

**THE CRIMINALIZATION OF CHILD PORNOGRAPHY: THE  
PROBLEM OF ENSURING A BALANCE BETWEEN  
FUNDAMENTAL HUMAN RIGHTS  
AND PUBLIC ORDER AND MORALS**

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**ABSTRACT:** *Protecting human rights has been the focal point of international legislation for the past years, criminal provisions being often under scrutiny, since they are the ones that, by their very nature, can prove most intrusive in this area. Without questioning the severe nature of the crime of child pornography, it is important to observe the way in which social or moral norms can influence the line between which action can be considered to be within the bounds of legal exertion of basic rights and which is a transgression. It has been established that freedom of expression includes even subjects that can shock and while some materials formally fulfill the requirements to be considered pornographic, at the same time they might present artistic and scientific value, preventing such a classification. A balance must be ensured to properly apply the legal norm, but at the same time to prevent the stifling creative manifestations. Also, certain issues may be raised regarding the right to the protection of private life, since the actions of a person while in the privacy of his own home or in other place that cannot be considered as public may only be sanctioned if justified under specific conditions.*

**KEY WORDS:** *child pornography; freedom of expression; private life; rights of the child; artistic creation.*

**JEL CODE:** *K14*

## **1. INTRODUCTION**

Legislation is the result of the decision-making process of the representatives elected by the majority within a community, who have been given this prerogative based on the belief that they will act in accordance with the common goals of that community. As such, it is invariably linked with the traditions and needs of a specific social group. While the law has to be sufficiently general and abstract, in order to encompass as many possible situations, it must also avoid interfering with other rights. The recent decades have seen a policy of human rights' protection that is centred on the individual seen as a complex entity, with the need to ensure not only his physical safety, but also the development of his personality free from unnecessary limitations.

While current Romanian legislation does not sanction the issuing, trading and possession of pornographic materials depicting adults, if done within the prescriptions of

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Law no.196/2003, it does criminalize child pornography, through article 374 of the Criminal Code. The evaluation of what is obscene or pornographic depends highly on the morals of the community. Therefore, it is to be observed that even though in time the perception upon the adult's right to explore his sexual desires has changed, becoming less strict, when it comes to the vulnerable category of children, protection offered through the means of criminal legislation is still seen as needed. In this way, the social values regarding the relations and attitudes towards children are placed on a higher level.

Even in this instance, though, it is important not to forget that the state should respect the balance that is essential in a democratic society with a person's rights and freedoms. Since the definition of pornographic materials is a very wide one, encompassing all forms of media, there can be situations when it is difficult to establish if the author was acting within the right to freedom of expression, or the one possessing such materials has the right to the protection of his private life.

## 2. MORAL NORMS AND LEGAL NORMS

Morality differs between communities around the world, being linked to their specific experiences and beliefs. Unlike laws, moral perceptions are more difficult to pinpoint, since they basically represent instructions of what one must or must not be or do in order for his actions and his very person to be appreciated by the community as being either good or bad (Fodor, 2003, p.20). Moral norms are part of the collective consciousness and each individual is born within an already existing system of such norms, which he assimilates (Fodor, 2003, p.25). It is important to identify elements of the moral code of a society, since it will influence the social values that are considered sufficiently important to be transposed into legal norms.

One of the main characteristics of legal norms is that they are recognised and enforced by the State, which establishes a suitable punishment, carried out through its institutions. The sanction for transgressing moral norms can be of an internal nature, such as regret, shame or a guilty conscience, but also of an external nature, under the form of public disgrace (Fodor, 2003, p.26).

Both legal and moral norms prescribe the relations between the individual and the community, but they cannot always overlap. Laws are stable and their change is a public and transparent process, whereas morals are subjective, forever fluctuating and lack the true coercion that is needed in order to create order and security within society. As stated before, legal norms tend to be in harmony with morals precepts, but they do not base their legitimacy solely in this correspondence (Fodor, 2003, p.30-31). There are many examples of situations where the shifts in moral perceptions generated a change of legislation. Until the year 2006, article 304 of the former Criminal Code of Romania (from 1968) criminalized adultery. Taking into consideration the principle of subsidiarity which states that criminal legislation should be used as a last instance resort, when other sanctions are not sufficient to ensure an effective protection of the social value, since the morals in society evolved it was considered that to continue to punish such acts is excessive. The moral sanction remains, the person involved being perhaps subjected to public opprobrium within their community, but the State sanction was removed. As part of the International Convention for the Suppression of the Circulation Of and Traffic In Obscene Publications, ratified in Geneva on September 12<sup>th</sup> 1923, under the auspices of

the League of Nations, Romania assumed the obligation to prosecute and punish offences which included, among others, making or producing or having in possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects, carrying on or taking part in a business, whether public or private, concerned with any of the said obscene matters or things, or dealing in the said matters or things in any manner whatsoever, or distributing them or exhibiting them publicly or making a business of lending them. In time, legislation was issued to establish the limits within which it was legal to produce, commercialize and possess pornographic materials, focusing mainly on the need to warn people of the adult content, to keep such materials out of the reach of children and to ensure the prosecution of those who exploited children or people with physical or mental disabilities in order to produce illicit materials. Law no.196/2003 also maintained the offence of child pornography.

### **3. ILLICIT MATERIALS AND THE PROTECTION OF FUNDAMENTAL RIGHTS**

When deciding if a certain image, song or piece of literature could be described as obscene or pornographic, it is difficult sometimes to be objective, since each person, based on his cultural and educational background, might have a different perception of what is morally acceptable, especially when children are involved. At the same time, it is important to ensure a balance between different social values when outlawing certain materials, since excessive censorship has always been perceived as an act of oppression, incompatible with the principles of a democratic society.

In Romania, art. 2, para. (1)-(3) of Law no.196/2003 provide definitions that were meant to help identify pornographic materials. According to this law, pornography is represented by acts having an obscene character, as well as materials which reproduce or disseminate such acts. Acts having an obscene character are understood as gestures or behaviors which are sexually explicit, done individually or in a group, images, sounds or words which by their meaning are an offence to decency, as well as any other form of indecent manifestation regarding sexual life, if committed in public, while obscene materials are defined as objects, engravings, photographs, holograms, drawings, writings, prints, emblems, publications, movies, audio and video recordings, advertisements, computer programs and applications, songs, as well as any other forms of expression which explicitly present or suggest a sexual activity.

It is easily observed that practically every form of media is encompassed in these definitions, the text plainly stating that any form of expression can be included, if the other requirements are met. However, there is still the problem of interpretation, since while it is relatively easy to distinguish acts or materials that explicitly present or suggest a sexual activity, what is offensive to decency and what can be considered “any other form of indecent manifestation” regarding sexual activities is still left to the general perception of morals within the community and, more importantly, to the evaluation of the one called upon to enforce the law. However, the law does establish, through art. 3, that it does not apply to works of art or science, or to materials realized for the purpose of art, science, research, education or information.

After the new Criminal Code was adopted, the offence of child pornography was included in the chapter containing crimes against public order<sup>1</sup>. The text was recently modified by Emergency Government Ordinance no.18/2016 on 23 May 2016 and it offers its own definition of the illicit materials. As such, art. 374, para. 4 of the Criminal code describes pornographic materials involving minors as any material which presents a minor or an adult depicted as a minor, having a sexually explicit behaviour or which, even though not presenting a real person, simulates, in a credible manner, a minor behaving in such a way, as well as any other representation of a child's genital organs, with a sexual purpose. The Criminal Code tries to follow the prescriptions of 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. This document established that child pornography can be: (i) any material that visually depicts a child engaged in real or simulated sexually explicit conduct; (ii) any depiction of the sexual organs of a child for primarily sexual purposes; (iii) any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or (iv) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes. It is to be noted that while the Directive includes in this category actual or realistic depiction of sexual organs of a child or person appearing to be a child for primarily sexual purposes, which would suggest that other purposes might be included, the national text limits the definition to those representations having a sexual purpose. This minor difference may prove useful when analysing the exceptions from the incriminating norm, respectively materials that have primarily a scientific, educational or artistic purpose. But the significant part of these texts is that they introduce two distinct types of images, which clearly state that it is not necessary for an actual child to feature in them in order for this provision to apply, thus suggesting that the value protected is not the physical wellbeing of the child, since acts of sexual abuse and exploitation are incriminated differently, but rather the normality of social relations which should exist regarding children.

The problem with virtual images of pornography, understood as those materials that do not present a real person, but a credible version of one, is that they necessarily involve a form of self-expression through diverse media by their creator. It is here that the problem of proportionality between the criminal norm and protection of other fundamental rights and freedoms is most evident and also where the concept of a "victimless crime" is in debate.

The European Court of Human Rights, in one of its often quoted decisions, established that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-

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<sup>1</sup> Before the entry into force of the new Criminal code, on the 1<sup>st</sup> of February 2014, the incrimination of child pornography was divided, with two laws sanctioning the different ways of committing the offence. While distribution and possession with the aim of distributing pornographic materials containing minors engaged in a sexually explicit behaviour was incriminated by article 11 of Law no.196/2003, the acts of producing for distribution, offering, making accessible, distributing or transmitting, procuring, for oneself or for others of pornographic materials depicting minors through information systems, or the unlawful possession of such materials in an information system or storage device was sanctioned by article 51 of Law 161/2003.

fulfillment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. (*Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24). This is the best-known paragraph of the decision, where the Court clearly states that even controversial subjects can be encompassed in the area of freedom of expression and, as such, any act of censorship must be analysed under the more restrictive conditions imposed by the Convention. The text, however, continues to say that, from another standpoint, whoever exercises his freedom of expression undertakes “duties and responsibilities” the scope of which depends on his situation and the technical means he uses. The Court says that it cannot overlook such a person’s “duties” and “responsibilities” when it enquires, as in this case, whether “restrictions” or “penalties” were conducive to the “protection of morals” which made them “necessary” in a “democratic society”. (*Handyside v. the United Kingdom*, § 49). Therefore, the Court also recognises that the moral standards of a society are to be taken into account when determining if proportionality was respected by the Member State when applying a sanction. In this case, the Court found no violation of paragraph 2 of Article 10, finding that the legitimate purpose was the protection of the morals of the young and the measure of banning a certain book had proven to be necessary in a democratic society.

In another case, related with child pornography, the Court’s decision was based on the idea that artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his freedom of expression undertakes “duties and responsibilities” and their scope will depend on his situation and the means he uses (Decision as to the admissibility of Application no. 1685/10 by *Ulla Annikki Karttunen against Finland*; §21). The circumstances of the case regarded an artist who exhibited her work in an art gallery in Helsinki. The exhibition was opened to the public and the work included photographs of teenage girls or otherwise very young women in sexual poses and acts, pictures that had been downloaded from free Internet pages and some of them were extremely violent or degrading. The exhibition was closed by the police, the pictures seized and the applicant was convicted for possessing and distributing sexually obscene pictures depicting children. The domestic courts dismissed her defence, that her work as an artist had to be equated with the work of a journalist or a scientist, and that she had therefore had a justification for the possession and distribution of the pictures in question, arguing that the protection of the privacy of children took precedence over the applicant’s right to freedom of expression and the fact that the identity of the children was not known or that the pictures could be illegally obtained elsewhere did not remove the applicant’s criminal liability nor justify her acts. In this decision, the Court recognised that conceptions of sexual morality have changed in recent years. Nevertheless, the Court did not find the view taken by the Finnish courts, that the applicant’s freedom of expression did not justify the possession and public display of child pornography, unreasonable, especially as the case concerned minors or persons likely to be minors. Through this, it is recognised that artistic expression is not prevalent over all other rights, since while it is true that shocking or disturbing images can in themselves be a form of art, there are some values that require greater protection and, therefore, actions against them cannot elude sanctioning by claiming artistic value. In another decision of inadmissibility, it was stated that the

Commission did not consider it necessary to examine in detail the actual contents of the book in question, entitled "The lascivious pastor's wanton niece", as the domestic Supreme Court's decision, which the applicant had submitted, cites various passages from it, and found that they at least were not justified as having artistic or scientific purposes (Decision of inadmissibility *X v. Austria*, 05.04.1974).

This leaves the question of who decides what is of artistic value and what is not. The answer can, again, be found in resorting to the standards of a society, its cultural history and moral conceptions. This problem was put before the European Court of Human Rights, which stated that it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken on the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject (*Müller and Others V. Switzerland*, 24 May 1988, §35). In the case in question, where the applicant was once again an artist, whose works contained depictions of sexual activity in a manner that was deemed obscene, it was argued that, having inspected the original paintings, the Court did not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity". In the circumstances, having regard to the margin of appreciation left to them under Article 10 § 2, the Swiss courts were entitled to consider it "necessary" for the protection of morals to impose a fine on the applicants for publishing obscene material (*Müller and Others V. Switzerland*, §36).

Another famous decision, belonging to the Supreme Court of the United States, focuses more on the importance of artistic value over the possibility to criminalize acts of virtual child pornography. In *Ashcroft v. Free Speech Coalition* (535 U.S. 234, 2002) it was first stated that pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not. However, it found that the legislation under scrutiny, the Child Pornography Prevention Act of 1996 (C.P.P.A.) prohibited speech despite its serious literary, artistic, political, or scientific value. The Court explained that if films like *Romeo and Juliet*, *Traffic*, *American Beauty*, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value. This was deemed inconsistent with an essential First Amendment rule: the artistic merit of a work does not depend on the presence of a single explicit scene, but it requires that redeeming value be judged by considering the work as a whole. It was considered that the C.P.P.A. prohibited speech that records no crime and creates no victims by its production. In this instance, the judges chose to place freedom of expression above the need to prosecute acts that although presented the material elements to be considered child pornography, were not "real" images and were "redeemed" by the work's artistic value as a whole.

The Court chose to mention in its argumentation that there were no victims when producing such images. It is sometimes difficult to separate in our perception the act of producing child pornography from the acts represented in it and, therefore, not to consider this crime as one directed solely against the child. If we accept this point of view then, indeed, if no child was actually physically or mentally mistreated in order to produce the

material, we could say that it is a victimless crime. Moreover, it would put into question the need to criminalize such acts, since there was no real harm done to anybody. Some have even suggested that society has progressed and must consider the implications of legislating based on emotional and instinctual urges, arguing that regardless of the emotional connection individuals feel to children, impulses are not sufficient justifications for enacting a prohibition (Byberg, 2012, p.34). The author also notes that the current justification for the infringement of the right to free speech in relation to child pornography is the direct physical harm of the depicted children and that none of the presumed forms of direct or indirect harms are conclusively proven when discussing virtual child pornography (Byberg, 2012, p.29). When analysing these statements, we must question the choice of considering a society which would completely exclude morals from its law-making process as an evolution. While we have to agree that the purpose of criminalization cannot be reduced to mere retribution against wounded sensibilities, a purposeful negation of human emotions and the commonly accepted sense of social normality is in danger of undermining the very concept of a legislation designed to protect social values that are considered relevant by a group of people at a certain time and dehumanizing rules that were meant to encourage the development of the human being as a complex entity, which does not only require physical safety, but also psychological and emotional security. As stated before, this has been the major trend in human rights regulations in the last decades, to ensure that the personality of the individual is considered just as important as his physical integrity. It is, therefore, not absurd to accept that criminal legislation could be called upon to ensure the sanctioning of acts that are in blatant contradiction with the shared perception of what is considered the normal conduct regarding a group of persons that are vulnerable and in need of protection. This point of view is more evident in the choice to criminalise the mere possession of materials depicting child pornography. Even when it contains images of real children, we could not say that the act of possessing the material has done any direct harm to anyone, nor does it encourage the production of such images, thus indirectly causing harm, since it is purchase and not possession that would be seen as such an encouragement<sup>2</sup>. Therefore, it is evident that this act is criminalised simply because, in itself, it represents a danger to the protected social value.

It is, perhaps, easier to accept that the crime of child pornography is not, in actuality, designed to protect the child as an individual, but rather as a part of a vulnerable social group in law systems which are based on codification, since the grouping and subgrouping of certain types of crimes offers us a clear understanding of the social value protected, representing the generic juridical object (Streteanu, 2008, p.346).

The choice of the Romanian legislator to include this crime in the Chapter of the Criminal Code regarding public order indicated that the primary value protected is the normality of social relations regarding children and the public perception of the incriminated action. As such, the principal passive subject is society or the State. The passive subject of a crime must not be confused with person who suffered harm or a

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<sup>2</sup> There are authors that have suggested that there can be a link between possession of illicit materials and the exploitation of children in order to produce them, because if more people were deterred, by criminal sanctions, to have such materials, then even the “manufacturers” would be discouraged to produce them (Moise, 2015, p.283).

material injury as a result of the activity, since they are not always the same (Streteanu, 2008, p.382). Moreover, this is not the only crime whose passive subject is the State, since it is the same, for example, for the crime of unauthorised possession of dangerous objects (article 372 paragraph 1 of the Criminal Code). No physical person is actually harmed by the mere possession of the object and the use of it is incriminated separately, but we do recognise that there is an abstract danger in the situation described by the incriminating text. It is the same in the case of child pornography, even when it regards virtually generated images. In this situation, we cannot say anymore that we can have a victimless crime.

This, however, brings us back to the question of who decides what gives a work the redeeming quality of it being artistically or socially relevant. In other words, how do we judge something to be a work of art? The famous American satirist, Tom Lehrer, remarked in his song *Smut*, written in the 1960's, using a twist of the famous quote: "*beauty is in the eye of the beholder*", that "*Filth, [...], is in the mind of the beholder;/ When correctly viewed,/ Everything is lewd!*". On a similar note, Robert J. Stoller pointed out that no representation is pornographic until the phantasms of the observer are added, since nothing is in itself pornographic (Stoller, 2014, p.99). Therefore, taking into consideration the arguments provided by the European Court of Human Rights in its case law, we must agree that it is, again, the collective cultural and moral background of a certain society which dictates what is accepted as being within the bounds of artistic expression. For example, the famous painting *Amor vincit Omnia*, by Caravaggio, is a depiction of a fully naked teenage boy as the god Cupid, the representation of love. The work is currently on display in a museum and it is undisputedly a work of art. The reason why this would not fit within the definition of pornographic material is that its purpose is not a sexual one. The representation of the nude figure is a tradition in Western art, used to express ideals of male and female beauty and other human qualities and since the painting does not contain any other elements to suggest a sexual activity, it is considered to be a testament to the mastery of a great artist, not to be judged as pornographic. It may be possible, though, that in other societies, with a different cultural heritage, this picture might not be considered as inoffensive.

The difference of cultural traditions can be observed when viewing the way in which Japan has chosen to criminalise child pornography. In June 2014, Japan made the possession of child pornography a punishable offense. However, the bill excludes the possession of explicit anime or manga. These forms of graphic art are perceived very differently from the way Western cultures relate to animation, being relevant to all ages and recognized as a part of the country's cultural identity. Representatives of those industries argue that any move to censor their products would be an unjustified restriction of freedom of expression (Hellmann, 2014; J.Mullen & Wakatsuki, 2014).

#### 4. CONCLUSION

When creating criminal legislation, there is always the problem of proportionality, especially when it touches areas that involve basic human rights, in this case the right to freedom of expression. Excessive censoring is always feared as the sign of a dictatorial society, but this does not mean that for fear of being seen as not sufficiently open-minded we must elevate this particular right above all others, without limitations, since every

democratic society recognises that one's freedom ends where someone else's begins. At the same time, child pornography is in itself a delicate subject, since it involves our core sensibilities towards a particularly vulnerable group, while at the same time requiring that both legislators and those called upon to apply the law remain objective, as they should be when analysing any other crime. A careful balance between the two values is necessary and also possible, if the right indicators are taken into consideration. Social and moral norms cannot be ignored in the process of establishing whether an act is a transgression of the law regarding child pornography, since this crime is a reflection of the commonly approved social order within a group. When we realise that the abstract concept of childhood, with all the values that it encompasses, can and should represent in itself a value which is in need of protection, it is no longer difficult to comprehend that a legislation which chooses to also incriminate virtually generated or modified materials is not unwarranted.

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