

However, such protection is provided primarily in the field of

Protection of Children in Czech Substantive Criminal Law and Its Comparison with the Polish Legal Regulation

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Abstract— Criminal law of all countries protects children's interests in different ways, despite the efforts to harmonize some standards in this area made on supranational level. The article offers a preview of some specific and interesting manners, which are characteristic for the Czech criminal law as part of the effort to penalize acts directed against children and their interests. Interesting questions are connected with criminal offences, when a child is protected independently of their own will. Liability for some criminal offences against children, including some serious crimes, may arise also in such cases, when the child in fact initiated the perpetrator's action. Although such attitude is justifiable in majority of cases, the article point out some situation, when the criminal penalization of act provided with consent of child would be inappropriate. Some problems may be identified also in construction of some qualified bodies of a crime contained in the Czech Criminal Code, which are determined to provided higher protection to children. The article offers also solution of problematic question, when a child victim could be considered as "defenceless" in the sense of body of a crime of rape. Finally, the article brings a brief comparison of Czech and Polish criminal law

Index Terms— Child, Qualified bodies of a crime, Sexual offences, Rape, Defencelessness.

XXIV. INTRODUCTION

Protection of children is one of the important and traditional goals of criminal law. In recent years, considerable attention has been paid to the protection of child victims during criminal proceedings, because there is a higher risk of the so called secondary victimization in the case of these victims; we may remind e.g. the *Minimum standards on the rights, support and protection of victims of crime* (European Parliament resolution of 30 May 2018 on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime – 2016/2328 INI), where the need of child victim's protection is emphasised.

substantive criminal law and it has two main forms. The first of them relates to the protection of children against a too harsh punishment when they commit a crime. Modern criminal law contains a special part regarding the criminal liability of juvenile persons, i.e. persons, whose age exceeds the limit for criminal liability, but does not reach the limit laid down for adulthood. For example Czech criminal law contains the Juvenile Justice Act (Act No. 218/2003 Sb.), which is special in relation to the Criminal Code (and to the Criminal Procedural Code too) and lays down special conditions for the criminal liability of juveniles (i.e. persons older than fifteen but younger than eighteen years of age), their sanctioning and conducting criminal proceedings against them.

However, the attention in this article will be focused on the second form of a children's protection in criminal law. That lies in the definition of individual bodies of a crime protecting a children's interest. The state penalizes this way (by the means of criminal law) the most dangerous actions against children and their interests, primarily attacks on their health and life, against their freedom and dignity (particularly in cases of a sexual nature) and attacks threatening a children's intellectual and moral development. It is worth mentioning that some of these criminal offences have been implemented into national criminal laws because of the obligations laid down by international treaties or other similar acts made at the supranational level; primarily may be reminded the Convention on the Rights of the Child (Adopted by United Nations in 1989) and Directive 2011/93/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..

Also the Czech Criminal Code (Act. No. 40/2009 Sb. – hereinafter also referred to as "CC") regulates several criminal offences, which may be committed only against children (i.e. persons younger than eighteen years of age – cf. § 126 of the



CC), therefore, committing a crime against a child is an element contained in the basic body of a crime. Much more criminal offences state that committing an offense against a child is a sign of qualified body of a crime, therefore such circumstance represents a reason for considering an act more serious, which is connected with a higher level of punishment.

In this article, we will focus on some interesting or problematic aspects of the Czech legal regulation regarding the criminal offences committed against children. It is undoubtedly interesting to point out criminal offences, when a child is protected independently of their own will. Liability for some criminal offences against children, including some serious crimes, may arise also in such cases, when the child in fact initiated the perpetrator's action.

Some problems may be identified in the manner of how the Czech Criminal Code distinguishes protection of children (persons under eighteen years of age) and children younger than fifteen years of age. Constructions of some qualified bodies of a crime seem to be slightly illogical. Finally, the term "defencelessness" in the context of the body of a crime of rape, regarding the cases, when a child should be considered a defenceless victim of a crime, represents a demanding and important problem.

After the explanation of the manner the Czech criminal law approaches the solutions of such problems, some brief comparison with Polish criminal law will be offered. Czech and Polish criminal law are based on the same ideas and it is possible to identify many common aspects, however, the different historical development and the different cultural conditions also brought many differences in the specific features of the legal regulation in the field of criminal law. It is possible to suppose that information regarding Czech legal regulation may be interesting and useful for Polish specialists on criminal law for comparative purposes. Possibly, some parts of this regulation could be an inspiration for Polish criminal law and at the same time, the Polish criminal law could offer some inspiring aspects for Czech criminal law.

XXV. RELEVANT LEGAL REGULATION

The article is based of analysis of relevant legal regulation existing in the Czech Republic and in Poland and their comparison; legal regulation of European Union and international treatments have been taken into account too. Such analysis includes following legal acts:

A. Czech legal regulation

- Act. No. 40/2009 Sb., Criminal Code (*trestní zákoník*)
- Act No. 218/2003 Sb., Juvenile Justice Act (*zákon o soudnictví ve věcech mládeže*)

B. Polish legal regulation

- Act of 6 June 1997, Dz. U. z 1997 r. Nr 88, poz. 553, Criminal Code (*Kodeks karny*)
- Act of 29 July 2005, Dz.U. 2005 nr 179 poz. 1485, on

Counteracting Drug Addiction (*o przeciwdziałaniu narkomanii*)

C. Legal regulation of European Union and international treatments

- Minimum standards on the rights, support and protection of victims of crime (European Parliament resolution of 30 May 2018 on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime – 2016/2328 INI)
- Directive 2011/93/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
- Convention on the Rights of the Child (Adopted by United Nations in 1989).

XXVI. CONSTRUCTION OF CHILDREN'S PROTECTION IN INDIVIDUAL BODIES OF A CRIME

It has been mentioned that there are several criminal offences in the Czech Criminal Code, whose bodies of a crime are determined (exclusively or alongside) to the protection of children. For easier orientation in the concept of a children's protection in the Czech Criminal Code and understanding the considerations below, it is suitable to briefly introduce this group of criminal offences.

They may be divided into seven categories:

- 1) Criminal offences, which may be committed only against a child (person younger than eighteen years of age) or in relation to a child, i.e. a child's protection is the exclusive object of the crime; for example, human trafficking (§ 168 section 1 CC), abuse of a child for the production of pornography (§ 193 CC), endangering a child's education (§ 201 CC), seducing a child to sexual intercourse (§ 202 CC), serving alcohol to a child (§ 204 CC), prostitution endangering the moral development of children (§ 190 CC), dissemination of pornography (variant under § 191 section 2 CC) or participation in a pornographic performance (§ 193a).
- 2) *Criminal offences, which may be committed only against a child under fifteen years of age* (protection of a child under fifteen is the exclusive object of the crime); sexual abuse (§ 187 CC) and illegal contact with a child (§ 193b CC) belong to this category.
- 3) Criminal offences, where protection of a child is one of the protected interests, so the commission of such crimes very often damages or endangers a child's interest. This category includes e.g. criminal offence of abandoning a child or entrusted person (§ 195 CC), ignorance of duty to support and maintain (§ 196 CC – them is usually committed, when a parent does not fulfil the duty to support and maintain his or her child), maltreatment of an entrusted

person (§ 198 CC), maltreatment of a person living in common residence (§ 199) or abduction of a child or a person suffering from a mental disorder (§ 200). The criminal offence of rape (Section § 185 CC) shall be mentioned in this context as well, because if the sexual intercourse was committed on a child of very young age, it may be the valid reason for the conclusion that such act was committed on a defenceless person, so it may be considered rape, although the perpetrator did not use any violence or threat (see below).

- 4) Criminal offences, where committing a crime against a child (person under eighteen years of age) represents a sign of qualified body of a crime, so it is a condition for considering this crime as more serious, which is connected with a higher range of punishment. For more details on these criminal offences see below.
- 5) Criminal offences, where committing a crime against a child younger than fifteen years of age represents a sign of a qualified body of a crime, so again, it is a condition for considering this crime more serious, which is connected with a higher range of punishment. For more details on these criminal offences see below.
- 6) *Criminal offences, where the body of a crime constitutes committing a crime against a child of a very low age.* Primarily the criminal offence of the murder of a new-born baby by its mother (§ 142 CC) belongs to this category, because it may be committed only against a new-born baby. Also, the criminal offence of abandoning a child or entrusted person qualified as the body of a crime under § 195 section 2 letter a) CC, which supposes committing a crime against a child younger than three years of age, may be included in this category.
- 7) *Criminal offences against the pregnancy of a woman,* which include the illegal interruption of a pregnancy without the consent of the pregnant woman (§ 159 CC), the illegal interruption of a pregnancy with the consent of the pregnant woman (§ 160 CC), assisting a pregnant woman with artificial interruption of a pregnancy (§ 161 CC) and the solicitation of a pregnant woman to artificially interrupt a pregnancy (§ 162 CC). It is necessary to emphasize that these criminal offences cannot be considered crimes against children *stricto sensu*, because according to the Czech criminal law, a person may be considered a human being, which may be an independent object of a crime, only from the moment of birth. Thus, the beginning of a birth is the first moment, when we may talk about a person (and about a child) in the criminal-law sense. Before this moment, the individual is considered and protected only as a foetus. However, we considered it appropriate to mention this group of offences for a complete presentation of the Czech legal regulation related to the criminal sanction of acts directed against children. It is also suitable to point out, that a pregnant woman cannot bear criminal liability for the crimes mentioned above or for

XXVII. PROTECTION OF CHILDREN AGAINST THEIR WILL

There are several criminal offences in the Czech Criminal Code, which may be committed only in relation to a child younger than fifteen years of age or through some direct confrontation with such a child and criminal liability is found although there is no kind of violence, threat or other form of unacceptable influencing of a child's will (e.g. exploiting the child's reliance on the perpetrator by the perpetrator), therefore, the perpetrator does not act against the child's will, or such action is even initialised or provoked by the child. These criminal offences include:

- - human trafficking (§ 168 section 1 CC),
- - sexual abuse (§ 187 CC),
- - dissemination of pornography (§ 191 section 2 CC),
- - abuse of a child for production of pornography (§ 193 CC),
- - participation in a pornographic performance (§ 193a CC),
- - illegal contact with a child (§ 193b CC),
- - endangering of a child's education (§ 201 CC),
- - seducing a child to sexual intercourse (§ 202 CC),
- - serving alcohol to a child (§ 204 CC).

The action of the perpetrator to all these criminal offences, except two of them (sexual abuse and illegal contact with a child) has to be related to a child, i. e. a person under eighteen years of age. Such action may consist in hiring, seduction, transport or some other form of action directed against the other person and it may involve child abuse involving e.g. sexual intercourse, producing pornography, military service etc. (human trafficking under § 168 section 1 CC), providing or disclosure of pornography to a child (dissemination of pornography under § 191 section 2 CC), soliciting hiring, seducing or abusing a child for the production of pornography (child abuse involving production of pornography under § 193 CC), participation in a performance of a pornographic character, where a child is performing (participating in the pornographic performance under § 193a CC), threatening the intellectual or moral development of a child, for example enabling a child to lead an immoral life, not to attend school etc. (the endangering of a child's education under § 201), offering, promising or giving an incentive for sexual intercourse with a child or for masturbation, stripping or similar conduct of a child (seducing a child to sexual intercourse under § 202 CC), or in serving alcohol to a child repeatedly or in a larger amount (serving alcohol to a child under § 204 CC). The Czech Criminal Code provides a higher protection to children also in relation to other addictive substances, i.e. drugs; providing narcotic or psychotropic substances to a child may be punished stricter than the same action directed to an adult person – see § 283 section 2 letter d) and section 3 letter c) CC.

The next two criminal offences (sexual abuse and illegal contact with a child) lies in the action directed towards a child younger than fifteen years of age. The perpetrator either has sexual intercourse with a child under fifteen without using any violence or threat (sexual abuse under § 187 CC), or proposes a

meeting to a child under fifteen years of age with the intention of committing sexual abuse, a pornographic offence or other sexual offence (illegal contact with a child under § 193b CC).

It is obvious the Czech Criminal Code protects children independently of their own will primarily in the field of sexual activities. Of course, it is not a surprising finding, because pre-adult sexuality represents a very sensitive matter in our society, primarily due to the danger of exploiting children by so-called sexual predators, for commercial purposes etc. (see e. g. Terry, 2013). After all, the European Union also pays attention to these problems and endeavours to harmonize the legal regulation of the Member States in this area (see Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and the sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA).

On the other hand, criminal restrictions on some activities in this area may seem problematic from the stand point of respecting a person's will and responsibility. It is logical that sexual intercourse with a child under fifteen years of age (or under another age limit, according to the specifics of the individual legal regulations) is punishable as sexual abuse. Children under fifteen years of age cannot bear criminal liability, therefore, the legislator took a consistent approach to their intellectual and moral abilities – such children are not able to make a responsible decision regarding their own sexual relations with another person, regarding their illegal activities, which may prove their criminal liability.

However, the same legislator declares that children between fifteen and eighteen years of age are mature enough to make a decision as a result of which they may be criminally liable, but at the same time the legislator wants to ignore their free decision (for example) to ask for money for sexual intercourse, to take part in the production of photos or videos of a pornographic character or show some performance of a pornographic character. In other words, who would not ignore such a will and the mentioned decisions of children between fifteen and eighteen years of age and would reflect that such decisions (to pay money to such a child for sexual intercourse, taking part in producing pornography with such a child or watch the mentioned pornographic performance), may bear criminal liability.

When we point out this interesting moment of considering a child's intellectual and moral abilities in connection with criminal law, it should not be understood as a criticism of such a construction of the legal regulation. As it has been mentioned above, protection of children (including children between 15 and 18 years of age) is one of the most sensitively perceived interests. Sexual intercourse for money (prostitution) or performance in pornography may be a tempting way for many teenagers of how to make "easy" money, especially in the current internet era, when it is very easy to contact such teenagers online, tempt them and offer money for some sexual activities. Many of these children are not able to predict the very negative consequences such actions may have on their future life. Thus, it is legitimate to criminalize such actions directed at children, although the perpetrator acts with the free consent of

the child, or even because of some child's impulse.

However, criminal liability of children older than fifteen (a juvenile) and at the same time their protection against some activities endangering their development may result in absurd consequences. Such cases may occur, when the "perpetrator" and "victim" are in a natural emotional relationship and there exists no real danger to the child's development. We may imagine, for example, the situation when the "perpetrator" asks his/her seventeen-year-old girlfriend/boyfriend to take some "titillating" photos or videos or to perform some "orgiastic" stripping show just for him/her only as a part of their sexual and emotional relationship. If such a girlfriend/boyfriend complies with this request (he/she takes such photos or performs such shows for his/her boyfriend/girlfriend), the boyfriend/girlfriend may really bear criminal liability, because we may conclude, he/she led a child to produce pornography, or he/she took part in a pornographic performance of a child fulfilling all formal elements of the criminal offence of abusing a child in the production of pornography (§ 193 CC), or participation in a pornographic performance (§ 193a CC) respectively.

Naturally, it would be absurd to exercise criminal liability in such cases, because actions described in these examples represents no danger to the intellectual and moral development of a child. Criminal liability for the mentioned criminal offences would fall to cases they are not aimed at.

The solution (according to the Czech criminal law) lays in the application of some of the two corrective measures of criminal liability. The first one has the form of the principle of subsidiarity of criminal repression, which is laid down in § 12 section 2 CC. According to this principle, criminal liability and the related consequences could not be applied if the act (which fulfils all the formal signs of some criminal offence) is not harmful to society and liability according to another legal regulation would be sufficient (see e. g. Fenyk, 2013, Kandová, 2017 or Šámal, 2018). On the basis of this principle, law enforcement authorities may conclude that actions described in the examples above could not be considered a criminal offence. The second corrective measure lays in the opportunity of a state attorney or court to make a decision about not prosecuting an act according to the provision of § 172 section 2 letter c) of the Code of Criminal Procedure. Such a decision may be made on the basis of a conclusion about the ineffectiveness of a prosecution in an individual case (see e. g. Šámal, 2013 or Kandová, 2017).

Factually, it does not matter which of these two corrective measures would be applied in an individual case, because both of these two ways lead to the same result – the non-application of criminal liability. However, in some cases, the situation may be more difficult than in the examples mentioned above. Competent authorities need to consider very carefully whether the individual action really endangers a child's morality, or if it is just part of a harmless emotional and sexual relationship of a child (older than fifteen years of age), which should be respected, as well as the will of a child manifested within their limits. In other words, criminal liability cannot be applied strictly, formally and blindly, although there is a child, whose relevant action it concerns.

XXVIII. PROTECTION OF CHILDREN AND CHILDREN
UNDER FIFTEEN YEARS OF AGE IN QUALIFIED
BODIES OF A CRIME

It has been mentioned that the Czech Criminal Code contains a lot of criminal offences where committing a crime against children (i.e. persons under eighteen years of age) or against children younger than fifteen years of age is considered a sign of a qualified body of a crime, therefore, the act is punishable in a stricter manner, meaning there are more severe punishment available. For example, the criminal offence of rape according to the basic body of a crime (§ 185 section 1 CC) may be punished by imprisonment from one to five years, committing the rape of a child (between fifteen and eighteen years of age) is connected with the possibility of punishment of imprisonment from two to ten years (§ 185 section 2 letter b) CC) and committing the rape of a child younger than fifteen years of age may result in the punishment of imprisonment from five to twelve years (§ 185 section 3 letter a) CC).

The majority of qualified bodies of a crime which consist in committing a crime against (any) children aims to protect children because of their inexperience, which may lead to children being manipulated by the offenders more easily. For example, participation in suicide (§ 144 section 2 CC), the taking of tissue or organs in the performance of transplantation for payment (§ 166 section 3 letter c) CC), illegal production and other treatments with narcotics and poisons (§ 283 section 2 letter d) CC), propagation of drug addiction (§ 287 section 2 letter b) CC) or production and other treatments with a substance with a hormonal effect (§ 288 section 2 letter c) CC) belong among these offences. The committing of these offences against children may be easier in principle than committing them against an adult person, i.e. children represent a very vulnerable object of the perpetrator's action, therefore, the stricter punishment of these offences is justifiable.

The qualified bodies of a crime, which may be fulfilled when the crime is committed on a child younger than fifteen years of age, are contained primarily in violent criminal offences, e.g. murder (§ 140 section 3 letter c) CC), killing (§ 141 section 2 letter c) CC), serious bodily injury (§ 145 section 2 letter c) CC), bodily injury (§ 146 section 2 letter b) CC), torture and other forms of inhuman and cruel treatment (§ 149 section 3 letter b) CC), rape (§ 185 section 3 letter a) CC) or sexual duress (§ 186 section 5 letter a) CC). Stricter punishment is also justifiable in these cases because of the greater vulnerability of children. Nevertheless, committing these criminal offences on children younger than fifteen years of age may also be considered a more serious consequence of the offender's action; typically, sexual criminal offences such as rape or sexual duress may cause even more serious psychological consequences for the victim when the victim is a child.

This construction seems to be logical, but we may find some criminal offences in the Czech Criminal Code whose construction may be considered as problematic regarding the protection of children. First of all, we should point out some criminal offences where the Czech Criminal Code surprisingly does not consider their committing on a child as a circumstance conditional for a more severe criminal liability, i.e. the Criminal

Code does not state committing it on a child (or on a child younger than fifteen years of age) in any qualified bodies of a crime of these offences. For example, the criminal offence of blackmailing (extortion) under § 175 CC naturally is one of the offences against free will, for this reason, its committing against a child may be easier. Moreover, coercing a child to some activity using violence or threats may be more harmful for a child and the risk of negative psychological consequences is higher as well. The same arguments also regard to the criminal offence of oppression under § 177 CC, where committing it against a child is not considered any qualified body of a crime either. Thus, it does not seem very logical that the Czech Criminal Code connects the committing of rape, sexual duress or the taking of a hostage (§ 174 CC) on a child with stricter punishment, but it does not determine the same consequence in the case of very similar offences like blackmailing (extortion) or oppression.

The Czech Criminal Code is very confusing and unnecessarily complicated with regard to the assessment of the sexually motivated actions towards children when the perpetrator exploits the reliance of the child on him/her (e.g. a parent exploits his/her child, teacher exploits his/her pupil or student etc.) or exploits his/her credible position (e.g. policeman or priest exploits his/her status).

When the perpetrator makes a child (i.e. any person younger than eighteen years of age) perform sexual intercourse, masturbation, indecent exposure, or other comparable conduct by exploiting his/her reliance or the perpetrator's position and credibility or influence derived from it, this act is considered the criminal offence of sexual duress under § 186 section 2 and 3 letter a) CC; such a perpetrator may be punished by imprisonment from one to five years or by some alternative punishment (e.g. community service or house arrest). It also includes cases when the victim is younger than fifteen years of age, but such a victim is not entrusted to the perpetrator's supervision. However, when the perpetrator has a sexual intercourse with a child younger than fifteen years of age who is entrusted to his/her supervision and he/she exploits the child's reliance or his/her position and credibility or influence derived from it, this act is considered the criminal offence of sexual abuse under § 187 section 1 and 2 CC; such a perpetrator may be punished by imprisonment from two to ten years.

It follows from the above that cases when the perpetrator exploits reliance of a child on him/her or exploits his/her credible position for the purpose of sexual intercourse with a child, his/her criminal liability is strictly different based on the circumstance whether such a child was entrusted to the perpetrator's supervision or not. The punishment could be twice as high for those who commit this crime and are the guardians of the children. Such a fundamental difference may be hardly considered justified.

However, the Czech Criminal Code seems to be more detailed in comparison with the Polish legal regulation with regard to considering the commission of some offences against a child (or child younger than fifteen years of age) into the legal qualification of the offense. The number of offences included in the Polish Criminal Code, where committing a crime against

(any) minor represents the aggravating circumstance causing a stricter assessment of the act, is limited compared to the Czech Criminal Code (forcing a subordinate into sexual intercourse under Art. 199 § 2 and incitement, facilitating or profiting from prostitution under Art. 204 § 3 of the Polish Criminal Code; it is also necessary to add the stricter sanctioning of supplying narcotics, drugs or psychotropic substances to minors according to Art. 58 point 2 and Art. 59 point 2 of the Act on Counteracting Drug Addiction).

This difference between both criminal codes is even bigger concerning the offences where committing a crime against a minor under fifteen years of age is connected with a stricter punishment. While the Czech Criminal Code contains a total of 15 qualified bodies of a crime based on committing a crime against a child younger than fifteen years of age or in relation to such a child (the enumeration mentioned above was of a demonstrative character only), the Polish Criminal Code states stricter sanctions in such cases as rape (Art. 197 § 3 point 2) and also stricter sanctions of exposition to danger of loss of life or danger of sustaining a grievous bodily harm under Art. 160 § 2 and physical or mental maltreatment of an immediate family member or a dependent person under Art. 207 § 1a may be included in this category. Probably the most significant difference in this way may be seen in relation to the criminal offences against life and health. As it has been explained above, the Czech Criminal Code considers the harm on the life or health of a child younger than fifteen years of age as a specific more serious consequence. The Polish Criminal Code (apparently) is based on the idea that all lives should be protected at the same level regardless of the victim's age. It may be judged that both of these approaches have their legitimacy.

XXIX. RAPE, SEXUAL DURESS AND THE CONSIDERATION OF THE STATUS OF DEFENCELESSNESS DEPENDING ON THE AGE OF VICTIM

According to the Czech Criminal Code, the criminal offence of rape may be committed in two ways: either the perpetrator forces the victim into having sexual intercourse by the use of violence, threat of violence or threat of another serious damage, or he/she exploits the victim's defencelessness in connection with this act (§ 185 section 1 CC). The criminal offence of sexual duress also involves the variant when the perpetrator exploits the victim's defencelessness not for sexual intercourse with such a victim, but in order to force the victim to masturbate, to indecently exposure her/himself, or other comparable conduct (§ 186 section 1 CC).

The defencelessness is defined as the state when the victim is not able to put up resistance regarding having sexual intercourse with the perpetrator (see decision No. 43/1994-II. published in the Law Reports and Opinions Collection - Criminal Cases). It may be caused by alcohol or drug intoxication, handcuffing, high fever, deep sleep, mental illness etc. (Ščerba, 2020).

However, the state of defencelessness may also result from the very low age of the victim, when insufficient mental ability

is the cause of the child not being able to recognize and assess the reasons for which he/she should express his/her disagreement with the sexual intercourse. Defencelessness may also exist in situations when the child is significantly limited in the possibility to resist the perpetrator's action effectively because of their low physical and psychological maturity of such a child (e.g. when the perpetrator performs his/her act in some remote place, when he/she uses his/her parental or similar status, etc. – see decision No. 42/2006 published in the Law Reports and Opinions Collection Criminal Cases and Collection of Decisions of the Supreme Court of the Czech Republic 8 Tdo 1228/2015 or 11 Tdo 782/2014.). Therefore, the child cannot be considered defenceless, if he/she is so physically and mentally mature that he/she is able to understand the perpetrator's action and he/she is able to show his/her possible disagreement with this action clearly enough (see decisions No. 43/1994-II. and No. 17/2020 published in the Law Reports and Opinions Collection, Criminal Cases).

It is not possible to determine unequivocally some common age limit, whose reaching would mean that the child is no longer defenceless. As follows from the above, it is always necessary to consider the mental abilities of the particular child victim, his/her physical and psychological maturity, primarily his/her knowledge and awareness about sexuality, as well as other circumstances that may affect recognition of the sexual character of the perpetrator's action and the reasons for its rejection. The child's possibility to express disagreement with sexual intercourse should be taken into consideration as well.

An expert examination is usually necessary for clarification of these questions. However, it may be concluded, that if the sexually motivated perpetrator's action is targeted at a child younger than ten years old, usually, the criteria mentioned above are fulfilled and such a child may be considered as defenceless in the sense of § 185 section 1 CC.

However, one natural problem may occur in some individual borderline cases. The criminal offence of rape is an intentional crime and the perpetrator's intent has to also include the fact that the person he/she has sexual intercourse with is defenceless. When the state of defencelessness has to be clarified usually an expert examination (i.e. it is not obvious for a non-expert how clearly was the individual child victim able to recognise the sexual character of the perpetrator's action and express his/her disagreement), it may be very demanding for the court to decide whether this perpetrator (who is usually not a psychological expert) was able to recognize the victim's state of defencelessness and intentionally exploited it.

In most of such cases, an indirect intent may be proved to the perpetrator, i.e. it is possible to conclude that the perpetrator knew the child was defenceless and he/she was aware of it (see § 15 letter b) CC). Such a conclusion may be made in situations, when the perpetrator knew (approximately at least) about the low age of his/her victim (i.e. that the victim is younger than ten years), because then the perpetrator has no reason to assume the victim's sufficient knowledge and maturity necessary for the assessment of the sexually motivated action and for the possible resistance against it.

However, it is easy to imagine a situation when the

perpetrator considers the child to be older than he/she is in reality or when the child (e.g. twelve years old) is really defenceless because of his/her lower mental maturity, but the perpetrator does not know about it (he/she considers the victim's mental maturity to be corresponding to the victim's age). In such situations, it is not possible to conclude that the perpetrator was (at least) aware of the existence of the victim's state of defencelessness, therefore, an intent to fulfil this element of rape is absent. Sexual intercourse with a child may then be considered the mere criminal offence of sexual abuse under § 187, not as rape.

We may note another interesting difference between the Czech and Polish criminal codes and their means of protection of children of a very young age against sexually motivated attacks performed without using violence or threat. The Czech Criminal Code places these attacks on the same level as the use of violence or threat and considers them as rape or sexual duress (according to the nature of the sexual act perpetrated against the child victim). The Polish Criminal Code considers sexually motivated attacks against minors under fifteen years of age (without using force, unlawful threat or deceit) as the criminal offence of paedophilia under Art. 200 § 1; it also includes these kinds of attacks against children of a very low age.

The difference has its consequences in the sphere of the punishment which may be imposed on the perpetrators of these kinds of attacks. For example, when the perpetrator has sexual intercourse with a child under fifteen years of age (and he/she does not exploit the victim's reliance or his/her position and credibility or influence derived from it), but such a child is not young enough to be considered defenceless, the perpetrator commits (according to the Czech legal regulation) the criminal offence of sexual abuse under § 187 section 1 CC and may be punished with the penalty of imprisonment between 1 to 8 years. If the same act is committed against a child young enough to be considered defenceless, the perpetrator is liable for rape under § 185 section 3 letter a) and may be punished with the penalty of imprisonment between 5 to 12 years.

According to the Polish Criminal Code, both of these situations would be considered as paedophilia under Art. 200 § 1 and the perpetrator may be punished with imprisonment between 2 to 12 years. Thus, it is up to the court to judge the individual circumstances of the case and the age of a specific child victim.

VII. CONCLUSION

The analysis of the legal regulation contained in the Czech Criminal Code and its brief comparison with the Polish one shows that there exist more ways how to reach the same goal, i.e. to provide a higher standard of protection for children against different kinds of illegal actions. Both of these legal regulations correspond to the requirements found in international treaties and European law. It is also one of the reasons, why the criminal codes of both countries support the protection of children, especially against the attacks of a sexual nature.

The Czech legal regulation seems to be more detailed, but also more complicated in some aspects. A higher amount of

criminal offences is considered as more serious (according to the qualified body of a crime) when committed against a child or against a child younger than fifteen years of age. Primarily stricter assessment and sanctioning of the main criminal offences against life and health which are committed on children younger than fifteen years of age represents the wider reach of children's protection provided by Czech criminal law. On the other side, the system of such protection existing in the Czech Criminal Code is not without defects, as it has been pointed out above.

The Czech legal regulation of sexually motivated acts identifies that children younger than fifteen years of age may probably be incomprehensible in some sexual aspects. On the one hand, it seems to be adequate to consider sexual intercourse with a very young child (usually with a child under ten years of age) as rape, i.e. the same way as forcing another person into sexual intercourse by violence or unlawful threat. On the other hand, it may give the confusing impression that when the same act is considered as a rape in one case (when sexual intercourse is had with e.g. a nine-year-old child) and as a sexual abuse in the second case (when sexual intercourse is had with e.g. an eleven-year-old child). A different consideration of the acts carried out on children younger than fifteen years of age, when the perpetrator exploits the child's reliance or his/her position and credibility or influence derived from it (as sexual duress in some cases or as sexual abuse in other cases) seems to be untenable and undesirable.

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XXXI. AUTHOR CONTRIBUTIONS

The whole article is the work of doc. JUDr. Filip Ščerba, Ph.D. and he agrees to be personally accountable for the author's own contributions and for answering questions related to the accuracy or integrity of any part of the work.

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