Child Protection, Sexuality and Feindstrafrecht

Critical Thoughts on Recent Reforms in Italy and Germany

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Across EU Member States, we are witnessing the growing use of criminal law for punishing behaviors related to the sexualization of minors, which do not directly imply the abuse of actual minors. This use of criminal law presents many reasons for perplexity.

Italian Criminal Law Prohibits the Access to Child Pornography

In 2022, the Italian legislator introduced a new crime under Article 600-quater paragraph 3 of the Criminal Code, which punishes the mere (intentional) "access to online child-pornographic material". Before, accessing child pornography had remained unpunished, since the crime of *possession* (*detenzione*) of child pornography implied at least the download from the web from a file sharing program or from a messaging app – even if the file is then deleted and even if there is no evidence that the file has been opened. The new legislative intervention intends to fill a gap that results from those who access websites containing child pornography without downloading any of the content.

However, this implies a clear anticipation of the use of criminal law. Just like when *possessing*, the perpetrator had no interaction neither with the minors portraited nor necessarily with the producers of the material, but in this case there was not even a download of the material. Therefore, the perpetrator is punished (only) for intentionally looking at something that should not be looked at.

It has to be noted, that the Italian jurisprudence applies the concept of child pornography extensively, far beyond the contents where minors are involved in sexual acts. The case law includes material where genitals are displayed, or even just erogenous zones of minors such as breasts or buttocks. For example, it is pornography to secretly film a child in a changing room after sports. The legal definition of pornography does not even require that the content was created for the purpose of inducing sexual arousal, since it is sufficient that it has this function "in the eye of the beholder" (e.g. pictures of naked minors playing normally on the beach). With a decision heavily criticized by the scholarship, the Italian Court of Cassation extended the concept of child pornography even to comics and hentai anime, the so-called "totally virtual pornography". According to the Court, the *possession* of child pornography is a crime of concrete danger (*reato di pericolo concreto* or *konkretes Gefährdungsdelikt*) and in the case of comics, the danger is represented by the evocation of real situations in which "children are reduced to mere sexual objects, sex toys with which and on which to perform acts of sexual nature" (Cass. Pen., Section III, 13 January 2017, n. 222659).

With the 2022 reform, Italy too yields to the punitive claims of the EU (following Croatia, Estonia, Latvia, Luxembourg, Spain, Sweden, Poland, Portugal, Greece, Czech Republic). The punishment of the mere *access* to child pornography is in fact requested by Article 5 of the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011, leaving no margin of discretion to the Member States. Nonetheless, other countries have introduced limiting corrections. The French Article 227-23 of the *Code pénal* punishes the mere *access*, but only when it takes place on a regular basis ("*Le fait de consulter habituellement* ..."), or when it required a previous payment. In Germany, § 184b StGB chooses not to punish the mere access (*Zugriff*) to child pornography, but requires a "retrieval" (*Abruf*). In the case of *Zugriff*, the user is passively contemplating the online content that appears on the screen, because of the automatic

opening of a pop-up window or because they passively receive the content from someone else. On the contrary, the *Abruf* presupposes an active request for data transfer (usually by clicking). The notion of *Abruf* is situated somewhere inbetween: it takes more than the passive *Zugang* and less than the effective *Download* of data. It is an active behaviour that expresses the intention of obtaining access to child pornography. The attempt is also punishable; therefore, the effective completion of the data transfer is not required (e.g. in case of interruption due to technical problems).

The German Law on Sexpuppen

Germany appears to be going even further down this trend. In 2021, a new § 184l StGB criminalized the placing on the market, the purchase and the possession of sex dolls with a childlike appearance; a crime that is to be explained exclusively on a moral and symbolic level. This means, an adult is punished for possessing a sex doll with the appearance of a child, on which they could potentially – no matter whether it happened or not – perform sexual acts. There is no child involved in the act or in a previous phase (differently from child pornography) and the object involved is not *per se* dangerous as a tool for the commission of crimes in the future; like a jemmy, for instance. Rather, it seems that an ethical-social environment is being protected through criminal law, which reminds of Günther Jakobs' notion of *Klimaschutzdelikte*. The rationale for the prohibition of a doll that sexualizes the child is the same for the prohibition of Nazi symbols under § 86a StGB: they evoke ideologies and practices that cannot be accepted in our society. Just like in the Italian decision on comics, the criminalization of sex dolls seems to be punishing a blasphemy, which violates the sacredness of children in abstract terms.

However, following the same logic, we should go even further. In fact, if someone is punished for the mere possession of a sex doll "dressed up" as a child, why should sexual roleplay not be punished as well? For instance, ABDL or Age Play describes a relationship between two adults in which one is "infantilized" by means of clothing (i.e. diapers), language or other practices that evoke a paedophile act. What about online chats, in which fantasies and descriptions of imaginary paedophile abuses are shared? Are they not equal expressions of a paedophile sexuality that does not include real minors, but implies a conception of minors as sexual objects? In this case, this is even shared between two or more people, in contrast to sex dolls or virtual pornography. What about a regular ("adult") sex doll? Couldn't it be said that performing sex on an inanimate and defenceless doll, shaped like a woman, expresses the idea of domination which is at the basis of rape? And what about the practice of the so-called *pup play*? Isn't this a zoophile fantasy?

The Expansion of Criminal Law as a Paradigm

From a constitutional point of view, the expansion of the use of criminal law with reference to child pornography is a paradigm for a broader question: the European Union's obligations of domestic criminalization. This in turn implies further issues. For instance, is there a discretionary margin in punitive choices left to Member States? Most importantly, the EU seems to be using criminal law to pursue its goals – or better to fight some transnational phenomena – but it neither has a general criminal law policy nor a constitution establishing basic principles guiding and limiting criminal law. Therefore, in relation to the functions and limits of criminal law, is it possible that counterlimits to EU law are stemming from national constitutional systems?

There is no doubt that in a secular criminal law, which punishes facts and not ideas, ideologies or lifestyles, the norms on child pornography cannot protect public morality, regardless of how repugnant the behaviors in question are. Therefore, the only admissible objects of protection are the life, the physical integrity, the freedom of sexual determination and the physical, psychological, moral and social development of minors. The punishment of possession of child pornography is often justified on the basis of the so-called *market deterrence theory*, elaborated by the Supreme Court of the United States in the case of *Osborne v. Ohio* (495 U.S. 103, 111 1990). Nonetheless, the anticipation cannot be justified when the conduct

itself does neither harm nor endanger the protected legal interest, but is only prodromic to a possible future danger. In the case of virtual child pornography, some justify the criminalization as a protection of the dignity of every child in abstract terms; it is arguably dangerous that the images could stimulate a transition to reality, increase the demand for the production of child pornography and therefore of child abuse. More correctly, part of the scholarship describes this as an example of criminal law of the enemy (*Feindstrafrecht*). The same can be said for the new German crime. The notion of *Feindstrafrecht* refers to a criminal law that is not addressed to a "normal" person, who violated a rule, but still recognizes the social order as such and is in turn recognized by the order and entitled to all the rights (the status) of the citizen. *Feindstrafrecht* is addressed to an "enemy", who attacks the social order as a whole and therefore cannot be considered as a part of this order. For this reason – according to Günther Jakobs and those who support *Feindstrafrecht* – a "dialogical" law cannot be applied. For the safety of all the citizens, the *Feind* must not be treated as a "person", but as a danger, and the penalty carries out the mere task of eliminating the danger. For the vast majority of the scholarship, however, *Feindstrafrecht* is illegitimate.

From this point of view, the case of Spain is quite significant. Here, the enforcement of the EU Directive 2011/93/EU took place through the *Ley Orgánica* 1/2015, which amended Article 189 of the *Código Penal*, introducing, among other things, the crime of *access* to child pornography (paragraph 5). Interestingly enough, this reform was soon followed by the *Ley Orgánica* 2/2015, which introduced the crime of "terrorist self-training" (Article 575, paragraph 2, of the *Código Penal*), punishing anyone habitually accessing one or more online contents in order to self-educate in the commission of terrorist crimes. Article 575 (2) directed against a "terrorist enemy" is corresponding to Article 189 against a "paedophile enemy".

The Criminalization May Not Help the Victims of Child Pornography

We are all obviously aware that when the protection of the weakest subjects within the community comes into play, we can accept a certain flexibility of our dogmatic categories; however, in relation to this kind of anticipation of the intervention of criminal law, it is legitimate to affirm that criminal law is used to fight an enemy, rather than to prosecute criminal acts. Regardless of an attack or a danger with reference to really existing children, these crimes target a deviant subculture, a person who is dangerous because of their impulses. These crimes safeguard an ethical-sacral environment, attacked by those who reduce children to mere sexual objects. This use of criminal law, nonetheless, does not seem to be acceptable in modern and secular societies.

Admittedly, it is difficult to find a middle way solution. For various reasons, there is not enough empirical data on the variegated framework of those who do not abuse minors, but "consume" child pornography or express (or sublimate) paedophile fantasies through online chats, comics, sex dolls or with (to date still) legal practices of Age Play among adults. There is a lack of data for an economic analysis of law; it is not known how many people legally cultivate this type of fantasies and how this population relates to the practices that involve real minors. However, existing research does not prove that practices that do *not* involve actual children are a form of transition to future child abuse. On the contrary, some studies show that there is a significant proportion of online consumers of child pornography who do not seek sexual contact with children offline. Criminology also discourages the use of criminal law where there is no abuse of real minors, since these practices would have a cathartic function for many paedophiles, constituting a form of sublimation and control over their deviant sexual instincts – a legal way out. In the words of Thomas Fischer, "we must offer people affected by paedophilia alternative courses of action, which protect potential victims and at the same time allow those affected to lead a life without criminalization.

Paedophilia is a fate; it is not a plan to become delinquents". Paradoxically, the anticipation of criminalization may not imply a greater protection of the victims, but quite to the contrary could have a criminogenic effect. It must be recognized that even these last theories are not yet sufficiently empirically proven; however, as the expression *in dubio pro liberate* reminds us, criminal law is asked to empirically motivate the reasons for criminalization and not those for freedom.

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