

## LANZAROT KONVENCIJA I OBAVEZE DRŽAVE SRBIJE

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Komitek eksperata Saveta Evrope započeo je 2005. godine izradu Konvencije o zaštiti dece od seksualnog iskorišćavanja i seksualnog zlostavljanja, a oktobra 2007. u Lanzarotu (Španija) upriličeno je svečano potpisivanje ove konvencije koja predstavlja prvi međunarodni instrument koji se odnosi na sve oblike seksualnog nasilja prema deci. Konvencija je stupila na snagu 1. jula 2010. godine, a Srbija je jedna od 19 zemalja koja je ratifikovanjem Konvencije maja iste godine, postala zemlja ugovornica i time preuzela veoma jasne obaveze u njenoj primeni i sveobuhvatnoj zaštiti dece od svih oblika seksualne eksploatacije dece.

Prema slovu Konvencije, seksualnom eksploatacijom i seksualnim iskorišćavanjem se smatraju sledeća krivična dela: 1) seksualno zlostavljanje, odnosno stupanje u seksualne odnose sa detetom koje nije navršilo pravni uzrast u kome su seksualne aktivnosti dopuštene (kod nas 14 godina), i to primenom sile i prinude, zloupotrebom poverenja ili autoriteta u odnosu na dete, korišćenjem posebne ranjivosti deteta (fizička ili psihička ometenost deteta) 2) krivična dela u vezi sa dečjom prostitucijom, i to: angažovanje ili primoravanje deteta na prostituciju ili korišćenje usluga dečje prostitucije; 3) krivična dela u vezi sa dečjom pornografijom, i to: proizvodnja, nuđenje distribuiranje ili prenos, ako i posedovanje dečje pornografije; 4) učešće deteta u pornografskim predstavama, ili prisustvovanje pornografskim predstavama sa decom; 5) primoravanje deteta da učestvuje kao svedok seksualnog zlostavljanja; 6) nagovaranje dece na neke od ovih usluga primenom informacionih tehnologija (grooming).

Polazeći od toga da svi oblici seksualnog zlostavljanja dece predstavljaju bolno i traumatično iskustvo sa posledicama destruktivnim po zdravlje i psihosocijalni razvoj i da žrtva, po pravilu, pati u tišini, Konvencija svoju sveobuhvatnost zasniva na sledeća četiri stuba :

- preventivnoj zaštiti od nasilja (prevention)
- zaštiti deteta žrtve (protection)
- krivičnom gonjenju počinioca (prosecution)
- učešću dece (participation)

A na šta to Lanzarot konvencija obavezuje?

1. Da počemo od onoga što najmanje košta, ali zahteva dobru organizaciju i nadasve, odgovorno ponašanje nadležnih, a to je PREVENCIJA. Konvencija konkretno zahteva sledeće: da profesionalci u svim sektorima koji rade sa decom – u obrazovanju, zdravstvu, socijalnoj zaštiti, pravosuđu, policiji, ali i u sportskim klubovima, institucijama kulture i zabave i sl. imaju odgovarajuća znanja o seksualnom iskorišćavanju i zlostavljanju dece, a posebno da nisu nikada bili osuđeni za ovu vrstu krivičnih dela počinjenih prema deci. Nadalje, prevencija podrazumeva i potrebu informisanja dece i u osnovnim i u srednjim školama o opasnostima od seksualnog iskorišćavanja dece, sredstvima i načinima zaštite.



## THE LANZAROTE CONVENTION AND THE OBLIGATIONS OF THE STATE OF SERBIA

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The Council of Europe Expert Committee began drafting The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse in 2005, and The Convention, which is the first international instrument concerning all forms of sexual violence against children, was opened for signature in Lanzarote (Spain), in October 2007. The Convention came into force on 1st July 2010, and Serbia is one of the 19 countries that, having ratified the Convention in May that year, became a signatory country and thus undertook very clear obligations in its implementation and comprehensive protection of children from all forms of sexual exploitation of children.

According to the provisions of Convention, the following criminal acts are defined as sexual exploitation and sexual abuse: 1) sexual abuse, engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities (14 years of age according to our national legislature), where use is made of coercion, force or threats, or abuse is made of a recognized position of trust or authority, or abuse is made of a particularly vulnerable situation of the child (because of a mental or physical disability); 2) criminal offences concerning child prostitution, such as: recruiting a child into prostitution or coercing a child into prostitution, or having recourse to child prostitution; 3) criminal offences concerning child pornography, such as: producing, offering, distributing or transmitting, as well as possessing child pornography; 4) recruiting a child into participating in pornographic performances or attending pornographic performances with children; 5) coercing a child into witnessing sexual abuse; 6) inducing of children for some of these sexual services through information technologies (grooming).

Observing that the sexual exploitation of children, in particular child pornography and prostitution, and all forms of sexual abuse of children are destructive to children's health and psycho-social development and that the victim, as a rule, suffers in silence, the Convention bases its comprehensiveness on the following four pillars :

- preventive measures against violence
- protection of the child victim
- prosecution of the perpetrator
- participation of children

What does the Lanzarote Convention bind us to do?

1. To start from what is the least costly, but at the same time requires good organization and, above all, responsible behavior of the authorities, namely, PREVENTION. The Convention concretely requires the following: that professionals in all the spheres that involve working with children – in education, healthcare, social protection, the judiciary, police, but also in sport clubs, institutions of culture and entertainment and the like, be knowledgeably informed about sexual exploitation and abuse of children, and above all, that

Predviđaju se i obaveze koje država treba da usmeri prema najširoj javnosti u cilju prevencije pojave seksualnog iskorišćavanja dece, potom prema privatnom sektoru u oblasti turizma, putovanja, bankarskog i finansijskog sektora, a uspešnost prevencije garantuje se saradnjom između državnog, civilnog i privatnog sektora.

2. Da bi ZAŠTITA deteta žrtve bila delotvorna, država je obavezna da uspostavi iste takve (delotvorne) socijalne programe podrške deci i njihovim bliskim rođacima, kratkoročne i dugoročne, u cilju njihovog fizičkog i psihosocijalnog oporavka. Ovo obuhvata i uspostavljanje SOS linija za savetodavnu pomoć žrtvama. Posebno je značajno da je takva podrška obavezna i onda kada nije poznata starost žrtve, a ima razloga da se veruje da je žrtva dete, dakle osoba mlađa od 18 godina.

Konvencija „oslobađa“ od čuvanja poverljivosti informacija neke profesije, na primer lekare, da kada dođu u kontakt sa žrtvom seksualnog zlostavljanja, da tu informaciju podele sa drugim nadležnim organima zaduženim za zaštitu dece žrtava (službe socijalne zaštite).

3. Konvencija predviđa da KRIVIČNO GONJENJE POČINIoca treba da se nastavi čak i ako je žrtva povukla svoje izjave, a predviđena je još jedna mera obezbeđenja da počinioc ne ostane nekažnjen. To je obaveza države da svojim propisom uredi da rok zastarevanja krivičnog gonjenja (rok za otpočinjanje krivičnog postupka) počne da teče od punoletstva žrtve, kako bi se detetu žrtvi dala mogućnost da, kada stekne zrelost i samostalnost, bez straha od odmazde i ucene privede pravdi počinioca, što je posebno važno u situacijama kada je taj počinioc bio u odnosu autoriteta i moći prema detetu žrtvi.

U sklopu ovih mera je i obaveza države da beleži i arhivira podatke lica (identitet i genetski profil, DNK) koja su osuđena za sva krivična dela ustanovljena ovom konvencijom, te da utvrdi organ koji će voditi ovakvu bazu podataka i o tome, u trenutku deponovanja ratifikacionog instrumenta obavestiti Generalnog sekretara Saveta Evrope. Kod nas je organ zadužen za vođenje baze podataka počinioca krivičnih dela seksualnog zlostavljanja prema deci, Ministarstvo unutrašnjih poslova.

Takođe, mere prema počiniocima mogu da obuhvate sledeće: stavljanje pod sudski nadzor; ukidanje prava na javne povlastice i pomoć; uskraćivanje mogućnosti obavljanja profesionalne ili volonterske aktivnosti sa decom; lišavanje roditeljskih prava; zaplenu ili konfiskaciju imovine stečene vršenjem ovih krivičnih dela. Konvencija sugerše državama stvaranje namenskog Fonda od tako prikupljenih sredstava, iz kojeg bi se finansirali programi prevencije i pomoći žrtvama.

4. Konvencija zahteva od država da u svim fazama istražnog i krivičnog postupka zaštiti prava i interese žrtava, tako što će im dati sve potrebne informacije o njihovim pravima, službama koje im stoje na raspolaganju, zaštititi privatnost žrtve, sigurnost žrtve i onemogućiti kontakt žrtve i počinioca. UČEŠĆE DECE obezbediće se tako da se razgovori sa detetom žrtvom vode: bez neopravdanog odlaganja; u prilagođenim prostorijama (child friendly); da razgovor obavljaju, po mogućstvu, uvek isti edukovani profesionalci, da broj razgovora bude ograničen na najmanju moguću meru; da se obezbedi snimanje i video zapis koristi u sudskom postupku; kao i da dete bude u pratnji svog pravnog zastupnika ili odraslog lica koje samo izabere, osim

they have no record of previous offences concerning this type of criminal acts against children. Furthermore, prevention comprises the need to inform children in primary and secondary schools about the dangers of sexual exploitation of children, and about the means and ways of protection.

The obligations that the state ought to impose to the broadest public with the aim of preventing sexual exploitation of children, and also to the private sector in the sphere of tourism, travel, the banking and financial sector, ensuring success of prevention through the cooperation between the state, civil and private sector are also envisaged.

2. In order to achieve efficient PROTECTION of the child victim, the state shall establish corresponding (efficient) short-term and long-term social programs of support to children and their close relatives, aiming at their physical and psycho-social recovery. This also refers to the opening of helplines for counseling victims. It is of utter importance that such support be mandatory also in cases when the age of the victim is unknown, and there is reason to believe that the victim is a child, i.e. a person under 18 years of age.

The Convention provides that the confidentiality rules imposed on certain professionals do not constitute an obstacle to the possibility of their reporting to the services responsible for child protection (social protection services), doctors, for example, when they suspect that a child is the victim of sexual abuse.

3. According to the Convention, the PROSECUTION of the perpetrator is to be continued even if the victim has retracted her/his statement, in addition to another protective measure ensuring that the perpetrator does not get away with impunity. That is the obligation of the state to take the necessary legislative measures to ensure that the statute of limitation (for initiating proceedings) shall continue for a period of time sufficient to allow the starting of proceedings after the victim has reached the age of majority, and acquired maturity and independence to bring the perpetrator to justice, without fear of retribution, which is of particular importance when the perpetrator is in a position of authority and power toward the victimized child.

Part of these measures is the obligation of the state to record and store data on individuals (identity and genetic profile, DNA) who have been sanctioned for any of the offences referred to in this Convention, and to assign a single national authority which will be in charge of this database and inform the Secretary General of the Council of Europe about it, when depositing its instrument of ratification. In our country, the authority in charge of storing the database on perpetrators of criminal acts pertaining to the sphere of child sexual abuse is the Ministry of Internal Affairs.

Also, the measures imposed to the perpetrators can involve the following: placing under judicial supervision; exclusion from entitlement to public benefits or aid; denying the perpetrator the exercise of the professional or voluntary activity involving contact with children; deprivation of parental rights; the seizure or confiscation of the property acquired by committing criminal offences. The Convention suggests that the proceeds of crime or property confiscated can be allocated to a special fund in order to finance prevention and assistance programs for victims.

4. The Convention requires that the state protect the rights and interests of the victims in all the phases of the investigation and criminal proceedings, by providing all the necessary information regarding their rights, available services, protection of the victim's privacy and security of the victim and by preventing contact between the victim and the perpetrator. THE

ako to nije u najboljem interesu deteta.

5. Konvencija uvodi i mehanizam nadzora nad primenom ove konvencije, čime ovaj međunarodni ugovor dobija na snazi. Komitet će doprinosti razmeni informacija, iskustava i primera najboljih praksi između država.

Radi uvida u to šta nam Lanzarot konvencija donosi, važno je ukratko reći kako postojeći Krivični zakonik tretira seksualne delikte nad decom, gde su teškoće u sprovođenju zakona, odnosno šta treba da bude predmet unapređenja.

Seksualno zlostavljanje dece u najvećem je delu krivičnopravno definisano posebnom glavom Krivičnog zakonika "Krivična dela protiv polne slobode", sa 9 članova (silovanje; obljuba nad nemoćnim licem; obljuba sa detetom; obljuba zloupotrebom položaja; nedozvoljene polne radnje; podvođenje i omogućavanje vršenja polnog odnosa; posredovanje u vršenju prostitucije; prikazivanje, pribavljanje i posedovanje pornografskog materijala i iskorišćavanje maloletnog lica za pornografiju i navođenje maloletnog lica da prisustvuje polnim radnjama). Dva člana (rodo-skrvne i vanbračna zajednica sa maloletnikom) čine deo druge celine - poglavlja KZ pod nazivom "Krivična dela protiv braka i porodice". Kod većine krivičnih dela, činjenica da je žrtva dete (osoba mlađa od 18 godina) delu daje teži karakter (uzrast žrtve je kvalifikatorna okolnost). Zakon, međutim, pravi razliku da li je žrtva dete mlađe od 14 godina (kada je to dodatna kvalifikatorna okolnost i zaprećena kazna mnogo teža) ili starije od 14 godina (kada je kazna strožija nego za isto delo učinjeno prema odrasloj osobi, a blaža nego u slučaju kada je delo učinjeno prema detetu mlađem od 14 godina).

Ono što je manjkavost postojećih rešenja je što je u nekim delima zaprećena kazna nedopustivo niska (za nedozvoljene polne radnje moguće je izreći čak i novčanu kaznu ili uslovnu osudu), zakon predviđa mogućnost ublažavanja kazne ispod zakonskog minimuma; primenom ovog instituta, moguće je izreći uslovnu osudu seksualnim zlostavljačima dece kod većeg broja krivičnih dela. Blaga kaznena politika ima još jedan aspekt: dužinu roka zastarelosti krivičnog gonjenja određuje zaprećena kazna. Tako u nekim slučajevima, krivično gonjenje zastareva za 2 godine ukoliko u tom periodu nije započeo krivični postupak (relativna zastarelost), a najviše za 4 godine (apsolutna zastarelost) od dana izvršenja dela.

Druga primedba tiče se različitog odnosa krivičnog zakonodavstva prema zlostavljačima, zavisno od uzrasta deteta žrtve. Polazeći od činjenice da je dete osoba mlađa od 18 godina i da ranjivost deteta postoji na svim uzrastima, dokle god traje period odrastanja, ovakva razlika u zakonodavstvu neopravdana je i štetna. Nепрепознавање карактеристика различитих периода детинства и одрастанја детета од стране законодавца довело је до тога да закон искључи одговорност за кривично дело "обљуба са дететом", уколико је извршено према детету старијем од 14 година или да инцест санкционише са минималном казном затвора од 6 месеци.

Nепрепознавање суштине ових кривичних дела резултирало је и тиме да се она кривичнopravno различито третирају; већина њих је део главе Кривичног законика под називом "Кривична дела против полне слободe"; међутим, родоскрвњење (инцест) уопште се и не препознаје као сексуално злостављање детета, већ као кривично дело против породице. Исто се односи и на кривично дело

PARTICIPATION OF CHILDREN will be ensured so that the interviews with the child take place without unjustified delay, in child friendly premises; that the interviews with the child are carried out, if possible, by the same professionals trained for this purpose, that the number of interviews is as limited as possible; that all interviews with the victim may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings; the child may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless it is against the child's best interest.

5. The Convention also provides for a mechanism of supervision over its implementation, which further enforces this international document. The Committee will facilitate the exchange of information, experiences and examples of best practices among the signatory countries.

In order to obtain a better insight into the provisions of the Lanzarote Convention, it is important to briefly consider the way the existing Serbian Criminal Code treats criminal acts against children, where the difficulties in implementing the laws lie, i.e. in what segments should be improved.

Sexual abuse of children is in the most part defined in a separate criminal and legal chapter of the Criminal Code, "Crimes against sexual freedom", with 9 articles (rape, sexual intercourse with a helpless person, sexual intercourse with a child, sexual intercourse by abuse of position, illegal sexual acts, pandering and enabling sexual intercourse; mediation in prostitution; display, acquisition and possession of pornographic material and engaging a minor in pornography, and the incitement of a minor to attend sexual acts). Two articles (incest and illegitimate marriage with a minor) form part of another unit - the chapter titled "Criminal offenses against marriage and family." For most offenses, the fact that the victim is a child (person under 18 years) constitutes an aggravating circumstance (the age of the victim being a qualifying circumstance). The law, however, makes a difference whether the victim is a child under 14 years (when it is an additional qualifying circumstance incurring severe sentence) or over 14 years (when the sentence is more severe than for the same offense committed against an adult, and milder than when the offense is committed against a child younger than 14 years).

The disadvantage of the existing solutions is that in some parts the prescribed penalty is inadmissibly low (illicit sexual acts can even be sanctioned by monetary criminal fines or probation), the Convention also provides for the possibility of mitigation of penalties below the legal minimum; by applying this institute, it is possible to pronounce a probation to perpetrators of repetitive child sexual abuse. The lenient penal policy has yet another aspect: the length of the statute of limitation is defined by the provided penalty. Thus in some cases, the statute of limitation expires after two years if the criminal proceedings have begun within that period (relative obsolescence), and after a maximum of four years (absolute obsolescence) after the date when the criminal act was committed.

The other objection concerns the different treatment of the offenders by the penal legislation, depending on the age of the child victim. Bearing in mind that 'child' means any person under the age of 18, whereas vulnerability of children is present in all stages of their development, such differences in legislature are unjustified and detrimental. The absence of distinction between the characteristics of different periods of childhood and growing up by the lawmakers has led to the exclusion of liability for the criminal act of "sexual intercourse with a child", if it was committed with a child over 14 years of age or to the sanctioning of incest with less than a six-month prison term.

vanbračne zajednice sa maloletnim licem.

Ono što je neophodno izmeniti jeste pre svega percepcija ovih dela: reč je o seksualnom zlostavljanju dece, gde ne postoji opravdanje za različit stepen zaštite dece različitih uzrasta, niti razloga da se menja zaštitni objekt (porodica, umesto deteta) i gde je neophodno obezbediti stvarne i procesne mogućnosti da se pokrene postupak zaštite deteta onda kada ono bude spremno da se sa tim suoči, a zaprećene i pre svega izrečene sankcije budu u cilju generalne i specijalne prevencije.

Prošlo je više od dve godine od kada je Srbija ratifikovala Konvenciju, a 1. jula i dve godine da je stupila na snagu, a Srbija još nije delotvorno sprovedla obaveze koje je prihvatila pristupanjem Konvenciji. Prvi koraci su učinjeni aprila ove godine kada je Vlada usvojila Predlog zakona o posebnim merama za sprečavanje vršenja krivičnih dela protiv polne slobode prema maloletnim licima i uputila ga Narodnoj skupštini. Ovaj Predlog predstavlja pokušaj zakonskog uređivanja i razrade jednog aspekta Lanzarot konvencije, tj. člana 37. Konvencije o beleženju i arhiviranju podataka o licima osuđenim za seksualne delikte, odnosno uspostavljanje baze podataka počinitelaca seksualnih delikata prema deci i druge mere zaštite kako bi se maksimalno moguće preveniralo ponavljanje ovih krivičnih dela.

Iako je ovo iznuđeno postupanje Vlade, nakon što se desilo nekoliko svirepih silovanja sasvim male dece, od kojih je jedno imalo i tragičan epilog i nakon intenzivnog medijskog pritiska, kao i pritiska porodica dece žrtava, trebalo bi podržati njegovo donošenje. Ovo zbog toga što Predlog zakona ima potencijal da uspostavljanjem mehanizama evidencije i merama kontrole bivših počinitelaca seksualnih delikata prema deci, kao i snagom generalne prevencije doprinese smanjenju broja seksualnih delikata prema deci u budućnosti.

Ukoliko se Predlog zakona o posebnim merama za sprečavanje vršenja krivičnih dela protiv polne slobode prema maloletnim licima usvoji u bliskoj budućnosti, to neće značiti i završetak posla u implementaciji Lanzarot konvencije. Ono što ostaje kao zadatak državnih organa to je dosledna primena Konvencije u svim njenim elementima. Pre svega, to su sve one preventivne mere kojima se postiže bolja osposobljenost i edukacija profesionalaca koji rade sa decom u svim oblastima da prepoznaju dete žrtvu, mere socijalnopsihološke zaštite deteta žrtve i mere podrške deteta žrtve u istražnom i sudskom postupku. Zaštita dece od seksualne eksploatacije jeste primarno zadatak države i njenih organa, ali to ne isključuje značajnu ulogu organizacija civilnog društva, koje su svoju profesionalnost dokazale, ali i privatnog sektora koji svoju ulogu treba da definiše saglasno načelima i ciljevima Lanzarot konvencije. Zbog toga je povezivanje državnog, civilnog i privatnog sektora u partnerstvo, u kojem će se sinhronizovati aktivnosti ovih aktera u dobroj veri i u cilju ostvarivanja najboljih interesa dece, a posebno dece potencijalnih ili stvarnih žrtava seksualnih delikata, od presudnog značaja za postizanje napretka u ovoj oblasti.

Failing to recognize the essence of these criminal offences has also resulted in their different treatment by criminal justice; most of them are treated in the chapter of the Penal Code entitled "Criminal offences against sexual freedom"; however, incest is not defined as child sexual abuse, but as criminal act against the family. The same applies to the criminal act of illegitimate marriage with a minor.

What should be the subject of necessary changes is the perception of these acts: they comprise child sexual abuse, and there is, therefore, no justification for different degrees of protection of children of different age, nor does it constitute a reason to change the object of protection (the family, instead of the child), where it is necessary to provide real and procedural conditions to launch child protection proceedings when she/he is prepared to face this situation, while provided and above all pronounced sanctions should serve the purpose of general and special prevention.

It has been more than two years since Serbia ratified the Convention, and on 1st July it will have been two years since it came into force, but Serbia has not yet efficiently implemented the obligations undertaken by the signing of this Convention. The first steps were made in April this year, when the Government adopted The draft law on special measures for the prevention of crimes against sexual freedom of minors and submitted it to the National Assembly. This Draft constitutes an attempt to legally define and develop one aspect of the Lanzarote, i.e. article 37 of the Convention on Recording and storing of national data on convicted sexual offenders. It refers to establishing a database of the perpetrators of sexual offences against children and other protective measures, so as to prevent the repetition of these criminal acts as much as possible.

Although this Government action was undertaken under pressure, following several cases of cruel rape of very young children, one of which ended tragically, and upon intensive media pressure and insistence of the victims' families, the adoption of this Law ought to be supported. This is because the Draft law has the potential to contribute to the curbing of the incidence of sexual offences against children in the future, by enforcing mechanisms for the keeping of records and measures of control of former perpetrators of sexual offences against children, as well as by means of general prevention.

If the Draft law on special measures for the prevention of crimes against sexual freedom against minors is adopted in the foreseeable future, it will not mark the end of activities concerning the implementation of the Lanzarote Convention. What remains to be done as a task for the state authorities to accomplish is the principled implementation of the Convention in all its aspects. Above all, this applies to all those preventive measures meant to ensure better competence and education of professionals working with children in all spheres, to recognize a child victim, and to apply measures of social and psychological protection of the child in the course of investigation and court proceedings. The protection of children from sexual exploitation is primarily the obligation of the state and its organs; however, this does not exclude the important role of civic society organizations, who have displayed a high level of professional competence, and also of the private sector, which should define its role in accordance with the principles of the Lanzarote Convention. That is why the association of the state, civic and private sector into partnership, where the activities of these actors will be synchronized in good faith and with the aim to work in the best interest of the children, and particularly of the potential or real child victims of sexual crimes, is crucial for making progress in this sphere.