

CRIME OF JOINING IN THE PROCESS OF CIRCULATION OF PORNOGRAPHIC IMAGES OF MINORS UNDER THE AGE OF FOURTEEN FROM THE CANON LAW PERSPECTIVE

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The fact that mass media, especially the Internet, apart from the access to knowledge, which is an obvious advantage of it, are used for criminal purposes, inter alia the dissemination of child pornography, is the painful truth nowadays. With the rise in the phenomenon of paedophilia, which has not left the Catholic clergy out, the Holy See, like state legislators, decided it was necessary to extend the canon protection of the image of minors below the age of fourteen against the potential misuse by Catholic priests.

The article aims to present the essence of a criminal act of joining in the process of circulation of pornographic images of minors under the age of fourteen laid down in the canon criminal law, its social harmfulness and penalisation. It discusses the specificity of actions undertaken by the Church legislator on behalf of the Catholic Church, and their compatibility with governmental legal solutions.

1. HISTORICAL OUTLINE OF THE CRIME

The Catholic Church unambiguously condemned pornography in #2354 Catechism of the Catholic Church (CCC) stating that: "It offends against chastity because it prevents the conjugal act, the intimate giving of spouses to each other. It does grave injury to the dignity of its participants (actors, vendors, the public), since each one becomes an object of base pleasure and illicit profit for others. It immerses all who are involved in the illusion of a fantasy world. It is a grave offence. Civil authorities should prevent the production and distribution of pornographic materials".

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Pope John Paul II, in one of his catecheses concerning the theology of the body given on 29 April 1981, explained that the issue of the Church's negative attitude towards pornovision and pornography is not the effect of a puritanical mentality or of a narrow moralism, just as it is not the product of a thought imbued with Manichaeism, either. It is a question of an extremely important, fundamental sphere of values. Before it, man cannot remain indifferent because of the dignity of humanity, the personal character and the eloquence of the human body.¹ In the apostolic exhortation *Familiaris consortio*, he emphasises that one of the political community duties is to ensure the protection against pornography.² Being aware of the fact that in the era of global sexual revolution almost everyone is exposed to the destructive influence of easily accessible pornovision and pornography, the Congregation for the Doctrine of the Faith, authorised by Pope Benedict XVI, held it was absolutely necessary, following the example of contemporary states, to introduce the offence into the system of canon law, which would safeguard the dignity and respect for good image of children and youth, and protect them against abuse by paedophilia and ephobophilia in the event they entered the circles of Catholic clergy. It took place with the entry into force of the promulgated Norms concerning grave delicts reserved to the Congregation for the Doctrine of the Faith (hence CDF) (*Normae de delictis Congregationi pro Doctrina Fidei reservatis seu Normae de delictis contra Fidem necnon de gravioribus delictis*), presented by the Holy See Press Office on 15 July 2010. Article 6 §1(2°) of the Norms stipulates that one of the more grave delicts against morals is "the acquisition, possession, or distribution by clerics of pornographic images of minors under the age of fourteen, for purposes of sexual gratification, by whatever means or using whatever technology".³ Taking into account all three forms of the crime, one can call them "the crimes of joining in the process of circulation of pornographic images of minors under the age of fourteen".

2. ACTIVE AND PASSIVE SUBJECT OF THE CRIME

On the one hand, an individually determined active subject, and, on the other hand, the specificity of the passive subject designate the scope of the crime of joining in the process of circulation of pornographic images of minors under the age of fourteen, which the features of the subject adequate to them indicate.

2.1. ACTIVE SUBJECT

An active subject, in other words a perpetrator referred to in Article 6 §1(2°) of the Norms concerning the more grave delicts reserved to the Congregation for the Doctrine of the Faith consisting in the acquisition, possession and distribution by

¹ See, *Jan Paweł II o małżeństwie i rodzinie* [John Paul II on marriage and family], Warsaw 1983, p. 363.

² Compare, John Paul II, Apostolic exhortation *Familiaris consortio*, #46.

³ *Acta Apostolicae Sedis* 102 (2010), p. 424.

clerics of pornographic images of minors under the age of fourteen, for purposes of sexual gratification, by whatever means or using whatever technology, in the light of the feature of the subject: *clericus*, may only be a clergyman. It does not matter whether he has been incardinated, i.e. included in a particular diocese (eparchy), or a religious institute, monastery or society of apostolic life.

2.2. PASSIVE SUBJECT

In the light of the feature of *minorum infra aetatem quattuordecim annorum*, used in the description of the prohibited act in Article 6 §1(2°) of the Norms concerning the more grave delicts reserved to the CDF, a passive subject, i.e. the aggrieved, is a minor under the age of fourteen who by whatever means was shown in the pornographic image acquired, possessed or distributed for purposes of sexual gratification provided that its content is adequate to what took place in reality. The age of the subjects of visualisation is assessed based on the physical features, e.g. the body build, and mainly facial features and the appearance of genitals. It may happen that in some cases, especially when the aggrieved minor is on the borderline between fourteen and fifteen years of age, appropriate assessment of his age will cause some problems.⁴ Therefore, if a perpetrator manages to prove that a person presented in a pornographic image was older than fourteen, e.g. if expert witnesses analysing the anatomic features confirm that or the Internet site presenting the image that the perpetrator used provide a declaration that presented people are adult, there will be a lack of features of a passive subject of crime and the perpetrator's act cannot be recognised as crime and, as a result, he cannot be punished. However, from the religious point of view, the act is a cardinal sin.

Introducing the feature of the aggrieved subject's age, the legislator indicates the will to protect children and younger teenagers against the use of their image for sexual purposes, thus against their instrumental use again. In comparison to other legal solutions adopted in other legal systems, this solution cannot be recognised as well balanced. For example, Article 600-bis of the Italian penal code stipulates that whoever acquires or possesses pornographic images produced as a result of sexual abuse of minors under the age of eighteen is subject to penalty of deprivation of liberty for a period of up to three years or a minimum fine of EUR 1,549. The Polish legislator also lays down that the crime of possession and distribution of pornography requires the participation of a minor whose age is under eighteen (Article 202 §§ 3 & 4a Criminal Code).

⁴ C. Papale, *Il processo penale canonico. Commento al Codice di Diritto Canonico*. Libro VII, Parte IV, Vaticano 2007, p. 236: "Si tratta di un giudizio non sempre di facile effettuazione: se, infatti, in alcuni casi è difficile che possa dubitarsi che si tratti di bambini o, comunque, di soggetti giovanissimi, non così in altri casi, come quando l'età del minore è 'al confine' dei 14 anni e, conseguentemente, arduo risulta essere l'emissione di un giudizio sicuro al riguardo".

3. OBJECTIVE SIDE OF THE CRIME

The criminal act consists in joining in the process of circulation of pornographic images of minors under the age of fourteen (*imagingum pornographicarum minorum infra aetatem quatordecim annorum*). The term images means photographs, e.g. put in an album, films, Internet presentations containing pornographic content, i.e. ones that their producers intended to evoke sexual elation because they present minors under the age of fourteen in the course of sexual activities, being subject to sexual activities or in lascivious poses. It is necessary to differentiate pornographic materials from materials containing erotic content, a sexual subtext, but not showing the image of genitals even if they present minors under the age of fourteen, e.g. a poster presenting a few-year old boy following his mother and pulling her skirt in the way that uncovers her buttock with a slogan: "What do men think about?" can be treated as erotic but not pornographic. Not every image of a minor's nudity is pornographic in nature, e.g. a photograph of a naked child bathing that his parents sent to their relative who is a cleric does not match the feature of "pornographic images". Similarly, not every pornographic image constitutes an element of an act prohibited by a sanctioned norm of Article 6 §1(2°) of the Norms concerning the more grave delicts reserved to the CDF. In accordance with Can. 18 Code of Canon Law (CCL/1983) and Can. 1500 of the Code of Canons of Oriental Churches (CCOC), pornographic material matches the features of the objective side of a prohibited act only when it contains the registration of real situations in which a minor found himself. Thus, virtual paedophile pornography is not subject to the sanctioning norm discussed because it results from advanced graphic processing, which creates an impression of a real situation with minors' participation, although the fact of using it for the purpose of sexual gratification is morally blameworthy and constitutes a cardinal sin against the Sixth Commandment of the Decalogue.

The Church legislator lays down three alternative forms of the crime of joining in the process of circulation of pornographic images of photographed or filmed minors under the age of fourteen, depending on the features of action concerned laid down in the sanctioned norm: *comparatio* (acquisition) or *detentio* (possession), or *divulgatio* (distribution).

Acquisition of this kind of pornographic materials means their purchase, exchange in order to obtain them, or receipt as a gift, as a result of which a perpetrator becomes their owner. It is not important who the vendor is. It may occur in the form of online purchase and payment by credit card or free downloading of files available online and saving them on a computer or memory carriers (floppy discs, compact discs or pen drives).

Possession means retaining the materials, in spite of a legal ban, in whatever place, e.g. on a shelf at home, in a safe, on the hard disc of one's own computer, on a floppy disc or a pen drive. It does not matter what the purpose of retention is: whether they are kept for one's own use, for other people's needs or for the purpose of distribution.

Distribution of pornographic images of minors under the age of fourteen means undertaking activities that make them available to other definite or indefinite

persons, i.e. passing them to other persons by means of e.g. selling, sending by post, lending, spreading cassettes or photographs in a busy place or any other way making them easily accessible. The latest method of distribution consists in enabling an indefinite number of people to have access to them, e.g. giving access to them on an easily accessible website that an unlimited number of people can visit and freely download files from it.

The fact that the sanctioning norm of §6(2°) of the Norms concerning the more grave delicts reserved to the CDF lays down the features of the way of committing a prohibited act: “by whatever means” (*quovis modo*) or “using whatever technology” (*quolibet instrumento*) indicates that all possible forms of acquisition, possession and distribution of child pornography are subject to the sanctioning norm.

4. SUBJECTIVE SIDE OF THE CRIME

The crime of joining in the process of circulation of pornographic images of minors under the age of fourteen in all its forms assumes a perpetrator’s intentional guilt in the form of direct intent to gratify sexual desire, which is indicated by the purpose-related feature of a prohibited act *turpe patrata*. A perpetrator purchasing them as well as the one who possesses or distributes them wants to do what he does, i.e. he wants to fulfil lascivious aims. In such a case, intentional guilt is annulled neither by the fact that a perpetrator has not achieved the intended aim nor by the lack of sufficient knowledge of the criminal act specifying this crime. It can influence the gravity of penalty at the most.

The use of virtual child pornography in particular requires a series of conscious attempts from searching for Internet sites with pornographic content, through the decision to buy them, to downloading the files onto the hard disc of one’s own computer.⁵ If someone does not want it, he has no other possibility of receiving virtual pornography and he cannot justify himself by the broad accessibility of the Internet or accidental coming into possession of pornographic materials. Striving to come into possession of specific pornographic content, a user of the peer to peer or point to point programmes have to use specific keywords to get access to them, to make the programme give access to all the files in accordance with the search criteria selected. It can happen, however, that the material looked for does not match the material actually downloaded. Let us imagine, for example, a person searching for all possible films of *Bolek i Lolek* series on the Internet, who finds a title *Bolek and Lolek on holiday X*, which he does not have in his collection. Having downloaded it, he opens the file and realises that he has come into possession of pornographic images of minors under the age of fourteen, which somebody gave an innocent title in order to increase its dissemination. The example clearly shows the difference between the Internet user’s intention and the result of his action. There is no doubt that he did not commit a crime and, as a result, is not subject to penalty because

⁵ See, G. Pica, *Internet*, [in:] *Digesto delle discipline pubblicistiche*. Aggiornamento, Utet-Torino 2004, p. 472.

his action was not accompanied by direct intent to acquire pornographic content presenting minors under the age of fourteen. Such unintentional acquisition of pornographic materials may, however, become an opportunity to commit an offence in the form of child pornography retention. If, learning what the content of the material is, the Internet user does not delete it from his computer but retains it with intention to perform lascivious acts or to distribute it in any way, his behaviour will indicate his criminal intent and he will become subject to an adequate canon penalty. It should be emphasised that what indicates the illegal intention of the person retaining pornographic materials is not just the fact of their retention on a computer hard disc or another data carrier (e.g. the retention of pornographic images of minors under the age of fourteen by the church officials in order to ensure a fair trial is not an offence because its purpose is not lascivious) but the use of them by the person involved for lascivious purposes at least a few times. The fact that a perpetrator deleted the materials after some time does not exempt him from a penalty if he had used them before. However, the fact that a perpetrator destroyed the materials before the detection of the crime or after the detection as a sign of repentance can constitute a circumstance prone to affect the mitigation of canon punishment, although it does not decrease the seriousness of the prohibited act.

In the event of distribution of pornographic images of minors under the age of fourteen, the direct intention to commit a lascivious act decides on the criminal liability of a perpetrator, provided that a particular person is a receiver of the material. However, the distribution may result from oblique intent, which takes place when a perpetrator gives his consent to indefinite and unknown number of people to obtain pornographic content.

5. DAMAGE RESULTING FROM THE CRIME

A perpetrator's activities to join in the process of circulation of pornographic images of minors under the age of fourteen result in the continuation of their abuse. This causes that they keep being deprived of their dignity and the right to privacy. It contributes to the development and consolidation of the pornographic market, which preys on perverted sexual needs of paedophiles and ephebophiles looking for new stimuli. To obtain them, the producers of such materials often take advantage of a difficult financial situation of minors and a lack of sufficient parental care. Moreover, they act deceitfully, use violence and blackmail, and sometimes even get them addicted to drugs. Thus, a perpetrator of such a crime promotes behaviour that makes every ordinary man embarrassed as it degrades him and makes him even more dependent on this degenerate inclination, which is a perpetrator's sexual drive to children and juveniles. Because of the emotional immaturity and egoism of a perpetrator (a diocesan or monastic cleric), the image of the Good Shepherd suffers. The Church uses it to present the positive didactic role of playing auxiliary functions to a family and the community. Moreover, a perpetrator flagrantly destroys the authority of the Church in the field of morality, which he represents, even if he does not act publicly.

6. PENAL SANCTION

Penal sanctions for this type of crime are laid down in Article 6 §1(3°) of the Norms concerning the more grave delicts reserved to the CDF. They are the same as in case of an offence against the Sixth Commandment of the Decalogue committed against a minor under the age of eighteen referred to in Article 6 §1(2°) of the Norms. The sanctions are obligatory and partially indefinite. The Church judge authorised to impose a penalty should apply a penalty adequate to the gravity of a given crime, including dismissal or deposing. The use of the phrase *dimissio vel depositio* in the sanctioning norm indicated that that the Church legislator envisages every potential form of dismissal or deposing. Therefore, clerics who are subject to the provisions of CCL/1983 may be dismissed from the institute of consecrated life (Can. 695 §1) or a society of apostolic life (Can. 746) or from the clerical state (Can. 1336 §1(5°)). On the other hand, in accordance with CCOC, the most severe penalties for the commission of this type of crime that can be imposed on a cleric who is a member of an Oriental Catholic Church are: dismissal from a monastery (Can. 495), from the Order or Congregation (Can. 547 §3), from the Society of Common Life to the Manner of Religious (Can. 562 §3) or deposing from an office or position of administration (Can. 762 §1(7°)) or from a clerical state (Can. 1433 §2).

The crime of joining in the process of circulation of pornographic images of minors under the age of fourteen by their intentional acquisition, possession or distribution was introduced to the catalogue of canon crimes, which constitutes the expression of the Catholic Church co-responsibility for the fight against any forms of paedophilia among the Catholic clergy. However, this protection cannot be recognised as sufficient because the sanctioned norm applies only to clerics. In the canon law in force, there is no analogous sanctioned norm that would safeguard children and youth's dignity against abuse by monks who are not clerics, nuns and secular staff, especially religion teachers and persons playing other didactic roles within the authorisation given by the Church or within a canon mission. Although, in case of those persons, one can use the general norm of Can. 1399 CCL/1983 and strive to punish the perpetrators of a grave violation of the Divine laws and a scandal caused, does not change the fact that the Catholic Church formally does not penalise them and refers the problem of criminal liability for their acts to public authorities. This lack of consistency undoubtedly weakens the role and importance of the Catholic Church as a guardian of morality.

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Summary

The article discusses the decision of the Congregation of the Doctrine of the Faith of 2010 to introduce the crime consisting in a Catholic Church cleric's participation in the process of circulation of pornographic images of minors under the age of fourteen by their intentional acquisition, possession and distribution. The author draws attention to the compatibility of the subjective side of such a crime with state legislations and, at the same time, critically assesses the scope of its sanctioned norm, which applies only to clerics. He believes that any violation of the dignity of children and youth by their sexual abuse aggravated by the distribution of photographs or films presenting them requires that a common norm should substitute for the special sanctioned norm in canon law.

Keywords: pornographic images, cleric, minor, canon sanctions

PRZESTĘPSTWO WŁĄCZENIA SIĘ W OBIEG MATERIAŁÓW PORNOGRAFICZNYCH PRZEDSTAWIAJĄCYCH MAŁOLETNI PONIŻEJ CZTERNASTEGO ROKU ŻYCIA W PRAWIE KANONICZNYM

Streszczenie

Przedmiotem artykułu jest wprowadzone w 2010 roku do kanonicznego prawa karnego decyzją Kongregacji Nauki Wiary przestępstwo polegające na włączeniu się przez duchownego Kościoła Katolickiego w obieg materiałów pornograficznych z udziałem małoletnich poniżej czternastego roku życia poprzez umyślne ich nabywanie, przechowywanie lub rozpowszechnianie. Autor zwraca w nim uwagę na kompatybilność przedmiotowej strony tak określonego przestępstwa z ustawodawstwami państwowymi i jednocześnie krytycznie ocenia zakres jego normy sankcjonowanej, która odnosi się wyłącznie do duchownych. Uważa, że wszelkie naruszanie godności dzieci i młodzieży poprzez ich seksualne wykorzystywanie, zwielokrotnione rozpowszechnianiem zdjęć lub filmów pornograficznych z ich udziałem, domaga się wprowadzenia do prawa kanonicznego w miejsce szczególnej normy sankcjonowanej normy powszechnej.

Słowa kluczowe: materiały pornograficzne, duchowny, małoletni, sankcje kanoniczne