

THE CHILD'S ACCESS TO JUSTICE IN CHILD PORNOGRAPHY CASES

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Abstract

In the Romanian Criminal Code, child pornography is included in the category of crimes against public order, which means that although the child can claim the status of victim, it will not be the injured party, in a procedural sense, during the trial. Therefore, it is necessary to analyse if the rights and guarantees provided for the participants to the proceedings are also accessible to the child and what are the measures that can be taken in order to ensure no further trauma is caused. In recent years, it has been the focus of most international organisations to promote a “child-friendly” justice system, since they represent a particularly vulnerable social category. Also, it is important to determine whether there is an effective way for the child to report the crime and obtain damages from the offender

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1. Introduction

Access to justice does not only mean the possibility to report an offence, but the active participation in all the proceedings leading up to a solution given in a court of law. It is important for the victim of a crime to have the opportunity to be a part of the process of investigation and of the trial. Besides the valuable information that can be obtained from those directly involved, in most cases the acknowledgement of the harm suffered and the mere ability to be heard is beneficial for the victim both as a way of overcoming the event and as a means of better accepting the outcome of the justice process. It has been stated that allowing victims to have the chance to participate in their own case leads to a higher sense of procedural justice (Pemberton & Reynaers, 2011).

However, there is also the risk that being confronted with the rigid and intrusive nature of official investigations can further enhance the trauma of a more vulnerable and inexperienced individual, especially when the case concerns aspects of a thoroughly intimate nature.

Such is the situation with children who were victims of abuse or exploitation. A child might be reluctant to share his experience because of greater feelings of shame, fear of retaliation or of being reprimanded. Also, the

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lack of knowledge regarding legal matters and ways of alerting authorities can prevent him from obtaining access to judicial remedies. Nevertheless, the right to participation has been recognised at an international level, being stated in the *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, issued by the United Nations Economic and Social Council¹.

Child pornography cases present certain particularities, due to the nature of the social value protected by criminal law in this instance, which influence the minor's possibility to participate in the trial. The status he is given during the proceedings is important, since it determines the rights and obligations prescribed by the Code of Criminal Procedure.

2. The child as a participant in the criminal trial

The present study shall focus mainly on the status of the victim in child pornography cases, but that is not the only capacity in which he can take part in the trial.

The participants to a criminal trial have been divided in the new Code of Criminal Procedure into parties and principal procedural subjects, according to art.29. Therefore, there no longer exists the term of injured party, but that of injured person, which is seen as a procedural subject, and is defined by art.79 of the Code of Criminal Procedure as the one who has suffered a physical, material or moral injury due to the crime. While the child, as an individual, is not the passive subject of the crime of child pornography, in some cases he suffers a direct moral injury because of it.

This might not always be the case, since there are situations in which the minor appears voluntarily in the illicit material. As in cases of sexual abuse involving children, in such a circumstance it would be recommended to consider the age of the person involved (Bogdan, 2009), since it is without doubt that someone very young cannot express a valid consent to being featured in pornographic materials. It can be imagined that a 17 year old might pose for pornographic materials and although his consent will not influence the existence of the crime, he can no longer claim the status of injured person, because of the lack of a moral injury. It is to be considered if in such a circumstance the minor shouldn't be considered a participant in the production of pornographic materials, since the text of art.374 of the Criminal Code does not mention that the active subject has to be an adult. If we understand the action of producing as only the actual recording, assembling, capturing or combining of such materials,

¹ United Nations Economic and Social Council, Resolution 2005/20 (<http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf> – last accessed 06 March 2018). According to this document, the right to participation means that “every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity”.

mainly using media technologies (Vasiu & Vasiu, 2014), then the minor would be committing the crime only if he was also the one operating the recording equipment. Otherwise, even by making a willing appearance in the pornographic material, the minor will not be a defendant in the trial, or an injured person, but he might be heard as a witness. We believe that the minor could be considered as an accomplice at producing child pornography, since he is aiding the production process, but since the reason behind the criminalisation of such acts is the protection of children, it should be avoided to bring charges against the child who only appeared in the material, without any other contribution, especially since the facts of each case can be so complex that the child might end up being both victim and culprit. For example, a 16 year old might agree to pose in sexual stances for his lover, but not to the further exposure of the images to other persons, the latter action being without doubt a traumatising one, capable of generating moral injury. Nevertheless, there are cases when the minor will participate in the trial as suspect or defendant.

In all three instances, it should not be forgotten that the authorities have to make sure that they respect the principle of the best interest of the child, prescribed by art.2 of Law no. 272/2004. In civil cases, since the minor is considered to be without the capacity to exercise his rights, or to have a limited capacity to do so, he will have to be represented or assisted by an adult, usually his parents². Therefore, it is the representative that ensures that the interest of the child is protected and has the responsibility of informing the child of the circumstances of the case, as prescribed by art.34 para.2 of Law no. 272/2004.

Most abuse victims are reluctant to reveal their experience during childhood (Lalor & McElvaney, 2011), which means that although according to national law the crime of child pornography is investigated *ex officio*, it is rarely due to a complaint filed by the child that the illicit activity is discovered, but rather when a relative or adult caretaker informs the authorities. In criminal trials, the parents or guardians of the child injured person do not take part in the proceedings³, but the child who is under 16 years old will be summoned through his legal representatives, according to art.257 para.6 of the Code of Criminal Procedure. This is explained by the fact that the injured person is not the one that exercises the criminal action, but the prosecutor (Udoriu, 2015). The legal representatives also have no say in the choice the minor makes about participating as an injured person, but if the minor is the defendant, the legal representative has to express his agreement for him to opt for the simplified procedure, which means that the minor admits to the crime.

² In civil procedure law, if the minor is under 14 years old, he is represented by his parents, but if he is over 14 years old, he stands before the courts himself, but is assisted by his parents, which have to confirm his actions.

³ The rules of representation are applicable for the civil action in the criminal trial, according to art.19 para.3 of the Code of Criminal Procedure, without, however, distinguishing between representation and assistance.

If the child informs the judicial authorities, in accordance with art.81 para.2 of the Code of Criminal Procedure that he does not want to participate in the trial, his action does not need to be approved by his caretakers. This is of little importance, since his participation in the trial will be insured as a civil party, with all the same rights, since either his legal representatives or the prosecutor will initiate the civil action on his behalf. In addition, if the injured person is a minor, it is mandatory that he is assisted by a lawyer⁴, which will have the responsibility of acting according to the best interest of the child.

3. Ensuring the rights and well-being of the child victim during the trial

As it has been stated before, it is important that the victim of a crime be heard, but the manner in which the hearing takes place is very important, in order to prevent further trauma⁵. For this, it would be best if the significant authorities, especially judges and prosecutors, had prior training in dealing with minors as participants in the trial⁶. Since it has been established that the crime of child pornography is capable of generating moral injury, we believe that authorities could apply the instructions offered in the guide created for hearings of child victims of violence⁷ in order to obtain the best results. Also, it must be mentioned that the right to be heard includes the possibility to ask for and receive pertinent information, to be consulted, to express an opinion and to be informed about the consequences this might have⁸. Authorities should provide certainty about the process, including providing child victims with clear expectations as to what to expect in the process⁹.

Especially in situations which involve abuse, it can be difficult for those carrying out the investigation to find the detachment needed to maintain

⁴ Code of Criminal Procedure, art.93, para.4.

⁵ It has been recognised that simply capturing the child's views is not enough and that meaningful participation requires creating a friendly and safe environment and using appropriate methods of questioning. (European Union Agency for Fundamental Rights. Child-friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States, 2015, p.11, <http://fra.europa.eu/en/publication/2015/child-friendly-justice-perspectives-and-experiences-professionals-childrens>, last accessed 12.03.2018)

⁶ Although according to national law, art.35 para.2, art.36 para.3 and art.39 para.2 of Law no. 304/2004, each jurisdiction should have specialised courts or chambers for cases involving minors, only one of them exists in the country. In a similar way, art.507 para.1 of the Code of Criminal Procedure, which states that in cases with defendants who are minors the judges presiding have to be specially appointed, is never applied.

⁷ Federația Organizațiilor Neguvernamentale pentru Copii, Ghid metodologic privind audierea minorilor victime ale violenței, aprilie 2017, http://www.fonpc.ro/downloads/programe/model-interventie-multidisciplinara/Ghid_audierea_minorilor_victime_violenței.pdf (ultima accesare 12.03.2018).

⁸ Law no. 272/2004, art.29 para.3.

⁹ United Nations Economic and Social Council, Resolution 2005/20, art. XI, §30, b).

objectivity without becoming too distant and intimidating. It is not enough simply to assume that life experience in caring for a child will offer sufficient skills when approaching such cases, since there are very few that will instinctively know how to react when faced with such a delicate matter, while avoiding any sort of biased behaviour that might also encourage the child to exaggerate his statement. The tendency for exaggeration exists because of heightened emotions, altered perception due to fear, or even the desire for revenge against the perpetrator (Butoi, 2012)¹⁰. There must be a balance between nurture and procedure, based on an understanding of the child's characteristics. In the previously mentioned *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, it is recommended that interviewers, examiners and investigators should proceed in a sensitive, respectful and thorough manner¹¹.

The aforementioned characteristics vary not only according to the child's age, but mainly based on his level of maturity. This may be difficult to establish, since it depends on many exterior and internal factors. In some countries, such as Germany and the United Kingdom, jurisprudence lists some indicators regarding a child's maturity, such as social relations, impulsivity, conflict management, results at school, living conditions and stability of emotional reactions¹². As a general rule, art.29 para.2 of Law no. 272/2004 states that it is obligatory to hear the child over the age of 10 and the one who is not yet ten years old may be heard, if the authorities believe that it is necessary. The Code of criminal Procedure offers no exemptions from the necessity of hearing the injured person based on age in art.380, therefore the minors will always be called upon to present what they know about the circumstances of the case.

Regarding the hearing procedure, it is to be noted that some of the important guarantees offered to the child defendant are only optional in the case of the child injured person. For example, art.509 para.2 and 3 of the Code of Criminal Procedure establishes that only if the defendant is a minor the procedures are not public and that if he is under 16 years old and the judge considers that certain pieces of evidence can have a negative influence he can remove him from the room. For the injured person, the judge is not obligated to declare that the proceedings are not public, but has the possibility to do so, invoking art.352 para.3 of the Code of Criminal Procedure, if he finds that a public hearing might harm the interest of the minor. It would be recommended that this option is used in cases of child pornography, since the law also states that the child has the right to the protection of his public image and his intimacy, any action that may affect this right being forbidden¹³. Undoubtedly, making

¹⁰ In such situations, the author suggests asking for as many details as possible, addressing control questions and presenting evidence that could prove that the child is being dishonest (p.154).

¹¹ United Nations Economic and Social Council, Resolution 2005/20, art. V, §13.

¹² European Union Agency for Fundamental Rights. Child-friendly ..., p.18

¹³ Law no. 272/2007, art.27, para.1 and 2.

public that the child appears in pornographic materials is highly detrimental to his public image and is capable of increasing the child's fear of public ridicule, thus hindering the proceedings by his unwillingness to participate. In addition, the judge must apply art.113 para.1 and 2 of the Code of Criminal Procedure, which presumes that child victims are vulnerable injured persons and therefore can benefit from the special protection measures included in art.124-130 of the same legal text, which also gives the possibility of questioning the person without the public being present, according to art.127, d). Again, it is regrettable that these provisions are not mandatory, especially since it is also established, in para.3 of the same article, that the injured person can relinquish these rights, no matter what age he is, without the consent of his legal representative, which is only supposed to be present. Even with the explanations that should be offered by the authorities, it is doubtful that a young person can fully comprehend the consequences that a public procedure can have.

Another important safeguard is the fact that repeated hearings of the injured person are only required if it is strictly indispensable for the proceedings¹⁴. It has been observed that, usually, after being questioned by the prosecutor during the investigation stage, child injured persons refuse to show up in front of the court to give a statement, in order to avoid having to relive their trauma by retelling it in front of the judge (Șerban Morăreanu, 2010). The state has to take appropriate measures to ensure that in criminal investigations relating to child pornography, without prejudice to the rights of the defence, the number of interviews is as limited as possible and interviews are carried out only where strictly necessary for the purpose of criminal investigations and proceedings¹⁵. It has been recommended that in order to limit the number of interviews, the authorities should make use of the special procedures for collection of evidence from the child, such as video recording¹⁶. The recording of interviews with child victims is important in order to avoid second victimisation through repetitive hearings¹⁷. Although the trial is based on the principle of immediacy, which means that all evidence must be administered directly before the court, it is important to remember that cases relating to a child's private life are of a special nature and require a different approach, which may not always fall within the strict limitations of normal procedural

¹⁴ Code of Criminal Procedure, art.113 para.4.

¹⁵ 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, art.20 para.3, e). The text also recommends that the same persons, if possible and where appropriate, conduct all interviews with the child victim. This is also important for the moral conform of the minor, since beside the fact that he can develop a feeling of trust and security regarding the first person he exposes his experience to, it is desirable that he does not perceive that more people discover aspects that are very intimate and embarrassing about him.

¹⁶ United Nations Economic and Social Council, Resolution 2005/20, art.31, a).

¹⁷ European Union Agency for Fundamental Rights. Child-friendly ..., p.18.

rules. According to art.111 para.8 of the Code of Criminal Procedure, if the injured person is a minor, it is mandatory to make an audio or audio-video recording whenever he is questioned. Although the text does not specify if the recordings made during criminal investigations are sufficient for the court phase of the trial, it is obvious that this was the intention behind the provision, especially when read in corroboration with the norm stating that repeated hearings are to be avoided. This interpretation is also in accordance with art.20 para.4 of Directive 2011/92/EU, which requires that member states take the necessary measures to ensure that the audio-visually recorded interviews may be used as evidence in criminal court proceedings, in accordance with the rules under their national law. These recordings are also useful for the court, since unlike a written statement, they allow the judge to perceive the emotions and reactions of the injured person, therefore reducing the need to have direct contact with the child victim. For the same purpose, it is possible to resort to the special procedure of anticipated hearing, prescribed by art.308 of the Code of Criminal Procedure, if the prosecutor considers that it is in the interest of the minor to avoid repeated hearings. This approach is useful since it can provide the court the access to a direct statement taken closed to the date the investigated events happened, taking into consideration that any interview with the child victim should take place without unjustified delay after the crime was reported.

Another important aspect regarding the child's hearing is the possibility of his legal representatives to be present. This can offer the child a certain degree of moral comfort, but it is also a way of ensuring that someone with more experience is there to make sure the procedure is being respected and that the minor is not being influenced in any way by the other parties. The general provision in this regard is that the injured person can ask to be accompanied by his legal representative¹⁸, but art.124 of the Code of Criminal Procedure, which can also be applied to child injured persons, states that if the child is under 14 years old the hearing will take place in the presence of his parents, guardian or a representative of the institution where he was placed and if the authorities consider it necessary, also with the participation of a psychologist, while avoiding that the interview generate any negative consequences for the child's psyche.

It is unfortunate to notice that the crime of child pornography is not included in the list of those for which the victim can obtain free psychological counselling¹⁹. This may be due to the fact that the crime is considered to be one

¹⁸ Code of Criminal Procedure, art.113, para.5.

¹⁹ The list included in art.8 para.1 of Law no. 211/2004 mentions only crimes that involve a physical aggression, like family violence, rape, sexual aggression, sexual act with a minor, sexual corruption, ill-treatment of the minor, traffic and exploitation of vulnerable persons. Currently, based on the placement of the crime in the Criminal Code, child pornography cannot be considered to represent a form of abuse or exploitations of vulnerable persons,

against public order, not regarding the child as an individual, but it was overlooked that there are situations when the child can be a secondary passive subject.

As shown before, the minor will always be assisted by a lawyer, therefore all his rights regarding the actual procedure, like suggesting evidence, consulting the file, or addressing requests will be exercised on his behalf by the appointed lawyer.

Conclusions

The possibility to be part of the judicial process is paramount for any person which considers that he has suffered an injustice. For a child, especially one of a young age, being involved in the rigid and complicated matters of an investigation may appear daunting. Therefore, it is the responsibility of the competent authorities to ensure that, without prejudice to the rights of the other parties, the minor is well informed and protected. National legislation has the main provisions necessary in this respect, in accordance with the recommendations issued by international organisms. Although many of these appear to have an optional nature, it is without doubt that due to the seriousness of the offence, the authorities are obligated to apply any measures instituted to guarantee the child's effective and efficient participation in the trial, since this also gives added legitimacy to the proceedings. The main problem, however, remains that since child pornography is not classified as a crime directed against the child, but rather against the normal social perception of children, which means that there can be situations when he is left without the possibility to have access to the trial or measures of protection, because he is not seen as the holder of the protected social value.

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