

CRIMINAL PROTECTION OF CHILDREN FROM SEXUAL ABUSE

Summary: The introductory part points out the seriousness of the problem of sexual abuse of children and lists, with the Constitution of the Republic of Serbia, conventions that are significant to address this problem. Also, the paper indicates that children, ie. persons under the age of fourteen, enjoy special criminal protection against sexual abuse by prescribing criminal offenses, and then these offenses are enumerated. Each of these criminal offenses is then presented with a brief analysis and an indication of particular problems or omissions in their prescribing. In the conclusion it is stated that the current criminal protection of children is at a satisfactory level, but that criminal legislation in this field is still expected to be amended due to the need for further alignment with the Istanbul Convention.

Key words: pedophilia, child, sexual offenses, rape, children's rights

Introduction

Sexual abuse of children is considered a significant social problem since the second half of the XX century, although scientific studies and social discussions about this phenomenon began much earlier. For instance, a French physician, Ambroise Tardieu, in the XIX century pointed to the problem of children victims of sexual abuse to experts and the general public. The interest of experts in different professions grew with time, so today there is many pieces of research of this problem, both in social and medical sciences (Жерарц, 2004: 28). Otherwise, the term “pedophile”, frequently used to mark perpetrators of crimes against sexual freedom of children is not the most adequate, although widely used. In literal translation the term “pedophile” means “a person who loves children”, and the perpetrators of crimes against sexual freedom whose victims are children certainly do not, meaning they do not love children in a noble sense, but the children are their “preferred victims”. (Шкулић, 2019: 40).

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The Constitution of the Republic of Serbia guarantees the rights of a child, and within that, it prescribes that the children are protected from mental, physical, economic, and every other, including sexual exploitation and abuse (Article 64(3) of the Constitution of Republic of Serbia). In addition to the Constitution of Republic of Serbia, the children are protected by Convention on the Rights of the Child adopted and set for signing and ratification or joining by the resolution of General Assembly of the United Nations 44/25 from November 20th, 1989, and it came into force on September 2nd, 1990. Within the general protection of the child, this convention provides general protection of children from sexual abuse, while additional and more precise protection of children in that field is prescribed by the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse from October 27th, 2007. These conventions shall be viewed as a whole while having in mind that they treat every person younger than 18 as a child, while in Criminal Law of Serbia persons younger than 14 are treated as children.

Criminal offenses that protect children from sexual abuse

The central question with crimes against sexual freedom is how to regulate them with laws, meaning where to set the border between allowed and criminal. This question is still current, although not as much as it was several decades ago when we had a wave of legislative reforms in this field in many countries. Still, even today certain criminal and political questions are current, and in the sense of legal-dogmatic questions, there is almost no crime from this group where these questions are not asked in the application. With that in mind, it could be said that the protected object can be limited to one basic good or right, and that is the right to sexual self-determination. Following that, in the sexual sphere, only those sexual acts where it is not conscious or willing consent of persons against which they are committed shall be incriminated. In essence, these are only two situations: either situations where the sexual act is committed by using force (or when a state of helplessness is abused), or the situation when the act is committed against a person to whom the right on sexual self-determination cannot be recognized due do psychophysical immaturity (Стојановић, Делић, 2015: 66-67).

Persons younger than 14 in Serbia enjoy special criminal protection regarding sexual relations. The basic goal of these incriminations is the prevention of sexual relations or other forms of satisfaction of sexual impulses with persons younger than 14 because they are not physically nor mentally suitable, so that can result in harm to their health and development (Јазаревић, 2006: 516).

Criminal protection of children, meaning persons younger than 14 years old (Article 112(8) of the Criminal Code) from sexual abuse is given to crimes against sexual freedom prescribed in Chapter 18 of the Criminal Code, and these

are rape (Art. 178 of the Criminal Code), sexual intercourse with a helpless person (Art. 179 of the CC), sexual intercourse with a child (Art. 180 of the CC), sexual intercourse by abuse of office (Art. 181 of the CC), illicit sexual acts (Art. 182 of the CC), sexual harassment (Art. 182a of the CC), mediation in prostitution (Art. 184 of the CC), displaying, acquiring and possession of the pornographic material and exploitation of juveniles for pornography (Art. 185 of the CC), leading the child to attend sexual intercourse (Art. 185a of the CC) and exploitation of computer network or communication by other technical means for performing criminal offenses against sexual freedom of minors (Art. 185b of the CC). In addition to these criminal offenses, the children are given suitable criminal protection from sexual abuse by the criminal offense of human trafficking (Art. 388 of the CC). The protection is provided in two ways, either when the object of the offense is exclusively a child or when a certain criminal offense receives graver form if the offense is committed against a child.

The Law on amendments to the Criminal Code from 2019 introduces many novelties, both in a general and special part of the Code. In that sense, it shall be said that the legislator, among other things, increased penalties for crimes against sexual freedom, especially whose forms of the criminal offenses that endanger children, so, in that field, the Criminal Code of Serbia is among the harshest codes. Although there are valid arguments for the harshest penalties imposed on the perpetrators of criminal offenses against sexual freedom when the passive subject is a child, it shall be said that the majority of theorists criticize such solution (see: Стојановић, 2020: 584-585; Шкулић, 2019: 63-67).

Rape

The criminal offense of rape (Art. 178 of the CC) in addition to basic form incriminates one lighter and two graver forms. The basic form of rape (Par. 1) is committed by a person who forces another to sexual intercourse or to the equal act, by using force or threat of endangering life or body of that person or persons close to that person, and the prescribed penalty is imprisonment in term of five to 12 years. A lighter form of the criminal offense (Par. 2) differs from the basic form only in the form of forcing, as in this form of the criminal offense only threats are used, where the passive subject is threatened that for that person or persons close to that person something will be revealed that would damage his/her honor, and the prescribed penalty is imprisonment in term of two to ten years. The gravest form (Par. 4) exists if due to criminal offense from Paragraph 1 the death of the passive subject occurred, or the offense is committed against a child, and the prescribed penalty is imprisonment of at least ten years or life imprisonment.

This offense can be committed only with premeditation which, in basic form, among other things, has to envelop the consciousness that the sexual inter-

course or the equal offense is committed by using force or qualified threat and against the will of the passive subject. In the lighter form of the offense, premeditation envelops the consciousness that the offense committed by threatening to reveal something to him or her close person that would damage his / her honor or reputation or threatening other grave harm and against the will of the passive subject. With the gravest form which exists if the offense is committed against the child, that circumstance must be enveloped by premeditation of the perpetrator. During determination, if the qualifying circumstance that the offense is committed against the child exists, we shall have in mind that sometimes it is difficult to determine how old the passive subject is. It is known that persons aged 12-13 can be developed with expressed sexual attributes that are applied to persons aged 16-17 (Лукић, 1980: 270). In such cases the perpetrator can be in error in regard of the age of the passive subject as a qualifying circumstance, meaning it can happen that the age of the passive subject was not enveloped in premeditation of the perpetrator, and then it would not be the gravest form of this criminal offense.

Sexual intercourse with a helpless person

The criminal offense of sexual intercourse with a helpless person (Act 179 of the CC), in addition to the basic form, incriminates two graver forms. The act of the basic form (Par. 1) is intercourse or equal act. For the existence of the offense, it is necessary that the perpetrator, during committing the offense, abused some of the conditions of the passive subject because of which he or she was unable to resist. The essence of this offense is that the intercourse occurred against the will of the passive subject, while the passive subject can express his or her opposition in any way.

The conditions of the passive subject used for committing this offense are mental illness, developmental problems, other mental issues, powerlessness, or any other condition due to which the passive subject is unable for resisting. Differently from the criminal offense of rape, the perpetrator does not use coercion as a means for committing the offense but abuses some of the conditions the passive subject suffers from regardless of the activities of the perpetrator. The punishment prescribed by the Criminal Code is imprisonment in terms of five to 12 years.

The gravest form exists if the death of the person against whom the offense was committed occurs, or if the offense was committed against the child. The qualifying circumstance that the offense was committed against the child has to be enveloped in premeditation of the perpetrator, and prescribed punishment is imprisonment in terms of at least ten years or life imprisonment.

Sexual intercourse with the child

Ratio legis of the criminal offense of sexual intercourse with the child comes from the general position that a person who is not yet arrived in a certain age is not objectively capable to consent to sexual intercourse by own free will, or from standpoint of the legislator that a person who is a child in the criminal sense is not at all capable to consent to intercourse in a relevant manner. The matter is in abuse of insufficient age of the person with whom voluntary sexual intercourse is achieved and such abuse represents essential *ratio legis* of the criminal offense of intercourse with a child (Шкулић, 2019: 361).

The act of committing of the basic form of the criminal offense of intercourse with a child (Art. 180 of the CC) is prescribed alternatively as the intercourse or equal act, and prescribed punishment is imprisonment in term from five to 12 years. The intercourse is defined as vaginal intercourse, meaning penetration of male genitals into female genitals, while the act equal to intercourse is defined as anal or oral intercourse, or penetration of male genitals into the anal or oral orifice of another person (female or male). It is disputable whether oral intercourse between two female persons, meaning penetration of the tongue of one female to the vaginal or anal orifice of another female is considered as an act equal to sexual intercourse. While having in mind regulations of the Istanbul Convention (Art. 36), that sets demand that in criminal offenses against the sexual freedom the act of committing is defined widely, meaning that vaginal, anal or oral penetration of sexual nature in body of another person without their consent by using any part of the body or objects is incriminated, a position that oral intercourse between female persons shall be considered as an act equal to sexual intercourse shall be accepted (Delibašić, 2019: 241).

Sexual intercourse or act equaled to it must be committed with “consent” of the passive subject. Although there is no consent in the true meaning of that word, there cannot be force or qualified threat, because in that case, the gravest form of the offense of rape from Article 178, Paragraph 4 of the Criminal Code would exist. Also, if the act is committed against a helpless person younger than 14, the gravest form of criminal offense sexual intercourse against a helpless person from Art. 179 Par. 3 of the Criminal Code will exist (Стојановић, Перић, 2009: 92). There cannot be any forms of influencing the will of the passive subject, such as those attributable to the criminal offense of sexual intercourse by abuse of office, since in that case, if the passive subject is child, a graver form of this criminal offense, from Article 181, Paragraph 3 of the Criminal Code would exist (Шкулић, 2019: 366).

The criminal offense can be committed only with premeditation, wherein the sense of the age of the passive subject it is not necessary that the perpetrator has a clear knowledge of the exact age, but it is enough that he or she was aware that it is a very young person. An additional problem is the question of the exis-

tence of true error in the sense of the age of the passive subject. That possibility is quite real particularly in cases when the passive subject was not significantly younger than 14 and when his or her physical appearance relates to one of the people aged 14, or in case of the above-average physical and intellectual development of the passive subject. Since the removable true error excludes the guilt, for the existence of the criminal offense it is not enough that the perpetrator could learn the age of the passive subject in a certain way, and the general question is asked whether someone is obliged to determine the age of another person before entering sexual relations with him or her (Стојановић, 2017: 578).

In that sense, it shall be said that in both theory and practice there is an opinion according to which the existence of error about the age of the passive subject can be accepted only in case when the perpetrator is a minor or a young adult, and when it is justifiable to expect that due to own experience and development stage he or she could act in error. Aside from that, in this opinion, when the perpetrator is older than 21, there is no reason not to expect from him or her to check the age of the minor with whom he or she enters sexual relations. Besides, we can talk about true error only in age borderline cases, measured in months, while more serious age deviations cannot be enveloped in argumentation of true error (Павловић, 2013: 266).

A similar position is taken in question of legal error, where the problem of adaptability of criminal norms to specific cultural and ethnic minorities, such as Roma community, which favors early entering to sexual and matrimonial (extra-marital) relations shall be observed. By this opinion, the existence of error about incrimination of sexual acts against the children based on customs of a certain group or national minority cannot be considered a valid argument, or even extenuating circumstance, as the logic that represents violent or abusing customs as cultural attributes of a people cannot be accepted. Also, such logic is not accepted by the international conventions which try to eradicate gender-violent and discriminative customs by their recommendations (Павловић, 2013: 266).

The graver form (Par. 2) exists if during the basic form grievous bodily harm occurred in children against whom the offense was committed, or if the offense was committed by several persons, or if the offense had pregnancy as a consequence, and the prescribed penalty is imprisonment in term from five to 15 years. Interestingly, the legislator did not predict the graver form in case that the offense is committed by a person who is in a close or special relationship with the passive subject, such as a parent, step-father, step-mother, teacher, or guardian. True, with the criminal offense of sexual intercourse by abuse of office from Article 181 of the Criminal Code, a qualified form is prescribed (Par. 3) which exists if one of these persons or another person who commits sexual intercourse or the equal act with the child commits that offense by abuse of his office or position. In this way, the legislator made an omission, by prescribing the same punishment, the imprisonment in term from five to 12 years both for the basic form of the criminal offense of sexual intercourse with a child from Art. 180,

Par. 1 of the Criminal Code and for graver form of the criminal offense of sexual intercourse by abuse of office, from Art. 181, Par. 3 of the Criminal Code. Such solution is not acceptable, as in the basic form of sexual intercourse with the child there is a “consent” of the child, while in the graver form of the criminal offense of sexual intercourse by abuse of office the intercourse does not occur “voluntarily”, but since the perpetrator abuses his/her office or authority. Because of that a difference between these two situations shall be made by prescribing different punishment (Делибашић, 2019: 245-246). The gravest form of the criminal offense of sexual intercourse with a child (Par. 3) exists when during the basic or graver form of this offense the death of the child occurred, and prescribed punishment is imprisonment from at least 10 years to life imprisonment.

For the basic form of this criminal offense, the perpetrator will not be punished, which means that in that case there is no criminal offense (Art. 112 Par. 29 of the CC), if between him/her or the child there is no significant difference in mental and bodily maturity (Par. 4). In this way, the legislator predicted a condition of exclusion of the existence of criminal offense when certain perpetrators are in question. Although a position that it is a special condition of exclusion of illegality, it is still a circumstance that is connected to the perpetrator’s personality. Namely, a person with certain attributes cannot commit this criminal offense, so that is a personal condition for exclusion of culpability. This question has no practical importance because in both cases there is no criminal offense. Otherwise, this solution introduced in the Criminal Code in 2005 was proposed in the literature for a long time, and it exists in the foreign legislature. That solution is undisputable in the criminal and political sense, but there are certain differences in the way or condition under which it is predicted in foreign legislatures. Although the Criminal Code did not explicitly set the condition that in this case, the perpetrator has to be a minor (persons older than 14 but younger than 18), in case that the perpetrator is of age the condition that there is no significant difference in mental and physical maturity of the perpetrator and the passive subject would not be met. Regarding maximum age difference that could exist, and that the mentioned condition is met, we can see somewhat different solutions in the foreign legislature, or in positions of judicial practice (if it is not explicitly prescribed by the law, which is the most frequent case), or in opinions expressed in theory. According to these positions, the difference is between two and four years, in addition to usually requesting the condition that the passive subject cannot be younger than 12. That would be acceptable orientation criteria for the application of this condition of exclusion of illegality in our criminal legislation as well. Beginning from solutions and experiences in criminal law of other countries, as well as theoretical positions, a position could be taken that in cases when the age difference is not larger than two years we shall start with the assumption that the given condition concerning mental and physical maturity is met. If that difference is between two and four years, it would be necessary to determine and

compare the level of mental and physical maturity of the perpetrator and the passive subject and from that, the existence of the criminal offense would depend (Стојановић, Перић, 2009: 93-94). Therefore, for instance, this criminal offense would not exist in the situation when there is negligible difference in “emotional and social maturity and stability” (АСК, Кж1 555/2015), meaning mental and physical maturity. Nonetheless, there will be a significant difference in mental and physical maturity, and by that, the criminal offense will exist, if the perpetrator (aged 20) by his emotional maturity is at the level of the older minor, and passive subject (aged 12) is at the level of a child (ВСН, К 143/2011-2) (Стојановић, Шкулић, Делибашић, 2018: 230).

Sexual intercourse by abuse of office

The basic form of the criminal offense of sexual intercourse by abuse of office (Art. 181, Par. 1 of the CC) is committed by a person who by abusing his position leads to the intercourse or the equal act the person who is in any form of subordination or dependence to him or her, and prescribed penalty is imprisonment from three months to three years. The graver form (Par. 3) exists if a teacher, guardian, foster parent, parent, step-father, step-mother or another person who by abuse of his or her position commits sexual intercourse or the equal act to it with a child given to him or her for education, upbringing, custody or care, and the prescribed penalty is imprisonment in term from five to 12 years. It will take a graver form (Par. 4) if the act had a pregnancy as a consequence, and in that case for the offense from the Paragraph 1 an imprisonment from six months to five years is prescribed, or for the act from Paragraph 3, imprisonment in term from five to 15 years. The gravest form of this offense (Par. 5) exists if the death of the child occurred, when the prescribed punishment is imprisonment for at least ten years, up to life imprisonment.

Illicit sexual acts

The criminal offense of illicit sexual act (Art. 182 of the CC) exists if under the conditions from Art. 178 Par. 1 and 2, Art. 179 Par.1 and Art. 181 Par. 1, 2, and 3 of the Criminal Code, instead of the sexual intercourse or the equal act some other sexual act is committed. A fine or imprisonment up to three years is prescribed (Par. 1), or imprisonment from six months to five years (Par. 2). If because of the act from Paragraphs 1 and 2 a grievous bodily harm to the person against whom the act is committed, or if the act was committed by multiple persons or in a particularly cruel or humiliating manner (Par. 3), imprisonment from two to ten years is prescribed. For the gravest form of the offense (Par. 4), which exists if after act from Paragraphs 1 and 2 the death of the person against which the offense was committed, the perpetrator will be punished by imprisonment of at least five years.

Sexual harassment

To meet the condition prescribed by the Istanbul Convention a new criminal offense was introduced, sexual harassment from Article 182a of the Criminal Code, with basic and grave form. Basic form (Par. 1) is committed by a person who sexually harasses another person, and a fine or imprisonment up to six months is prescribed as a penalty. Grave form (Par. 2) exists if the basic form is committed against a minor, including a child, and imprisonment from three months to three years is prescribed. With the third paragraph of this offense, it was precisely defined that the sexual harassment is every verbal, non-verbal or physical behavior that has for a goal or represents damage to the dignity of a person in a sphere of sexual life, and which causes fear or creates a hostile, humiliating or insulting environment.

It is interesting that with the fourth paragraph the legislator predicted that for this criminal offense the criminal prosecution is undertaken after the request of the aggrieved. Such solution is not per the Istanbul Convention as it prescribes that providing services cannot be dependent on the readiness of victim to file a complaint or testify against any perpetrator (Art. 18 Par. 4 of the IC), or that crimes from the Istanbul Convention are valid independently from the nature of the relationship between the victim and the perpetrator (Art. 43 of the IC), as well as that the proceedings can be continued even if the victim withdraws his/her statement or complaint (Art. 55 of the IC) (Делибашић, Николић, 2017: 211-212).

Solicitation and facilitating of sexual intercourse

The criminal offense of solicitation and facilitating sexual intercourse (Art. 183 of the CC) has two forms. In the basic form (Par. 1) the act is the solicitation of a minor to commit sexual intercourse or the equal act or other sexual acts, and prescribed punishment is imprisonment from one to eight years and a fine, while the other form of the criminal offense (Par. 2) consists of facilitating the committing of sexual intercourse or the equal act or other sexual acts with a minor, and the prescribed punishment is imprisonment from six months to five years and a fine.

We should have in mind that this offense marks an underage person as the passive subject. Based on Art. 112 Par. 3 of the CC the underage person is a person younger than 18. That means that this term includes the child, or person under 14 years of age, and a minor, or person over 14 but under 18 years of age. The first impression can lead us to think that the passive subject of this offense can be a person younger than 14. Nonetheless, by criminal offense sexual intercourse against the child from Article 180 of the Criminal Code, and with criminal offense illicit sexual acts from Article 172 of the CC sexual intercourse, the

equal act to it or other sexual act committed against the child, meaning person under 14 years of age is incriminated. That further means that if someone would commit the criminal offense of solicitation or facilitating sexual intercourse against the child he or she would not be the perpetrator of this offense, but he or she would be an instigator or abettor in criminal offense of sexual intercourse against the child, or criminal offense of illicit sexual acts. Therefore, the passive subject of this criminal offense can only be a minor, meaning a person older than 14 and younger than 18 years of age (Стојановић, Шкулић, Делибашић, 2018: 234-235).

While having in mind that the passive subject of this criminal offense can freely decide whether or not they will enter sexual relations, and that having sexual relations with a minor is not incriminated a question of justification of the existence of this incrimination arises, as with this incrimination we arrive at the absurd situation that persons who have sexual relations with a minor is not culpable but the person who facilitates or helps in performing an activity which is not punishable is culpable.

Mediation in prostitution

The criminal offense of mediation in prostitution (Art. 184 of the CC) has a basic and a grave form. The activity of committing the basic form (Par. 1) is prescribed alternatively. First, the acts of instigation to prostitution are listed, which consists of leading and instigating others to prostitution. Then as the activity of the basic form helping in committing prostitution is defined, which consists of giving a person to another person for prostitution. In the end, the basic form includes propagation or advertising prostitution employing media or other similar means. A punishment of imprisonment from six months to five years and a fine is prescribed for the basic form.

If the act of committing would consist of instigation or helping in prostitution, and a juvenile would appear as the passive subject, and additionally a condition that the goal of the act is not the exploitation of prostitution, it would not be the basic form, but it would be a graver form of this criminal offense (Par. 2), whereas qualifying circumstance the age of the passive subject appears. For this form, the imprisonment from one to ten years and a fine are prescribed. Considering that the most frequent motive for this criminal offense is profit, meaning the exploitation of prostitution, such a situation will be very rare but not impossible in practice. For instance, the goal of the person who instigates or helps in prostitution can be revenge for a person close to the passive subject, who cares about the moral reputation of the passive subject or moral reputation of his or her family. Also, to the instigator to prostitution, or abettor to prostitution, unless he or she himself is involved in prostitution, the goal doesn't have to be exploitation of prostitution, but to find an adequate job company for himself.

Nonetheless, if the act of committing the offense would consist of some of the designated forms of instigation or abetting in prostitution, which regularly happens in practice, with a goal of exploitation of prostitution, and a juvenile appears as the passive subject, it would not be a grave form of criminal offense mediation in prostitution, but it would be criminal offense human trafficking from Article 388 Paragraph 2 of the Criminal Code. Such a solution imposes itself as terms *leads* or *instigates*, used for criminal offense mediation in prostitution are concurrent with the term *recruits* used for criminal offense human trafficking. The term *gives* is used for both criminal offenses. In that sense, we should have a fact in mind, that criminal offense human trafficking from Art. 388 Par. 2 of the CC, when the passive subject is a juvenile, it does not require instigation or abetting to be done in ways otherwise predicted by this criminal offense (Делибашић, 2010: 58-59). With the graver form of the criminal offense, premeditation must envelop the awareness that the passive subject is a juvenile.

Here the legislator in graver form must use the term underage person (a person younger than 18), which includes a child (less than 14 years of age) and a minor (between 14 and 18 years of age). Therefore it is important to stress that the graver form of criminal offense mediation in prostitution exists only if the passive subject is a juvenile, while if the passive subject were to be a child, it would be instigation or abetting criminal offense sexual intercourse against the child. In that sense, in situations where the passive subject is younger than 14, if it comes to prostitution, the person who uses such services would commit criminal offense sexual intercourse with a child from Art. 180 of the CC.

Displaying, acquiring and possession of pornographic material and exploiting of a juvenile for pornography

Abuse of children for pornographic purposes is a very serious global criminal problem of the modern age, and various sources present visibly unequal estimation of the number of Internet pages with child pornography as well as the total number of children exploited in the production of that content. Besides, although the literature mentions distribution of child pornography mostly in the context of the specific subculture of pedophiles and secret forums where an exchange of the content is done, by simply looking we can see that the situation in the cyber world is drastically different. It would not be untrue to say that the average Internet user would need only a few minutes to find materials where children are represented in a sexual context. Certain limitations are tied to special and rare content, such as a series of photographs of one child, or specific molestation scenarios. At numerous forums, the supply and demand of child pornography is a dominant part of communication. It is only a question of will to find and communicate with an Internet pedophile, and not of ability or time. Exchange of photo and video content through MMS, e-mail, phone software

reached such proportions that it seems impossible to identify and process all involved in this form of abuse (Павловић, 2013: 120-122).

The criminal offense of Displaying, acquiring and possession of pornographic material and exploiting of a juvenile for pornography (Art. 185 of the CC) is in the group of offenses against sexual freedom, and it is mentioned as a high-tech crime criminal offense due to its connection with the IT, in production of pornographic material, its distribution, and modality of making available to a wide circle of users by abusing the information technology (Бодржић, 2013: 145).

This offense includes several forms, and criminal offenses even, because the passive subject is the same (a child, a minor, and underage person), and are tied for pornography, united by the same article (Стојановић, 2012: 552). The basic form (Par. 1) is committed by persons who sells, displays or makes available texts, pictures, audiovisual and other objects of pornographic content or shows to him or her a pornographic show to an underage person, and a fine or imprisonment for up to six months is prescribed. The other basic form (Par. 2) is committed by those who use an underage person for the production of pictures, audiovisual or other objects of pornographic content or pornographic show, and prescribed punishment is imprisonment from six months to five years. The passive subject of this criminal offense is an underage person.

Grave form (Par. 3) exists if one of the two basic forms is committed against a child, meaning person younger than 14, and in that case imprisonment from six months to three years for Paragraph 1, or from one to eight years of imprisonment from Paragraph 2 is prescribed. In this form, the passive subject is a child, and that circumstance has to be enveloped by the premeditation of the perpetrator. If that circumstance is not enveloped by the premeditation of the perpetrator, the crime would be in its basic form.

A special form (Par. 4) is committed by those who procure for himself or the other, possesses, sells, displays, publicly exhibit or makes available electronically or in other way pictures, audiovisual or other objects of pornographic content created by the abuse of an underage person, and the prescribed punishment is imprisonment from three months to three years. The other special form (Par. 5) is committed by those who by IT means consciously access pictures, audiovisual or other objects of pornographic content created by the abuse of an underage person, and the prescribed penalty is a fine or imprisonment up to six months. For this criminal offense (Par. 7) a mandatory measure of seizure of objects, and depending on which form of this offense is committed, these objects will be objects used for committing a criminal offense, or object created by committing the criminal offense.

Leading the child to attend sexual intercourse

The basic form of criminal offense leading the child to attend sexual intercourse (Par. 1) is committed by those who lead a child to attend rape, sexual

intercourse, or equal act or other sexual act, and prescribed punishment is imprisonment from one to eight years. Graver form (Par. 2) exists if the offense is committed by using force or threats, and the prescribed penalty is imprisonment from two to ten years.

The exploitation of a computer network or communication by other technical means for performing criminal offenses against sexual freedom of underage persons

The legislator defines the activity of this criminal offense Art. 185b of the CC) as the exploitation of a computer network or communication by other technical means for performing criminal offenses from Art. 178 Par. 4, Art. 179 Par. 3, Art. 180, Par. 1 and 2, Art. 181 Par. 2 and 3, Art. 182 Par. 1, Art 183 Par. 2, Art. 184 Par. 3, Art. 185 Par. 2 and Art. 185a of the Criminal Code. The act implies the existence of intent of the perpetrator that with the goal of committing one of the mentioned criminal offenses, by using a computer network or communication by other technical means, agrees on a meeting with an underage person and to appear on that meeting. The passive subject in the basic form (Par. 1) is an underage person, and prescribed punishment is imprisonment from six months to five years, while the offense is in its graver form when the passive subject is a child (Par. 2), and in that case, the prescribed punishment is imprisonment from one to eight years. As the only form of guild premeditation is predicted, which must be directly due to the existence of special intent on the perpetrator's side, which must envelop the age of the passive subject.

Human trafficking

The criminal offense of human trafficking is most often committed with the goal of exploitation of the prostitution of the passive subject, or sexual exploitation, so if the passive subject of this offense is a child, then it is also sexual exploitation of a child. It is described in Article 388 of the Criminal Code and consists of several forms. The basic form (Par. 1) as an act of committing predicts, alternatively, the following acts: recruitment of another person, transportation, transfer, giving, selling or buying of another person, mediation in the sale, hiding or keeping another person. In the basic form of this offense, the act must be committed by force or threat, leading to and keeping in error, abuse of authority, trust, dependence, the hardship of others, keeping of personal identification documents or giving or receiving money or other goods. Therefore, for the existence of criminal offense human trafficking, it is not enough that some of the alternatively prescribed acts are committed, but the act must be committed in one of the alternatively prescribed ways. Nonetheless, for the existence of the basic form of this criminal offense, in addition to the fact that the act has to be com-

mitted in one of the prescribed ways, it also has to be committed because of a precisely defined goal. This criminal offense exists in a situation when the act is committed with the goal of exploitation of work of the passive subject, forced labor, committing crimes, exploitation of prostitution and other forms of sexual exploitation, panhandling, use in pornographic purposes, establishing of slavery or similar relation, for taking of organs or body parts or for use in armed conflict. For the basic form imprisonment in terms of three to 12 years is prescribed.

A special form of this criminal offense (Par. 2) exists when the act is committed against an underage person. Nonetheless, to be this form of a criminal offense, the perpetrator must not use force, threat, or some other form prescribed for the basic form of this offense. Prescribed punishment is imprisonment from three to 12 years. In contrast to the previous form, the graver form of this criminal offense (Par. 3) exists when the act is committed in one of the alternative ways prescribed in the basic form of this criminal offense. The act, committed in such a way, has to be committed against an underage person, meaning person younger than 18, where the age of the passive subject appears as a qualifying circumstance, and prescribed punishment is imprisonment in term of at least five years.

Conclusion

Despite the great need to give comprehensive protection to children, the basis for prescribing criminal protection to children from sexual abuse is the Constitution of Republic of Serbia, as well as a large number of international conventions that cover this field, while stressing that under the explicit provision of the Criminal Code (Art. 112 Par. 8) a person younger than 14 years of age is considered a child. There are many ways sexual abuse of children is done, starting with “voluntary” sexual relations with children, exploitation of children for pornography and prostitution, to the rape of children. All these acts are subject to criminal sanctions, or all the acts that are sexual abuse of children can be construed under the being of some of the criminal offenses against sexual freedom or human trafficking, prescribed by the Criminal Code, with harsh sanctions predicted. In that way, adequate criminal protection of children is given, regardless whether the protection is given due to object of the act of a concrete criminal offense is exclusively a child, or if a criminal offense transforms in its graver form if the act is committed against a child.

By prescribing of graver form of a concrete criminal offense against sexual freedom if it is committed against a child, the legislator gives increased criminal protection to the children, which is correct. Namely, such normative differentiating of the passive subjects according to their age is better suited to the needs of criminal policy, while it allows better criminal protection of the youngest age groups, for what the society is very interested, and that interest shall be clearly expressed in the framework of the criminal system (Шкулић, 2003: 481).

In the end, we shall say that we shall expect a serious reform of criminal offenses against sexual freedom, which includes harmonization of our legislation with the Istanbul Convention (although a part of obligations is already completed), but correcting some omissions the legislator made in Chapter XVIII where criminal offenses against sexual freedom are prescribed. Although criminal protection of children from sexual abuse is on a satisfactory level, even better results shall be expected in that field, but we always shall have in mind a fact that is often forgotten, that the criminal law is the last line, and that protection of children should be done by other means (education, for instance), and only when all the other means do not give results, we shall resort to criminal law.

References:

1. Delibašić, Veljko (2019): Criminal offence of sexual intercourse with a child, *Yearbook human rights protection*, number 2, Provincial Protector of Citizens - Ombudsman, Institute of Criminological and Sociological Research in Belgrade, Novi Sad.
2. Bodržić, Ivana (2013): Krivična dela sa elementima visokotehnološkog kriminala, *Bezbednost*, broj 2, Beograd.
3. Delibašić, Veljko (2010): *U kandžama prostitucije, krivičnopravni aspekt prostitucije*, Čigoja, Beograd.
4. Delibašić, Veljko, Nikolić, Milena (2017): Ispunjene i neispunjene obaveze prema Istanbulskoj konvenciji, *Reformski procesi i poglavlje 23 /godinu dana posle/ - krivičnopravni aspekti*, Srpsko udruženje za krivičnopravnu teoriju i praksu, Zlatibor.
5. Žegarac, Nevenka (2004): *Deca koja čekaju, izazovi i trendovi profesionalne prakse u zaštiti dece od zlostavljanja*, Save the Children UK, Beogradska kancelarija Centar za prava deteta, Beograd.
6. Lazarević, Ljubiša (2006): *Komentar Krivičnog zakonika Republike Srbije*, Savremena administracija, Beograd.
7. Lukić, Mihajlo (1980): *Osnovi sudske medicine*, Beograd.
8. Pavlović, Zoran (2013): *Seksualna zloupotreba dece, kriminološki i krivičnoprocesni aspekti*, Pravni fakultet za privredu i pravosuđe, Novi Sad.
9. Stojanović, Zoran (2012): *Komentar Krivičnog zakonika*, Službeni glasnik, Beograd.
10. Stojanović, Zoran (2017): *Komentar Krivičnog zakonika*, Službeni glasnik, Beograd.
11. Stojanović, Zoran (2020): *Komentar Krivičnog zakonika*, Službeni glasnik, Beograd.
12. Stojanović, Zoran, Delić, Nataša (2015): *Krivično pravo posebni deo*, Pravna knjiga, Beograd.
13. Stojanović, Zoran, Perić, Obrad (2009): *Krivično pravo, posebni deo*, Pravna knjiga, Beograd.
14. Stojanović, Zoran, Škulić, Milan, Delibašić, Veljko (2018): *Osnovi krivičnog prava, Krivično materijalno pravo, Knjiga I*, Službeni glasnik, Beograd.
15. Škulić, Milan (2003): *Maloletnici kao učinioci i kao žrtve krivičnih dela*, Beograd.
16. Škulić, Milan (2019): *Krivična dela protiv polne slobode*, Službeni glasnik, Beograd.

КРИВИЧНОПРАВНА ЗАШТИТА ДЕЦЕ ОД СЕКСУАЛНИХ ЗЛОУПОТРЕБА

Сажетак: У уводном делу се истиче озбиљност проблема сексуалне злоупотребе деце и наводе се, уз Устав Републике Србије, конвенције које су значајне за решавање овог проблема. Такође, у раду се указује да деца, односно лица млађа од четрнаест година, уживају посебну кривичноправну заштиту од сексуалних злоупотреба, тако што се прописују кривична дела, а затим се она и таксативно набрајају. Након тога се даје приказ сваког од тих кривичних дела уз кратку анализу и указивање на поједине проблеме или пропусте у њиховом прописивању. У закључку се констатује да је тренутна кривичноправна заштита деце на задовољавајућем нивоу, али да се и поред тога очекује измена кривичног законодавства у тој области због потребе додатног усклађивања са Истанбулском конвенцијом.

Кључне речи: педофилија, дете, сексуални деликти, силовање, права детета