

# **The Protected Legal Right in Child Pornography**

## **Problems of Confluence**

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The problems of confluence<sup>1</sup> between child pornography and other provisions are associated with the issue of the protected legal right. First we have to make a case scenario for the protected legal right on Section 348A Greek Penal Code (GPC). When a crime is committed juvenility is violated, without excluding the simultaneous protection both of sexual freedom and corporal integrity. In particular, the juvenile's rights are trespassed either as a victim because he was used for the production of the pornographic material or because -by watching this pornographic material along with other juveniles- he considers them as sexual objects and is psychologically hurt.<sup>2</sup>

In our opinion, the issues of confluence which are associated with the provisions of Section 348A GPC as well as Section 29 of law 5060/1931 about obscene publications are of utmost importance. Moreover, another interesting issue concerns the cases where both the provisions on juveniles' trafficking and Section 351 para. 4(a) GPC co-exist.

Under Section 30 of Law 5060/1931, as *obscene publications* can be characterized documents, papers, images and other objects, when -according to the legal phrase of 'public opinion'- they infringe upon decency. Therefore, at this point indecent offences are defined, since decency is an abstract legal term which needs interpretation. At the Greek Supreme's Court (Areios Pagos) decision 1055/1988,<sup>3</sup> decency has the notion of the unpleasant feeling and aversion caused by objects which represent or describe sexual illustrations or acts. At Supreme's Court Decision 1415/1988,<sup>4</sup> there is also another interpretation of the notion, which refers to a person's modesty and constraint towards anything related to sexual life according to the public opinion. Hence, it could be endorsed that the violated legal right, according

to the acts defined in Section 29 of Law 5060/1931, is the sexual dignity of an indefinite number of people.

Under Section 348A GPC, juvenility is primarily protected, no matter how the action is carried out, even in fictional representations. However, apart from the violation of juvenility, this is about a pornographic material offending the sexual dignity of its recipients and probably this offence is more serious than the one of generally obscene publications, since this provision particularly refers to child pornography. Given the above inferences, we conclude that the confluence between the crime of 348A GPC and crime of obscene publications is apparent. The child pornographic material, as defined in 348A GPC constitutes a special type of obscene publications of law 5060/1931. Consequently, we reach the conclusion that in case of confluence, article 348A GPC prevails as a specific provision over the general provision of 5060/1931 on obscene publications. Moreover, this view is accepted by the Greek Supreme Court's 628/2006 decision.<sup>5</sup>

As far as the confluence of Section 348A GPC with Section 351 GPC (juveniles' trafficking) is concerned, many distinct views have been theoretically advanced depending on the legal right which is considered to be violated under Section 348A GPC.

Thus, according to a view,<sup>6</sup> child pornography offends public order, under Section 184A GPC, as a form of provocation or stimulation against juvenility, while juveniles' trafficking trespasses juvenile's sexual freedom. Consequently, confluence between these two provisions will be 'real'. However, in this case confluence will concern the basic form of the child pornography crime, i.e., the one defined in Section 348A GPC para.1, and not the special type of para. 3. Otherwise, the element of child abuse or exploitation would be criminalized twice.<sup>7</sup>

Nonetheless, according to another view,<sup>8</sup> one should consider that in the provision of juveniles' trafficking the demerit of pornography has been also 'evaluated'. Consequently, because there exists a violation of the same legal right in both two provisions, one should refer to '*apparent confluence*'. Particularly, in Section 351 para. 6 GPC are described several acts such as the production of pornographic material which is also defined in Section 348A para. 3 GPC. Such acts

are punished with ten-year minimum imprisonment according to Section 351 para. 4(a) GPC<sup>9</sup>, when juveniles are victims.

Based on the above assumptions, we conclude that in case of confluence, juveniles' trafficking under Section 351 para.4(a) GPC will prevail over the provision of Section 348A para. 3(a) GPC. concerning juvenile's pornography

To sum up, one could support that the above provision on child pornography adequately protects juvenility. After the amendment of the above provision by law 3625/2007, the protection remains the same or becomes even greater.<sup>10</sup> The main amendment following the adoption of the new law was the penalization of production or circulation of child pornographic material, even in cases where profit is not the purpose for the committal of the crime. Moreover, crimes committed via the use of a computer or internet constitute an aggravated type of the offence. Nowadays, this is not only the most common but simultaneously the most dangerous way of the circulation of pornographic material.

Finally, one should stress that the problematic of confluence remains the same, even after the recent amendment of Section 348A GPC.

## Endnotes

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<sup>1</sup> Regarding confluence, as a notion of actualization of more crimes see I. Manoledakis, Criminal Law, 6<sup>th</sup> ed., p. 231 et seq.

<sup>2</sup> On protection of juvenility as legal right: see article 21 para.1 and 3 of Constitution, Section 24 para. 1 of the International Covenant on Civil and Political Rights of UN, as well as International Convention on the Rights of the Child of 20<sup>th</sup> November 1989.

<sup>3</sup> Penal Chronicles 1999, p. 584.

<sup>4</sup> Legal Forum 1989, p. 113, Penal Chronicles 1989, p. 336.

<sup>5</sup> Justice 2007, p. 819.

<sup>6</sup> E. Kosmidou- Kastanidou/Chr. Kosmidis/ G. Dimitraina, The recent law 3064/2002 on trafficking of human beings (Ο νέος νόμος 3064/2002 για την εμπορία ανθρώπων), North Greece Jurists' Society, Sakkoula Publications, Athens - Thessaloniki, 2003, p. 46.

<sup>7</sup> E. Kosmidou- Kastanidou/Chr. Kosmidis/ G. Dimitraina, The recent law 3064/2002 on trafficking of human beings, (Ο νέος νόμος 3064/2002 για την εμπορία ανθρώπων), *op. cit*, p. 48.

<sup>8</sup> G. Nouskalis, 'Child Pornography: Critical Issues of Section 348A GPC' («Πορνογραφία ανηλίκων: τα κρίσιμα ζητήματα του άρθρου 348Α ΠΚ») *Poiniki Dikaiosiini* 7/2006, p. 908 et seq.

<sup>9</sup> I. Manoledakis Criminal Law, Nutshell of General Part, Sections 1-49 GPC, 7<sup>th</sup> edition, fully revised under M. Kaiafa-Gbandi/ E. Simeonidou-Kastanidou, SAKKOULA Publications, Athens-Thessaloniki, 2005, p. 289 et seq.

<sup>10</sup> Section 348A GPC before law 3625/2007 stated that:

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“1. Whoever, in order to gain profit, prepares, possesses, is supplied, buys, transfers, transports, displays, sells or circulates in any way pornographic material, shall be punished with imprisonment of at least one year and the pecuniary penalty of ten thousand to one hundred thousand Euros.

2. Pornographic material constitutes according to the above paragraph any description or real or fictitious imprint on any material of juvenile’s body which aims at sexual stimulation, as well as the recording or imprinting on any material of real, simulative or fictitious indecent act carried out for the same purpose by or with a juvenile.

3. If an action of the first paragraph is related to pornographic material associated with the exploitation of the need, the mental weakness, the deafness or inexperience of a juvenile, or with the physical violation against him, imprisonment of minimum duration of ten years and pecuniary penalty of fifty to one hundred thousand Euros shall be imposed and in case of the victim’s serious bodily injury imprisonment of minimum duration of ten years and pecuniary penalty of a hundred thousand to five hundred thousand Euros shall be imposed.”

Section 348A GPC following its amendment by law 3625/2007 states that:

“1. Whoever intentionally produces, distributes, publishes, shows, introduces to Greece or exports, transports, offers, sells or in any other way disposes, buys, is supplied, obtains or possesses child pornographic material or diffuses or transmits information regarding the committal of the above acts, is punished with imprisonment of at least one year and the pecuniary penalty of ten thousand to one hundred thousand Euros.

2. Whoever intentionally produces, offers, sells or in any other way disposes, transmits, buys, is supplied or possesses child pornography material or diffuses information regarding the committal of above actions via a computer or use of internet, is punished with imprisonment of at least two years and the pecuniary penalty of fifty thousand to three hundred thousand Euros.

3. Child pornographic material, according to the previous paragraphs, constitutes the representation or the real or fictitious imprint on electronic or other material carrier of the body or part of the body of the juvenile, in a way that manifestly causes sexual stimulation, as well as real or fictitious indecent act carried out by or with a juvenile.

4. The acts of first and second paragraph are punished with imprisonment of least ten years and pecuniary penalty of fifty thousand to one hundred thousand euros: a) If these acts were carried out by profession or habit b) If the production of the material of child pornography is connected with the exploitation of the need, the psychological or mental injury or the physical dysfunction because of organic illness of the juvenile or with the exercise or threat of exercising violence or with the use of juvenile who has not completed ten years of age. If the act of case b resulted in serious bodily injury of the victim, minimum imprisonment of ten years and pecuniary penalty of one hundred to five hundred thousand Euros is imposed and if this action resulted in death, life imprisonment is imposed.”