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The 17-year-old Child

An Absurdity of the Late 20th Century

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No language in the world ever used the term "child" for persons beyond their early teens (Friedenberg (1974, 21). No person beyond its early teens is a "child" (Baacke 1983, 70); Herbold 1977, 101); Kraemer et.al. 1976, 40); Lautmann 1987, 66). It was the *Convention on the Rights of the Child* of 1989 which first did away with the distinction between children and adolescents and labelled all minors under 18 "child" (Art. 1).

The European Commission took this concept over into the criminal law area when it proposed an *EU-Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography* in December 2000. This framework-decision obliges all the member states of the European Union to create certain sexual offences which goes far beyond what is known in that area in any European state so far.

The proposal of the Commission defined as "child" every person up to its 18th birthday (Art. 1 lit. a). It did not differentiate in any way between various age groups, i.e. it did not distinguish between children on the one hand and adolescents on the other. The proposal treated a 17 _ year old young man in the same way as a 5 year old child.

This implementation of the same criteria for sexual protection and abuse to a five-year-old child and a 17-year-old adolescent leads to absurd and dangerous consequences.

Deficient Protection of Children

The Commission in its proposal did not set a minimum age limit for consensual sexual activity, despite the fact that all the EU member states as well as all of the other European and non-European countries have determined such age limits, which limits are nowhere set under 12 years of age and, in most cases at 14 or 15. According to the Commission proposal, member states are obliged to outlaw sexual activity with children only in the context of pornography, prostitution, violence and inducement (Art. 2 & 3). The proposal (and the final text) did not cover sexual activity with a child outside the area of pornography and prostitution and committed without violence and without inducing the child. This deficiency in protection appears inconceivable, in that it would leave it open to the EU member states to even decriminalize pedosexual contacts, to the extent that no inducement or violence and no involvement into pornography or prostitution of the child takes place.

The Commission proposal also merely required the member states "to *consider"* prohibiting convicted offenders "from exercising…activities involving supervision of children" (Art. 5 par. 5). That this is not an *absolute requirement* is perplexing, indeed. As is the fact that only *private* - and not *public* - bodies can be held responsible for their offences (Art. 1 lit. d, Art. 6 & 7).

These insufficient and half-hearted measures for the protection of children stand in striking opposition to the near draconian limitations prescribed for the sex live of adolescents. Both being the result of the same mistake: the equation of children with adolescents.

Draconian Limitations on the Sex Live of Adolescents

The Commission defines as "child"-pornography all visual depictions of explicit sexual conduct which (directly or indirectly) involves a person under 18 (Art. 1 lit. b). Explicit sexual conduct thereby includes even "lascivious exhibition" not only of the genitals but also of the mere pubic area. This phrase, as the whole definition of "child"-pornography, has been literally taken over from § 2256 of the U.S.-Federal Criminal Code. How extensive these phrases are can be inferred from the development in the U.S.. In 1994 the Congress, in reaction to a Supreme Court case (United States vs. Knox 1992), expressly declared that in enacting this provision it was and is the intent of Congress that "the scope of 'exhibition of the genitals or pubic area' is not limited to nude exhibitions or exhibitions in which outlines of those areas were discernible through clothing, and that for videotapes falling under this law it is not afforded that the genitals or the pubic area are visible in the tapes and that the minors pose or act lasciviously. So the phrase now taken over into European law covers all kinds of allegedly erotic depictions of persons under 18, even if the young man or woman on the picture is fully clothed.

According to the Commission's proposal also fictitious depictions are covered, as for instance comic strips, drawings and paintings, even if totally unrealistic (Art. 3). In addition it shall not be necessary to establish the true age of the actors; it shall suffice that for the viewer they appear to be under 18. Given the very diverse views in estimating age and considered that according to this wide variety nearly every person of 18, 19 or in its early twenties can be judged to be possibly under 18, a good deal of standard pornography and standard erotic material faces the risk of prosecution under this provision.

The Commission's proposal aimed not only at a massive extension of sexual offences in the area of pornography. It wanted to oblige the member states also to criminalize sexual contacts with persons under 18 not just against money or other items of economic value but also in exchange for

"other (non-economic) forms of remuneration" (Art. 2 lit. b ii), whatever that might be. In addition even "inducement" of young men and women under 18 to sexual acts should have become a criminal offence (Art. 2 lit. b ii). The Commission did not define "inducement" and gave no reason whatsoever for this proposed criminalization of sexual contacts of adolescents which are not initiated by themselves but by their partners.

The proposal (as the final text) also contains no exception for juveniles, so the member states have to criminalize even adolescents themselves as perpetrators of these offences. And the penalties suggested by the Commission are draconian: the maximum penalty set at at least four years incarceration, with no differentiation between juvenile and adult offenders (Art. 5). So as victims adolescents are treated as children, and as offenders they are treated as adults.

According to the proposal of the Commission in all the member states of the European Union a 15-year-old was liable to up to four years incarceration (at the minimum) for making a picture of his girl-friend of same age in tight bikinis exposing (not the genitals but) the "pubic area" and posing erotically (or in the words of the law: "lasciviously"). The same is true for a 14-year-old who, in private, draws a young beauty naked and in "laszivious" poses. As well it is for 17-year-olds, who exchange intimate pictures of themselves, or watch each other via live cams on the internet "laszivіously" exposing their "pubic area" (or even their genitals), not to mention watching each other during sexual activity (so called "webcam-sex"). Also adolescents asking other adolescents for sex would have faced prosecution, as they "induce" a "child" into sex. That would be the more so if they offer any reward for being accepted.

The *European Parliament* welcomed the proposal by a vast majority of 446 against 16 votes. It even called for extensions, as for instance the criminalization of "negligent" production of "child"-pornography and the criminalization of audiovisual, textual or written material advocating sexual contacts with persons under 18. It also wanted to criminalize images of adults who look younger than 18, even if it is proven that the person depicted was adult at the time of depiction.

Widespread Expert Criticism

Among experts the proposal caused widespread criticism. In particular the *World Association for Sexology (WAS),* the *Austrian Society for Sex Research (ÖGS) and all three German sexological associations* as well as the *European Region of the International Lesbian and Gay Association (ILGA-Europe)* and the *German Lesbian and Gay Association (LSVD)* expressed their opposition to such a wide-ranging criminalization of juvenile sexuality. The *German Society for Sex Research* even spoke of "moral colonialism" as the definition of "child"-pornography has been literally taken over from § 2256 of the U.S.-Federal Criminal Code. In a public hearing of experts in the *Austrian parliament* experts (in law, child psychiatry, psychotherapy and child sexual exploitation) unanimously criticized the framework-decision and Austrian implementation legislation for its extensive and overbroad criminalization.

The associations and experts called for respect of adolescents' sexual autonomy by lowering the age limit of 18 and, above all, to differentiate between children and adolescents. They asked for a complete deletion of the offence of "inducement" of a person under 18 into sex and the deletion of the offence of sexual contact against "non-economic" remuneration. In addition they asked to bear in mind that giving a reward is not necessarily prostitution; it could also cover the invitation to cinema or a dinner. The associations suggested to consider also that criminal investigations whether a reward has been causative for an intimate contact or not would do more harm than good to the juveniles involved. Finally even in the case of real youth-prostitution criminalization would remarkably impair social-work with young prostitutes, which turned out as the only effective mean of support and relief for them.

These concerns, also raised by more than half of the member-states, to some extent have been taken into account during the deliberations in the EU-Council of Ministers, which is the competent body to finally pass the frame-work-decision. The offence of "inducement" of under 18-year-olds into sexual contacts and the reference to non-economic forms of remuneration have been deleted at the first discussion of the proposal. And the offence of sexual contact against

remuneration has been amended so that the remuneration or consideration has to be given as payment in order to induce a 'child' (a person under 18) to engage in sexual activity. This wording excludes from the offence situations where the juvenile initiates the contact or readily agrees to a respective offer. Later on in the deliberations of the Council, however, the English (and Italian) version of the text, for reasons not known, returned back to the former wording ("remuneration or consideration given as payment in exchange for the 'child' engaging in sexual activities"), which wording again seems to cover all cases of sex against consideration. The German, the French, the Spanish, the Portuguese and the Dutch versions however still involve inducement.

As regards pornography the Council established certain exceptions, which the member-states can, but need not, apply.

Insufficient Exceptions

Under the Commission's proposal it was always possible to avoid punishment by proving that the person depicted in fact was over 18 at the time the picture was taken (Art. 3 par. 2). The Council changed that to a mere option for the member-states (Art. 3 par. 2 lit. a). They can also establish that the mere impression that a depicted person looks like a person under 18 suffices for conviction, and that a younger look and impression alone constitutes the offence. Several member-states wanted to go even further, exclude the exception totally and oblige all the member-states to render also depictions of adults, who look like a minor, a criminal offence. That despite the fact that the U.S.-Supreme Court in a recent judgment held that the criminalization of fictitious or virtual (child-)pornography violates fundamental rights (Ashcroft vs. Free Speech Coalition 2002). As the definition of "child"-pornography has been taken over from the U.S.-Federal Criminal Code one might have expected that such a judgment of fundamental importance by the Supreme Court would matter. It did not.

Another exception the Council introduced is that the member-states can (but again need not) exclude from criminal liability the production and possession of images of persons of the age of sexual consent or older with their consent and solely for their own private use (Art. 3 par. 2 lit. b). This exception turns out as far too narrow. It does exempt from criminal liability just production and possession which is solely for the use of the adolescent depicted. So it seems highly questionable whether other persons than mere photographers and depositaries without any interest in the images on their own could benefit from this exception. So for instance the 15-year-old who possesses a "lascivious" picture of his girl-friend for joint (!) use with her or for his bedside table; or an (even also himself adolescent) "Webcamsex-Partner" of a juvenile on whose computer the image of his juvenile partner is displayed primarily for his use, and only secondarily for the use of the juvenile partner who sends the picture (mainly in exchange to see the other one himself over the cam). In all these cases the image is possessed or produced not solely (!) for the use of the depicted person. Definitely outside of the scope of the exception is an adolescent who hands over or even just shows a "lascivious" picture of him- or herself to another person; a 15 or 16-year-old doing so is liable to harsh sentences for producing, making accessible and distributing "child"-pornography. Also outside of the scope of the exception is a couple of two 17-year-olds exchanging intimate pictures of themselves, let alone if they show it to third persons.

Italy persistently resisted even this extremely narrow exception. So, as a compromise, a paragraph has been included saying, that "[E]ven where the existence of consent has been established, it shall not be considered valid, if for example superior age, maturity, position, status, experience or the victim's dependency on the perpetrator has been abused in achieving the consent" (Art. 3 par. lit. ii). It is not hard to imagine that in each and every relation between two people at least one of those elements exists: either one is older, or more mature, or in a higher position, or more experienced than the other. This way, and given also the ambiguity of the term "abused", the application of this, anyhow extremely narrow, exception is left up to the unfettered discretion of police authorities, prosecutors and judges, without any legal certainty for adolescents and their partners.

The third exception regards fictitious or virtual images. The Council (different than the Commission) restricted the scope of the frame-work-decision to fictitious images, which are "realistic", and stipulated that the member-states could (but again need not) exclude from liability production and possession for the own private use of the producer (Art. 3 par. 2 lit. c). Also here the judgment of the U.S.-Supreme Court had no, or just a minor, impact. The 14-year-old mentioned before, may now (if his member-state allows for that exception) draw the naked young beauty in "lascivious poses", but he becomes liable to prosecution and harsh sentences for making accessible "child"-pornography if he shows this drawing to a friend. Italy again persistently resisted also this exception. And also here, as a compromise, the exception has been narrowed further. The exception has been made contingent upon the condition that in the production of the virtual material no depiction of a real person is used and that the act (production and possession) involves no risk for the dissemination of the material (Art. 3 par. 2 lit. c). So a 17-year-old (if her member-state allows for that exception) may generate and store a lascivious virtual animation of an adolescent on her computer but she becomes criminally liable under "child"-pornography legislation if she uses a picture of her 16-year-old boyfriend in the production of the animation or if she does not lock the file with a password.

All this seems absurd. As it seems absurd to treat 17-year-olds as "children" and to criminalize a person for acquiring or possessing an erotic ("lascivious") picture of a 17 _ year old fully developed young man or of a 17 _ year old fully developed young woman.

Even more so as the Council inserted a provision into the framework-decision prohibiting member-states to make investigations or prosecution dependent on the report or accusation by the juvenile or his/her legal guardian (Art. 9 par. 1).

To make it utmost clear. The fight against sexual exploitation of children is extremely important. In this respect the frame-work-decision is to be welcomed. As shown at the beginning, it even dos not go far enough in this area. The decision however goes very far beyond combating child-

pornography and child-prostitution and infringes deeply into people's sex lives. Insofar it has to be criticized and rejected.

Initially six member-states raised concerns regarding the indiscriminate age-limit of 18 years. It is difficult to understand why they gave in. On 22nd December 2003 the Council of Ministers of the European Union formally adopted the framework-decision, which entered into force on 21st January 2004. All of the 25 member states have to implement those draconian regulations of adolescent sex lives by 20.01.2006 at the latest.

Further information in H. Graupner, *The 17-year Old Child – An Absurdity of the Late 20th Century*, in: H. Graupner & V. Bullough (Ed.): Adolescence, Sexuality & the Criminal Law, New York: Haworth Press (2005), http://www.haworthpress.com/store/product.asp?sid=30HUEMR0G2WK9K7UPUAHTP5XPAJX08R9&sku=5494&AuthType=4

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