

Warranties of Albanian criminal law for children protection from “pornography”

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Abstract

This paper will focus on the Analysis of current Albanian Criminal Law regarding criminal acts of pornography. This paper will analyze Albanian Criminal Law, under the perspective of the Convention on the Rights of the Child, to reflect the alignment of criminal law with Convention, as a minimum guarantee to be provided by the States.

Another element of this paper is the approach of criminal law in the context of the defense of children from pornography with judicial practice. In this way the effectiveness of Criminal Law, on prevention and protection of society, family and especially children, from pornography will be identified. This paper considers the judicial practice in other European countries, but also from the United States and other countries on other continents, as a source of the definition of pornography and its application. This analysis is conducted through the prism of Criminological and criminal policy, to identify the current state of the Albanian legislation to protect minors from pornography, challenges and its prospects, both in legislative and practical terms.

Keywords: pornography, pornographic materials, use of child online, child abuse, cyber security, etc.

Introduction

Pornography (often abbreviated as “porn” or “porno” in informal usage) is the portrayal of sexual subject matter for the purpose of sexual arousal. Pornography may be presented in a variety of media, including books, magazines, postcards, photographs, sculpture, drawing, painting, animation, sound recording, film, video, and video games. The term applies to the depiction of the act rather than the act itself, and so does not include live exhibitions like sex shows and stripteases. The primary subjects of pornographic depictions are pornographic models, who pose for still photographs, and pornographic actors or porn stars, who perform in pornographic films. If dramatic skills are not involved, a performer in a porn film may also be called a model. Pornography is defined as any media with sexual activity or nudity that is explicit and has sexual arousal as its main purpose. In the US there are no explicit rules about which media are considered pornographic; standards vary from jurisdiction to jurisdiction and guidelines are generally vague. Pornography involving children, however, has been consistently labeled as obscene, and possession of this type of pornography is criminal.

Pornography can be defined as any media basically construed as intended to entertain or arouse erotic desire. This is the most common definition used by researchers and the courts. Among some persons and groups, associated materials have negative connotations and they wish to express that sentiment in the definition. For others

pornography is viewed positively. In the United States these materials are legal under the First Amendment unless judged *obscene* in accordance with a so-called Miller standard (Milton, 2009).

The issue after the 1990's in the US was internet users and also children could see pornographic materials with no restriction. New laws on pornography were needed, not only in the US, but also in Europe. In the Albanian language this is a new word, borrowed from other languages. These actions qualified as pornography were identified as a criminal offense in the Criminal Code 1977.¹ As per article 136 of this code, production, distribution and advertising works, pornographic publications, as well as trade with them or keeping them for the purpose of sale or distribution is forbidden.

After the democratic changes, Albanian legislation and the Albanian society has advanced in this context. The Penal Code of 1995 has forecasted pornography in relation to the minors and was later amended and adapted to the social needs and the additional warranties for children and society, against this offense.

If we refer to the judicial practice, in the period 1995-2015 there is no case in the Court of Tirana for the offense of pornography.²

However, to assist in the identification of pornography, democratic societies have ratified international treaties and adopted laws, in particular to protect children from this type of action and to prevent them happening. Pornography is not just a legal problem or a court, but above all, is a social problem related to children and the future of a nation.

Warranties of international and national civil legislation for children protection from "pornography"

The Convention on the Rights of the Child³ is a general guarantee for the rights of children, but it also provides a protection to them, in particular from all forms of sexual exploitation and sexual abuse, and in particular, Article 34 letter c states: "*States Parties shall in particular take all appropriate measures at national, bilateral and multilateralism to prevent that children are used to display pornography or pornographic material.*"

In this sense the Constitution of the Republic of Albania has forecasted special attention for children from the state.⁴

Likewise with the Optional Protocol to the Convention on the Rights of the Child in connection with the sale of children, child prostitution and child pornography, obligations were provided for states party to amend criminal law and fully cover actions and activities foreseen in this Protocol as criminal offenses. In the case of pornography such obligation provided for in Article 3, paragraph 1, letter c. This legal norm is the reference in the case of identifying the elements of the offense as defined in Article 2 of this Protocol, letter c, which defines child pornography "Any representation, by whatever means of a child engaged in explicit sexual activities,

¹ Albanian Criminal Law, Law 5591, 15.06.1977.

² <http://www.gjykatatirana.gov.al/>

³ Albania has signed the Convention on 26 January 1990 and ratified, on 02/27/1992.

⁴ The Constitution of the Republic of Albania 1998 (updated).

real or simulated, or any of the sexual parts of a child for primarily sexual purposes". The Protocol obliges state parties to take measures for a more efficient justice, in such cases, not only through amendments to substantive criminal law, but also through the criminal procedure.

Also the adoption of the law on the rights of the child No. 10347 dated 14.11.2010 is a first step towards the protection on the rights of the child in general.

Law no. 97/2013 "On Audiovisual Media in the Republic of Albania" is suggested to be reviewed. The definition of "harmful content" may include content promoting or connected with goods and IT services, which can harm children.

The role of the Authority of Electronic and Postal Communications (AEPC), should be active with regard to the supervision of ISP services that may contain illegal content. AEPC should be given more power to regulate and supervise internet caffès. It suggested that cyber crime legislation should be reviewed. It should contain a definition of "child pornography on the Internet." The law also should consider as infringement actions that facilitate child pornography on the internet the following actions, such as: "making access to knowledge," "Friendship," "activation," help, "" support, "" attempt "and" aggravating circumstances."

Cybercrime law should provide protection for someone who faces the entrance to "illegal" and "harmful" content by using the Internet for non-criminal purposes (ie, scientific and academic).

Analysis of criminal legislation regarding the protection of children from pornography and Albanian judicial practice, in relation to those of other developed countries.

Article 117 of the Albanian Penal code regulates the offense of pornography. It was initially estimated without any regard to persons under 18 years old. However, the Criminal Code, unlike the Convention on the Rights of the Child uses the concept of a minor. Criminal law should unify the notion, with international acts that have defined and unified the concept of children. In this case Article 117 of the Criminal Code uses the terminology "a minor" as a concept to identify persons under the age of 18 years.

The offense of pornography can be shown by several forms such as production, distribution, advertising, import, selling and publication of pornographic materials in the premises of minors. If we refer to the concept of pornography, there is no definition in the Criminal Code. However, in these cases, practitioners of law may refer to Article 2, letter c, of the Optional Protocol to the Convention on the Rights of the Child, regarding the sale of children, child prostitution and child pornography. Exactly, it qualifies as pornography use whatever means, where one child is involved in activities involving real or simulated sexual, or any demonstration of child sexual parts, primarily for sexual purposes.

In this context, the decision of the District Court of Tirana, describes pornography as a criminal offense provided by article 117 of the Criminal Code.⁵ Materials found consisted of photos and videos of minors aged 4 to 8 years old. The Court decided,

⁵ Decision no 1048 dated 05.04.2016 of District Court of Tirana.

that the offense was carried out by the defendant with serious, active, illegal, and concrete actions, by downloading photos and videos containing child pornography in his computer.

Despite the fact and lack of Albanian judicial practice regarding this offense it can not be concluded that in Albania there are no cases of pornography. Internet and technology has made Internet unsafe for children and the access to material which is broadcasted illegally on the social network. For these reasons these cases are difficult to be identified in practice. If we refer to the Alternative Reporting of the Convention on the Rights of the Child 2004-2009, it can be stated that: There are not any identified offenses of abuse or mistreatment or sexual exploitation, and for more pornography, in the policy statistics.

In comparison with the Albanian state legal and judicial practice, developed countries have a different approach and also the structures that are in the first contact with the reporting or identification of this offense too. Based on data from Denmark, Sweden, West Germany and the U.S.A for which ample data were available at the time, Kutchinsky showed that for the years from approximately 1964 to 1984, as the amount of pornography increasingly became available, the rate of rapes in these countries either decreased or remained relatively level (Milton, 2010).

Studies of Croatia (Landripet, Stulhofer, & Diamond, 2006), and of the United States and China also showed significant decreases in rape as pornography became increasingly available (Diamond, 1999). To add to these data it should be mentioned that yet unpublished studies from Poland (Diamond, in preparation), Finland (Diamond & Kotula, in preparation), and the Czech Republic (Diamond, Weiss, & Jozifkova, in press) also similarly found that as the availability of pornography increased the incidence of sex crimes decreased.

Conclusions

Pornography is not just a legal problem or a court, but above all, is a social problem related to children and the future of a nation. Article 117 of the Albanian Criminal Code does not provide, as an aggravating circumstance when the child is exposed and identified as such in the public and caused such consequences in terms of its emotional and psychological development. Even if there is a lack of judicial practice for pornography, we still cannot come to a conclusion regarding the need for further improvements to the Criminal Code. However, the Albanian Criminal Code has undergone other changes and improvements related to cybercrime, which has an integral connection with the criminal offense of pornography.

Despite the fact and lack of Albanian judicial practice regarding this offense it cannot be concluded that in Albania there are no cases of pornography. Developments of the Internet and technology have made the Internet use unsafe for children and the access to material which is broadcasted illegally on the social network. For these reason these cases are difficult in practice to be identified.

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