rape of three children and sexual abuse of one child. The teacher has been suspected in 2007 for sexual molestation but the investigation has been closed down.<sup>426</sup>

Regarding children older than 15 years, Penal Code chapter 6, § 3, about sexual exploitation of a person in a position of dependence, is applicable. The article states that a person who induces another person to undertake or endure a sexual act by seriously abusing that the person is in a position of dependence to the perpetrator shall be sentenced to imprisonment not exceeding two years. At felony, the perpetrator shall be sentenced to a minimum six months and a maximum of four years of imprisonment.<sup>427</sup> Such position of dependence can be an employment or subordination relationship or the relationship between a prison inmate and a staff person.<sup>428</sup>

Regarding children under the age of 15, the above mentioned Penal Code chapter 6, § 4, paragraph 2, is applicable. The article pays special attention to those who, because of an agency's decision, are in charge of the child's care or supervision and applies on situations

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<sup>423</sup> SOU 2010:71 p.407.

<sup>424</sup> SOU 2010:71 p.408.

<sup>425</sup> SOU 2010:71 p.409.

<sup>426</sup> TT, “Misstänkta sexbrott granskas”, [Suspected sexual offences are examined] in *Sydsvenskan*, published 2012-08-17 <http://www.sydsvenskan.se/malmo/misstankta-sexbrott-granskas/> (Retrieved 2012-09-26).

<sup>427</sup> SFS 2005:90, *Penal Code*, Chapter 6, §3.

<sup>428</sup> Proposition. 2004/05:45 p.141.

where the care has been arranged in accordance with a special legislation.<sup>429</sup> By care, the legislator intends care in accordance with Act (1990:52), with specific provisions for the care of the young and the Act (1991:1128) on compulsory psychiatric treatment.

This article is aimed at those who have care and supervisory functions at the department. Supervision means not only institutional treatment, but also various types of surveillance, i.e. also the guardians are subject to the rule. The prohibition does not apply to teachers in schools and staff in institutions where the child is ingested voluntarily.<sup>430</sup>

1<sup>st</sup> of January 2011 a new Act (2010:479) was introduced which concern control of registry of personnel performing certain support and maintenance activities for children with disabilities. It states that a person operating in accordance with Act (1993:387) concerning support and service for the disabled and carrying out activities for children must, when recruiting, inspect an extract of the criminal records registry.<sup>431</sup> The law also applies to the persons offered assignments, internships and similar. The exceptions are those who do not participate directly in the work of support and service efforts and employment of parents who carry out activities for their child.

## 2.2 Child Prostitution

**vii.** Yes, Sweden has signed and ratified the Council of Europe Convention on Action against Trafficking in Human beings.

Date of signature: 2005-05-16. Date of ratification: 2010-05-31. It entered into force: 2010-09-01.<sup>432</sup>

**viii.** Whoever enables a child under the age of 18, for payment, to undertake or endure a sexual act, shall be sentenced for purchase of a sexual act from a child to a fine or imprisonment not exceeding two years. This also applies if the payment was promised or given by someone else.<sup>433</sup>

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<sup>429</sup> Holmqvist, p.6:28.

<sup>430</sup> Holmqvist, p.6:28.

<sup>431</sup> SOU 2010:71 p.408.

<sup>432</sup> Council of Europe  
<http://Conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=Swe&MA=999&SI=2&CM=3&CL=E>  
NG. (Retrieved 2012-10-09).

<sup>433</sup> SFS 2005:90, *Penal Code*, Chapter 6, §9.

““Payment” is not restricted to money but also includes clothing, jewelry and other forms of compensation.”<sup>434</sup>

In contrast to the previous article, which was only applicable to street prostitution and similar, purchase of sexual acts that take place under conditions that are not pure prostitution conditions are now included.

The Government bill sets out several requirements that must be met for criminal liability. In conformity with the Lanzarote Convention, the promised or the given payment to the child must have been a prerequisite for the sexual act. It is not necessary, though; that the remuneration has been given out to the child, i.e. even cases where it has been given, in whole or in part, to anyone other than the child is comprised by the article.<sup>435</sup> It is also important to note that if the perpetrator had believed that the child was over the age of 18 and had no reasonable cause to suspect otherwise, § 11 about the purchase of sexual services, which does not have an age limitation, may be applied.<sup>436</sup>

We believe that the Swedish definition of “child prostitution” is compatible with the definition given in the Lanzarote Convention. All prerequisites given in article 19 (2) of the Convention are fulfilled in the Swedish legislation.

Child prostitution is a term used internationally to describe the purchase of sexual activities of children. The term is also used in this report. However, the term is not used in the Swedish legislation. The perpetrator is sentenced to purchase of a sexual act from a child instead of child prostitution. Important to note is that ECPAT Sweden does not want to use the term “child prostitution” because the term can give the expression that a child can consent to sexual exploitation and does not accurately reflect the abuse that constitutes child prostitution.<sup>437</sup>

**ix.** The crimes of trafficking, unlawful coercion and pimping are regulated in the Penal Code chapter 4, § 1a, chapter 4, § 4 and chapter 6, § 12.<sup>438</sup> The purchase of a sexual act from a child is regulated in the Penal Code chapter 6, § 9.

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<sup>434</sup> Karlén, Helena (ed.), *The Commercial sexual exploitation of children*, Jure AB, Stockholm, 2011, p. 2.

<sup>435</sup> Proposition. 2004/05:45 p.92.

<sup>436</sup> Holmqvist, p.6:43.

<sup>437</sup> ECPAT Sweden

<sup>438</sup> SOU 2010:71 p.435.

A person who, through coercion, deception, abuse of someone's plight or with other improper means recruits, transports, transfers, accommodates or receives a person so that he or she will be exploited for sexual purposes, is sentenced to trafficking and imprisonment for a minimum of two and a maximum of ten years. When the victim is under the age of 18, the perpetrator shall be sentenced for trafficking even if no improper means has been used. If an offense is less serious, the perpetrator will be sentenced to imprisonment not exceeding four years.<sup>439</sup>

A high penalty is imposed where the perpetrator has exhibited particular ruthlessness or if the child is very young.<sup>440</sup> The article includes internal trafficking as well as border crossing trafficking.<sup>441</sup>

There are cases where someone grants premises or an apartment or accepts children in their home. That person can be considered to have promoted or financially used children having occasional sexual relations for remuneration and therefore be found guilty of procuring in accordance with the Penal Code chapter 6, § 12 of. The person will be sentenced to imprisonment not exceeding four years.<sup>442</sup>

The requested promotion can be done by maintaining a brothel, assigning premises, leaving instructions on prostitutes' addresses, transport, and surveillance. Psychological influence resulting in someone starting or continuing with prostitution may also constitute promotion. The provision is also applicable to cases of seduction and coercion.

To meet the given requirements, the perpetrator must through his or her actions have enabled occasional sexual relations, i.e. intercourse or other sexual activity, for another person. It is not necessary to prove that an occasional sexual relation has actually been brought about. It is important, however, that the perpetrator has taken some of the earnings, although the requirement for neither habitualness nor profit purpose exists. Even single occasions can be considered as procuring.<sup>443</sup>

As previous said, it is a criminal act to purchase a sexual act from a child in accordance with the Penal Code chapter 6, § 9. In a recent case from the District Court of Sodertälje, five

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<sup>439</sup> SFS 2010:371, *Penal Code*, Chapter 4, §1a.

<sup>440</sup> Holmqvist, p.4:4g.

<sup>441</sup> Holmqvist, p.4:4c.

<sup>442</sup> SFS 2005:90, *Penal Code*, Chapter 6, §12.

<sup>443</sup> Berggren et al. Penal Code (2012-07-03 Zeteo) comment to chapter 6,§12.

perpetrators were sentenced to purchase of a sexual act from a minor. The minor in the case was 17 years old. Because of the minor being close to the age of 18, the Court sentenced the perpetrators to fines only.<sup>444</sup>

### 2.3 Child Pornography

x. Sweden signed the Convention on Cybercrime 2001-11-23.<sup>445</sup>

The question of whether Sweden should ratify the Convention and the additional protocol was discussed in the ministerial memorandum Ds 2005:6. It was said to be important that the Swedish penal legislation could offer good protection against the misuse of modern technology and that procedural law could give efficient opportunities to investigate crimes of IT-nature. It was also expressed to be important that Sweden work as an active part in the international cooperation on such issues concerning IT crime, as the main characteristic is that those types of crimes are generally not restricted by national borders. In the memorandum, the ministry proposed that Sweden should ratify the Cybercrime Convention and the additional protocol and that its provisions should be redrafted to Swedish legal text.<sup>446</sup>

The Ministry of Justice also suggested, in a directive in 2011, that a new examination should be done on the legislative changes that would be necessary for Sweden to meet the requirements of the Convention and the additional protocol. The new examination was said to be needed because of ongoing ratifications of other directives<sup>447</sup> and because the basis of the assessment in the previous directive, of whether Swedish law complies with the requirements drawn up in the Convention and the additional protocol, had substantially changed since 2005.<sup>448</sup> The new examination should include a review of the provisions in the Convention and protocol in order to analyze the need for Swedish constitutional amendments, proposals for change in legislation as well as suggestions on which

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<sup>444</sup> Södertälje District Court, TR, Case number :B 14554-11. The judicial decision was announced 2012-03-02

<sup>445</sup> <http://Conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG> (Retrieved 2012-08-23).

<sup>446</sup> Ds 2005:6 "Brott och brottsutredning i IT-miljö; Europarådets konvention om IT-relaterad brottslighet med tilläggsprotokoll", [*Crime and criminal investigation in the IT environment, the Council of Europe Convention on Cybercrime and its Additional Protocols*], p. 202.

<sup>447</sup> Mentions directive 2006/24/EG and the amendment of directive 2002/58/EG.

<sup>448</sup> Dir 2011:98 "Tillträde till Europarådets konvention om IT-relaterad brottslighet med tilläggsprotokoll", [*Access to the Council of Europe Convention on Cybercrime and its Additional Protocols*], p. 3-4.

reservations to certain provisions that Sweden might wish to make.<sup>449</sup> The report following the investigation on Sweden's possible ratification is scheduled to be presented no later than 2013-05-02.<sup>450</sup>

**xi.** Offences concerning child pornography are legislated in the Penal Code chapter 16, § 10 a. The definition of "picture" includes all types of art forms, i.e. also images produced with computer technology and cartoon images, and it is not required that the image depicts a specific child or that a child has modeled.<sup>451</sup>

The definition of pornographic image is the same for child pornography offences as for other crimes relating to pornography. A picture is generally considered to be pornographic under Swedish law when it depicts a sexual scene in an uncovered and challenging way, without containing any artistic or scientific values.<sup>452</sup>

In the context of child pornography, a "child" is defined as anyone under the age of 18 or a person whose pubertal development is not complete.<sup>453</sup> It is the external physical changes that occur during puberty that are intended when speaking of "pubertal development". Due to this definition, the provision means that anyone who goes through puberty late can be assessed under the concept of "child" even if he or she is 18 or older.<sup>454</sup> If the person is under the age of 18 but fully developed through puberty it may, in some cases, be required by the law that it is understandable from the pornographic image and the surrounding circumstances that the depicted person is under the age of 18, for criminal liability to be imposed on the accused.<sup>455</sup> When assessing whether the depicted person is perceived to be under the age of 18, the court can examine how the image has been marketed or what information is given through, for example, advertising text. If there is only a suspicion that the depicted person may be under the age of 18, the age requirement might not be considered to be met.<sup>456</sup>

<sup>449</sup> Dir 2011:98 "Tillträde till Europarådets konvention om IT-relaterad brottslighet med tilläggsprotokoll" p. 5-6.

<sup>450</sup> Dir 2011:98 "Tillträde till Europarådets konvention om IT-relaterad brottslighet med tilläggsprotokoll" p. 14.

<sup>451</sup> Karnov comment on Penal Code chapter 16 § 10 a, nr 741, author Göran Nilsson (2012-06).

<sup>452</sup> SOU 2007:54 "Barnet i fokus – En skärpt lagstiftning mot barnpornografi" [*Child in Focus - A stricter legislation against child pornography*], p.77 (which refers to Proposition. 1970:125, "Med förslag till ändring i tryckfrihetsförordningen m.m.", [with the proposal to amend the Freedom of the Press Act etc.] p.79 f).

<sup>453</sup> SFS 2010 :1357, *Penal Code*, Chapter 16 § 10 a.

<sup>454</sup> Karnov comment on Penal Code chapter 16 § 10 a, nr 750, author Göran Nilsson (2012-06).

<sup>455</sup> SFS 2010 :1357, *Penal Code*, Chapter 16 § 10 a.

<sup>456</sup> Karnov comment on Penal Code chapter 16 § 10 a, nr 752, author Göran Nilsson (2012-06).

Since the provision on child pornography contains a definition of the term "child", it seems the legislature did not intend to criminalize so-called "evocation pornography", referring to cases where adult models are portrayed as children or are provided with different characteristics to bring thoughts to children in a sexual context.<sup>457</sup> It is not, however, required that a child is included in material which have obvious sexual meaning, but it may be sufficient that the child is in a situation where one or more adults perform some type of sexual act. Images portraying children in a manner that alludes to sexual behavior, without having the child participating in any act, may also be subject to criminalization. As a general rule to determine the nature of materials, it is required that the image is perceived, under common values and language, to be presenting a child in a pornographic environment.<sup>458</sup>

The provision on child pornography includes involvement of any child pornographic images in all types of media. In other words, the provision is intended to cover images in printed magazines as well as those accessible on the internet and images in videos or films.<sup>459</sup>

It is worth mentioning that when Sweden ratified<sup>460</sup> the *Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, a reservation was declared to one of the articles;

### Article 2

*"For the purposes of the present Protocol:*

*(a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;*

*(b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;*

*(c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes."*

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<sup>457</sup> Karnov comment on Penal Code chapter 16 § 10 a, nr 749, author Göran Nilsson (2012-06).

<sup>458</sup> Proposition. 2009/19:70 "Barnpornografibrottet", [Child pornography offences], p. 16.

<sup>459</sup> Proposition. 2009/19:70 "Barnpornografibrottet" p. 16.

<sup>460</sup> Signed 2000-09-08, ratified 2007-01-19.

<sup>461</sup> Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (New York, 25 May 2000) Article 2.



Sweden declared that “any representation” in paragraph (c) was interpreted as “visual representation”.<sup>462</sup>

**xii.** The child pornography offences punishable under Swedish law are:

1. To depict a child in a pornographic image
2. To distribute, assign, let, display or otherwise make such an image of a child available to someone else
3. To acquire or offer to sell such an image of a child
4. To pass on contacts between buyers and sellers of such images or to take other actions aimed at promoting trade in such images, or
5. To possess such an image of a child or view such a picture that he or she has made available for him- or herself.<sup>463</sup>

If the pubertal development of the child who is illustrated has been completed, responsibility for offences mentioned above in 2-5 may only be imposed if it can be determined by the presentation of the image and circumstances surrounding the image that the person is under the age of 18.<sup>464</sup>

The intention of establishing the list above in the provision for child pornography offences was to try to criminalize all forms of acts where an image with child pornographic content is made available to anyone else and the legislator has meant the list to be interpreted only as exemplifications of criminal acts.<sup>465</sup>

The definition of "depicting" a child in a pornographic image is that such an image is produced through for example photographing, filming, artificial manufacture or through the child being used as a model for drawings. It is not necessary that the child imagined is a real person; the provision also includes fictional representations. Also manipulation of film sequences, for example, to create child pornography material through cutting and pasting such sequences, may be subject to criminal penalties.<sup>466</sup>

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<sup>462</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11c&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11c&chapter=4&lang=en#EndDec) (Retrieved 2012-10-06).

<sup>463</sup> SFS 2010 :1357, *Penal Code*, Chapter 16 § 10 a

<sup>464</sup> SFS 2010 :1357, *Penal Code*, Chapter 16 § 10 a

<sup>465</sup> Karnov comment on Penal Code chapter 16 § 10 a, nr 742, author Göran Nilsson (2012-06).

<sup>466</sup> Proposition. 2009/10:70 ”*Barnpornografibrotten*”, [*Child pornography offences*], p.17

The expression "distribution" means that an image is transmitted or made available for more than a few people. In the case of availability or brokering to a limited group of people or to a single person, the same paragraph of the list may be subject to application but then rather by the terms "assigning", "leasing" or "displaying", depending on the circumstances.<sup>467</sup> To "assign" a picture means that the picture is sold, donated or traded away. To "let" a child pornographic picture to someone else means that the image is rented out or lent without compensation. "Displaying" of an image means that someone plays a movie for someone else.<sup>468</sup> The terms mentioned in paragraph 3 of the list refers specifically to criminalization of purchasing a child pornographic image and making such an image available for sale. The purpose of this paragraph is to cover the intermediaries who can be involved at the stage of distribution and assigning of child pornographic images.<sup>469</sup>

Anyone who arranges contacts between buyers and sellers of child pornographic images or takes any other similar measures aimed at promoting trade with such images may carry criminal responsibility according to paragraph 4. Such actions can thus be criminal without the organizer directly being in contact with child pornography, if he or she intends to increase the circulation of such material. These types of acts are punishable at the level of action to facilitate transfer or acquisition. An example could be that a person provides address information between sellers and buyers of the material without there being any personal contact but it is required that the deed has sought to promote trade in child pornography and that there has been more than a single occasion of communication or transaction.<sup>470</sup>

To possess a child pornographic image (paragraph 5) means that the person has it in his or her possession without necessarily being the owner. This provision represents the lower limit of the punishable responsibility. Because it requires possession of the image, it is not illegal to simply look at the picture as someone else shows it and it is not illegal to physically hold the image as it is displayed.<sup>471</sup>

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<sup>467</sup> Proposition. 2009/10:70 "*Barnpornografibrottet*" p.17.

<sup>468</sup> Karnov comment on Penal Code chapter 16 § 10 a, nr 742, author Göran Nilsson (2012-06).

<sup>469</sup> Karnov comment on Penal Code chapter 16 § 10 a, nr 743, author Göran Nilsson (2012-06).

<sup>470</sup> Karnov comment on Penal Code chapter 16 § 10 a, nr 744, author Göran Nilsson (2012-06).

<sup>471</sup> Proposition. 2009/10:70 "*Barnpornografibrottet*", [*Child pornography offences*], p.17.

If an image has been retrieved through the use of Internet, possession of the image arises when the image is saved by transferring it to any type of storage device.<sup>472</sup>

To make a child pornographic image available for oneself means that someone has actively, paid for access to the material or otherwise, through effort, has gained access to it.<sup>473</sup>

The penalty scale of child pornography criminal offences is imprisonment of up to two years but if the offence may be regarded as less severe, the scale allows a maximum of six months in prison or imposes fines.<sup>474</sup> An example of a case where the offence may be considered as less severe is when one person at a single occasion has produced and saved a child pornographic image on his or her computer, or if, for example, a tourist is caught with such material in his or her luggage.<sup>475</sup>

Child pornography offences can also be considered to be of a more severe nature. For such offences, the penalty scale imposes imprisonment for at least six months and at the most six years. When evaluating the severity, it should especially be taken into account if the crime has been committed for financial or commercial gain, as part of business, if a particularly large number of images have been involved or if the images are of especially young children. It should also be taken into account if the offence has been a part of criminal activities on a systematic or larger scale, or if the child is exposed to violence, coercion or any form of exploitation in a particularly ruthless manner.<sup>476</sup>

An exemption from criminal liability for depiction and possession is when someone paints, draws or otherwise produces an image of a child pornographic nature through handicraft, if the image is not intended to be displayed, distributed, transferred, leased, or otherwise be made available to others. With this exception, the intention has been to refer to cases where a person uses such a method to manufacture an image of child pornographic nature and it can be assumed that the image essentially is intended for personal use. If, however, the image might be shared or otherwise put into circulation, criminal responsibility is still effective.<sup>477</sup>

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<sup>472</sup> Karnov comment on Penal Code chapter 16 § 10 a, nr 745, author Göran Nilsson (2012-06).

<sup>473</sup> Karnov comment on Penal Code chapter 16 § 10 a, nr 746, author Göran Nilsson (2012-06).

<sup>474</sup> SFS 2010 :1357, *Penal Code*, Chapter 16 § 10 a.

<sup>475</sup> Karnov comment on Penal Code chapter 16 § 10 a, nr 748, author Göran Nilsson (2012-06).

<sup>476</sup> SFS 2010 :1357, *Penal Code*, Chapter 16 § 10 a.

<sup>477</sup> Proposition. 2009/10:70 ”Barnpornografibrötet” [*Child pornography offences*], p.18.

A second exemption from the provision on child pornography is if the materials can be regarded as justified with reference to the surrounding circumstances. This is intended to exclude such possession which may be necessary for research, news dissemination and advocacy from criminal responsibility. When determining if this exemption can be applicable, it has to be assessed if the purpose of the possession may be considered justifiable, i.e., not whether the holder of the material can be regarded as excusable due to his or her profession.<sup>478</sup>

Furthermore, the legislator considers that there is no explicit exemption from the prohibition provided in cases where young people, for example two persons who are both 16 years old, depict their own legally performed sexual acts.<sup>479</sup>

As regards statutory limitation, penalties for child pornography crimes of a normal nature may not be imposed if the suspect has not been indicted or been arrested within five years from the date on which the offence was completed. For minor offences, there is a two-year limitation and ten years for crimes with aggravating nature.<sup>480</sup>

Even if the child pornography offence has been committed abroad, there is in some cases a possibility for the Swedish court to rule. According to general rules there should be some link to Sweden for Swedish jurisdiction to be applicable. Ties may exist if the offender habitually resides in Sweden or if he or she is a Swedish citizen. However, there are often restrictions in jurisdiction according to the requirement of double criminality, meaning that the offence shall be punishable in the country where the offence was committed, as well as in Sweden. In addition, there may be restrictions ruling that the penalty cannot be more severe than the most severe punishment prescribed for the same offence in the country where the crime was committed.<sup>481</sup>

There are also provisions in Swedish law (1998: 1443) stating that import of child pornographic images to and export of such images from, Sweden is illegal.<sup>482</sup>

**xiii.** Child pornography offences can be detected by the police in various ways. The police frequently receive tips from the public which are first assessed for credibility and then an

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<sup>478</sup> Proposition. 2009/10:70 "*Barnpornografibrotten*" p.18.

<sup>479</sup> Proposition. 2009/10:70 "*Barnpornografibrotten*" p.18.

<sup>480</sup> Proposition. 2009/10:70 "*Barnpornografibrotten*" p.19.

<sup>481</sup> Proposition. 2009/10:70 "*Barnpornografibrotten*", p.19.

<sup>482</sup> Act (1998:1443) on the prohibition of import and export of child pornography.

investigation may be opened regarding the materials and the circumstances surrounding the case. Every image of child pornography that the police are given knowledge of are marked with a unique code and stored in an image database. When the police review an image, attempts are made to identify the vulnerable depicted children. Occasionally, information on the origin of the image can be retrieved by analyzing the backgrounds or dialects and languages used. Criminal investigation begins when the offender or the child has been identified. Interpol is also informed. The police also work to seek out people who share child pornography material on the Internet, which often leads to international cooperation since the networks can be transnational. If the police find a webpage containing child pornography they collaborate with the internet service provider (ISP), if such an agreement exists. The ISP can then redirect the link to a blocked page. Information on the webpage found is also sent to the Finance Coalition aiming to ensure that no one can make financial purchases with the current page.<sup>483</sup>

The Swedish Financial Coalition works to complicate and prevent trade of child pornography, with the goal to stop child abuse. The coalition was established through a partnership between several Governmental institutions and partners in both the non-profit and private sectors. Ultimately, it is the police who are responsible for combating child pornography, but because economic transactions occur in this type of trade, different parties of the financial industry also become key players in the preventive work. Members of the coalition focus primarily on finding sellers of child pornographic material and then act to close the possibility for the seller to receive any payments.<sup>484</sup>

**xiv.** One of the main reasons for criminalization of child pornography is that the legislator considers there to be a substantial risk that such images might be used to encourage children to participate in sexual acts.<sup>485</sup> The criminalization is intended not only to protect the children depicted or otherwise involved in the creation of the material, but also to protect children in general. Those children who are involved in the creation, however, are exposed to a particular risk of harm to privacy and integrity and both the creation and possible circulation of the image imply a violation even if the child is normally not able to assess the

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<sup>483</sup> <http://www.polisen.se/Om-polisen/Sa-arbetar-Polisen/Olika-typer-av-brott/Brott-mot-barn/Sexuella-overgrepp-mot-barn-och-barnpornografi/> (Retrieved 2012-08-25).

<sup>484</sup> [www.finanskoalitionen.se](http://www.finanskoalitionen.se) (Retrieved 2012-09-25).

<sup>485</sup> Proposition. 2009/10:70 "Barnpornografibrottet", [Child pornography offences], p.15.

impact and meaning of his or her own participation. The violation of integrity may be considered to be continuous in the sense that every occurrence of the image implies a penalty worth violation.<sup>486</sup> However, it can be possible to produce child pornography without committing sexual assaults against children.<sup>487</sup> The criminalization of child pornography is therefore included as a provision in the Penal Code chapter concerning crimes against public order. This is done to differentiate between child pornography offences and what is regarded as “other” sexual assaults against children. For this reason, it is considered that the link to a sexual child abuse is irrelevant for the question of whether child pornography is punishable or not.<sup>488</sup>

## 2.4 Corruption of Children

**xv.** Sexual harassment is a criminal offence in the Penal Code chapter 6 on sexual offences, criminalizing acts that involve someone touching a child who is under the age of 15 or induces the child to participate in, or carry out, acts of sexual meaning. Sexual harassment also includes someone “flashing” himself or herself naked to someone else or commits any other act which is likely to violate the other person’s sexual integrity.<sup>489</sup>

To have the effect of criminal responsibility, the offence should be of unmistakable and clear sexual character, based on an adult person's assessment, and it does not matter what the child's attitude to the situation is.<sup>490</sup> As for the actual act, it is sufficient that it is typically of such nature that it constitutes a violation of the victim's sexual integrity.<sup>491</sup>

In the Governmental report of sexual offences investigation in 2010 it was not considered necessary that the offender holds a particular sexual purpose for committing an act of touching a child sexually or otherwise involving a child in a situation of sexual nature.<sup>492</sup> It was also suggested in the report that the provision on sexual harassment would cover situations when children witness sexual acts, even if such an extensive interpretation of the

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<sup>486</sup> Swedish Prosecution Authority, office of the Prosecutor-General, official letter; ”SL./. Riksåklagaren ang. barnpornografibrott”, [The Prosecutor General regarding child pornography offences] (Retrieved 2011-09-14) page 3.

<sup>487</sup> Proposition. 2009/10:70 ”Barnpornografibrottet” p.57.

<sup>488</sup> Swedish Prosecution Authority, office of the Prosecutor-General, official letter; ”SL./. Riksåklagaren ang. barnpornografibrott” (Retrieved 2011-09-14) page 3.

<sup>489</sup> SFS 2005:90, Penal Code, Chapter 6 § 10.

<sup>490</sup> Karnov comment on Penal Code chapter 6 § 10, nr 241, author Göran Nilsson (2012-06).

<sup>491</sup> Karnov comment on Penal Code chapter 6 § 10, nr 244, author Göran Nilsson (2012-06).

<sup>492</sup> SOU 2010:71 ”Sexualbrottslagstiftningen – utvärdering och reformförslag” p.383.

rule already seemed to exist according to certain practices. It was, however, justified from a principle of legality point of view that the provision should be supplemented with explicit criminalization of the offence when someone for sexual purpose induces children to witness a sexual act. The report also commented on certain requirements of the legislation, according to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. "Causing" can be constituted through offering, coercion or persuasion and the offence has to be intentional for criminal responsibility. It was considered that legislation should contain direct demands for sexual purposes, and what constitutes such objective should be settled in court. Furthermore, it was said that the interpretation of the provision should be broad and not only include situations in which the sexual desire of the offender is "teased" or satisfied.<sup>493</sup>

## 2.5 Solicitation of Children for Sexual Purposes

**xvi.** "Contact with children for sexual purpose", also called "grooming", is a punishable offence under the Penal Code chapter 6, § 10 a. It is punishable under the provision to make an agreement with a child who is under the age of 15 to meet and then take action likely to promote that such a meeting will happen, if the purpose of the agreement is to enable the crime of committing rape<sup>494</sup>, sexual exploitation<sup>495</sup>, sexual abuse<sup>496</sup>, sexual harassment<sup>497</sup> or exploitation of a child for sexual posing.<sup>498</sup>

This provision intends to criminalize contact with children when the purpose of the contact is making sexual abuse possible through a physical encounter. Such contact is in practice often initiated through the use of Internet.<sup>499</sup> To "take action" in order to make an encounter likely to happen can mean that the adult, through repeated contacts with the child, propels that the deal should be completed, that the adult gives instructions to the child concerning transport or timetables or that the adult arranges the child's transportation or accommodation.<sup>500</sup> There have to be actual actions involved which confirm that the

<sup>493</sup> SOU 2010:71 "Sexualbrottslagstiftningen – utvärdering och reformförslag" p.441-444.

<sup>494</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 4.

<sup>495</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 5.

<sup>496</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 6.

<sup>497</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 10.

<sup>498</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 8.

<sup>499</sup> Karnov comment on Penal Code chapter 6 § 10 a, nr 245, author Göran Nilsson (2012-06).

<sup>500</sup> Karnov comment on Penal Code chapter 6 § 10 a, nr 248, author Göran Nilsson (2012-06).

perpetrator stands by the arrangement to meet the child in order to enable sexual abuse.<sup>501</sup> The form of contact can be any type of sexually-oriented conversation with a child, that the child is asked to show him- or herself through a webcam or that the adult shows nudity to the child. Other types of contact can be sending pictures of sexual content to a child or that a child is induced to send such images of him- or herself. Any contact mean that the child is offered some kind of payment for sexual services or if the child through the contact be prevailed upon to perform any type of sexual activity by threats or blackmail. In the introduction of this provision, however, the Government stated in its bill that two main categories of sexual contact with children could be identified; contacts aimed at subjecting children to sexual abuse online and contacts aimed at getting children to physically meet with an adult for the enabling of sexual abuse. As regards the first category of contact types, the Government already felt that there was general protection in the Penal Code for the conduct of various elements which could occur following such purpose, but that there was a particular need to adopt legislative measures to further strengthen the protection of children from being exposed to sexual abuse at physical encounters.<sup>502</sup>

Criminal responsibility requires actual active intention to commit certain offences, which have been listed above, and there has to be an overall assessment of the purpose. The parties' relationship, age difference, the agreed meeting place and the way in which the parties have had contact are of particular importance when making the assessment.<sup>503</sup> The parties need not to actually have met for criminal liability to be imposed but it is sufficient that there is a mutual will between the parties to meet at a certain time and place.<sup>504</sup> In terms of the agreement, it may be totally informal and it does not matter which one of the parties has taken the initiative to the contact.<sup>505</sup>

The offence applies only to acts committed against children under the age of 15, i.e. the age of sexual self-determination in Sweden. However, there is no requirement that the offender should know whether the child is under the age of 15 or not; to be criminally liable it is

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<sup>501</sup> Government Offices, fact sheet of the Ministry of Justice Ju 09.02 "Kontakt med barn i sexuellt syfte", [*Adults' contacts with children for sexual purposes*], 2009.

<sup>502</sup> Proposition. 2008/09:149 "Vuxnas kontakter med barn i sexuella syften", [*Adults' contacts with children for sexual purposes*] p.16-18.

<sup>503</sup> Karnov comment on Penal Code chapter 6 § 10 a, nr 246, author Göran Nilsson (2012-06).

<sup>504</sup> Karnov comment on Penal Code chapter 6 § 10 a, nr 247, author Göran Nilsson (2012-06).

<sup>505</sup> Government Offices, fact sheet of the Ministry of Justice Ju 09.02 "Kontakt med barn i sexuellt syfte", [*Contact with children for sexual purposes*] 2009.



sufficient that the adult had reasonable grounds to believe that the age of the child was below the age provision.<sup>506</sup>

The intention when creating the provision on contact with children for sexual purpose was to discourage such contact with children which might threatened to lead to sexual abuse at a physical meeting. The provision is technology-neutral and applies to all types of contacts, both by phone or per internet or, for example, through contact which occurred in connection with recreational activities. Abuse can also be considered committed "online", and for such offences the legislator referred to already existing criminal law protection in the Penal Code. It depends on the circumstances of the case which offences occur in a particular case, in addition to the unlawful contact with the child under this provision. The circumstances may bring up offences that do not have a direct sexual orientation, such as unlawful coercion, unlawful threat, insult, harassment or defamation.<sup>507</sup>

In cases where the circumstances clearly tell that the offence has not resulted in any abuse of the child, for example if the difference in age between the parties is insignificant, it may be a case of discharge. The provision for discharge is stated, as said above, in the Penal Code chapter 6, § 14 which is also applicable in cases of sexual abuse, exploitation for sexual posturing or sexual harassment of a child. This meaning was extended when the provision on contact with children for sexual purpose was introduced in 2009.<sup>508</sup>

**xvii.** Rape<sup>509</sup>, Sexual coercion<sup>510</sup>, sexual exploitation of a person in a dependent position<sup>511</sup>, rape against a child (all of these including crime of aggravating nature),<sup>512</sup> sexual exploitation of a child,<sup>513</sup> sexual abuse against a child (including crime of aggravating nature),<sup>514</sup> exploitation of a child for sexual posing (including crime of aggravating nature),<sup>515</sup> purchase

<sup>506</sup> Government Offices, fact sheet of the Ministry of Justice Ju 09.02 "Kontakt med barn i sexuellt syfte", [*Contact with children for sexual purposes*] 2009.

<sup>507</sup> Government Offices, fact sheet of the Ministry of Justice Ju 09.02 "Kontakt med barn i sexuellt syfte", [*Contact with children for sexual purposes*], June 2009.

<sup>508</sup> Government Offices (Regeringskansliet) "Viktigare lagar och förordningar inför halvårsskiftet 2009", [*Major laws and regulations before mid-2009*] art.nr. IR 2009:008 page 9.

<sup>509</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 1.

<sup>510</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 2.

<sup>511</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 3.

<sup>512</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 4.

<sup>513</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 5.

<sup>514</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 6.

<sup>515</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 8.

of a sexual act of a child<sup>516</sup> and procuring (including crime of aggravating nature)<sup>517</sup> are criminalized at the stage of attempt, according to the Penal Code chapter 6, § 15. The provision does not include criminalization of attempts of sexual harassment.<sup>518</sup>

In addition, preparation and conspiracy to commit rape, aggravated rape, rape against children, aggravated rape against children, serious exploitation of children for sexual posing, aggravated procuring, and failure to disclose such crimes, is also criminalized according to the same provision.<sup>519</sup>

As for child pornography crimes, attempting to commit such offences are punishable at the normal degree, as well as attempts and preparations for aggravated child pornography offences.<sup>520</sup>

General provisions on attempt, preparation, conspiracy, and participation in such activities are also legislated in the Penal Code chapter 23.<sup>521</sup> For penal responsibility at the experimental stage under these provisions it is necessary that the offender has started the execution of the crime and that there has been an actual threat that the crime could be successfully carried out but could not be implemented solely because of temporary circumstances.<sup>522</sup>

## 2.6 Corporate Liability

**xviii.** Under Swedish law it is punishable to carelessly spread child pornographic images if the act was carried out for trading purposes or through business operations.<sup>523</sup>

Sweden explained in a proposition to the adoption of a framework decision on the strengthening of the European Union's common efforts to combat sexual exploitation of children and child pornography offences (2003/04), that the European Commission had stated that Sweden at the time could be regarded as one of eight Member States whose legislation contained effective legal responsibility for offences covered by the framework

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<sup>516</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 9.

<sup>517</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 12.

<sup>518</sup> SFS 2005 :90, *Penal Code*, Chapter 6 § 10.

<sup>519</sup> Proposition. 2008/09:149 "Vuxnas kontakter med barn i sexuella syften", [*Adults' contacts with children for sexual purposes*], p.14-15.

<sup>520</sup> SFS 2010 :399, *Penal Code*, Chapter 16 § 17.

<sup>521</sup> SFS 1962 :700, *Penal Code*, Chapter 23.

<sup>522</sup> SFS 1962 :700, *Penal Code*, Chapter 23 § 1.

<sup>523</sup> SFS 2010:1357, *Penal Code*, Chapter 16 § 10 a.

decision subject area. On this basis, the Government assumed that the Swedish legislation on corporate fines was considered to meet the requirements of liability and imposition of penalties for legal persons in the subject area in question.<sup>524</sup>

Legislation with general criminal liability for legal persons is provisioned in the Penal Code chapter 36. It is stated in §7 that when crimes are committed in the exercise of commercial activities, in some cases, the operator should be required to pay corporate fines. Those fines are imposed on the request of the public prosecutor and the criteria to be met are that there is stricter punishment than monetary fines prescribed and that the trader has not done what could reasonably have been expected of him in order to prevent the crime, or if the offence is committed by:

- a) A person in a leading position based on power to represent the businessman or to take decisions on his behalf, or
- b) Other person considered to have specific responsibility for the control and supervision of the company's operations.<sup>525</sup>

Criminal responsibility may thus be imposed on a legal person where he or she can be considered to have had a lack of routines, checks and procedures<sup>526</sup> and the offender should be a person who is part of the company's management or due to independent responsibility reports directly to the management<sup>527</sup> or at least a person who works as a supervisor and bears greater responsibility than for day-to-day tasks.<sup>528</sup>

As regards the assessment of the danger or damage that the criminal offence has implied, the evaluation is to be carried out objectively and as a rule, damage or danger can be assessed as more limited if the individual offender has acted intentionally or was negligent.<sup>529</sup>

In the assessment of the offence it should be taken into account to which extent the trader can be to blame for the crime and it is also relevant to assess the degree to which the trader's

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<sup>524</sup> Proposition 2003/04:12 "Sveriges antagande av rambeslut om åtgärder för att bekämpa sexuellt utnyttjande av barn och barnpornografi", [*Sweden's adoption of the Framework Decision on combating the sexual exploitation of children and child pornography*], p.38.

<sup>525</sup> SFS 2006:283, *Penal Code*, Chapter 36 § 7

<sup>526</sup> Karnov comment on Penal Code chapter 36 § 7 nr 1429, author Sven Johannisson (2012-06).

<sup>527</sup> Karnov comment on Penal Code chapter 36 § 7 nr 1431, author Sven Johannisson (2012-06).

<sup>528</sup> Karnov comment on Penal Code chapter 36 § 7 nr 1432, author Sven Johannisson (2012-06).

<sup>529</sup> Karnov comment on Penal Code chapter 36 § 9, nr 1436, author Sven Johannisson (2012-06).

obligations have been breached as well as the position of the offender within the organization and whether the crime has been accepted by the management.<sup>530</sup>

If a crime that can lead to a corporate fine has been committed by negligence and it is not likely to lead to sanctions other than fines, the case may be brought to prosecution by the public prosecutor only when it may be considered appropriate from a general point of view.<sup>531</sup> This rule means that the corporate liability is primary in relationship to individual responsibility in cases of negligence and when financial penalty can be imposed. Prosecution may be considered appropriate from a general point of view when the penal value approaches the limit of crimes which imply fines or in cases where the offences mean certain risk and special protection purposes can be considered to exist.<sup>532</sup>

**xix.** According to the Government's view, stated in the bill concerning corporate fines,<sup>533</sup> which resulted in the rule above, corporate fines should be the *primary* criminal sanction in the case of less serious crime. The provision is therefore a procedural trial rule which means that prosecutors in some situations should not prosecute an individual offender for the violation if it may lead to a case of corporate fines. For more serious offences, however, both corporate fines and individual responsibility can be demanded. The Government stated in the bill mentioned above that if the committed crime can lead to other penalties than fines, it should also be possible to direct criminal sanctions at the individual, no matter the success of the case on corporate fines. Then, it is not assumed to be a question of “less severe” crime of negligence. This view was presented with the motive that the legitimacy of the rule should not be undermined.<sup>534</sup>

## 2.7 Aggravating Circumstances

**xx.** Felony is stated in the Penal Code chapter 6, § 4, paragraph 3. If the offences are considered as grave, the perpetrator shall be convicted of aggravated rape of a child to imprisonment for a minimum of four and a maximum of ten years. In assessing whether the crime is grave, special consideration shall be taken of whether the perpetrator has used violence or threats of criminal offence or if more than one person abused the child, or

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<sup>530</sup> Karnov comment on Penal Code chapter 36 § 9, nr 1438, author Sven Johannisson (2012-06).

<sup>531</sup> SFS 2006:283, *Penal Code*, Chapter 36 § 10 a

<sup>532</sup> Proposition 2006/06:59 ”*Företagsbot*”, [*Corporal fines*] p.63.

<sup>533</sup> Proposition 2006/06:59

<sup>534</sup> Proposition 2006/06:59 p.44-46.

otherwise participated in the assault or the perpetrator with regard to the approach or the child's young age, or otherwise demonstrated particular ruthlessness or brutality.

An example is when a guardian or someone involved in the child's upbringing repeatedly has used the child sexually by abusing the child's dependency. The punishment may be more severe if the child has been harmed psychologically or physically as a result of the abuse.

There is no age limit, but the lower the age of the child, the greater the importance of assessing the penalty value. This does not mean that abuse of older children cannot be considered as grave. In these cases the personal circumstances of the child may affect the penalty value.<sup>535</sup>

What is said in chapter 6, § 4, paragraph 3, beside the threat and violence requisite, also applies when determining aggravated sexual abuse of a child in accordance with § 6, paragraph 2.

Except what is stated for each offense through Chapter 6 of the Penal Code, there are other aggravating factors listed in chapter 29, § 2.<sup>536</sup> Among these are, if the perpetrator seeks to attain more serious consequences than the crime committed and if the child had difficulty in defending him or herself. If the perpetrator abused a position or abused a special trust, if he or she by coercion, fraud, or abuse of the child's lack of understanding, dependency or young age persuaded him or her to participate in the crime, are also covered. Eventually, if the offense is part of a crime in an organized form<sup>537</sup>, systematically or if it was preceded by special planning, if the subject were to violate a person, a group because of race, color, national or ethnic origin, religious belief, sexual orientation or other similar circumstances, and if the crime alluded to harm the security and trust of a child in its relation to a related person, are mentioned.

## 2.8 Sanctions and Measures

### **xxii.** Sanctions.

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<sup>535</sup> Holmqvist, p.6:29.

<sup>536</sup> SFS 2010:370, *Penal Code*, Chapter 29, §2.

<sup>537</sup> For the definition of crime in an organized form and systematically committed crime, see Proposition 2009/10:147, *Skärpta straff för allvarliga våldsbrott m.m.*, [Stricter sentences for serious crimes of violence, etc.] Stockholm, Justitiedepartementet, p.42

- Rape of a child- Penal Code, chapter 6, § 4, paragraph 1. A minimum of two and a maximum of six years of imprisonment.
- Aggravated rape of a child- Penal Code chapter 6, § 4, paragraph 3. A minimum of four and a maximum of ten years of imprisonment.
- Sexual exploitation of a child- Penal Code chapter 6, § 5. Imprisonment not exceeding four years.
- Sexual abuse of a child- Penal Code chapter 6, § 6, paragraph 1. Imprisonment not exceeding two years.
- Aggravated sexual abuse of a child- Penal Code chapter 6, § 6, paragraph 2. A minimum of six months and a maximum of six years of imprisonment.
- Sexual intercourse with descendant- Penal Code chapter 6, § 7, paragraph 1. Imprisonment not exceeding two years.
- Sexual intercourse with sibling- Penal Code chapter 6, § 7, paragraph 2. Imprisonment not exceeding one year.
- Exploitation of children for sexual posing- Penal Code chapter 6, § 8, paragraph 1. Fines or imprisonment not exceeding two years.
- Aggravated exploitation of children for sexual posing- Penal Code chapter 6, § 8, paragraph 3. A minimum of six months and a maximum of six years of imprisonment.
- Purchase of sexual act of a child- Penal Code chapter 6, § 9, paragraph 1. Fines or imprisonment not exceeding two years.
- Human trafficking- Penal Code chapter 4, § 1a, paragraph 1. A minimum of two and a maximum of ten years of imprisonment.
- Less grave human trafficking- Penal Code chapter 4, § 1a, paragraph 3. Imprisonment not exceeding four years.
- Sexual molestation- Penal Code chapter 6, § 10, paragraph 1. Fines or imprisonment not exceeding two years.
- Procuring- Penal Code chapter 6, § 12, paragraph 1. Imprisonment not exceeding four years.
- Aggravated procuring- Penal Code chapter 6, § 12, paragraph 3. A minimum of two and a maximum of eight years of imprisonment.

#### Extradition

The provisions on extradition are regulated in Act (1957:668) on extradition for commission of a crime (Act nr 1) and the Act (1959:254) on extradition to Denmark, Finland, Iceland and Norway for commission of a crime (Act nr 2), which facilitates delivery to these countries, more than in the previous act. According to both laws extradition is excluded if the perpetrator has already been convicted of the crime in Sweden.<sup>538</sup> In case of extradition, the applicant state cannot sentence the person to death penalty.<sup>539</sup>

According to §1 of the Act nr 1, any person who is suspected, accused or convicted of a criminal offense in another state, and is staying in Sweden, may by a decision by the Government be surrendered to that state. Extradition may be granted only if the offense is equal to an offense for which under Swedish law imprisonment of one year or more is provided. When extraditing to Nordic countries, however, it is not a requirement that the offense is punishable under Swedish law.<sup>540</sup>

If the person has already been convicted in the requesting State, he or she may, according to Act nr 1, be extradited if he or she will be imprisoned or put into care in institutions for at least four months.<sup>541</sup> Extradition cannot be granted, when taking into account the person's youth, health or personal circumstances in general, the nature of the act and the foreign state's interest, it is considered incompatible with humanity demands.<sup>542</sup> It has to be taken into consideration if the person is a minor or has physical or mental health problems. The seriousness of the crime and the time since it was committed will be compared to the circumstances which prevent extradition.<sup>543</sup>

In the case of extradition to the Nordic countries, extradition may not take place if the offender can only be sentenced to a fine in the requesting state.<sup>544</sup>

Extradition will not be granted if it is a statute-barred crime according to Swedish law,<sup>545</sup> or if the person is prosecuted for any crime in Sweden, for which prison is prescribed<sup>546</sup>. The

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<sup>538</sup> Holmqvist, p.2:69.

<sup>539</sup> SFS 1975:292. *Act (1957:668) on extradition for commission of a crime*, 12§, Stockholm, Justitiedepartementet.

<sup>540</sup> Löfgren, Karnov, comment to 1§ of the Act (1957:668) on extradition for commission of a crime.

<sup>541</sup> SFS 1957:668. *Act (1957:668) on extradition for commission of a crime*, 4 §.

<sup>542</sup> SFS 1957:668. *Act (1957:668) on extradition for commission of a crime*, 8 §.

<sup>543</sup> Löfgren, Karnov, comment to 8§ of the Act (1957:668) on extradition for commission of a crime.

<sup>544</sup> *Act (1959:254) on extradition to Denmark, Finland, Iceland and Norway for commission of a crime*, 3 §, Stockholm, Justitiedepartementet.

<sup>545</sup> SFS 2003:1158. *Act (1957:668) on extradition for commission of a crime*, 10 §.

<sup>546</sup> SFS 1975:292. *Act (1957:668) on extradition for commission of a crime*, 11 §.

same applies if the preliminary investigation has already been launched in Sweden. Extradition may take place only after conditional release if the sentence has already been announced in Sweden.<sup>547</sup> According to Act nr 2, §6, extradition may not take place if the person is prosecuted for a crime which has two years of imprisonment in its range of punishment, or disposal in institutions for crimes or preliminary investigation has been launched. It is not an obstacle to extradition if the person is prosecuted in Sweden for the same crime.<sup>548</sup>

A Swedish citizen can be extradited to the Nordic countries, if that person has had his or her permanent abode in the requesting country for at least two years or if the offense is punishable, by Swedish law, by more than four years' of imprisonment.<sup>549</sup>

According to both laws, a person extradited shall not, without special permission given in § 24 or §18, be prosecuted or punished in the foreign state for any crime committed before the transfer, or except when wanted by two or more states,<sup>550</sup> be extradited to another state<sup>551</sup>. If the requesting state would violate the so called principle of specialty, it would be a crime against international law.<sup>552</sup> However, this can be set aside if the Government gives consent to it.<sup>553</sup>

Important to note is that the Act (1959:254) on extradition to Denmark, Finland, Iceland and Norway for commission of a crime is abrogated as from 2012-10-16.

**xxiii.** Sweden is one of the countries that have made progress in its legislation regarding the protection of children. However, there is still much to do in this area and we believe that the protection of children who are victims of sexual exploitation should be strengthened. CRC considers the penalties not being proportionate with the seriousness of the crimes and criticizes the financial penalties and short term of imprisonment. We, members of the national research group, agree with CRC's criticism.

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<sup>547</sup> Löfgren, Karnov, comment to the Act (1957:668) on extradition for commission of a crime, §11.

<sup>548</sup> Löfgren, Karnov, comment to the Act (1959:254) on extradition to Denmark etc. § 6.

<sup>549</sup> SFS 1964:212. *Act (1959:254) on extradition to Denmark, Finland, Iceland and Norway for commission of a crime*, § 2.

<sup>550</sup> *Act (1957:668) on extradition for commission of a crime*, §13 and *Act (1959:254) on extradition to Denmark, Finland, Iceland and Norway for commission of a crime*, § 8.

<sup>551</sup> *Act (1957:668) on extradition for commission of a crime* §12 and *Act (1959:254) on extradition to Denmark, Finland, Iceland and Norway for commission of a crime*, §7.

<sup>552</sup> Löfgren, Karnov, comment to the Act (1957:668) on extradition for commission of a crime §12.

<sup>553</sup> SFS 1981:1090. *Act (1957:668) on extradition for commission of a crime*, §24 and *Act (1959:254) on extradition to Denmark, Finland, Iceland and Norway for commission of a crime*, §18.



In conformity with CRC, we believe that a fine is not an acceptable punishment for the sexual exploitation of children and the purchase of sexual acts from a child and these crimes should not be classified as less serious sexual offences against children.<sup>554</sup> We agree with the Swedish Ombudsman for Children and find the requirement of double criminality for prosecuting a Swedish national who has purchased a sexual act from a child in another country, very unfortunate.<sup>555</sup> The requirement of double criminality, which means that a crime committed outside the Swedish territory must be criminalized in that country as well as in Sweden for the possibility of prosecuting, should be abolished, which is also emphasized by CRC. We also agree on the necessity of including sounds in the regulation of child pornography and not only pictures.

A major problem we believe exists in Sweden today is the fact that there is not a ban on hiring persons, convicted of sexual offences against children, in occupations that involve direct contact with children. While we respect the employer's freedom to employ, we think that such a ban would not mean such restrictions on that freedom as the Government claims it would. A ban would prevent these people from moving between different workplaces and continuing to work with children. This is clearly not accomplished with the obligatory register controls that exist today. We welcome, therefore, CRC's encouragement to the Swedish Government to prohibit sex offenders from working with children.<sup>556</sup>

We also find it unfortunate that the sanctions against legal persons are limited to pecuniary penalties and we agree with CRC who recommends the penalties to include criminal, civil or administrative sanctions.<sup>557</sup>

Another problem is the protection of children who are unaccompanied asylum seekers which is to be discussed in chapter IV.

**xxiv.** Liability for legal persons is settled in the Penal Code on corporate fines chapter 36, §§ 7-10a.<sup>558</sup> A trader may be sanctioned with a corporate fine if a crime has been committed in

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<sup>554</sup> Consideration of reports submitted by States parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography by the Committee on the Rights of the Child, 58<sup>th</sup> session, between 2011-09-19 and 2011-10-03 p.3, article 11(c).

<sup>555</sup> Comments of the Ombudsman for children in Sweden on Sweden's initial report on the implementation of the Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2011-02-25, p. 2.

<sup>556</sup> Committee on the Rights of the Child, op. cit. p.5, article 22 (c).

<sup>557</sup> SFS 2006:283, *Penal code*, Chapter 36 on corporal fines, §7-10a

the exercise of an economic activity.<sup>559</sup> The offense shall be considered committed if the act is related to the business where the offender is a trader or a representative or an employee of the trader.<sup>560</sup>

Corporate fines are imposed if the offense is prescribed with punishment more severe than a fine and if the trader has not done what could reasonably be required to prevent the crime or if the offense is committed by a person who has a leading position with authority to represent and make decisions on behalf of the trader or has a special oversight of the business. This does not apply if the crime was directed against the trader.<sup>561</sup> The traders have an extensive responsibility and the rules about freedom from liability should be applied restrictively.<sup>562</sup>

Corporate fines shall be set at not less than SEK 5000 and not more than SEK 10 million.<sup>563</sup> In determining the amount of the corporate fine the damage that the crime resulted in, the extent of the crime and its relation to the economic activity should be taken into consideration. Whether the trader has previously been ordered to pay corporate fines should also be taken into account.<sup>564</sup> If the company has made a profit, the value thereof shall be declared forfeited, unless this is unreasonable.<sup>565</sup>

**xxv.** Items that can reasonably be assumed to be significant for the investigation of crimes or has come to someone's possession through crimes or forfeited because of crimes may be seized. Coercive measures may be adopted only if the reasons for such action outweigh the intrusion caused to the perpetrator.<sup>566</sup>

Seizure relates only to personal property and objects that are accessible. The right to confiscation does not involve the right to search for objects but requires a search warrant, a decision about body search or similar. A prosecutor does not have the right to decide to seize objects; he can only give orders about the objects to be examined. Those that examine

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<sup>558</sup> Committee on the Rights of the Child, op. cit. p.7.

<sup>559</sup> Sweden's fifth periodic report to the UN, Committee on the Rights of a Child p.111.

<sup>560</sup> Proposition. 1985/86:23, *Om ändring i brottsbalken m. m. (företagsbot)*, [*Changes in the Penal Code etc. (corporate fine)*] p.63.

<sup>561</sup> SFS 2006:283, *Penal code*, Chapter 36 on corporal fines, §7.

<sup>562</sup> Proposition. 1985/86:23 p.66.

<sup>563</sup> SFS 2006:283. *Penal Code*, chapter 36, §8.

<sup>564</sup> SFS 2006:283, *Penal Code*, Chapter 36, §9.

<sup>565</sup> SFS 1986:1007, *Penal Code*, Chapter 36, §4.

<sup>566</sup> SFS 2008:376, *Code of Judicial procedure*, Chapter 27, § 1.

the objects determine whether they should be seized. Who the object belongs to has no impact on the confiscation, i.e. also objects not owned by the perpetrator can be seized.<sup>567</sup>

The object needs not to be invoked as evidence, but can be used as a basis for investigation or similar. When the item is not of any value or in someone's possession but is useful for the investigation, the rules about seizure do not apply.

**xxvi.** The health care, kindergartens and schools, agencies whose activities affect children and youth, as well as other agencies within the psychiatric evaluation activities, social services, and correctional care and their employees have the obligation to notify the social welfare committee when a child is exposed to violence or sexual abuse at home.<sup>568</sup> This also applies to those professionally engaged in individual activities involving children and young people or in the field of health care or social services. However they do not have to notify the police.<sup>569</sup> After the social services have investigated the circumstances, it is up to them to decide whether the event should be reported to the police or not.<sup>570</sup>

In case of suspected abuse or sexual abuse of a child, several agencies work together and carry out investigations. The social welfare committee investigates whether the child needs support and protection while the police carry out the preliminary investigation under the supervision of the prosecutor. If required, the child and adolescents psychiatry services can be connected to the case. During the preliminary investigation a special representative is appointed when the suspect is a parent or a guardian or someone who is in close relationship with the guardian. The representative's roll is to take the child's wishes into consideration and protect the child's rights during the investigation and the trial.<sup>571</sup> Under this Act a child is any person under the age of 18.

The child's best interest should be taken into account in actions concerning children.<sup>572</sup> The Social Services Committee has to make sure that children grow up in secure and good conditions and to provide support for children at risk of adverse developments.<sup>573</sup> They also have an obligation to provide the child with relevant information and identify his or her

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<sup>567</sup> Fitger et al. Code of Judicial procedure (2012-04-01, Zeteo) comment to chapter 27, §1.

<sup>568</sup> SFS 2003:407, *The Social services Act*, Chapter 14, §1, paragraph 2.

<sup>569</sup> SOU 2009:68, *Lag om stöd och skydd för barn och unga (LBU)*, [*Law on support and protection for minors and adolescents*], Stockholm:Fritze, p.123.

<sup>570</sup> SOU 2009:68 s 292.

<sup>571</sup> SOU 2009:68 p. 291.

<sup>572</sup> SFS 2001:453, *Social services Act*, Chapter 1, § 2.

<sup>573</sup> SFS 2007:1315, *Social services Act*, Chapter 5, §1.

views.<sup>574</sup> If necessary, the committee shall ensure that those who need care and are placed outside the home are received in a foster home or similar.<sup>575</sup> Before placing the child in another home, the committee has to consider the possibility of placing the child with a relative.<sup>576</sup> Without the committee's consent the child cannot be received for permanent care in a private home that does not belong to any of the parents or a guardian.<sup>577</sup>

In cases where a guardian or a child over the age of 15 does not give his or her consent to the necessary care for the child, the committee may decide on compulsory institutional care.<sup>578</sup> If in cases of physical or mental abuse, improper exploitation, neglect or any other condition in the home, there is a real risk that a young person's health or development will be damaged, a decision about the care of the person shall be made.<sup>579</sup> This is decided by the administrative court on application by the Social Services Committee.<sup>580</sup>

The Social Services Committee may decide on immediate placement of a person younger than 20 years, if it is likely that the young person needs care on the basis of this Act and the court's decision cannot be awaited with regard to the risk of the young person's health or development.<sup>581</sup> The design of the care and the place where the young person will live is determined by the Social Services Committee.<sup>582</sup> During the time of the young person's absence from home, the above mentioned committee is responsible that his or her rights according to the Children and Parents Code chapter 6, § 1 are fulfilled.<sup>583</sup> These rights include that the child is given security, good care and upbringing, is treated with respect and is not subjected to physical punishment or other degrading treatment.<sup>584</sup>

The Social Services Committee may also, at the same time as satisfying the child's need of contact with parents and guardians<sup>585</sup> as far as possible, decide what the interaction should be like and determine if certain restrictions should also apply to telephone and mail contact.

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<sup>574</sup> SFS 2001:453, *Social services Act*, Chapter 3, §4.

<sup>575</sup> SFS 2001:453, *Social services Act*, Chapter 6, §1.

<sup>576</sup> SFS 2001:453, *Social services Act*, Chapter 6, §5.

<sup>577</sup> SFS 2007:1315, *Social services Act*, Chapter 6, §6.

<sup>578</sup> SOU 2009:68 s 125.

<sup>579</sup> SFS 2003:406, *Act on the Care of Young Persons*, §2.

<sup>580</sup> SFS 2009:804, *Act on the Care of Young Persons*, §4.

<sup>581</sup> SFS 1990:52, *Act on the Care of Young Persons* §6.

<sup>582</sup> SOU 2009:68 p.126.

<sup>583</sup> SFS 2007:1312, *Act on the Care of Young Persons* §11.

<sup>584</sup> SFS 1983:47, *Parents Code*, chapter 6, §1.

<sup>585</sup> SFS 2003:406, *Act on the Care of Young Persons*, §14.

This should be applied strictly and not last too long if the circumstances allow it.<sup>586</sup> Even parents who do not have custody are covered by the provision if the access rights are regulated by a judgement or an agreement. In addition to regulations regarding visits, the Social Services Committee may, if necessary, determine that the child's residence is not to be disclosed to the parents.<sup>587</sup>

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

i. Article 3 in the Convention states that the best interest of the child shall be a primary consideration. The article is directed not only to public but also to private institutions for example the legal bodies and the courts of law. Sweden has taken several measures due to its obligations to interpret Swedish law in the light of the Convention. The establishment of the Barnahus can be seen as a step towards adjusting the criminal procedure to the best interest of the child.<sup>588</sup>

On behalf of the Government, the police in cooperation with the prosecution, national board of forensic medicine and the social board have established a reception and advocacy center for child victims of sexual abuse and exploitation, so called Barnahus. Barnahus is a cooperative composed of police, public prosecutors, forensic doctors, social workers and child psychologists who aim to provide child victims with one place to go for legal and other support service. The Barnahus process facilitates tape-recorded testimony with investigators, which later can be used in court to avoid re-victimizing child witnesses. Common guidelines have also been developed. The purpose of these guidelines is to ensure that the interaction takes place in an efficient legally secure manner with a continuous focus on the child perspective. Currently there exist about 22 Barnahus activities in different cities.<sup>589</sup>

In 2009 the faculty of law at University of Stockholm conducted an evaluation on the Barnahus. The result of the evaluation was presented in 2010. The evaluation points out that the preliminary investigation done at the Barnahus has the same deficiencies as the regular police and prosecution investigation and that the prosecution rate in fact was lower at the

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<sup>586</sup> Thunved, The new social Acts, (2012-01-01, Zeteo) comment to §14 on *Act on the Care of Young Persons*.

<sup>587</sup> SFS 2003:406, *Act on the Care of Young Persons*, §14.

<sup>588</sup> A.Kaldal, C. Diesen, J.Beije & E.Diesen, Barnahusutredningen, 2009 page. 21.

<sup>589</sup> A.Kaldal, C. Diesen, J.Beije & E.Diesen, Barnahusutredningen, 2009 page 148-152.

Barnahus. The evaluation on the other hand points out that the inter-agency cooperation is higher in places with Barnahus and that more children tend to receive crisis support. The participation of medical experts also leads to more medical examinations.<sup>590</sup>

In 2011, the Government commissioned the crime victim compensation and support authority to develop and implement a training program for better treatment of victims of sexual exploitation during police investigation, pre-trial and trial. The program intends to focus on children and young people's special vulnerability and needs due to sexual offences. The program also focuses particularly on the best interests of the child. The program is addressed to police, prosecutors, judges and lawyers.<sup>591</sup>

The handbook "handling of child abuse" has worked as guidance for prosecutors. The handbook puts a focus on how to conduct an investigation from a child's perspective, in an efficient and legally secure way.<sup>592</sup>

Förundersökningskungörelsen (1947:948) §17 states that an interrogation of a person under the age of 18 must be planned and executed so that there is no risk that the person who goes through an interrogation suffers from it. The provision is applicable to the injured party, witness and suspect. If the interrogation concerns sexuality special care shall be taken to this circumstance, and the investigation should not be more detailed than the circumstances require.<sup>593</sup> §17 also states that the best interest of the child shall be taken into account. An interrogation with a child should therefore not take place more times than what is necessary.

In Swedish law there are several measures that can be taken to provide support or protection to victims and witnesses during a trial. Sweden is also obliged by the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC) article 8 to ensure that measures are adopted in order to protect the rights and interests of child victims. Article 8 OPSC states that states shall provide appropriate support service to child victims through the legal process.<sup>594</sup>

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<sup>590</sup> Ibid.

<sup>591</sup> The Governments fifth rapport to the UN:committee on the rights of the child, page 97-98.

<sup>592</sup> Ibid.

<sup>593</sup> Förundersökningskungörelsen (1947:948),[Preliminary investigation Proclamation], article 17§.

<sup>594</sup> Optional protocol to the Convention on the rights of the child on the sale of children, child prostitution and child pornography, Article 8 d).

A victim has in many cases a right to a counsel for an injured party or, if the victim is a child under the age of 18, the Government provides a special representative in cases where the parents are accused or may not pursue the child's best interest because of the relationship with the accused.<sup>595</sup> The counsel for an injured party's general assignment is to look after the child's interests as well as to be a support for him or her.<sup>596</sup> The counsel can also request that the process will be held behind closed doors or that the questioning with the injured party may be made in the absence of the accused.<sup>597</sup> During the preliminary investigation the counsel shall explain to the child how an investigation is performed.<sup>598</sup> A counsel for an injured party also has the right to be present at all hearings held with the child. At a main hearing the counsel shall provide the child with general support and draw the court's attention to a situation that could cause stress for the child.<sup>599</sup> He or she is, however, only to be seen as a counsel and has no ability to act on his or her own without authorization from the principal.<sup>600</sup>

A victim of crime that is going to be heard in a trial may be accompanied by an appropriate person as a personal support, a so called support person according to Code of judicial procedure chapter 20, § 15, paragraph 1.<sup>601</sup> It is the injured party that initiates the need for a support person. The injured party is the one to decide who will be their support person.<sup>602</sup> The purpose of the provision has been to give the child, in cases that he or she can experience particularly stressful, a right to special support.<sup>603</sup> The support person should be seen as a complement to the injured party's defense, who under the observance of his or her duty of impartiality doesn't have as a main task to provide support to the child.<sup>604</sup> A support person cannot, unlike an attorney, carry out any legal acts.<sup>605</sup> A support person has beyond

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<sup>595</sup> Proposition 1998/99:133. *Särskild företrädare för barn* [Special representative of the child]. Stockholm, Ministry of Justice. p. 18.

<sup>596</sup> SOU 1986:49. *Målsägandebiträde* [Counsel for an injured party]. p. 87 and 98.

<sup>597</sup> Cit p. 99.

<sup>598</sup> Proposition 1987/88:107. *Om målsägande biträde* [Counsel for an injured party]. Stockholm, Ministry of Justice. s. 23 f.

<sup>599</sup> Cit p. 23.

<sup>600</sup> Ekelöf, rättegång II, p. 98-99.

<sup>601</sup> Government Bill, Prop 1993/94:143, *Brottsoffren i blickpunkten- en brottsofferfond och andra åtgärder för att stärka brottsoffrens ställning* (Victims- a victims fund, and other measures to strengthen the standing of victims) page 38.

<sup>602</sup> Ibid.

<sup>603</sup> Swedish Government official reports, SOU1986:49, *Målsägandebiträde* (Counsel for an injured party) page. 64-66.

<sup>604</sup> NJA II 1984 page.167-168.

<sup>605</sup> Swedish Government official reports, SOU 1986:49, *Målsägandebiträde* (Counsel for an injured party)

his or her supporting functions a possibility to request pauses in the hearing if the child needs it, or in exceptional cases draw the courts attention to the fact that a certain question is particularly distressing for the child.<sup>606</sup>

The majority of the Swedish courts also conduct a witness support activity. A witness support person is a person who works on a non-profit basis in assisting witnesses and victims of crime with support and practical information in relation to a criminal trial. A witness support person will primarily be a fellow human being but he or she can also explain how the criminal procedure is carried out.<sup>607</sup>

The court is allowed to provide security in court under the Act (1981:1064) on the safety in court. According to the act, decisions on safety checks can be made if such checks are needed to limit the risk for serious danger to life, health, liberty or extensive destruction of another's property.<sup>608</sup> Since 2001 a security check can be made at the entrance to a courtroom, but also at the entrance to the building.<sup>609</sup>

ii. Since 1995, the Swedish National Criminal Investigation Department has included a Child Abuse team. The Child Abuse team was established to serve as a centralized focal point for domestic and international cooperative efforts including Interpol. Team within its Special Victims Unit. The National Criminal Investigation Department has issued an Action Plan for International police work on child sex offences and child pornography.<sup>610</sup>

The National Criminal Investigation Department's child pornography group (C.I.D) consists of ten police officers and one administrator, of which four police officers are dedicated to work with child sex tourism. For a number of years the group consisted of only two police officers. After a campaign in 2006/2007 by ECPAT Sweden the group received more resources.<sup>611</sup> C.I.D has in return educated around 150 investigators within the local police enforcement to review pictures that could be child pornography. Since 2006 the local police

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page. 66.

<sup>606</sup> Government Bill, Prop 1993/94:143, Brottsoffer i blickpunkten- en brottsofferfond och andra åtgärder för att stärka brottsoffrets ställning [Victims- a victims fund, and other measures to strengthen the standing of victims ], page 38.

<sup>607</sup> Government Bill, Prop 2000/01:79, "Stöd till brottsoffer" ( Support to victims of crime) page 25-26.

<sup>608</sup> SFS (1981:1064) Act on safety in the courts, paragraph § 1.

<sup>609</sup> Government Bill, Prop 2000/01:32, "Säkerhetskontroll i domstol" ( Security in the Court), page 77.

<sup>610</sup> The Governments national action plan , 2007-2008.

<sup>611</sup> <http://www.ecpat.se/index.php/pressrum/180-pa-torsdag-oeverlaemnas-25-000-underskrifter-foer-mer-resurser-till-polisens-barnpornografi> (Retrieved 2012-10-31)



also investigate child pornography cases. Every picture is put and stored in a database with a specific code for each photograph. A computer program then sorts out the pictures that have been under investigation. The pictures can also be put together to series. The group also works to identify the children who are in the pictures. When identifying the children in the pictures, C.I.D for example looks at the background of the pictures to get information about the location where the photo was taken. When the child or the perpetrator has been identified a criminal investigation is initiated by the police. The information is also sent to Interpol. When working to find child pornography on the internet the C.I.D receives cases from both Europol and Interpol. They also receive tips from the general public.<sup>612</sup>

Since September 2006, a separate division has been set up within the prosecutor's office to combat international crime and serious organized crime. The new division means that the processing of cross boarder crime and serious organized crime has been concentrated in three international public prosecution offices, which are located in Stockholm, Gothenburg and Malmo. The national public prosecution offices deal with matters relating to trafficking and aggravated procuring.<sup>613</sup>

In Sweden there is currently some uncertainty circulating around the legality of so called secret operations. In 2007 the Government authorized the Ministry of Justice to appoint a special investigator in order to address some police legal issues concerning covert surveillance and investigations. The investigation was concluded in 2010. According to the investigation there was no need for any special regulations concerning undercover reconnaissance, so called infiltration. Infiltration can currently be carried out according to the Police Act ( 1984:387).<sup>614</sup> However the Government emphasized that three basic principles should be considered when carrying out such operations.<sup>615</sup> The first principle states that the police is forbidden to commit a crime when seeking to detect a crime. According to the second principle the police shall never provoke someone into committing a crime. The police may also never of reconnaissance reasons ignore to take the required

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<sup>612</sup> Rapport 2012. *Sveriges femte periodiska rapport till FN:s kommitté för barnets rättigheter om barnkonventionens genomförande under 2007–2012* [Sweden's fifth periodic report to the UN Committee on the Rights of the implementation of the CRC]. Stockholm, Ministry of Health and Social Affairs, page 116.

<sup>613</sup> ECPAT Int. Global Monitoring Report on Sweden 2012, page 28.

<sup>614</sup> SOU 2010:103 Polismetodutredningen [The Inquiry on Police methods]. *Särskilda spanningsmetoder* [Special reconnaissance methods]. Stockholm, Ministry of justice, p. 18.

<sup>615</sup> Ibid p.87

measures against a criminal suspect.<sup>616</sup> Article 8, Police Act also states that an action made by the police shall always be in accordance with the principle of necessity and the principle of proportionality. As for provocative actions, the Government proposed that regulation should be made in relation to such provocative actions that could lead to someone being induced to commit a criminal offence.<sup>617</sup> Currently provocative actions may only be made in accordance with the National prosecutors guidelines which stipulates that needs and proportionality must be observed, that it is never allowed to provoke someone to commit a crime, that there must be a strong suspicion of crime, provocative measures may only be used to reveal serious crime, that decisions on provocation shall be made by the prosecutor and that such measures must be thoroughly documented.<sup>618</sup> In 2006 a new law was introduced increasing opportunities for the police to work under cover with protected identity.<sup>619</sup>

According to Act (2007:978) on secret bugging, bugging is officially allowed during preliminary investigation in cases of serious crime. With secret bugging purposes eavesdropping or recording which occurs in secret and with technical aid designed to reproduce sounds, and refers to speech in private, conversations between other or negotiations at a meeting, which the public has access to.<sup>620</sup> Article 2 states that secret bugging may be used during preliminary investigation if the crime, for which it is not prescribed a less severe punishment than imprisonment for four years, other offences if it due to the circumstances can be assumed that the penal value exceed imprisonment for four years and it is a case of (...) rape of a child under chapter 6, article 2, third paragraph, Penal Code, aggravated sexual abuse of a child under chapter 6, article 6, second paragraph, Penal Code, exploitation of a child for sexual posing under chapter 6, article 8, third paragraph, Penal Code (...) aggravated child pornography offences under chapter 16, article 10 a, fifth paragraph, Penal Code. Attempt, preparation or conspiracy to commit one of the above mentioned offences may also allow secret bugging if it is punishable and if it from the circumstances can be assumed that the offence has a penal value of four years. Secret bugging may only be used if there is anyone who is reasonably suspected for an offence of

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<sup>616</sup> Ibid

<sup>617</sup> Ibid p.22

<sup>618</sup> Ibid p.124

<sup>619</sup> SFS 2006:939. *Lag om kvalificerade skyddsidentiteter* [Act on qualified security identities]. Stockholm

<sup>620</sup> SFS 2007:978. Act on secret bugging. Stockholm. § 1.

the above mentioned, or if action is of extraordinary importance for the preliminary investigation and reasons for such action outweigh the intrusion or means for the suspect.<sup>621</sup> Secret bugging may for example be used in the suspect's home according to article 4, Act on Secret Bugging. Questions about secret bugging is to be considered by the court at the request of the prosecutor.<sup>622</sup>

**iii.** In the Code of Judicial Procedures chapter 23, § 1 states that a preliminary investigation is initiated whenever there is reason to believe, because of an indication or any other reason, that an offense subject to public prosecution has been committed. The perpetrator does not need to be known and it does not require any proof of certain strength.<sup>623</sup> However, it is required that there is a suspicion of a specific crime.<sup>624</sup> Reason to believe that an offense has been committed may be due to a report, but that need not to be the case.<sup>625</sup> Code of Judicial Procedures chapter 20, § 3 prescribes the offences subject to public prosecution. These crimes do not belong to the category of crimes that require the injured party to press charges.<sup>626</sup> An investigation is initiated as soon as the police or the prosecutor learns of the crime, for example from information that comes up during a general police operation.<sup>627</sup> A report is not necessary to initiate an investigation.<sup>628</sup> The decision to initiate an investigation is made by the police or the prosecutor in accordance with the Code of Judicial Procedure chapter 23, § 3. A report on a crime subject to public prosecution cannot be revoked.<sup>629</sup> It is the prosecutor who decides if a prosecution shall be undertaken.<sup>630</sup> The prosecutor must then strongly believe that the indictment will lead to a conviction.<sup>631</sup>

**iv.** In connection with the sexual law reform in 2005, the period of limitation for certain sex offences against children was extended.<sup>632</sup> The reform also resulted in an extended coverage of several sexual offences. Chapter 35, § 4, paragraph 2, Penal Code now states an extended statute of limitations for certain sex crimes. § 4, paragraph 2 states that the special limitation

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<sup>621</sup> SFS 2007:978, Act on secret bugging, 3§

<sup>622</sup> SFS 2007:978, Act on secret bugging, 7§

<sup>623</sup> Ekelöf, Rättgång, V, page 107.

<sup>624</sup> Ekelöf, Rättgång, V, page 107.

<sup>625</sup> Fitger, Code of Judicial Procedure, (2012-10-08, Zeteo) Comment to chapter 23, §1.

<sup>626</sup> Ekelöf, Rättgång, II, page 56-59.

<sup>627</sup> Fitger, Code of Judicial Procedure, (2012-10-08, Zeteo) Comment to chapter 23, §1.

<sup>628</sup> Ibid.

<sup>629</sup> Fitger, Code of Judicial Procedure, (2012-10-08, Zeteo) Comment to chapter 23, §1.

<sup>630</sup> Ibid.

<sup>631</sup> Ibid.

<sup>632</sup> Government Bill, Prop 2004/05:45 "En ny sexualbrottslagstiftning", [A new sexual offences legislation]

periods in Penal Code chapter 35, § 1 should not be counted from the day of the offense but from the day when the injured party turns 18 years old. Offences with extended periods of limitations are offences under Penal Code chapter 6, §§ 4-6 and 8 paragraph 3, or attempts to commit such crimes, or offences under chapter 6, §§ 1-3 or 12, or attempts to commit such crimes if the offense is committed against someone under the age of 18. The statute of limitation thus takes as its starting point the victim's legal age.<sup>633</sup>

v. Children who are born in Sweden are registered at birth by the Swedish Tax Agency. In general there is therefore not a problem to determine the age or identity of a child born in Sweden. Problems arise mainly in relation to age determination of migratory children. In order to determine their age, a medical examination is performed if no papers or identification documents are found.<sup>634</sup> The national Board on Health and Welfare has recommended that a medical examination shall be performed by a pediatrician.<sup>635</sup> Teeth, bone structure, hands and the weight of the child shall be examined. An x-ray of the skeleton may also be performed.<sup>636</sup> However these examinations cannot give a definite answer, which often results in children being treated as adults because the medical examination suggests it. The consequences for a child who is estimated to be over the age of 18 can be crucial for both the criminal process and the asylum process. Save the children Sweden has expressed a concern about the legal security of these examinations and the limited right to appeal a determination of age.<sup>637</sup> As a response, the National Health and Welfare Agency has developed new guidelines for how to determine the age of a child in a more efficient and secure way.<sup>638</sup>

vi. According to the Criminal Records Act (1998:620), § 1, the National Police Board (NPB) is responsible for recording and storing data for convicted offenders. Courts and prosecutors can extent the data into the registry, but the NPB are still responsible for personal data in the registry.<sup>639</sup> This also means that the NPB is responsible for inaccurate

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<sup>633</sup> See Penal Code.chapter 35 §4, paragraph two

<sup>634</sup> National Health and Welfare Agency's general advice (SOSFS) 1993:11, National Health and Welfare Agency.

<sup>635</sup> Ibid.

<sup>636</sup> Ibid.

<sup>637</sup> <http://www.rb.se/SiteCollectionDocuments/Ställningstaganden/Rädda Barnens ställningstagande åldersbedömningar.pdf> (Retrieved 2012-09-29).

<sup>638</sup> Dnr 31156/2011. "Åldersbestämningar av äldre asylsökande barn", [Age determination of older asylum seeking children).

<sup>639</sup> Karnov comment on Criminal Records Act, article 1, note 1, author Ulf Berg.

information is corrected and liable to stand for compensation in cases of damage and violation of privacy caused by the data processed in violation of the law.<sup>640</sup> Criminal records Act §3 states that anyone who has been found guilty of committing a crime shall be registered in the criminal record.

Nordic police authorities assist each other in criminal investigations.<sup>641</sup> Criminal Records Act §12 states therefore that data from the register shall be submitted to the court or the police or prosecutor in Denmark, Finland, Iceland or Norway if requested for investigation in criminal cases. The collaboration also includes, upon request, to disclose records of financial penalty sanctions when such information is needed for a criminal investigation in another Nordic country.<sup>642</sup> When it comes to other states data may, on request, be submitted to the court or the police or prosecutor in a state that is connected to Interpol if necessary to the authority for prevention, detection, investigation or prosecution of criminal offences or a foreign case.<sup>643</sup> Almost all countries are connected to Interpol. Disclosure may be made in cases where information is needed to prevent crime. This means that information from the registry that can be significant for other countries intelligence may be disclosed.<sup>644</sup>

A request for data from the registry shall be handled by the NPB.<sup>645</sup> However, the Government or an authority appointed by the Government may issue regulations that a police department, in some cases, may consider whether to disclose information or not.<sup>646</sup> A person who takes part of the personal data from the registry may not improperly disclose this information.<sup>647</sup> In the public sector the provision of the Public Access to information and Security Act (2009:400) is applied. Terms of breach of professional secrecy is stated in Penal Code chapter 20, § 3.

### 3.2 Complaint Procedure

vii. The Code of Judicial Procedures chapter 49 provides the right to appeal decisions and verdicts of the district court. In Swedish law only a judgment and a final decision can be

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<sup>640</sup> Prop 1997/98:97 ”*Polisens Register*”, [Police records), page.90.

<sup>641</sup> Karnov comment on Criminal Records Act, article 12, note 19, author Ulf Berg.

<sup>642</sup> Karnov comment on Criminal Records Act, article 12, note 20, author Ulf Berg.

<sup>643</sup> Karnov comment on Criminal Records Act, article 12, note 20, author Ulf Berg.

<sup>644</sup> Ibid

<sup>645</sup> Karnov comment on Criminal Records Act, article 15, note 23, author Ulf Berg.

<sup>646</sup> Ibid

<sup>647</sup> Karnov comment on Criminal Records Act, article 19, note 25, author Ulf Berg.

appealed.<sup>648</sup> The law gives a right to appeal to the person who was a party in the lower instance. According to Swedish law everyone has the right to be a party, no matter the age.<sup>649</sup> A difference is however made between a person being competent and a person who has process eligibility. A person with eligibility is a party that himself/herself can be active in the process through a counsel. Process eligibility is in Sweden associated with legal competence. A child is according to Swedish law without legal competence.<sup>650</sup> The legal competence will instead be carried out by the child's legal representatives, according to Code of Judicial Procedures chapter 11, § 1 paragraph 2.

For a party to be entitled to bring an appeal against a judgment the judgment must from a legal point of view have passed him or her.<sup>651</sup> The assessment of what can be seen as passing a party is done from an objective perspective.<sup>652</sup> As for other decisions made by the court, only decisions that are final can be appealed. Which decisions that are final are stated in the Code of Judicial Procedure chapter 17, § 1 and chapter 30, § 1. From these statements the conclusion can be made that a final decision is a decision where the court distinguishes itself from the case.

In Swedish law, the right of the child to be heard and to express his or her opinion is to be ensured by its legal representatives, normally his or her parents. If the parents are considered not to have the child's best interests in mind, a counsel for an injured party may be appointed.<sup>653</sup> Then it is the counsel that ensures the rights of the child and processes the appeal. According to the Government, the system of the especially appointed counsel for a child lives up to the requirements of article 12 on the Convention on the Rights of the Child.<sup>654</sup> The Care of Young Person's Act (1990:52) § 36 however states that a child over the age of 15 has the right to bring his or own action in a case.

Code of Judicial Procedure chapter 52 prescribes what details an appeal against a decision shall contain. Any such complain must be written and submitted to the court within three

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<sup>648</sup> Welamson, Munck, Rättgång VI, page 23.

<sup>649</sup> SFS 1942:740, *Code of Judicial procedure*, Chapter 11 article 1§ paragraph one.

<sup>650</sup> Ekelöf, Rättgång, II, page. 50-54.

<sup>651</sup> Welamson, Munck, Rättgång VI, page 33.

<sup>652</sup> Welamson, Munck, Rättgång VI, page 35.

<sup>653</sup> *Sveriges femte periodiska rapport till FN:s kommitté för barnets rättigheter om barnkonventionens genomförande under 2007–2012* [Sweden's fifth periodic report to the UN Committee on the Rights of the implementation of the CRC]. Stockholm, Ministry of Health and Social Affairs page 39-40

<sup>654</sup> Ibid.

weeks from the date of issue of the notification of the judgment or the decision, or from the date when the appellant received the decision. The appeal must include an explanation of the decision being appealed and the amendment demanded the grounds of appeal and the facts relied upon in support of any appeal, the evidence relied on and what should be attested with each evidence.<sup>655</sup> The appeal must be submitted to the district court but should be addressed to the court of appeal.<sup>656</sup>

**viii.** A child's action is brought by a deputy due to the fact that a child according to Swedish law lacks legal competence. The deputy works in these standings as a representative of that party and carries out the proceedings in the child's name. What a deputy undertakes in the process is therefore legally binding for the party.<sup>657</sup> In Swedish law the deputy normally is the child's legal guardian or a representative of society.<sup>658</sup> The Swedish Government provides a special representative for child victims under the age of 18 in cases where the parents are accused or may not pursue the child's best interests because of a relationship with the accused.<sup>659</sup>

A prerequisite for a special representative to be appointed is that the crime in question prescribes prison. This means that it is not possible to appoint a special representative in cases where the law only prescribes fines. The suspicion of a crime must also be so strong that there is reason to believe that a preliminary investigation will be initiated, i.e. that there is reason to believe that a crime has been committed.<sup>660</sup>

A special representative shall not be appointed if, having regard to the child, it is to be considered as unnecessary, or if there are other reasons against it.<sup>661</sup> The need for a special representative shall be made in consideration of the age and maturity of the child. If a special representative is ordered, he or she also assumes the guardian's powers in matters relating to the investigation and trial. The special representative may however not prosecute or make a claim for damages without a public prosecution.<sup>662</sup> A special representative may be

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<sup>655</sup> Lindell. B, Eklund. H, Asp.P, Andersson.T, Straff-processen , page 284 f.

<sup>656</sup> SFS 1942:740, *Code of Judicial procedure*, Chapter 51, 3§.

<sup>657</sup> Ekelöf, II, page 100.

<sup>658</sup> Schiratzki.J, Barnrättens grunder, page 41.

<sup>659</sup> SFS 1999:997, Lagen om Särskild företrädare för barn [Act on special representative of the child].

<sup>660</sup> Prop 1998/99:133, "Särskild företrädare för barn" [Special representative of the child ]page. 23 f.

<sup>661</sup> SFS 1999:997, Lagen om Särskild företrädare för barn [Act on Special representative of the child], 1§, paragraph 2.

<sup>662</sup> SFS 1999:997, Act on Special representative of the child, 3§.

a lawyer, an associate at a law firm or other.<sup>663</sup> In order to be appointed to the mission as a special representative Act (1999:997) on special representative of the child, §5 paragraph 2, prescribes criteria on knowledge, trial experience and personal qualities. There is an emphasis on the representative's personal qualities and his or her knowledge of the child's vulnerability.<sup>664</sup>

According to act (1988:609) on Counsel for an injured party, a counsel for an injured party shall be appointed for the plaintiff when an investigation has begun. In cases concerning offences under Penal Code chapter 6, a counsel for an injured party shall be appointed, unless it is clear that the plaintiff has no need for such a counsel.<sup>665</sup> Thus, for cases concerning sexual offences there is a strong presumption that the court shall appoint a counsel. A counsel for an injured party may be appointed during a trial as well as during a preliminary investigation.<sup>666</sup> The appointment of a counsel for an injured party is made by the court. It is up to the prosecutor to monitor that the plaintiff has a legal counsel and that a request to the court is made without delay. If the plaintiff and his or her legal guardian have not made a request about a counsel, the issue should be considered by the prosecutor. The Code of Judicial Procedure chapter 23, § 5 paragraph 2 states that it is the responsibility of the prosecutor to draw the court's attention to the need for a counsel. A counsel for an injured party may also be appointed if the plaintiff requests it or if the court acts *ex officio*.<sup>667</sup>

The general principle in Swedish law is according to Code of Judicial Procedure chapter 5 § 10 that the parties and others who are going to take part in the trial shall turn up in the courtroom or where the session will be held. Code of Judicial Procedure chapter 5, § 10 paragraph 2 prescribes the possibility for a victim to be heard in a courtroom through sound transmission or sound and picture transmission. In assessing whether there are grounds for such participation, the court shall take into consideration the fact that a person who is to take part in a trial can feel fear of being present in the courtroom.<sup>668</sup>

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<sup>663</sup> SFS 1999:997, Act on Special representative of the child, 5§.

<sup>664</sup> Government Bill, Prop 1998/99:133, "Särskild företrädare för barn" [Special representative of the child], page. 34.

<sup>665</sup> SFS 1988:609, Act of counsel for an injured party, 1§, paragraph one.

<sup>666</sup> Ekelöf, Rättegång II, page 98.

<sup>667</sup> Ekelöf, Rättegång II, page 98.

<sup>668</sup> Fitger, Code of Judicial Procedure, (2012-10-08, Zeteo) Comment to chapter 5 article 10.



Children are rarely heard directly in court. During normal circumstances, a child will be heard during the preliminary investigation. The interrogation with the child will be videotaped and the interrogation will then be viewed during the main hearing.<sup>669</sup> This is to try and protect the child from exposure to any stress that could follow from attending a main hearing.<sup>670</sup> However, if the child is over the age of 15, it is of general principle that he or she shall be called to the main hearing.<sup>671</sup>

The obligation to witness in Swedish court is absolute. This means that those who are called to testify in a trial are obliged to do so. This general principle is however subject to exceptions. Code of Judicial Procedure chapter 36, § 4 states that those who are under the age of 15 or those of any age suffering from a mental disorder are only obliged to testify if the court finds it to be suitable. In a suitability assessment the court has a right to take into consideration any consequences for the individual person following being submitted to an interrogation, but also in regards of the presumable value of the witness's testimony.<sup>672</sup> The court also has a possibility to decide that a victim or witness may give his or her testimony in the absence of the defendant or the audience, according to Code of Judicial Procedure chapter 36, § 18. Such a decision may be made if the court has reason to believe that the victim or witness is afraid or abstains from telling the truth because of the presence of the defendant or the audience.<sup>673</sup>

The general principle in Swedish law is that a hearing shall be public, which follows from the provision in Code of Judicial Procedure chapter 5, § 1 paragraph 1. If it can be presumed that confidential information may be presented during the main hearing the court can decide to hold the hearing in camera, but only under the condition that it is of the utmost importance that the data will not be disclosed. There must therefore be a particularly strong need for confidentiality in order to deviate from the principle of public access to official records. The implication of the main hearing being held in camera is that only the court and the parties may be in the courtroom. The hearing will consequently be closed to the press.

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<sup>669</sup> Ekelöf, *rättegång IV*, page 226-227.

<sup>670</sup> Schelin.L., *Bevisvärdering och utsagor i brottsmål*, page 220.

<sup>671</sup> *Ibid.*

<sup>672</sup> NJA II 1943, page 465.

<sup>673</sup> Fitger, Code of Judicial Procedure, (2012-10-08, Zeteo) Comment to chapter 36, 18§.

Code of Judicial Procedure chapter 5, § 1 paragraph 3, also states that an interrogation of a child under the age of 15 may be held in camera.<sup>674</sup>

The Public Access to Information and Security Act (2009:400) chapter 35, § 12 states confidentiality of information about an individual's personal and financial circumstances, if it can be assumed that the individual or someone close to him or her would suffer injury or harm if the information were to be disclosed and the information occurs in a case concerning guilt for sexual offences, human trafficking. Confidentiality is also imposed on the court with regards to information about a child depicted in a pornographic image in the event that it can be assumed that he or she or somebody close to him or her would suffer injury if the information were exposed and the information figures in a case of liability, compensation or description of child pornography.<sup>675</sup>

## 4 COMPLEMENTARY MEASURES

i. The Government's National Action Plan against Sexual Exploitation of Children states that all professional groups working with children shall be given knowledge on these subjects.<sup>676</sup> The national action plan has, as mentioned above, not been updated since 2007 and an updated version of the action plan has been postponed until sometime in 2012. CRC has in its concluding observations on Sweden expressed a concern about the fact that the national action plan has been postponed.<sup>677</sup>

The judiciary has organized training on issues of child abuse. The goal has been to increase the knowledge around those whose work affects children. The crime victim compensation and support authority has also, between 2007-2009, had a special government mandate to design, and in consultation with the relevant authorities, carry out a training program to improve treatment of sex offenders.<sup>678</sup>

Prosecutor training courses include sections on child abuse and child pornography. The Prosecution Authority has created an additional instruction manual for prosecutors

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<sup>674</sup> Fitger, Code of Judicial Procedure, (2012-10-08, Zeteo) Comment to chapter 5, 1§.

<sup>675</sup> SFS 1942:381, *Code of Judicial Procedure*, Chapter 35, 12§.

<sup>676</sup> The Governments national action plan, 2007-2008, page.16

<sup>677</sup> Committee on the Rights of the Child, op. cit. p.3

<sup>678</sup> The Governments national action plan, 2007-2008, page 15.

investigating cases involving child abuse. A course focused on child pornography has also been added to prosecution training on IT crimes and evidence collection in IT context.<sup>679</sup>

Within the National Police Authority on trafficking (NPA), the Government has mandated the crime victim compensation and support authority to arrange a training program for the police and prosecution authority, the Swedish courts and the Swedish Migration Board on matters related to prostitution and human trafficking for sexual purposes. The training program is intended to improve knowledge about the underlying mechanisms that affect the incidence of prostitution and human trafficking for sexual purposes and to improve treatment of victims.<sup>680</sup>

Europol also hold an annual training course on combating sexual exploitation of children on the internet for law enforcement officers and the judiciary from EU member states, as well as from other countries. The training aims to share experiences and good practice to develop the participants' knowledge and investigation skills, whilst presenting to them the latest investigation methods and techniques.<sup>681</sup>

The above mentioned courses are however not mandatory.

ECPAT Sweden has conducted training on commercial sexual exploitation of children for police, prosecutors, judges, lawyers and teachers, as well as students of law, tourism, social workers and journalists. However ECPAT Sweden stresses that none of these groups are given compulsory regular training in the field of commercial sexual exploitation of children.<sup>682</sup>

ii. Of national policy documents for the school follows that the activities of the school shall be designed in accordance with fundamental and democratic values and that everyone who works within the school shall promote and respect the value of every human being.<sup>683</sup> The

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<sup>679</sup> Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Initial reports of States parties due in 2009. Sweden.* (CRC/C/OPSC/SWE/1). 17 may 2011. <http://www2.ohchr.org/english/bodies/crc/crcs58.htm>. (Retrieved 2012-10-10)

<sup>680</sup> The Governments national Action plan, 2007-2008 , page 17.

<sup>681</sup> Europol, Child Sexual Exploitation Factsheet, 2011.

<sup>682</sup> NGO Monitoring- ECPAT Sweden, page .17.

<sup>683</sup> SFS 2010:800. *Skollagen* [Education Act]. Stockholm, Ministry of Justice. Chapter 1, § 5.

curriculum for social studies included to reflect and discuss concepts such as identity, sexuality, love and equality.<sup>684</sup>

Within sex education, knowledge is given on sex and reproductive health. Sex education also gives an opportunity to address attitudes, norms and values when it comes to sexual contact, gender roles and sexual identity.<sup>685</sup> That information should be provided about the risks of sexual exploitation and sexual abuse is not enacted in any document.<sup>686</sup> According to the Government this does not preclude that these issues may be addressed in the context of the social oriented subjects in school.<sup>687</sup> The current curriculum for 2012, presented by the national agency for education, does however not put specific focus on knowledge about sexual exploitation of children.<sup>688</sup>

ECPAT Sweden has, in a response to the Government's statement on implementation of the Lanzarote Convention, recommended the Government make education about commercial sexual exploitation of children, and the risks connected, a compulsory part of the school curriculum.<sup>689</sup>

Since 2002, the Media Council, Sweden's "Awareness Node", has been participating in the EU project "Safety, Awareness, Facts and Tools (SAFT)", which aims to promote more secure use of the Internet among children and younger people. Together with the Swedish National Agency for School Improvement (MSU), the council has prepared material entitled "The Young Internet", and arranged conferences to provide support to teaching and discussion concerning the Internet and other media. The Media Council has also produced a brochure entitled "ten tips to parents with surfing children".<sup>690</sup>

In 2012 the media council re-launched its training package "*Nosa på internet*" (Nosa online). "*Nosa på Internet*" aims to raise awareness among young children about the internet and to introduce practices of critical thinking, how to interpret messages and in general how to

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<sup>684</sup> The Swedish National Agency for Education. *Läroplan för grundskolan, förskoleklassen och fritidshemmet 2011* [Curriculum for the primary school, the pre-school class and the after-school]. 2011. <http://www.skolverket.se/publikationer?id=2575> (Retrieved 2012-09-29).

<sup>685</sup> Ibid.

<sup>686</sup> Ibid.

<sup>687</sup> SOU 2010:71. The 2008 Sex crimes investigation. *Sexualbrottslagstiftningen – utvärdering och reformförslag* [Sexual offences legislation – evaluation and reform]. Stockholm, Ministry of Justice, 2010.

<sup>688</sup> <http://www.skolverket.se/publikationer?id=2575>, (Retrieved 2012-10-01).

<sup>689</sup> NGO Monitoring-ECPAT Sweden, page 23.

<sup>690</sup> SOU 2010:71, *Sexualbrottslagstiftningen- utvärdering och reformförslag* [Sexual offences - legislation evaluation and reform] page 411.

become a conscious media user. The training package will be sent out to all schools and preschools in Sweden.<sup>691</sup>

iii. Currently there are primarily two projects in Sweden; the Centre for Andrology and Sexual Medicine at the Karolinska University-hospital, which assists individuals suffering from conditions such as compulsive sexual behavior and sexual addictions, as well as the project called KAST, that offers support to buyers of sexual service via telephone, internet and individual meetings. The Center for Andrology and Sexual Medicine at the Karolinska University hospital is however only primarily available for residents, when it comes to treatment, in the Stockholm region.<sup>692</sup>

In the report “*Rehabilitation efforts targeting individuals who have committed or run the risk of committing sexual offences against children*” from 2011, the National Board of Health and Welfare expressed that tried efforts should be further elaborated and be made available for men, women and children who have committed, or run the risk of committing, sexual offences. The National Board of Health and Welfare also emphasized the importance of developing regional centers able to facilitate access for children and younger people to proven treatments closer to their home district.<sup>693</sup>

In March 2012, the Government begun a project called PrevenTell, a helpline for persons with unwanted sexual desires. PrevenTell aims to provide help in time to potential sex offenders. The organization is also addressed to relatives. A person who is worried, experiencing anxiety or has questions relating to their sexual fantasies or acts can turn to PrevenTell by making a duty free and anonymous call. Through the helpline a person can get in contact with nurses, doctors and psychologists. The Centre for Andrology and Sexual medicine is responsible for the organization.<sup>694</sup>

iv. The Crime Victim Compensation and Support Authority conduct witness support activity in most Swedish courts. The Government has considered the witness support

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<sup>691</sup> The Swedish Media Council. *Nosa på nätet – ett mediekunnighetspaket* [Sniff the Internet – a media literacy package]. <http://www.statensmedierad.se/Publikationer/Produkter/Nosa-pa-natet--ett-mediekunnighetspaket/> (Retrieved 2012-10-01).

<sup>692</sup> SOU 2010:71, Sexualbrottslagstiftningen- utvärdering och reformförslag [Sexual offences - legislation evaluation and reform] page 412.

<sup>693</sup> The National Board of Health and Welfare. *Behandlingsinsatser för personer som har begått eller riskerar att begå sexuella övergrepp mot barn* [Rehabilitation efforts targeting individuals who have committed or run the risk of committing sexual offences against children]. Stockholm. 2011. p. 8.

<sup>694</sup> The Centre for Andrology and Sexual Medicine. [www.preventell.se](http://www.preventell.se) (Retrieved 2012-08-29).

activities in the country's district courts and courts of appeal shall play an important part within the judiciary and has therefore decided that the activity should be established in all the courts.<sup>695</sup>

v. A general NGO-helpline for children exists on violence against children through the Children's Rights in Society Helpline. In Sweden the non-profit organization Children's Rights in Society (BRIS) has since 1971 conducted an activity with a helpline where the organization assists vulnerable children with advice and support anonymously for free. The activity now includes the BRIS e-mail and the BRIS chat, and an online discussion forum. The organization is built upon gifts by private as well as official donations.

Since the end of 2010 there is also a broad state-operated helpline for victims of trafficking called safetrip.se. However, the helpline mainly concentrates on helping women rather than children.

ECPAT Sweden has run a web-based hotline since 2005, at [www.ecpathotline.se](http://www.ecpathotline.se), where the general public can anonymously report cases of the commercial sexual exploitation of children. The information received is sorted out and forwarded to the National Criminal Investigation Department (CID) for investigation. The ECPAT Hotline is an alternative way to report cases and the general public should, in all instances, also contact the police. ECPAT Sweden does not conduct any investigation.<sup>696</sup>

The Swedish Government has not implemented the European Commission's 2007 decision to reserve the number "116000" as the standard "missing and sexually exploited childcare's telephone hotline" in every EU country.<sup>697</sup> There is therefore currently no other available helpline providing specialized assistance to child victims of trafficking in Sweden. The Swedish Government has however stated that there is a plan to begin implementation of the 116000 helpline.<sup>698</sup> CRC noted in 2012 that the helpline still hadn't been implemented and therefore recommended Sweden to take necessary measures to introduce it.<sup>699</sup>

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<sup>695</sup> Prop 2000/01:79. The Crime Victim Investigation. *Stöd till brottsoffer* [Support to victims of crime]. Stockholm, Ministry of Justice, 2001. p. 25 f.

<sup>696</sup> ECPAT Sweden. [www.ecpathotline.se](http://www.ecpathotline.se) (Retrieved 2012-08-29).

<sup>697</sup> Prop 2000/01:79 p. 25-26.

<sup>698</sup> Rapport 2012. *Sveriges femte periodiska rapport till FN:s kommitté för barnets rättigheter om barnkonventionens genomförande under 2007–2012* [Sweden's fifth periodic report to the UN Committee on the Rights of the Child on the implementation of the CRC]. Stockholm, Ministry of Health and Social Affairs. p.188

<sup>699</sup> Committee on the Rights of the Child, op. cit. page.9

Within the frame of the public domain counseling is given through UMO.<sup>700</sup> UMO is a national youth clinic online for young people between the ages of 13-25. The youth service provides general information and an inquiry service where young people can anonymously ask questions about health, sex and relationships. UMO was introduced in 2009 and the development of the organization is carried out in collaboration with Swedish youth clinics, school health and interest groups as well as others who work with young people.<sup>701</sup>

Throughout the country there are also young women and men empowerment centers. There are currently about 60 young woman's empowerment centers in Sweden. These centers are non-profit organizations aiming to give support and strength to young women. Anyone who identifies themselves as a young woman can turn to an empowerment center with any thought or issue. The people working at the centers are not professional psychiatrists or experts but they can listen, encourage and give advice on where to turn when, for example to file a report.<sup>702</sup>

vi) Sweden currently has a number of public bodies, set up in their respective business areas, responsible for protecting and assisting victims of sexual exploitation and sexual abuse. These bodies mainly include social and health care services. According to the Social Service Act the residence municipality always has the ultimate responsibility that those who reside in the municipality receive the support and help they need.<sup>703</sup>

The Social Service Act (2001:453) chapter 5, § 11 states that the Social Services Committee is responsible for care of crime victims and their relatives. The Government has determined that Sweden fulfills article 39 of Convention on the Rights of the Child, which states that a child victim of any form of neglect, exploitation, or abuse (...) has a right to rehabilitation and reintegration, by referring to chapter 5, § 11 of the Social Service Act.<sup>704</sup> The treatments of children who have been victims occur mainly within the children and youth psychiatry. There are currently only two official clinics in the country that specialize in sexual abuse, child psychiatry Elephant in Linköping and BUP Vasa in Stockholm. These clinics can offer different treatment methods, for example group therapy and individual counseling.<sup>705</sup>

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<sup>700</sup> [www.UMO.se](http://www.UMO.se) (Retrieved 2012-08-29).

<sup>701</sup> Ibid.

<sup>702</sup> Ibid.

<sup>703</sup> [www.tjejjouren.se](http://www.tjejjouren.se) (Retrieved 2012-08-29).

<sup>704</sup> SFS 2001:453, Social Service Act, chapter 2, 1§.

<sup>705</sup> Prop 2005/06:68. *Försäljning av barn, barnprostitution och barnpornografi – Fakultativt protokoll till konventionen om*

However, a child that has suffered trauma is not given an unconditional right to treatment in Sweden.<sup>706</sup> In order for a child to receive help it is required that he or she exhibit a serious symptom and that the child and its parents are motivated to treatment and make initial contact.<sup>707</sup> It was therefore stated in SOU 2004:71 "*Sexual exploitation of children in Sweden*" that BUP is not an ideal solution for treatment of a child.<sup>708</sup>

The County Administrative Board in Stockholm (CABS) has, through the Governments mandate, been assigned to coordinate and develop activities in order to secure a safe return for victims of sexual exploitation to their home country.<sup>709</sup> The ambition has been to offer more comprehensive support and assistance for a return than just paying for a ticket to the home country.<sup>710</sup> With the ambitions to develop a national safe return program, CABS has initiated collaboration with the NGO International Organization for Migration in Helsinki.<sup>711</sup> This pilot project was launched in August 2012 and is intended to be a 14 month long project.<sup>712</sup> The project will be focusing on supporting Swedish authorities in providing return counseling to the target group, empower the projects beneficiaries to take an informed decision on voluntary return, and to help organizing approximately 15 assisted voluntary returns followed by individually tailored reintegration support and monitoring.<sup>713</sup>

ECPAT Sweden has, in their global monitoring of Sweden, highlighted that the access to appropriate recovery and reintegration service for child victims of trafficking is hampered by the lack of cooperation, coordination, knowledge and clear division of responsibilities between various organizations working on the issue.<sup>714</sup> They also stressed the lack of child perspective in the guidelines.<sup>715</sup> The CRC, in the "*Concluding observations of 2011 on Sweden's implementation of the OPSC*", also expressed a concern that foreign children are not receiving

*barnets rättigheter* [Sale of children, child prostitution and child pornography – Optional Protocol to the Convention on the rights of the child]. Stockholm, Ministry of Health and Social Affairs, 2006. p. 33.

<sup>706</sup> SOU 2004:71. Utredningen om kunskaper om sexuellt exploaterade barn i Sverige [The Inquiry on knowledge of sexually exploited children in Sweden]. *Sexuell exploatering av barn i Sverige* [Sexual exploitation of children in Sweden], Stockholm, Ministry of Health and Social Welfare, 2004. p. 171-172..

<sup>707</sup> Ibid

<sup>708</sup> Ibid.

<sup>709</sup> Report 2010:03. *Ett tryggare återvändande* [A Safe return]. Stockholm, Stockholm County Administration, 2010.

<sup>710</sup> [www.lanststyrelsen.se](http://www.lanststyrelsen.se) (Retrieved 2012-10-31)

<sup>711</sup> [www.iom.fi](http://www.iom.fi) (Retrieved 2012-10-31)

<sup>712</sup> Ibid

<sup>713</sup> Ibid

<sup>714</sup> ECPAT Int. Global Monitoring Report on Sweden, 2011, second edition, page. 29.

<sup>715</sup> Ibid



the same quality standards as children from the state party. The CRC also expressed further concern about the fact that both rehabilitation and safe return programs are limited to the Stockholm area.<sup>716</sup>

In Sweden there are currently no intervention programs for children who have been exposed to sexual exploitation.

In 2011, new provisions were included in the Social Service Act to further strengthen protection of children.<sup>717</sup> It is stated that the child should receive the relevant information, and that his or her attitude shall be mapped as far as possible. Consideration should also be made to the child's wishes with consideration of the child's age and maturity.<sup>718</sup>

### III NATIONAL POLICY REGARDING CHILDREN

i) There is a political discussion regarding incorporation of the Convention on the Rights of the Child in Sweden. In 1990 the Convention was ratified by Sweden without any dissents.<sup>719</sup> Sweden has chosen to use a transformation method to change and adopt the Swedish legislation to the Convention, but it has currently not been incorporated into Swedish law.<sup>720</sup> However the government has recently decided to make an inquiry about making the Convention on the Rights of the Child Swedish law. There is still an uncertainty if Moderaterna, one of the parties in the government, wants to make the Convention part of Swedish legislation or not. Moderaterna's previous counterargument has been that the rights of children are not necessarily straightening by making the Convention law. There is one party, Sverige Demokraterna, who doesn't want the Convention part of the legislation, but three parties in the government and three parties in the opposition want the Convention on the Rights of the Child part of the Swedish law system.<sup>721</sup>

In 2010 the parliament adopted a strategy to strengthen children's rights in Sweden.<sup>722</sup> In the strategy the Government suggests a few proposals on how to strengthen children's rights in

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<sup>716</sup> Ibid

<sup>717</sup> Ds 2011:37 p. 98.

<sup>718</sup> SFS 2001:453, Social Service Act, chapter 3, 5§, paragraph 2.

<sup>719</sup> Prop 1989/90:107 "Om godkännande av FN:s konvention om barnets rättigheter" (Approval of the UN Convention on the Rights of the Child), page 27.

<sup>720</sup> <http://unicef.se/projekt/gor-barnkonventionen-till-lag> (Retrieved 2012-08-19).

<sup>721</sup> <http://rod.se/barnkonventionen-kan-bli-svensk-lag> (Retrieved 2012-11-04).

<sup>722</sup> Prop 2009/10:232, "Strategi för att stärka barnets rättigheter" (Strategy to strengthen the rights of the child in Sweden).

Sweden. The Government states, among other things, that all legislation concerning children shall be designed in accordance with the Convention.<sup>723</sup> Children should, for example, be aware of their rights and how these can be applied in practice. The Government also want to ensure children and young people the possibility to express their views in matters concerning him or herself. The current knowledge about children's living conditions should be the foundation for the decisions and priorities concerning children. The aim of the strategy is to strengthen children's rights in all areas and activities at the Governmental and municipal level.<sup>724</sup>

ii. ECPAT is a non-Governmental organisation that, among other things, conducts campaigns to raise public awareness about issues concerning sexual exploitation of children. There has been an international campaign called "Stop Sex Trafficking of Children and Young People" which ECPAT Sweden conducted together with the company The Body Shop. ECPAT is collecting knowledge and producing information materials about commercial sexual exploitation of children, both domestically and internationally. ECPAT Sweden initiated both the blocking collaboration with the ISPs and the Swedish Financial Coalition. Their main focus is on the commercial aspects of the global exploitation of children.<sup>725</sup>

In the National Action Plan against Sexual Exploitation of Children, the Government's vision is expressed that no child in Sweden shall be subjected to sexual exploitation.<sup>726</sup> It is also stated that no child in any other country shall be exposed to sexual exploitation by a person from Sweden.<sup>727</sup> Children who still suffer from sexual exploitation shall get the help they need.<sup>728</sup> Sweden will also contribute to an effective international cooperation regarding this issue.<sup>729</sup> However, the national action plan has not been updated since 2009.

The Minister of Justice, Beatrice Ask, and the Minister for Children and Elderly, Maria Larsson, arranged a seminar in May 2012 for authorities and organisations about child pornography and sexual exploitation of children. The seminar was held to raise awareness

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<sup>723</sup> Ibid, page. 10.

<sup>724</sup> Ibid, page.10-11.

<sup>725</sup> <http://www.ecpat.se/index.php/om-ecpat/detta-goer-ecpat-sverige> (Retrieved 2012-08-19).

<sup>726</sup> S 2008.002, National action plan against Sexual exploitation of children in Sweden 2007.

<sup>727</sup> Ibid, page.6.

<sup>728</sup> Ibid.

<sup>729</sup> Ibid, page 4.

about the issue, before a follow-up and a review on the current national action plan.<sup>730</sup> Nevertheless, the CRC has in its concluding observations called upon the state party to increase and improve the awareness-raising measures.<sup>731</sup>

iii. The responsible agency for official crime statistics in Sweden is The National Council for Crime Prevention. In Sweden there is lack of data regarding almost all forms of sexual exploitation of children. Not only does the lack of data make the analysis of the statistic difficult, various experts, for instance the Faculty of Law at Stockholm University, has, as recently as 2011, pointed out that it is not possible to follow a case from reporting or notification to verdict.<sup>732</sup> The lack of a comprehensive system for data collection has also been a concern of CRC who, in their 2011 concluding observation of Sweden, recommended Sweden to further develop and centralize mechanisms for systematic data collection.<sup>733</sup> They also recommended Sweden to establish a coordinated system of data.<sup>734</sup>

Concerning pornography offences, 125 Swedish children were identified in Interpol's database of abusive pictures in 2009, according to information by the Swedish Government. From year 2006 to 2008, statistics provided by the Swedish National Council for Crime Prevention (BRÅ) indicated that more than 1,000 cases of child pornography were reported. During 2006 and 2007 there were in total 132 convictions. The estimated conviction rate during the period 2001 – 2005 is 15 % and consists of about 70 convictions per year. In 2010 there were 390 reported offences of child pornography in Sweden.<sup>735</sup>

In a Swedish Government Official Report<sup>736</sup> 303 verdicts of child pornography were analysed during the years 2001 to 2005. The defendants were, in about 50 % of the verdicts, sentenced for other offences as well as child pornography. Two thirds of these defendants were sentenced for sexual offences against children.<sup>737</sup>

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<sup>730</sup> <http://www.regeringen.se/sb/d/14859/a/192038> (Retrieved 2012-08-20).

<sup>731</sup> Committee on the rights of the child, fifty-eighth session, Concluding observations; Sweden, page.3

<sup>732</sup> ECPAT Int, Global monitoring, status of action against commercial sexual exploitation of Children Sweden 2th edition. page. 16.

<sup>733</sup> Committee on the rights of the child, fifty-eight session, Concluding observations of Sweden, page.2.

<sup>734</sup> Ibid.

<sup>735</sup> Ibid, page. 11.

<sup>736</sup> SOU 2007:54

<sup>737</sup> ECPAT Int, Global monitoring, status of action against commercial sexual exploitation of Children Sweden 2th edition. p. 11.

In 2011, 2990 cases of rape of children of the age 0-17 were reported. In 9 % of the cases the victims were boys. Boys as victims were highly represented in the age group of 0-14 years.<sup>738</sup>

Reported crimes in 2011 according to National Council for Crime Prevention (BRÅ):<sup>739</sup>

Sexual exploitation against children under the age of 15 years (5 §)	436
Sexual exploitation against children between 15-17 years (5 §)	47
Sexual abuse against children under the age of 15 years (6 §)	574
Sexual abuse against children between 15-17 years (6 §)	28

iv. In 2011, the Ministry of Health and Social Affairs conducted a campaign called “*Titta inte bort*” (Don’t look away) highlighting sexual offences against children. The message of the campaign was spread through a film, which was shown in Scandinavia’s airports during the winter of 2011. The campaign was run in collaboration with the Swedish Police and ECPAT.<sup>740</sup>

ECPAT and The Body Shop had a common campaign called “Stop Sex Trafficking of Children & Young People” which was part of an international campaign. In June 2011, 325590 signatures were handed over to the Minister of Justice, Beatrice Ask, with demands for improvement in the Swedish commitment against child trafficking for sexual purposes.<sup>741</sup> The Committee on the Rights of the Child has also called upon the state party to increase and improve its awareness-raising measures, including campaigns.<sup>742</sup>

v. The legislative process in Sweden starts with an initiative from the Government, a political party, interest organisation, authority or a citizen.<sup>743</sup> The Government thereafter makes a decision on the directives for an appointed investigation. The Government’s official review then goes on circulation for comments from authorities and organisations, after which a proposal is prepared by the relevant ministry, and then the Council on Legislation

<sup>738</sup> [http://www.bra.se/webdav/files/statistik/pdf/sammanfattning\\_anmalda\\_2011.pdf](http://www.bra.se/webdav/files/statistik/pdf/sammanfattning_anmalda_2011.pdf) (Retrieved 2012-08-20) Anmällda brott slutlig statistik för 2011 (Reported crimes, final state statistics) s. 7.

<sup>739</sup> <http://www.bra.se/bra/statistik/100/2011/100La-2011.html> (Retrieved 2012-08-20).

<sup>740</sup> <http://www.ecpat.se/blogg/2011/12/20/swedavia-berattar-om-sitt-samarbete-med-ecpat-sverige/> (Retrieved 2012-08-26).

<sup>741</sup> <http://www.thebodyshop.se/web/varderingar.aspx>. (Retrieved 2012-10-25).

<sup>742</sup> Committee on the rights of the child, fifty eighth session, Concluding Observations; Sweden, page.3

<sup>743</sup> <http://www.regeringen.se/sb/d/1522>. (Retrieved 2012-10-25).

review the proposal. The Government subsequently hand over the Government bill to the Parliament. The Government bill, and possible motions from the oppositional parties, is processed in the parliament's committees. The parliament then makes a decision and if the legislative proposal is approved the Government pronounce the law.<sup>744</sup>

In the Government has also declared the importance of making the whole legislative process characterized by a child rights and child's perspective, from the directive for the investigation to the final decision-making in the parliament.<sup>745</sup>

In the design of all relevant legislation and regulations the basic principles of the Convention on the Rights of the Child shall be respected, regardless of the area.<sup>746</sup>

The circulation for comments is an important part of the legislative process and involves both authorities and the civil society. The Ombudsman for Children has the responsibility to pay attention to laws and regulations and make sure that the adjudication is comported with the Convention. The Ombudsman for Children can make proposes for constitutional changes and other essential measures.

vi. There are many NGOs working for children's rights in Sweden. Some of the main contributors in this field are Save the Children Sweden,<sup>747</sup> UNICEF Sweden,<sup>748</sup> ECPAT Sweden<sup>749</sup> and Plan Sweden<sup>750</sup>, who are all working both nationally and internationally, and BRIS who is working only on a nation level.<sup>751</sup>

That the Government has stressed the importance of allowing authorities, NGOs and other actors to contribute with their opinions in the political decision-making process is acknowledged.<sup>752</sup> The circulation for comments has its base in the constitutional law's "beredningskrav" (demand for drafting) which is stated in chapter 7 paragraph 2 Instrument of Government. The aim of the circulation for comments is to foresee as many of the consequences as possible, if a proposal was to be approved. In the same time the circulation

<sup>744</sup> <http://www.regeringen.se/content/1/c6/01/16/10/b91125b9.gif> (Retrieved 2012-10-25).

<sup>745</sup> Prop 2009/10:232, "Strategi för att stärka barnets rättigheter i Sverige" (Strategy to strengthen the rights of the child) p.11.

<sup>746</sup> Ibid, p.11-12.

<sup>747</sup> <http://rb.se/VARTARBETE/ISVERIGE/Pages/default.aspx> (Retrieved 2012-08-26).

<sup>748</sup> <http://unicef.se/sa-arbetar-vi> (Retrieved 2012-08-26).

<sup>749</sup> <http://www.ecpat.se/index.php/om-ecpat/detta-goer-ecpat-sverige> (Retrieved 2012-08-26).

<sup>750</sup> <http://plansverige.org/om-plan/det-har-ar-plan> (Retrieved 2012-08-26).

<sup>751</sup> <http://bris.se/?pageID=372> (Retrieved 2012-08-26).

<sup>752</sup> Prop. 2009/10:55, "En politik för det civila samhället" (Politics for the civilized society) page. 16-18.

for comments is a way to encourage participation of citizens in public debates. It's not mandatory for NGO's to give responses to the submissions for comment but they can be invited to do so. If an organisation hasn't been given an invitation to leave their comments they still have the opportunity to do so, this is called "spontanytttrande" (spontaneous comment). <sup>753</sup>

## IV OTHER

What is the expressed legal protection of asylum-seeking children in Sweden?

Sweden has ratified the UN Convention on the Rights of a Child and its Optional Protocol on the Sale of Children, Child Pornography and Child Prostitution and is therefore obliged to protect all children regardless of their legal status in the country. <sup>754</sup> However, Sweden has received a lot of criticism from the Ombudsman for Children and the Committee on the Rights of the Child. The criticism from the Committee concerns the implementation of the Optional Protocol into the Swedish legislation.

Every year, an alarmingly high rate of asylum-seeking children disappears without ever being found. Between June and January 2010, the Migration Board recorded 660 asylum-seeking children as missing. In June, 494 children were missing of which 118 were unaccompanied refugee children. <sup>755</sup> The Ombudsman believes that many of these children are still in Sweden and considers it likely that many of those are in danger of becoming victims of sexual exploitation. <sup>756</sup>

Beside the Ombudsman for Children, Sweden has also been criticized by the Committee which shows concerns about the lack of protection that Sweden gives to unaccompanied asylum-seeking minors and children of irregular immigrants or undocumented children. The Committee's concern is not unaccounted. Especially unaccompanied asylum-seekers have a

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<sup>753</sup> Ibid., page. 70.

<sup>754</sup> UN Convention on the Rights of a Child, article 34.

<sup>755</sup> <http://www.ecpat.se/index.php/component/content/article/46-debattartiklar/270-494-barn-forsvann-i-sverige-under-forsta-halvaret>. (Retrieved 2012-10-09)

<sup>756</sup> Comments of the Ombudsman for Children in Sweden on Sweden's initial report on the implementation of the Optional Protocol to the Convention on the Rights of the child on the sale of children, child prostitution and child pornography, 2011-02-25, p.2.

risk of being exploited for sexual purposes. It is also known that several boys were exploited in a refugee camp in 2003 by perpetrators who used their vulnerability.<sup>757</sup>

There is also an existing problem concerning cooperation between the Migration Board and the Social Services Committee regarding the protection of unaccompanied asylum seeking children. None of these have the main responsibility for these children which leads to them not having the full protection they are in need of.<sup>758</sup> Therefore, CRC encourages Sweden to improve protection for children in an unaccompanied asylum-seeking or migration situation, including by increasing control of the persons into whose care the child is put.<sup>759</sup> CRC also underlines the importance of residence permit for children who have been trafficked into Sweden.<sup>760</sup>

The issue of trafficked children who are smuggled into the country with look-alike passports is considerable in Sweden. It often happens that a person travels alone from Sweden and comes back with a child, claiming to be the parent. There is a case where a woman was stopped when she wanted to come to Europe with six children and none of them were hers.

<sup>761</sup>

Foreign children are not receiving assistance and protection services with the same quality standards as for children from Sweden. Above are some of the reasons why Sweden has been recommended to ensure that child victims, especially those of foreign origin, are provided with appropriate assistance. This includes social reintegration as well as physical and psychological recovery.<sup>762</sup>

## V CONCLUSION

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<sup>757</sup> SOU 2004:71, *Sexuell exploatering av barn i Sverige*, [*Sexual exploitation of children in Sweden*] Socialdepartementet, p.85.

<sup>758</sup> SOU 2004:71 p.85.

<sup>759</sup> Consideration of reports submitted by States parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography by the Committee on the Rights of the Child, 58<sup>th</sup> session, between 2011-09-19 and 2011-10-07, p.5, article 22 (d).

<sup>760</sup> Consideration of reports submitted by States parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography by the Committee on the Rights of the Child, 58<sup>th</sup> session, between 2011-09-19 and 2011-10-07, p.8, article 35 (c).

<sup>761</sup> Swedish Official Government Reports, SOU 2004:71 p.85.

<sup>762</sup> Consideration of reports submitted by States parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography by the Committee on the Rights of the Child, 58<sup>th</sup> session, between 2011-09-19 and 2011-10-07, p.8, article 37 (a) &(b).

Sources on the subject of legal status of children in Sweden can be dated back to the 16th century. By following the development on the subject of corporal punishment and abuse of children, by parents, teachers, magistrates et al. over the centuries an order appear where the child – contrary to as we now know it; its rights to respect for its individuality, physical and mental integrity, codetermination etc. being acknowledged, protected and promoted – has been deemed an object merely of the parental responsibility to properly raise. Today, the tone has changed insofar the vast majority of parents no longer consider the corporal punishment an infeasible parenting tool and the perspective has also shifted in the sense that children no longer solely are considered a *parental responsibility* and a parental obligation to make every effort possible to look after, but a separate legal entity with a claim to be respected.

When glancing at the national legislation of today, a different image than the one above appears: although the Instrument of Government does not mention children as a group, vast legislative changes have been carried out due to the Swedish accession to the 1989 Convention on the Rights of the Child and its Optional Protocols. It can also be said that dualistic traditions through adaptations of law obligate Sweden to fully obey the principle on the child's best interests and in a legally secure manner ensure every individual child its rights. To try to guarantee children their rights, such as those codified in the Convention, Sweden seek to ensure their full national impact through transformation. The state's largest problem has been identified in terms of meeting the Conventional standards *in practice*, in every application of laws onto a actual case, not only by upholding a formal legal protection in the enactment of law.

That being said: the State itself considers that an overall accurate adaptation of internal legislation has been ensured in order to comply with the Conventional provisions. Although, there are articles of the Convention that still awaits transformation. Transformation at large has, furthermore, by UNICEF Sweden, Save the Children, the CRC, a majority of the political parties et. al., been deemed an unsatisfying method as the legislation is considered not meet the challenges in safeguarding child's rights in e.g. the legal process, on the school ground, while in contact with social authorities or at home etc. Recently in 2012 there has been decided upon an inquiry to investigate the possibility of giving the Convention legal status as law.

Further legislative work has been carried out following the Swedish approval and ratification of the Convention's Optional Protocol on the Sale of Children, Child Prostitution and Child



Pornography in 2006. The sexual activities hereby referred to are today covered by the Penal legislation on sexual crime since its revision was carried out in 2005 and the extension of the term sexual activities was achieved. During the revision of the sexual offences legislation in Chapter 6 of the Penal Code in 2005, the term sexual intercourse was rephrased to “sexual activities”. With the substitution an extension and further application of the concept was denoted so that not only regular intercourse or penetrative acts would fall within the punishable area, but also other equally intrusive acts of pronounced sexual nature. For any of the crimes of the Penal Code chapter 6, intention is required for criminal liability unless otherwise is stated.

The legal age for engaging in sexual activities is 15 years, a far from absolute limit which can be stretched due to a special discard rule applicable if the child is far gone into its maturity process, insofar a sexually self-determined child engaging in sexual activities with a 14-year-old is committing a crime, sexual exploitation of a minor, which is considered less grave than rape of a child. The formal legal age has also proved to be just formal when a child close to turning 15 had been bought to perform sexual acts with a number of grown men; the latter being sentenced for sexual exploitation of a child.

It is noteworthy that it is not imposed for the crime rape of child prerequisites, equivalent to the rape offense for adults, which requires that the offense is committed under duress, threat or use of force. At the commissioning of these crimes it is presumed to be an issue of abuse of power and ruthlessness, which weighs as heavy as the requirement for violent or formulation of an advanced threat at the rape offense. Furthermore it should be added that it is irrelevant for the question of criminal liability whether or not the child was coerced, exploited, taking advantage of, exposed of violence or, on the other hand, engaged consensually and voluntarily in the act. The Penal Code legislation on sexual offences also occupies rules about sexual intercourse between biologically related persons, such as parents, children and siblings, as well as exploitation of a person in a position of dependence (intended for cases when school or pre-school personnel et al. are abusing their authorities.

In Sweden, there is a discussion going on about the ratification of the Lanzarote Convention, in which it is claimed from the Government that it strives to get the internal legislation to conform to the Convention before ratifying the latter. An example of a successful such attempt to create conformity is that the Conventional requirements now are met with regards to specific requisites of the offense purchase of sexual act from a child. Swedish criminal code similarly admits provisions on trafficking, unlawful coercion and

pimping in conformity with the Council of Europe Convention on action on human trafficking, which was ratified in 2010. Regarding child pornography Sweden has ratified the Optional protocol to the Convention, on the Rights of the Child, the Sale of Children Child Prostitution and Child Pornography. Furthermore it is being discussed whether the Convention on Cybercrime of 2001 should be ratified by Sweden; in 2011 was latest summoned an investigation to identify necessary legislative changes for Sweden to meet its requirements. While awaiting the report, the offences punishable as child pornography under contemporary national law are the depiction of a child in a pornographic image, distribution, display, offering to sell, acquiring etc. of the same. The act of so called “grooming”, that is to take action (often initiated through the use of internet) towards a physical meeting with a child in order to fulfill a sexual purpose, is likewise criminalized under the penal Code chapter 6. The sentencing formally following above mentioned crimes vary from being punishable by a fine to ten years imprisonment (aggravated rape of a child). The authors consider however, as has been pointed out by the CRC, that the *actual* sanctions is not proportionate to the real damage. There ought not be a fine in the range of punishment for the crime of sexually exploiting a child, further on a purchase of sexual acts from a child should not be regarded a less serious sexual offence against children. As has been pointed out by both the CRC and the Children’s Ombudsmen the requirement of double criminality should thereto be abolished in order to enable Swedish authorities to prosecute a perpetrator that has bought a sexual act from a minor in another country.

If we leave the legislature and the crime investigating authorities' activities, and attend to a greater perspective on how the impact of children's rights generally is guaranteed in various sectors of society through complementary measures it can, in summary, be said that this offers a colorful view. For example, the judiciary has organized trainings on child abuse and child pornography, courses on the latter has been introduced, instruction manuals has been created and provided to prosecutors investigating child abuse and the crime victim compensation fund has carried out a training program for the improved treatment of sex offenders. ECPAT Sweden concludes though that none of the groups police, prosecutors, judges, lawyers, teachers, students of law et al are given compulsory training on the topic commercial sexual exploitation of children, in all its various expressions.

On the school area sex education knowledge is provided on sex and reproductive health in order to address attitudes and norms towards certain sexual conduct, sexual contacts and sexual identities; although lacking in providing relevant information about the risks of being

sexually exploited and abused. ECPAT Sweden has recommended the Government to make education on these topics compulsory parts of the school curriculum.

Finally, with regards to the curative and preventive work there has been established help lines in PrevenTell and the Children's Rights in Society helpline as well as the ECPAT hotline, aiming at, on the one hand, provide help to prospective sex offenders in time, on the other hand provide a channel for children experiencing violence in home, and on the third hand enable the public to report suspected cases of commercial sexual exploitation of children. Further on, considering for example in the Stockholm area at the Karolinska university hospital where projects are running assisting "sexually addicted" individuals, it can be concluded that the rehabilitation efforts made, targeting individuals that has committed or are risking to commit sexual offences against children, by necessity must be developed and made available.

**Final word**

For approximately 1,5 year ago I was introduced to the main outlines for the project "ELSA for Children". I immediately felt that this was a great opportunity for the ELSA network to work in a concrete way in line with our vision "A just world in which there is respect for human dignity and cultural diversity" at the same time as we could make a contribution in the way towards enlightening the complex issues regarding sexual abuse against children in different contexts.

From the start I was completely convinced that I would find qualified national researchers for the project, however I could never imagine the engagement I would find in the persons I chose to conduct the research. They have made an impressive and amazing effort to create a complete report of high quality.

We have not only received support and good advices that has been absolutely necessary for us to be able to achieve our academic ambitions from our Academic Advisor, Amanda Bertilsdotter Nilsson, ECPAT, she has also been a great source of inspiration for our research group.

We have also received some external help regarding the language from Kirsten Sandberg, professor in law at Oslo University, and Lee Dobson that we are very grateful for.

Best Regards

Josefine Petersen

National Coordinator, Sweden



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**National Coordination**

Sahar Nasiri

**National Reserchers**

Tristan Naber

Loubna el Bouazzaou

## I INTRODUCTION

### 1 GENERAL

**Aim:** This introductory section will be a general overview on the status of the internal protection of the subjects of our research. It is very important that you give official credits of your statements, to grant the objectivity of this general part. When you will describe the implementation of international and European instruments, it's important that you cite name and number of the main legislative acts; in this way, readers will have precise references of the legal basis that sustain also the following answers.

#### *Equal Rights*

i. Are there discrimination problems regarding sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status of men and women? Please quote official reports from National or International Institutions, reports from the main NGOs that are active in the country and/or Journalistic inquiries.

“The ETC (Equal Treatment Commission) is concerned because Muslim women looking for jobs or internships may suffer from discrimination due to the fact that some private and public sector organisations ban headscarves in the workplace.”<sup>1</sup>

“The Netherlands Institute for Social Research (SCP) has extensively researched<sup>39</sup> the scope and causes<sup>40</sup> of discrimination based on race and ethnic origin in recruitment and selection procedures.

Even when candidates' qualifications and motivation are equal, employers tend to base their choice of applicant on their own biases regarding ethnic origin.”<sup>2</sup>

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<sup>1</sup> THE NETHERLANDS UN HUMAN RIGHTS COUNCIL UNIVERSAL PERIODIC REVIEW  
SECOND CYCLE – 2012.

<sup>2</sup> THE NETHERLANDS UN HUMAN RIGHTS COUNCIL UNIVERSAL PERIODIC REVIEW  
SECOND CYCLE – 2012.



“Women in the Netherlands structurally earn less than men, even after correction for factors such as age and job level.”<sup>3</sup>

#### *Family Protection*

ii. What is the definition given to the term “family” in your national legislation or Constitution? What is the status of marriage? What is the average marital age of the population? Please quote official reports/statistics from National or International Institutions or official statistics from Private Institutions or NGOs.

The traditional Dutch family is still consisting of a mother, a father and two children. The family ties are looking more like ties with friends.<sup>4</sup>

Non-traditional families like gay families consisting of two mothers or two fathers are been accepted more and more but it is still an issue in mostly rural areas.<sup>5</sup>

It is often thought that the family has lost ground in western society and has given way to other social ties, such as friends, colleagues and associations. Some say that families today are as disjointed to describe and they are possible causes of the changing labour market and the welfare state. The industrial age brought with it the social and geographical mobility of individuals. This can hinder maintaining family ties. The welfare state made it possible for people who cannot take care of themselves to be independent of their families and hire professional help.

#### *Child Protection*

iii. What is the general status of children within the respective States’ cultural and historical background? What is the general approach to children rights issues in the respective state? Is there a general concern regarding children/children rights? Were there/are there any violations that has been caught the eye of the media or the legislators?

Parents are primarily responsible for the upbringing of their children. Problems must, as far as possible, be solved with support from their own environment. Most parents and children succeed in this well. But if children are in need of care, this must be adequately and timely delivered through the Centres for Youth and Families and other care facilities for youth. The

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<sup>3</sup> Idem.

<sup>4</sup> Report from the Social and Cultural Plan Bureau called “The Netherlands in perspective of generations”.

<sup>5</sup> Idem.

role of government is to protect children from any form of discrimination and maltreatment by parents or others. The Netherlands have an Ombudsman for the Children. There is in the national and local government's policies always a policy regarding to children but this is not very specific sometimes.

About the media & children:

The public broadcaster must legally serve all groups in society, including children and young people. Since 2000, children have their own television channel within the public broadcasting. On the general channels of the public broadcaster there is since 2005 Zappelin for children aged two to six years and Z @ PP for the older children from six to twelve years. Z @ PP and Zappelin transmit daily from 7:00 to 19:30 from. Zappelin / Z @ PP broadcasts are also available 24 hours a day on the same digital theme channel.

Z @ PP and Zappelin each have their own website, with the aim of children in a stimulating way to engage with the program's using the transmitter offered. Children can find there games, news, information and videos of the associated programs. The websites have taken into account the online safety of children.

Children have also a wide range of educational and informative programs, including private daily news, the Youth News, which on schooldays broadcasts even two times. The partnership of the public broadcaster, the Dutch Broadcasting Foundation, is legally obliged to this special news for children. The children's public broadcaster is of high quality, which is demonstrated by the fact that it regularly wins international prizes.

iv. International obligations: What is the relevant legislation regarding the implementation of international treaties? What is the relationship between State law and international treaties (dualistic or monistic approach)? What is the date of ratification of United Nations Convention on Rights of the Child? Did the State make any reservations to the Convention? What is the general status of implementation?

Normally The Netherlands are very internationally orientated and are signatory parties to many treaties. The Netherlands have a monistic approach between State law and international treaties. The Convention was ratified 6 Feb 1995, there we no reservations by The Netherlands. It is fully implemented.

To elaborate a bit more:

UN Convention

The UN Convention has existed since 1989 and is about everything that kids may face from birth until the eighteenth birthday. According to the CRC, the government should take all possible measures to combat sexual exploitation of children and prevention. The UN Convention was signed by 193 countries (all UN member countries except the USA and Somalia). In the Netherlands, the CRC since 1995. Article 34 and 35 deal specifically with the protection of children against sexual abuse, sexual exploitation and trafficking.

#### Article 34

The child is entitled to protection from sexual exploitation and sexual abuse. The government should take measures to prevent child prostitution and child pornography. These purposes, States Parties shall take all appropriate measures to prevent:

- A child inducement or coercion to engage in any unlawful sexual activity;
- Exploitative use of children in prostitution or other unlawful sexual practices;
- Exploitative use of children in pornographic performances and materials.

#### Relationship with other Articles of the CRC

Article 34 and 35 of the UN Convention are closely related to the other articles that focus on the protection of children against exploitation, including economic exploitation (Article 32) and other forms of exploitation (Article 36). Article 34 should also be seen in relation with Article 19 and Article 39 of the UN Convention. Article 19 is much wider and determines that the child's right to protection from all forms of abuse and neglect, including sexual exploitation and abuse. Article 39 deals specifically with the right to special care for children who are victims of exploitation or abuse.

#### Optional Protocol on the sale of children, child prostitution and child pornography

The Optional Protocol is part of the UN Convention and is intended to make the text of Article 34 and 35 to tighten. Like the CRC calls the Optional Protocol to the countries party to the banning of the sale of children, child prostitution and child pornography. The Optional Protocol is much more extensive and thus provides for improvements in detection and prosecution and child-friendly legal procedures. It also draws attention to the disproportionate number of girls who are victims of sexual exploitation.

The Netherlands has signed on 23 August 2005 the Optional Protocol on the sexual exploitation of children.<sup>6</sup> It has ratified it on 23 August 2005.

v. European Obligations: If the State is an EU Member, what is the general implementation process of the Directive 2011/92/EU of the European Parliament and the European Council of 13 December 2011? Please cite the internal legal instruments of the implementation.

On the 15 of November 2011 this Directive was implemented.

The following text is directly from the Dutch translation of the Directive. We found it so valuable and so important that we will mention it here as a quote:

“Sexual abuse and sexual exploitation of children are particularly serious crimes, as they are directed against children, who are entitled to special protection and care. They cause long-term physical, psychological and social harm and existence of such practices is an attack on the core values of a modern society relating to the special protection of children and the trust in relevant State institutions. Although accurate and reliable statistics are lacking, research indicates that a significant minority of children in Europe may be sexually abused during their childhood, and that such abuse over the years is not decreasing, but rather that certain forms of sexual violence are increasing. In general, the policy of the Union in this field, in accordance with Article 29 of the Treaty on European Union, aimed at preventing and combating offenses against children, including sexual abuse and sexual exploitation of kids. This should be done by the third pillar a more coherent framework for the combat these crimes and their effectiveness increase. Specific objectives would be to effectively prosecute the crime, the protection of the rights of victims, prevention of sexual exploitation and sexual abuse of children and the introduction of effective monitoring systems.”<sup>7</sup>

## 2 THE LANZAROTE CONVENTION

**Aim: To give general overview on the implementation of this legal instrument in the internal protection of this subjects. Answers should be precise and detailed, as required before, to grants objectivity.**

vi. When did the State ratify the European Convention on Human Rights?

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<sup>6</sup> <http://www.ecpat.nl/p/1/138/mo45-mc55/wetgeving>

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[http://www.eerstekamer.nl/eu/europeesvoorstel/com\\_2009\\_135\\_gedrukt\\_als\\_kamerstuk/document/f=/vi3pc0btjxnr.pdf](http://www.eerstekamer.nl/eu/europeesvoorstel/com_2009_135_gedrukt_als_kamerstuk/document/f=/vi3pc0btjxnr.pdf)

On 31-8-1954.

When the Netherlands on 4 November 1950 signed the Convention, and by the means of ratification on 31 August 1954 it entered into force for the Netherlands. The Dutch didn't know that the treaty would play such a significant role to play. Although the government was not entirely reassured and during the negotiations - largely unsuccessfully - had sought the text of the

treaty to weaken, it was assumed that the ECHR had no practical significance and would not have that for the Netherlands. However, it seemed unbelievable that the Netherlands human rights violations would occur and they saw the treaty therefore especially as a clear statement against the totalitarian countries in Europe where the guarantee of rights and freedoms would not have applied.

Until well into the seventies of the last century it was estimated that the ECHR had no role in The Netherlands, although in the literature the attention increased and it also highlighted the potential significance of the treaty for the further development of human rights in The Netherlands.

Also in Dutch administrative law, the ECHR has in the last twenty years played an increasingly important role, focusing is assumed to meaning of Article 6 of the Convention for the establishment of the administrative judicial protection. In the literature - even in the administrative manuals - this procedural influence of Article 6 is widely discussed. Thereby we could include issues such as the independence and impartiality of the administrative court, the reasonable period, the obligation to state reasons for a decision of the court, the assessment by the court of an expert report, etc.

vii. Is the state a party to the Lanzarote Convention? Date of signature and ratification? Did the country make any reservations to the Convention/opt out of any parts?

Yes, signature 25-10-2007 and ratification was on 1-3-2010. No reservations or opt outs.

Since January 2010, the Netherlands amended its legislation and thus the Lanzarote Convention ratified. The amendment is 'grooming' punishable under Article 248th Sr. Under 'grooming' is defined by an adult on internet sites actively approach and seduction of minors with the ultimate goal of committing sexual abuse with minors. By this provision this person

can be prosecuted once he makes a proposal for a meeting with the child. The penalty for this is up to two years imprisonment or a fine of the fourth category of the Dutch Penal Code.<sup>8</sup>

v. What is the rank of the Lanzarote Convention under your national legal order? Is there a legislation regarding its implementation? If so, indicate the source and if available, an English translation.

There is national legislation for the implementation of the Convention. National criminal law has been changed at some points to be able comply with all the requirements set by the Convention.

vi. Does this legislation address all the issues within the Lanzarote Convention?

Yes.

## II NATIONAL LEGISLATION

### 1 GENERAL PRINCIPLES OF THE JURISDICTION

**Aim: This section is important to frame the juridical system of the Country that is the object of the research. It's important to understand how the legislation is implemented and how victims of violations can be protected.**

i. Please give us a brief history of the respective State and the governmental regime (Federal State/Central government?)

The Netherlands have a central government. The term central government stands for the collective name of the ministries, a large number of implementing organizations, the inspectorates and the High Councils of State.

In the Netherlands, the government consists of the central government and three other tiers: provinces, municipalities and water authorities. The central government operates at the national level while the other tiers operate at a regional respectively a local level.

Each ministry is headed by a minister, often with the support of one or more state secretaries. There are also ministers without a portfolio, this means who are not in charge of

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<sup>8</sup> <http://www.ecpat.nl/p/1/138/mo45-mc55/wetgeving>

a ministry, but who still fall under one of the ministries. An example is the ‘Development Cooperation’, which is part of the Ministry of Foreign Affairs.

The ministries are responsible for a large number of civil service agencies and implementing organizations. These include:

- the Tax and Customs Administration, which is responsible for the collection of taxes and social insurance contribution
- the Custodial Institutions Agency, whose responsibilities include implementing prison sentences.

The central government also has a number of inspectorates. These include, but are not limited to:

- the Education Inspectorate;
- the Healthcare Inspectorate;
- the Transport and Water Management Inspectorate.

The High Councils of State monitor and advise the central government bodies. The Constitution states that the Councils must be independent and autonomous. They include:

- the Senate and the House of Representatives (Parliament);
- the Council of State;
- the Netherlands Court of Audit;
- the National Ombudsman.

The Kingdom of the Netherlands was recently political restructured. It concerns the former Netherlands Antilles, consisting of the islands Curacao, Sint Maarten, Bonaire, Sint Eustatius and Saba. The use of referenda showed that all islands, except for one, no longer wanted to be part of the Netherlands Antilles, without detracting the relations with the Kingdom.

The Netherlands Antilles ceased to exist on 10 October 2010. The new structure entails that Curacao and Sint Maarten gained a similar status as Aruba. Aruba contains the status of country within the Kingdom and has this status since 1986.

From 10 October 2010 the Kingdom consists of four, instead of three equivalent countries, the Netherlands, Aruba, Curacao and Sint Maarten. The countries hold a high degree of internal autonomy.

The three remaining islands, Bonaire, Sint Eustatius and Saba, have chosen for a direct relation with the Netherlands and form the “Caribbean part of the Netherlands”. They gain the status of a public entity as stated in Article 134 of the Dutch Constitution. This status is similar to the status of the Dutch municipalities with certain modifications. The Dutch-Antillean legislation is for the time being still applicable in the public entities.

The countries themselves are responsible for the implementation of obligations deriving from international treaties. The Dutch government assists the other countries within the Kingdom in the field of children’s rights amongst other by way of cooperation programs.<sup>9</sup>

ii. About the general approach of the National legislation to Human Rights, how does the State legislate Human Rights? Is there a “Bill of Rights” within the respective country or are human rights mentioned in the Constitution as fundamental principles? When was this Constitution/Bill of Rights created? Are there any specific provisions regarding Children Rights?

There is no Bill of Rights in the Netherlands. Human rights are codified in the Dutch Constitution. The present Constitution is generally seen as directly derived from the one issued in 1815, constituting a constitutional monarchy. A revision in 1848 instituted a system of parliamentary democracy. In 1983 the Dutch constitution was largely rewritten. The text is very sober, devoid of legal or political doctrine. It includes a bill of rights. Another important aspect is the fact that laws and treaties cannot be tested against the constitution. There are no specific provisions regarding children rights within the Dutch Constitution.<sup>10</sup>

With regard to the question how human rights are legislated, a closer look is needed at Articles 93 and 94 of the Dutch Constitution. This will be dealt with in the upcoming questions. Therefore, a reference to p. 4 - 6 of this document is sufficient.

iii. Are there specific judicial bodies which monitor the implementation of international and national human rights instruments (for example Constitutional Courts etc.)? Can individuals claim their constitutional rights directly (e.g. direct effect)? Is there a Constitutional Court? Is it possible to apply individually? If not, how can the individuals claim their constitutional rights in case of violation? Is there a system of hierarchy or other jurisdictions to ask before

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<sup>9</sup> Vierde Periodieke Rapportage van Nederland inzake de Implementatie van het Internationaal Verdrag inzake de Rechten van het Kind 2012, p. 7-9

<sup>10</sup> Wikipedia.



being able to go before Constitutional/Supreme Court? Please, briefly describe the application process.

The monitoring of implementation of international and national human rights instruments is conducted by several institutions. The courts are entrusted with these tasks, next to the Ombudsman and the Child Ombudsman. Recently, the College for Human Rights was established which is also responsible for the monitoring of the implementation of (inter)national human rights instruments. An outline of all these institutions will be given starting with the Child Ombudsman, followed by the College of Human Rights and to conclude with the Youth Monitor.

□ Child Ombudsman

Since 1 April 2011 the Netherlands have a Child Ombudsman. This is a new, nationwide functioning and independent institution which monitors the compliance of the children rights. Marc Dullaert is the first Child Ombudsman inaugurated by the Parliament.

The Child Ombudsman advises the Parliament and the government and has the task to make adults, children and the youth aware about children rights. His main working area is not limited to the government, but also includes the youth care, education, child care and health care. His tasks are covered in the Law Child Ombudsman.<sup>11</sup>

□ College of Human Rights

The Netherlands have a national human rights institution since 2012. In November 2011, the Senate approved the law which established this institution. The College of Human Rights is independent and is established in accordance with the Paris Principles.

The aims of this College are to protect human rights in the Netherlands, to raise awareness about human rights and to enhance compliance with human rights. This is achieved by conducting investigations, reporting about the human rights situations in the Netherlands by a long-term collaboration with civil society actors and national, European and other international institutions entrusted with the protection of human rights.<sup>12</sup>

□ Youth Monitor

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<sup>11</sup> Vierde Periodieke Rapportage van Nederland inzake de Implementatie van het Internationaal Verdrag inzake de Rechten van het Kind 2012, p. 13.

<sup>12</sup> Vierde Periodieke Rapportage van Nederland inzake de Implementatie van het Internationaal Verdrag inzake de Rechten van het Kind 2012, p. 14.

The Youth Monitor is created to inform policymakers, researchers and other interested persons about the situation of the youth. The monitor contains indications and publications about the youth (0-25 years). Het Centraal Bureau voor de Statistiek (Statistics Netherlands) created this monitor in collaboration with the Ministerie of Volksgezondheid Welzijn en Sport (Ministry of Health, Wellbeing and Sports). This Youth Monitor does not contain any information about sexual abuse or human trafficking. However, the Youth Monitor does contain statistics about child abuse and youth care.<sup>13</sup>

With regard to the question whether constitutional rights can be enforced by a Constitutional Court, the following remarks should be taken into account. The Netherlands do not have a Constitutional Court. So, constitutional rights cannot be invoked directly for a Constitutional Court. However, constitutional rights can be invoked for every other judge (civil, criminal, administrative) based on Article 93 of the Dutch Constitution which states:

“Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.”

Article 94 of the Dutch Constitution states:

“Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.”

This means that every provision from a treaty or resolution is binding by virtue of their contents with the consequence that these provisions may be directly invoked (in other words, they have direct effect) before the national courts.

The concept of direct effect of international law within the Dutch legal order is relevant for the question how the Netherlands legislate human rights as well as how individuals can claim their constitutional rights in case of a violation.

The starting point is that binding international law automatically has direct effect in the Dutch legal order. This means that the legislator, the judges and the executive bodies are obliged to apply these rights. With regard to the question how citizens can invoke these

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<sup>13</sup> Vierde Periodieke Rapportage van Nederland inzake de Implementatie van het Internationaal Verdrag inzake de Rechten van het Kind 2012, p. 15.

rights, Articles 93 and 94 of the Dutch Constitution are relevant as mentioned before. These articles contain rules with regard to the supremacy and direct effect of these international rules.

First of all, Art. 93 speaks of ‘provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents’ rather than ‘direct effect’. The question whether such provision may be binding on all persons by virtue of their contents must be answered by the judge.

According to settled case law of the Dutch Supreme Court the judge takes the following point in consideration in order to answer this question in the affirmative:

- the content of the provision is decisive, unless according to the text or the history of the creation of the text of the treaty the contracting parties have agreed that no direct effect should be granted to those provisions

It is also important whether the treaty provisions prescribes that the Dutch legislator has an obligation to adopt national legislation with a certain content or scope, or that these provisions can function as objective law in the domestic legal order.

According to settled case law of the Dutch Supreme Court, the following considerations have to be taken into account to establish that no direct effect should be granted to the provision in question:

- the general wording of the provision can hardly function within the domestic legal order without further elaboration
- the provision does not contain a specified standard which by its content is suitable for direct application
- the provision concerns performances of the government towards the citizens and these provisions cannot function within the domestic legal order without any further elaboration.<sup>14</sup>

This means that an individual can invoke any provision, including human rights, if this is binding on all persons, from any treaty before the domestic court next to the human rights codified in the Dutch Constitution. In other words, next to the human rights which are

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<sup>14</sup> NJCM-Bulletin, jrg. 30 (2005), nr. 6 p. 701.

codified in the Dutch Constitution also these provisions derived from international law have direct effect.

In case of a violation of a human right, the individual can rely on the direct effect of this category of rights with the consequence that the judge at issue is obliged to assess whether such an infringement has taken place.

There is a hierarchy between the courts in the Netherlands. The highest court is the Supreme Court. However, all remedies must be exhausted in order to be able to file a complaint at this highest court. This means that first the district court must be consulted, after this the Court of Appeal and hereafter the Supreme Court may be consulted.

iv. Is there a Criminal Supreme Court? Please, briefly describe the criminal procedure.

There is a Criminal Division within the Supreme Court, but not a specific separate Criminal Supreme Court.

This Criminal Division is entrusted with criminal cases and cases as mentioned in Article 31 Extradition Law (Uitleveringswet) and Article 32 Law on the Enforcement of Transfers of Sentences (Wet overdracht tenuitvoerlegging strafvonnissen).<sup>15</sup>

The Supreme Court and thereby the Criminal Division of the Supreme Court is only competent to hear cases in case of exhaustion of all remedies.

v. What is the age of criminal liability? Are there any statistics available regarding children prisoners?

The age of criminal liability of children is 12-17 years. With regard to this group, the youth justice system in principle. However, exceptions can be made in case of aggravating circumstances.

In 1965 the current range for criminal liability was established setting the age of criminal liability at 12 years. Before 1965 the age of criminal liability was set at 10 years.

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<sup>15</sup> Procesreglement van de strafkamer van de Hoge Raad  
<http://www.rechtspraak.nl/Organisatie/Hoge-Raad/Regels%20en%20procedures/Pages/Procesreglement-van-de-strafkamer-van-de-Hoge-Raad.aspx>.

A minor younger than the age of 12 years cannot be criminally prosecuted since 1965. He or she enjoys an irrefutable presumption of insanity.

The Report of Commission Overwater, which formed the foundation for the amendment, made it clear that children under the age of 12 years should not be held responsible because criminal proceedings would be a ponderous measures which are not necessary. This age stayed unmodified during the amendment of 1995.<sup>16</sup>

There is also a maximum age of criminal liability. This is set at 18 years and has been established in 1905. Before 1905, the age was set at 16 years. Cort van der Linden, then Minister of Justice, consciously chose the maximum age of 18 years. According to Cort van der Linden, 16- and 17 years old persons find themselves in a critical phase of life which makes them insecure and they need supervision because of this.

During the revision of the youth criminal law in 1965, the border at 18 years stayed unmodified. Even though the possibility was present to apply an adults penalty on persons between the age of 16 ad 17 years, this penalty was hardly used. However, a legal criterion was added with regard to this provision: it is not required that the judge uses the penalties derived from the youth criminal law, when he believes that the severity of the committed crime and the personality of the offender obliges him to apply adult penalties. By law of 1995, this criterion was modified: it is not required that the judge uses the penalties derived from the youth criminal law, when he believes that the severity of the committed crime, the personality of the offender or the circumstances in which the offense was committed obliges him to apply adult penalties.<sup>17</sup> This modification meant that the conditions did not have to apply in a cumulative manner.

In 2008 the judge imposed 17.200 penalties on minor offenders. The most common penalty is the community service (50%), followed by the conditional custodial (voorwaardelijke vrijheidsstraf) (15%) and a money penalty (geldboete) (14%).

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<sup>16</sup> M. Herweijer, De leeftijdsgrenzen in het jeugdstrafrecht en het jongvolwassenenstrafrecht, *Proces* 2011 (90) 4, p. 215-216.

<sup>17</sup> M. Herweijer, De leeftijdsgrenzen in het jeugdstrafrecht en het jongvolwassenenstrafrecht, *Proces* 2011 (90) 4, p. 218.

### □ Community services and money penalties

In 2008, 10.200 community services penalties were imposed on minor children and almost 2.400 money penalties. Per 1.000 12 until 17 years old persons, this means that 7 community services were imposed, 1 training order and 2 money penalties.

The amount of community services penalties per 1.000 minors shows us a rising trend and shows that in 2008 with regard to 2003 the amount of these penalties is increased with 52%. The money penalties show a fluctuating trend. In 2008, the amount of money penalties is similar to that of 2003.

### □ Custody

In 2008, more than 4.000 custody penalties were imposed by the judge. Almost 65% from these penalties had a conditional character. The other percentage did not have a custodial character. Most of these penalties are for a period of maximum 3 months. The amount of these penalties under the group of 12- until 17 years old is increased until 2004/2005. Hereafter, a drop is visible. In 2008 with regard to 2003, the amount of custody penalties has decreased with 45% , the penalties not exceeding 3 months decreased with 37%.<sup>18</sup>

## 2 SUBSTANTIVE CRIMINAL LAW

**Aim:** In this section the research starts to explore national peculiarities. Researchers are asked to analyze the protection provided by criminal law about sexual abuse, child prostitution, child pornography, corruption of children, solicitation of children for sexual purposes.

### 2.1 Sexual Abuse

i. How does the national legislation define the term “sexual activities”? Is it to be applied broadly or narrowly?

The Dutch legislator defines the term sexual activities that are punishable in national criminal law as “ontucht” (sexual abuse). The term sexual abuse has to be applied broadly

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<sup>18</sup> Cahier 2011-2, Jeugdcriminaliteit in de periode 1996-2010, p. 66-67.

and in Dutch law is defined as “handelingen met een seksuele strekking in strijd met de social-ethische norm” (activities of a sexual nature in violation of the social-ethical norm).<sup>19</sup>

ii. Does the law define and interpret the word “intentionally”? What is the criminal liability of an internationally committed crime of sexual abuse?

In Dutch law the *bestandsdeel* “opzet” defines when intention has to be proven. Intention is defined in Dutch law as “willens en wetens” (willingly and knowingly) . There are several different levels of severity of intention that are used with each lowering the amount someone knew or should have known.

iii. What is the legal age for engaging in sexual activities? How are consensual sexual activities between minors regulated?

Normal consensual sexual activities between minors are considered to be within social-ethical boundaries and therefore fall outside the Dutch criminal code.<sup>20</sup> However this can only be considered if there is a slight age difference. The legal age for sexual maturity in The Netherlands is 16.

iv. How is the use of force, taking advantage of disability or threat regulated in regards to sexual offences against children?

If a person uses force or threatens to use force for any sexual crime this person can be prosecuted on the basis of article 246 of the Dutch criminal code.

v. How is the crime of “incest” regulated?

Incestuous relations are punishable under article 249 (1) Dutch criminal code.

vi. Are there any specific provisions regulating offenders who take advantage of school and educational settings, care and justice institutions, the work-place and the community?

If a person uses advantage of educational settings, care and justice institutions, the workplace or the community they will be able to be prosecuted under article 249 (2)2 of the Dutch criminal code.<sup>21</sup>

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<sup>19</sup> MvT, Kamerstukken II 1988/89,20930, nr 3, p. 2)Tekst en commentaar pagina 1097.

<sup>20</sup> Pagina 10 goedkeuringswet.

<sup>21</sup> Memorie van toelichting goedkeuring. Pagina 10.

## 2.2 Child Prostitution

vii. Is the State a party to the Council of Europe Convention on Action against Human Trafficking? If yes, what is the date of ratification and signature? If not, is the State planning to ratify the Convention?

The Netherlands has ratified the convention on Action against Human Trafficking. It has been signed on 17th of November 2005 ratified on 22nd April 2010 and entered into force in The Netherlands on 1st of August 2010.<sup>22</sup>

viii. How does national legislation define “child prostitution”? Is it compatible with the definition in Article 19(2) of the Lanzarote Convention? Please comment.

The national legislation provides for two different ways in which child prostitution can be the case. The first is when the child itself is offering his/her services. In that case if someone takes advantage of that by using the services then that person can be prosecuted under article 248b of the Dutch criminal code.

If however the child is held against her will and forced into prostitution Dutch law looks at the actual actions. Under article 273f human trafficking is punishable. The article includes provisions for when someone, under the age of 18, is recruited<sup>23</sup> or coerced<sup>24</sup> into prostituting him/herself for the benefit of the third person.<sup>25</sup>

ix. Does national legislation criminalize both the recruiter (the person that coordinates the business of child prostitution) and the user (the person that pays to conduct sexual activities with children)?

Where the recruiter can therefore be prosecuted under article 273f, the user is thus criminally prosecutable under article 247 and 248b of the Dutch criminal code.

## 2.3 Child Pornography

*Child Pornography in General:*

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<sup>22</sup> <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=&CL=ENG>.

<sup>23</sup> 273f lid 1 sub 2.

<sup>24</sup> 273f lid 1 sub 5.

<sup>25</sup> It (273f) is compatible according to the Dutch government in the memorie van toelichting pagina 11.



x. Is the State party to the Council of Europe Convention on Cybercrime? If yes, what is the date of ratification and signature? If not, is the State planning to ratify?

The Netherlands is a party to the Council of Europe Convention on Cybercrime. It has been signed on 23rd of November 2001, ratified on 16th of November 2006 and entered into force in The Netherlands on 1st of March 2007.

xi. How does the national legislation define “child pornography”? Is it compatible with the definition in Article 20(2) of the Lanzarote Convention? Please comment.

The definition the Dutch government adopted is the same as in the Lanzarote Convention. Child pornography is “een afbeelding, van een seksuele gedraging, waarbij iemand die kennelijk de leeftijd van achttien jaar nog niet heeft bereikt, is betrokken of schijnbaar betrokken”,<sup>26</sup>

xii. To whom does the State attribute the criminal liability to? Is it compatible with the Article 20(1.a) to (1.f)?

The state attributes criminal liability to the person whom is involved, looks to be involved, distributes, publicly shows, makes, imports, exports or has in his possession and materials .

Under point 1.f. The Dutch government has been the government who proposed to add this point but 1.f. it was put in the Convention only as an optional clause.<sup>27</sup> As proposers of the clause they off course have taken it up in their own legislation and can be found back in the Dutch criminal code.

xiii. What is the control mechanism for pornographic materials? If the state is a party to the Lanzarote Convention, did the state use the reservation right that has been given to them in the Lanzarote Convention Article 20(3) and 20(4)?

The Netherlands has not used the reservation rights under Article 20(3) and Article 20(4). Under Article 20(3) first subsection it has the ability to exclude paragraph 1a to e to the production and possession of pornographic materials “consisting exclusively of simulated representations or realistic images of a non-existent child”.

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<sup>26</sup> Tekst en commentaar pagina 1085, goedkeuring pagina 11-12.

<sup>27</sup> Goedkeuring p 11.

The Dutch government has as his aim with art 240b Criminal Code a broad protection of children against sexual exploitation and sexual abuse<sup>28</sup> which can be found back in the bestandsdeel „schijnbaar is betrokken“ (apparently is involved). The background of this is that the Dutch government has wanted not only to protect the child but also that the child must be protected from „behaviour that can be used to make encourage or seduce children to participate in sexual behaviour or behaviour that can become part of a subculture that sexual abuse encourages“.<sup>29</sup> Therefore also virtual child pornography can be a violation of Dutch law in specific circumstances.<sup>30</sup>

The second subsection of Article 20(3) would allow for an reservation for cases where „a child that would have reached the legal age for sexual majority but not yet the age of 18 and the images possessed would solely be for their own private use“. In this case the Dutch government recons that the chances of such a case coming to light are quite slim but if this would happen the “opportuniteitsbeginsel” gives the public prosecutor the possibility not to prosecute so making a reservation is not needed.<sup>31</sup>

In regard to the possible reservation right under art 20(4) Lanzarote Convention the Dutch government has not used its right to make a reservation and as it is already criminally prosecutable under article 240b.

#### *Participation of a Child in Pornographic Performances:*

xiv. Does the State criminalize intentional conduct of making a child participate in pornographic performances? Does the State highlight and differentiate between recruitment and coercion? What is the State’s approach to the attendance of pornographic performances involving the participation of children? If the State is a party to the Lanzarote Convention, did the state use the reservation right stated in Article 21(2)?

The intentional conduct of making a child participate in pornographic performances is criminalized under several Articles of the Dutch criminal code depending on the circumstances.

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<sup>28</sup> Goedkeuring P 12.

<sup>29</sup> Court of Almelo, 22 april 2011, LJN BQ2272.

<sup>30</sup> Example Hof ‘s Hertogenbosch 4 februari 2008 LJN BC3225, Gerechtshof Arnhem, 25 januari 2012 LJN BV2126. A case in which virtual pictures were not evident enough to be considered virtual child pornography: Rechtbank ‘s-Hertogenbosch 30 maart 2010 LJN BL8876.

<sup>31</sup> Goedkeuring 12.

When a child is recruited for the use in a pornographic performance it is criminalized under Dutch law under article 273f.<sup>32</sup> The article makes human trafficking illegal and by Article 273f(2) this includes forcing or recruiting someone for sexual abuse or prostitution.

Also the seduction of a child into participation in sexual abusive actions is criminalized by Article 248a of the Dutch criminal code.

Under Dutch law intentionally attending a pornographic performance with people involved, of whom someone knows or should know that they have not reached the legal age of 18 years, is criminalized under Article 248c of the Dutch Criminal code. For this article it does not matter how the children are recruited as the action of being present is a criminal action. Therefore the Dutch government has not used its reservation right under article 21(2) of the Lanzarote Convention.<sup>33</sup>

## **2.4 Corruption of Children**

xv. Does the State criminalize the intentional causing of a child to witness sexual abuse or sexual activities, without necessarily having to participate? How does the state define “causing”? Does it involve forcing, inducement, and promise?

Because of the Convention of Lanzarote the Dutch legislator has seen the need to adapt the Dutch penal code and add Article 248d. This article criminalizes the intentional causing of a child to witness sexual abuse or sexual activities.<sup>34</sup> In its “Memorie van Toelichting” (considerations) the Dutch legislator has not specifically made a definition or consideration on how to define “causing” in this case.<sup>35</sup>

## **2.5 Solicitation of Children for Sexual Purposes**

xvi. How does the State criminalize intentional sexual gratification through information and communication technologies by an adult? Does it specify that the perpetrator should also propose a meeting with the potential child victim and come to the meeting place in order to be accused of committing this kind of crime (a.k.a. grooming)?

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<sup>32</sup> Idem.

<sup>33</sup> Idem.

<sup>34</sup> Uitvoering p 5-6.

<sup>35</sup> Idem.

Next to the criminalisation of corruption of children the Dutch legislator changed the Dutch penal code to also include grooming. This has been done in Article 248e of the Dutch penal code which reads:

“A person who, using a computerized device or system or a communication service, proposes a meeting to a person whom he knows or may reasonably be expected to know to be under the age of sixteen, with the objective of committing an indecent act with this person or manufacturing an image of a sexual act in which this person is involved, shall be liable to a term of imprisonment not exceeding two years or a fourth-category fine if he takes any action directed towards the realization of this meeting.”

As can be seen it specifies that for grooming to be an offence it is not necessary that the perpetrator actually meets the child. It is needed though that the contact leads to a concrete proposal for a meeting and that the offender actually makes actions that are directed towards realizing this meeting.<sup>36, 37</sup>

xvii. Does the State criminalize aiding or abetting and attempting to the activities that have been mentioned in the subsection a, b, c, d and e?

Yes, through the normal Dutch legal system for aiding/abetting and attempting allows that all actions in the previous subsections are criminally prosecutable.

## 2.6 Corporate Liability

xviii. Does the State hold legal/moral persons (entities) such as commercial companies and associations liable when an action has been performed on their behalf by a person in a position at their entity? Is there a difference between leading persons (persons in position of authority) and regular employees being held liable? If yes, please describe the differences.

Under Dutch law crimes can be committed by natural and legal person (Article 51(1) Dutch Penal Code. When a legal person commits a criminal offence it can be criminally prosecuted and the penalties and measures foreseen by law can also be applied to legal entities where applicable (Article 51(2) Dutch Penal Code).

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<sup>36</sup>[http://www.om.nl/publish/pages/194954/directive\\_on\\_child\\_pornography\\_dutch\\_penal\\_code\\_section\\_240\\_b\\_2010a025.pdf](http://www.om.nl/publish/pages/194954/directive_on_child_pornography_dutch_penal_code_section_240_b_2010a025.pdf), p.5.

<sup>37</sup> Uitvoering p.6-7.

xix. What kind of liability does national legislation impose? Criminal, civil or administrative? Please explain.

Criminal: Article 51 (2) of the Dutch Penal Code. When found guilty, then the victim could also start a civil procedure to get compensation.<sup>38</sup>

xx. Does national legislation exclude individual liability when there is a corporate liability?

In Dutch legislation there is not a specific provision that can exclude someone from his individual criminal liability if there is a corporate liability.

## **2.7 Aggravating Circumstances**

xxi. Does the state accept any aggravating circumstances for the crimes that have been described above? (e.g. when the offence damaged physical health of the child) Please, write down these circumstances and explain, try to specify the different crimes if there are different aggravating rules applying.

Dutch criminal code article 248 provides increased punishments for aggravated circumstances.

“1. The prison sentences provided in Sections 240b, 242 to 247, 248a to 248e, 249 and 250 may be increased by one third if the offence is committed jointly by two or more persons.

2. The prison sentences provided in Sections 240b, 242 to 247, 248a to 248e may be increased by one third if the offender commits the offence against his child, a child submitted to his authority, a child that he cares for or rears as if part of his family, his ward, a minor entrusted to his care, instruction or supervision, or his minor servant or subordinate.

3. In case of an offence as described in the articles 240b, 243, 245 to 247, 248a, 248b and 249 results in severe physical harm, or when mortal danger for another person can be expected, a term of imprisonment not exceeding twelve years or a fifth-category fine shall be imposed.

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<sup>38</sup> Uitvoering p.14.

4. In case of an offence as described in the articles 240b, 243, 245 to 247, 248a, 248b and 249 results in death, to a term of imprisonment not exceeding eighteen years or a fifth-category fine shall be imposed.”

## 2.8 Sanctions and Measures

xxii. How does the state sanction the above mentioned crimes? Is there a penalty including deprivation of liberty? How does the state legislate extradition?

The Dutch criminal law has several penalties: jail sentence, civil commitments.

Article 16, paragraph 4 of the European Convention on Extradition states that provisional arrest can be terminated somewhere between 18 days and 40 days if the original request for extradition and accompanying documents are not received by the requested state. Following Dutch legislation, provisional arrest can last no longer than 20 days without the receipt of the original request for extradition and accompanying documents. If the original request for extradition and accompanying documents (a fax version is not sufficient) are not received within 20 days after a Dutch judge has ordered the provisional arrest, this provisional arrest must be terminated. Only after the original request for extradition and accompanying documents are received can the requested person be arrested for extradition again.

xxiii. Do you consider the sanctions effective, proportionate and dissuasive? Please comment.

There are strong feelings within the society to make the violators ‘pay’ more. In other words to give them more severe punishments.

xxiv. How does the state sanction the legal persons/moral entities? What kind of measures does it include?

It sanctions legal persons/moral entities with the same punishments as normal persons when the sanctions are applicable. Art. 9 of the Dutch Penal Code provides the possible sanctions.

xxv. Does the state legislate seizure and confiscation of materials, instruments... etc. used for committing the crime? Does the state protect *bona fide* third parties? Is there allocation of a special fund for financing prevention or intervention programmes in which these properties confiscated allocated?

The state does legislate seizure and confiscation of materials used for committing the crime. In this matters there was no evidence found that the State protected *bona fide* third parties.

There is no special fund for financing prevention or intervention programmes in which these properties confiscated are allocated.

xxvi. When the crime has been committed within the family or within the close environment of the child, how does the state react?

Articles 249 and 248 (1) of the Dutch Penal Code explicitly mention the punishments for crimes committed by members of the family of the child or those close to the child.

### 3 CRIMINAL PROCEDURE

**Aim:** After the analysis of the protection framed by criminal law, in this section researchers are asked to explain if national rules of criminal procedure take into consideration the particular needs and situation of the child.

#### 3.1 Investigation

i. How is the principle of the “best interests of the child” applied during investigation of a crime as mentioned above? Is there a protective approach to the victims? What kind of measures has been taken? Is the victim offered protection during the court proceedings? (such as appointing special representatives) If so, please indicate what kind of protective measures have been taken.

There are multiple measures to ensure that the child will get the necessary protection. An outline will be given of the current protective measures towards victims. (Slachtoffer hulp Nederland, spreekrecht, slachtoffer-dadergesprekken, wet versterking positie slachtoffers)

□ Victims Supports Netherlands

Victim Supports Netherlands offers victims, including young persons, help after a crime or road accident. The staff offers practical and legal advice and emotional support. They inform the victims about the criminal proceedings and they can assist them during those proceedings. The volunteers and the paid staff followed an education to enlarge their expertise about the support of the youth who find themselves being victims of violence.

Also the possibilities offered by the internet are used to support the young victims. Next to e-mailing, young persons can also use the chat function on the website (ikzitindeshit.nl). The

reason to choose for the chat function is that young persons are already familiar with this. The chat function is an accessible and approachable medium that allows them without much fuss to ask a question.<sup>39</sup>

□ Spreekrecht (right to speak during proceedings)

Since 1 January 2005, victims and (nabestaanden) are entitled, in case of serious offenses, to give a declaration during the trial about the consequences of that offense in their regular life.

This declaration may also have the form of a written declaration. Children from the age of 12 years may use this right. However, also children under the age of 12 years are in particular circumstances entitled to invoke this right when they have a reasonable understanding of their interests.<sup>40</sup>

□ Victim-offender meetings

Since 2007, there is a possibility for everyone, including the youth, to create victim offender meetings. Slachtoffer in Beeld (Foundation Visible Victim) is responsible for the organization of such meetings. These meetings are run according to a fixed method and may contribute to the processing of the crime by the victim.

Moreover, a successful meeting may have a positive influence on the behaviour of the offender and may contribute to the preventing of recidivism. In case of young offenders, the meetings have a positive pedagogical impact: by these meetings they insistently learn about the consequences of their behaviour. These meetings have a complementary character. They also have a voluntary character. In other words, these meetings are not mandatory and can only take place if the victims want to.<sup>41</sup>

□ “Wet versterking van de positieve van het slachtoffer in het strafproces”

On 1 January 2011 the Law to Amendment of the Code of Criminal Procedure and the Criminal Code to strengthen the position of victims in the criminal proceedings entered into force. With this law, codified in a separate section in the Code of Criminal Procedure, the following rights can be invoked by victims:

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<sup>39</sup> Vierde Periodieke Rapportage van Nederland inzake de Implementatie van het Internationaal Verdrag inzake de Rechten van het Kind 2012, p. 92.

<sup>40</sup> Idem.

<sup>41</sup> Vierde Periodieke Rapportage van Nederland inzake de Implementatie van het Internationaal Verdrag inzake de Rechten van het Kind 2012, p. 92.



- Right to proper treatment (“bejegening”)
- Right to information from the point of declaration to the release of the convicted
- Right to damages
- Right to access to the files

These rights can be invoked by all victims including the youth. This law is also concerned with the obligation from the parents to be present during the criminal proceedings against their minor child. Also, the right to hold the parents of children under the age of 14 years liable for the damage is codified.<sup>42</sup>

The implementation of the Lanzarote Convention by the Netherlands resulted in the following measures:

- The tightening of criminalization of child porn (Article 240 (b) Sr)
- The criminalization of (“corrumpieren”) corrupting children and
- The criminalization of “grooming” (by pimps)

These legislative measures entered into force on 1 January 2010.

ii. Are there any special units for investigating the crimes mentioned above within the legal force? Are they authorised to carry out covert operations? Do they investigate and analyse child pornography materials?

There is no specific separate coordination mechanism for the fight against the sale of children, child prostitution and child porn. The reason for this lies in the fact that the Netherlands approach these problems from the criminal view and not from the perspective of the type of victims in question.

There is a Task Force Human Trafficking with its own Plan and there is also a Task Force against Child Porn and Child Sex Tourism with its own plan. During 2007-2010 there also was a Steering Group for the Fight against Child Abuse with her own Plan, ‘Children Safely Home’. In the beginning of 2012 there was a new Action Plan against Child Abuse.

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<sup>42</sup> Vierde Periodieke Rapportage van Nederland inzake de Implementatie van het Internationaal Verdrag inzake de Rechten van het Kind 2012, p. 93.

The primary responsibility with regard to the first two subject lies with the Ministry of Safety and Justice. With regard to the child abuse subject, the responsibility lies with the Ministry of Safety and Justice and the Ministerie van Volksgezondheid Welzijn en Sport (Ministry of Health, Wellbeing and Sports).

Whenever this is necessary, horizontal measures can be taken for minor victims of the aforementioned crimes. Examples hereof would be; allowing statements of children in criminal proceedings and investigating them. Also horizontal preventive measures are taken, for example the programs and websites for children concerning relationships and sexual health. Whenever this is necessary, further horizontal measures will be taken.

However, the government is planning to tackle child porn more and more severe. From the beginning of 2011, 75 extra police staff were put in, a nationwide plan with regard to child porn was set up and a nationwide expertise centre with regard to child porn was set up. The aim is 25% more suspects in 2015.

There is a special team of (Korps Landelijk Politie Diensten) KLPD which is concerned with the fight against child porn in the Netherlands. The team mainly focuses on the following subjects:

- Infiltrating on the internet and networks
- Detecting the producers of child porn
- Developing new tools, for example a database with found images and the software to compare these new images in order to detect the victims and offenders more easily.<sup>43</sup>

The investigation of sex offences is conducted by special investigators (“rechercheurs”). Within the police training special courses are offered to increase the expertise in the field of sex offences. Within the police regions, special trained investigators are part of the sex offences unit.

Since 2010, a separate education is offered to police officers who have the task to investigate data on the presence of child porn images, like photographs and videos.<sup>44</sup>

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<sup>43</sup> Rijksoverheid.nl, Bestrijding Kinderporno, geraadpleegd 19 juli 2012.

<sup>44</sup> Vierde Periodieke Rapportage van Nederland inzake de Implementatie van het Internationaal Verdrag inzake de Rechten van het Kind 2012, p. 103-104.

iii. Is it required that the crime is reported in order to be investigated? Do the proceedings go on even in case of withdrawal from the statements?

Between 1991 and 2002, the Dutch Criminal Code contained several sex offenses in title XIV which could only be prosecuted in case of a complaint. It concerned sex offences with minors from the age of 12 until 16 years. The aim of the requirement of a complaint was to protect minors.

In practice this meant that because of the complaint requirement, the public prosecutor could not *ex officio* start a criminal investigation in case of minors from the age of 12 until 16 years. This complaint could either be brought by the minor himself or herself, one of his or her parents, or by the Council of Child Protection.<sup>45</sup>

In 2002, this complaint requirement was replaced by the right to be heard. The reason for the introduction of this right was the fact that the complaint requirement did not have satisfactory results. The right to be heard is codified in now Article 167a of the Code of Criminal Procedure and was set by the Law of 13 July 2002, Stb. 388.<sup>46</sup>

iv. How long is the statute of limitation? When does it start? Can it be suspended?

The Minister of Justice, Ivo Opstelten proposed a new bill that will radically alter the statute of limitations by preventing criminals whose crimes were committed 12 or more years ago from avoiding punishment.

At the moment, only crimes carrying a life-long sentence are not included in the statute. Opstelten wants to change this to include lesser sentences for murder, rape, human trafficking and child molestation.

“It is completely unacceptable that criminals should avoid punishment just because a certain amount of time has elapsed since they committed their crime”, Opstelten writes in the introduction to his bill.<sup>47</sup>

This bill was lodged at 1 May 2012 and was accepted by the Parliament. At the moment, this bill is at the Senate waiting for its approval.<sup>48</sup>

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<sup>45</sup> M.G.M Hoekendijk, *Politie Zakboek Strafrecht voor de Politie*, Kluwer 2009, p. 172.

<sup>46</sup> C.P.M Cleiren, J.F Nijboer, *Tekst & Commentaar Strafvordering*, 7e druk, Kluwer 2007, p. 719.

<sup>47</sup> Dutchnews.nl, Statute of limitations to be scrapped.

<sup>48</sup> Kamerstukken 32 853.

v. How does the national legislation proceed when the age of the victim is not certain?

This is a very hypothetical question. It's almost always certain how old a victim is.

vi. Who is responsible for recording and storing data for convicted offenders? Who do they relate to? Can and do these authorities transmit their data to other competent authorities in other states? Do the authorities respect protection of personal data rules?

The following data concern the registration of sex offenders:

- Onderzoeks- en Beleidsdatabase (OBJD)

This is an encrypted, anonymous copy of the official judicial documentation system; JDS which is managed by Judicial Information Service (JustID). Only the offenses are registered which have led to contact with the judicial bodies. However, it only concerns those offenses which are dismissed by the court or OM.

- Monitoring Informatiesysteem Terbeschikkinggestelden (MITS)

This is managed by Dienst Justitiele Inrichtingen (Service of Judicial Institutions) of the Ministry of Justice. With this information system a further distinction is made towards the type of sex offense.<sup>49</sup>

### **3.2 Complaint Procedure**

vii. How does the complaint procedure work in case of violations of Substantive Criminal Law? Are children allowed to present their individual complaint? What are the criteria for Communication to be accepted for examinations (e.g. written/oral)?

The procedure to bring a complaint in case of no (further) prosecution is codified in Article 12-12l of the Code of Criminal Procedure. This right is codified because of the possible disadvantages of two main principles which should be applied during criminal procedures. The two principles are:

- The principle that the monopoly of prosecution only lies with the competent authority
  - The principle of opportunity
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<sup>49</sup> Memorandum 2012-1, Kenmerken en recidivecijfers van ex-terbeschikkinggestelden met een zedendelict, p. 13.

These two principles give the government a great amount of power. The principle of opportunity legitimizes that the government does not prosecute and the fact that only the government has the right to prosecute also prevents the establishment of an actual criminal procedure.

Because of this, it is very important to have a complaint procedure. This also means that the public prosecutor must be more cautious when balancing the interests whether to start a criminal procedure or not.

First of all it must be pointed out this procedure is not a procedure to enforce a criminal procedure. It concerns a dispute about the discretionary powers of the public prosecutor. This makes it a more administrative dispute.<sup>50</sup>

Based on Article 12 (1) of the Code of Criminal Procedure the complaint must have a written character. It is not bound to any further form. The complaint must be submitted to the court within the jurisdiction of which the dismissal decision is taken or the punishment decision is taken or at The Hague court if the decision is taken at the national office.<sup>51</sup>

With regard to the question whether a child can bring a complaint, the following considerations must be taken into account. The Articles 12-12l of the Code of Criminal Procedure do not mention that the minor child or the legal representative is entitled to bring a complaint.

To fix this gap, academics in the literature suggest that by way of analogy with other rules in the law, it is possible for minor children or their legal representative(s) to bring a complaint based on Article 12 of the Code of Criminal Procedure.

The Gerechtshof (Court of Justice) of Amsterdam stated that a minor child can bring a complaint itself. However, it is conceivable that the court will state that the complaint is inadmissible if the minor is not in the position (also) by his age to oversee the meaning and scope of the complaint. The same Court also stated that the legal representative, one if the child has more than one, is entitled to bring a complaint.

However, some additional remarks must be made here. This possibility of the legal representative only exists during the minority of the child. This means that if the child

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<sup>50</sup> G.J.M Corstens, *het Nederlands strafprocesrecht*, 6e druk Kluwer 2008, p. 545.

<sup>51</sup> G.J.M Corstens, *het Nederlands strafprocesrecht*, 6e druk Kluwer 2008, p. 546.

reaches the age of 18 years during the course of the complaint procedure, the child will be called by the Councillor Commissioner (raadsheer-commissaris) to show his point of view. If this child wishes that the complaint must be dealt with and states that he or she maintains the complaint, the child instead of the legal representative would be regarded as the plaintiff from that point. In this case, the legal representative does not have an interest in the prosecution procedure anymore.

If the complaint is filed by the parent of the adult child, this parent would in principle be regarded as inadmissible. Again, the Councillor Commissioner would ask the opinion of the adult child in order to qualify the adult child as the plaintiff. If a parent is regarded as inadmissible, the adult child still has the right to bring a complaint procedure himself or herself. This would even be more desirable since no time is lost with the formalities of bringing a complaint and the public prosecutor does not have to request the views of the adult child.<sup>52</sup>

viii. What are the rules about legal representation of children, especially in the case of complaints against their parents? What are the rules of participation of minors in trials? (Protection of their names, prohibition of media etc.)

Not very clear in the law. It depends on the judge and his/her decision.

## 4 COMPLEMENTARY MEASURES

**Aim:** In every system complementary measures have an important role in terms of prevention, education and recovery. This is the area where National Institution has more freedom of movement, because they are free to choose the more suitable means to obtain the result, meaning the protection of children. This section is of great importance, because it will allow the exchange of experiences and “good offices” between systems.

### Preventive Measures

i. What kind of educational guarantees are given in relation to professionals working with children in the area of sexual exploitation and sexual abuse? What does the State do in order to assure these people are aware of these situations?

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<sup>52</sup> S.J.A.M van Gend, G.J Visser, Artikel 12 Sv, Ars Aequi Libri Nijmegen 2004, p. 93-94.

Following the Amsterdam abuse case (2001), the independent committee Gunning investigated which measures nurseries can take to sexual abuse by professionals to prevent and better signalling. The government has summarized everything in a policy. The Ministries of Social Affairs and Employment of Security and Justice have six conclusions drawn from the report of the committee Gunning<sup>53</sup>:

A situation where a group of children in long day care can be alone with an adult, is from the viewpoint of safety not acceptable.

Signs of sexual abuse should be noted earlier and agencies must work better together.

The educational level of the employees and the formation of building a nursery should ensure that employees are able to provide child safety.

The recruitment and selection procedures should be strictly implemented.

The administrative supervision but especially enforcement by the municipality with more force must be taken in hand.

In the interest of safety of children there should be made more stringent quality requirements for nurseries. Also, repositioning of the child should be considered: not only directed at the reception function, but primarily on the development of the child.

ii. Does the State educate children regarding these issues? Does the State involve parents into this educative process?

In education this subject of sexual abuse prevention in the eighties and nineties of the last century was very much in the spotlight. There is generally school policy on sexual behaviour developed, the first counsellors did their appearance and there were complaints and complaints committees were established. There is a material developed for students, teachers are trained to identify sexual abuse. Stimulant policies of the Ministry of Education have resulted in the PPSH<sup>54</sup> (prevention project sexual harassment). PPSH is an expertise in the field of combating and prevention of (gay) sexual harassment and sexual abuse in education and works with schools to implement security and support of counsellors in the performance of their duties. Since 1998, the PPSH its was extended to the broader spectrum

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<sup>53</sup> <http://www.nji.nl/eCache/DEF/1/35/193.html>

<sup>54</sup> <http://www.ppsi.nl/aps/PPSI>

of undesirable behaviour such as physical and psychological violence (bullying) and discrimination.

Then, the years after the nineties it becomes very quiet when it comes to government attention to sexual violence. The emphasis shifts to domestic violence.

The State has taken some measures to educate children regarding to sexual exploitation and child abuse, so it's not totally absent after the 1990's. One of those measures is the 'underwear rule' (ondergoedregel).<sup>55</sup> Though the Dutch government itself has not developed this rule, we do see this rule used as a reference when it comes to education of the children.

The Dutch Agency Grey Amsterdam developed with the Council of Europe "The Underwear Rule" concept. We have not seen any particular national projects regarding this when it comes to educating children and/or their parents.

iii. Has the State created preventive intervention programmes for people who fear that they may commit the crime?

From April 3th 2012 paedophiles can call to an anonymous telephone helpline. The psychiatric clinic The Waag and Meldpunt Child Porn want with the 'Stop it Now' campaign prevent paedophiles to put their desires into practice.<sup>56</sup> Stop it Now! receives funding from the Ministry of Health, Welfare and Sport.

#### *Protective Measures and Assistance to Victims*

iv. Are there any social programmes to provide support for victims? How exactly do these programmes work?

There are many, many social programmes to provide support for victims. In the list below we will summarize some of them and mention their method of work:

<http://www.seksueelgeweld.nl/> : A website for victims of sexual violence and the people around them. Objective of this site is accessible help and peer support. This website is made possible by volunteers.

<http://www.seksueelmisdrijf.nl/> : The site is intended for anyone who is professionally or as an educator involved in people with mental, physical, auditory or visual impairment. The

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<sup>55</sup> [http://www.ondergoedregel.nl/Default\\_nl.asp](http://www.ondergoedregel.nl/Default_nl.asp)

<sup>56</sup> <https://www.stopitnow.nl/>



website is an initiative of the Rutgers Nisso Group and MOVISIE. Central to the website is a database with descriptions of materials, courses and other tools that can be used for sex education and for prevention and treatment after sexual abuse of people with disabilities

<http://www.fondsslachtofferhulp.nl/?gclid=CLn25qjCx7MCFcbLtAod10QAyg> : The mission of the Fund is to promote the Victim assistance to victims (and survivors, relatives and witnesses) of a crime, accident or disaster, promoting prevention of victimization and otherwise improve the position of victims in every way.

They do this through the following activities:

1. Financial support (grants) to organizations active in victim assistance, prevention of victimization or otherwise improve the position of victims;
2. Emergency financial assistance to individual victims;
3. Follow and justify expenditures, conducting a spending policy research;
4. Where necessary, initiating projects, campaigns and research;
5. Raising funds through private donors and businesses, lotteries and the organization of events;
6. Education, awareness and advocacy campaigns.

Overall can be said that the most of social programmes try to cover the possible costs of the victims and try to help them with financial means as well to get their lives back on track after such a traumatic experience.

v. Are there any help lines in service of the victims? Are these help lines aware of the confidentiality principles?

Yes, there are some helplines available:

<https://www.hulplijnseksueelmisbruik.nl/> : this is the national helpline funded by the State directly.

<http://www.slachtofferhulp.nl/seksueel-misbruik/Delicten/Seksueel-misbruik/> : Victim Support Netherlands helps victims of crime, traffic accidents and calamities. They are also helping survivors, witnesses and other people involved. Their help is always free, thanks to funding from the Ministry of Security and Justice, municipalities and the Victim Fund.

Both helplines are fully aware of the confidentiality of the victims. Confidentiality is a core principle in the Dutch professional help for the victims of sexual crimes.

vi. How does the State assist victims when it comes to recovery? Are the intervention programmes (if there are any) aware of the possibility that these child victims could have sexual behaviour problems in the future? Does the State make sure to get the consent of the persons or inform them thoroughly about the intervention programmes?

Through several above mentioned programmes the State tries to assist the victims in their recovery. In the investigations after the child abuse cases all the researchers concluded that the victims who were at an age, at which they could understand to the fullest what was happening to them, might have sexual behaviour problems in the future.<sup>57</sup> On the 16<sup>th</sup> of May 2012 a report by the WODC<sup>58</sup> was published. In this report a study was done (an overview) of the research literature on problems reported after sexual abuse (SCM) in childhood.<sup>59</sup>

Every help of the State commences only after prior consent of the victims or their parents.

### III NATIONAL POLICY REGARDING CHILDREN

**Aim: In this section researchers will describe the commitment of active citizenship and NGOs in the protection of children.**

i. Is there a serious political discussion regarding the children in the respective country?

On this moment there are certain active political discussions regarding to the position of children. Due to certain major public scandals and issues, awareness for the children's position arose and political action has been taken.

In the following we will (shortly) mention two of these events and the concrete actions of politicians. First we will mention in short the wide broad public and political aversion against Dutch paedophiles' association called 'Martijn'. Second, we will provide some information about the consequences of the abuse scandals which scourge the Roman Catholic church in The Netherlands.

A. Paedophiles' association 'Martijn'

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<sup>57</sup> <http://www.rijksoverheid.nl/documenten-en-publicaties/persberichten/2012/05/16/wodc-veel-problemen-na-seksueel-misbruik-in-de-kindertijd.html>

<sup>58</sup> Wetenschappelijk Onderzoek-en Documentatie Centrum

<sup>59</sup> <http://www.wodc.nl/onderzoeksdatabase/literatuuronderzoek-schadelijkheid-sex-van-volwassenen-met-kinderen.aspx?cp=44&cs=6796>

‘Martijn’ was an association where its adult members advocated for legal sexual relationships with children and the acceptance for paedophilia. As probably expected, a wide broad public and political discussion arose.

On the 29 November 2011 a debate took place in the Dutch Parliament about the continuity of this specific association.<sup>60</sup> In The Netherlands the freedom of association is a constitutional right (Article 8 Dutch Constitution), but all politicians agreed on the fact that this freedom is not unlimited. And however the association did not committed any (known?) crimes, the politicians agreed also on an investigation by the public prosecutor by what possibilities this association could be stopped and disbanded. The main thought is that you “keep your hands off from children”. No one in Parliament challenged that idea.

Judgement of the court of Assen

Finally, this political discussion led to a judgement of the court in Assen, which ordered on 27 June 2012 that the group was indeed illegal and that it had to disband immediately. The main argument of the judge was that the safety of children would be undermined if you consider such an organisation and its views (e.g. adults having sexual intercourse with children) as legal and as the norm.<sup>61</sup>

#### B. Scandals Roman Catholic church in The Netherlands

At the beginning of 2010, the first signs of the (globally) wide scale abuse of minors in catholic institutions came into light in The Netherlands. In other countries the issue was questioned earlier in public. One of the reasons for this later outcome, is that some of the cases were already dealt with internally by the church itself, so by cannon law. Another reason is that people were reluctant to step outside with their story, because the limitation period of the sex crime already expired and/or they did not want to rip open old wounds.

Through political discussion, a commission was established (“Commissie Deetman”) which had to investigate this scandal. They had to bring into view the size and aspects of this scandal between 1945 and 2010. The report the commission offered to the Minister of Safety and Justice (mr I.W. Opstelten) led to the following reaction.

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<sup>60</sup> [http://publiek.nl/debat/pedofielenvereniging\\_martijn\\_29-11-2011](http://publiek.nl/debat/pedofielenvereniging_martijn_29-11-2011).

<sup>61</sup> LJN: BW9477

First, there has to be more and deep investigation about the status and aspects of child abuse in The Netherlands, since such events can have grave and major consequences on the life of children and their future. Both the Minister and the Commission under scribe this.

Second, a special Taskforce is established which is commissioned with asserting the Plan of action against child abuse (“Kinderen veilig – Actieplan tegen kindermishandeling 2012-2016”).<sup>62</sup> This plan contains improvements for the prevention, signalling and fighting of child abuse. This Plan will be dealt with in a more extensive way in Paragraph iv, because of its high promotional character.

Third, according to the limitation period of sex crimes, already expired crimes cannot be prosecuted anymore. Following from the jurisprudence of the European Court of Human Rights, this conflicts with Article 7 ECHR. However, there is space to extend or annul the current term. Therefore the Dutch Cabinet proposed a bill in which is stated that the limitation period of grave sex crimes and abuse against children cannot expire anymore. This because of the fact that sometimes it takes a lot of time for victims being able to bring their story into light, because of feelings like shame, guilt, fear and more.

Main conclusion:

Political discussion exists regarding to the position of children and the national politics (on state or municipality level) deal with it in an adequate fashion.

ii. How has the awareness within the society regarding children’s sexual abuse and exploitation been raised by committed NGOs and/or the State (use of official sources, documents, statistics...)?

NGO’s

Before we can answer this question, we have to determine what a “NGO” exactly means. In this report NGO means: an organisation held by private non-profit parties, acting without any involvement en steering of the State or its organs and set up for the social importance.<sup>63</sup>

In the Dutch landscape there are quite a lot of NGO’s representing children’s rights and fighting child abuse. These NGO’s are raising awareness through various methods. In the

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<sup>62</sup> The report can be found at the following website:

<http://www.rijksoverheid.nl/onderwerpen/kindermishandeling/documenten-en-publicaties/richtlijnen/2011/11/28/actieplan-aanpak-kindermishandeling-2012-2016-kinderen-veilig.html>

<sup>63</sup> Definition abstracted from Wikipedia: [http://nl.wikipedia.org/wiki/Niet-gouvernementele\\_organisatie](http://nl.wikipedia.org/wiki/Niet-gouvernementele_organisatie)

following I will sum up the two biggest and well-known organisations and their methods. I note that does not mean that the other smaller ones count for less, of course. But because of the limited space provided, inevitable choices need to be made.

A. “Stop Kindermisbruik”<sup>64</sup>

This may be the biggest well-known private organisation in The Netherlands regarding to the struggle against child exploitation, more specific child prostitution. It is founded by two Dutch celebrities and a lot of popular Dutch celebrities are supporting this organisation. Its main purpose is to free children who are trapped in child prostitution, but not only in The Netherlands. They cooperate with a lot of foreign organisations in order to realise their (same) purpose.

The manners the organisation uses to raise public awareness is through media, such as television, radio and not to forget, social media. It owns various accounts on media like Facebook and Twitter. People can even download banners from the site to place on their own site as a link.

Stop Kindermisbruik suggests people to take action by themselves, in order to raise awareness in their environment. On educational level, they suggest that children can hold a presentation about the topic at school and teachers can download a program of lessons they can present to their pupils. Private persons and companies can sponsor the organisation with (monetary) support. On its website the guest can look for many opportunities and manners to do something.

B. “No Kidding”<sup>65</sup>

This organisation has an interesting purpose formulated on the home page of its web site. It states that ‘No Kidding dreams of getting all Dutch grown ups become a member of its organisation and thus via this public movement raise awareness for the abused child. This can be effectuated by being a sponsor or a volunteer in order to make the topic of child abuse discussable. When people can talk freely about it, child abuse can be prevented.’ Also here a Dutch celebrity is represented.

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<sup>64</sup> <http://www.stopkindermisbruik.nl/>

<sup>65</sup> <http://www.no-kidding.nu/>

Their web site provides a lot of general information about the topic and people can find possibilities what to do, like holding presentations about the topic. Volunteers can visit schools, companies even the government to hold a presentation as well. They are also involved at big events which can count on a big public interest, like sports events where a delegate as a participant tries to bring the organisation under the attention.

#### State

The State raises awareness directly via public campaigns, mostly initiated by the involved Minister. I will discuss a very recent one in Paragraph iv. But it also raises awareness indirectly when it establishes commissions in order to investigate great public scandals regarding to child abuse. These commissions are frequently in the news with their findings. I already mentioned Commissie Deetman who investigated the situation about the scandals scourging the Roman Catholic Church. Another commission noticeable is the Commissie Samson, which investigates since 2010 the situation about children placed by the State<sup>66</sup> in (state) institutions, foster families, boarding schools and orphanages, from 1945 till now.<sup>67</sup> There were signals that child abuse sexual abuse took place on a very great scale in these environments. There is also information that the State was aware of signals that could have concerned child abuse, but did not react in an adequate fashion. The commission earlier mentioned to be shocked about the scale and the severeness of the abuse. Children taken care of by Jeugdzorg (the Dutch Youth care) or placed in foster families were under a much greater risk to get exposed by sexual abuse.<sup>68</sup>

The results of the investigation will be published in October 2012, unfortunately after the outcome of this report.

Such awareness is maybe not wished, because the (possibly) lack of the government will come into light and the dysfunction of the bigger youth care institutions, but this also falls under the concept of raising awareness. People need to know what sexual abuse of children means, that it exists and how have dealt with it (or not).

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<sup>66</sup> Institutions like Jeugdzorg, translated as 'Youth care'

<sup>67</sup> <http://www.onderzoek-seksueel-kindermisbruik.nl/onderzoek/>

<sup>68</sup> [http://www.rtl.nl/components/actueel/rtlnieuws/2012/06\\_juni/01/binnenland/Commissie-Samson-veel-meldingen-buiten-onderzoeksvraag.xml](http://www.rtl.nl/components/actueel/rtlnieuws/2012/06_juni/01/binnenland/Commissie-Samson-veel-meldingen-buiten-onderzoeksvraag.xml)

iii. If the statistics are available, how many reporting have been done regarding children's sexual exploitation in last the 5 years (e.g. police records, court records etc.)?

For answering this question we had to search through several sources, because it was quite hard to find 'just' numbers. Therefore we will mention several sources which provided some information about the sexual abuse of children.

#### A. Nederlands Jeugd Instituut (NJI)

This is a non-profit organisation with a public profile, thus investigating on all public topics regarding to the Dutch youth. The NJI works on request of the government, other state institutions and professionals working in youth care.<sup>69</sup> From what we read on the websites of the different Ministries, the statistics provided in brochures are mainly results of NJI. Concerning sexual abuse of children, in 2010 there were 118,000 children exposed to children abuse. 4% of these children were victims of sexual abuse. The total number of 118,000 children was increased compared to results in the years before.

#### B. Politie / Openbaar ministerie (Police and public prosecutor)

The police comes with the following statistics, which it extracted from the Ministry of Safety and Justice<sup>70</sup>:

'Numbers sexual abuse with children:

- Almost 40% of all women experienced a form of sexual abuse before the age of 16;
- Almost 15% of all women experienced a form of sexual abuse by a family member before the age of 16;
- Sexual abuse is most likely between the age of 8 and 12 year;
- The public prosecutor takes care of 2050 to 2350 per year;
- Etc.'

Note: it was hard to find results for the last five years. A careful conclusion can be drafted that however there is an increase of numbers, mainly because there is more awareness about

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<sup>69</sup> [www.nji.nl](http://www.nji.nl)

<sup>70</sup> [http://www.politie.nl/PolitieABC/Criminaliteit/zedenzaken/cijfers\\_kindermisbruik.asp](http://www.politie.nl/PolitieABC/Criminaliteit/zedenzaken/cijfers_kindermisbruik.asp)

the topic, more adequate approach exists and signals can be picked up much quicker, so more cases come into light.

#### C. First report of the National Reporter of Human Trafficking – Child pornography

In this extensive report regarding to child pornography it is stated that there are no numbers available concerning child pornography. The only conclusion the National Reporter could draft is that there exists a lot of child pornography and that the amount only increases. Furthermore the approach should not only be limited through criminal law. The private sector for example should join in the struggle against child pornography.

iv. Are there any promotional campaigns in the State so far regarding these issues?

“Kinderen veilig – Actieplan aanpak kindermishandeling 2012-2016”

Over the last couple of years the State initiated several campaigns in order to bring this subject under attention. The most recent campaign is called “Kinderen veilig – Actieplan aanpak kindermishandeling 2012-2016” (“Children safe – Plan of action against abuse of children 2012-2016”). I already mentioned this campaign in foregoing Paragraph i. This campaign is launched 28 November 2011 by the Minister of Safety and Justice (mr I.W. Opstelten) and the Secretary of the State of the department Health, Wealth and Sports (mrs M.L.L.E. Veldhuijzen Van Zanten-Hyllner).

In the following a brief summarize of the main points of this Plan of action is provided. Then the focus will be set on a particular section of this Plan, the section regarding to the sexual abuse of children.<sup>71</sup>

#### i. The three pointers

This plan has three main pointers and these are:

1. Preventing child abuse; the number of victims has to be decreased. The way to effectuate that is through improving the general help with the upbringing of a child and providing assistance to high-risk families;

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<sup>71</sup> <http://www.rijksoverheid.nl/documenten-en-publicaties/richtlijnen/2011/11/28/actieplan-aanpak-kindermishandeling-2012-2016-kinderen-veilig.html>



2. Bundling powers; the cooperation between the different institutions and organisations has to improve on the fields of stopping severe cases and the treatment and help for perpetrators and victims. They aim on a multidisciplinary approach;

3. Approach of violent physical abuse and sexual abuse: the need for tackling sexual abuse is many times under scribed in investigations.

Point 3 of this Plan will be discussed in the following, now this has more relevance regarding to the subject of this report.

ii. Point 3

After several investigations done by certain commission (which are almost all stated here in this report as well), there are three central tasks which has to be fulfilled:

1. Physical safety more explicit

Counsellors and other helpers in youth care should pay more notice to the physical safety of children. This also counts for medical specialists. The physical state of a child can be an important indicator that abuse may be the cause. Between these actors should be a better communication in case of signalling, so adequate action can be taken if needed. Forensic-medical expertise can also be used by determining the case.

2. Approach of child pornography should be integrated in the approach of sexual abuse of children

This point was stressed in the first report of the National Reporter Human Trafficking.<sup>72</sup> The National Reporter came with the quite harsh conclusion that The Netherlands fails on the approach of child pornography. However, it is not only the concern of the government, also public-private organisations and the internet communities could act.

This plan states the following approach:

- Prevention: make people (parents and children) more ‘digi-skilled’ or ‘digi-alert’. The internet offers a lot of opportunities, but it may confront you as well with a lot illegal material like children pornography. People who (intend to) search for children pornography are offered help. It will probably be difficult to reach these people however, since there exist a lot of shame and distrust.

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<sup>72</sup> <http://www.bnrm.nl/publicaties/eerste-rapportage-kinderpornografie/>

- Online inform button: a special button can be clicked on if a minor sees him or herself confronted with indecent behaviour of other people, such as bullying, abuse, sex or harassing.
- Signalling: the National Reporter suggested to look out for visual material when a case of child abuse or sexual abuse is determined. With Jeugdzorg (Youth care) special agreements and instruments are developed to raise the awareness.
- Stopping: the police and the public prosecutor are not only looking for the downloaders of child pornography, but as well to the makers of it. Regarding to the internet, this is not locally dealt with but on a national level. Also on a national level is that the search for child pornography is prioritized. With this the public prosecutor has to be able to prosecute 25% more perpetrators. This should be all effectuated by the earlier mentioned multidisciplinary approach.

On a regional level the police force is increased so the more officers can work on cases concerning sexual abuse and the making of child pornography.

- After care of child pornography victims: victims should get the best care there is. A big case concerning child pornography in Amsterdam (2011) learned that there are good experiences with adequate after care. This Plan wants to broaden this specific kind of care.
- Improving private-public cooperation: investments will be made in a broadened approach of child pornography with relevant partners like ICT platforms; youth care institutions and care institutions for paedophiles. This can be realised by bringing in map what the main barriers are between the organisations and then anticipate on these.

### 3. Physical safety in a professional setting

A topic which is on top of the list of the government, but also on the list of organisations in the field. A lot of progress has been made, but the attention should not weaken. The several investigations of earlier en next mentioned commissions should make more clear where improvement is needed and should be realised. The report of the earlier mentioned Commissie Samson is in this context a very important one.

#### iii. Monitoring and control of the plan

A team of so-called ambassadors will monitor and control the asserting of this plan. To obtain a good monitoring, they will meet the involved institutions and organisations in

periodic meetings where the plan will be evaluated. Other tasks of the ambassadors will be keeping certain topics high on the (public) agenda and stimulate specific initiatives.

The National Reporter of Human Trafficking will get a broader report request. Now she reports about child pornography, but she will report about sexual abuse of children, including child pornography.

Different other already existing Inspections are keeping their function on controlling on child abuse.

v. How has the children's perspective represented in the law making process?

This question here is maybe a bit difficult to answer. The point I want to make here is that a lot of measures are realised through policy, but not through hard law. However, the main idea is always that children have to be safe under all circumstances and should not be abused or violated in whatever way. Therefore reports are made, plans are presented in order to decrease the number of abuse and to increase the numbers of conviction. All of this is in the benefit of the child.

vi. Who are the main national Non-Governmental Organisations working on the topic of children's rights? Does the State regulate (or not) their involvement in law making process?

There are two main NGO's which work on the topic of children's rights, one is called 'Kinderrechtencollectief' and one is called 'ECPAT'. In the following I will discuss these two NGO's in a more detailed way.

#### A. Kinderrechtencollectief<sup>73</sup>

Kinderrechtencollectief exists of several separate (bigger) organisations standing for children's rights on different divisions, so not only regarding to the sexual abuse of children. Their starting point is that if they bundle their powers, they will stand stronger and can make stronger points towards the government. This is important since the State can not neglect the UN Convention of the Rights of the Child.

Thus, one of their main activities is to advise the government concerning children's rights. Kinderrechtencollectief used the recently held elections (12 September 2012) to bring under attention that there should be a lot of attention paid to the people who can not vote, the

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<sup>73</sup> <http://www.kinderrechten.nl/p/13/83/wie-zijn-wij%3F>

children. The accord the coalition is going to make should however contain a paragraph regarding children in The Netherlands, which should have as a starting point the UN Convention of the Rights of the Child. This advice is sent 23 August 2012 to the leaders of all political parties.

Other activities can be found in the field of education; special brochures can be obtained as well material in order to hold a presentation about children's rights.

Kinderrechtencollectief is an organisation which has an advising function. The State does not regulate their involvement in the law making process, since it is an independent organisation which only advises.

#### B. ECPAT<sup>74</sup>

ECPAT stands for 'End child prostitution, child pornography & trafficking of children for sexual purposes'. ECPAT itself is an international organisation, but ECPAT Nederland is the national department. Together with Defence for Children it forms one organisation: Defence for Children. ECPAT Nederland is founded 1995 and tries to raise awareness about the above mentioned topics at the public. They think that if greater awareness arises, public involvement will improve and thus the problem of child abuse will be countered. To achieve this, they provide a lot of educational material, do research, but they lobby as well. ECPAT is also part of the above mentioned Kinderrechtencollectief.

Concerning politics and government the organisation pleads for good assistance and adequate and effective legislation, regarding to the prevention of sexual exploitation of children. Even Internet Service Providers and travellers agencies are summoned to watch out for malicious intentions of their customers.

ECPAT Nederland has a research team, which contains of a lot of academic skilled people, like lawyers specialised in children's rights. Since this is a private organisation, no regulation of the State regarding to the law making process is at the order, in fact ECPAT is not involved in this process.

## **IV OTHER**

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<sup>74</sup> <http://www.ecpat.nl/p/1/118/mo45-mc52/ecpathy>

Are there any other legal or political issues that might be relevant in the respective country? Please keep in mind that ELSA is a non-political organisation, hence only political issues which might affect the data you have provided should have been mentioned here.

In this chapter we will provide the reader information about the biggest scandals ever in the Dutch history of child abuse in children's day care and which has shocked the nation. The central topics in this case (child abuse, child pornography) fit the main topics regarding this report and should therefore not be unnoticed.

We will first start with sketching the situation and the facts. Second, we will bring into view the main points of the report of Commissie Gunning which commission was established to investigate the situation about the current children's day care in Amsterdam. This in-depth report contains a lot of conclusions and advices and serves as guidance for the national politics and legislator.

#### Children's day care 't Hofnarretje'

In December 2010 the whole nation was shocked by the news that on the Amsterdam babies and children's day care 't Hofnarretje a former male employee, Robert M., had been arrested, being accused of grave abuse of children such as rape, and on a very big scale: 30-50 children. This case came into light after a photo was found in the United States, showing a child with a particular Dutch toy, 'Nijntje'. 'Nijntje' could and eventually was the sign this picture and abuse took place in The Netherlands. The same night after the picture was shown in a Dutch police program, Robert M. was arrested.

The suspect, Robert M. was a foreigner who married a Dutch man and came to work with children in different situations, such as various children daycares but he also worked as a private babysitter. During this 'working' he sexually abused his protégées, whom some of them were extremely young babies and toddlers. He recorded and photographed these actions and shared this self-made child pornography worldwide with other paedophiles.

After his arrest a deep investigation took place and Robert M. admitted he abused and raped at least 87 (very) young children. He was however prosecuted for the abuse and rape of 67 children, since the public prosecutor could only prove these certain cases and next to this fact, some of the parents did not want to have the name of their child appeared on the

charges. The public prosecutor claimed for 20 years jail and TBS.<sup>75</sup> His spouse, Richard van O. was also prosecuted. Factually, Richard van O. never abused and raped children with Robert M., but he was accused of having and spreading child pornography. He was also a short time member of earlier mentioned paedophiles association 'Martijn'. Although he never touched children<sup>76</sup>, he never tried to stop Robert M. from his deeds as well. His motivation was that he loved him too much and was afraid he would leave him.

Finally, on 21 May 2012 the Dutch court in Amsterdam decided the following sentences, regarding to Robert M., namely 18 years of years plus TBS. Because his lesser mental sanity, which was proven by mental health experts, the judge shortened the period he has to spend in jail with two years.<sup>77</sup> Robert M. declared he will appeal against his sentence. He does not agree because his fully cooperation with the investigation would have been reason for less punishment. Richard van O., his spouse, heard a jail sentence of 6 years against him, based on proven complicity.<sup>78</sup>

#### Commissie Gunning

Almost directly after this big case came into light, the mayor of Amsterdam established in December 2010 a certain commission, 'Commissie Gunning' to investigate the situation about the involved children day cares and private babysit companies and how it was possible that the abuse could take place.

This Commissie Gunning came in April 2011 with an extensive report<sup>79</sup> in which it brings into map the situation and many recommendations. Such ad hoc reports are more than valuable in the sphere of protecting children, here specifically children taken care for in children's day cares. In the following I will discuss the conclusions drawn and will discuss shortly a few recommendations. Note that the list is very long (77 recommendations) and therefore we cannot discuss all.

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<sup>75</sup> In Dutch criminal law, TBS is a measure the judge can decide for, possibly together with an a jail sentence. In this context TBS means treatment in a special clinic in order to minimize danger for recidivism in the future.

<sup>76</sup> That may be not completely true. Earlier he was accused of assaulting an 11 year old boy though fact was never proved.

<sup>77</sup> LJN: BW6148

<sup>78</sup> <http://www.ad.nl/ad/nl/3322/Misbruik-in-Amsterdamse-creches/article/detail/3258548/2012/05/21/Robert-M-krijgt-18-jaar-celstraf-en-tbs.dhtml>

<sup>79</sup> Rapport onafhankelijke Commissie Onderzoek Zedeenzaak Amsterdam, [http://www.nji.nl/DossierDownloads/RAPPORT\\_COMMISSIE\\_GUNNING\\_15-4\\_10\\_00%5B1%5D.PDF](http://www.nji.nl/DossierDownloads/RAPPORT_COMMISSIE_GUNNING_15-4_10_00%5B1%5D.PDF)

## Conclusions

Roughly, the commission drew six main conclusions. In the following we will set them out, with a short explanation.

### i. 'Principle of four eyes'<sup>80</sup>

The commission stresses the concept that there should always be at least two persons to watch for and hear the children. This is essential to counter abuse. However, one of the results of its investigation is that it is rare practice that there is more than one person functioning. A reason for this is that it is more expensive to employ more staff, but there are exceptions though. There are children day cares which do employ more persons and have no hole in their budget, because they are hiring for example trainees.

### ii. More attention for learning to recognise the signals of child abuse<sup>81</sup>

The commission found out that in the event a person is inflicted with signals of child abuse, people do not recognise the abuse or tend to ignore the feeling they get and think that the abuse is not happening. This is wrong. Providing educational material to parents and paying a lot more attention to these subjects in the various studies are the main solutions to effectuate more awareness.

### iii. The education level of workers in children day cares should be improved<sup>82</sup>

In case the education level of employees are improved, the workers are able to recognise the first signals of child abuse. Furthermore, there has to be a good mixture of the different degrees in specialisations, meaning people who actually take care for the children and pedagogical workers.

### iv. Tougher procedure recruiting and selecting<sup>83</sup>

In the case people apply for a job in a children day care, they need to hand over references and a VOG, a declaration of the municipality in which is stated that the person who requested for it, is of unspoken behaviour. The commission wants sharper control, even

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<sup>80</sup> Paragraph 11.2 Rapport Commissie Gunning

<sup>81</sup> Paragraph 11.3 Rapport Commissie Gunning

<sup>82</sup> Paragraph 11.4 Rapport Commissie Gunning

<sup>83</sup> Paragraph 11.5 Rapport Commissie Gunning

after the application and during the working period. That can be periodically checking for VOG's.<sup>84</sup> References, diplomas and such should be available all time at the location.

v. Increase administrative supervision and control<sup>85</sup>

The commission recognises the great importance of administrative supervision and control. Unfortunately, resulting from different report of the national inspection of health care, this supervision and control is in a lot of municipalities under the line. Supervision and control can only work if the specific municipality internally makes a strong hand and acts adequately on this topic.

However, in order to improve there are several points the commission stresses to focus on. One is the quality improvement of lagging day cares. Instead of nagging about structures and legal/administrative stuff, they really need to focus on other aspects like these. The other one is the case of unannounced visitations in order to check certain documents. The commission recommends checking the content of documents on its quality instead of being satisfied when the needed documents are just available.

vi. Children day cares: from care giving to child development<sup>86</sup>

In The Netherlands, children day care is a very popular way of daytime activity for a child when the parents work. Unfortunately, there are not enough places on day cares. The commission then pleas for only good to very good day cares since there are not many places and young parents often do not know what is 'good' whatsoever. The should only choose between those two. Day cares which perform badly, should be under supervision and if there is no improvement, the day care should be closed as a punishment. Another point to stand still with, is that the children day care is a place where children develop and they should do that in a high quality environment and with all safeguards imaginable.

Recommendations<sup>87</sup>

The commission provides a long list of recommendations to the specific actors, like parents, the children day cares and the municipalities. However, the children's day cares are seen as

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<sup>84</sup> VOG is a Dutch official document in which stated that the person who requested it, is of unspoken behaviour and there does not exist a police record

<sup>85</sup> Paragraph 11.6 Rapport

<sup>86</sup> Paragraph 11.7 Rapport

<sup>87</sup> Chapter 12 Rapport



the main actors who are primary responsible for the safety of the children. Like I mentioned earlier, this list is so extensive that it will not be possible to discuss all recommendations. Therefore we will shortly discuss a few of these.

i. Parents should be critical in their choice for a day care<sup>88</sup>

Parents have to be critical in choosing a day care. And when they have chosen one, they should ask for reports of inspections in order to get a full profile.

ii. Camera surveillance<sup>89</sup>

However it is not ideal, camera surveillance could be used in a small scale. The risk exists that spontaneous behaviour will decrease or the visual material gets in the wrong hands.

iii. Introduce annual education programs for staff<sup>90</sup>

In order to maintain the necessary quality in a day care, personnel should be up-to-date according to the knowledge needed.

vi. Dutch as mother language<sup>91</sup>

However in Dutch law is stated that the spoken language on a children day care should be Dutch, this is not always the case. One language maintains the uniformity and clear interpretation of policy, better understanding with parents and a good development of the speech of Dutch language.

v. Ask twice a year for a 'VOG'<sup>92</sup>

As a day care, ask twice a year a VOG of your employees. This is a declaration of 'unspoken behaviour' which can be obtained at the municipality.

vi. Different angle of inspection<sup>93</sup>

In case the GGD (municipal health care service) visits a day care, the focus should not be an administrative-legal test, but much the more a test on quality.

vii. Children day cares as an important policy field<sup>94</sup>

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<sup>88</sup> Paragraph 12.1 Rapport Commissie Gunning

<sup>89</sup> Point 698 Rapport Commissie Gunning

<sup>90</sup> Point 660 Rapport Commissie Gunning

<sup>91</sup> Point 659 Rapport Commissie Gunning

<sup>92</sup> Point 665 Rapport Commissie Gunning

<sup>93</sup> Point 690 Rapport Commissie Gunning

The municipality should recognise children day cares as a very important field which needs policy, now it's in the direct context of the health and wealth of a child.

## **V CONCLUSION**

After so many months of investigation of the Dutch legal system regarding to the child victims of sexual abuse and the victims' position in the society we can summarize the following points:

It is the women's movement who has in the seventies driven attention to sexual violence. Because the feminist analysis of sexual violence emphasized the power differences between men and women as the cause, there was in the beginning with particular attention to sexual violence against women, within such power relations between father and daughter.

In the nineties the focus on the importance of selective prevention shifted to the focus from women as victims to children as victims.

Currently, it lacks a national policy and a national action program to combat sexual violence in all its forms. There is a need for a directing role of the national government.

The need for the government to respect of sexual violence can be the reached the best by setting firmly framework policies. The tangible and intangible costs of sexual violence have been very high. Recent figures show that the number sexual offenses have increased again. Victims are at high risk of post-traumatic stress disorder, major depression or an anxiety disorder to develop.

Moreover, they have a greater chance to become again victims of sexual violence. Male victims often develop later to offenders.

Preventing and addressing sexual violence are necessary for three reasons. First, the number of perpetrators and victims, and thus the costs of sexual violence need reduction. Second, to prevent the victims to develop themselves to perpetrators or further victimization. Third, the impact of sexual violence on victims and their immediate environment must as little as possible and need good initial and adequate assistance. In short, it is necessary to adequately

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<sup>94</sup> Point 696 Rapport Commissie Gunning

tackle sexual violence through effective prevention, appropriate assistance to victims and their environment and treatment of offenders, framed in a policy.

By implementing the Lanzarote Convention The Netherlands is on a right path of protecting child victims and set an example for other countries.

Though there are some lacking points in the protecting of the children especially when it comes to education of children and their parents of sexual abuse, the Dutch government is quite on the right track of safeguarding children's rights.

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**National Coordinator:**

Yana Ballod

**National Researchers:**

Anastasiya Verba

Andriy Dashkovets

Khrystyna Zalizniak

Kseniya Kovryga

Anna Mykytenko

Dariya Oliinyk

Halyna Pshenytska

Maryna Rabinovych

Alina Shchetinina

**National Advisor:**

Tamara Buhayets

**Abbreviations**

ARC	Autonomous Republic of Crimea
CC	Criminal Code of Ukraine
CIS	Commonwealth of Independent States
HSCU	Higher Specialized Court of Ukraine
ILO	International Labour Organization
MIA	Ministry of Internal Affairs
NAS	National Academy of Science
OSCE	Organization of Security and Co-operation in Europe
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
USSR	Ukrainian Soviet Socialistic Republic

## I INTRODUCTION

### 1 GENERAL

i. As a member state of UN, Council of Europe, OSCE and CIS and also as a state whose main foreign policy priority is European Union integration, Ukraine ratified many international legal acts aimed at realization the principle of equity. According to Article 9 of the Constitution of Ukraine these international legal acts after their ratification become a part of national legislation of Ukraine. For example, as a UN member state Ukraine ratified Convention on the Elimination of All Forms of Discrimination Against Women, International Convention on Elimination of All Forms of Race Discrimination, a number of ILO documents and UNESCO. Ukraine is also a party to the majority of the Council of Europe antidiscrimination documents. Nevertheless in the European Commission Against Racism and Intolerance report there are few recommendations on the improvement of acceptance by Ukraine international legal standards of equity principle realization insurance. Ukraine is recommended to ratify such international legal instruments as Convention on Participation of Foreigners in Social Life on the Local Level and International Convention on Rights' Protection of Working Immigrants and Their Families' Members. Under its membership in OSCE and CIS Ukraine ratified main acts on human rights that contain equity guarantees.

Equity principle and discrimination counteraction are reflected in such normative-legal acts of national legislation as: Constitution of Ukraine, Law of Ukraine "On National Minorities", "On Languages in Ukraine", "On Refugees", "On Equal Rights and Possibilities of Men and Women Insurance", Criminal Code of Ukraine, Code of Laws of Ukraine on Labour and so on. The institutionalization of this principle takes place with the help of State Committee for Nationalities and Religions and Parliamentarian Representative in Human Rights (Ombudsman).

Article 24 of Constitution of Ukraine provides that "citizens have equal constitutional rights and freedoms and are equal before the law".<sup>1</sup> Also this article highlights the principle of non-discrimination for race, skin colour, religious and other beliefs, ethical and linguistic

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<sup>1</sup> Конституція України. - Х: ТОВ «Одіссей», 2012. - с.7

characteristics reasons. Disadvantage of the formulation in Article 24 is that the principle of equity and non-discrimination embraces only citizens of Ukraine but not all the people that remain under the jurisdiction of the country.

Law of Ukraine “On National Minorities” declare that Ukraine guarantees to citizens regardless of their national origin equal political, social, economic and cultural rights and freedoms, supports the development of national self-consciousness and self-expression. Beside that the Law guarantees to all national minorities the right to national cultural autonomy.

On 3<sup>rd</sup> July, 2012 Verkhovna Rada of Ukraine (Ukrainian Parliament) adopted a Law “On the Principles of State’s Language Policy” which is aimed to make Ukrainian legislation relevant to the European Charter on Regional Languages and Languages of Minorities, ratified by Ukraine.

Law of Ukraine “On Equal Rights and Possibilities of Men and Women Insurance” defines equal rights of men and women as an “absence of restrictions or privileges according to sex feature” and equal possibilities as “equal conditions for equal rights realization”.<sup>2</sup> This act is aimed to provide gender equity in all spheres of social life and is the reflection of a so called substantive model of equity which foresees the acknowledgement of differences between men and women but does not limit to formal statement of their equity. The existing model of gender equity in Ukraine underlines the importance of insurance of equal possibilities for men and women and allows additional guarantees for women for their rights realization. In order to provide equity of men and women in Ukraine and development of state gender policy it is being realized a UN Development Programme project “Support of National Gender Mechanism”.

On 6<sup>th</sup> September, 2012 Verkhovna Rada adopted a Law “On principles of Prevention and Counteraction to Discrimination in Ukraine”. According to the norms of the Law “discrimination” is a decision, actions or inactions aimed to provide restrictions or privileges for a person and/or group of people under race features, skin colour, political, religious and other beliefs, sex, age, inability, ethnic or social origin, family and property status, place of living, under language or other features (further on – particular features) if they unable

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<sup>2</sup> Закон України «Про забезпечення рівних прав і можливостей жінок і чоловіків» - [Електронний ресурс] - Режим доступу: <http://zakon2.rada.gov.ua/laws/show/2866-15>



acknowledgement and realization on different grounds human and citizen's rights and freedoms. This Law embraces all the people on the territory of Ukraine. It regulates such spheres of social relations: social and political activities; state service and service at the bodies of local self-government; justice; labour relations; healthcare; education; social protection; housing relations; access to goods and services; other spheres of social relations. The entitled subjects for prevention and counteraction to discrimination are: Verkhovna Rada of Ukraine, Verkhovna Rada of Ukraine Empowered for Human Rights, Cabinet of Ministers of Ukraine (Ukrainian government), other state bodies, power bodies of Autonomous Republic of Crimea, bodies of local self-government, non-governmental organizations, individuals and legal persons.

A person, who considers that the discrimination took place in respect to it, has the right to appeal to the Verkhovna Rada of Ukraine Empowered for Human Rights and/or to the court. The realization of this right cannot be the ground for biased treatment and can not cause any negative consequences for a person who is using its right (Article 14 of the Law).<sup>3</sup>

Article 161 of the Criminal Code of Ukraine forbids

“intentional actions aimed to provoke national, race or religious hostility and detestation, to humiliate the national honour and dignity and to offend citizens’ feelings with regard to their religious beliefs, to restrict directly or indirectly rights or to impose directly or indirectly privileges under the race features, skin colour, political, religious and other beliefs, sex, ethnic or social origin, property status, place of living, under language or other features”.<sup>4</sup>

Beside that cl.1 p.3 Article67 of the Criminal Code of Ukraine classifies racist motivation as an aggravating circumstance. Amended in 2009 p.1 Article300 of the Criminal Code of Ukraine defines the crime

“importation to Ukraine works that popularize ... race, national or religious intolerance and discrimination with the aim to sell or distribute or with the purpose of their production, storage, transportation or other relocation with the same purpose or their sale or distribution and forcing to participate in their production”.<sup>5</sup>

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<sup>3</sup> <http://zakon2.rada.gov.ua/laws/show/5207-17>

<sup>4</sup> **Кримінальний кодекс України** - Х: ТОВ «Одіссей», 2012. - с.73

<sup>5</sup> **Кримінальний кодекс України** - Х: ТОВ «Одіссей», 2012. - с.137

According to the Report in Human Rights Practices of Democracy Bureau, Human Rights and Labour of State Office of the USA from 2011 negative attitude to foreigners of a non-Slavic appearance remains to be a problem. Criminals who committed crimes under race intolerance motives are usually charged with “hooliganism” and related crimes. International rights’ protection organization Amnesty International has the same point of view.<sup>6</sup> Official statistics concerning crimes committed under race intolerance does not exist. According to the data provided by General Prosecution Office of Ukraine 5 people were sentenced for committing crimes under race intolerance motives. Furthermore 4 out of 5 people received amnesty and another person has been released because of its active cooperation with the prosecution bodies and court. Nevertheless in the Shadow Report to the 21<sup>st</sup> Report of Ukraine on compliance of International Convention on Elimination of All Forms of Race Discrimination there is data on much bigger quantity of crimes committed under race intolerance motives.<sup>7</sup>

Remains complicated the situation of protection of the rights of Roma. Facts of discrimination against Crimean Tatars were also registered. Anti-Semitism is expressed mainly in vandalism regarding monuments of Jewish culture, offending expressions in the media, especially during pilgrimage to the Rabbi Nahman grave in Uman.

Since signing of the Agreement between Ukraine and EU on Readmission, the number of migrants, asylum seekers and refugees substantially increased in Ukraine. According to the Amnesty International Report 2010 violations of their rights are often related to the state bodies’ activity.<sup>8</sup> For example, in 2010 300 asylum seekers, who filed an appeal on the decision of refusal of their legal status change, remained without any documents for the whole period of their complaints’ consideration.

In their reports Amnesty International and Minority Rights Group International express disturbance with the limited access of NGOs’ representatives and international rights’ protection organizations to the centres where migrants are kept. The conditions of migrants’

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<sup>6</sup> Amnesty International, Put Deeds Before Words. Deliver Human Rights for Ukraine - Ukraine, 2010 - p.9

<sup>7</sup> The “Social Action” Centre, Minorities’ Group International, “No Borders” Project, Shadow Report to Ukraine’s 19<sup>th</sup> to 21<sup>th</sup> periodic report under the ICERD - Ukraine, 2011

<sup>8</sup> Amnesty International, Put Deeds Before Words. Deliver Human Rights for Ukraine - Ukraine, 2010 - p.5

maintenance are also disturbing both in such centres and at the maintenance zone in the “Boryspil” airport.<sup>9</sup>

Despite ratification by Ukraine of the UN Convention on Refugees’ Status that forbids coercive return of individuals to the countries where they can become victims of human rights violations, during 2006-2009 there were registered cases of such returns.

Among other problems in this sphere the following are distinguished: opacity of the procedure of applications for the refugee status consideration, very common are motiveless verifications of migrants’, asylum seekers’ and refugees’ of a non-Slavic appearance documents by the police, realization of economic and social rights.

Gender equity and women’s rights in Ukraine, despite of developed legislative basis in this issue, remain to be the sphere which requires a lot of attention. In the NGOs Coalition, that are engaged in women rights protection, Report, presented for the periodical universal UN review, there were 70 items that highlight the main violations of the gender equity principle and women’s rights in Ukraine.<sup>10</sup>

There are mentioned such issues in the Report as institutional mechanism of gender equity implementation destruction, counteraction to domestic violence, trafficking in person as a result of liquidation of Ministry of Ukraine in family, youth and sports issues, absence of the State programme for gender equity implementation, formal existence of the Gender issues Advisor position, sexism in the information and media dimensions, big difference in salaries of men and women, low level of women representation in the state government mechanism, existence of gender stereotypes in education programmes. Also a lot of attention in the Report of State Office of the USA and miscellany “Pekin +15: international obligations and practices of their implementation” is paid to such problems as violence in families, its detection and suspension difficulties, sexual pretension against women, sex tourism and trafficking in person. It is also distinguished in the miscellany “Pekin +15: international obligations and practices of their implementation” the necessity of address events

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<sup>9</sup> Amnesty International, Put Deeds Before Words. Deliver Human Rights for Ukraine - Ukraine, 2010 - p.7

<sup>10</sup> Доповідь, представлена до Універсального періодичного огляду ООН/Коаліція громадських організацій - Україна, 2012 - 13с.

implementation concerning old women rights protection, women, who live in the rural areas, representatives of ethnic minorities and women-victims of gender violence.<sup>11</sup>

Among other grounds for equity principle violations it worth mentioning the age (children are often subjected to violations in the sphere of education, housing, sexual inviolability, the rights protection of disabled children is problematic as well; old people are discriminated in the sphere of labour, economic and social rights); health condition and disability (access to education, labour market, healthcare, segregation); sexual orientation and gender identity.

Some media reports: “up to 2011 the average salary of women in Ukraine is 8% less than men, that is discrimination against women, of course, and infringement of rights.”<sup>12</sup> Rating of gender development in Ukraine fell by 14 points due to low participation of women in power and social status of women. Even the Pension Code, which rises the retirement age for women, is discriminatory. On one hand, there is an objective trend to equalize the retirement age for men and women. But no one considers unpaid domestic labour of women and they spend about four times more time than men on it.<sup>13</sup> But some politicians in their interviews for press deny the existence of discrimination: “Discrimination is against the weak, those who are looking for reasons, not the solution, who shouted: “Skip the woman!” There is as a lot of women in Verkhovna Rada as: a) the chosen people, b) how many women have decided to go for this.”<sup>14</sup> However, we can often find the mentioning of discrimination against men in the press. For example Labour Code of Ukraine has the signs of sexual discrimination in certain positions. But it applies to men. Society considers discriminatory provisions of the Code that do not provide equal opportunities for men and women to combine family obligations with work responsibilities. In particular, the experts recommended extending to men who have children in the Code of setting for women with children, regarding the reduction of working time, a more flexible work schedule and holidays.<sup>15</sup> Most of appeals to Commissioner of Verkhovna Rada on Human Rights are appeals about discrimination. The highest number of complains is for violations of civil

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<sup>11</sup> Пекін+15в Україна: міжнародні зобов’язання і практики упровадження/ упорядниця О.Суслова – Київ, СПД Москаленко О.М., 2010-85с.

<sup>12</sup> Focus.ua, *Discrimination against women in Ukraine is on the full*, March 3, 2012, <http://focus.ua/society/222170>

<sup>13</sup> The Ukrainian Truth, *Discrimination against women in Ukraine: from seats in the Cabinet to pensions*, March 7, 2011, <http://www.pravda.com.ua/rus/news/2011/03/7/5990771>

<sup>14</sup> Delo.ua, *There isn't gender discrimination in Ukraine*, March 4, 2011, <http://delo.ua/opinions/gendernoj-diskriminacii-v-ukra-153347>

<sup>15</sup> KyivPost, *Ukraine has legalized discrimination against men*, January 18, 2011, <http://www.kyivpost.ua/ukraine/news.html>

rights (56,2 %) in particular, discrimination against certain classes of society in judicial proceedings. Almost 17% of appeals relating to discrimination in the social sphere, including deprivation of benefits and compensation, violations of the appointment of pensions, providing financial assistance and subsidies. In the third quarter (14%) - notification of the economic rights of citizens: to work, its proper and timely payment, ownership of land. In 12% of complaints on an infringement of personal rights, including rights to personal security, torture, as well as government interference in private lives of citizens and about 2% of appeals concerning violations of political rights. In addition, nearly 100 thousand Orthodox Citizens of Ukraine appealed last year to the Commissioner of discrimination on religious grounds and protection of their rights to an alternative form of registration of natural persons - taxpayers without an identification number and any electronic documentation.<sup>16</sup>

Committee of Verkhovna Rada on Human Rights, National Minorities and International Relations makes regular reports on issues of discrimination that is part of its duties and subject of jurisdiction. In these documents much attention is paid to the issue of gender discrimination. It's important point because in Ukraine we have no women in government, among the heads of regional administrations, including the leadership of the judiciary. We can see the practical removal of Ukrainian women from decision-making at the highest political level, the lack of women in the Cabinet of Ministers of Ukraine, among the heads of regional state administrations, few women deputy heads of executive agencies. In general, women predominate in the civil service, as managers and professionals, respectively 64,8% and 79,5% in early 2010. However, women constitute an absolute majority of civil servants at lower positions on the lower level that requires lower qualifications and, of course, provides a lower level of responsibility and participation in decision making. Only 13.3% in the first official category leaders involved in decision making – it is women.<sup>17</sup> There are only 8% of female members of the general composition in Verkhovna Rada. During the last local elections only 7 women (4.0%) became the head of the city of regional and national importance; the head of towns - 18 (6.5%), head of the village - 151 women (19.5%).<sup>18</sup>

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<sup>16</sup> N. Karpachova, p.4

<sup>17</sup> Committee on Human Rights, National Minorities and International Relations, *Transcript hearings in the Committee on the Practice of the Law of Ukraine On ensuring equal rights of women and men*, November 10, 2010, p.8

<sup>18</sup> N. Karpachova, p.12

Ministry of Justice is concerned with combating discrimination because its work lies in fact that it consults authorities on special legal issues and analyzes laws. In general, Ministry of Justice makes legal conclusions and analyzes all legal documents relating to anti-discrimination. Sometimes it holds public discussion like discussion on President's draft decree on Strategy to combat discrimination. Report of the Ministry of Justice on this issue includes analysis of the draft decree and list of remarks and reasons why the draft can't be accepted.<sup>19</sup> In the report on overcoming of gender violence Ministry of Justice recommended

“to develop measures for implementation of the campaign to combat violence against women of Council of Europe at the national level; create a database of agencies, institutions and organizations which are aimed at preventing gender-based violence; to attract men to participate actively in the fight against all forms of violence against women, including domestic violence of family”<sup>20</sup>

Actually, if you raise the issue formally, the law currently provides a specific mechanism of protection against discrimination only on grounds of sex. In all other laws there is only declared prohibition of discrimination, but provides no mechanisms to guarantee the victims of discrimination in a particular area or on a particular basis of the right to challenge discriminatory practices in relation to themselves in court or out of court. This problem requires an immediate solution because for example rights of convicted persons are not protected in fact. Access to information on the rights of prisoners in the system is too limited. Practice of not providing answers or only partial information from officials of requests still pending. By department employees who violate the law on information, not taking steps reaction.

So from these reports and other legal documents we can draw some conclusions. First of all Ukraine has no legislation to prohibit discrimination and effective state antidiscrimination policy. But before the law it's necessary to provide the definitions of key concepts related to the phenomenon of discrimination that would be understandable, unambiguous and applicable case law. Now Ukrainian legislation does not meet international standards on human rights and non-discrimination and cannot provide adequate protection to victims of violations, because constitutional guarantees are mainly declarative and today the Criminal

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<sup>19</sup> Ministry of Justice, *Report on the results of public discussion of President's draft decree on Strategy to combat discrimination*, October 20, 2012, <http://www.minjust.gov.ua/0/36397>

<sup>20</sup> Ministry of Justice, *Information on gender-based violence in Ukraine*, <http://www.minjust.gov.ua/0/24036>

Code of Ukraine remains the main source of non-discrimination. The most common subject to discriminatory actions are minors, HIV-infected, pensioners, persons with disabilities and also gender discrimination prevalent in many spheres of social life. As for discrimination of HIV-infected people that are 340 thousand in Ukraine<sup>21</sup>, fifth part of HIV-infected confronted with violations of human rights during last year.<sup>22</sup> However, there are much more references about different types of discrimination in media than in official reports. Thus, members of human rights organizations say about discrimination based on age which begins from 30 years but only 9,7% of people whose rights in professional sphere were violated try to protect their rights. It's easier to find a good job for people of the age of 23-39 because 15% of paper announcements and 58% of internet job announcements include age limits.

"Discrimination based on age is very widespread in Ukraine despite the fact that state and public organizations in theory would have to work on overcoming it. The practice of refusing to accept the post for too young people makes it impossible to learn how to work. Too "old", i.e. people over 50, 40 or even 30 years, are denied a job because those who have the experience, the more difficult to manage manipulative methods to impose meaningful manifestations of corporate loyalty."<sup>23</sup>

According to media reports such discrimination can even cause suicides, like the case when man who has once again been denied employment, citing his 45 years of age committed suicide from the fire unit.<sup>24</sup>

But the greatest resonance in the field of age discrimination has produced another case described by the media when citizen of Kharkiv has filed a lawsuit against an employer who refused to the applicant for employment, citing the young age of the candidate is not enough.<sup>25</sup>

"Not long ago, 54-year-old Alexander turned to the office of the Kharkiv Human Rights Protection Group and complained of the fact that he was refused to be accepted for the post of storekeeper, arguing that it is not appropriate for age. But suddenly the applicant's age troubled employer. Head of the organization did not stand on ceremony and said the man: the main requirement of employment - up to age 30 years. And the most

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<sup>21</sup> D. Brun, *Report for Program on HIV of UNO*,

[http://zaknews.at.ua/news/v\\_ukrajini\\_zbilshuetsja\\_kilkist\\_vil\\_infikovanikh/2010-07-10-8293](http://zaknews.at.ua/news/v_ukrajini_zbilshuetsja_kilkist_vil_infikovanikh/2010-07-10-8293)

<sup>22</sup> KyivPost, *HIV-infected Ukrainians complain of discrimination, March 4, 2011*, <http://www.kyivpost.ua.html>

<sup>23</sup> Gorod.dp.ua, *Age discrimination thrives in Ukraine, July 17, 2012*, <http://gorod.dp.ua/news/73907>

<sup>24</sup> All.kharkov.ua, *Unemployment has committed suicide because of the refusal of employment, June 18, 2011*, <http://www.all.kharkov.ua/news/idn/197813.html?SID=c>

<sup>25</sup> Comments: Kharkiv, *Citizen of Kharkiv has filed a lawsuit against an employer for refusing to hire, November 2, 2011*, <http://kharkov.comments.ua/news/2011/11/02/161258.html>

interesting: constituting a claim to court, human rights activists tried to find precedents in the database of judicial decisions in Ukraine, but this kind of case will be considered at first.”<sup>26</sup>

Analysis of judicial practice shows that in most cases courts of appeal instance have acquitted persons accused of discrimination, and courts of third instance left without meeting the application for review of such decisions. This applies to all categories of cases like administrative, civil, and criminal.<sup>27</sup> There was even claim to Prime Minister of Ukraine<sup>28</sup> on protection of personal rights for equality between women and men of honour, dignity and business reputation and non-pecuniary damage at the Supreme Court of Ukraine specialized in handling civil and criminal cases. Plaintiff appealed to the court with a suit, which asked to recognize the speech of Prime Minister of Ukraine: "... it's not for women to carry out reforms ..." as those that have signs of discrimination against women, and it personally insulting her honour, dignity, business reputation, enable her to make public response to the appearance of the defendant in the newspaper "Governmental courier" charge in her favour 1 hryvnia (*national currency, 0.125 dollars*) pecuniary damage. But court decided to reject cassation complain because Court is set and it is seen from the case that the impugned judgments made in compliance with the rules of substantive and procedural law. These arguments in the cassation appeal the findings of the courts are not denied.<sup>29</sup>

So resolution to the problem of discrimination in Ukraine should involve a wide range of activities including a focus on the level of state institutions (especially the legislative and executive branches of government), and in the sphere of social, charitable, religious and other non-governmental organizations, including human rights and national and cultural associations. It is also important to develop specific rules and make the appropriate changes to existing legislation regarding the establishment of adequate administrative and criminal liability of officers for violation of any rights and for the discriminatory acts. There is a need to mainstream the issue of discrimination in society and develop and adopt a comprehensive anti-discrimination law with the most complete and open the list of possible grounds for discrimination, a clear definition of discrimination, locking mechanism protection from discrimination.

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<sup>26</sup> The Evening Kharkiv, *Citizen of Kharkiv is suing the employer because of age*, November 2, 2011, <http://vecherniy.kharkov.ua/news/57554>

<sup>27</sup> Unified State Register of Judgments, *cases 21610674, 13843982, 21610094, 20203891, 13146955 and so on*, <http://reyestr.court.gov.ua>

<sup>28</sup> The suit was filed by K.V. Levchenko, the President of the La Strada-Ukraine centre

<sup>29</sup> Unified State Register of Judgments, *case 13146955*, <http://reyestr.court.gov.ua/Review/13146955>



ii. Constitution of Ukraine does not define a term “family” proclaiming that “the family, childhood, maternity and paternity shall be under the protection of the State” (Article 51). Article 3 of the Family Code of Ukraine is devoted to the defining of the term “family”:

“Family is original and the main centre of society. The family is composed of persons living together who are related by common way of life and have mutual rights and obligations. Spouses is considered to be the family even if wife and husband do not live together because of studying, work, medical treatment, the necessity of taking care of parents or children and other valid reasons. The child belongs to the family of his/her parents in case if he/she does not live with them. The single person has the rights of the family member. The family is created on the basis of marriage, blood relation, adoption as well as other grounds not prohibited by law and not contradicting the moral fundamentals of society.”

The Constitutional Court of Ukraine singled out the following features of family and family membership:

“blood relationship, family relationships, marital relationships, and provisions on determination of paternity stated in part 3 of Article 53 give grounds for recognition of factual marriage relationships (concubinage) as one of the features of family.”

Moreover, the term “family” is defined in Article 1 of Ukraine’s Law “On State Social Aid to Indigent Families”, in particular “family is persons who live together, related by common way of life and have mutual rights and obligations.” Separately, the term “family with children” is defined in Article 2 of Ukraine’s Law “On State Aid to Families with Children” as “the circle of persons connected by family ties and obligations to maintain each other, in which own and adopted children as well as children under custody or care are brought up.”

Therefore, the notion “family” is presented through formulation of its features.

Under Article 4 of Family Code of Ukraine, the person who gave birth to child regardless of her age can create the family. Therefore, a connection could exist between the fact of child’s birth and the appearance of new family or inclusion of child as a new member to the existing family of his/her parents (this family is complete) or of one of them (incomplete family is family consisting of mother or father and child (children) by Article 1 of Ukraine’s Law “On protection of childhood”). The creation of new family can take place in case of adoption since the rights and obligations between adopter and adopted child arise to the same extent as between native parents and children. On the contrary, from legal point of view there is no new family and the quantity of members of existing family is not changed in case of transferring the child to grow up in a foster family, in family of foster caregiver, the establishment of children’s home of family type or guardianship. Under such circumstances there are no family relationships between child and the persons who took him/her into

foster care but relationships partially equals to them, they are not considered family members and cannot obtain rights and obligations determined by such a status.

Under Article 21 of Family Code of Ukraine,

“Marriage is a marital union of man and women registered in the state registry office. Joint residence of man and women as a family without marriage is not a ground for arising of the rights and obligations of spouses. The church wedding ceremony is not a ground for arising of the rights and obligations of the spouses, unless the church wedding ceremony has taken place before establishment or renewal of state registry bodies. Marriage is based on free consent of man and women. Women or man shall not be forced to get married.”

The term “union” underlines the legislative definition of contract theory of marriage defining its voluntary character.

Therefore, the main features of marriage characterizing the status of marriage in Ukraine could be pointed out:

1. The marriage is a marital union. However, birth of children is not a constitutive feature of marriage, since from legal point of view family exists with the presence or absence of children, and the status of parents is not a part of spouses’ status.
2. It is a monogamous union. National legislation does not endow the person with the right to be in two or more registered marriages.
3. It is an opposite-sex union. Only man and women as persons of different sex can get married.
4. It is an equal union. Spouses have equal rights and obligations.
5. It is a union registered in a state registry body. Joint residence of man and women as a family without marriage is not a ground for arising of the rights and obligations of spouses.

Man and women after acquiring of marriage status are vested with a set of personal non-pecuniary rights and obligations. They are the following: the right to maternity (paternity) (Article 49, 50 of Family Code of Ukraine), the right of wife and husband to respect of her/his personality (Article 51 of Family Code of Ukraine), the right of wife and husband to physical and moral development (Article 52 of Family Code of Ukraine), the right to change the surname (Article 53 of Family Code of Ukraine), the right to disposal of obligations and joint solution of family issues (Article 54, 55 of Family Code of Ukraine), right to freedom and personal inviolability (Article 56 of Family Code of Ukraine).

The marital age attaining which the person has the right to get married is set in Article 22 of Family Code of Ukraine and is equal to 18 years (before the alteration of Family Code of Ukraine by Law №452-VI of 15/03/2012 the marital age for men was 18 years, for women – 17 years). But in accordance with Article 23 of Family Code of Ukraine, after filing a submission by a person attained 16 years of age he/she could be granted the right to marriage under the court decision if court determined that this corresponds to his/her interests.

Taking into account the official report of UN of 2008 concerning World Marriage Data, the average marital age in 2008 in Ukraine was 25,9 years for men and 23,1 for women.<sup>30</sup>

According to L. Slysar, the researcher of Institute for Demography and Social Studies of M. V. Ptuh, nowadays the average marital age is 30 years for men and 27 years for women. Women have an average age at first marriage of 21-24 years and men - 26 years. The most numerous is the quantity of marriages with women who reached 21-23 years of age and men - 23-25 years of age.<sup>31</sup>

The researcher stressed that:

“Ukrainians, like most Europeans, get married later. This is because modern person shall study for a long time and to find profession prior to becoming financially independent and able to maintain family”.<sup>32</sup>

Taking into account the official statistics of State Statistics Service of Ukraine, the latter calculates the marriage's indicators, in particular, the average age at entering into a marriage and average age of the persons who got married for the first time, separately for men and women. In 2010-2011 the average marital age was 30,3 years for men and 27,4 for women. Simultaneously, the average age of persons who entered into a marriage for the first time in 2010 was 26,7 years for men and 24,1 years for women; in 2011 – 26,8 and 24,3 years correspondingly.<sup>33</sup>

**iii.** The nature of child care in Ukraine began to develop long before Kiev Rus was established.

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<sup>30</sup> World Marriage Data.UN. 2008. - <http://www.un.org/esa/population/publications/WMD2008/Main.html>

<sup>31</sup> DariaBura. Українці одружуються все пізніше. – Newsmarket. 11.04.2012 -

<http://www.newsmarket.com.ua/2012/04/ukrayintsi-odruzhuysya-vse-piznishe/>

<sup>32</sup> Українці все пізніше одружуються. – ZIK. 17.10.2012 - <http://zik.ua/ua/news/2012/09/17/245582>

<sup>33</sup> Letter of State Statistics Service of Ukraine №15/1-20/1060III of 23.08.2012

The origin of social assistance, care began in ancient families. Later on the same stage society begins to worry about small children. Neighbours paid great attention to children whose parents are sick. They could come to clean the house, cook and eat, etc. After the death of parents, children already had to take care of other family. Thus begins gradual solving the problem of guardianship. Also, people are faced with the problem of succession.

The subsequent period is the period of Kiev Rus. It begins with the 10th century. Then in "Ruska pravda" at first appears the concept of "custody." It is understood that after the death of his parents, guardian of the child is someone of the close relatives. Guardians on loan transferred movable and immovable property belonging to the fatherless. But he was supposed to return everything after the child reaches adulthood.

At the same stage it was typical princely protection and care. Then Prince Vladimir tried various good works to help disadvantaged children. He also urged people to help orphans and children living in poor families. Vladimir bared school for normal children, enabling them to gain at least some level of education.

It is worth mentioning the period of the USSR. That's when children were actively creating organizations focused on child development. Almost all pupils were pioneers.

Also during the Soviet times it was compulsory for children to do sports. All of them were involved in some kind of sport. This has stimulated a good physical development of children.

The status of children in families is determined by different customs and traditions. According to Ukrainian cultural and historical background children, as a rule, live in families that influences on their moral, ethical, spiritual bringing up. A traditional Ukrainian family has one or two children. The parents try to give them good school education, provide them with all necessary facilities for overall, complete development as a personality.

But there are also one-parent families, where the position of children is not so good. Unfortunately, one parent does not have enough possibilities to give his/her child all necessary care.

According to our research results of the reports of International and state organizations and state bodies on human and children rights, we have found out different types of violations which commonly relate to different family types.

Generally, children in full families, complain of not being listened to, their opinions not being taken into account by parents, school authorities, state bodies, courts, etc in cases which are concerned with them.

In incomplete families the situation is worse. The aforementioned problems become secondary. Insufficient material support, lack of parents' attention and care become primary. The largest number of complaints concern violations of children's rights during conflicts between the parents of the child or failure by a parent to fulfil his responsibilities by law or court regarding the child. The most common problems are related to alimonies, appeals relating to the conflict to determine residence of the child whose parents separated or divorced, child abduction by a parent, including interstate kidnapping of children, property disputes between parents or between parents and third parties, whose hostages are children, untimely or wrong calculation of state benefits.

However, the most vulnerable are orphans. The government provides a range of benefits and assistance to orphans and children deprived of parental care. However, social orphanhood becomes rampant. About six thousand children in Ukraine become orphaned each year, having living parents. They are left without parental care. At the same time not many people who wish to adopt a child from a boarding school, can do this because of the low level of financial support.

The task set by the children's social and educational institutions is to ensure optimal conditions of life of orphans and children deprived of parental care. There are also problems with the placement of children after graduation. For most students to continue education is primarily to get a place in a hostel, financial support in the form of scholarships and other benefits established by the state.

According to our research results, there are some approaches concerning the issues directly related to children's rights. In Ukraine on a legal level there is legislative foundation to provide sufficient protection of common children's rights. Depending on the degree of violation, there exists civil, administrative and criminal liability. Despite such legislative basis the society actively discusses inefficiency or incompleteness of execution of Ukrainian legislation by state bodies, courts and individuals.

The majority of cases are directly related to civil liability. Usually these are cases of alimony non-payment, divorces processes, parental rights hostages of which are children. Most often

such cases are connected with personal interest of parents, but not the rights of their children.

Another type of liability is administrative. The cases concern different types of minor violations of children's rights by state bodies, such as untimely payment of state benefits, no observance of living conditions of children at special institutions. Unfortunately, in such cases, there is a problem of children representation before the court.

Criminal liability connected with children's rights sets in cases of international kidnapping by one of the parents, rape, sexual abuse, slavery, etc.

In such cases there is hush up of the facts of the crimes. Parents usually put their individual interests prior to protection of children rights. It is connected with the fear of parents of publicity.

On the other hand, because of high corruption level, the cases are often hushed up, or rejected the right to open criminal cases, or are closed on the investigation stage.

Consequently, such information rarely gets sufficient mass media coverage.

According to social polls, the most important issues of childhood are still alcoholism and drug addiction among children and adolescents. The society is concerned with prevalence of children and juvenile's crimes on the ground of social and economic inequality. The third most important problem is low standard of living in Ukrainian families with the children. That is why, the questioned people are sure that these are the most urgent issues which became the reason of various violations of children's rights. Over the past two years, the Ukrainians began to attach more importance to the problems of low living standards of families with children, as well as poor living conditions of orphaned children in institutions. Each year, number of homeless and orphaned children grows substantially. As a rule this is a concern of the state bodies. These children are sent to specialized preschool and school institutions. The concern of population on numerous violations of their rights, abuse and violence against children has been reported in the press. The children's right to secondary school education is assumed to be best realized in Ukrainians' opinion. The interviewed are also satisfied with the fact that rights of children to freedom of expression and their own opinion are respected. The realization of the right to receive medical care in kindergartens, schools, hospitals, special institutions for the handy kept and juvenile criminals is much worse.

The most poorly implemented today are children's rights to protection from violence and abuse in the family and in different institutions, the protection from the information that is harmful to their health and moral development.

Unfortunately, public discussion of problems directly related to the children and their rights is still not very developed. The government and the society do not pay enough attention to such violations. Generally it is connected with the low level of justice understanding and fear of public opinion. We are sure there are still a lot of different cases, which have not received enough general public attention. A great number of cases have not been investigated at all or have been closed on the investigation stage. The main reasons of this are high corruption level, the questions of morality and fear to reveal such cases before public, which can cause various types of damage to the child or a family.

During our research we have not found many cases of violation of children's rights highlighted in the mass media. Among those mentioned in the press is information linked to juvenile suicide due to violations of the rights of children in boarding schools and correctional facilities for juveniles, sexual abuse, children's prostitution and taking part in porno movies, exploration of children's labor in the fields, workshops. There is some general information and statistics about common violations and petty crimes in the state mass media, special government websites, etc.

Regarding the legal framework for the protection of children's rights, we guided the following regulations:

1. Council of Europe Convention Against Trafficking
2. UN Convention on the Rights of the Child
3. Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to the Convention on the Rights of the Child
4. Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse
5. Stockholm Declaration and Action Plan against Sexual Exploitation of Children for Commercial Purposes
6. Law of Ukraine "On the National Program National Action Plan for the Implementation of the UN Convention on the Rights of the Child"
7. Law of Ukraine "On Protection of Childhood"

8. Joint Order of the State Committee of Ukraine for Family and Youth, Ministry of Internal Affairs of Ukraine, the Ministry of Education and Science of Ukraine, Ministry of Health of Ukraine dated 16.01.2004 № 5/34/24/11 "On Approval of the Procedure of Consideration of Appeals and Messages About Child Abuse or Real Threat of It"

9. Law of Ukraine "On Bodies and Services for Children and Special Facilities for Children"

10. The Criminal Code of Ukraine

11. Family Code of Ukraine

According to the Law of Ukraine "On the National Program of the National Action Plan on Implementation of the UN Convention on the Rights of the Child", Ukraine identified four priority areas of activity: promotion of healthy lifestyles, providing opportunities to acquire high-quality education, protecting children from abuse, violence and exploitation, the fight against HIV/AIDS, and providing a global action plan that focuses on the development and protection of human rights and interests of the younger generation, and the challenges that the international community should perform for children and with children.

However, these indicators are not commonly met. For example, the rate of stillbirths in 2010 was 6.5 (2009 - 6.7, down for 0.2%), the mortality rate of children under one year of birth defects has decreased by 3.1%.

Prosecutor's audit found serious violations of the law on the protection of children's rights in protection of life, health, education, custody, care, work, employment and crime prevention in the structural subdivisions of executive bodies and local authorities, the police.

Guardianship authorities of the executive committees of village councils do not always ensure implementation of the Family Code of Ukraine and the Rules of Guardianship, to exercise control over the conditions of detention, education, teaching of a child under the guardianship or custody, record keeping and personnel files of children in this category.

Shortcomings are being identified in the work of regional criminal police departments for children. Most of these units state that juvenile delinquency is not analyzed; the causes and conditions that led to it are not studied, leading to an increase in crime by 10 months of this year by 21.4%. (Most of them in Kremenchuk, Kozelshchina, Hrebinkivskomu, Semenov and areas in Komsomolsk). Also this year juveniles committed two murders.

Law of Ukraine "On Protection of Childhood" defines child protection in Ukraine as a strategic national priority aimed to ensure the realization of children's rights to life, health,



education, social protection and comprehensive development, establish the fundamental principles of state policy in this area.

All the children in Ukraine, regardless of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property status, health condition or any other circumstances, have equal rights and freedoms defined by this Law and other regulations.

In accordance with the legislation, the state guarantees all children equal access to free legal assistance necessary to protect their rights.

iv. United Nations Convention on Rights of the Child had been ratified in Ukraine on the 27th of February, 1991 by the Resolution of the Parliament of the Ukrainian SSR N 789-XII.<sup>34</sup>

Ukraine did not make any restrictions to the Convention.

According to Article 9 of the Constitution of Ukraine<sup>35</sup> ratified Convention is considered to be a part of the Ukrainian national legislation. Consequently, the Convention on the Rights of the Child in accordance with Article 9 of the Constitution of Ukraine is part of the national legislation of Ukraine, and Ukrainian law as well as other legislative rules pertaining to this area should be aligned with the provisions of the Convention.

Based on the provisions of the Constitution of Ukraine, the UN Convention on the Rights of the Child and other international instruments, on the 26th of April 2001 the Law of Ukraine "On Protection of Childhood" and a number of other laws aimed at protecting the rights and interests of children have been adopted. Since 2004 the new Civil Code of Ukraine and the Family Code of Ukraine, the basic laws of independent Ukraine, in particular in the field of legal protection of children, entered into force. The new codes have taken into account a number of important observations and recommendations of the UN Committee on the Rights of the Child. In recent years a series of public programs aimed at ensuring the rights of the child have been implemented. Resolution of the Verkhovna Rada (Parliament) of Ukraine on January 1, 2006 approved the State Program of National Adoption in Ukraine "Every child - his own family" in 2006-2016.

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<sup>34</sup> <http://zakon2.rada.gov.ua/laws/show/789-12>

<sup>35</sup> <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>

On the 5th of March, 2009 the Parliament of Ukraine has finally adopted the Law "On the State Program "National Plan of Action for the implementation of the UN Convention on the Rights of the Child" until 2016"<sup>36</sup>, which has been developing during past five years. As noted in the second part of the Program, the purpose of this document is to ensure optimal functioning of an integrated system of protection of children's rights in Ukraine in accordance with the UN Convention on the Rights of the Child and Aims of development, proclaimed by the UN Millennium Declaration, and strategy of the Final document of the special session of the UN General Assembly for children's interests "The world, which is beneficial for children."

The Ombudsman's monitoring proves that, despite the implementation of the best provisions of the international instruments, laws of Ukraine in the sphere of children's rights are mostly a declarative.<sup>37</sup> Therefore, in practice the realization of individual rights of the child, including accommodation, access of talented youth to higher educational institutions, obtaining quality medical services, etc., is especially complicated. The financial and economic crisis has exacerbated these negative phenomena.

This fact is also proved by the numerous NGO's monitoring reports in the sphere of children rights in Ukraine. For example, according to the results of monitoring performed by specialists of the Ukrainian public organization "Human Rights Organization" Common Goal" the status of implementation of the UN Convention on the Rights of the Child in Ukraine is extremely low.<sup>38</sup> According to this monitoring prepared by the Government of Ukraine 193-page "The combined 3rd and 4th periodic National Report on the implementation by Ukraine of the UN Convention on the Rights of the Child", submitted to the UN Committee in autumn 2010, while covering the issues of the Convention and contains extensive statistical material, not fully reflects the real situation and offers no effective ways to implement the Convention and to ensure the inviolability of child rights.

At the same time, the rights of children require special protection from the state, as provided by international instruments and national legislation of Ukraine. Problems relating to children's rights increase, primarily due to lack of a systematic approach of creating effective

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<sup>36</sup> <http://zakon2.rada.gov.ua/laws/show/1065-17>

<sup>37</sup> [http://www.ombudsman.gov.ua/ru/images/stories/07022011/S\\_Dopovid\\_4.pdf](http://www.ombudsman.gov.ua/ru/images/stories/07022011/S_Dopovid_4.pdf).11.

<sup>38</sup> [http://commongoal.org.ua/index.php?option=com\\_content&view=article&id=148:news&catid=14:2010-04-06-17-35-35&Itemid=18&lang=en](http://commongoal.org.ua/index.php?option=com_content&view=article&id=148:news&catid=14:2010-04-06-17-35-35&Itemid=18&lang=en)

child protection procedures. Declaring social benefits for children, the state today does not always provide the basic tasks of compliance with the minimum standards for children's rights. For example, well-known is violence and child abuse, unlawful bringing children to work in the most polluted areas of economic activity (work in porn and the sex industry), child trafficking etc.

There is no effective mechanism for coordination and monitoring, which would make a systematic and comprehensive data collection on Ukraine's compliance with all provisions of the legislation of Ukraine and assumed international obligations regarding the rights of the child.

Media do not pay enough attention to the problems of children and childhood, publications and materials are superficial and one-sided scandalous nature. Media mostly do not control and are not covering the activities of law enforcement agencies as a result of the release of material for investigative journalism.

v. In DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December, 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA speaking about suggestions to EU States' legislation. This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. It also introduces provisions to strengthen the prevention of those crimes and the protection of the victims thereof.

In 3 to 6 paragraphs of Directive describes offences concerning sexual abuse, offences concerning sexual exploitation, offences concerning child pornography, solicitation of children for sexual purposes and tells about incitement, aiding and abetting and attempt.

In Ukrainian legislation, namely in the Criminal Code we have separate section devoted to sexual abuse in general. In articles of this section child sexual abuse is mentioned but as an aggravating circumstance. The smallest penalty is to 5 years of imprisonment and the biggest punishment is 15 years.

We don't have any State program of protection of children from sexual abuse, but actually we need one.

## 2 THE LANZAROTE CONVENTION

- i. Ukraine ratified the European Convention on Human Rights on 17.07.1997.
- ii. Ukraine is a party to the Lanzarote Convention. It was signed on 25.10.2007 and ratified on 20.06.2012; it comes into force on 01.12.2012.

With the ratification of the Lanzarote Convention Ukraine added 2 parts:

- Ukraine declares that the state body in Ukraine which has authority for the purposes of paragraph 1 of Article 37 of the Convention is the Ministry of Internal Affairs of Ukraine;
- Ukraine declares that this Convention is the legal basis for cooperation on mutual legal assistance in criminal matters and extradition if a request from the state - party to this Convention, with which Ukraine has no agreement on mutual legal assistance in criminal matters or extradition.

Central Body in Ukraine, which has authority to consider paragraph 3 of Article 38 of the Convention is the Ministry of Justice of Ukraine (on trial or execution) and the General Prosecutor of Ukraine (under preliminary investigation).

v. According to p.5 Article 3 of the Criminal Code of Ukraine, laws of Ukraine on criminal responsibility should correspond to the provisions of international treaties ratified by Verkhovna Rada of Ukraine. For now there is no legislation in Ukraine on implementation of Convention provisions into national legislation of Ukraine.

vi. There is no relevant legislation.

vii. There are 18 legal acts that are partly connected with the Lanzarote Convention.<sup>39</sup> It is worth mentioning that it is international conventions and action plans concerning children rights and interests. There already exists a draft law with amendments “Law draft On Amendments to Some Legislative Acts of Ukraine with respect to Ratification of Council of Europe Convention on Protection of Children from Sexual Exploitation and Sexual Abuse” from 09.11.2011 (№9434). It was suggested in particular to make amendments to Criminal Procedure Code of Ukraine, Criminal Code of Ukraine, Law of Ukraine “On Childhood

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<sup>39</sup> <http://zakon2.rada.gov.ua/laws/main/l290477p6>; <http://zakon2.rada.gov.ua/laws/main/l290477z6>

Protection”, Law of Ukraine “On Social Morality Protection”. On 05.07.2012 the consideration of this draft has been suspended. This draft exists only in Ukrainian.

There were six parliamentary committees involved in the ratification of the Convention. However, the Main Committee was the Committee on Foreign Affairs. According to paragraph seven of Article 9 of the Law of Ukraine "On International Agreements of Ukraine" if at ratification submitted international agreement, which requires the adoption of new or amendments to existing laws of Ukraine, drafts of such laws submitted to the Verkhovna Rada of Ukraine together with the draft law on ratification and adopted at a time.

But consideration of the draft law with amendments to the national legislation is currently adjourned.

**viii.** Ukraine did not make reservations to the Convention.

## II NATIONAL LEGISLATION

### 1 GENERAL PRINCIPLES OF THE JURISDICTION

**i.** The history of state and law of Ukraine is very complicated; it includes many periods of being a part of foreign countries, strong external influence on the development of state and legal system, the story of young democracy, lawful state and civil society. The evolution of state regime of Ukraine contains the following periods:

Historical Period	Dates	Form of the State
Kyiv Rus	IX-XII century	Early feudal monarchy built on the principle of suzerainty-vassalage. Prince council existed
Disunity of Kyiv Rus	XII-XIV century	
Ukrainian lands belonged to the Big Lithuanian Principality	XIV-XVI century	Monarchy. Main governing bodies – king, royal council, landowners council

Ukrainian lands belonged to Poland	XVI-XVIII century	Nobility republic, governed by elected kings. Sejm existed
Hetmanshchyna	XVII-XVIII century	Republic. General, regimental and sotnia governance
Ukrainian lands belonged to Russian Empire	XVIII-XIX century	Monarchy. Local governance performed by governors-general
Western Ukrainian lands belonged to Austrian Empire	XVIII-XIX century	Monarchy. Artificial unity of Ukrainian, Polish, Hungarian and Romanian lands
Ukrainian revolution and fight for independence	1917-1922	Autonomy declared in the composition of Russian Empire. Independence declared. Skoropadskyy Hetmanat. Dyrectoria governance. Soviet republic
Western Ukrainian lands in the mid-war period	1918-1939	Polish republic, Romanian Kingdom, Czech-Slovakia republic
Ukraine belonged to the Soviet Union	1922-1991	USSR, Soviet republic. Lack of power separation

On 24th August, 1991 Verkhovna Rada of Ukraine adopted an Independence act of Ukraine. USSR stopped its existence. A new country appeared on the geopolitical map of the world – Ukraine.<sup>40</sup>

On 28th June 1996 the Constitution of Ukraine was adopted.

Article 5 of the Constitution of Ukraine declares that Ukraine is a republic. The carrier of the sovereignty and the only source of power in Ukraine is the people. The people perform their power directly and through the bodies of state power and bodies of local self-government.

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<sup>40</sup> <http://uk.wikipedia.org/wiki/>

Article 6 of the Constitution of Ukraine provides that the state power in Ukraine is performed under the principle of its division to legislative, executive and judicial.<sup>41</sup>

There exists one autonomous republic in Ukraine – Autonomous Republic of Crimea. According to Article 134 of the Constitution of Ukraine it is an inalienable part of Ukraine.

ii. Provisions on human rights and freedoms can be found in Chapter II of the Constitution of Ukraine. It also contains guarantees of human rights and freedoms realization. One of the main guarantees is reflected in Article 3 of the Constitution of Ukraine which stipulates:

“A human being, its life, health, honour and dignity, inviolability and security are acknowledged to be the highest social value in Ukraine. Human rights and freedoms and their guarantees determine the content and direction of a state’s activity. The state is responsible before a human being for its activity. Strengthening and ensuring human rights and freedoms is the main state’s obligation.”<sup>42</sup>

According to Article 22 of the Constitution of Ukraine “human rights and freedoms provided by this Constitution are not exhaustive”.<sup>43</sup>

Constitution of Ukraine foresees different kinds of human rights – Article 27-36.

Constitution of Ukraine has the following references concerning children rights:

1. P.2 Article 24 of the Constitution of Ukraine:

“Equity of men and women is ensured with providing women with equal with the men possibilities in social, political and cultural activity, obtaining education and professional preparation, work and reward for it; with special means concerning labour protection and women’s health, establishment of pension privileges; creation of conditions that allow women to combine work with motherhood; legal protection, material and moral support of motherhood and childhood, including providing of payable vacations and other privileges to pregnant women and mothers”.

2. P.3 Article 51 of the Constitution of Ukraine: “Family, childhood, motherhood and fatherhood are protected by the state”.

3. P.2 Article 52 of the Constitution of Ukraine: “Any violence concerning children and their exploitation is prosecuted by law”.

4. Cl.6 Article 92 of the Constitution of Ukraine:

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<sup>41</sup> <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>

<sup>42</sup> Конституція України. - X: ТОВ «Одіссей», 2012 - с.3

<sup>43</sup> Конституція України. - X: ТОВ «Одіссей», 2012 - с.7

“Exclusively laws of Ukraine define: principles of social protection, forms and kinds of pension maintenance; principles of labour regulation and employment, marriage, family, childhood, motherhood and fatherhood protection; upbringing, education, culture and healthcare; ecological security”.

**iii.** The task of the Constitutional Court of Ukraine is to guarantee supremacy of the Constitution of Ukraine on the territory of Ukraine with determination whether laws and other legal acts correspond to Constitution of Ukraine and official explanation of laws of Ukraine. In its activity the Constitutional Court of Ukraine is guided by the Constitution of Ukraine, Law of Ukraine “On Constitutional Court of Ukraine” from 16.10.1996 and Regulations of the Constitutional Court of Ukraine. Constitutional Court of Ukraine consists of 18 judges who are elected by Verkhovna Rada, President of Ukraine and Congress of judges of Ukraine.

According to Article 13 of the Law of Ukraine “On Constitutional Court of Ukraine”, the Constitutional Court of Ukraine decides and makes conclusions concerning:

1. Constitutionality of laws and other legal acts of Verkhovna Rada of Ukraine, President of Ukraine, Cabinet of Ministries of Ukraine, Verkhovna Rada of Autonomous Republic of Crimea;
2. Conformity of Constitution of Ukraine to valid international treaties of Ukraine or those international agreements ratified by Verkhovna Rada of Ukraine;
3. Observance of the constitutional procedure of investigating and considering the case of removal of the President of Ukraine from the position under impeachment within Article 111 and 151 of Constitution of Ukraine;
4. Official interpretation of the Constitution and laws of Ukraine;
5. Conformity of the draft law on amendments of the Constitution to the requirements of Article 157 and 158 of the Constitution of Ukraine (concerning impossibility of amending the Constitution of Ukraine in case amendments foresee cancellation or restriction of human rights and freedoms or if they are aimed to cancel independence or violate the territorial unity of Ukraine and impossibility of the second presentation of such draft to Verkhovna Rada earlier than a year after deciding upon this draft).<sup>44</sup>

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<sup>44</sup> Закон України «Про Конституційний Суд України»// Відомості Верховної Ради України (ВВР), 1996, № 49, ст. 272



According to Article 38 of the Law of Ukraine “On Constitutional Court of Ukraine”, forms of application to the court are constitutional presentation and constitutional appeal. Under the definition given in Article 39 of the Law constitutional presentation is a written appeal to Constitutional Court of Ukraine concerning acknowledgement of the legal act (its separate provisions) being unconstitutional, determination of conformity of the draft law on amendments to the Constitution of Ukraine with requirements of Article 157 and 158 of the Constitution of Ukraine, constitutionality of an international agreement or necessity of an official interpretation of the Constitution of Ukraine and laws of Ukraine. A constitutional presentation is also a Verkhovna Rada of Ukraine address on making a conclusion concerning observance of constitutional procedure of investigation and consideration of the case of removal of the President of Ukraine from the position under impeachment, violation by Verkhovna Rada of Autonomous Republic of Crimea the Constitution of Ukraine or laws of Ukraine. Subjects of constitutional presentation are the President of Ukraine, not less than 45 deputies of Ukraine, Supreme Court of Ukraine, Verkhovna Rada of Ukraine Commissioner on human rights, Verkhovna Rada of Autonomous Republic of Crimea. In some cases subjects of constitutional presentation can be other state power bodies and local self-government.

According to Article 42 of the Law constitutional appeal is a written appeal to the Constitutional Court of Ukraine concerning the necessity of an official interpretation of the Constitution of Ukraine and laws of Ukraine in order to provide realization or protection of constitutional human rights and freedoms and rights of legal persons. Subjects of constitutional appeal are citizens of Ukraine, foreigners, persons without citizenship and legal persons.

Nowadays the only violated rights protection mechanism is addressing courts. In Ukraine there is the following model of judicial system:

1. Local general courts,
2. Courts of appeal in oblasts, Court of Appeal of the city of Kyiv and Sevastopol, Court of Appeal of ARC,
3. Higher specialized court of Ukraine in civil and criminal cases,
4. Supreme Court of Ukraine.

**iv.** According to Article 2 of the Criminal Procedure Code of Ukraine tasks of criminal justice are the protection of rights and lawful interests of individuals and legal persons who

participate in it, quick and comprehensive investigation of crimes, detection of guilty persons and providing of proper implementation of the Law in order to punish everybody who committed a crime and ensure that nobody innocent is being punished.<sup>45</sup>

Article 33 of the Criminal Procedure Code of Ukraine provides that all criminal cases are considered by district, city districts', city and intercity courts. Before the court considers the case in the first instance there is a preliminary examination of the case by a judge. Depending on the results of the preliminary examination of the case the judge makes one of these decisions: to appoint the case to a trial; to terminate the investigation in the case; to return the case to the prosecutor; to direct the case according to the jurisdiction; to close the case or to return it for additional investigation.

In order to provide the right to appeal against the court's decision the judicial system of Ukraine foresees the possibility to address the court of the appeal instance. According to Article 356 of the Criminal Procedure Code of Ukraine appeals against the court's decisions of district, city districts', city and intercity courts are considered by the Court of Appeal of the Autonomous Republic of Crimea, oblasts' courts of appeals, cities of Kyiv and Sevastopol. Depending on the results of the case consideration the court can leave the verdict without changes, abolish the verdict or change it. In some cases the court of appeal has the right to abolish the verdict of the first instance court and bring its own one.

The next instance for the case revision is cassation. According to Article 383 of the Criminal Procedure Code of Ukraine, "cassation refers to verdicts and ruling of the court of appeal made by it during the appeal procedure." Article 385 of the Criminal Procedure Code of Ukraine provides that cassation complaints are considered by the board of judges of the Judicial Chamber in criminal cases of the Higher Specialized Court of Ukraine in civil and criminal cases.<sup>46</sup>

With respect to its competence determined by the Law of Ukraine "On Judicial System and Judges' Status", HSCU considers cases of civil and criminal jurisdiction under the cassation procedure according to the procedural law; analyzes courts statistics, learns and generalizes courts practice; provides methodical help to courts of a lower level with the aim of equal

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<sup>45</sup> Кримінально-процесуальний кодекс України - К: «Правова єдність», 2012 - с.3

<sup>46</sup> It was established with the Decree of the President of Ukraine from 12.08.2010 №810/2010 "On the Higher specialized court of Ukraine in civil and criminal cases."

application of the Constitution norms and laws of Ukraine in judicial practice; provides specialized courts of a lower level with recommendation interpretations of legislation implementation concerning consideration of cases of particular jurisdiction.

After considering the case by the Court, it can leave the verdict, ruling or decision without changes and cassation complaints without satisfaction; abolishes the verdict, ruling or decision and directs the case to a new investigation or new court's or appeal procedure; abolishes the verdict, ruling or decision and closes the case; changes the verdict, ruling or decision.

According to Article 397 of the Criminal Procedure Code of Ukraine, "cassation court does not have the right to strengthen the punishment or apply law on more serious crime".

Despite appeal and cassation procedures Criminal Procedure Code of Ukraine foresees the procedure of courts decisions revision under newly detected circumstances. The revision of the court's decision by the Supreme Court of Ukraine is possible in case of unequal application by the cassation court the same provisions of the criminal law concerning similar socially dangerous actions that led to making different by content courts decisions or detection by an international judicial organization, which jurisdiction is acknowledged by Ukraine, the violation of international obligations by Ukraine during the consideration of the case. After considering the case the Supreme Court of Ukraine makes a ruling on the satisfaction of application or denial in satisfaction of the application.

v. Both Criminal Code of Ukraine from 1960 and valid Criminal Code of Ukraine<sup>47</sup> impose the general age for criminal responsibility from 16 years. According to p.2 Article 22 of the Criminal Code of Ukraine individuals who have committed a crime in the age from 14 to 16 years will bare criminal responsibility only in case of: intentional murder (Article 115-117), state or social figure life infringement, official of the rights protection body, member of a civil formation on social order protection and state's border or serviceman, judge, juror with respect to their activity, execution of justice, protector of the interests or representative of the person with respect to their activity connected with providing legal aid, foreign country representative (Article 112, 348, 379, 400, 443),

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<sup>47</sup>Adopted by Verkhovna Rada of Ukraine in 2001

443), intended heavy corporal injury (Article 121, p.3 Article 345, 346, 350, 377, 398), intended middle gravity corporal injury (Article 122, p.2 Article 345, 346, 350, 377, 398), diversion (Article 113), banditry (Article 257), terrorist act (Article 258), hostage capture (Article 147, 349), rape (Article 152), violent sexual desire satisfaction in unnatural way (Article 153), larceny (Article 185, p.1 Article 262, 308), robbery (Article 186, 262, 308), brigandage (Article 187, p.3 Article 262, 308), demanding (Article 189, 262, 308), intend destruction of property injury (p.2 Article 194, 347, 352, 378, p.2,3 Article 399), communications damages and vehicles (Article 277), rail creeping or usurpation of railway movable composition, air, sea or river ship (Article 278), unlawful usurpation of a vehicle (p.2,3 Article 289), hooliganism (Article 296).<sup>48</sup>

Article 7-3 of the Criminal Procedure Code of Ukraine foresees the procedure of solving cases on socially dangerous activities committed by individuals who did not reach the age of criminal responsibility. A person in the age from 11 years, suspected in committing a socially dangerous act, which has the features of an act for which the Criminal Code of Ukraine imposes a punishment of over 5 years of imprisonment, and which did not reach the age of criminal responsibility and concerning which there is enough of grounds to consider that it will be avoiding investigation and trial or executing procedural decisions, obstructing in establishment the truth in a case or continuing unlawful activity, can be placed in a receiver-distributor for children for 30 days. This term can be prolonged in the case of grounds availability for 30 days more. Investigator after establishing in the criminal case that the socially dangerous act was committed by a person in the age of above 11 years and before reaching the age of criminal responsibility introduces a ruling on closing of the case and application to the juvenile coercive educational measures. The case together with the ruling is transferred to the prosecutor.<sup>49</sup>

The official web site of the State penitentiary service of Ukraine does not contain statistic data on the quantity of juveniles kept in investigatory solitary confinement cells of the Service. According to the right of access to public information within the research an inquiry has been made to the State penitentiary service of Ukraine with regard to the Law “On Access to Public Information”. In its response to our request the State penitentiary service

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<sup>48</sup>Кримінальний кодекс України-Х:«Одісей», 2012-с.12

<sup>49</sup> <http://zakon2.rada.gov.ua/laws/show/1001-05>

of Ukraine informed that for the 01.08.2012 in the investigatory solitary confinement cells of the Service 530 juveniles were kept under arrest.

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual abuse

i. National legislation of Ukraine does not contain the definition of a term “sexual activities” though it is used in the legislation, in particular in the Law of Ukraine “On Violence Prevention in the Family”, Law of Ukraine “On Social Morality Protection”.

The term “sexual activities” should be applied broadly. Unfortunately national legislation of Ukraine does not foresee any responsibility for some crimes of a sexual character, for example such crime as “sexual pretension”.

ii. The word “intentionally” in Criminal Code means “with intent”. Article 24 of Criminal Code divides intent into two categories: direct and indirect intent, providing an explanation to both of them.

“Direct intent is the intent when a person was aware of socially dangerous character of his act (action or inaction), foresaw its socially dangerous consequences and wished its occurrence.

Indirect intent is the intent when a person was aware of socially dangerous character of his action (act or inaction), foresaw its socially dangerous consequences and although did not wish but knowingly assumed its occurrence.”

Legislative definition of direct and indirect intent includes three features characterizing psychic treatment of a person to committed act and its consequences: 1) person’s awareness of social danger of his act; 2) foresight of socially dangerous consequences of his act; 3) wish of the consequences occurrence or knowing assumption of its occurrence. The first two features (awareness and foresight) characterize the processes occurring in the person’s psyche, as a result, making up the intellectual component of intent. The third feature (wish or knowing assumption of consequences) characterize the volitional sphere of a person making up the volitional component of intent.

Criminal liability for an intentionally committed crime of sexual abuse varies depending on the specific circumstances of the crime committed. It is strictly fixed in Chapter IV (Crimes against sexual freedom and sexual inviolability) of Criminal Code (Article 152-156).

Article of Criminal	Crime	Sanctions
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Code		
Part 1 of Article 152	Rape (sexual activities with physical violence, threat of violence or using a helpless state of a victim)	3-5 years imprisonment
Part 3 of Article 152	Rape of minors (persons who attained 14 years or more)	7-12 years imprisonment
Part 4 of Article 152	Rape of minors (persons under 14 years)	10-15 years imprisonment
Part 1 of Article 153	Forcible sexual satisfaction in unnatural way (sexual satisfaction in unnatural way with physical violence, threat of violence or using a helpless state of a victim)	Up to 5 years imprisonment
Part 2 of Article 153	Forcible sexual satisfaction in unnatural way against minors (persons who attained 14 years or more)	3-7 years imprisonment
Part 3 of Article 154	Forcible sexual satisfaction in unnatural way against minors (persons under 14 years)	10-15 years imprisonment
Part 1 of Article 155	Sexual activities with a person who did not reach puberty	Restraint of freedom up to 5 years or imprisonment up to the same term
Part 1 of Article 156	Corruption of minors (committing of corruptive actions as to the person who did not reach 16 years)	Restraint of freedom up to 5 years or an imprisonment up to the same term.
Part 2 of Article 156	Corruption of minors who did not reach 14 years	5-8 imprisonment with the deprivation of the right to hold certain office or deal with certain activity to the term 3 years or without such

		a term
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**iii.** The legislation of Ukraine does not foresee a particular age for engaging in sexual activities. It is considered that it requires sexual puberty. Sexual puberty embraces only biological factors and is not connected with reaching certain age. It happens individually in any case. For consideration of sexual puberty a forensic medical expertise is applied concerning sexual stages which define whether a person reached sexual puberty (Ministry of Healthcare Order from 17.01.1995 №6 “On Development and Improvement of Forensic Medical Service”). Criminal Code of Ukraine foresees criminal responsibility for sexual relations with a person who did not reach sexual puberty. The subject of this crime is a person who reached 16 years. If both children are engaged in sexual activities before 16 years, their actions would not be punished in case of mutual consent and if there was no other crime of a sexual character committed.

**iv.** The use of force, taking advantage of disability or threat as constituent elements of crime “rape” (Part 1 of Article 152 of Criminal Code) are foreseen in its main corpus delicti. Thus, to qualify the rape at least one of the three ways of its commitment should be proved – use of force, threat or taking advantage of disability (“helpless state” under Criminal Code). One of the aggravated corpora delicti of rape pertains to minors aged from 14 till 18 and another one (particularly aggravated) to minors aged till 14 (Part 2 and 4 of Article 152 of Criminal Code correspondingly).

The same approach is applied to the regulation of crime “forcible sexual satisfaction in unnatural way” (Article 153 of Criminal Code) where the use of force, taking advantage of disability or threat is set forth as constituent elements of the crime, and commitment of the crime in relation to minors till 14 and minors till 18 is qualified as aggravated corpus delicti of the crime (Parts 2 or 3 of Article 153 of Criminal Code).

Also if there is another body of the crime present in the actions of a person its actions are qualified as a totality of crimes, for example “rape” and “serious corporal injuries infliction”.

**v.** The term “incest” is not used in national legislation. Legislation of Ukraine contains a definition of a term “sexual violence in a family”. According to Article 1 of the Law of Ukraine “On Violence Prevention in a Family”, sexual violence in a family is an unlawful assault of one member of the family on sexual inviolability of another member and actions of a sexual character against juvenile member of the family. There is a criminal responsibility foreseen for committing sexual violence in a family.

Applying general definition of incest as “sexual intercourse between family members and close relatives”<sup>50</sup> we can find references to it in Criminal Code, in particular, in:

- Part 2 of Article 155 “sexual activities with a person who did not reach puberty”;
- Part 2 of Article 156 “corruption of minors”<sup>51</sup>.

In the first case incest could be inferred from Part 2 of Article 155 (“sexual activities with a person who did not reach puberty”) that establishes the criminal liability for sexual activities with a person who did not reach puberty committed by father, mother, stepfather, stepmother, guardian, or the person who has undertaken the obligations of taking care of that person.

“The separation of mentioned persons as special subjects of the crime is quite justified from the set of circumstances. Foremost, it is those persons who are responsible for taking care and upbringing of minors. [...] The cases of incest place the greatest social danger. The most essential harm to sexual inviolability of minors is caused by actions committed by parents (pedophilic incest). [...] The cases of pedophilic incest influence on social morality to the great extent, general care for growing generation, which is the reason why a social danger of paedophilic incest is higher than other paedophilic actions”.<sup>52</sup>

In accordance with Article 10, 12 of Ukraine’s Law “On the Protection of Childhood”,

“State protects child from all forms of physical and psychical violence, insult, negligent and cruel treatment, including sexual abuse and sexual abuse by parents or persons who substitute them. Parents or persons who substitute them have the right and duty to bring up a child, take care of his health, physical, intellectual and moral development, studying, to create due conditions for his natural skills development, to respect his dignity and prepare him for independent life and work. Parents and person who substitute them hold liability for violation of rights and restrictions of a child’s legal interests to health protection, physical and psychical development, studying, non-fulfilment of parental obligations in accordance with law.”

As a result, the punishment foreseen for sexual activities with person who did not reach puberty committed by father, mother, stepfather, stepmother, guardian, or the person undertaken the obligations of taking care of that person is harsher (5-8 years imprisonment with the deprivation from the right to hold certain office or deal with certain activity to the

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<sup>50</sup> Incest Law & Legal Definition. - Definitions.uslegal.com

<sup>51</sup> It should be mentioned that in case of commitment of another crime of a sexual character against a child by one of the members of the family the court can consider this as an aggravating circumstance that influences on the sanction. на санкцію. Also it foresees a family-legal responsibility as deprivation from parents’ rights.

<sup>52</sup> Хряпінський П.В., Чмут С.В. Кваліфікуючі ознаки статевих зносин з особою, яка не досягла статевої зрілості. – Часопис Академії адвокатури України. - №3 (2009). - <http://www.nbu.gov.ua/e-journals/Chaau/2009-2/09hpvdz.pdf>



term 3 years or without such term) than those for the main corpus delicti of the crime in accordance with Article 155 of Criminal Code (restriction of freedom or imprisonment up to five years).

It is necessary to refer to the court practice. In conformity to Clause 16 of the 5th Resolutions of the Plenum of Ukraine's Supreme Court of May, 30, 2008,

“voluntary sexual activities with the person who did not reach puberty establish the corpus delicti of the crime foreseen by Article 155 of Criminal Code in case the guilty person realised (reliably knew or assumed) that victim did not reach puberty as well as had to and could realise that. Voluntary sexual activities are recognised those exercised without the use of force, threat of its using and taking advantage of disability (helpless state of a victim). If a victim due to mental retardation or minor age could not understand the character and meaning of committed actions as to him/her, sexual activities with such a person need to be qualified as rape with the use of helpless state of a victim (Article 152 of Criminal Code).”<sup>53</sup>

Thus, courts in case there is no consent of a person to be engaged in sexual activities usually qualify the actions of the guilty person as rape committed in relation to minor (Part 4 of Article 152 of Criminal Code). The absence of consent should be proven by physical harm the type of which is established by obligatory forensic examination.<sup>54</sup>

The second case of inferred incest is provided in Part 2 of Article 156 of Criminal Code as committing of corruptive actions as to a person who did not reach 16 years (“corruption of minors”) by father, mother, stepfather, stepmother, guardian, or the person undertaken the obligations of taking care of a victim.

What are corruptive actions? We would like to highlight a national court practice.

“Corruptive actions are to have sexual character and can be in form of physical actions or intellectual corruption. These actions are directed at satisfaction of sexual passion of a guilty person or sexual instinct excitation of minor. Physical corruptive actions should be considered outcrop of genitals of guilty person or victim, lewd fondling causing sexual excitation, teaching sexual perversions, simulation of sexual intercourse, inclination or compulsion of the victims to exercise certain sexual activities between themselves, committing sexual intercourse or masturbation act in the presence of a victim etc. Intellectual corruptive actions are acquaintance of a victim with pornographic images, videos, cynical talks with her on sexual topics etc.

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<sup>53</sup>The 5th Resolutions of the Plenum of Ukraine's Supreme Court of May, 30, 2008, “On court practice in cases concerning crimes against sexual freedom and sexual inviolability of a person”. - <http://zakon2.rada.gov.ua/laws/show/v0005700-08>

<sup>54</sup>Case №1-55/2008 Kompaniivka's district court of Kirovograd district. - <http://reyestr.court.gov.ua/Review/4415302>

Corruptive actions can be committed by male as to female and vice versa, as well as between persons of the same sex, but in all cases the victim is a person who did not attain 16. Previous behaviour of the victim (including her previous sex life) does not influence the qualification of actions of the guilty person under Article 156 of Criminal Code.”<sup>55</sup>

The criminal liability for committing this crime is set up in the form of 5-8 imprisonment with the deprivation of the right to hold certain office or deal with certain activity to the term 3 years or without such a term. Therefore, the liability is severer than those set up for “corruption of minors” by not a close person (it is restraint of freedom up to 5 years or an imprisonment up to the same term).

vi. As for specific provisions, the first one concerns those taking advantage of the workplace. Article 154 of Criminal Code is specifically devoted to compulsion to sexual intercourse. The main corpus delicti of the crime foresees “compulsion woman or man to sexual intercourse by natural or unnatural way committed by a person from whom a woman or man are materially or officially dependent.” The punishment foreseen for the crime committed is set forth as a fine up to fifty non-taxable minimum of citizens’ income or arrest up to six months.

The Plenum of Ukraine’s Supreme Court gave the interpretation of some provisions dealing with the above mentioned crime,

“The courts should take into account that the corpus delicti of crime foreseen by Part 1 of Article 154 of Criminal Code can take place only provided that it is proven that the influence was done on a male or female victim with the use of his/her material or service dependence from the guilty person with the aim to compel her to engage in sexual intercourse by natural or unnatural way against his/her will. Thus, under Clause 1 of Article 154, the sexual intercourse by natural or unnatural way shall be understood as a natural sexual act, act of sodomy or lesbianism to which according to guilty person’s intent a victim has to agree as a result of his/her compulsion.

Material dependence of a victim occurs when the victim is on full or partial maintenance of the guilty person, lives in the latter’s apartments, and when the guilty person due to his/her acts or inaction is able to cause essential deterioration of the material state of the victim. Official dependency takes place when woman or man holds an office under which he/she is subordinate to the person using compulsion or falls under the control of such a person, or victim’s interests depend on official status.

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<sup>55</sup>The 5th Resolutions of the Plenum of Ukraine’s Supreme Court of May, 30, 2008, “On court practice in cases concerning crimes against sexual freedom and sexual inviolability of a person”. - <http://zakon2.rada.gov.ua/laws/show/v0005700-08>

The only proposition to engage in a sexual intercourse without the compulsion made in relation to the person who is materially or officially dependent from the offerer does not fall under the corpus delicti envisaged by Article 154 of Criminal Code. Compulsion shall not be considered as a promise to another person to improve his/her material or official state if woman or man expresses consent to engage in sexual intercourse.”<sup>56</sup>

The second specific provision is Part 2 of Article 155 of Criminal Code that has been mentioned above. It sets forth sexual activities with person who did not reach puberty committed by father, mother, stepfather, stepmother, *guardian, or the person who has undertaken the obligations of taking care of that person*. The punishment set out for committing such crime is 5-8 years imprisonment with the deprivation from the right to hold certain office or deal with certain activity to the term 3 years or without such a term. The punishment is harsher than those set out in Part 1 of Article 155 (the main corpus delicti of the crime without the aggravating circumstance – commitment by a special subject) since it is set out in the form of restriction of freedom or up to 5 years imprisonment.

Article 156 “Corruption of minors” also contains Part 2 with a special subject of the crime, in particular, “father, mother, stepfather, stepmother, guardian, or the person who has undertaken the obligations of taking care of a victim”. The crime foreseen by Part 2 of Article 156 is punishable by 5-8 years imprisonment with the deprivation of the right to hold certain offices or exercise certain activity up to 3 years or without such a term. In the same time the punishment for the main crime “corruption of minors” (Clause 1 of Article 156 of Criminal Code) is determined alternatively: in the form of 5 years restriction of freedom or 5 years imprisonment. Consequently, the criminal liability for committing the crime by special subject is harsher in both cases confirming more socially dangerous character of the crime committed by a person legally responsible for taking care of a child.

As for the interpretation of the notions “guardian or the person undertaken the obligations of taking care of that person”, it should mean patronage guardian, foster father (foster mother), foster father from children’s home of family type. Some of the authors propose to add to this category the person who took a child to his/her family who is an orphan or because of another grounds is deprived of care.<sup>57</sup> Nevertheless, to define as a special subject

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<sup>56</sup>The 5th Resolutions of the Plenum of Ukraine’s Supreme Court of May, 30, 2008, “On court practice in cases concerning crimes against sexual freedom and sexual inviolability of a person”. - <http://zakon2.rada.gov.ua/laws/show/v0005700-08>

<sup>57</sup>Кримінальне право України. Особлива частина: [підруч.]/Ю.В.Александров, О.О.Дуров, В.А.Клименко та ін. Вид. 2-е, перероб. і под./[за ред.Мельника М.І., Клименка В.А.]. – К.:Юридична

only the persons related by blood would substantially restrict the circle of persons who have the legal obligation to take care, educate and develop a child. Then it is quite justified and expedient to spread the notion “the person who has undertaken the obligations of taking care of that person” to cover other persons who are entrusted to care for a child. In accordance with Ukraine’s legislation, a wide range of people have the obligations of care for person who did not reach puberty. They are the following: the persons who 1) exercise care and education of children of pre-school age (heads of institutions, teachers, nurses), 2) exercise care and education in school and extracurricular educational institutions (heads of institutions, their deputies, teachers, psychologists), 3) carry out organization of free time and rest for children in recreation camps (heads of camp and their deputies, teachers, organizers of educational, art and sport activity etc.), 4) carry out oversight, education and observance of the regime of serving punishment in correctional educational institutions for the minors who have committed socially dangerous acts or crimes (heads of the unit, teachers, psychologists etc.) The decisive legal characteristic of these persons is a direct vesting them with the obligation of maintenance, taking care, education, custody and development of minors.<sup>58</sup>

## 2.2 Child Prostitution

**vii.** Ukraine is a party to the Council of Europe Convention on Action against Human Trafficking. It was ratified on the 21<sup>st</sup> of September, 2010.

**viii.** Unfortunately, Ukrainian legislation doesn’t content the definition of “child prostitution”. It takes the definition given by the Lanzarote Convention, where child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration. The Code of Ukraine on Administrative Offences contents the punishment for prostitution, but there is no differentiation on adult or child prostitution (Article 181-1 of the Code of Ukraine on Administrative Offences). The general age for administrative responsibility is 16 years. Children in the age from 16 to 18 years are considered to be not victims of this crime but offenders. This kind of situation is a violation of children rights and Ukrainian legislation should be amended correspondingly.

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думка, 2004. – 566с. – с.103

<sup>58</sup> Кримінальне право України. Особлива частина: [підруч.] / М.І. Бажанов, Ю.В. Баулін, В.І. Борисов [та ін.]. / [за заг. ред. М.І. Бажанова, В.В. Стапися, В.Я. Тація]. – 2-е вид., перероб. і доп. – К.: Юрінком Інтер, 2005. – 544 с. – с.96

**ix.** Criminal Code of Ukraine criminalizes only the recruiter (the person that coordinates the business of child prostitution) for creating or running brothels, and also trading in prostitution.

Article 303 of the Criminal Code of Ukraine “Procuring or involvement of a person into prostitution” foresees responsibility for involvement of a juvenile or infant person into prostitution or forcing to prostitution. If abovementioned acts committed by engaging a minor – that is aggravating circumstance, that causes greater penalty. The user (the person that pays to conduct sexual activities with children) doesn’t get punished under criminal or administrative responsibility.

Loopholes in legislation give a “green light” to foreigners who come to Ukraine to get sexual services from children and choose Ukraine because they are not liable for their actions here. In 2012 Centre La Strada-Ukraine with Centre of social expertises of Institute of sociology NAS Ukraine, Criminalist association of Ukraine and Kharkiv national university of internal relations conducted a research “Children sex-tourism in Ukraine: an attempt of situational analysis”. Researchers name the following reasons of sex-tourism in Ukraine being common: social and economical factors of sex-tourism development, influence of the environment on the development of children’s personality, children abandonment, alcoholism and drug abuse, lack of proper social protection, accessibility of Ukrainian women, little probability of being punished for sex with a child, cheap sex services, cheap accommodation, alcohol, well developed infrastructure, the possibility to get sex services confidentially, absence of visa regime.

There were several attempts to improve national legislation in protection of children’s rights in the sphere of combating child prostitution. One of them is the “Draft Law on Amendments to Some Laws of Ukraine on Combating Child Prostitution” which was registered on the 12<sup>th</sup> of November 2011. The amendments included: to establish responsibility for the user, to distinguish the “adult” and “child” prostitution and to establish different types of liability, to establish social rehabilitation to children, who were prostitutes. But it was withdrawn.

### **2.3 Child Pornography**

**x.** Ukraine is a party to the Council of Europe Convention on Cybercrime. It was signed on the 23 of November 2001 and ratified on the 7<sup>th</sup> of September 2005.

**xi.** According to the Lanzarote Convention the term “child pornography” shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes. In Ukrainian legislation the meaning of the above mentioned term was widen. According to the law of Ukraine on ‘Protection of Public Moral’ “child pornography” is any material that visually depicts a child or a person appearing to be a minor engaged in real or simulated explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes. The definition given by the Law corresponds to the Conventional definition.

**xii.** Criminal Code of Ukraine had criminalized crimes concerning child pornography. These are: importation into Ukraine for sale or distribution purposes, or production, transportation or other movement for the same purposes, or sale or distribution of pornographic images or other items, containing child pornography, and compelling minors to participate in making pornographic works, images or motion and video films, computer programs. The person conducting these crimes shall be punished by imprisonment of five to ten years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years and forfeiture of pornographic items, motion pictures, video films, computer programs, and means of their making, dissemination and showing (p.4 Article 301 of the Criminal Code of Ukraine).

**xiii.** Ukraine while ratifying the Convention on Cybercrime reserved the right not to apply subparagraphs 1.d. (procuring child pornography through a computer system for oneself or for another person) and 1.e. (possessing child pornography in a computer system or on a computer-data storage medium). The Ministry of Interior Relations of Ukraine is responsible for disclosing offences concerning child pornography. There is a department on combating with cybercrime and trafficking in people.

There is the National Expert Commission of Ukraine on the protection of public morals. The main objective of the Commission is examination of products, events and sexual or erotic material and products containing elements or promoting the cult of violence, cruelty, pornography. Commission in accordance with its tasks: analyzes TV, radio and video production, repertoire of theatres, films and videos, production of printed media, as well as events and their accordance with legislation on the protection of public morals; takes measures to prevent the proliferation and prohibition screenings and programs, information materials, entertainment activities that might harm public morality; provides advice to public authorities and local governments, individuals and entities with government regulation and

control over the circulation of goods and spectacles sexual or erotic nature; creates a database (catalogue) of all products with a sexual character and products containing elements of erotic, violence and cruelty; archive of erotic, pornographic products and products containing propaganda of a cult of violence and cruelty; publishes the conclusion of compliance with legislation on the protection of public morality about:

- printed production of sexual or erotic nature, intended for sale and distribution in designated places;
- events with sexual or erotic nature, held by individuals and legal entities in specially designated areas;
- production of electronic media with a sexual nature, production of audio and video cassettes recordings with sexual or erotic nature intended for sale or the provision of public rental;
- audio and video production with a sexual or erotic nature, designed to display in cinemas.

Having such responsibilities the abovementioned Commission takes expertise and gives the conclusion whether the given material is pornographic. If necessary the Commission has the right to address rights protection bodies and court.

**xiv.** National legislation of Ukraine does not foresee criminalization by separate articles of Criminal Code of Ukraine intentional behaviour concerning: children recruitment for participating in pornographic performances or children inducement for participation in such performances, forcing children to participate in pornographic performances or getting profit from that or another exploitation of children with this purpose, conscious attendance of such performances in which children are involved.

Article 304 of the Criminal Code of Ukraine imposes criminal responsibility for involving juveniles in criminal activity. Involvement into criminal activity is expressed by actions of an adult person connected with direct psychological or physical influence on the juvenile and committed with the aim to provoke the desire to participate in one or several crimes by conviction, intimidation, corruption or fraud, etc. Direct object to this crime is a normal moral development of juveniles, persons under 18 years old.

## **2.4 Corruption of Children**

**xv.** In case a child becomes a witness of sexual violence or sexual actions according to national legislation it is not qualified as “corruption of children” (Article 156 of the Criminal Code of Ukraine). First part of the article foresees criminal liability for committing

corruptive actions against a person who did not reach 16 years. The second part foresees commitment of the same actions against infant person by father, mother of a child or a person that substitutes them. Corruptive actions can be physical (baring of victim's genitals, touching them, conducting sexual activities in the presence of a child, etc.) or intellectual (demonstration of pornographic images, etc.). The consent of a child for corruptive actions commitment does not matter for the criminal valuation of the guilty person's actions.

## **2.5 Solicitation of Children for Sexual Purposes**

**xvi.** Ukrainian legislation does not criminalize children corruption through Internet. Communication technologies development makes the problem of children corruption through Internet (grooming) more serious. Children institutions are not equipped with special systems that would block pornographic web sites. Nowadays it is performed mostly by parents. Moreover a person that corrupts a child through Internet could be liable only under Article 156 of the Criminal Code of Ukraine but in most cases it is very difficult to prove that crime even if the criminal arranged a meeting with a child. The mechanism of proving this kind of crimes is not foreseen by Ukrainian legislation.

**xvii.** Ukrainian legislation prescribes liability for preparation to a crime (Article 14 of the Criminal Code of Ukraine), attempt to a crime (Article 15 of the Criminal Code of Ukraine) and accomplices in a crime (Article 26-31 of the Criminal Code of Ukraine). It also concerns crimes of a sexual character. Preparation, attempt and accomplices are also considered to be a crime committal and according to the legislation of Ukraine criminal will be liable for that.

## **2.6 Corporate Liability**

**xviii.** Corporate liability in Ukraine does not exist as such. Legal persons' responsibility can be civil and in some cases administrative. The legislation of Ukraine prescribes legal persons' responsibility that violate legislative norm in a form of monetary charge (fine), termination of a license, etc.

Criminal responsibility concerns only individuals but in some cases of imposition of punishment the legislation of Ukraine distinguishes individuals according to their positions. Criminal Code imposes on coordinators, servants of legal persons of all property types bigger responsibility, accordingly they will be punished for crime committal more severely than ordinary workers of a legal person.



It is worth mentioning Article 21 of the Law of Ukraine “On Public Morality Protection” which provides:

“Violation of norms of legislation of Ukraine on public morality protection, conditions of goods circulation, and procedure of conduct performance events of sexual character and production distribution which contains pornographic elements causes civil, disciplinary, administrative or criminal liability according to the valid legislation of Ukraine. Actions of state power bodies’ chairman, local self-government, mass media, institutions and organizations of all property forms, legal and physical persons that violate norms of this Law can be appealed before court.”

In case a newspaper is distributing a pornographic production responsible for that will be both the legal person itself (annulment of the license) and the owner of the newspaper (distribution of pornographic materials, Article 301 of the Criminal Code of Ukraine).

**xix.** Legislation of Ukraine foresees civil, disciplinary, administrative or criminal responsibility.

As it has been mentioned already legal persons can bare civil and in some cases administrative responsibility.

Individuals bare all kinds of responsibility. Depending on the occupied position the individuals’ responsibility extent can vary.

**xx.** No, Ukrainian legislation does not exclude individual responsibility when it comes to legal persons’ responsibility (corporate responsibility).

## **2.7 Aggravating Circumstances**

**xxi.** The availability of aggravating circumstances influences on the qualification of a crime and on the extent of sentenced punishment as according to Ukrainian legislation punishment of crimes of a sexual character have an alternative sanction and it is decided by the court in every particular case separately.

Article 67 of the Criminal Code of Ukraine provides a comprehensive list of aggravating circumstances:

1. commitment of a crime repeatedly and setback of crimes;
2. commitment of a crime by a group of people or under prior conspiracy;
3. commitment of a crime on the ground of race, national or religious hostility or enmity;
4. commitment of a crime in relation to execution by the victim its official or social obligation;

5. serious consequences caused by the crime;
6. commitment of a crime against infant, old person or a person in a helpless state;
7. commitment of a crime against a pregnant woman if the guilty person was aware of that;
8. commitment of a crime against a person who was materially, officially or in another way dependant from the guilty person;
9. commitment of a crime with the usage of infant or a mentally sick person;
10. commitment of a crime with exclusive cruelty;
11. commitment of a crime under military or emergency situation, other extraordinary events;
12. commitment of a crime in a generally dangerous way;
13. commitment of a crime by a person under alcohol or drug intoxication.

## 2.8 Sanctions and Measures

**xxii.** It should be mentioned that Law of Ukraine of 01.06.2010 N 30<sup>59</sup> strengthened the liability for crimes against sexual freedom and sexual personal integrity. In majority of cases deprivation of freedom (imprisonment) should be applied for offenders, but for minor offenses deprivation of the right to occupy certain positions or be engaged in certain activities, confinement and penalties can be applied. When the object of the crime is a child (an underage person), this fact is considered to be an aggravating circumstance which leads to applying tougher sanctions for a crime. For example:

Rape shall be punishable by imprisonment for a term of three to five years. Rape of a juvenile (under the age of 18) shall be punishable by imprisonment for a term of seven to twelve years. Rape of a minor (under the age 14) shall be punishable by imprisonment for a term of ten to fifteen years.

Satisfaction of sexual desire in an unnatural way with the usage of physical violence, threats of it or using the helpless state of the victim is punishable by imprisonment for up to five years. The same crime committed against a minor or a juvenile shall be punishable by imprisonment for a term of three to ten years. The same crime committed against a minor

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<sup>59</sup><http://zakon2.rada.gov.ua/laws/show/2295-17>

or a juvenile that caused any especially grave consequences, shall be punishable by imprisonment for a term of ten to fifteen years.

Sexual intercourse with a person, who has not reached puberty, shall be punishable by confinement for up to five years or imprisonment for the same term. The same crime committed by a father, a mother, a stepfather, a stepmother, a guardian or a trustee, shall be punished with imprisonment from five to eight years, with deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years or without it.

Debauchery of a person, who has not reached the age of sixteen, shall be punishable by confinement for up to five years or imprisonment for the same term. The same crime committed against a minor by a father, a mother, a stepfather, a stepmother, a guardian or a trustee, shall be punished with imprisonment from five to eight years, with deprivation of the right to occupy certain positions or be engaged in certain activities for a term up to three years or without it.

The analysis of the sanctions proves that the legislation of Ukraine sets up more serious responsibility for crimes committed against a child and crimes committed against a child within a family by the members of a family of a child. The last fact is especially important because in most cases, a sexual assault is committed by family members or others who live in the family of the child or frequently visit family. Usually these people have the trust of children and often acting as trustees.

Law of Ukraine № 2286-VI "On Amendments to the Criminal Procedure Code of Ukraine on Issuing Entity (extradition)", adopted on May 21, 2010 (hereinafter - the Law № 2286-VI), amended Code of Criminal Procedure (CCP) with Chapter 9 ("Extradition"), which, of course, had a positive impact on the development of the institute of extradition in criminal proceedings in Ukraine. Law № 2286 - VI was adopted pursuant to Article 22 of the European Convention from 1957, which states that if this Convention does not provide otherwise, the procedure concerning extradition and provisional arrest is regulated exclusively by the law of the requesting party.

**xxiii.** Strengthening of criminal liability for sexual crimes should be considered as a positive step, because in order to change the situation of children protection in Ukraine radically, first and foremost, the national legislation should be brought into line with international standards. Particular attention in modern world is paid to increasing criminal liability for

committing sex crimes against minors and minors in families and by those who must educate them.

Court practice shows that judges often apply Article 75 of the Criminal Code of Ukraine (deliverance from punishment under probation) concerning some sex crimes, for example for corruption of juveniles, sexual intercourse with a person who did not reach sexual puberty and other crimes.

According to the abovementioned article if criminal responsibility for a crime imposes not more than 5 years taking into account the guilty person's personality, circumstances of the crime, a court can release from responsibility on probation. Applying Article 75 of the Criminal Code of Ukraine judges usually do not give enough arguments in their decisions for that position and often limit to the phrases "is positively characterized at the place of work (education/living)", "was not tried before". Such approach leads to de facto avoidance of punishment by the criminal. We consider it to be a serious problem which requires amendments of legislation.

There are discussions being held in Ukraine nowadays concerning strengthening of the punishment for sex crimes and application of castration as it already works in neighbouring countries – Republic Moldova and Russian Federation. But there is no draft law for now on that.

Scientific researches in this sphere proclaim that there are still ways to improve the system of responsibility for crimes against children. For example, there is a scientific suggestion which is worth attention - to allocate crimes against minors separately as an independent unit of a Criminal Code. Supporters of this idea motivate this by the reason that this separation is required by the interests of consistent science-based classification of the provisions of the Special Part of the Criminal Code for a generic object. We can add that this approach will be also consistent with international legal agreements in the field of protection of the younger generation.

The other common idea is that we should not only punish offenders for already committed crimes but also avoid new crimes by eliminating their reason.

Such measures include measures related to changes in the adverse conditions of identity formation in cases where antisocial setting of the person has been already formed. Due to the fact that sexual crimes are usually committed in the certain, mostly typical situations, preventive measures should exclude such situations and eliminate conditions that contribute

to their existence. Preventing non-violent actions of sexual nature is full disclosure of already committed crimes, combating and preventing sexual crimes that are being prepared. Of great importance for the prevention of non-violent actions of sexual nature are operational measures that are taken by the police to identify persons able to commit sexual crimes, timely taking them on operational accounting and holding them for preventive work. Police operational measures to identify persons able to commit sexual crimes, taking them on a timely operative accounting and carrying out their prevention work play a great role for preventing sexual crimes as well.

**xxiv.** The provisions of Criminal Code of Ukraine shall not be applied for legal entities.

**xxv.** The legislation of Ukraine does not provide such legal mechanisms as confiscation of materials, instruments or protection of bona fide third parties **in cases regarding violation of sexual integrity of a child.** Generally the mechanism of confiscation and expropriation of property, money, etc. is foreseen by the Ukrainian legislation. It usually concerns economic crimes or crimes against person's property.

**xxvi.** Sex crime against a child in many cases is being "noticed" by the state through its bodies only if serious consequences for a child took place, for example pregnancy, systematic or long-lasting corruption, etc. In Ukraine the topic of sexual violence against children in a family is closed. In many cases members of the family who found out about the violence try to keep everything in secret. The state condemns commitment of sexual violence in a family against a child. Valid legislation foresees responsibility for commitment of such crimes; Ukraine joins international standards on children rights protection but nevertheless the quantity of crimes increases and the quantity of children victim raises.

In practice it is very difficult to reach an accusatory verdict in cases on sex violence. The case starts only if serious consequences are available, that has to be reflected in the experts' conclusions which could be convincing for investigators and prosecutors. Often investigators refuse starting a case under Article 156 of the Criminal Code of Ukraine (juveniles' corruption) if the materials contain only child's statement. If the criminal did not inflict any corporal injuries to a child in the area of genitals the chances for a case to be brought to court are very low. For example there was a case when an infant child K. was for 3-4 years systematically corrupted by her father. Corruption was in the form of sexual games but the child did not get any corporal injuries. In few years the child got used to these games and started to feel a need in them. When mother of child found out about the corruptive

actions of her husband against a child – she addressed the police. The case was closed because the father denied everything and nobody believed a 5-years old child.

Also a serious problem in Ukraine is sexual violence commitment against children in specialized institutions (boarding schools, orphanages). Principality is often smothering cases of sexual violence being afraid of publicity.

Nevertheless the state moves forward combating sexual violence in the family with legislation improvement, application of preventive measures.

### 3 CRIMINAL PROCEDURE

#### 3.1 Investigation

i. The problem of criminal law protection of minors is a very important and challenging for society, the state, schools and families. Current legislation of Ukraine to some extent aimed at ensuring the rights of the child who is a victim of violence against children. The principle of the “best interests of the child” applied during investigation of these crimes implemented by various means to ensure children's rights. First of all, according to the Criminal Procedure Code of Ukraine in cases where the victim is a minor, to participate must be attached representative of victim. Representatives of the victim may be lawyers, close relatives, legal representatives and other persons under the order of the person inquirer, investigator, judge or a court order. Legal representatives in this situation are parents, guardians, trustees of the person or representatives of institutions and organizations in the care or taking care of it.<sup>60</sup> Supreme Court of Ukraine put it slightly different. If the victim is recognized to be a minor, the court provides in the case of legitimate representative of the person who has to protect his rights and protected legitimate interests, with the consent of the victim to participate in case the legal representative is not required. After achieving by victims 18 years legal representative functions are terminated, but the latter may participate in the case as representative of the victim.<sup>61</sup>

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<sup>60</sup> *Criminal Procedure Code of Ukraine, December 28, 1960*, Articles 32, 52, <http://zakon2.rada.gov.ua/laws/show/1001-05/page2>

<sup>61</sup> Supreme Court of Ukraine, *Resolution On the use of legislation, which provided for the rights of victims of crime*, July 2, 2004, article 8, <http://zakon1.rada.gov.ua/laws/show/v0013700-04>

The problem which exists in this case is the prohibition of double procedural status. It means that the representative of a child cannot be a witness of the case at the same time. Analysis of courts' cases on domestic violence and cases related to sexual violence and sexual exploitation against children showed that in this category of cases legal representatives of children are witnesses of such crimes. If this situation occurs person has to choose whether to be a legal representative of its child or a witness in a case and testify. The legal representative of a child is a very important participant of the criminal procedure as the child, because of its age and development is sensitive, and needs the legal representative's participation that has to look after children rights and interests to be preserved in their full extent. Also there are cases when a person independently brings up a child and is a single mother or father. That is why legal representatives' testimonies as witnesses are a very important proofs basis in a case. Prohibition of being a legal representative and a witness at the same time in a case can lead to the situation when a legal representative will be another member of the family or relative but its participation will be formal. It is worth mentioning that not everybody have a financial possibility to get a qualified legal aid and hire a lawyer. Law does not foresee obligatory participation of an attorney on the side of infant or juvenile victim or witness but at the same time it is obligatory for juvenile convict or defendant.

Legal representative of juvenile convict can be examined as a witness within the courts' proceedings and in this case a question on his double procedural status does not occur.

Taking into account the practice a combination of witness' and legal representative's obligation should not be contradictory as such combination takes place in the best interests of a child or a victim in a case.

The principle of the "best interests of the child" is realized also with other provisions. Given the fact that the victim in court is examined under the rules of examination of a witness, minor victim under 14 years old (at the discretion of the court - 16) should be questioned in the presence of the teacher, and if necessary - a doctor, parents or other legal representatives. Juvenile victims under 16 years Court clarifies the obligation to speak the truth, but about the criminal penalties for false statements they are not warned. In cases where the presence of the defendant in the court room may affect the completeness and accuracy of testimony of the minor victim, questioning of the latter with a trial decision may

be conducted in the absence of the defendant. It also should discuss the feasibility of abandonment of a minor victim in the courtroom after his interrogation if case a legal representative of the victim is involved.<sup>62</sup>

In practice in the majority of cases a pedagogue is invited to the interrogation of a child as it is „more easy” to find it than psychologist. But in this case persons who conduct interrogation of a child have to put child’s interests on the first place. Formal approach to interrogation of a child can lead to the situation when a child will not tell what events it witnessed or victim of which criminal actions it became. In practice victims of sex crimes do not immediately tell about the events they experienced of different reasons: shame, fear, intimidation. Also interrogation should be divided into several stages: gathering the story and facts, conversation with a child. Conducting of interrogation with the participation of a qualified specialist in the sphere of children and juveniles psychology, that has experience in working with a child of the same age as the one being interrogated, will prevent additional traumatizing of a child, recurring interrogations of a child in future, and, in case of reminding negative memories during the interrogation, will help to immediately apply necessary methods. Also a psychologist can create an individual rehabilitation programme for a child.

As for a juvenile suspect or convict, their interrogation has to take place with the participation of a protector. If a juvenile did not reach 16 years or if it is considered to be mentally retarded, at his interrogation, with the decision of an investigator, prosecutor, judge, court or with solicitation of the protector, the participation of a legal representative, pedagogue or psychologist is provided and, if needed, a doctor, who during the interrogation can ask juvenile suspect or convict questions.

During the interrogation of a child who is suspected or convicted of a crime in the age from 16 to 18 years, if a child is not acknowledged to be mentally retarded, it is not provided the participation of the legal representative, pedagogue or psychologist and, if needed, a doctor, that puts a child in more sensitive conditions.

However, lawyers emphasize that the rules of the current Criminal Procedure Code and Criminal Code “do not fully meet the requirements of today, international conventions,

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<sup>62</sup> Supreme Court of Ukraine, article 19



covenants and agreements which provide protection of the interests of minors and does not cover all acts which are committed against them”. Reform legislation and recognition of the priority of international law over national law requires changes in the regulation of questions of criminal law protection of minors.<sup>63</sup> In addition,

“today in Ukraine holistic approach to solving the problem of protecting the rights of children - members of criminal procedure is not developed, there is no strategy in this field and innovation, due to the radical socio-economic changes in the Ukrainian society”.<sup>64</sup>

It should be noted that there are attempts to resolve the issue with the authorities and civil society, the companion of law. Nevertheless, lack of coordination and ignoring the views of each other, both domestic and international experience does not allow the effective changes to protect children's rights.

New Criminal Procedure Code of Ukraine that will enter into force on November 19, 2012 resolves the issue with slightly different formulation and wider one. Now if the victim is a minor, to participate in the procedural steps involving it, it is required for a legal representative to be present. Parents (adopters), and in their absence - guardians or caretakers, other adult relatives and family members, as well as representatives of care, institutions and organizations in the care or custody of the minor may be involved as legal representatives. Prosecutor makes the decision, and the investigating judge, the court - decides on bringing legal representative investigator. Copy of such document is given to the legal representative. In case of a legal representative interests contradict the interests of the people it represents, with the decision of the investigator, the prosecutor, the investigating judge of the court a legal representative is replaced by another from among the persons mentioned in the second part of this passage. Legal representative has all the procedural rights of the person whose interests he represents, except for procedural rights, the subject to implementation of which is directly a suspect, accused and cannot representative be assigned.<sup>65</sup>

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<sup>63</sup> Juzikova N., *Criminal legal issues of responsibility for crimes against minors*, 1999, <http://www.criminology.org.ua/articles/r3/vidpovid.htm>

<sup>64</sup> Zelenskyj S., *Implementation of reforms of criminal justice to provision of children rights as objective necessity*, *Legal Bulletin Zaporozhye Law Institute*, 2010/3, p.207

<sup>65</sup> *Criminal Procedure Code of Ukraine, April 13, 2012*, Articles 44, 59, <http://zakon2.rada.gov.ua/laws/show/paran421#n357>

We can notice a large number of cases of children rights violations during the trial. For example, court should inform the victim about the previous day trial. However, in practice this requirement of the law is often not met, that leads to judicial errors. Judges do not always check whether it is recognized at the pre-trial investigation all of victims, who have suffered damage offense themselves. Although resolution of the Plenum of Supreme Court of Ukraine indicated that in the previous trial judge must determine whether all persons to whom the offense was caused and who suffered moral, physical or property damage, are recognized as victims. If some of them are not recognized as victims under inquiry and investigation, upon appropriate motion judge in his decision has to recognize the person as injured, tell her about it and provide the opportunity to review the case. One of the means for ensuring the legality of sentences and thus protection of victims is to give them the right to appeal court decisions. In most cases, the victims complained on a violation of their procedural rights, including the fact that they are not acquainted with the case, not summoned, did not have the opportunity to participate in the debate, as well as the appointment of convicted penalties that victims felt were too soft.<sup>66</sup> But after studying cases we can conclude that the vast majority of representatives of juvenile victims in the criminal process is passive, hoping that their rights and legitimate interests are provided with the conduct of an investigation and trial. This largely depends on the level of professionalism and responsibility for the performance of official duties of employees of investigation, prosecutors, judges, and lawyers.

Media says that the most child victims of crime expect endless interrogations and meetings with the abuser. Unfortunately, the Criminal Procedure Code of Ukraine prescribed only mechanisms to work effectively on investigating and protecting the accused and has no mechanism to protect the injured child.<sup>67</sup> Deputies decided to change this problem again in December 2011 and re-introduced bill number 7340, which can protect the most vulnerable. Norms of bill number 7340 can protect a child victim of crime from re-injury during the investigation, including: enhance of the role and importance of the psychologist involved to conduct investigations that provide reducing their impact; limit the number of interviews of a child, and at the same time to arrange these interviews only when reasonably necessary;

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<sup>66</sup> Supreme Court of Ukraine, *The practice of application of the legislation that provided rights of the victims of crimes*, <http://www.scourt.gov.ua/clients/vs.nsf>

<sup>67</sup> Moskalenko O., *Parliament and the publicity make a second attempt to help the children - victims of crime, December 16, 2011*, <http://gurt.org.ua/articles/12923>

legislate new standards for interrogation, including specially trained people to interview for the investigator and in specially equipped centres; prevent conduct confrontation involving child witnesses and child victims of crimes of sexual nature, and so on. But the bill was never passed.

It's determined that more than 80% of the materials of criminal, administrative and civil cases are witnesses or victims, including children, contributing to the detection and investigation of crimes, administrative offenses and the clearest decision regarding civil rights. But the place and importance of questioning in ensuring the quality and effectiveness of investigation is determined not so much by quantitative indicators, but by the ability of the investigator or judge to correctly build and conduct an interrogation. Different social status of children, especially their psyche require investigators' knowledge of general and developmental psychology, which determine the nature of communication and tactics to interview them.<sup>68</sup> The limits of acceptability tactics to characterize are as follows: interrogation techniques are such that are contradictory to law, and particularly those that may lead to the fact that the child is not able to protect its legitimate interests are not allowed.

Considering the prospects of creating an integrated system of child protection - participants in the criminal process, we propose to begin the development and laying the foundation of the criminal justice system as the principles of procedural safeguards enshrined not within the criminal justice system, and independent system that is able to reliably provide the child with the implementation of its right to life and dignified existence. Consideration of the prospects for criminal justice, which is provided with the rights and freedoms of the child in criminal proceedings, requires consideration of the provisions of international instruments produced by mankind during its existence.

**ii.** Current Criminal Procedure Code of Ukraine establishes that in cases of crimes against children (rape, forcible sexual assault committed in unnatural way, sexual intercourse with a person who has not reached puberty, seduction of minors and so on), and in all cases of crimes committed by minors investigating police conduct preliminary investigations.<sup>69</sup> New Criminal Procedure Code formulated this article in a new way. Now investigatory police

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<sup>68</sup> Zvereva I., *Status of children victims of crime: the experience of Ukraine*, 2010, p.9

<sup>69</sup> *Criminal Procedure Code*, Article 112, <http://zakon2.rada.gov.ua/laws/show/1002-05>

conducts preliminary investigation of criminal offenses under the law of Ukraine on criminal liability, except for those assigned to the investigative jurisdiction of other pre-trial investigation.<sup>70</sup> Nevertheless, the rules' change in text does not affect the actual legal relations.

Important problem is the absence of appropriate authority investigation of mentioned cases. Moreover, educational institutions of the Ministry of Internal Affairs of Ukraine (MIA) almost don't train staff to work in the criminal police departments for children. The only exception - Kyiv University of Internal Affairs, where there was a relevant department few years ago. And the place of "children's services" at MIA also is full of uncertainty. Department of Criminal Juvenile Police was eliminated. At its base in central MIA was created and departments, which are subject to various departments, and not even able to align their activities. The technical base of law enforcement and actual system documentation and proof of such crimes is categorically outdated.

Problems in the investigation of mentioned crimes arise at the stage of a bringing a criminal case. In Ukraine the situation is such that police in fact recognizes and investigates all cases of apparent rape. Instead, sexual harassment and other pressures in the form of coarse "encouragement" with straight text or physical influence actually are perceived by police as "child's play". According to the Ombudsman in our country every five criminal cases related to crimes against sexual freedom and sexual integrity of a person where the victim is a minor is closed, and in fact criminals escape punishment.<sup>71</sup> Note: it is usually about rape. If the brakes can pull even a cause, the cause of abuse without trying to rape, the police did not take it: it is troublesome, unpromising, requires the highest skills.

There is no civilized mechanism of police interrogation of children in the system of MIA.

"Unlike civilized countries, we have not created a system of questioning children in so-called "green rooms." Currently, there are only few such rooms, and it was made not by the state but by the charitable foundation YUNIDEA and "La Strada". In these rooms, decorated like a children room, it can be held a friendly conversation with the child. However, this requires considerable cost, including construction of an adjoining

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<sup>70</sup> *Criminal Procedure Code, 2012*, Article 216, <http://zakon2.rada.gov.ua/laws/show/paran5>

<sup>71</sup> N. Karpachova, *Speech of Commissioner of Verkhovna Rada on Human Rights during the presentation of the Annual Report on the observance and protection of human rights and freedoms in Ukraine in the Verkhovna Rada of Ukraine*, 2010, p.18 <http://www.ombudsman.gov.ua/index.article&id:2010&Itemid=222>

room with Venetian glass (one way vision), audio-video recording, and more. All of this is part of the juvenile justice system, which somehow is a struggling part for deputies".<sup>72</sup>

Although the President in May this year signed a Decree that approved the concept of criminal justice for juveniles,<sup>73</sup> in order to implement these procedures it requires changes to the Criminal Procedure Code, concerning "examination of a witness," "interrogation of a minor witness" and "questioning the victim," and so on.

Also if bodily injury is relatively easy to prove, the sexual purpose in the absence of rape (child molestation) - extremely difficult. Problems arise in the stage of court proceedings. Firstly, such things are intimate, traumatic to the psyche and often the victims or their parents do not want to talk about them. In addition, a child at that age is not yet able to think in terms of "law", "crime", "criminal responsibility", "prison", "court", "the testimony of the victim," and seeks to forget experiences. Here much depends on the quality and speed of the investigators.

"If for the first time the child is questioned immediately after the incident, and for the second - after 1-2 months, the readings may differ for 80% of child victims of sexual crimes, protective psychological mechanisms turn on.

Official statistics for cases under Articles 155 and 156 of the Criminal Code of Ukraine (respectively, sexual intercourse with a person who has not reached puberty and corruption of minors) apparently does not reveal the real extent of the problem. Latency of cases in this category, as you realize, is very high. And it should be remembered that the corruption in law enforcement is high, because 20 thousand dollars is the bribe for investigators and judge for abuse of a child."<sup>74</sup>

**iii.** At present prosecutor, investigator or judge are obliged to accept the claim and notice of crimes committed or prepared, including cases that do not fall within their jurisdiction. If there are reasons and grounds, the prosecutor, the investigator, the police or a judge must decide on a criminal case, pointing actuators and grounds for instituting proceedings, articles of the criminal law on the basis of which proceedings are initiated and continue its focus.

If there are no grounds for instituting criminal proceedings, the prosecutor, the investigator, the police or a judge deny its decision to institute criminal proceedings, but must notify interested persons and enterprises, institutions and organizations. The investigator and the

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<sup>72</sup> Sereda V., *Abuse? It is very safe*, October 17, 2011, <http://khpg.org/index.php?id=1318844941>

<sup>73</sup> President of Ukraine, *Decree On the Concept of Development of Juvenile Criminal Justice in Ukraine*, May 24, 2011, <http://zakon3.rada.gov.ua/laws/show/597/2011>

<sup>74</sup> Sereda V., *Abuse? It is very safe*.

inquiry authority who denied criminal case can be appealed by the prosecutor and if such decision was rendered by prosecutor - superior prosecutor. A complaint is filed by a person whose interests are concerned, or its representative within seven days of receipt of a copy of the decision. Prosecutor, investigator and inquiry authority to deny criminal case can be appealed by the person whose interests are concerned, or its representative, to the court. Decision of judge who refused to initiate a criminal case can be appealed by the person whose interests are concerned or its representative within seven days after receiving a copy of resolution to the appeal.<sup>75</sup>

Even if a victim decides to withdraw their application the investigation continues if there is the body of a crime available, the rights protection bodies or prosecutor will initiate the criminal case. In case an official gives the application back to the victim and stops the investigation it can be accused of hiding a crime and will be liable for that.

**iv.** As for terms of criminal investigations in cases of crimes that are not serious, or very serious, inquiry is made within a period not exceeding ten days from the moment when the person who has committed it was found. In case of serious or especially serious crime inquiry is conducted in a period of not more than ten days after the proceedings. If elected to the suspect, precaution inquiry is made within a period not exceeding five days after pre-trial release. Pre-trial investigation in criminal cases should be completed within two months. During this period it is included the time since the initiation of proceedings to the direction of the prosecutor of the indictment or decision to refer the case to the court to consider the application of compulsory medical measures or the closure or suspension of proceedings. This period may be extended by the district or municipal prosecutor, military prosecutor of army, flotilla, garrisons and similar prosecutor in case of failing to complete the investigation up to three months. In particularly difficult cases the investigation can be extended to six months. Next it is possible to extend pre-trial investigation only in exceptional cases, the Prosecutor General of Ukraine or his deputies are entitled to do so.<sup>76</sup> It concerns only cases on crimes initiated by a person. Crimes initiated under a fact do not have terms of limitations and are investigated for years, are very convenient for investigators.

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<sup>75</sup> *Criminal Procedure Code*, Articles 97, 99, 99-1, <http://zakon1.rada.gov.ua/laws/show/05/page4>

<sup>76</sup> *Criminal Procedure Code*, Articles 108, 120

Pre-trial investigation according to the new Criminal Procedure Code should be completed within two months from the date of notification of the person suspected of committing a crime. The period of pre-trial investigation may be extended. The total period of pre-trial investigation may not exceed six months from the date of notification of the person suspected of committing a small or moderate crime; twelve months from the date of notification of the person suspected of committing a grave or especially grave crime. The period from the date of an order of suspension of the criminal proceedings prior to its repeal investigating judge or an order of recovery of criminal proceedings is not included in the terms. The period of pre-trial investigation of the crime can be extended to three months if it cannot complete due to the complexity of the proceedings up to six months due to the special complexity of the proceedings, to twelve months due to the exceptional complexity of the proceedings.<sup>77</sup>

v. When the age of a victim is not certain current Criminal Procedure Code of Ukraine provides for conducting expert evaluation. Expertise is granted in cases when the solution to certain issues in the proceedings in the case requires scientific, technical or other specialized knowledge. But it's obligatory for establishing puberty of a victim in cases of committing crimes in the area of child sexual abuse.<sup>78</sup> This provision will not change with the entry into force of the new Criminal Procedure Code of Ukraine on November 19, 2012.<sup>79</sup>

Forensic examination to establish the age of victim is conducted in accordance with resolution of the person conducting the inquiry, the investigator, prosecutor, judges, and a court order. Conducting forensic examination is carried by experts of state institutions for forensic examinations of the Ministry of Health of Ukraine or it can be carried out on business principles based on the license issued by the Ministry of Health of Ukraine.<sup>80</sup> Procedure of examinations, specifically for establishing the age of the victim, in national legislation is not defined in detail, but regulations give us opportunity to conclude that the age is determined by identifying of victims sexual maturity.

In such cases anthropometric measurements by the examinee are performed during the examination of the establishment of puberty, namely: mass; height in standing and sitting;

<sup>77</sup> *Criminal Procedure Code, 2012, Articles 219, 294*

<sup>78</sup> *Criminal Procedure Code, Articles 75, 76*

<sup>79</sup> *Criminal Procedure Code, 2012, Article 242*

<sup>80</sup> Ministry of Health of Ukraine, *Instructions on conducting forensic examination, January 1, 1995*, <http://zakon2.rada.gov.ua/laws/show/z0254-95>

the length of the body; chest circumference; the right shoulder circumference at the level of the middle third; circle right leg in the middle third; shoulder width; the size of the pelvis; determination of the number of teeth and the presence of wisdom teeth.<sup>81</sup> However, absence of a particular regulation that would regulate the procedure of examination to establish the age of victim complicates the investigation of criminal cases in category of violence against children.

vi. To determine authority that is responsible for recording and storing data for convicted offenders we need to find out about the establishment where convicted persons are serving their sentences. If it's remand prison data is stored there because according to the Order of Ministry of Justice of Ukraine "On Approval of the Instruction on Work Units (groups, sectors, senior inspectors)" enforcement of judgments of penal institutions and detention centres subsection institutions (prison) perform concrete functions. Among these functions are: to carry out personal and quantitative account of prisoners (persons detained), prepare reports on their size, composition and movement; keep records, form and store personal cases of prisoners (persons detained), hold it in an institution (prison).<sup>82</sup>

Another establishment of this kind can belong to the system of the State Penitentiary Service of Ukraine. According to the Decree of President of Ukraine "On Approval of the State Penitentiary Service of Ukraine" this Service is a central executive authority, whose activities are directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Justice of Ukraine, it belongs to the executive power and ensures the implementation of state policy on execution of criminal penalties.<sup>83</sup> Main objectives of the Service are: implementation of the state policy of execution of criminal penalties; control over compliance with human rights and requirements of legislation to implement and serving criminal sentences, realization of the rights and interests of prisoners and persons taken into custody; to ensure the formation of a system of oversight, social, educational and preventive measures that apply to prisoners and persons detained.

Realization of enumerated functions implies that Penitentiary Service organizes registration of convicted persons and persons taken into custody, determines the type of penal

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<sup>81</sup> Ministry of Health of Ukraine, *Rules of the forensic examinations (surveys) on the sexual states in the forensic medical examination*, January 17, 1995, [http://search.ligazakon.ua/l\\_doc2.nsf/link1/REG789.html](http://search.ligazakon.ua/l_doc2.nsf/link1/REG789.html)

<sup>82</sup> Order of Ministry of Justice of Ukraine № 847/5, June 8, 2012, <http://zakon2.rada.gov.ua/laws/show/z0957-12>

<sup>83</sup> Decree of President of Ukraine № 394/2011, April 6, 2011, <http://zakon1.rada.gov.ua/laws/show/394/2011>



institutions in which convicts will serve their punishments, carries them distribution and takes prisoners and persons detained with one institution to another.

These authorities can transmit their data to other competent authorities in other states and do this in pursuance of European Convention on Mutual Assistance in Criminal Matters and performing of their functions. State Penitentiary Service of Ukraine establishes and maintains relations with international organizations, in consultation with the Minister of Justice of Ukraine who made agreements with relevant foreign authorities on cooperation in the execution of criminal penalties against crime and other matters within the competence of the Service. According to Convention which entered into force in Ukraine on June 9, 1998, a requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in similar case. Another situation for the information exchange is that each Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Ministries of Justice shall communicate such information to one another at least once a year.<sup>84</sup>

The authorities respect protection of personal data rules fulfilling the requirements of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and the Law of Ukraine “On Protection of Personal Data”. According to Convention which entered into force in Ukraine on January 1, 2011, personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions. Derogation from these provisions shall be allowed when such derogation is provided by the law of the Party and constitutes a necessary measure in a democratic society in the interests of protecting State security, public safety, and monetary interests of the State or the suppression of criminal offences.<sup>85</sup>

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<sup>84</sup>*European Convention on Mutual Assistance in Criminal Matters, April 20, 1959*, [http://zakon2.rada.gov.ua/laws/show/995\\_036](http://zakon2.rada.gov.ua/laws/show/995_036)

<sup>85</sup>*Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, January 1, 1981*, [http://zakon3.rada.gov.ua/laws/show/994\\_326](http://zakon3.rada.gov.ua/laws/show/994_326)

Law “On Protection of Personal Data” and Order of the Ministry of Justice “On Approval of Order on Processing of Personal Data in Databases of Personal Data” determined that the collection of personal data for police purposes should be limited to the extent necessary to prevent a real danger or stop a specific criminal offense. Storing of personal data for police purposes should be limited to accuracy of data and treat such data as far as necessary to the police to carry out their legitimate objectives of the national law and their obligations under international law.<sup>86</sup>

So recommendations of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data are implemented into the national legislation of Ukraine, but there is a widespread opinion that it's necessary

“to provide registration of personal databases of law enforcement agencies in the State Register of personal data; establish a mechanisms for oversight of the Authority for the Protection of Personal Data (State Service of Ukraine on protection of personal data) in compliance with statutory law enforcement requirements for the processing of personal data; establish mechanisms for public monitoring of the processing of personal data by the competent authority on the protection of personal data”.<sup>87</sup>

An important aspect is also bringing legislation that regulates the activity of law enforcement bodies of Ukraine, in accordance with the Law of Ukraine “On Protection of Personal Data”.

### 3.2 Complaint Procedure

**vii.** In case of criminal law norms violation a criminal case has to be initiated. According to Article 4 of the Criminal Procedure Code of Ukraine a court, prosecutor, investigator and investigatory body are obliged within their competence to initiate a criminal case in every case of detection of crime body features, apply all the measures foreseen by the legislation for establishment of the event of the crime, persons, guilty of the crime commitment, and their punishment. Article 94 of the Criminal Procedure Code of Ukraine imposes reasons and grounds for criminal case initiation. One of the reasons and grounds is an application or information about a crime. Legislation of Ukraine does not impose any prohibitions for a child to inform about a crime or write an application. A child can do it in written or orally.

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<sup>86</sup> *Law of Ukraine On protection of personal data № 2297-VI, June 1, 2010*, <http://zakon2.rada.gov.ua/laws/show>

<sup>87</sup> Mervinskyj O., *Aspects of personal data protection in accordance with European standards*, <http://www.minjust.gov.ua/0/38486>

But a child cannot support the applied information about the crime or complaint. This right is realized through the legal representative, attorney or relative.

**viii.** Article 52 of the Criminal Procedure Code of Ukraine provides that the representative of a victim can be an attorney, close relative, legal representative and other persons under the ruling of a person who conducts investigation, investigator, judge or court. In a case when parents cannot be legal representatives of a child, child's interests are realized by the representative of a state power body who is entitled to protect child's rights and represent its interests in state and non-governmental bodies, including court.

If there is a real danger for life, health, dwelling or property person's security can be provided (Article 52-1 of the Criminal Procedure Code of Ukraine). Non-disclosure of data about a person kept under arrest can be provided with limitation of information about it in the materials of the review (applications, explanations, etc.) and in protocols of investigatory actions and court's hearings. Investigatory bodies, investigator, prosecutor, court (judge) after deciding on application of security measures, rule on the change of a surname and name of a protected person to a pseudonym. Further on in procedural documents only the pseudonym is mentioned and the real surname and name (date of birth, family status, place of work, occupation, place of living and other application data that contain information about the protected person) are mentioned only in ruling on the change of application data. This ruling is not included into the case's materials and is kept separately in a body under which jurisdiction is the criminal case. In case of change of the surname of protected person to pseudonym all the investigatory actions protocols and other documents containing data about this person are excluded from the materials of the case and kept separately and copies of these documents are included into the case with the change of a real surname to a pseudonym. Data about security measures and protected persons is the information with a limited access (Article 52-2 of the Criminal Procedure Code of Ukraine).

## 4 COMPLEMENTARY MEASURES

**i.** It is quite difficult to find any legal acts on this issue. From the answer to our information request to the Ministry of Education and Science, Youth and Sports we found out that in higher education institutions that train specialists in "Social Pedagogy" are implemented courses on social and legal protection of children, social technologies and educational activities. Their education programs include studying of issues of child sexual abuse.

There are some organizations that try to protect human and children rights. As part of their work they organize educational events like workshops and trainings on such issues as sexual violence. As we can see now the society is beginning to notice the existence of the problem. Unfortunately, at the state level the interest in solving this issue is growing extremely slowly.

**ii.** Here is the data we have got from the analytical reference that is based on the interviews of children aged 10-17years in the project "Children's Rights in Ukraine: realities and challenges after 20 years of independence":

Every second child indicates a violation or failure to comply with certain rights that should be guaranteed in today's society. 52% think that there are cases of sexual exploitation of children.

Compared with research dedicated to children's rights held in 2000 the percentage of children who have never heard of Rights of the Child significantly decreased (from 8 to 1%).

Despite general awareness of children about their rights, some concern the fact that 11% of the respondents do not know that anybody has the right to use children for sexual gratification.

We can conclude that not all children have enough knowledge about this issue, and some are not aware of this problem. There is no subject that would fully reveal the problem of sexual violence and its prevention in educational programs.

From another side there are some thoughts in society that we don't need to tell children about sexual issues because sex education is poisoning their minds. Anyway talking about our generation (born in 90<sup>th</sup>) we never had any subjects about such issues at school. Unfortunately Ukrainian children do not receive information how it is necessary to take care of their safety and ask for help in the case of a threat of violence.

**iii.** According to the text of the Convention, the Ukraine state body authorized for the prevention of crimes against children and their protection from sexual exploitation and to ensure the prosecution of offenders is the Ministry of Internal Affairs.

According to Article 3 of the Law of Ukraine "On Prevention of Domestic Violence" to prevent home violence the state empowers the following bodies:

- 1) specially empowered executive body on prevention of domestic violence;
- 2) the relevant departments of internal affairs bodies;
- 3) bodies of guardianship and care;

4) specialized institutions for people who have committed domestic violence and victims of violence.

Beside the executive authorities, local governments, enterprises, institutions and organizations regardless of their ownership, associations, and individuals can contribute to the implementation of measures to prevent domestic violence.

In 2009 Ukrainian public organization "Women's Consortium of Ukraine", supported by the Ministry of Education and Science of Ukraine, organized the research on the issue "Violence in schools: problems and assistance needed by children and teachers in facing it" in schools of Vinnitsa, Kirovograd, Kyiv and Cherkasy regions. This research gave opportunity to understand the types of violence that are encountered in schools or at home.

There is no specific preventive work against child prostitution conducted by governmental institutions. Activities to prevent child sex tourism in Ukraine are mostly carried out by NGOs. Unfortunately, no tourism company in Ukraine has signed the Code of Conduct for Protection of Children from Sexual Exploitation in Travel and Tourism.

The Ukrainian government has been active in implementing preventive measures against human trafficking. Anti-trafficking awareness-raising materials were published and distributed to the public, though there was no special focus on child trafficking for sexual purposes. Efforts were made to include lessons for prevention of human trafficking in school curricula.

Centre La Strada-Ukraine runs an Internet hotline for child pornography reporting. With regard to private sector collaboration, Onlandia ([www.onlandia.org.ua/ukr/](http://www.onlandia.org.ua/ukr/)) is a website developed by Microsoft Ukraine to raise awareness among children and young people about online safety.

**iv.** In Ukraine there are medical and social rehabilitation centers of victims of domestic violence. They are established in accordance with the laws governing the creation of health care.

In such centres are placed the victims of violence on the basis of the decision of the medical commission centre.

In the medical and social rehabilitation it is applied:

1. Treatment and psycho-social rehabilitation.
2. Victims of violence may be given certain types of mental health care.

3. Organized advising for victims.
4. Announces of committed domestic violence service precinct police inspectors or criminal police for children.
5. Provides information on the prevention of domestic violence at the request of authorities.

In 2010, there was a programme implemented "The rights of women and children against violence", which is funded by the Council of Europe.

Special programs for helping victims of sex crimes do not exist in Ukraine, neither for adults nor for children. As a rule, victims of sexual violence and sexual exploitation can get help at social service on the general grounds.

v. In Ukraine there exists a National “hot line” for prevention of domestic violence and children rights protection. It works on the basis of Centre “La Strada-Ukraine”<sup>88</sup>, where a person can get informational, expert, psychological and legal consultations. One of the main principles of the “hot line” work is confidentiality. A person is not obliged to name its name or address and receives the needed consultation. From 2013 Centre “La Strada-Ukraine” will have a separate “hot line” for children rights protection.

vi. Unfortunately there is not state social program in Ukraine aimed to help a child who suffered from sexual violence or sexual exploitation. A child goes through a rehabilitation course in social services; a psychologist is working with it. It can receive a single address help. But there are problems in this issue: lack of psychologists in the rural areas; the quantity of psychologists is not enough, low level of their qualification and impossibility of its improvement, low salaries, absence of systematic approach, absence of culture of addressing a psychologist in the need of help, bureaucracy (necessity of proper directions, etc.). If a legal representative or an adult does not want to go through the rehabilitation course there are no legal ground to make them to do it.

### **III NATIONAL POLICY REGARDING CHILDREN**

- i. Children’s rights became the hot topic of political discussion and political manipulations in Ukraine very often especially before the elections.

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<sup>88</sup> <http://www.la-strada.org.ua/>

The challenge for policy and programs for children was the destruction as a result of the administrative reform of institutional mechanism of children's rights protection. Presidential Decree of December 9, 2010 (№ 1085/2010) abolished Ministry of Ukraine for Family, Youth and Sports, which was the authorized central executive authority in this area. Presidential Decrees of April 6, 2011 approved position of central government and its functions were partly transferred to the Ministry of Social Policy. But only in November 2011 the Department of Child Rights Protection and Adoption began to operate within the Ministry of Social Policy of Ukraine. Financing of its activity was a residual one.

One positive result of political discussions was the creation in August, 2011 by the President of Ukraine the institution of Ombudsman for Children's Rights. But this new body cannot be considered as an independent monitoring mechanism, which would be set up to implement the UN Convention. In addition, the main function of the Commissioner is monitoring the situation of children's rights in Ukraine, not policy implementation that makes it relevant to the further strengthening of services for children. Certain wave of attention to the issue was raised in October during Ukrainian meeting for child protection. On December 12, 2011 Decree number 1163/2011 was signed by President, which is aimed at strengthening of children policy protection.

Furthermore, in 1991, ratifying the UN Convention on the Rights of the Child, Ukraine has committed to implement juvenile justice at the national level. However, until now this issue is not resolved, moreover, it has acquired social deterioration. Since preparing reform projects, unfortunately, no one thought about conducting explanatory work with the population, which led to public opposition. Even the draft Concept of Development of Juvenile Criminal Justice in Ukraine, which was prepared by the Ministry of Justice of Ukraine, is not optimal, because it only takes into account the rights of children in conflict with the law, not paying any attention to the interests of children who are in contact with the law that is, those children who are victims of crime. However, certain political structures with the support of the Russian Orthodox Church expanded movement against the implementation of juvenile justice. They created special sites, held street protests; they are

active in various online forums and social networks<sup>89</sup>. This opposition is still considered as a serious obstacle for implementing the institution of juvenile justice in Ukraine.

ii. It is extremely important to raise awareness about international standards of human rights and the status of their implementation in Ukrainian law. To this end, in 2004, the Commissioner for Human Rights with the assistance from the UN Office in Ukraine published a digest entitled “The Concluding Observations and Recommendations of the UN Treaty Bodies on Reports of Ukraine in the Area of Human Rights” in three languages (Ukrainian, Russian, and English). This was the first attempt to communicate the UN concluding observations and recommendations to the central and local government officials, lawyers, NGOs, trade unions, mass media, students, and the general public.

Due to the words of the Commissioner for Human Rights cases of cruelty and violence against children became more frequent in recent years in Ukrainian society. Unfortunately, Ukraine is recognized as one of the main centres of pornographic products using the image of the child. Some “Child Model Agencies” are reported to have cameras hidden in bathrooms to take pictures of naked children.

One of the first cases in Ukraine concerning images of violence against children production that became very loud because of the police investigation was the detection of model agencies in Kyiv, Kharkiv and Simferopol. The criminals’ victims who rented apartments for “photo sessions” became approximately 500 girls.

According to Interpol evaluation, the Ukrainian market of such products is estimated to be \$ 100 million per year. Only in the last five years, nearly 3,000 people were sentenced for crimes against sexual freedom and sexual immunity of a person, where the victims were children. However, Ukraine has no statistics on children who are victims of sexual exploitation and trafficking, in particular about age, sex and location of the affected children. Such records must be urgently implemented.

According to the Department for information technologies of the Ministry of internal relations of Ukraine data in the year 2008 there were detected 303 cases of sexual abuse against juveniles in Ukraine (in 2007 – 251). Also there were registered 851 crimes

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<sup>89</sup> <http://uogcc.org.ua/ua/letters/article/?article=8033>



concerning importation, production, sales and distribution of pornographic products, including those with the children involved (811 in 2007).

In 91% of the cases the reason for starting a criminal case against the children pornography producers was the citizens' notification, in 9% - police actions.

Very useful for the statistic are the reports of the ECPAT International. Due to their reports about situation in Ukraine child prostitution is most evident in the capital Kiev and other big cities such as Odessa, Kharkiv and Sevastopol. Though prostitution is illegal, it is still widespread due to light punishment. The majority of child victims of prostitution are unaccompanied children coming to the cities from rural areas and small towns in the eastern and southern regions. Some children are forced to migrate to large cities to pursue higher education and are later pushed to sell sex to support themselves. Prostitution of boys is also becoming an increasingly acknowledged problem.

Sexual exploitation of children in tourism is especially prominent during the summer season in the coastal areas where many children are trafficked from CIS countries like Moldova and Russia for prostitution, with demand from both local and foreign tourists. According to research conducted in 2010, the Internet plays a key role in the facilitation of child sex tourism in Ukraine, including through tourism agency websites that market sex with children to foreign tourists. Additionally, child trafficking is believed to be closely linked to the production of child pornography, as there have been a number of cases of children being trafficked from neighboring CIS region for this purpose.

Before Euro-2012 Championship International women rights protection centre La Strada-Ukraine summarized the research "Children sex-tourism in Ukraine: an attempt of situational analysis" and presented its results at the press-conference. Experts in children rights protection joined the discussion – President's authorized in children rights, Head's deputy of the UNICEF office in Ukraine, president of Kharkiv national university of internal affairs and head's deputy of Administration of criminal police for children of Ministry of internal affairs in Ukraine.

The research proved that the problem of children sex-tourism in Ukraine is considerable but latent. The real scope of this occurrence is impossible to define because of the difficulties in detecting these crimes, corruption and also because children usually do not understand that they are subjects to criminal activities and consider it as a normal earning. Beside that Ukrainian society tolerates children sex-tourism – the majority of people understands the

term “a child” as children under 10 years old and the most often exploited are juveniles who usually look and are treated by outsiders as adults. The increase of offer of sexual services in Ukraine indicates that Ukraine attracts foreigners with accessibility of receiving services from children and impunity for such actions.

Foreign sex-tourists come mostly from the European Union countries (or candidate countries, such as Turkey), USA, Canada and from the Middle East, such as Israel and Syria.

Among the children involved into providing services to tourists are those who do it permanently and temporally. The first ones are usually the representatives of socially sensitive groups – orphans, children from the crisis families for whom it is the only way of making money, they are girls from 14 years and boys from 16-17 years. The second ones are those, attracted with “beautiful life”, expensive presents, girls from 16-18 years and boys from 14-17 years (their percentage increased from 2009 to 2011 4 times). Intermediaries-pouncers usually involve children in such work or even their own parents or sex-tourists themselves promising valuable things.

Yuriy Pavlenko, President’s authorized in children rights, admitted that there is pretty neglect treatment from the police’s side. If the case does not concern rape itself there is almost no chance for a proper attention of the police.

Centre La Strada-Ukraine has 8 cases concerning children rights violations, half of them are about sexual violence against children with 8 victims in total. None of these cases is unambiguous for our courts. Sometimes even the results of medical and psychological expertise is not enough for punishing perpetrators in these crimes.

UNICEF is worried about the fact that Ukraine remains one of the main countries in human trafficking in Europe. In its final observations from 21 April 2011 UN Committee in children rights expresses concern regarding absence of information about responsibility of people who deal with human trafficking and emphasizes on the importance of target information and information campaigns as a prevention measure.

Committee encouraged Ukraine to review all of its national legislation in order to provide its full relevance to the UN Convention on children rights and its Optional protocol, especially regarding the issue of children prostitution and other forms of sexual exploitation of children. Also Committee draws attention to the fact that a clear provision prohibiting children prostitution has not been included into legislation yet.

Ministry of Internal Affairs of Ukraine from 2009 until 2011 registered 37 crimes of children involvement in prostitution. At the same time the internal affairs' bodies detected 465 juveniles at the age of 16-18 years involved into prostitution.

During October 2010 – August 2011 in Ukraine there was held a global campaign “Stop children and youth trafficking with sexual purposes!”. Under this campaign 55 763 signatures had been gathered for the Petition with the same name. Among main demand of the Petition – improvement of national legislation concerning prevention of sexual exploitation of children including a clear prohibition installation of using children in prostitution and imposing responsibility on the clients. Petition and signatures were transferred to Verkhovna Rada on the 5 October 2011, V.V. Shemchuk in particular – contact parliamentarian in issues on fighting with sexual violence against children.

In nine months of the year 2009 police detected 40 cases of children trafficking, 110 rapes (50 children under 11 years), and 46 sexual intercourses with juveniles and 214 sexual abuses against juveniles.

In 2008 there were detected 37 facts of children and juveniles trafficking. Nevertheless experts are concerned that the official statistics does not reflect the objective situation. Since 2008 on the basis of NGO La Strada-Ukraine there exists a hot line where following the phone number on the web page (0 800 500 335) one can anonymously report about the cases of violence against children.

In 2008 La Strada-Ukraine together with Kyiv international sociology institute conducted a poll on public opinion concerning children rights violation. 84% of citizens named the children sexual services and 97% stated that it is necessary to criminalize it.

In Ukraine the Office for fighting against cybercrimes of the Department for fighting with crimes concerning human trafficking of Ministry of internal affairs is dealing with investigating cases of sexual exploitation of children through Internet. Ukrainian policemen cooperate in investigating crimes in this sphere with colleagues from Australia, Great Britain, Italy, Canada, Netherlands, Belarus and the USA. There was a draft law suggested by few deputies, V.V. Shemchuk, Bondarenko O. F., Lukyanova K.Y., on the changes to the Criminal Code of Ukraine and the Code on administrative offences of Ukraine concerning sexual violence against children and exploitation issues. It was created considering recommendations of state power bodies' specialists, international and public organizations during the discussion of fighting with children prostitution problematic. Changes into

legislation were discussed during the deliberation “Condition of the legislation realization in the sphere of fighting with human trafficking, children prostitution and pornography and the perspectives of its improvement” (23.11.2010), experts hearings “Perspectives of improvement of national legislation in the sphere of children protection from human trafficking, sexual violence and exploitation” (02.03.2011), deliberations “Realization of UN Committee on children rights recommendation under the results of state reports’ consideration. “Counteraction to crimes against children” (08.07.2011) and deliberations “National legislation improvement concerning children protection from sexual exploitation and sexual overuses” (18.10.2011).

**iii.** In order to receive data on quantity and quality characteristics of sexual exploitation of minors (under 14 years old) and juveniles (from 14 to 18 years old) we analyzed courts’ decisions from 1 January 2007 until now:

Crime	Quantity of crimes in the Register	Sanction foreseen by the CC
Juveniles’ rape (p. 3 Article 152 CC)	340	Imprisonment from 7 to 12 years
Minors’ rape, including attempt to rape (p. 4 Article 152 CC)	480	Imprisonment from 10 to 15 years
Violent satisfaction of sexual passion in an unnatural way committed against juveniles (p.2 Article 153 CC)	816	Imprisonment from 3 to 7 years
Violent satisfaction of sexual passion in an unnatural way committed against minors (p.3 Article 153 CC)	320	Imprisonment from 10 to 15 years
Sexual relations with a	3	Freedom restriction for 5 years or imprisonment

person who has not reached puberty (Article 155 CC)		for the same time; qualified structure - imprisonment from 5 to 8 years with the deprivation from the right to hold particular positions and conduct particular activities for 3 years or without that.
Abuse of juveniles (Article 156 CC)	9	Freedom restriction for 5 years or imprisonment for the same time
Trading in prostitution or involvement into prostitution against juveniles (p.3 Article 303 CC)	1	Imprisonment from 5 to 10 years with property confiscation

Crimes against sexual inviolability of juveniles and infants include rape itself and sexual desire satisfaction in unnatural way. The benefit of the latter is explained with the fact that crimes against sexual inviolability of juveniles and infants are usually committed by persons of the same sex as the victim. Both rape and sexual desire satisfaction in unnatural way against children are often committed by persons who were well known to the juvenile/infant, relatives in particular, step-mother, step-father, neighbours. Complicity is typical for this kind of crimes, especially in case when it is committed by several people without preliminary conspiracy.

Rape commitment and satisfaction of sexual passion in an unnatural way by group of people under the same malice is also typical. It usually happens under alcohol or drug intoxication. Beside sexual inviolability violation injuries are also inflicted to juveniles. Psychological pressure usually contains threads of infliction more serious injuries. There are cases of rapes and satisfaction of sexual passion in an unnatural way with the usage of victims' helpless condition, alcohol intoxication in particular. A typical image of such crime is a common leisure of a group of young people combined with the alcohol drinks consuming, after which few people who volunteered to help intoxicated juveniles/infants to get home, commits a crime against sexual inviolability of the latter.

Sexual relations with a person who has not reached puberty is not a common crime. It is typical for this crime to not inform about it the rights-protection bodies as in this case a person who has not reached puberty enters into sexual connection with another person by

its own will. In the majority of cases of these crimes there were considered serious consequences for the victim's health.

Cases concerning juveniles' abuse include both physical and intellectual abuse, often both of them at the same time. The main feature of the victim is social and pedagogical abandonment.

The most dangerous the situation is in the localities where parents do not follow the spare time of their children enough, where children have access to alcohol drinks and often spend their time with "adult" companies that abuse alcohol and drugs. It is a serious problem that children do not possess information about danger of early sexual life, prevention of provocative conduct with which they can become victims of such crimes.

Ministry of Internal Affairs of Ukraine provides general statistics not separating children as special category of victims. Applying available statistics concerning crimes against sexual freedom and sexual inviolability in general that includes sexual exploitation of children as well, the following results can be singled out:

Year	Registered crimes against sexual freedom and sexual inviolability	Proportion in total, %
2011	1348	0.3
2010	1348	0.3
2009	1698	0.4 <sup>90</sup>

The participants of the project Youth Partnership against commercial sexual exploitation of children in Ukraine applied to Ombudsman for Children at the President of Ukraine with the recommendation to conduct the research as to the scale of sexual exploitation of children in Ukraine since the problem of absence of certain statistics on this issue exists nowadays.<sup>91</sup>

In fact, there is difficulty in obtaining official statistics in Ukraine concerning sexual exploitation and corruption of children. It is worth mentioning that not all of the crimes

<sup>90</sup> Statistics of crime rate. The official website of Ministry of Foreign Affairs of Ukraine. - <http://mvs.gov.ua/>

<sup>91</sup> Уповноважений Президента України з прав дитини підтримав рішення учасників проекту Молодіжного Партнерства проти комерційної сексуальної експлуатації дітей в Україні. 01.02.2012. – Прес-служба Президента України. - <http://www.president.gov.ua/>

become known to law-enforcing bodies and not all of them are due investigated. The majority of children do not report about the facts of sexual exploitation committed by a close person being afraid of disclosure of that information or the fact that other persons will not believe them etc. "74 persons aged from 14 to 18 and 44 persons under 14 were recognized victims of rape during 2010. 144 persons suffered from rape in 2009 and 194 persons – in 2008."<sup>92</sup>

The problem of sexual exploitation in Ukraine is highly discussed by mass media. In official statistics based on the data of Ministry of Internal Affairs the real sexual violence against children is not precisely reflected as the only completed criminal cases are taken into consideration. There are no data on the quantity of commenced criminal cases concerning sexual exploitation of children. As representative of UNICEF in Ukraine has stressed, "in conformity to data of Ministry of Internal Affairs of Ukraine the quantity of crimes on corruption of minors was equal to 307 in 2007 and 347 in 2008."<sup>93</sup>

iv. There are a lot of promotional campaigns within the state regarding children's sexual exploitation; however, they are carried out mainly by NGOs. This is the project of Human Rights Centre "Progress", which was addressed to representatives of non-governmental organizations working for children groups risk, law enforcement agencies and organizations responsible for working with at-risk children, including representatives of civil society organizations that work to protect children, representatives of the Office of Human Rights Monitoring in the Ministry of Internal Affairs of Ukraine, representatives of various government institutions responsible for human children.<sup>94</sup>

Ukrainian Foundation "Welfare of children" had a thorough statistical research of the problem of violence against children to determine the attitude of adults to physical, corporal punishment and identify opportunities for child care in case of family violence.<sup>95</sup> The project

<sup>92</sup> Пояснювальна записка до проекту Закону України "Про внесення змін та доповнень до Кримінального та Кримінально-процесуального кодексів України" (щодо процедури допиту неповнолітніх потерпілих і свідків). Український фонд «Благополуччя дітей».- <http://childfund.org.ua/>

<sup>93</sup> Надання допомоги дітям-жертвам злочинів, пов'язаних із торгівлею дітьми, дитячою проституцією, дитячою порнографією, проти статевої свободи та статевої недоторканості дитини, з урахуванням національної та міжнародної практик/ Авт.: Волинець Л. С., Гурковська Л. П., Савчук І. В. — К.: ТОВ "К.І.С.", 2011 — 132 с. — с.60 - [http://www.unicef.org/ukraine/ukr/UNICEF\\_Manual.pdf](http://www.unicef.org/ukraine/ukr/UNICEF_Manual.pdf)

<sup>94</sup> *Actions to protect children at risk: the experience of Poland, Germany and Ukraine*, Project of Human Rights Centre "Progress", <http://gurt.org.ua/articles/8114>

<sup>95</sup> Kalinina A., *Results of researching on problem of children violence, "Childhood without violence - improving the protection of*

results determined that the vast majority of respondents believe that the situation with regard to sexual violence against children is improving, but on the contrary, there is a trend towards deterioration. Participants of this project recognized the major problem an unclear procedure of survey and interviewing of victims of sexual violence or crime related to trafficking in persons, especially children. After an initial survey of the child 4-6 times repeats and re-living scenes of violence for documentary fixing crime goes through the identification of the offender to trial. It rarely involves a psychologist, more often an expert on child psychology.

Ukrainian NGO "Child Protection Service" analyzed while providing professional comprehensive assistance to victims, the crimes related to child trafficking, child prostitution, child pornography, abuse against sexual freedom and sexual integrity of children. It published a guide on this subject which is intended for personnel services for children, law enforcement, social services for families, children and young people, adoptive parents, teachers, foster parents, and professionals of NGOs, representatives of the media.<sup>96</sup> Authors suggest that there is carrying smuggled children, within the country and beyond its border in Ukraine, growing child sex tourism, often using children in prostitution or production of pornography, there is a high level of accessibility to pornographic materials containing children's pictures on the internet and so on. In their researching Youth NGO "Boom" states that the real number of victims of sexual violence is difficult to establish. Incomplete information about sexual abuse of children can be drawn from court statistics. These social studies show that the experience of sexual abuse before reaching the age of 15 had 34.9% of women and 29% men. Much of these cases occurred in the family. 10.5% of women and 3% of men have experienced rape or attempted.<sup>97</sup>

Many articles and coverage are dedicated to the fight against children violence. As a rule, journalists write that it is important that the society open its eyes and raises the facts of violence that should be reported to the appropriate service. It is very important that teachers, doctors, nurses, social workers who work with children and can see problems in

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*children in Eastern Europe*", Project of Foundation "Welfare of children", <http://www.ccf.org.ua/oak2009>

<sup>96</sup> Volynets L., Hurkovska L., Savchuk I., *Providing assistance to the victims of crimes related to trafficking in children, child prostitution, child pornography, against sexual freedom and sexual integrity of children, taking into account national and international practices*, Project of NGO "Child Protection Service", <http://kdm-ldd.org.ua/medics>

<sup>97</sup> *Violence against children*, Project of NGO "Boom", <http://www.moobum.org/uk/nasilie/nasilie-nad-detmi>



children recognize that the child was the victim.<sup>98</sup> More than 38% of all raped in Ukraine are children and adolescents of 12-16 years. But sexual violence is understood as using a child (boy or girl) for adults or another child for sexual gratification or receiving benefits. Sexual abuse includes sexual intercourse (coitus), oral and anal sex, mutual masturbation, and other bodily contact with the genitals. It also includes involving children in prostitution, pornography, exposure to child sexual organs and buttocks, peeping at it when it did not suspect: while undressing, sending natural needs. It is not only different ways of intercourse, but too bold graces in demonstration pornography. The most horrible thing is that rape is molesting children themselves. More than half of the prostitutes were subjected to sexual harassment in childhood.<sup>99</sup>

v. Ukraine became a part of different Conventions on the protection of children rights. These are: the Convention on the rights of a child, Convention on Cybercrime, Convention on Action against Human Trafficking, etc. But, unfortunately, the biggest amount of norms was not implemented into the national legislation. For example, there is no definition for child pornography, child prostitution in national legislation. Nevertheless, Criminal Code of Ukraine contains punishment for the crimes committed against children. There were some Draft Laws, task of which were to improve national law and to align with the European law, but it were not supported by the legislative organ.

Nowadays Ukraine is on its way of implementation of protection of children rights in legislation along with the human rights. That is the 'blind' spot in Ukrainian law.

vi. The most basic national non-governmental organizations who work on the topic of children and women are: La Strada-Ukraine, Ukrainian Women's Fund, National Foundation "Protecting the rights of children," Ukrainian NGO "Child Protection Service", Women's Consortium of Ukraine and others.

International Women's Rights Centre "La Strada-Ukraine" is working towards the prevention of trafficking in persons, especially women and children, elimination of all forms of discrimination and violence in society, promote human rights, gender equality and children's rights.

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<sup>98</sup> Mykoljuk O., *"Human rights start with children's rights"*, May 24, 2011. - <http://www.day.kiev.ua/209976>

<sup>99</sup> *"The problem of violence against children"*, August 25, 2004. - <http://familytimes.com.ua/nasylstvo-dity.html>

"La Strada-Ukraine" is a member of the Coordinating Council for the Prevention of Trafficking in Women in Parliament Commissioner for Human Rights (since 1998), the Expert Working Group under the Interagency Coordinating Council for the Prevention of Trafficking (since 2003), and the Public Council under the Ministry of Interior Ukraine on Human Rights (since 2005).

In 2004 the Centre "La Strada-Ukraine" became the founder and member of the International Association "La Strada".

Ukrainian Women's Fund (UWF) - an international charitable organization founded in 2000. It provides financial, information and advice to civil society organizations from Ukraine, Moldova and Belarus. UWF is a member of Ukraine Network Women's Program of Open Society Institute - New York, International Network of Women's Funds and Philanthropists Forum in Ukraine. It is willing to help civil society organizations, particularly women's organizations, but not only play an active role in the development of the democratic society that ensures equality, justice and the realization of human rights by supporting civil society through the provision of financial opportunities. Objectives of the Fund: promotion of human rights and fundamental freedoms by strengthening CSOs fundraising to support civil society by promoting the development of cultural philanthropy in Ukraine; increasing consolidation of the women's movement as an integral part of civil society in Ukraine, Moldova and Belarus; strengthening public participation in decision making at various levels; increased public attention to issues of diversity and gender.

NGO Ukrainian Foundation "Protecting Children's Rights" (VFZPD) is a non-profit organization that was founded in January 2003. The organization was founded by experienced professionals in the field of children's rights, which started its activities in the field of human rights protection in 1993 under the auspices of the Ukrainian Legal Foundation, and from 2002 to 2005 headed the Ukrainian Committee of protection of children, birth to entirely new approaches to the field of children's rights and logically continued implementation of innovative design and research activities within the Ukrainian Foundation "Children's Rights". The priorities of the organization is urgently important for Ukrainian society: legal education in the field of child protection, juvenile justice, children in conflict with the law, street children, prevention of all kinds of violence and exploitation of children, monitoring children's rights in Ukraine and research. For years, it was established close and fruitful cooperation with the Supreme Court of Ukraine, the Ministry of Justice of Ukraine, Ministry of Education and Science of Ukraine, the Ministry of Family, Children and

Youth, the State Department of Ukraine for Enforcement of Sentences, the General Prosecutor of Ukraine, Ministry of Internal Affairs, UNICEF and several NGOs acting in the interests of children. The organization was one of the founders of the Network of NGOs for children.

Women's Consortium of Ukraine - a NGO, which provides a coordinating role in promoting advocacy, education and outreach initiatives aimed at preventing violence against women and children, in particular, home to overcome trafficking and promote equal rights and opportunities for women. Today, members of the Women's Consortium are 32 NGOs from all regions of Ukraine. This local and regional independent organizations working to address the following priority issues: domestic violence and child abuse, trafficking in persons, especially women and children, equal access of women to decision-making, gender stereotypes.

## **IV OTHER**

While having conducted a global legal research on combating sexual exploitation of children in Ukraine, researchers became aware about the following problems, which complicate effective fight against sexual exploitation of children. First of all, the researchers mentioned that the relevant legislation is characterized by a wide range of contradictions. For instance, the relationship between the term 'child abuse' and such concepts as "domestic violence" "child exploitation," "sexual operation", "trafficking in children", "occupation of the child to criminal activity", "prostitution", "forced begging" is not clear. Secondly, it is worth emphasizing problems, which relate to ensuring relevant institutional infrastructure of combating sexual exploitation of children. Lack of effective institutional mechanism and relevant specialists prevent Ukraine from fast and qualitative dealing with the problem of child abuse.

A lot of issues are associated with lack of awareness of the topic. Firstly, as the problem does not become a subject for a wide public discourse, an issue of underreporting arises. Parents, whose children became victims of sexual exploitation, prefer not to reveal this fact due to the fact that (1) they do not believe in effective protection of their children's rights and (2) they are afraid of public discussion of the case. The problem becomes insoluble in case a victim is deprived of parental custody. Underreporting of sexual exploitation of children leads to lack of punishment of aforementioned crimes. Another issue, related to awareness, lies in the fact that children, especially those, who live in the rural area, lack

awareness about sex, crimes against sexual inviolability and simple rules, which can help them protect themselves from becoming a victim of sexual offence. Under reporting of the problem and lack of open discourse lead to the fact that we do not have a real picture of the quantitative and qualitative characteristics of sexual exploitation of children in Ukraine.

It is obvious that combating sexual exploitation of children should become one of national priorities and improved in terms of legislation, institutional infrastructure and increasing awareness about the issue.

In Ukraine there might be three ways of improving the situation with the legislative children protection against sexual violence: governmental/parliamentary work, NGOs and public initiatives. All three are linked to each other and each of these elements can originate one from another.

As we saw from the situation of that kind of work in general is that the government is not aware of the reality in children rights protection issues at all, there is an institute of Ombudsman for children but it exists separately. This position was created, in our point of view, in order to relieve the government from the children rights matters but it resulted in a total indifference and distraction to the problem. Nothing is being done “from above”. It was really difficult to contact anybody from the governmental body during the research. Those who responded were not able to help. We did not manage to contact the responsible parliamentarian for children protection from sexual abuse. We have been working though with the Ombudsman. But as we see the possibility of such matters being discussed in the Parliament is equal to zero.

In the work of NGOs it is obvious the lack of coordination, the level of real cooperation between them is very low and their activities are limited to more theoretical work. Very few events organized by them include direct practical work with the children and adults. From this side we can assume that NGOs have not become a joint force in Ukraine that can have influence on the legislative process. But if they would have become active in a joint work it will be impossible for the government to not notice them and the issues in their work.

What we mean with the public initiatives is that people themselves are becoming active when it comes to children protection issues. Yes, we have a really unique phenomenon in Kyiv. A group of young people created in August this year an unofficial organization called “Okkupay-Pedofilyay” which also exists in some cities in Russia. Its aim is to fight against paedophilia. People from this organization are acting both in radically practical and

extraordinary way. They create a situation under which a juvenile (a boy under 16-18) arranges a meeting with a man who seems to have a disposition to paedophilia. Members of the organization join this “agent” and interview the “paedophile” with camera recording. They do not use physical force and do not cause injuries to the “paedophile”. They only take an interview and in the end make sure that he is not going to continue meeting with juveniles. The videos are published on a web page in a Russian social network.<sup>100</sup> Some people state that it is hooliganism what they are doing though.

Another important issue for the children protection from sexual violence in Ukraine is juvenile justice. Our President has signed a decree on the juvenile justice policy in Ukraine and there exists a project of reforms on it but the society takes it completely wrong. Formally the main accent is being made on the criminal responsibility of juveniles but it also foresees social work of the governmental bodies with the families. In Ukraine a family is considered to be untouchable, it is a unity based on strong religious and cultural traditions. There is a stereotype that juvenile justice will lead to the situation under which children will be taken from their families for children rights violations by their parents. Furthermore a lot of organizations manipulate this misunderstanding. In particular, the so-called sect Dognala, unrecognized Ukrainian orthodox greek-catholic church, which leader Antinin Dognal has been deported from Ukraine under court’s decision. They systematically organize demonstrations against juvenile justice. They are sure that protection of children from sexual violence will lead to juvenile justice implementation. When we started promoting our legal research group the representatives of this sect filed several complaints to different state bodies including police. They are accusing our project of being aimed to take children from Ukrainian families. It does not sound serious but these complaints are obstructing the work of our network around Ukraine.<sup>101</sup> Unfortunately no educational programs concerning juvenile justice are implemented by the state and the society does not understand its meaning.

As we see the sexual violence issue is a very broad area for speculations. NGOs and governmental bodies should be very careful while dealing with it because at every stage of their activity they can meet the misunderstanding of the society.

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<sup>100</sup> <http://vk.com/kyivsafari>

<sup>101</sup> <http://uogcc.org.ua/ua/letters/article/?article=8246>

## V CONCLUSION

Childhood is the ground for every individual's development. It is the first stage in becoming a person. Its importance cannot be overvalued. That is why it should be properly protected by adults as children cannot do it themselves but they surely need it.

Ukraine has joined many international conventions on protection of childhood and children rights. Its legislation has been also amended. But somehow the mechanism of children rights protection does not work. Norms, providing guarantees for children rights realization, are mainly declarative, it is not clear who in particular is in charge for helping directly the children and families in children rights realization and protection.

Ukrainian legislation has a very formal approach in criminalization of socially dangerous activities. There are usually foreseen many obligatory features for every crime and in case of their absence the actions that have some other features of a crime are not considered as such, it is impossible to protect ones rights in case this kind of activity caused damages.

Also there is a big mess in all the existing laws. There can be a situation under which several laws regulate the same issue but at the same time they can prescribe different mechanisms for it. So if the state joins a convention and has to amend its legislation in accordance to it, it is sometimes really difficult to amend all the laws that contain an issue, regulation of which should be improved.

Ukraine ratified the Lanzarote Convention. It requires substantial changes of the legislation. To our mind it will take years to amend it and even more to make it work.

But the reasons for poor children rights protection situation is connected with much more factors than these of the abovementioned gender equity in particular. It is more natural for women to be concerned of children right issues. The statistics shows that there are almost no women involved in the decision making spheres of activities in Ukraine. To our point of view this is one of the main reasons why Ukraine still does not have any state program on children rights protection.

It is worth mentioning that one of the reasons for ignoring the sexual violence issues is soviet background. It is well known that sex in the Soviet Union was a forbidden topic and all the problems concerning sex issues "did not exist". It has been only 21 years that the Soviet Union collapsed and the elder generation still does not educate their children on sex

issues. It is considered to be a kind of shame and disgrace to talk about it. That is why it obvious that in most cases the society remains indifferent when it comes to sexual violence.

The main thing that has to be done in order to improve the situation with combating sexual violence against children is not changes into legislation of Ukraine, it is consolidation. Everybody involved in the human rights protection have to clarify for themselves the main task in combating sexual violence against children and start acting together. In this case the government will be obliged to react to their position and finally create a state program at least on children rights protection. It is important for the NGOs to understand that they should influence on the government and not ask the government to support them. NGOs are an important force in the civil society and it should be in the Ukrainian society as well.

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**National Coordinator**

Natasha Shotunde

**National Researchers**

Angie Lai

Anna Toufexi

Evelina Kolodziej

Nicole Langrana

Sarah Trotter

Tasneem Woozeer

Viktoria Skrivankova

Valentina Dimitriou

**National Advisor**

Dr Aoife Daly

## I INTRODUCTION

### 1 GENERAL

The present report focuses on how the UK legislation protects child victims from sexual violence, in its national legal framework in Europe. It must be acknowledged that the UK includes Great Britain<sup>1</sup> and Northern Ireland.<sup>2</sup> Great Britain is composed of England, Wales and Scotland. In areas such as family law, different laws apply in each part of the UK. In particular, Scots law applies in Scotland and Northern Ireland law applies in Northern Ireland. Legislation drafted in the parliament of the United Kingdom and UK Supreme Court judgments are highly influential in both legal systems.<sup>3</sup> However, due to restraints and limitations on research, this report will focus on England and Wales, where the law of England and Wales applies. This report is written in accordance with the guidelines and academic framework provided by ELSA for Children.

#### Equality Rights

i. The year of 2010 was marked by the introduction of the Equality Act 2010 which came into force in October 2010. This Act addresses and prohibits all forms of discrimination. The Act consolidates and simplifies a number of existing complex Acts and Regulations, which formed the basis of the anti-discrimination law. This included the Equality Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Discrimination Act 1995 and the Disability Discrimination Act 1995.<sup>4</sup> In addition a number of regulations were consolidated in the Act including Employment Equality regarding religion or belief and sexual orientation.<sup>5</sup> The Equality Act 2010 covers a range of protected characteristics, which cannot be used as a reason to treat people unfairly. These are namely: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.<sup>6</sup> The Act has the same goals as four major EU Directives: EU Directive 2000/78/EC, 2000/43/EC, 2006/54/EC. This is evident when reading the

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<sup>1</sup> see Law in Wales Act 1536 and Union with Scotland Act 1706.

<sup>2</sup> Union with Ireland Act 1800; Government of Ireland Act 1920.

<sup>3</sup> Supreme Court Review, 'Independent Review Group examining the relationship of the High Court of Justiciary and the United Kingdom Supreme Court 2010' <  
<http://www.scotland.gov.uk/About/Review/supreme-court-review>> accessed on 27 October 2012.

<sup>4</sup> Equality Act 2010, sch 27.

<sup>5</sup> *Ibid* s 39.

<sup>6</sup> *Ibid* ss 5-12.

Equality Act 2010, where pieces from the EU Directives have been included in the statute without any change.

In general, the Act did not change the law per se, but merely brought together a series of complex instruments by incorporating them in a single and simpler document. Nevertheless, since April 2011 all public authorities in Great Britain are subject to a general single equality duty as the Act “*significantly extended the ability of employers and others to adopt positive action measures to promote equality*”<sup>7</sup> However, while it requires equal treatment in access of employment regardless of age, disability, gender, reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation, it allows transsexual people to be barred from gender-specific services if that is “a proportionate means of achieving a legitimate aim”<sup>8</sup>.

The Civil Partnership Act 2004 is another major piece of legislation regarding same-sex relationships. Its enactment and unilateral support from all UK parties demonstrates a change in attitude towards homosexual people. The Act granted civil partnerships in the UK identical rights and responsibilities as to civil marriage. This includes property rights<sup>9</sup>, parental responsibility for a partner’s children<sup>10</sup>, tenancy rights<sup>11</sup>, full life insurance recognition<sup>12</sup>, and a formal process for dissolving the partnerships akin to divorce<sup>13</sup>.

It should be pointed out that racially motivated crimes are severely punished under criminal law. The *Crime and Disorder Act 1998* created new offences of racially and aggravated assaults. If a person commits an offence under s. 20 or s.47 of the *Offences Against Person Act 1861*, or common assault, and it satisfies requirements of the s. 29 (as amended by s. 39 of the Anti-Terrorism, Crime and Security Act) the maximum sentence for sections 20 and 47 which is five years is increased to seven years and in case of common assault from six months to two years. The judges’ reasoning in *Rogers*<sup>14</sup> implies that everyone who is of a different race to the

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<sup>7</sup> Alleen McColgan, ‘Summary: Country Report UK 2010 on measures to combat discrimination’, European Network of Legal Experts in the Non-discrimination Field 2011, < [http://www.non-discrimination.net/content/media/2010-UK-Country%20Report%20LN\\_FINAL\\_0.pdf](http://www.non-discrimination.net/content/media/2010-UK-Country%20Report%20LN_FINAL_0.pdf) > accessed 26 October 2012.

<sup>8</sup> Equality Act 2010 sch 3, pt 7, para 28.

<sup>9</sup> Civil Partnership Act 2004, ch 3.

<sup>10</sup> *Ibid* s 75.

<sup>11</sup> *Ibid* s 81.

<sup>12</sup> *Ibid* s 70.

<sup>13</sup> *Ibid* s 44.

<sup>14</sup> *R v Rogers (Phillip)* [2007] UKHL 8, [2007] 2 AC 62.

defendant comprises a racial group. Furthermore, the Criminal Justice Act 2003 obliges the court to treat the act in question as an aggravating circumstance if:

“an offender demonstrated hostility towards the victim based on his or her sexual orientation or disability (or presumed sexual orientation or disability); or

the offence was motivated by hostility towards persons who are of a particular sexual orientation or who have a particular disability”<sup>15</sup>

Relations between natives and people of African, Afro-Caribbean, South Asian, Middle Eastern descent and Irish travellers have improved over the past few years - according to the US Department of State report on the state of Human Rights 2011: *“In 2010/2011 the Home Office reported 2,982 racially or religiously motivated assaults with bodily harm or other injury; there were 4,058 such assaults without injury. These figures represent a 15 percent and a 6 percent decline, respectively, from 2009/2010 figures.”*

However, individuals might still encounter negative experiences. Despite the fact that all forms of racial discrimination are prohibited, there are sporadic problems reported, including incidents of homophobic violence and mistreatment based on racial or ethnic grounds. The Dale farm eviction is an example, where 300-400 Irish Travellers were forcibly evicted from their encampment in Essex, caught the attention of numerous national and international human rights institutions. The UN Committee on the Elimination of Racial Discrimination has expressed its concern about the discrimination and lack of access to education, services and urged the British government to improve their employment prospects and living conditions.<sup>16</sup>

### Family Protection

The United Kingdom has no single constitution document. It has an unwritten constitution which embodies written documents such as statutes, precedent and treaties.<sup>17</sup> It also includes unwritten sources such as parliamentary constitutional conventions and royal prerogatives.

Family law in particular is based on parliamentary legislation and extensive court decisions. In the British legal system, no definition of ‘family exists’. The law is more open and some

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<sup>15</sup> Criminal Justice Act 2003, s 146.

<sup>16</sup> Amnesty International, ‘Amnesty International Report 2012: The State of the World’s Human Rights’ 375.

<sup>17</sup> Anthony Wilfred Bradley and Keith Edwing, *Constitutional and Administrative Law* (15<sup>th</sup> edn, Longman 2010).

less formal relationships can be defined as family. In the case of *Fitzpatrick v Sterling Housing Association*<sup>18</sup> Lord Slynn stated that in a familial relationship there should be “*a degree of mutual interdependence, of the sharing of lives, of caring and love or commitment or support*”<sup>19</sup>. According Schedule 1 par 2(2) of the Rent Act 1977, a person who was living as the wife or husband is treated as the spouse of the original tenant. It was decided that for the purpose of the Rent Act 1977 Schedule 1 paras.2 and 3., a tenant’s homosexual partner could depending on individual circumstance, be family member but not spouse. In the case of *Mendoza v. Ghaidan*<sup>20</sup> however, the House of Lords concluded that para.2 of the Rent Act 1977 should be read, and given effect to, as though the survivors of a homosexual couple living together was the surviving spouse of the original tenant.

The status of ‘marriage’ in the laws of England and Wales encompasses same sex unions only. The Civil Partnership Act 2004 however gives almost identical rights and responsibilities to civil partnerships as in marriage.

The minimum marriage age for both sexes according to the Ages of Marriage Act 1929 is 16.<sup>21</sup> Nowadays, the average age of marriage is 25-29 for both genders.<sup>22</sup> There has been a decrease in the number of marriages in recent years, with people preferring cohabitation.

#### Child Protection

iii. (a) Status of children within the UK’s cultural background and the UK approach to children rights

A sectoral approach has been prominent in the UK with particular focus on certain rights, and neglect for other rights.<sup>23</sup> Currently, 3.8 million children live in poverty the UK while 1.6 million children, who compromise 13 per cent of all children in the UK, are living in severe poverty. The criminal law system of the United Kingdom has been constantly criticised for having one of the lowest ages of the criminal responsibility in Europe, which is, since the abolishment of *Doli incapax* – a rule that protected children as being incapable of making a

<sup>18</sup> *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC (HL).

<sup>19</sup> *Ibid*, 38 [D] (Slynn LJ).

<sup>20</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

<sup>21</sup> Age of Marriage Act (Northern Ireland) 1951, s 1.

<sup>22</sup> Statistical Bulletin, ‘Marriages in England and Wales 2010’, Office of National Statistics  
<[http://www.ons.gov.uk/ons/dcp171778\\_258307.pdf](http://www.ons.gov.uk/ons/dcp171778_258307.pdf)> accessed 26 October 2012.

<sup>23</sup> Children’s Rights Alliance for England State of Children’s Rights December 2011.

decision with full understanding of the consequences – in 1998, set at 10 years.<sup>24</sup> The UN Committee on the Rights of the Child criticised the UK's low age of criminal responsibility in 1995, 2002 and 2008. In 2001 the Prisons Minister Crispin Blunt has stated that the coalition government is not planning to increase the age to 14 years<sup>25</sup>, despite the requirement of the Convention to protect all children from contact with the criminal justice system.

Furthermore, amongst other problematic issues remains the treatment of asylum seeking children. The government is not currently planning to introduce a system to select guardians for unaccompanied children arriving to the UK. Children are being returned to Europe according to Dublin II regulation, removals of families are enforced by separating children from their parents, children are being held in detention centres for considerable period of time – all these issues evoke serious concern from the international community and require a thorough investigation by the government and effective attempts for improvement of the current situation.<sup>26</sup>

Progress has been made in the treatment of children during the screening interview process. Although the mistreatment has not ended completely, according to the reports of the Office of the Child Commissioner, a specialised training undertaken by the UKBA staff has improved experience of the children during interviews conducted.

(b) Violations catching the eye of the media and the legislators

In recent years there have been many cases reported by the media involving child abuse. The government and the legislators have been under extreme pressure to react to numerous scandals highlighting the UK law's deficiencies in the area of child protection.

The murder of 9-year-old Victoria Climbié, in 2000, who was tortured and killed by her guardians was crucial to the change of child protection policies in England. An inquiry was launched into the case pointing out the repetitive failures of the British system. The case led to the formation of the Every Child Matters initiative, the introduction of the Children Act 2004 which also created the Office of the Children's Commissioner chaired by the

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<sup>24</sup> Council of Europe Annual Penal Statistics, SPACE I (2009) 51  
< <http://www.coe.int/t/dghl/standardsetting/cdpc/bureau%20documents/PC-CP%282011%293%20E%20-%20SPACE%20I%202009.pdf>> accessed 26 October 2012.

<sup>25</sup> HC Deb, 8 March 2011,col 171WH .

<sup>26</sup> *Ibid.*

Children's Commissioner for England, the creation of the ContactPoint project and the creation of a government database designed to hold information on all children in England. The ContactPoint was a database, which contained information on all children under 18 in England. It was heavily criticised for privacy, security and child protection reasons.<sup>27</sup> The new UK Coalition Government announced the decisions for the termination of the project<sup>28</sup> and in August 2010 the database was switched off.

In 2007 the Baby P case, involving the death of a 17-month-old baby boy due to abuse, which was overlooked by Haringey Children's services and NHS health professionals, highlighted the persistent problems in the child protection system in the UK. In his report<sup>29</sup>, Lord Laming stated that too many authorities had failed to adopt reforms introduced by his previous review into welfare following the death of Victoria Climbié in 2000. Haringey Council initiated an internal audit to identify reasons for the failure of its officers to act, but the full report was not available to the public and therefore further investigations were launched. Two years following his death, the social worker working on his case and three managers of the Haringey Council were dismissed. The General Medical Council had actions of two doctors who examined the boy inspected, which resulted in their suspensions. As a consequence of a review of general practices of Haringey social services, which was conducted at the request of Edd Balls, Secretary of State for Children, Schools and Families, Sharon Shoesmith - the head of children's social services was removed from her post as well.<sup>30</sup>

Recent stories have been published including teenage girls in care homes being groomed and targeted for sex by groups of men. Victoria Agoglia was a 15-year-old girl placed at a solo home, who died of heroin overdose after she was groomed for sex.<sup>31</sup>

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<sup>27</sup> Jessica Shepherd, 'New children's database faces criticism' *The Guardian* (London, 26 January 2009) <<http://www.guardian.co.uk/society/2009/jan/26/childrens-database-contactpoint>> accessed 27 October 2012.

<sup>28</sup> Election 2010: Conservative-Lib Dem deal BBC (12 May 2010) <[http://news.bbc.co.uk/1/hi/uk\\_politics/election\\_2010/8677933.stm](http://news.bbc.co.uk/1/hi/uk_politics/election_2010/8677933.stm)> accessed 27 October 2012.

<sup>29</sup> The Lord Laming, 'The Protection of Children in England : A Progress Report' 12 March 2009 .

<sup>30</sup> Judy Cooper, Molly Garboden and Camilla Pemberton, Baby Peter case in Haringey, Community Care. <<http://www.communitycare.co.uk/Articles/09/12/2010/109961/baby-peter-case-in-haringey.htm>> accessed 27 October 2012.

<sup>31</sup> "‘Drugs’ death teenager named" (*BBC News*, 1 October 2003). <<http://news.bbc.co.uk/1/hi/england/manchester/3155664.stm>> accessed 27 October 2012.

In 2009, Vanessa George, who worked at a nursery, involved in a paedophile ring was convicted for a series of child sexual assaults and sharing images of the abuse online.<sup>32</sup> In 2012, another nursery worker admitted sexually abusing toddlers of ages two and three.<sup>33</sup> In September 2012 the British public was appalled by a grooming scandal in Rochdale. After arresting 9 men who led a children exploitation ring, an extensive examination has shown that the social workers failed to report stories of groomed girls, some as young as ten. In some cases the workers believed that 10 year olds “were making their own choices”, whilst the abused girls were attempting to seek help. The staff missed opportunities to address the problem and to “bring the perpetrators to justice”.<sup>34</sup>

#### iv. International Obligations

The UK has signed up to several major international instruments that affect children’s rights including Convention on Cybercrime, Convention on Action Against Trafficking, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. It is, therefore, responsible to uphold numerous international obligations regarding the rights of the child. According to the Constitutional Reform and Governance Act 2010, part 2:

“(1) Subject to what follows, a treaty is not to be ratified unless—

- (a) a Minister of the Crown has laid before Parliament a copy of the treaty,
- (b) the treaty has been published in a way that a Minister of the Crown thinks appropriate, and
- (c) period A has expired without either House having resolved, within period A, that the treaty should not be ratified.

(2) Period A is the period of 21 sitting days beginning with the first sitting day after the date on which the requirement in subsection (1)(a) is met”

The relationship between UK state law and international treaties is based on a dualist approach. In dualist states, a treaty adopted by the state does not alter the national laws

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<sup>32</sup> ‘Woman jailed for child abuse at day nursery’ ( *The Independent*, 16 December 2009)  
<<http://www.independent.co.uk/news/uk/crime/women-jailed-for-child-abuse-at-day-nursery-1841972.html>> accessed 27 October 2012.

<sup>33</sup> ‘South Lanarkshire nursery worker admits sex abuse of toddlers’ (*BBC News*, 10 May 2012).  
<<http://www.bbc.co.uk/news/uk-scotland-glasgow-west-18023422>> accessed 27 October 2012.

<sup>34</sup> The Rochdale Borough Safeguarding Children Board, ‘Review of Multi-agency to Responses to the Sexual Exploitation of Children’ (September 2012).



unless incorporated into national law by the legislation.<sup>35</sup> Therefore, for treaty law to apply in UK territory, the UK parliament has to adopt the relevant legislation incorporating international law into national law.

The UK is a member state of the United Nations Convention on the Rights of the Child, which was ratified on 16 December 1991.

Reservations were made upon ratification on several topics, which were later withdrawn.<sup>36</sup>

The first reservation concerns “the right to apply such legislation, in so far as it related to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and the acquisition and possession of citizenship, as it may deem necessary from time to time”. The reservation was withdrawn on the 18 November 2008.

The second reservation concerned Art. 32. As stated “employment legislation in the United Kingdom does not treat persons under 18, but over the school-leaving age as children, but as “young people”. Accordingly the United Kingdom reserves the right to continue to apply article 32 subject to such employment legislation.” On 3 August 1999 the UK withdrew its reservation.

In its third reservation the UK “where at any time there is a lack of suitable accommodation or adequate facilities for a particular individual in any institution in which young offenders are detained, or where the mixing of adults and children is deemed to be mutually beneficial, the United Kingdom reserves the right not to apply article 37 (c) in so far as those provisions require children who are detained to be accommodated separately from adults.”<sup>37</sup> On 18 November 2008 the reservation was withdrawn.<sup>38</sup>

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<sup>35</sup> European Scrutiny Committee –Tenth Report: The EU Bill and Parliamentary Sovereignty  
<<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633/63304.htm>> accessed 26 October 2012 .

<sup>36</sup> Multilateral Treaties deposited with the Secretary-General, Status as at 31 December 1991, (*United Nations*, New York 1992) paras 202-203 <<http://www.icrc.org/ihl.nsf/NORM/2F76B1DA5D7509D7C1256402003FCCF3?OpenDocument>> accessed 26 October 2012.

<sup>37</sup> Multilateral Treaties deposited with the Secretary-General, Status as at 31 December 1991, (*United Nations*, New York, 1992), paras 202-203  
<<http://www.icrc.org/ihl.nsf/NORM/2F76B1DA5D7509D7C1256402003FCCF3?OpenDocument>> accessed 27 October 2012.

<sup>38</sup> <<http://www1.barnardos.org.uk/committedtorights/resources.html>> accessed 27 October 2012

During the UK's Universal Periodic Review report<sup>39</sup> in the 21<sup>st</sup> session of the United Nations Human Rights Council in Geneva, several states urged the UK to withdraw its reservations on numerous optional protocols to the Convention on the Rights of the Child.<sup>40</sup> In response, Karen Pierce, the Permanent Representative of the United Kingdom to the United Nations Office at Geneva stated that the UK has withdrawn its reservations to the Convention.

The Convention on the Rights of the Child is currently not incorporated into national law despite many calls from non-governmental organizations such as the Rights of the Child UK<sup>41</sup> and Barnardos<sup>42</sup>. Baroness Hale, however has stated that *"Even if an international treaty has not been incorporated into domestic law, our domestic legislation has to be construed so far as possible so as to comply with the international obligations which we have undertaken. When two interpretations of these regulations are possible, the interpretation chosen should be that which better complies with the commitment to the welfare of children which this country has made by ratifying the United Nations Convention on the Rights of the Child."* The provisions of the Convention are relevant to the interpretation of the European Convention and as Lord Bingham stated in *Dyer v Watson* [2004] 1 UKPC at [23] *"colour the courts approach."*<sup>43</sup> In other words, the courts when interpreting domestic legislation prefer to comply with international instruments.

The UK Government did not stand still. The Children's Act 2004 adoption for England and Wales created the Children's Commissioner for England. This position is currently taken by Sir Al Aynsley-Green. The Childcare Act 2006 and a range of legislation on the right to education<sup>44</sup> were enacted.

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<sup>39</sup> Universal Periodic Review, UK Report, March 2012, <<http://www.justice.gov.uk/downloads/human-rights/upr-report.pdf> > accessed 26 October 2012.

<sup>40</sup> UNOHCHR, 'Human Rights Council adopts outcome of Universal Periodic Review on the United Kingdom, India and Brazil' <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12553&LangID=E>> accessed 26 October 2012.

<sup>41</sup> ROCK Coalition, 'Why incorporate? Making rights a reality for every child' <[http://www.crae.org.uk/assets/files/ROCK%20Coalition\\_Why%20Incorporate%20the%20CRC.pdf](http://www.crae.org.uk/assets/files/ROCK%20Coalition_Why%20Incorporate%20the%20CRC.pdf) > accessed 26 October 2012.

<sup>42</sup> above, n 38.

<sup>43</sup> *Smith (FC) v The Secretary of State for Work and Pensions* [2006] UKHL 35 at [78], [2006] 3 All ER 907.

<sup>44</sup> Human Rights Act 1998.

Despite recommendations by the Joint Committee on Human Rights that the UK Government should devise a comprehensive and detailed plan for implementation of the UNCRC recommendations across the UK in 2009<sup>45</sup>, the CRC has not been incorporated yet.

In 2010 the British Parliament started to discuss the adoption of the Children's Bill of Rights<sup>46</sup>, which would have made the Convention on the Rights of the Child part of UK national law. Unfortunately the Bill was not adopted, because the Second Reading did not take place. The Parliament was dissolved prior to the 2010 General Election.

*Children's Minister, Tim Loughton, told the UK Parliament in September 2011:*

*"There are no plans to incorporate the Convention into domestic legislation. In general the UK Government does not incorporate treaties and international conventions directly into UK law. There is no requirement in the [Convention] that it be incorporated into a single piece of legislation. Our approach to deliver the [Convention's] outcomes is through a mixture of legislative and policy initiatives."* The optional protocols on the sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict also need to be incorporated into UK law. It would ensure accessible means through which children can assert their individual rights and entitlements. Such a Bill would have a range of effects into national legislation and procedure and it would impose a duty to ensure all new legislation is compatible with the convention and is "children's rights proofed". The interpretation of convention rights would be determined by a court or a tribunal. 'Children in the UK are in need of a more comprehensive framework to protect their rights, they need their own Magna Charta recognizing their rights and entitlements.'<sup>47</sup>

v. European Obligations: Directive 2011/93/EU

The UK became a member state of the European Union on 1<sup>st</sup> January 1973. The UK is under obligation to conform to certain EU laws and incorporate them to national legislation in several matters, as part of the European Union. The Directive 2011/93/EU of the European Parliament and the European Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replaced the

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<sup>45</sup> < <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/157.pdf> > accessed 27 October

<sup>46</sup> Joint Committee on Human Rights, 'Children's Rights – Twenty-fifth Report of Session 2008-2009' (HL Paper 157, HC 318) London November 2009.

<sup>47</sup> above, n 41.

Council Framework Decision 2004/68/JHA. The Directive “*established minimum rules in the EU concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes and introduces provisions to strengthen the prevention of those crimes and the protection of the victims thereof*”<sup>48</sup>.

During a debate in the House of Commons on the 26<sup>th</sup> of April 2011 Mr. Blunt<sup>49</sup> stated that no major changes would be required to existing legislation and practice in England and Wales, because the UK has implemented high standards of protection already and the reason behind opting in to this instrument is the desire to rise standards in other European states. <sup>50</sup>An article-by-article account of the plans for implementation across the UK will be provided once the text is finally agreed.<sup>51</sup>

No further information about the process of implementation of the directive has been provided by the UK authorities.

## 2 THE LANZAROTE CONVENTION

i. The European Convention on Human Rights was signed by the UK on 4 November 1950 and ratified in 1951. The UK was actively involved in the drafting of the Convention. The Human Rights Act 1998 is the main instrument of the ECHR implementation into UK law. According to Art. 3 of the 1998 Act, “*so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*”. UK courts have, under Art.4 of the Act, the ability to make a declaration of incompatibility ‘*if they are satisfied that the provision is incompatible with a Convention right*’.

It should be noted that the European Convention on Human Rights does not provide much in particular to children’s rights. There have been series of cases being brought to the European Court of Human Rights against the UK regarding the physical punishment of

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<sup>48</sup> CONSILIUM, ‘Council conclusions on a Global Alliance against Child Sexual Abuse Online’ <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/130727.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/130727.pdf)> accessed 27 October 2012.

<sup>49</sup> HC Deb 26 April 2011, col 18 <<http://www.publications.parliament.uk/pa/cm201012/cmgeneral/euro/110426/110426s01.htm>> accessed 27 October 2012.

<sup>50</sup> HC Deb 26 April 2011, col 8 <<http://www.publications.parliament.uk/pa/cm201012/cmgeneral/euro/110426/110426s01.htm>> accessed 27 October 2012.

<sup>51</sup>*Ibid.*

children and care cases without much success. In the case of *Campbell and Cosans v UK*<sup>52</sup> the court rejected allegations of corporal punishment as the boy in question was not a subject of such punishment. It did, however, rule that the UK was in breach of Article 2 of Protocol 1 of the Convention which converts the right to education and the duty of the State to respect to the parents philosophical conviction with regards to that education and teachings. In the cases of *Y v UK*<sup>53</sup> and *Costello-Roberts v UK*<sup>54</sup> it was unsuccessfully argued that corporal punishment amounted to degrading treatment and therefore was in breach of Article 3 of the ECHR. In the landmark case of *A v UK*<sup>55</sup> however, it was held the applicants right under Article 3 had in fact been breach. The boy, in question, was beaten with a cane by his father, causing him bruising. Also in the case of *Z and Others v UK*<sup>56</sup> the Court held that the failure of social services to remove children from parents known to be neglecting them was in breach of Article. Nevertheless, in the case of *D.P. and J.C. v UK*<sup>57</sup> regarding the failure of social services to protect children from sexual abuse, no breach of any of the Convention rights in question, namely Article 3, 8 and 6, was found to exist. Yet, in the case of *E and Others v UK*<sup>58</sup>, failure of the social services to protect children from sexual and physical abuse by their mother's partner was in breach of Article 3.

ii. The UK is a signatory party to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, namely the Lanzarote Convention since 5 May 2008 and it has yet to ratify it. No reservations or opt outs were made.

iii. There is no set date of ratification of the Convention at the present time. Questions have been made to the Parliament regarding the ratification and implementation process. The UK Government responded through Lynne Featherstone, the Parliamentary Under-Secretary for Equalities, who stated that “*discussions are taking place across Government to establish a clear picture of current levels of existing compliance. Subject to the successful progression of these discussions, we aim to reach a decision on the steps needed to ratify and implement the convention before the conclusion of this Parliament.*”<sup>59</sup>

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<sup>52</sup> *Campbell and Cosans v. UK* (1982) 4 EHRR 293.

<sup>53</sup> *Y v. UK* (1992) 17 EHRR 238.

<sup>54</sup> *Costello-Roberts v UK* (1993) 19 EHRR 112.

<sup>55</sup> *A v UK* [1998] 2 FLR 959.

<sup>56</sup> *Z and Others v UK* (2001) 34 ECHR 97.

<sup>57</sup> *D.P. and J.C. v UK* [2002] ECHR 663.

<sup>58</sup> *E and Others v UK* (2002) App no 33218/96 (ECHR, 26 November 2002).

<sup>59</sup> House of Commons Hansard Written Answers Index for 11 July 2012

iv. When ratified, the rank of the Lanzarote Convention under the UK's national legal order will merely be a source of interpretation. For it to have a binding effect, it has to be incorporated into national law. In addition, if ratified, the convention can be used as a source for guidelines for policy makers and step-by-step make children's rights a reality.

## II NATIONAL LEGISLATION

### 1 GENERAL PRINCIPLES OF THE JURISDICTION

i. The modern United Kingdom (UK) is a union of England, Wales, Scotland and Northern Ireland. It does not include the Channel Islands and the Isle of Man (the British Islands). The UK is composed of three legal systems: (a) England and Wales, (b) Scotland, and (c) Northern Ireland. The focus of this report is on the law of England and Wales.

The seat of government is in Westminster, and the sovereign organ is the Queen-in-Parliament. Major public powers are vested in Ministers, who are servants of the crown. By structure of devolution, some legislative and executive powers have been vested in elected bodies in Scotland, Northern Ireland and Wales. The essential features of the devolution settlement are to be found in the Scotland Act 1998, the Government of Wales Act 2006, and the Northern Ireland Act 1998.

There is no one single written Constitution. The British Constitution is rather "*indeterminate, indistinct, and unentrenched*"<sup>60</sup>; a product of history, but also originality<sup>61</sup>, and composing a 'flexible'<sup>62</sup> structure of rules, conventions, institutions and principles. *Constitutional reforms effected since 1997 have relied for their efficacy on the unwritten rule of Parliamentary supremacy*<sup>63</sup>. The UK is a parliamentary democracy and the fundamental principle of constitutional law is the doctrine of parliamentary sovereignty, by which the Queen in Parliament "*has under the*

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<<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120711/index/120711-x.htm>>  
accessed on 27 October 2012.

<sup>60</sup> Finer, Bogdanor and Rudden, *Comparing Constitutions* (OUP 1995) 40.

<sup>61</sup> *Ibid* 100.

<sup>62</sup> Phillips, Jackson, and Leopold, *O. Hood Phillips & Jackson: Constitutional and Administrative Law: Eighth Edition* (Sweet & Maxwell 2001) 21.

<sup>63</sup> *Ibid* 18.

*English constitution, the right to make or unmake any law whatsoever; and further...no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament*<sup>64</sup>.

ii. The Human Rights Act was enacted in 1998, and incorporated the European Convention on Human Rights (1950; ratified by the UK in 1951) into domestic law<sup>65</sup>. The Government stated that its aim with this legislation was to “*make more directly accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home*”<sup>66</sup>. The Act enables citizens to enforce their human rights before the domestic courts, rather than having to go to the European Court in Strasbourg as was previously the case, although having exhausted domestic remedies they may still have recourse to the Strasbourg Court<sup>67</sup>. The European Convention on Human Rights has had a significant impact on British constitutional law. Between January 1966, when the right of individual petition was accepted and the Convention was considered “*a sleeping beauty (or slumbering beast...)*”<sup>68</sup> and 2011, the Court has issued 279 judgements in which violations were found<sup>69</sup>.

In March 2011 the Government established an independent Commission on a Bill of Rights. Its mandate is to “investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties”<sup>70</sup>. The Commission is due to report back by the end of 2012.

There are no specific provisions in the Human Rights Act regarding Children’s Rights, but that is because this is an Act giving ‘further effect to rights and freedoms guaranteed under the European Convention on Human Rights’<sup>71</sup>, not creating substantive rights. Specific provisions on child rights are contained within other legislation, including the Children Act

<sup>64</sup> Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund Inc 1982) 39-40. For the effect of European Union law on the principle of parliamentary sovereignty, see Finer, Bogdanor, and Rudden, *Comparing Constitutions* (OUP 1995); Loveland, ‘Britain and Europe’, in Bogdanor (ed.), *The British Constitution in the Twentieth Century* (OUP 2003) 663-688; Phillips, Jackson and Leopold, *O. Hood Phillips & Jackson: Constitutional and Administrative Law* (8<sup>th</sup> ed, Sweet & Maxwell 2001) 110-135.

<sup>65</sup> On the growth of the human rights culture, see Feldman, ‘Civil Liberties’, in Bogdanor (ed.), *The British Constitution in the Twentieth Century* (OUP 2003) 401-481.

<sup>66</sup> White Paper, *Rights Brought Home: The Human Rights Bill* (1997) HMSO CM 3782) at para 1.19.

<sup>67</sup> See, e.g. Irvine, ‘The Human Rights Act: Principle and Practice’ (2004) *Parliamentary Affairs* 57(4), 744-753.

<sup>68</sup> Lester and Clapinska, ‘Human Rights and the British Constitution’ in Jowell and Oliver (ed.), *The Changing Constitution* (5<sup>th</sup> ed, 2004) 67-9.

<sup>69</sup> Council of Europe, Annual Report 2011 of the European Court of Human Rights (2012, Council of Europe) 161.

<sup>70</sup> <<http://www.justice.gov.uk/about/cbr>, Accessed 19 September 2012> accessed 28 October 2012.

<sup>71</sup> Preamble to the Human Rights Act 1998.

1989. In its submission regarding the Bill of Rights, the ROCK collation has suggested that such a Bill incorporate the rights in the UN Convention on the Rights of the Child.

iii. With the incorporation of the European Convention on Human Rights into domestic law by the Human Rights Act 1998 citizens are able to enforce their human rights before all domestic courts. The structure of these domestic courts is one of a multi-layered hierarchy. The Supreme Court of the United Kingdom is the highest court of appeal for UK civil cases, and also the highest court of appeal for criminal cases in England, Wales and Northern Ireland<sup>72</sup>. It was established by Part 3 of the Constitutional Reform Act 2005. It hears appeals from the Court of Appeal and, in exceptional circumstances, the High Court, which in turn hear appeals from the courts below them.

As for specific judicial bodies monitoring implementation of national and international human rights instruments, Section 3 of the Human Rights Act provides for an interpretive obligation on courts to ‘read and give effect’ to legislation in a way compatible with Convention rights, ‘so far as it is possible to do so’. Judges cannot disapply or hold invalid primary legislation as this would run contrary to Parliamentary legislative sovereignty, but under Section 4, specified (superior) courts can make a declaration of incompatibility as to the legislation if satisfied that a provision is incompatible with a Convention right. This brings the incompatibility to the attention of the relevant minister, facilitating amending legislation.

iv. The Supreme Court of the United Kingdom is the highest court of appeal for criminal cases in England, Wales and Northern Ireland. The criminal procedure for appeals to the Supreme Court is contained within the Criminal Procedure Rules 2012/1726. Appeals can be made following an application to the Court of Appeal concerning retrial following acquittal for a serious offence, an appeal to the Court of Appeal against ruling at preparatory hearing, ruling adverse to prosecution, or about conviction or sentence or following a reference to the Court of Appeal of point of law or unduly lenient sentencing<sup>73</sup>. The Court of Appeal *must* have granted permission to appeal.

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<sup>72</sup> <[www.supremecourt.gov.uk](http://www.supremecourt.gov.uk)> accessed 2 August 2012.

<sup>73</sup> Rule 74 (‘Appeal or Reference to the Supreme Court’) of the Criminal Procedure Rules 2012/1727 (version in force from October 1 2012).



v. The age of criminal responsibility in England and Wales is 10 years old<sup>74</sup>. Children and young people aged 10-18 fall under the responsibility of the young justice system, which is distinct from the adult justice system and is overseen by the Youth Justice Board<sup>75</sup>. The average population under 18 in custody in 2010/11 was 2,040<sup>76</sup>. 79% of these were in Young Offender Institutions, 13% in Secure Training Centres, and the remaining 8% in Secure Children's Homes.<sup>77</sup>

## 2 SUBSTANTIVE CRIMINAL LAW

### 2.1 Sexual Abuse

i. Section 4 of the Sexual Offences Act 2003 (which replaced the Sexual Offences Act 1956 and hereafter referred to as 'Sexual Offences Act'), makes it an offence for a person (A) to intentionally cause another person (B) to engage in sexual activity without that person's consent, if he does not reasonably believe that B consents.

Under this section, the offence can be committed by words alone, for example a victim is forced to carry out a sexual act involving their own person (eg: self-masturbation). Also, the offence covers situations where the victim is forced to engage in sexual activity with a third party (who may be willing or not) or to engage in sexual activity with the offender.

'Sexual activity' is defined broadly in Section 78 of the Sexual Offences Act:

Penetration, touching or any other activity is sexual if a reasonable person would consider that –

whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or

because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.<sup>78</sup>

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<sup>74</sup> <<https://www.gov.uk/age-of-criminal-responsibility>> accessed 2 August 2012.

<sup>75</sup> Youth Justice Board and Ministry of Justice, *Youth Justice Statistics Bulletin 2010/11: England and Wales* (Ministry of Justice 2012) 4.

<sup>76</sup> *Ibid* 29.

<sup>77</sup> *Ibid* 31.

<sup>78</sup> Sexual Offences Act 2003, s78.

According to the Legal Guidance of the Crown Prosecution Service, the nature of the activity has to be taken into consideration when deciding whether an activity is sexual (or not). Moreover, even where the nature of the activity is found not to be sexual, one should look at the circumstances or purpose of the defendant, or even both in deciding whether it falls under the definition of 'sexual'. An example is the case of *R v Price* [The Times 20 August 2003]<sup>79</sup> where the stroking of a woman's leg over trousers was considered to be an indecent assault and thus satisfying the definition of 'sexual'. [see also *R v H* (Karl Anthony)<sup>80</sup>] – where touching was again widely defined.

Finally, a secret fetish cannot be made sexual where the nature of the act cannot be sexual. Therefore, the term 'sexual activities' under the UK legislation is to be applied broadly.

ii. 'Intention' here is defined in the case law as basic intent; deliberate<sup>81</sup>. The criminal liability of an internationally committed crime of sexual abuse varies by offence, and is accordingly outlined in the Sexual Offences Act.

Section 7 of the Sex Offenders Act 1997 extended the jurisdiction of the courts of England, Wales and Northern Ireland. It was repealed and replaced by section 72 of the SOA 2003 on 1 May 2004, which in turn was amended by s.72 Criminal Justice and Immigration Act 2008. The outcome is that if a person commits an act outside the UK, which is an offence in that country or territory, that person can be prosecuted in the UK for the offence, if it is a sexual offence listed in Schedule 2 of the SOA 2003.

iii. The legal age for engaging in consensual sexual activities is 16. Consensual sexual activities between minors are regulated by the Sexual Offences Act and the Legal Guidance issued by the Crown Prosecution Service.

An important aspect of the criminal law is that the principal aim of the Youth Justice System is the prevention of offending by children and young persons. In particular, section 37 of the Crime and Disorder Act 1998 states that:

*(1) It shall be the principal aim of the youth justice system to prevent offending by children and young persons.*

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<sup>79</sup> [2003] All ER (D) 331 (Jul).

<sup>80</sup> [2005] 2 Cr App R 9.

<sup>81</sup> *R v Heard* [2007] EWCA Crim 125; see also Crown Prosecution Service Legal Guidance on the Sexual Offences Act 2003 <[http://www.cps.gov.uk/legal/s\\_to\\_u/sexual\\_offences\\_act/#Intent](http://www.cps.gov.uk/legal/s_to_u/sexual_offences_act/#Intent)> accessed 28 October 2012.

*(2) In addition to any other duty to which they are subject, it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim.*<sup>82</sup>

The Directors Guidance on Charging (third edition: February 2007) states that offences under the Sexual Offences Act 2003 committed by or upon persons under the age of 18 years must always be referred to a Crown Prosecutor for early consultation and charging decision, whether admitted or not. In addition, Youth Offender Specialists should review all files involving youth offenders and take all major decisions in relation to those cases, in particular, whether or not a prosecution should take place.

The Code for Crown Prosecutors with regard to child defendants in these cases cites Lord Falconer's comment during the passage of the bill:

"Our overriding concern is to protect children, not to punish them unnecessarily. Where sexual relationships between minors are not abusive, prosecuting either or both children is highly unlikely to be in the public interest. Nor would it be in the best interests of the child...."

Prosecutors may exercise more discretion where the defendant is a child (under 18), according to the Code for Crown Prosecutors. Before commencing prosecution, the public interest will be considered, since the protection of children is the overriding public concern. In addition, there are a number of factors to be taken into account before prosecuting young defendants, detailed in the Legal Guidance.<sup>83</sup> Examples include the age and the understanding of the offender; the nature of the activity and what is in the best interests of both the complainant and the defendant. In *R (on the application of S) v Director of Public Prosecutions, QBD (Admin) 28/06/2006*, the following was emphasised:

"It is **not** in the public interest to prosecute children who are of the same or similar age and understanding that engaging in sexual activity, where the activity is truly consensual for both parties and there are no aggravating features, such as coercion or corruption. In such cases, protection will normally be best achieved by providing education for the children and young

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<sup>82</sup> Crime and Disorder Act 1998, s 37.

<sup>83</sup> The Crown Prosecution Service, 'Sexual Offences Act 2003'.

people and providing them and their families with access to advisory and counselling services. This is the intention of Parliament.”<sup>84</sup>

The Sexual Offences Act provides for three categories of offences against children of different ages: 13 (Sections 5-8), 16 (Sections 9-13), and 18 (Sections 16-24). The latter concerns offences involving abuse of position of trust. Where an offence under sections 9 - 12 is committed by a person under 18 there is a reduction in penalty. The culpability of young offenders who are found guilty of certain sexual offences (‘consensual’ category) is given a special provision. Thus, under the Sexual Offences Act, offenders aged younger than 18 will face a maximum penalty of 5 years’ detention as opposed to the maximum 14 years for offenders aged 18 or over.

Welfare is significant when dealing with young offenders. Specifically, section 44(1) of the Children and Young Persons Act 1933 states that when a court is dealing with a young offender, welfare should always be taken into account.<sup>85</sup> In addition, different factors can influence a decision. For example, in *R v Paimant Asi-Akram*<sup>86</sup> it was noted that the youth and immaturity of an offender should be potential mitigating factors when passing a sentence; however the seriousness of the facts of the offence should not be disregarded in any case.

The age of criminal responsibility in England and Wales is currently ten. Therefore no child under this age can be found guilty of a criminal offence. This should be worrying if we compare UK law to other laws in different countries. For instance, the age of criminal responsibility in France is 13, 14 in Germany, Austria, Italy and many eastern European countries. Also the age of criminal responsibility rises even more in Scandinavia which is set at 15 years old, 16 in Portugal, Poland and Andorra and 18 in Spain, Belgium and Luxembourg. It is also worth noting that some of the above mentioned countries have a presumption akin to *doli incapax*, which the UK has abolished under the Crime and Disorder Act 1998. Section 34 states the following:

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<sup>84</sup> *Ibid.*

<sup>85</sup> Sentencing Guidelines Council, ‘Sexual Offences Act 2003, Definitive Guideline’ [2007].

<sup>86</sup> EWCA Crim 1543.

The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished.<sup>87</sup>

Critics of the UK age of criminal responsibility argue that this is too low and should be increased to at least 12 in accordance with the recommendations of the UN Committee on the Rights of the Child. The Children's Commissioner Maggie Atkinson stated that:

“The age of criminal responsibility in this country is ten – that’s too low, it should certainly be moved up to 12. In some European countries it’s 14. People may be offenders but they are also children. Even the most hardened of youngsters who have committed some very difficult crimes are not beyond being frightened.”<sup>88</sup>

However, there is optimism surrounding this issue. Positive claims have been recently been made by the Justice Minister David Ford, that the age of criminal responsibility could rise to 12. He said he is committed to pressing for this increase in age while also stating that: ‘10 years old was too young to deal with the weight of a criminal justice system’.<sup>89</sup> He emphasised that young offenders are more in need of protection by the society rather than punishment.

iv. The use of force, taking advantage of mental disorder, or threat, in relation to sexual offences is regulated in Sections 30-37. Where a defendant, for example, is exploitative, or coercive, or much older than the victim, the balance may be in favour of prosecution, whereas if the sexual activity is truly of the victim's own free will the balance may not be in the public interest to prosecute.

Children with disabilities face an increased risk of abuse for a variety of reasons. According to the NSPCC, factors such as communication difficulties, or isolation and their dependency on their carer can affect a disabled child’s ability to recognise and understand that they are being abused as well as their ability to access help and support.<sup>90</sup> NSPCC strategy, whose vision is to end cruelty and protect children in the UK, is focusing in delivering innovative

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<sup>87</sup> Crime and Disorder Act 1998, s 34.

<sup>88</sup> “Even Bulger killers were just children, says Maggie Atkinson, Children’s Commissioner” (*Times*, 13 March 2010)

<sup>89</sup> ‘Age of criminal responsibility could rise says David Ford’ (*BBC News*, 23 October 2012).

<sup>90</sup> NSPCC, ‘Children with Disabilities’ <[www.nspcc.org.uk/disabledchildren](http://www.nspcc.org.uk/disabledchildren)> accessed 28 October 2012.

services that keep disabled children safe from harm. Moreover, NSPCC provides a course<sup>91</sup> for professionals who work with children with disabilities. This course aims in helping those professionals to develop confidence and knowledge to be able to safeguard and promote the welfare of children and young people with disabilities.

v. Crimes of incest are familial child sex offences. It involves family members and close relatives. Example of such situations are where someone is living within the same household as a child and assuming a position of trust or authority over that child; relationships defined by blood ties; adoption; fostering.

The crime of incest is regulated under Sections 25-29 of the Sexual Offences Act 2003. For instance, sexual activity with a family member is an offence (section 25), while inciting a child family member to engage in sexual activity is also an offence (section 26). For the purposes of sections 25 and 26 family relationships are defined in section 27 and they fall within three categories.<sup>92</sup>

vi. There are specific provisions concerning offenders who take advantage of school and educational settings, care and justice institutions, the work-place and the community. These are offenders aged 18 or over who are in 'a position of trust' and who abuse that position by behaving in a sexual way towards children under 18.

Sections 16-24 of the 'Sexual Offences Act' have been put in place which try to regulate abuses committed by persons in a position of trust. The main purpose of these provisions is to protect young people who are considered to be particularly vulnerable and could be easily exploited by people who hold a position of trust or authority in their lives.<sup>93</sup> Section 21 of the Sexual Offences Act outlines 'positions of trust' and Section 22 provides for interpretation of the positions. For example, looking after persons in educational establishments, residential settings, or where duties involve regular unsupervised contact of children in the community.

Moreover disqualification orders are available under sections 28 and 29 of the Criminal Justice and Court Services Act 2000. A Disqualification Order can only be made by a Crown Court or Higher Court to disqualify a person convicted of an 'offence against a child' from

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<sup>91</sup> *Ibid.*

<sup>92</sup> Sexual Offences Act 2003, s 27.

<sup>93</sup> The Crown Prosecution Service, 'Child Abuse: Guidance on Prosecuting cases of Child Abuse'.

working with children. The order may (and in some cases must) disqualify from working with children indefinitely.<sup>94</sup>

## 2.2 Child Prostitution

vii. The UK signed the Council of Europe Convention on Action against Human Trafficking on March 23 2007, ratified it on 17 December 2008, and brought it into force on 1 April 2009.

Abuse of children through prostitution is dealt with in Sections 47-50 of the Sexual Offences Act. These offences are: paying for sexual services of a child (47); causing or inciting child prostitution or pornography (48); controlling a child prostitute or a child involved in pornography (49); arranging or facilitating child prostitution or pornography (50). This category of offences complies with the stipulation in Article 19 of the Lanzarote Convention that State Parties are to take legislative or other means to ensure that intentional conduct in relation to the following is criminalised:

recruiting a child into prostitution or causing a child to participate in prostitution;

coercing a child into prostitution or profiting from or otherwise exploiting a child for such purposes;

having recourse to child prostitution.

viii. The Lanzarote Convention specifically defines ‘child prostitution’ in Article 19(2) as ‘the fact of using a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment, regardless, if this payment, promise or consideration is made to the child or to a third person’. Whilst the Sexual Offences Act does not specifically define ‘child prostitution’ per se, the breadth and depth of provision for this offence renders it compatible with the Convention definition.

The offences under these sections concern either (i) a child (B) under 18 who is not reasonably believed by the offender (B) to be over 18; or (ii) a child under 13. The definition of ‘prostitute’ is provided in Section 51 of the Sexual Offences Act as ‘a person (A) who, on at least one occasion and whether or not compelled to do so, offers or provides sexual

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<sup>94</sup> *Ibid.*

services to another person in return for payment or a promise of payment to A or a third person; and “prostitution” is to be interpreted accordingly.’

ix. Children involved in prostitution are primarily victims of abuse and people who take advantage of them by exploiting them, are child abusers. National legislation criminalises both the recruiter and the user of child prostitution, with offences outlined in Sections 47-50 of the Sexual Offences Act.

Consent is not in issue. It does not matter if a child of 16 or 17 consents to the activity, it is those who exploit children who commit a criminal act. Also, there is a defence that a person reasonably believed that the child was over 18. This does not apply if the child was under 13.

### **2.3 Child Pornography**

x. The UK is a party to the Council of Europe Convention on Cybercrime. It signed the Convention on November 23 2001, ratified it on 24 May 2011, and it entered into force on 1 September 2011.

xi. The main provisions regarding indecent photographs of children are Section 1 of the Protection of Children Act 1978 and Section 160 of the Criminal Justice Act 1988. The Sexual Offences Act provides a definition of ‘pornography’ in Section 51 as ‘a person is involved in pornography if an indecent image of that person is recorded; and similar expressions, and ‘pornography’, are to be interpreted accordingly’. ‘Indecent’ is not defined by the Protection of Children Act, but case law has stated that it is for the jury to decide by reference to recognised standards.

xii. Under the Sexual Offences Act, criminal liability regarding child pornography is attributed to the person who causes or incites the child to become involved in pornography or who intentionally arranges or facilitates the involvement in it. Criminal liability for distributing an indecent photograph of a child is incurred under the Protection of Children Act, and criminal liability for possession of an indecent photograph of a child is incurred under the Criminal Justice Act. This is compatible with Article 20(1)(a) – (f) of the Lanzarote Convention.

xiii. The UK did not make a reservation under Article 20(3) and (4) of the Lanzarote Convention.



xiv. Intentional conduct of making a child participate in pornographic performance is criminalised under Section 48 of the Sexual Offences Act. This provision targets both recruitment and coercion.

## 2.4 Corruption of Children

xv. Section 19 of the Children's Act of 1960 addressed the criminal offence of corruption of children before being repealed by the Sexual Offences Act 2003<sup>95</sup>. Child sexual exploitation is defined by the UK government in the guidance and policy by the National Working Group for Sexually Exploited Children and Young People as

"exploitative situations, contexts and relationships where young people (or a third person or persons) receive 'something' (e.g. food, accommodation, drugs, alcohol, cigarettes, affection, gifts, money) as a result of performing, and/or others performing on them, sexual activities"

<sup>96</sup>

The definition states that child exploitation can occur through technology without the immediate recognition of the child and stresses the power that is exerted through different means on the child.

Causing a child to witness sexual abuse or activity is a form of non-touching sexual abuse. Under Section 9(11) of the Sexual Offences Act various circumstances are detailed in which engaging in the sexual activity in the *presence of* a child is considered sexual activity *with* a child.

## 2.5 Solicitation of Children for Sexual Purposes

xvi. Grooming is dealt with by the Section 15 of the Sexual Offences Act. In addition to covering situations of contact through meetings and telephone conversations this sections covers internet communication where the perpetrator works to garner 'the child's trust and confidence so that he can arrange to meet the child for the purpose of committing a 'relevant offence' against the child'.<sup>97</sup> It is not necessary for the content of the earlier

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<sup>95</sup> Explanatory Notes of the *Sexual Offences Act* 2003.

<sup>96</sup> 'A Definition'. *National Working Group for Sexually Exploited Children and Young People*, 2008.

<<http://www.nationalworkinggroup.org/what-is-child-sexual-exploitation>> accessed 28 October 2012.

<sup>97</sup> Explanatory Notes *Sexual Offences Act* 2003.

communication to be explicitly sexual in nature, for instance including discussion of sexual material or sending pornographic images.

Section 15 deals with physical meetings, which have been preceded by at least two communications. For the purpose of the offence the offender must either meet the child or have travelled to the prearranged meeting but the intended offence need not have occurred. Criminal liability is in the form of summary conviction to imprisonment for a term not exceeding 6 months and/or a fine not exceeding the statutory maximum or on conviction on indictment, to imprisonment for a term not exceeding 10 years.

xvii. Under the Sexual Offences Act 2003, Part 1 Section 73, a person is not guilty of aiding or abetting or counseling the commission against a child of an offence for four reasons including protecting the child from sexually transmitted infection, protecting the physical safety of the child, preventing the child from becoming pregnant or promoting the child's emotional well-being by the giving of advice. These reasons have to fall outside the purpose of sexual gratification or encouraging the activity constituting the offence or the child's participation in it. However, these exceptions apply only to Sections 5 (rape of a child under 13), 7 (sexual assault of a child under 13), 9 (sexual activity with a child) and 13 (Child sex offenses committed by children or young persons) of the Sexual Offences Act.

## **2.6 Corporate liability**

xviii. A corporate employer is vicariously liable for the acts of its employees and agents where a natural person would be similarly liable.<sup>98</sup> The relevant Legal Guidance is issued by the Crown Prosecution Service. If the offending represents isolated actions by individuals, then that is a consideration against prosecuting. Likewise, prosecution of the company should not be as a substitute for prosecution of criminally culpable individuals; this will however be balanced with a consideration of the possible liability of the company where the criminal conduct is for corporate gain.

Corporate officers who are the embodiment of the company can be deemed 'controlling officers' of the company by the identification principle. Criminal acts by such officers will not only be offences for which they can be prosecuted as individuals, but also offences for

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<sup>98</sup> Corporate Prosecutions, Legal Guidance: Crown Prosecution Services  
<[http://www.cps.gov.uk/legal/a\\_to\\_c/corporate\\_prosecutions/#a10](http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/#a10)> accessed 27 October 2012.

which the company can be prosecuted because of their status within the company. Therefore, a company may be liable for the act of its servant even though that act was done in fraud of the company itself.<sup>99</sup> However, the key exception to corporate liability the most relevant here is: “*A company cannot be criminally liable for offences which cannot be committed by an official of a company in the scope of their employment, for example rape*”.<sup>100</sup>

xix. Corporate liability may be criminal, and with regard to offences requiring mens rea the ‘identification principle’ is applied. This states that the ‘acts and state of mind’ of those representing the directing mind will be imputed to the company<sup>101</sup>. The Crown Prosecution Service has outlined many factors considered in deciding whether to prosecute a corporation and hold it liable.

xx. National legislation does not exclude individual liability on the basis of there being corporate liability. Depending on the type of offence, it may be determined that the company, as a ‘legal person, capable of being prosecuted’ and which ‘should not be treated differently from an individual because of its artificial personality’<sup>102</sup> is wholly responsible.

## **2.7 Aggravating Circumstances**

In 2007 the Sentencing Guidelines Council issued a Definitive Guideline which every court must have regard to in sentencing for offences under the Sexual Offences Act. The ‘general principles’ section deals with many factors<sup>103</sup>.

Factors indicating a higher culpability are as follows: ‘offence committed whilst on bail for other offences; failure to respond to previous sentences; offence was racially or religiously aggravated; offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation); offence motivated by, or demonstrating, hostility based on the victim’s disability (or presumed disability); previous conviction(s), particularly where a pattern of repeat offending is disclosed; planning of an offence; an intention to commit more serious harm than actually resulted from the offence; offenders operating in groups or gangs; ‘professional’ offending; commission of the offence

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<sup>99</sup> *Moore v I. Bressler Ltd* [1944] 2 All ER 515.

<sup>100</sup> *ibid.*

<sup>101</sup> *Lennards Carrying Co and Asiatic Petroleum* [1915] AC 705, *Bolton Engineering Co v Graham* [1957] 1 QB 159 (per Denning LJ) and *R v Andrews Weatherfoil* 56 C App R 31 CA.

<sup>102</sup> above, n 99.

<sup>103</sup> Sentencing Guidelines Council, *Sexual Offences Act 2003: Definitive Guideline* (2007) 1.20-1.27.

for financial gain (where this is not inherent in the offence itself); high level of profit from the offence; an attempt to conceal or dispose of evidence; failure to respond to warnings or concerns expressed by others about the offender's behaviour; offence committed whilst on licence; offence motivated by hostility towards a minority group, or a member or members of it; deliberate targeting of vulnerable victim(s); commission of an offence while under the influence of alcohol or drugs; use of a weapon to frighten or injure victim; deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence; abuse of power; abuse of a position of trust'.

Factors indicating a 'more than usually serious degree of harm' are as follows: 'multiple victims; an especially serious physical or psychological effect on the victim, even if unintended; a sustained assault or repeated assaults on the same victim; victim is particularly vulnerable; location of the offence (for example, in an isolated place); offence is committed against those working in the public sector or providing a service to the public; presence of others e.g. relatives, especially children or partner of the victim; additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence); in property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)'.

In addition to the 'general principles', there are aggravating factors that are relevant to each offence. These divided in depth according to individual offence.

## **2.8 Sanctions and Measures**

xxi. The European Parliament has laid out a specific Directive against sexual violence on children. According to the Directive 2011/92 of the European Parliament and of the Council of 13th December 2011, on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, it has been clearly laid out but the European Parliament that Member States have the full responsibility to enact on the aforementioned Directive, so as to penalise persons who have committed sexual violence crimes on children.

Art. 13(1) spells out that ' Member States shall take the necessary measures to ensure that legal person held liable pursuant to Article 12(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions...'

Art. 15(1) puts forward that 'Member States shall take the necessary measures to ensure that investigations into or the prosecution of the offences referred to in Art.3 and 7 are not dependent on a report or accusation being made by the victim or by his or her representative, and that criminal proceedings may continue even if that person has withdrawn his or her statements'. Furthermore, in Art.2 and 3, it is mentioned that 'Member States shall take the necessary measures to enable the prosecution', and 'ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases are available to persons'. Accordingly, Member States also own the obligation to 'take the necessary measures to enable investigative units or services to attempt to identify the victims of the offences.' (Art. 15(4))

In addition, Art. 16(1) and (2) of the Directive states that Member States ought to report suspicion of sexual abuse or sexual exploitation by applying 'the confidentiality rules imposed by national law...' and that they should 'encourage any person who knows about the suspects'. Subsequently, Art. 18 provides general provisions on assistance, support as well as protection measures for child victims who suffer from sexual violence. Member States are subjected to provide necessary measures to ensure assistance and support are awarded in an appropriate manner, and that child victims can enjoy their rights by having those specific actions to assist and support granted to them.

By citing Art.20, it is a legal requirement that child victims are subject to the protection of the Directive in the process of criminal investigations and proceedings. Child victims can also enjoy the measures against advertising abuse opportunities and child sex tourism (Art. 21), and that Member States ought to take preventive intervention programmes or measures to 'prevent the risk of such offences being committed' (Art. 22). Art. 23, 24 and 25 have further spelled out the prevention, intervention programmes or measures on a voluntary basis in the course of or after criminal proceedings, as well as measures against websites containing or disseminating child pornography stipulations, respectively.

In the United Kingdom, the Sexual Offences Act 2003 is the most up-to-date legislation which is designed to act against various types of sexual violence, it also serves as a protection to child victims within the country, including prostitution, trafficking, as well as child sex offences. The aim of the Act was to 'make a new provision about sexual offences, their prevention and the protection of children from harm from other sexual acts'.

With specifications to sexual violence on children, S. 5 to 8 specify details of rape and other offences against children under 13 years of age; S. 9 to 15 of the Act describe conditions of

sexual activity with child, causing or inciting a child to engage in sexual activity, engaging in sexual activity in the presence of a child, causing a child to watch sexual act, child sex offences committed by child or young persons, arranging or facilitating commission of a child sex offense, and meeting a child following sexual grooming etc; whereas S. 25 to 29 mention familial child sex offences. Situations on indecent photography of children are put forward in S. 45 and 46, while S. 47 to 51 are about the abuse of children through prostitution and pornography.

As this 2003 Act was reformed to reflect social changes on attitudes and values, in regard to the contemporary situation, the British government has placed heavy attention on the concept of 'consent' (to sexual activities) on this Act. It has been widely criticised by children's campaigners that the Act has no recognition of the concept of actual consent, thus the Act would also criminalise consensual sexual activities between children. As a result, the Act bears the risks of penalising the wrong persons, and in return, fails to protect those who are indeed needing assistance.

Although the United Kingdom is one of the Member States of the European Union and it exerts to protect children from any form of sexual abuse, whilst the European Parliament has spelled out a holistic Directive as a guideline to assist national legislations, the UK is in fact struggling to protect its victims by placing the attention of 'consent' inappropriately. On the other hand, by referring to the Sarah Payne case, it is apparent that tougher sentences for sex offenders are introduced on repeat offenders which this is deemed to be unjust in the legal system.

All in all, the United Kingdom is suggested to once again reform the 2003 Act according to the Directive. At the moment, the national Act appears to be slightly doubtful as false judgements on 'consent' can lead to granting wrong sanctions on the persons, and, providing inappropriate preventive measures to prevent children (and any other persons) from sexual abuse. To improve the situation, the UK government ought to reconsider the concept of 'consent' and reform the existing law from this point onwards.

## 3 CRIMINAL PROCEDURE

### 3.1 Investigation

i. Section 4. 19 of the CPS Code for Crown Prosecutors states that ‘prosecution does not act for victims and must act in the overall public interest.’<sup>104</sup> The CPS however has a separate policy outlined for prosecuting criminal cases involving children and young people as victims and witnesses, which states that they will always think about what is best for children in criminal case but it is not the only thing that is considered in their decision making process.<sup>105</sup> During the instigative process the special measures that can be taken, specifically in relation to sexual offence crimes, is having trained police officers or social workers conduct video statements. Child victims can also make victim personal statements but these can be made through the parents or guardians of the children. The Ministry of Justice in the UK, also has issued guidance titled ‘Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures’<sup>106</sup> that elaborates on the Youth Justice and Criminal Evidence Act 1999. In regards to the investigative process, the police and the social care worker of the child are in communication to determine whether an investigation headed solely by the police is necessary. If the police conduct the interview the local authority can make enquires concerning the planning of the interview and the role of the social worker. In addition, reports to the CPS should always include clear information about the wishes of the child about their time in court.<sup>107</sup>

When it comes to the court proceedings, the child victim can make an application to the court to use some of the special measures that are offered when giving evidence. These include using their video evidence instead of appearing in person and in sexual offence cases, using the ‘live link’, children can also give evidence in private or behind a screen or

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<sup>104</sup> CPS Policy Directorate, *Code for Crown Prosecutors* (February 2012)

<<http://www.cps.gov.uk/publications/docs/code2010english.pdf>> accessed 28 October 2012.

<sup>105</sup> CPS Policy Directorate, *Children and young people: CPS on prosecuting criminal cases involving children and young people as victims and witnesses* (June 2006) <[www.cps.gov.uk/victims\\_witnesses/children\\_policy.pdf](http://www.cps.gov.uk/victims_witnesses/children_policy.pdf)> accessed 28 October 2012.

<sup>106</sup> Home Office, *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures*, 124

<<http://www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/achieving-best-evidence-criminal-proceedings.pdf>> accessed 28 October 2012.

<sup>107</sup> *ibid.*

using someone to explain the questions to the child. There is also a Witness Care Unit (CPS and the police) in place for the child during the entire process where a worker can help the child in court and in cases where there are very young children involved a trained ‘intermediary’ person to help them understand and answer questions.

The case of *T and V v United Kingdom*<sup>108</sup> at the ECHR set principles for how to conduct trials regarding children and related to Article 3 of the Convention on the Rights of the Child which states:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

In this monumental case the applicant alleged that the cumulative effect of the age of criminal responsibility, the accusatorial nature of the trial, the adult proceedings in a public court, the length of the trial and other reasons all accounted for a breach of Article 3. The courts lengthy discussion on this Article regarding the best interests of the child outlines the importance that should be paid to the issue of child rights throughout the entire process.

According to a Barnardo’s report titled ‘Puppet on a String’ a joint review of police practice and prosecution procedures is required to improve the prosecuting of cases of child sexual exploitation.<sup>109</sup> They also suggest that the priority should be the safeguarding of child victims and witnesses through a distinct witness care program. Another report from Barnardo’s further suggests that cross examination of child witnesses along with better training for all the legal personnel involved in the process.<sup>110</sup>

ii. There are a variety of special unit task forces on a national and local level that conduct investigations into crimes of the nature being examined here. The Major Investigation Team is responsible for investigating child homicide and suspicious child deaths leading many larger national cases. There are also other teams including The Serious Case Team investigates complex child abuse cases working with local Child Abuse teams and the Paedophile Unit focusing on the activities of individuals who produce and distribute

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<sup>108</sup> *T v The United Kingdom* [1999] ECHR 171.

<sup>109</sup> Barbardos, *Puppet on a String: The urgent need to cut children from sexual exploitation*, 27  
<[http://www.barnardos.org.uk/ctf\\_puppetonastring\\_report\\_final.pdf](http://www.barnardos.org.uk/ctf_puppetonastring_report_final.pdf)> accessed 28 October 2012.

<sup>110</sup> Barnardos, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape*.  
<[http://www.barnardos.org.uk/barnardos\\_response\\_convicting\\_rapists.pdf](http://www.barnardos.org.uk/barnardos_response_convicting_rapists.pdf)> accessed 28 October 2012.



indecent child images. There are also 18 Child Abuse Investigation Teams catering to the 32 London boroughs investigating allegations of physical abuse, sexual abuse, emotional abuse and neglect. Additionally, the Paladin Team safeguards the children at the London ports working alongside the UK Border Agency.<sup>111</sup>

The Child Abuse Investigation Command deals with many issues in addition to predatory paedophiles and sexually corrupting children through use of the internet through their Hi-Tech Crime Paedophile and Intelligence Units.<sup>112</sup> They also work proactively to prevent children offences such as grooming and conspiracy to commit rape facilitated through the internet. There is also a Child Exploitation and Online Protection (CEOP) Centre<sup>113</sup> takes a holistic approach to help eradicate the sexual abuse of children while the Serious Crime Analysis Section analysts and specialist police staff analyses rape and serious sexual assaults and motiveless or sexually motivated murder cases.<sup>114</sup>

iii. According to the Guidance on Investigating Serious Sexual Offences issued by the Association of Chief Police Officers in conjunction with the National Centre for Policing Excellence, the investigation begins with the reporting of a serious sexual offence to the police.<sup>115</sup> The most common is the reporting of the crime either via the phone or in person by the victim.<sup>116</sup> However, there is also the existence of third party and anonymous reporting which may be an organization or a direct witness to the crime reporting it.

In regards to withdrawal of a statement by the victim, if there is a withdrawal of support for the prosecution it can be for several reasons not pertaining to untruthful statements.<sup>117</sup> These withdrawal statements can be used as evidence in current or future circumstances so must be retained. Furthermore, if a victim retracts there statement - if they retract a partial statement, it may have an impact on the victorious prosecution and

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<sup>111</sup> The Met Police Child Protection Unit

< <http://content.met.police.uk/Site/childprotectionwhoweare>> accessed 28 October 2012.

<sup>112</sup> Specialist Crime Directorate, Child Abuse Investigation Command Policing Plan 2007/2008 < [http://www.cscb.org.uk/downloads/policies\\_guidance/london/SCD5PolicingPlan.pdf](http://www.cscb.org.uk/downloads/policies_guidance/london/SCD5PolicingPlan.pdf)> accessed 28 October 2012

<sup>113</sup> Child Exploitation and Online Protection Centre <[www.ceop.police.uk](http://www.ceop.police.uk)> accessed 28 October 2012

<sup>114</sup> Serious Crime Analysis Section <<http://www.soca.gov.uk/about-soca/serious-crime-analysis-section>> accessed 28 October 2012.

<sup>115</sup> Guidance on investigating serious sexual offences

<[http://www.ssiacymru.org.uk/media/pdf/7/2/Guidance\\_on\\_Investigating\\_Serious\\_Sexual\\_Offences\\_2005\\_1\\_.pdf](http://www.ssiacymru.org.uk/media/pdf/7/2/Guidance_on_Investigating_Serious_Sexual_Offences_2005_1_.pdf)> accessed 28 October 2012.

<sup>116</sup> *Ibid* 12.

<sup>117</sup> *Ibid* 60.

Finally, if there is a false report that has been made, the CPS must then decide if the person who made the false report should be cautioned.<sup>118</sup>

iv. The UK does not have a statute of limitation for criminal offences.

v. Authorities should follow the UKBA guidance on assessing age when the age of the victim is unknown.<sup>119</sup> The general policy for assessing age includes taking into account all relevant sources, information and evidence.<sup>120</sup>

vi. Home Office Offenders Index and the Police National Computer are responsible for recording and storing the information regarding convicted offenders. The Offenders Index holds criminal history data for offenders convicted in England and Wales for all indictable and some summary conviction offences since 1963.<sup>121</sup> The Police National Computer stores all offences for which a custodial sentence is possible and records co-offenders information as well. Organizations can request data from the Offenders Index but have to give the Home Office a detailed report on how the data will be used and what the aims are. In addition there must be declarations signed to safeguard that the approved personnel would only access the information.<sup>122</sup>

### 3.2 Complaint Procedure

vii. According to The Code of Practice for Victims of Crime 16.1, victims can bring a claim to the service providers, particular organization who have failed to deliver under the obligations stated in the Code.<sup>123</sup> Additionally, there is an internal complaints procedure to which victims can make a complaint.<sup>124</sup> Service providers include the Police, Crown Prosecution Service (CPS), Joint Police/Crown Prosecution Service Witness Care Units, Crown Court, Magistrates' Court, Court of Appeal, Youth Offending Team, National Probation Service, Prison Service, Parole Board, Criminal Injuries Compensation Authority,

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<sup>118</sup> *Ibid* 61.

<sup>119</sup> Assessing Age <

<http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/assessing-age?view=Binary> > accessed 28 October 2012.

<sup>120</sup> *Ibid*.

<sup>121</sup> Philip Howard and Chris Kershaw, *Using Criminal Career Data in Evaluation*, (2000) 3 British Criminology Conference: Selected Proceedings.

<sup>122</sup> *Ibid*.

<sup>123</sup> Criminal Justice System, The Code of Practice for Victims of Crime, 18

<<http://www.justice.gov.uk/downloads/victims-and-witnesses/working-with-witnesses/victims-code.pdf>> accessed 28 October 2012.

<sup>124</sup> *Ibid* 18.

Criminal Injuries Compensation Appeals Panel, & Criminal Cases Review Commission.<sup>125</sup> The UN Committee on the Right of the Child “will soon be able to consider individual complaints by children. In the meantime, violations of child rights may be raised before other committees with competence to consider individual complaints”.<sup>126</sup> As such, currently six human rights treaty bodies may consider individual complaints.<sup>127</sup>

viii. The appropriate legislature in this regard is S1.3 of the Children Act 1989<sup>128</sup> states that children’s views will be an important way to determine the welfare of the child, enshrined in s.1.1. In the article provided by David Boyd, 12.1 & 12.2 of the United Nations Convention on the Rights of the Child notes that children are to be given the opportunity to be heard in a judicial proceeding through a representative.<sup>129</sup>

According to the Guidance on interviewing victims and witness, and guidance on using special measures, children who are under the age of 18 are eligible under the criteria stated in B.2.4, B.2.5, B.2.6 and B.2.7 for special measures.<sup>130</sup> Measures to assist child witnesses during hearing prior to evidence includes decreasing court wait time, having waiting areas that are secure that also include toys and activities that pertain to the children, side door to the court room, and support worker present at all times.<sup>131</sup> With regards to some of the special measures that may be provided to children at court, these special measures include screens, a live link with a supporter included in the room, video recorded evidence or evidence provided in private, a communications specialist to communicate to the child as well as aids, appropriate amount of breaks, and cross examination that is pre-recorded on video.<sup>132</sup>

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<sup>125</sup> *Ibid* 19 – 20.

<sup>126</sup> Committee on the Rights of the Child <<http://www2.ohchr.org/english/bodies/crc/>> accessed 28 October 2012.

<sup>127</sup> *Ibid*.

<sup>128</sup> Children Act 1989, s 1.

<sup>129</sup> *Ensuring Children Are Represented: David Boyd considers the current position and examines some future developments in the representation of children in family proceedings* <<http://www.familylawweek.co.uk/site.aspx?i=ed308>> accessed 28 October 2012.

<sup>130</sup> Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measure* (March 2011) 156<<http://www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/achieving-best-evidence-criminal-proceedings.pdf>> accessed 28 October 2012

<sup>131</sup> *Ibid* 126

<sup>132</sup> *Ibid* 27

In order to receive such special measures, an application is made to the court at the earliest, where the magistrates' or the judge decide the type of special measure that is to be used and is thus case by case dependent.<sup>133</sup>

In some cases, in terms of publicity, the courts can declare newspapers, tv programs and radio not to disclose the identity of the child.<sup>134</sup> With regards to sex offence cases, the identity of the victim can also be prevented from disclosure by such news mediums.

The Children and Young Persons Act 1933, Section 39 states the limits placed on publicity.<sup>135</sup> The name, address, school, as well as any factors that may lead to the identification of the child must be kept hidden from publication.<sup>136</sup> The risks of the child are taken into account and weighed against the overall public interest.<sup>137</sup> Youth court proceedings are granted extensive protection in terms of publication as indicated in section 49 of the Children and Young Persons Act 1933.<sup>138</sup>

## 4 COMPLEMENTARY MEASURES

### Preventive Measures

Article 19 (1) of the Convention on the Rights of the Child outlines State parties' responsibility to protect children while in the care of individuals or institutions<sup>139</sup>, and Article 19 (2) outlines the protective and preventative measures that should be taken.<sup>140</sup> Although these standards are not binding in the UK, they are of vital importance that should be given attention to.

The purpose of this section is to examine the educational guarantees that are given in relation to professionals working with children in the area of sexual abuse and sexual

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<sup>133</sup> CPS Policy Directorate, Children and young people: CPS policy on prosecuting criminal cases involving children and young people as victims and witnesses (June 2006).

<sup>134</sup> *Ibid.*

<sup>135</sup> The Crown Prosecution Service, Legal Guidance: Safeguarding Children as Victims and Witnesses <[http://www.cps.gov.uk/legal/v\\_to\\_z/safeguarding\\_children\\_as\\_victims\\_and\\_witnesses/#a42](http://www.cps.gov.uk/legal/v_to_z/safeguarding_children_as_victims_and_witnesses/#a42)> accessed 28 October 2012.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> 'Conventions on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989' (*Office of the United Nations High Commissioner for Human Rights*) <<http://www2.ohchr.org/english/law/crc.htm#art11>> accessed 9 August 2012.

<sup>140</sup> *Ibid.*

exploitation, and to examine the State's role in ensuring that these individuals are aware of these situations.

Preventative measures to be taken are illustrated in Articles 5 - 7 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Article 5 focuses on recruitment, training as well as awareness for persons who have contact with children whether it is within a professional or non-professional capacity. The rights of the child as outlined in the United Nations Convention on the Rights of the Child are to be understood and enforced. The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse indicates that knowledge and awareness of indicators of possible sexual exploitation or sexual abuse are required, and are to be reported. There is no obligation for training with this provision, as it is based primarily on whether there are reasonable grounds to believe that a child has been victimized of sexual exploitation or sexual abuse.

With regards to professionals who are working with children, a screening process is required in order to ensure that there are no previous sex offender convictions or other possible indicators of perpetrating against children. Although some member States are required to screen persons who volunteer with children, it is not required for all member States.

Article 6 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse outlines each party's responsibility within primary and secondary education to educate and provide information to children and young persons regarding the sexual exploitation and sexual abuse.

The UK's leading children's charity, *Barnardo's*, has extensive involvement in prevention education in schools. As such, training on the topic of developing appropriate relationships was delivered amongst schools in the UK.<sup>141</sup> Additionally, *Barnardo's Young Women's Project* has been developed to provide training to "teachers, social workers and counsellors to educate young people about sexual exploitation with honesty and realism".<sup>142</sup> *Barnardo's* research recommends a national action plan to be taken in order to raise awareness as well as proper training for professionals in identifying and responding accordingly to sexual

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<sup>141</sup> 'Puppet on a String. The urgent need to cut children free from sexual exploitation' (*Barnardo's*, 2011) <[http://www.barnardos.org.uk/ctf\\_puppetonastring\\_report\\_final.pdf](http://www.barnardos.org.uk/ctf_puppetonastring_report_final.pdf)> Accessed 2 September 2012.

<sup>142</sup> *Ibid*.

exploitation amongst children and young persons.<sup>143</sup> *Barnardo's* illustrates a need for improvement in relation to providing information to children and young persons in school on how to stay safe, while making a combined effort to educate parents and care takers on the early signs of possible sexual exploitation or sexual abuse.<sup>144</sup> In helping to achieve such goals, the Local Safeguarding Children Boards are vital for their cooperation in addition to other agencies including third sector agencies.<sup>145</sup> Furthermore, the Lucy Faithful Foundation provides educational services such as Internet safety seminars and safer recruitment training.<sup>146</sup>

xxii. In relation to Article 6 of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, the State has an obligation to educate children at a primary and secondary school level on how to protect themselves of the risks of sexual exploitation and sexual abuse as well as provide access to resources for students.<sup>147</sup> Article 6 also outlines the importance of having a collaborative effort with parents and school staff whenever it is deemed appropriate.<sup>148</sup> Although the state must involve parents in the education process, this becomes difficult to do so when the parents are the perpetrators of the abuse. When it is appropriate to do so, the State must make a combined effort with parents and caretakers to involve them in the educative process however it is difficult to examine fully the extent to which parents have such involvement.

The Committee on the Rights of the Child notes the importance of prevention measures that are to be taken for children. Such prevention measures include the registration of children to access services, educating children of their rights and development of skills that will empower them, as well as implementing mentorship program.<sup>149</sup> With regards to

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<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> 'Tackling child sexual exploitation. Helping local authorities to develop effective responses' (*Barnardo's*, 2011) <[http://www.local.gov.uk/c/document\\_library/get\\_file?uuid=9c0835b3-7f08-48d2-86b8-efcd85467994&groupId=10171](http://www.local.gov.uk/c/document_library/get_file?uuid=9c0835b3-7f08-48d2-86b8-efcd85467994&groupId=10171)> Accessed 2 September 2012.

<sup>146</sup> 'Specialist assessment, intervention, training & case advice' (*The Lucy Faithful Foundation. Working to Protect Children*)

<<http://lucyfaithfull.org/home.htm>> Accessed 17 August 2012.

<sup>147</sup> 'The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Explanatory Report, CETS No. 201' (*Council of Europe*).

<<http://conventions.coe.int/Treaty/EN/Reports/Html/201.htm>> Accessed 9 August 2012.

<sup>148</sup> *Ibid.*

<sup>149</sup> 'Committee on the Rights of the Child, General Comment No. 13 (2011), The right of the child to freedom from all forms of violence' (*Office of the United Nations High Commissioner for Human Rights*, 18 April

preventative measures for parents and caregivers, proper support is to be provided by the state to educate parents and caregivers on the rights of their children.<sup>150</sup> The Committee also recommends that all State parties are to establish greater and more accessible support mechanisms.<sup>151</sup>

The Home Office of the UK provided an online resource that is available for parents entitled *Parents Protect* is designed for parents to help protect their children from sexual exploitation and sexual abuse.<sup>152</sup> There is an online learning program that illustrates how to create a family safety plan as well as a learning database to educate oneself on understanding the risks and recognizes the signs of abuse.<sup>153</sup> Access to a helpline is available as well.

xxiii. Article 7 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse takes a preventative approach in providing access to programs for persons who fear they may commit an offence.<sup>154</sup> Article 15 of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse indicates that party's should provide access to intervention programs to prevent sex offences committed towards children.<sup>155</sup> This involves cooperative effort between services such as social services as well as judicial authorities, in addition to various agencies that aim to prevent and combat sexual exploitation and sexual abuse.<sup>156</sup> Access to programs should be available, and not imposed, whether an offence has been committed or not, as well as throughout court proceedings and sentencing.<sup>157</sup>

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2011) <<http://www2.ohchr.org/english/bodies/crc/comments.htm>> Accessed 28 August 2012.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> 'Parents Protect! Together we can prevent child sexual abuse' (*Parents Protect*, October 2010). <<http://www.parentsprotect.co.uk>> Accessed 28 August 2012.

<sup>153</sup> *Ibid.*

<sup>154</sup> 'The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, 25.X.2007' (*Council of Europe*)

<<http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>> Accessed 9 August 2012.

<sup>155</sup> 'The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Explanatory Report, CETS No. 201' (*Council of Europe*)

<<http://conventions.coe.int/Treaty/EN/Reports/Html/201.htm>> Accessed 9 August 2012.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

Article 7 outlines information and consent such that consent must be given to enter into an intervention program and cannot be imposed unless convicted and the condition is stipulated in the sentence imposed.<sup>158</sup>

An example of a charitable organization that is worth mentioning is *The Lucky Faithful Foundation*. The foundation provides preventative programs, in addition to assessment and intervention services. The charitable organization has been in operation in the UK for twenty years and they specialize in the area of sexual abuse as well as the delivery of services within the criminal justice system. Lucy Faithful Foundation works with adult male and female sex offenders, young adult sex offenders, and individuals within probation services and with prisons.<sup>159</sup> The services in which the Lucy Faithful charity provides are assessment, risk management advice, educational courses, consultancy (both at an individual basis and on a team basis), devise and deliver supervision plans and intervention programs for young adults aged 18-21, as well as offer services for monitoring offender computers.<sup>160</sup> It is worth noting that the funding contract by the Public Protection Unit (now PPMHG) ended in 2010 for the service of assisting probation offender managers.<sup>161</sup> Evaluations conducted on the services provided reflect positive results.<sup>162</sup>

#### Protective Measures and Assistance to Victims

i. *Barnardo's* currently has 22 Specialist Services in the UK that provide support to children who are victims of sexual exploitation or are at risk.<sup>163</sup> *Barnardo's* focuses primarily on prevention by collaborating with schools, referral and residential units, as well as providing protection and support to those who are vulnerable of becoming victimized and those who are victims to sexual exploitation crimes.<sup>164</sup> The *Barnardo* model consists of four elements: "Access", "Attention", "Assertive Outreach", and "Advocacy for Young People in Need".<sup>165</sup>

#### Access

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<sup>158</sup> *Ibid*

<sup>159</sup> Specialist assessment, intervention, training & case advice (*The Lucky Faithful Foundation*)  
<<http://lucyfaithfull.org/home.htm>> Accessed 17 August 2012.

<sup>160</sup> *Ibid*

<sup>161</sup> Specialist assessment, intervention, training & case advice (*The Lucky Faithful Foundation*)  
<<http://lucyfaithfull.org/home.htm>> Accessed 17 August 2012.

<sup>162</sup> *Ibid*

<sup>163</sup> n 144

<sup>164</sup> *Ibid*

<sup>165</sup> *Ibid*



Both children and young persons may refer themselves to *Barnardo's* services, as numbers are widely provided listing the nearest services available to these individuals.<sup>166</sup> Other agencies can refer individuals children and young persons upon identifying and responding to indicators of sexual exploitation.<sup>167</sup> As such, the services provided by *Barnardo's* ensures an inviting environment where the children and young persons are able to feel safe and comfortable.<sup>168</sup>

#### Attention

It is evident that children and young persons who are susceptible to becoming a victim of sexual exploitation or who have already been victimised, may lack the ability or the skills to trust adults.<sup>169</sup> *Barnardo's* strives on ensuring that attention is provided to each child and young person who enter into their services, by assigning one worker to remain with him/her throughout the duration of the utilization of the service.<sup>170</sup> This is to allow a trusting relationship to develop.<sup>171</sup> *Barnardo's* notes that this is established through a range of one-to-one work and counselling, drop-in support and group work sessions, we are eventually able to help the young person stabilise their life and build their confidence to a point where they are able to escape the situation in which they are being exploited.<sup>172</sup>

Assertive Outreach involves workers engaging with children and young persons on the street who may not realize the position to which they are in.<sup>173</sup> The Assertive Outreach team focuses on developing a relationship of trust and confidence in one another.<sup>174</sup> The *Barnardo's* staff helps children and young persons gain access to other services while striving to establish a supportive network.<sup>175</sup>

ii. Article 12 of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, outlines the terms of reporting suspicion of sexual exploitation or sexual abuse. The Convention enables professionals to report to child protection services without

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<sup>166</sup> *Ibid*

<sup>167</sup> *Ibid*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

the risk of breaching confidence.<sup>176</sup> The purpose of the Convention is to protect the children who are victims of sexual abuse or sexual exploitation, even if that means that confidentiality may be breached.<sup>177</sup> Article 13 outlines the use of helplines to be provided by the state and be made available both to children, young persons and adults.<sup>178</sup>

The NSPCC, which “is the only UK children’s charity with statutory powers to safeguard children at risk of abuse” provides a helpline service, a ChildLine as well as support services within the community.<sup>179</sup> According to the NSPCC Report & Accounts for 2010/2011, the ChildLine is utilized more than 50 000 times a month.<sup>180</sup> Additionally, the Helpline receives over tens of thousands of calls annually.<sup>181</sup> Within the UK, the NSPCC expanded its services to reach a greater number of children than adults.<sup>182</sup> A grant of £11.2 million was made by the UK government in support of helplines.<sup>183</sup> This illustrates the governments belief in the beneficial impact helplines can have on children and adults.

The Helpline reached more than 35,000 adults in the past year who had concerns about a child, which resulted in 16, 385 cases being brought to the police and social services.<sup>184</sup> The NSPCC is now dedicated in establishing a greater number of services within primary schools while transforming the national helpline such as developing a helpline text service in order to reach more adults.<sup>185</sup>

Within the UK, the “Stop it now!” campaign and helpline have been developed to prevent child sexual abuse and provide awareness of child sexual abuse in the region.<sup>186</sup> Information is provided in educating and training parents, caregivers as well as other members in the

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<sup>176</sup> ‘The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Explanatory Report, CETS No. 201’ (*Council of Europe*) <<http://conventions.coe.int/Treaty/EN/Reports/Html/201.htm>> Accessed 9 August 2012.

<sup>177</sup> *Ibid.*

<sup>178</sup> ‘The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, 25.X.2007’ (*Council of Europe*) <<http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>> Accessed 9 August 2012.

<sup>179</sup> ‘Annual Report and Actions 2010/2011’ (*NSPCC Cruelty to Children Must Stop*).

<[http://www.nspcc.org.uk/what-we-do/about-the-nspcc/annual-report/annual-report-2011/annual-review-2010\\_wdf84903.pdf](http://www.nspcc.org.uk/what-we-do/about-the-nspcc/annual-report/annual-report-2011/annual-review-2010_wdf84903.pdf)> Accessed 03 September 2012.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*

<sup>186</sup> ‘Stop it now! UK & Ireland. Together we can prevent child sexual abuse’ (*Lucy Faithful Foundation*) <<http://www.stopitnow.org.uk/home.htm>> Accessed 12 September 2012.

public, in addition to providing a helpline.<sup>187</sup> The helpline follows a confidentiality protocol however the safety of a child remains to be a priority that enables a breach of confidentiality. As stated on the website,

The Helpline is confidential. We will not ask you for your name or any other details, but if you do give us any information that identifies a child who has been, is being, or is at risk of being abused, we will pass this on to the appropriate agencies. We will also pass on details of any criminal offence that has been committed.<sup>188</sup>

The Lucy Faithfull Foundation (LFF) provides services to victims of sexual abuse as well as other members within the family that have been affected by the abuse.<sup>189</sup>

iii. Aside from charitable organizations, the state does not fully assist victims in terms of recovery. The Childlines and helplines that are provided through charitable organizations include Childline, The Survivors Trust, and Lifecentre in the UK.

The state defines victim as ‘any child exploitation or sexual abuse’.<sup>190</sup> Article 14 of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse provides that assistance is to be given to victims both within the short term and the long term healing process from childhood to adulthood where the impacts of the victimization continue to be apparent/detrimental to the victim.<sup>191</sup> Recovery is provided both physically and psycho-socially.<sup>192</sup> As such, the child’s needs are vital and must be a significant factor while taking recovery measures. It is apparent that significant cases of sexual abuse or sexual exploitation occur within the family.<sup>193</sup> As such, the convention has the ability to remove a child who has fallen to sexual victimization within his/her home or the alleged

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<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> ‘Specialist assessment, intervention, training & case advice’ (*The Lucy Faithful Foundation*)  
<<http://lucyfaithfull.org/home.htm>> Accessed 17 August 2012.

<sup>190</sup> ‘The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Explanatory Report, CETS No. 201’ (*Council of Europe*)  
<<http://conventions.coe.int/Treaty/EN/Reports/Html/201.htm>> Accessed 9 August 2012.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> Paulo Sérgio Pinheiro, ‘World Report on Violence against Children’ (*UNICEF*, 2006)  
<[http://www.unicef.org/lac/full\\_text\(3\).pdf](http://www.unicef.org/lac/full_text(3).pdf)> Accessed 11 September 2012.

perpetrator.<sup>194</sup> Intervention programs are to be sought out first prior to taking the steps to remove a child or an alleged perpetrator.<sup>195</sup>

Complimentary measures have an important role in terms of prevention, education and recovery. The purpose of this section was to examine preventive and protective measures as well as the assistance that is provided to victims. It is important to highlight UK's leading children's charity, *Barnardo's*, which has extensive involvement in prevention education in schools. Additionally, *Barnardo's* is the main provider of specialist child sexual exploitation services within the UK, and therefore the facts illustrating *Barnardo's* services and involvement are of great importance within this section of the report. Furthermore, the NSPCC has proven to be of great significance, as this charity has statutory provisions to safeguard children who are at risk of abuse by providing a helpline service and support services within the community.

### III NATIONAL POLICY REGARDING CHILDREN

#### i. Political discussion regarding the children in the UK

*An Overview of Well Being of Children in Rich Countries*<sup>196</sup>, a report by United Nations International Children's Emergency Fund in 2007 revealed that the United Kingdom is placed at the bottom in the well-being of children and young people in 21 industrialised countries. Similarly, the United Kingdom was ranked among countries with the most unhappy children in Europe in 2009 report of the Child Poverty Action Group.<sup>197</sup> These worrying reports evoked a strong reaction from the Parliament. In 2009 the Joint Committee on Human Rights issued a comprehensive report on the state of children's rights in the UK, attempting to look at several specific issues of concern, among others incorporation of the UN Convention on the Rights of the Child into domestic legal system, status of children in the UK and their negative depiction in the media, sexual abuse and asylum seeking, refugee and trafficked children. The report compared the current protection of children rights in the United Kingdom to the standard required by the United Nations

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<sup>194</sup> *ibid.*

<sup>195</sup> *Ibid.*

<sup>196</sup> UNICEF, *Report Card 7, Child Poverty in Perspective: An Overview of Child Well-being in Rich Countries*, February 2007.

<sup>197</sup> Child Poverty Action Group, *Child Wellbeing and Child Poverty: where the UK stands in the European table*, Spring 2009.

CRC and recommendations by the UN Committee on Rights of the Child and identified numerous shortcomings, which according to UNICEF UK are:

“partly a result of the gradual approach that has been taken to implementing child rights – focusing on particular children in particular places, rather than looking at all aspects of every child’s life.”

In the Parliamentary session 2009/2010 the Children Bill, which was supposed to enshrine the United Nations Convention on the Rights of the Child in the United Kingdom law, was discussed among MPs. The Bill was supported by the Rights of the Child UK coalition, unfortunately the Second Reading did not take place before Parliament was dissolved prior to the 2010 General Election.

The Government’s response to the Munro review of Child Protection<sup>198</sup>, launched in July 2011 is evidence of such political discussion. Over the years, tragedies have encouraged national reviews and inquiries, resulting in calls for action. Consequently, legislation has been passed; rulebooks have expanded; more procedures and processes have been introduced and structures have been changed.

In their ‘Review of domestic violence policies in England and Wales’ 2011, stated that policy development after 2000 recognised the inter-relationship between domestic violence and the abuse and neglect of children. What follows are examples of such policies being put in place. The Framework for the Assessment of Children in Need and their Families (Department of Health, 2000) pointed the impact of domestic abuse on parenting capacity. The Every Child Matters Outcomes Framework (Department for Children, Schools and Families, 2003) set targets that children affected by domestic violence are identified, protected and supported. The National Service Framework for Children, Young People and Maternity Services (2004) highlighted the serious effects on children who witness domestic violence. A Vision for Services for Children and Young People affected by Domestic Violence Local Government Association, The Association of Directors of Social Services, Women’s Aid and CAFCASS, 2005) provided guidance focused on meeting the needs of children affected by domestic violence within the planning of integrated children’s services and this was strengthened by subsequent publication of Working Together A guide to inter-agency

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<sup>198</sup>A child-centred system The Government’s response to the Munro review of child protection, July 2012  
<<http://www.education.gov.uk/munroreview/downloads/GovernmentResponseToMunro.pdf>> accessed on 27 October 2012.

working to safeguard and promote the welfare of children(2006, revised 2010) which contains statutory and non-statutory guidance to public agencies to work together in relation to domestic violence to protect children, including unborn children; empower mothers to protect themselves and their children; and to identify the abusive partners, hold them accountable for their violence and provide them with opportunities to change.<sup>199</sup>

Following the last unsuccessful attempt to incorporate the UNCRC into British Law through Children Bill 2010, in 2012 Children's Minister Sarah Teather told Parliamentarians on a subcommittee of the European Scrutiny Committee: "*We do not have any plans at the moment to enshrine the UNCRC in British law.*"<sup>200</sup> According to the Children's Rights Alliance England, one of the possible interpretations of this statement implies that although there are no such plans now, in the future there is a prospect that the issue will be brought back to Parliament for further discussion.<sup>201</sup>

On the 11<sup>th</sup> September, the Joint Committee on Human Rights, chaired by Dr Hywel Francis MP, launched an inquiry into the human rights of unaccompanied migrant children and young people in the UK, with a particular focus on those who are seeking asylum or have been the victims of trafficking. The committee is seeking written evidence on questions relating to their status in the UK, their treatment, also the committee is attempting to find out how to ensure their rights are protected effectively and they have access to them, and they are planning to report on their findings to both Houses before Easter 2013.<sup>202</sup>

In the last year there were two major children rights related topics that required submissions from external organizations. Firstly, in May 2012 UNICEF UK criticized de-prioritisation of children's rights. 2011 Report<sup>203</sup> reflected the Foreign Commonwealth Office is lacking a child rights expert on its human rights panel, the child rights strategy has expired and currently there are no plans for its renewal and the central position of the FCO that children

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<sup>199</sup> Anna Matczak, Eleni Hatzidimitriadou & Jane Lindsay, Review of Domestic Violence Policies in England and Wales  
<[http://www.academia.edu/1016854/Review\\_of\\_domestic\\_violence\\_policies\\_in\\_England\\_and\\_Wales](http://www.academia.edu/1016854/Review_of_domestic_violence_policies_in_England_and_Wales)>  
accessed on 27 October 2012.

<sup>200</sup> European Committee C considering the 'Rights of the Child', 12 September 2011. Transcript available here:  
<<http://www.publications.parliament.uk/pa/cm201012/cmgeneral/euro/110912/110912s01.htm>>

<sup>201</sup> CRAE State of Children's Rights in England report December 2011.

<sup>202</sup> Joint Committee on Human Rights <<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/human-rights-of-unaccompanied-migrant-childpowerldren/>>  
accessed on 27 October 2012.

<sup>203</sup> The FCO's human rights work in 2011, Written evidence from BOND Child Rights Group.

rights are not included in its centrally driven human rights priorities. The NGO highlighted that *“the government must ensure that its new strategy on Business and Human Rights pays particular attention to child rights because of the potential for irreversible harm during childhood.”*<sup>204</sup>

Secondly, the concerns about the Office of the Children’s Commissioner resonated in the Joint Committee of Human Rights. In August 2012 both NGO Coordinating Group<sup>205</sup> <sup>206</sup> and the Children’s Rights Director for England<sup>207</sup> submitted a paper on reform of the office of the Children’s Commissioner. Report of the NGO Coordinating Group recommended strengthening Commissioner’s powers, children’s involvement and enhancing accountability of the office with the purpose of creating an effective National Human Rights Institution as defined in The Paris Principles, adopted by the United Nations’ General Assembly in 1993. In order to accomplish this aim, the group proposed to change budgeting of the office, reform the appointment process and the mandate itself, include vulnerable groups of children under its protection and work on suggested change which both reports have in common - functions and powers that the office entails. <sup>208</sup> Whereas submission of the Children’s Rights Director were focused on transferring its duties under the Office of Children’s Commissioner, in the report of the group of NGO’s it occurs to be only one of their numerous points of concern. Other improvements put forward by reports, that may enhance the effectiveness of the office, include promoting positive attitudes towards children, raising awareness about children’s rights as well as enhancing its legal powers and duties.

In respect to protection of children from sexual exploitation in particular, the Home Office has been working on a strategy to combat sexual violence against children and in 2009 *Supplementary guidance and policy on sexual exploitation of children and on child trafficking* was issued

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<sup>204</sup> Written evidence from UNICEF: The FCO’s human rights work in 2011

<<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/writev/humanrights/m12.htm>>

<sup>205</sup> British Youth Council, Children England, Children’s Rights Alliance for England (CRAE), The Children’s Society, National Children’s Bureau, NSPCC, Save the Children, and UNICEF UK.

<sup>206</sup> Joint Submission to the JCHR in relation to its consideration of draft legislation for reform of the office of the children’s commissioner

< [http://www.parliament.uk/documents/joint-committees/human-rights/Submission\\_reform\\_of\\_the\\_Office\\_of\\_the\\_Children.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Submission_reform_of_the_Office_of_the_Children.pdf)> accessed 27 October 2012.

<sup>207</sup> Prelegislative scrutiny of clauses relating to the Office of the Children’s Commissioner in the Children and Families Bill.

<sup>208</sup> Joint Submission to the JCHR in relation to its consideration of draft legislation for reform of the office of the children’s commissioner < [http://www.parliament.uk/documents/joint-committees/human-rights/Submission\\_reform\\_of\\_the\\_Office\\_of\\_the\\_Children.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Submission_reform_of_the_Office_of_the_Children.pdf)> accessed 27 October 2012.

by Department for Children, School and Families<sup>209</sup>. One year later, Tim Loughton, Parliament Under Secretary of State for Children and Families, published a guidance on child sexual abuse that updates the Statutory Guidance in relation to Serious Case Review. The new guidance is a part of *Working together to safeguard children: a guide to inter-agency working to safeguard and promote the welfare of children* report.<sup>210</sup>

In November 2011, the Department for Education put out *Tackling child sexual exploitation: action plan*<sup>211</sup>, that contains initiatives to address sexual violence and abuse in a more considered and collaborative way. However, in the following February the NSPCC, the Lucy Faithfull Foundation, NAPAC and Action for Children jointly wrote a Letter to Tim Loughton MP,<sup>212</sup> calling for the action plan to also make specific reference to abuse that occurs within families.

On 3 July 2012, the Government issued the first report on progress, along with a new guide on what practitioners should do if they suspect a child is being sexually abused. The guide complements should be read in conjunction with the *Safeguarding children and young people from sexual exploitation statutory guidance*, published in 2009.

ii. How has the awareness within the society regarding children's sexual abuse and exploitation been raised by committed NGOs and/or the State (use of official sources, documents)

The National Working Group (NWG) for Sexually Exploited Children and Young People is the forum made up from a wide range of organisation regarding children's rights and especially the sexual exploitation of children. Along with other voluntary organisations, they are the main promoters of awareness within society regarding children's sexual abuse and exploitation. This task is being pursued through websites, conferences, seminars, training, awareness-raising events and national campaigns. It has been recognised by government

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<sup>209</sup> Safeguarding Children and Young People from Sexual Exploitation: Supplementary guidance to Working Together to Safeguard Children,  
<<https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DCSF-00689-2009>>  
accessed on 27 October.

<sup>210</sup> *Ibid.*

<sup>211</sup> Tackling Sexual Violence and Abuse <[http://www.dhsspsni.gov.uk/8678\\_-\\_sexual\\_violence\\_web.pdf](http://www.dhsspsni.gov.uk/8678_-_sexual_violence_web.pdf)>  
accessed on 27 October.

<sup>212</sup> Letter 'Re: Stop Sexual Exploitation' from The Lucy Faithfull Foundation, NSPCC, NAPC and Action for Children to Tim Loughton MP (8 February 2012)  
<[http://www.nspcc.org.uk/Inform/resourcesforprofessionals/sexualabuse/sexual-exploitation-letter-Tim-Loughton\\_wdf89795.pdf](http://www.nspcc.org.uk/Inform/resourcesforprofessionals/sexualabuse/sexual-exploitation-letter-Tim-Loughton_wdf89795.pdf)> accessed on 27 October.



officials that “*the NWG alone has delivered awareness raising through conferences and training events to over 3.4000 practitioners since July 2011.*”<sup>213</sup>

Several governmental departments have initiated action plans regarding different aspects of child sexual abuse and exploitation. Supplementary guidance and policy on sexual exploitation of children and on child trafficking was put in place. In November 2011, the Department of Education published an Action Plan on tackling child sexual exploitation after consultation with several governmental department, national organisations and community groups. The action plan was the outcome of the Barnado’s report *Puppet on a string: the urgent need to cut children free from sexual exploitation* published in January 2010. In July 2012 the government issued a progress report on the action plan on sexual exploitation of children and on child trafficking.

On 8 February 2012, NSPCC in collaboration with The Lucy Faithfull Foundation, the National Association for People Abused in Childhood and Action for Children sent a letter to Tim Loughton MP, the Parliamentary Under Secretary of State for Children and Families. While welcoming the Child Sexual Abuse Plan introduced and its effect in raising awareness, the charities raised a serious concern: the action plan lacked a specific reference to sexual abuse occurring within families regardless of the fact that between 2005 and 2009 81% of confidential calls made to their helplines were about another adult’s behaviour within the family.

In its progress report on the action plan in July 2012 the Parliamentary Under Secretary of State for Children and Families listed a series of attempts and practices to raise awareness throughout the country which had taken place up to that point. It highlights the role of the NWG and other voluntary sector organisations in promoting awareness and understanding of materials targeted at children and young people. It noted that the Association of Chief Police Officers (ACPO) and the National Police Improvement Agency (NPIA) took on board proposals for the training of frontline police officers on child sexual exploitation. In attrition, ACPO created a virtual library of child sexual exploitation awareness material. The NHS joined by commissioning a short film of child sexual exploitation to go on it online portal NHS Choice.<sup>214</sup> The Department of Health in working towards improving the

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<sup>213</sup> Department of Education, “Tackling child sexual exploitation action plan: Progress report – July 2012” 6.

<sup>214</sup> *ibid* 7.

guidance of health professional while the 2012 Foundation Curriculum provides that new foundation year doctors should receive training in order to meeting the need of victims of violence and abuse. Special focus has been given to children going missing especially from care homes.<sup>215</sup> The government issued its Missing Children and Adults Strategy, while the Child Exploitation And Online Protection Centre (CEOP) is working towards integrating missing children in its operations. It currently provides advice and support with the aim of locating missing children to the maximum of its potential.<sup>216</sup>

The report also makes reference to voluntary groups' activities and campaigns on a local and national level. It praises promotional campaigns such as *Say Something If You See Something* campaign (see below for further details) and the joint publication of Barnardo's and the Local Government Association named *Tackling Child Sexual Exploitation: Helping Local Authorities to develop effective responses* providing good practice examples.<sup>217</sup> In addition it mentions the work of BLAST project on a local level in Leeds and Bradford in raising awareness regarding sexual exploitation of boys and young men.<sup>218</sup> The production of leaflets for the education of professional and the training of police officers were the focal points of other projects in Lancashire and Torbay accordingly.<sup>219</sup> The report also notices that numerous people approached the Parliamentary Under Secretary of State for Children and Families for the creation of support groups.

Free of charge sexual abuse awareness workshops for parents and carers were delivered at children's centres, schools, community venues and churches.<sup>220</sup> These courses were part of Stop It Now! UK & Ireland run by the Lucy Faithfull Foundation and had the support of the Department of Education. Barnardo's committed to the education of professional sent thousands of 'spot the signs' leaflets, postcards and posters to schools and other service providers.<sup>221</sup>

The Department of Education produced and circulated a guide for practitioners when in suspicion of the child's sexual abuse.<sup>222</sup> The report ends with several remarks on areas that

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<sup>215</sup> *ibid* 8.

<sup>216</sup> *Ibid.*

<sup>217</sup> *ibid* 9.

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> *ibid* 10.

need improvement and assures that the Tackling Child Exploitation Action Plan remains 'live' and further progress review are to follow.<sup>223</sup>

The UK government issued guidance on child sexual abuse as part of Working together to safeguard children: a guide to inter-agency working to safeguard and promote the welfare of children. It noted that *'voluntary organisations play a key role in providing information and resources to the wider public about the needs of children and young people, and resources to help families'*<sup>224</sup>. The NSPCC in particular offers helplines dedicated to raising awareness and providing information, advice and support. It includes Stop it Now! which specialises in child sexual abuse prevention and Parentline Plus which is available to anyone parenting a child.<sup>225</sup>

The Children Act 2004 established the mechanism of the Local Safeguarding Children Boards (LSCB) giving every locality the statutory responsibility incorporate it. As it is stated in their website, "LCSBs are now the key system in every locality of the country for organisations to come together to agree on how they will cooperate with one another to safeguard and promote the welfare of children" According to section 14(1) of the Children Act 2004 the objective of the a LSCB is to "(a) co-ordinate what is done by each person or body represented on the Board for the purposed of safeguarding and promoting the welfare of children in the area of the authority by which it is established, and (b) to ensure the effectiveness of what is done by each such person or body for those purposes". The Local Safeguarding Children Boards Regulations 2006 outlines the functions of the LCSBs including developing policies and procedures in relation to recruitment, supervision and investigations of people working with children. In addition they can undertake reviews of serious cases and advise their authority and Board members.

iii. If the statistics are available, how many reporting have been done regarding children's sexual exploitation in last the 5 years (e.g. police records, court records etc.)?

In England and Wales crime is being measured based on Police Recorded Crime and the British Crime Survey. The Police Recorded Crime is based on figures supplied by the policy to the Home Office and it covers crimes reported and recorded by the police. The British Crime Survey is a victimisation survey focusing on the households in England and the

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<sup>223</sup> Taking child exploitation: action plan progress report July 2012

<sup>224</sup> Department of Education, Working together to safeguard children: a guide to inter-agency working to safeguard and promote the welfare of children 84.

<sup>225</sup> *Ibid* 85.

Wales, asking a selection of people of crimes they have been victims to. Although being a large survey of a representative sample of people and providing a reliable measure of the extent of victimisation and national trends over times it has some serious defects regarding taking into account child victims. The survey included people only over the age of 16 and it is only recently in 2009 that it was opened up to the ages of 10-15 years old. In addition another major defect is the scope of the survey questions which are limited to the household and therefore not covering crimes carried out in institutions, such as care homes and prisons, and in the workplace. Nevertheless, it is still highly regarded within the UK.

According the statistics of a large NSPCC research on child abuse:

“17,727 sexual crimes against children under 16 were recorded in England and Wales in 2010/11.

32% of all sexual crimes (54,982 sexual crimes in total) recorded in England and Wales in 2010/11 were sexual crimes against children under 16.

In 2010/11 the police in England and Wales also recorded 146 offences of abuse of a position of trust involving a child under 18.

More than one third (38%) of all rapes recorded by the police in England and Wales in 2010/11 were committed against under 16 years of age”<sup>226</sup>

Year	2006/ 2007	2007/ 2008	2008/ 2009	2009/ 2010	2010/ 2011	Total
Sexual assault on a male child under 13	1 237	1 121	1 004	1 054	1 125	5 541
Sexual assault on a female child under 13	4 245	3 984	3 665	4 149	4 301	20 344
Rape of a female child under 16	2 853	2 422	2 537	2 909	2 880	13 601

<sup>226</sup> < [http://www.nspcc.org.uk/Inform/resourcesforprofessionals/sexualabuse/statistics\\_wda87833.html](http://www.nspcc.org.uk/Inform/resourcesforprofessionals/sexualabuse/statistics_wda87833.html) > accessed 27 October 2012.

Rape of a female child under 13	1 524	1 487	1 658	1 964	2 235	8 868
Rape of a male child under 16	261	237	216	241	247	1 202
Rape of a male child under 13	458	430	408	564	671	2 531
Sexual activity involving a child under 13	1 936	1 836	1 650	1 819	1 773	9 014
Unlawful sexual intercourse with a girl under 16	67	33	51	...	...	
Sexual activity involving a child under 16	3 208	3 123	3 318	3 986	4 033	17 668
Abuse of children through prostitution and pornography	101	108	116	134	152	611
Gross indecency with a child	64	149	121	...	...	
Sexual grooming	322	274	313	397	310	1616
Total of sexual crimes against a child under 16	16 276	15 204	15 057	17 217	17 727	81 481
	57	53	51	54	54	
Total sexual offences	522	566	429	355	982	

(From: Chaplin, Rupert, Faltley, John and Smith, Kevin (eds.) (2011) Table 2.04. In: Crime in England and Wales 2010/11: findings from the British Crime Survey and police recorded crime (PDF). London: National Statistics. p.43.)

In total, 202 victims of child trafficking have been identified over the period 1 January to 15 September 2011, from 36 countries, for different purposes including sexual exploitation and domestic servitude. <sup>227</sup> This figure includes referrals made to the National Referral

<sup>227</sup> <[http://ceop.police.uk/Documents/ceopdocs/child\\_trafficking\\_update\\_2011.pdf](http://ceop.police.uk/Documents/ceopdocs/child_trafficking_update_2011.pdf)> accessed 28 October

Mechanism and referrals received by the Child Trafficking Advice and Information Line (CTAIL), operated by the NSPCC.

It should be highlighted that these statistics numbers are merely an indication of the reported offences. Several other factors, usually not in the hands of the victim or the state, play a crucial part in the criminal justice procedure. Many crimes go unreported as the victims might not realise that they have been victimized, they do not trust the police or that nobody will believe them.<sup>228</sup> In the case of children this problem is even more prominent due to their vulnerable nature and psychology. The government, in its response to the Stern Review gathered that according to statistics 89 per cent of rapes go unreported<sup>229</sup>, while 38% of victims of serious sexual assault since the age of 16 tell no-one about their experience<sup>230</sup>. Some 3.2 million women in England and Wales have been sexually assaulted at some point since the age of 16<sup>231</sup>, and 38 % of all rapes recorded by the police are committed against children under 16 years of age<sup>232</sup>.

Of the small number of offences that are reported even less are being investigated. In the investigation process the efficient involvement of the police is key. Evidence is being destroyed and witnesses may decide not to come forward. Furthermore even if an incident is investigated the chances of the prosecution moving forward, depends on whether there is a strong evidentiary support and a conviction is most likely to be granted. In October 2012, the Director of Public Prosecutions, Keir Starmer QC, admitted the failings of the justice system's approach to sexual exploitation and called for a comprehensive restructuring of the Crown Prosecution Services targeting at raising the number of convictions relating to sex grooming.<sup>233</sup>

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#### 2012.

<sup>228</sup> Allnock, D, Children and young people disclosing sexual abuse: An introduction to the research (2010) [http://www.nspcc.org.uk/Inform/research/briefings/children\\_disclosing\\_sexual\\_abuse\\_pdf\\_wdf75964.pdf](http://www.nspcc.org.uk/Inform/research/briefings/children_disclosing_sexual_abuse_pdf_wdf75964.pdf), accessed 27 October 2012.

<sup>229</sup> Smith (Ed), Coleman, Eder and Hall (2011) Homicides, Firearm Offences and Intimate Violence 2009/10 (Supplementary Volume 2 to Crime in England and Wales 2009/10) Home Office Statistical Bulletin 01/11, Table 3.12.

<sup>230</sup> *Ibid.*

<sup>231</sup> Smith (Ed), Coleman, Eder and Hall (2011) Homicides, Firearm Offences and Intimate Violence 2009/10 (Supplementary Volume 2 to Crime in England and Wales 2009/10) Home Office Statistical Bulletin 01/11, Table 3.02

<sup>232</sup> Flatley, J, Kershaw, C, Smith, K, Chaplin, R and Moon, D (Eds.) (2010) Crime in England and Wales 2009/10. Home Office Statistical Bulletin 12/10, Table 2.04.

<sup>233</sup> Andrew Norfolk, 'We failed grooming victims, law chief Keir Starmer admits' (*The Times*, 24 October 2012) <<http://www.thetimes.co.uk/tto/news/uk/crime/article3577555.ece>> accessed 27 October 2012

iv. Are there any promotional campaigns in the State so far regarding these issues?

Promotional Campaigns regarding children themselves and children's rights takes a wide form and variation. On one level promotional campaigns are governmental campaigns based on policies. However there also exists campaigns around the country which are implemented locally.

The United Kingdom promotes the learning of Information Technology in school, there exists a wide range of websites designed solely for children. These websites contain child-friendly information on children's rights as well as suggestions of other safe websites that can be accessed. An example is [www.childline.org.uk](http://www.childline.org.uk)<sup>234</sup>. It includes a message board, requesting access to a counsellor, online chat and an 'explore' feature on the following topics: bullying, sexual health, your rights.

TALK to Frank is another promotional campaign by the state regarding drug and drug use by children and young people. FRANK provides a friendly, confidential and non-judgemental service to anyone wanting help, information or advice about drugs. It is available 24 hours a day, 365 days a year. It is a free service and operated by fully trained advisers. FRANK aims to give young people the skills and confidence needed to reject drugs and offer parents the information they need to bring up the topic with their children. The talk to frank campaign is being promoted by the home office on their website <sup>235</sup> and it is also available locally.

In many areas, the Local Safeguarding Children's Board exists. It has a 'responsibility to safeguard and promote the welfare of children and young people <sup>236</sup>as well as links all the agencies involved in working with children, young people and families in the local areas. In Leicestershire, urgent referrals can be made by professionals and members of the public if there are worried about a child. This is done through the 'Electronic Agency Referral form'.

<sup>237</sup> It is a secure website used to report concerns regarding a child or young person to the Central Duty Service electronically.

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<sup>234</sup> <[http://www.childline.org.uk/EXPLORE/CRIMELAW/Pages/Rights.aspx?utm\\_source=google&utm\\_medium=cpc&utm\\_term=childrens%2Brights&utm\\_campaign=childline%2Bhot%2Btopics&gclid=CJK\\_3YCN-rICFRPLtAod4HcA-A](http://www.childline.org.uk/EXPLORE/CRIMELAW/Pages/Rights.aspx?utm_source=google&utm_medium=cpc&utm_term=childrens%2Brights&utm_campaign=childline%2Bhot%2Btopics&gclid=CJK_3YCN-rICFRPLtAod4HcA-A)> accessed 27 October 2012.

<sup>235</sup> <<http://www.homeoffice.gov.uk/drugs/FRANK/>> accessed 27 October 2012.

<sup>236</sup> <<http://www.lrlscb.org/index.htm>> accessed 27 October 2012.

<sup>237</sup> <<http://www.lrlscb.org/index/worriedaboutachild.htm>> accessed 27 October 2012.

As a response to the Stern Review, a report by Baroness Vivien Stern CBE into how rape complaints are handled by public authorities in English and Wales, the Department of Health launched an awareness-raising campaign in November 2010 on violence against women and children, targeting health professional and patients.<sup>238</sup> It urges practitioners to notice signs of violence, including rape and sexual assault of women and children. The NHS Choices website in support of this attempt tried to improve access to information for the public by gathering all essential information on violence and abuse in its website.

In September - November 2011 the government re-ran a campaign of February - March 2010 regarding teenage relationship abuse as part of the Violence Against women and girls Action Plan which was published in 8 March 2010. Extensive advertising on youth TV stations, in cinemas, on posters in schools, shopping and leisure centres and online took place. The campaign aimed to educate teenagers and to make them re-access their view of acceptable violence and abuse. It also aimed at directing them to third party support and advice. A guide for parents and carers was produced as part of the campaign alerting the tell-signs to look out for a teenage being in an abusive relationship and advice on how to approach children was included. <sup>239</sup> A website with comprehensive information was also launched as part of the campaign while short video clips were featured in it. In addition, documents advising schools and students were distributed. A similar new campaign focusing on rape and sexual assault of teenagers has been launch on March 2012. The campaign focuses on the ages of 13 to 18 years old. What is new is that it gives an online portal of discussion for teenagers with their peers.

The ‘Cut Them Free’ campaign is an initiative to raise awareness of the sexual exploitation of children which the specific focus on getting ‘all police forces across England and Wales focused on tackling this appalling crime’<sup>240</sup>. By taking advantage of the Police Commissioner elections, Barnado’s aims to put pressure on election candidates via mobilised voters. The candidates are called to sign the statement “*I support Barnado’s campaign to cut children free from sexual exploitation and if elected will take the necessary steps to tackle this abuse within my local Police and*

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<sup>238</sup> Home Office, The Government Response to the Stern Review: An independent review into how rape complaints are handled by public authorities in England and Wales, (March 2011).

<sup>239</sup> Teenage relationships abuse: A parent’s and carer’s guide to violence and abuse in teenage relationships.

<sup>240</sup> <[http://www.barnardos.org.uk/get\\_involved/campaign/cutthemfree.htm](http://www.barnardos.org.uk/get_involved/campaign/cutthemfree.htm)> accessed 27 October .



*Crime Plan*". National celebrities such as Brenda Blethyn and Alex Jones support the campaign.

In November 2011 the National Working Group for Sexually Exploited Children and Young People and The Children's Society developed a national "*Say Something If You See Something*" campaign focusing on the problem of hotels being used as venues for the sexual exploitation of young people. A part of the campaign talks in conferences took place such as in April 2012 in a conference organised by Just Whistle where talk was given on the campaign for the hospitality industry and a review of the work done so far was given.

In October 2012, a huge scandal erupted regarding one of the biggest media personalities in the UK, namely Jimmy Saville who as it has been revealed was a paedophile who according to the police's belief used his position to abuse hundreds of children across the country. He was an eccentric DJ, TV host and prominent charity worker who was given a papal knighthood by Pope John Paul II in 1990 because of his charity work and who died in October 2011. The police and the BBC are now conducting formal investigations into the allegations. It is believed that Jimmy Saville sexually abused over 200 children in a 40 year period span. It is alleged that suspicions existed throughout that period of time and claims were dropped due to the position of the perpetrator. The BBC Corporation and its administration are under severe criticism. The BBC has announced two inquiries regarding the abuse claims and a review into its current corporate sexual harassment policies. In addition an independent inquiry. This scandal raises further questions which were illustrated by the Guardian you took the time to publish comments of its reader.<sup>241</sup> These questions included as to whether institutions such as the BBC, the NHS and voluntary and charitable organisations did not take any action regarding rumours and allegations earlier. In addition questions are raised with regards to paedophiles in general in all parts of society and how to deal with paedophile behaviour on a wider level. Last but not least, it was noticed that the burden of protecting children from sexual abuse has primarily fallen on the shoulders of voluntary organisations and charities which are extremely underfunded.

v. How is the children's perspective represented in the law making process?

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<sup>241</sup> 'Letters: Wider issues raised by Saville case' (*The Guardian*, 26 October 2012).

Article 12 of the UNCRC grants a child who is capable of forming a view the right to express that view freely in all matters affecting him or her; and these views should be given due weight in accordance with the age and maturity of the child. In the UK law the right is covered partially by Section 157 of the Education and Skills Act 2008, enabling children to have their voices heard in schools and by the Children Act.

The introduction of the 2004 Children Act has provided the legislative framework for taking forward the 2003 *Every Child Matters* and the 2007 Children's Plan, and these have helped change the way local and national government, and other organisations, work with children. The Children Act 2004 created an Office of Child Commissioner of England, a non-departmental public body, whose main function is to speak on behalf of children in all devolved parts of the UK and promote their views and interests. According to Office, their mission is:

“to use our powers and independence to ensure that the views of children and young people are routinely asked for, listened to and that outcomes for children improve over time. We will do this in partnership with others, by bringing children and young people into the heart of the decision-making process to increase understanding of their best interests.”<sup>242</sup>

In 2001 the first under 18s were given opportunity to present their views and opinions on the office of Children's Rights Commissioner before the Joint Committee of Human Rights, as a part of the campaign Right Here, Right Now, as a result of ceaseless lobbying by CRAE.<sup>243</sup>

The Department for Education has provided a grant for 2011/13 to the British Youth Council, a charity helping to empower young people, representing their views to local and the central government, to support young people's voice and involvement in local and national decision making.<sup>244</sup> In order to improve the negative image of children, which was criticised by the UN Committee on the Rights of the Child in 2008<sup>245</sup>, a part of the Government funding was given to the British Youth Council to support a small number of

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<sup>242</sup> Children's Commissioner, Official website <[http://www.childrenscommissioner.gov.uk/info/about\\_us](http://www.childrenscommissioner.gov.uk/info/about_us)> accessed on 27 October 2012.

<sup>243</sup> CRAE, Right to be heard <<http://www.crae.org.uk/protecting/right-heard.html>> accessed on 27 October 2012.

<sup>244</sup> CRAE State of Children's Rights in England report December 2011.

<sup>245</sup> Par 28 the UN Committee on the Rights of the Child 2008.

<<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>> accessed on 27 October 2012.

youth representatives to represent the views of young people in the media<sup>246</sup>. These general efforts are applauded and they might be trickling down to the issue of children sexual abuse, strengthening children voices.

Since 2010 Children Trust Board are obliged to consult with children when discussing their Children and Young People's plan and the plan itself has to be issued in language that would make it accessible to children. On national level the Government Code of Practice on Consultations recommends to make consultation documents available in a "young persons version" so that youth is encouraged to participate.<sup>247</sup>

Existence of the National Participation Forum offers another opportunity for young people to get involved in shaping their future. They have produced An Equal Place at the Table for Children and Young People, a document outlining barriers young people need to overcome when trying to get involved in the society and suggesting methods of changing the current situation and supporting children participation.<sup>248</sup>

Existence of the UK Youth Parliament provides opportunities for 11-18 year-olds to use their voice in creative ways to bring about social change.<sup>249</sup> The charity is run by young people, who are democratically elected to represent their constituency. Over 500,000 young people vote in the elections each year, which are held in at least 90% of constituencies.<sup>250</sup>

According to the research on *Children's Participation in decision-making* conducted by the Children's Rights Alliance: 92 per cent of organisations investigated believed that children's involvement in decision-making had increased over the last five years and over two-thirds of organisations had a written policy or strategy to support participation of children.<sup>251</sup>

Another example where children's views have been represented is from the Munro Report, whereby it is clearly stated that in putting the report together, children and young people

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<sup>246</sup> *Ibid.*

<sup>247</sup> *ibid.*

<sup>248</sup> Participation Works Partnership official website <<http://www.participationworks.org.uk/npf>> accessed on 27 October.

<sup>249</sup> <<http://www.ukyouthparliament.org.uk/>> accessed 28 October 2012.

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<<http://uk.virginmoneygiving.com/charityweb/charity/finalCharityHomepage.action?uniqueVmgCharityUrl=byc>>

<sup>251</sup> Clara Davey, Children's participation in decision making: A Summary Report on progress made up to 2010 (Children's Rights Alliance for England)  
<[http://www.participationworks.org.uk/files/webfm/files/npf~/npf\\_publications/A%20Summary%20Report\\_jun10.pdf](http://www.participationworks.org.uk/files/webfm/files/npf~/npf_publications/A%20Summary%20Report_jun10.pdf)> accessed 28 October 2012.

partly contributed to the work themselves.<sup>252</sup> It is stated in the report that the Government agrees with Professor Munro that there will continue to be an important role for external inspection. Ofsted is designing a new inspection framework that will focus on the effectiveness of help given to children and young people, putting the experiences of children, young people and their families at the heart of the inspection system. In line with Professor Munro's recommendation, the new inspections will be conducted on an unannounced basis to minimise the bureaucratic burden associated with preparation for inspection.

CRAE, the Children's Rights Alliance for England has made comprehensive submissions each time the UK has been examined by the UN Committee on the Rights of the Child – in 1995, 2002 and 2008. For the 2008 examination, they supported and encouraged children and young people in England to carry out children's rights investigation and submit their own report to the UN. Get ready for Geneva was a three year project that enabled children to build knowledge about their rights and take an active part in the reporting process. Children could complete surveys and post their comments on an interactive website, elect "children rights champions" to influence local decision making and improve their lives.

vi. Who are the main national Non-Governmental Organisations working on the topic of children's rights? Does the State regulate (or not) their involvement in law making process?

Non-governmental organisations (NGO) have played a significant role in shaping children's rights policies in the UK. Before the UN Committee on the Rights of the Child meets with Government, to examine written evidence, it holds private discussions with non-governmental organisations (NGOs) and with children and young people. CRAE co-ordinates the NGO England alternative report to the UN Committee by submitting a written report highlighting areas of concern, as well as significant progress in implementing the Convention on the Rights of the Child.<sup>253</sup>

UNICEF UK is the world's leading organisation working to promote and protect children's rights around the globe for over 60 years. The work of UNICEF has been guided by the Convention on the Rights of the Child which states that specific role of the transnational organisation in its capacity as the UN body responsible for the rights of the child. They are

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<sup>252</sup> Department of Education, A child-centred system: The Government's response to the Munro review of child protection (July 2011) <<http://www.education.gov.uk/munroreview/downloads/GovernmentResponsetoMunro.pdf>> accessed 28 October 2012 .

<sup>253</sup> <<http://www.crae.org.uk/protecting/un.html>> accessed 27 October 2012.

currently campaigning for the protection of children from the effects of climate change and the implementation of a so called “Robin Hood Tax” on the financial sector which could raise considerable amounts of money to be used to help tackle poverty in the UK among other objectives.

The ROCK Coalition is an initiative of the CRAE in collaboration with UNICEF UK and Save the Children. It brings together organisation and individuals working on the area of children’s rights to consider how the Convention of the Rights of the Child can form part of the national legislation through a Bill of Rights and to pressure the UK government. In their attempts they published *‘Why incorporate? Making rights a reality for every child’* in 2012.

The Coram’s children’s Legal Centre is involved in research and policy making as well as publicising materials and providing training.<sup>254</sup> It undertakes research and consultancy in the areas of child rights, child law and policy both in the UK and abroad. The main projects over the last two years have covered child protection, juvenile justice, child employment and child protection in complex emergencies. In 2006, a research project was completed on complaints from children to the Independent Police Complaints Commission. Prior to this research, very little attention had been paid to the unique situation of child complainants or to the issues which arise for children in making complaints against police officers.

Child victims experience unique concerns and challenges at all stages of the criminal process. In 2010, Coram Children's Legal Centre completed a research project on the protection of child victims, which arose out of participation in a two-year EU-funded multi-country project which aimed at establishing best practice in meeting the needs of child victims and witnesses. The project was coordinated by La Voix De l’Enfant.

Coram Children's Legal Centre's aims to influence policy developments and promote the implementation of children's rights in the UK by publishing policy papers including responses to government consultations on children's rights issues, and submissions to domestic and international bodies on key children's rights issues. A list of their responses to consultation on children’s rights and equality can be found on their website.<sup>255</sup>

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<sup>254</sup><http://www.childrenslegalcentre.com/?gclid=CP-w19Wp77ICFaXKtAodZTMA6g> accessed 27 October 2012

<sup>255</sup>[http://www.childrenslegalcentre.com/index.php?page=childrens\\_rights\\_and\\_equality\\_](http://www.childrenslegalcentre.com/index.php?page=childrens_rights_and_equality_) accessed 27 October 2012

The *National Society for the Prevention of Cruelty to Children (NSPCC)* is one of the most well established NGOs in the UK dealing with the rights of the child and its work is widely recognised by the government. It is the only voluntary organisation with the ability to initiate proceedings to protect children under the terms of the Children Act 1989. It offers a number of services to children and practitioners, including a number of helplines and is acting as a liaison with local statutory agencies.

*Barnardo's* is another well established British charity fighting for the rights of the child for over a century now. It was founded in 1886 by Thomas John Barnardo to care for vulnerable children and young people and as of today it is spending over £190 million each year. The Charity has included child exploitation in its mandate for almost two decades.

The *Children Are Unbeatable! Alliance* is also a major campaigner and lobbyist the government with regards to children's rights and in particular corporal punishment. The Alliance was established in 1998. They are campaigning "for the UK to satisfy human rights obligation by modernising the law on assault to afford children the same protection as adults"<sup>256</sup>. Through regular newsletters reporting on the progress made and a plethora of information on corporal punishment, campaign material and information for an individual on how to approach and lobby a Member of Parliament, is regarded a very active and trust-worthy alliance.

The *Children's Rights Alliance for England (CRAE)* is major organisation fighting for the implementation of the Convention on the Rights of the Child in the UK. It protects children's rights by lobbying the government and others. In addition it offers legal information, raises awareness of children's human rights and contacts researches to children's the access of rights. It has produced bestseller children's books informing children and parents about the Convention on the Rights of the Child. CRAE also produces the State of Children's Rights in England- a CRAE annual publication<sup>257</sup> which included an in-depth analysis as to whether law, policy and practices in England comply with the UN Committee on the Rights of the Child recommendations, which was a useful tool in conducting the present report. Several changes have been made due to CRAE government lobby and alerting the UN Committee on the Rights of the Child. This includes local authorities having

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<sup>256</sup> <<http://www.childrenareunbeatable.org.uk/pages/action.html>> accessed 27 October 2012.

<sup>257</sup> 'Annual children's rights review' <<http://www.crae.org.uk/protecting/socr.html>> accessed 27 October 2012

to have regard to the Convention on the Rights of the Child in all stages of their plans for local child services. The government took on board many of the CRAE's recommendations regarding changes to the Children Act 2004 which created the body of the Children's Commissioner and the independent review of that body. In addition due to CRAE pressure the Government promised to transform the Office of Children's Commissioner into an independent human rights body and committed to give 'due consideration' to the Convention on the Rights of the Child when adoption of new laws and policies.<sup>258</sup>

## **IV OTHER**

There are no other legal or political issues that might be relevant in the United Kingdom for the purpose of the report.

## **V CONCLUSION**

In a nutshell, sexual violence in child victims may take various shapes or forms. This can include child prostitution, child pornography, grooming, and solicitation of children for sexual purposes, child exploitation, causing a child to witness sexual abuse and many more. With the advances in technology and the widespread use of the internet, child victims may experience abuse face-to-face but also through using the internet. The main national UK legal framework dealing with sexual abuse is contained within the Sexual Offences Act 2003, forming part of criminal law. With it being such a recent piece of legislation, it encompasses a wide range of activities that can fall within the definition of sexual- as previously discussed above.

Thus, on one hand, it is fair to say that the UK national legislative does provide an adequate legal framework within criminal law dealing with offenders in providing sanctioning measures and imprisonment for those found to have been involved in a sexual activity with a child. Notably, S 16-24, which regulates abuses committed by persons in a position of trust. However, where on one side there are legal frameworks, on the other, the protection of child victims, on the other, also needs to be well balanced. Protection of the child victims in the UK can include being placed with a carer or with social care, special measures to assist child witnesses can be implemented in court and in some cases the identity of the child may

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<sup>258</sup> <<http://www.crae.org.uk/about/our-impact.html>> accessed 27 October 2012.

not be disclosed for overall public interest;<sup>259</sup> to name a few. However, through case-law examples, it can be noted that not all of these special measures work adequately, thus there is still a gap in terms of ensuring that these rules are being abided by.

Ultimately, although there exists very good legislative frameworks, which might have been extremely well drafted, the effectiveness of such depends on its implementation within local council and safeguards put in place to identify and combat sexual abuse towards children. States' responsibility to protect children while in the care of individuals or institutions<sup>260</sup> are outlined in Article 19 (1) of the Convention on the Rights of the Child, and Article 19 (2) outlines the protective and preventative measures that should be taken.<sup>261</sup> Although these standards are not binding in the UK, they are of vital importance. However, as noted above, there have been instances where there has been a fundamental lack in the quality of services provided by some institutions e.g. The Rochdale grooming scandal. Another example is the case of Baby P, as discussed.

Another factor for the effectiveness of the legal framework and to reduce the risks of children being sexually abused is as stated by the ROCK Coalition, that a more comprehensive framework is needed for children to understand and recognise their rights and entitlement.<sup>262</sup> Hence why, the work of NGOs in the area of child abuse, child protection also forms an important part in shaping towards a change in the law, both nationally and on an international level, many of which also lobby for the implementation of international conventions within domestic law, for example, the United Nations Convention on the Rights of the Child. For example, NSPCC is able to initiate proceedings to protect children under the terms of the Children Act 1989. CRAE, on the other hand, is fighting for the implementation of the Convention on the Rights of the Child in the UK. It protects children's rights by lobbying the government and others. In addition it offers legal information, raises awareness of children's human rights and contacts researchers to children's access of rights.

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<sup>259</sup> <[http://www.cps.gov.uk/victims\\_witnesses/children\\_policy.pdf](http://www.cps.gov.uk/victims_witnesses/children_policy.pdf)> accessed 28 October 2012

<sup>260</sup> Office of the United Nations High Commissioner for Human Rights, *Conventions on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, Retrieved 9 August 2012, <<http://www2.ohchr.org/english/law/crc.htm#art11>> accessed 27 October 2012.

<sup>261</sup> *Ibid.*

<sup>262</sup> n 41.



To conclude, there exists a number of positive points in relation to the national legislative framework of the UK, for example, Sexual Offences Act 2003 – where the act places emphasis on those who exploit children whilst committing a criminal act. However, there are also negative criticisms, in particular, on the issue of consent within the Sexual Offences Act 2003 as to the interpretation and definition of it, which has caused a lot of debate.

The fact that the UK has suggested to one again reform the 2003 Sexual offences act is evidence of a willingness to improve the system.