Kirstin Drenkhahn
Bernd Geng
Joanna Grzywa-Holten
Stefan Harrendorf
Christine Morgenstern
Ineke Pruin
(Hrsg.)

Kriminologie und Kriminalpolitik im Dienste der Menschenwürde

Festschrift für Frieder Dünkel zum 70. Geburtstag

Forum Verlag Godesberg

Kirstin Drenkhahn, Bernd Geng, Joanna Grzywa-Holten,
Stefan Harrendorf, Christine Morgenstern, Ineke Pruin (Hrsg.)

Kriminologie und Kriminalpolitik im Dienste der Menschenwürde –
Festschrift für Frieder Dünkel zum 70. Geburtstag

Kriminologie und Kriminalpolitik im Dienste der Menschenwürde

Festschrift für Frieder Dünkel zum 70. Geburtstag

Herausgegeben von

Kirstin Drenkhahn, Bernd Geng, Joanna Grzywa-Holten,
Stefan Harrendorf, Christine Morgenstern, Ineke Pruin

Forum Verlag Godesberg GmbH
Mönchengladbach 2020

Bibliographische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über **https://portal.dnb.de** abrufbar.

© 2020 Forum Verlag Godesberg GmbH, Mönchengladbach
Gesamtherstellung: Books on Demand GmbH, Norderstedt
Porträtfoto: Vincent Leifer, Greifswald
Printed in Germany

ISBN: 978-3-96410014-6

Vorwort

Lieber Frieder, liebe Leserin, lieber Leser!

Vor Dir, vor Ihnen und Euch liegt die Festschrift aus Anlass von *Frieder Dünkels* 70. Geburtstag. Versammelt sind fünfundfünfzig Beiträge von Kolleginnen und Kollegen, Schülerinnen und Schülern, Mitstreiterinnen und Mitstreitern, Freundinnen und Freunden – viele Autorinnen und Autoren sind dabei mehreren dieser Kategorien zuzuordnen. Zusammengekommen sind Beiträge aus 21 Ländern aus den Bereichen, in denen *Frieder Dünkel* forschend und lehrend aktiv war und ist – Kriminologie, Kriminalpolitik, strafrechtliche Sanktionen, Jugendstrafrecht, Straf- und Maßregelvollzug. Es finden sich Rückblicke und Überblicke, Fallstudien und Detailaufnahmen, Dauerbrenner und aktuelle Probleme, Theorie und Empirie, Landesspezifisches, Europäisches und Internationales. Enthalten sind außerdem herzliche, oft dankbare Worte der Anerkennung und Freundschaft für Frieder.

Damit ist schon viel abgebildet von dem, was wir als Herausgeberinnen und Herausgeber mit dieser Festschrift ausdrücken möchten: In *Frieder Dünkels* Wirken als Forscher findet sich der weite Blick auf die kriminalwissenschaftlichen Probleme der Zeit; er geht ohne Scheu vor Grenzen, anderen Sprachen und Kulturen an seine Projekte. Alle, die mit ihm arbeiten, schätzen seine großartige Bereitschaft zu teilen: Die Möglichkeiten des akademischen Zugangs zur Materie, aber auch praktisch zu Forschungsmöglichkeiten in Gestalt von Forschungsaufenthalten, Projektgeldern oder Tagungen; später die Erkenntnisse aus Forschungsprojekten und die Publikationen. Immer hat er auch Studierende teilhaben lassen: In seinen Vorlesungen erfuhren sie unmittelbar von laufenden Forschungsprozessen und Ergebnissen; Exkursionen und Forschungspraktika boten erste praktische Einblicke – und die Hiddensee-Seminare sind legendär. Von seiner Gastfreundschaft – zuerst in Freiburg, später in Greifswald – können viele, die sich an der Festschrift beteiligt haben, berichten. Dies hat *Dirk van Zyl Smit* in seiner Rede zu *Frieder Dünkels* 60. Geburtstag treffend ausgedrückt:

„What is special about *Frieder's* approach is that concern for accuracy and justice is combined with an overarching humanism that transcends barriers of nationality and culture. That is far too abstract. Put another way, *Frieder* has

an exceptional ability to engage with people from a very wide range of cultures. He does not patronise them but genuinely cares about them as fellow human beings. If they are fine intellects that will contribute to our discipline, great; if they are not, he will still be interested in them as individuals. He invites them into his home and his life."

Greifswald mag manchen klein und abgelegen erscheinen; Spuren von *Frieder Dünkels* Greifswalder Kriminologie lassen sich jedoch in ganz Europa – und, wie die lateinamerikanischen Beiträge zeigen, darüber hinaus! – verfolgen. In der Festschrift ist gut erkennbar, welche von seinen Projekten besonderen Nachhall gefunden haben. Zu nennen sind vor allem seine Arbeiten zur Jugendstrafrechtsreform in Deutschland und anderen Ländern; zu Fragen der Behandlung von Straffälligen und Öffnung des Strafvollzugs; zu Fragen eines gerechten Sanktionensystems; zur vergleichenden Analyse der Kriminalpolitik über Ländergrenzen hinweg und schließlich zur Frage der Achtung der Menschenrechte im Kriminaljustizsystem. Die „Greifswalder Schule" ist daher als dezidierte Ausprägung einer ganzheitlichen, interdisziplinären Kriminalrechtswissenschaft zu verstehen, die *Frieder Dünkel* – und uns – am Herzen liegt. Profitiert haben wir schließlich alle von seiner Freude an der Arbeit und am akademischen „Miteinander-Tun" und der Fähigkeit, diese uns und anderen zu vermitteln.

Frieder Dünkel wurde am 10. Mai 1950 in Karlsruhe geboren. Nach der Grundschule besuchte er das Markgrafen-Gymnasium in Karlsruhe-Durlach und begann direkt nach dem Abitur 1969 mit dem Studium der Rechtswissenschaften in Heidelberg, das er 1971 in Freiburg i. Br. fortsetzte. Nebenbei studierte er drei Semester Psychologie an den Universitäten Heidelberg und Freiburg, wo er das erste juristische Staatsexamen 1974 ablegte. 1975 heiratete er *Gertraude*, die er schon in der Schulzeit 1968 kennengelernt hatte. 1979, 1980 und 1986 wurden die Kinder *Vera*, *Roland* und *Nora* geboren, inzwischen bereichern sieben Enkelinnen und Enkel das Familienleben.

Seit 1971 arbeitete er ehrenamtlich in der Freiburger „Anlaufstelle für Strafentlassene" und „lebte", was er sehr viel später in den Forschungen zur Desistance wissenschaftlich zu begreifen lernte: Eine Wohngemeinschaft mit Strafentlassenen und zahlreiche geteilte Freizeitaktivitäten wurden für einige Entlassene zum „turning point" im Ausstiegsprozess der Kriminalität. Diese Erfahrungen bilden den persönlichen Hintergrund seines wissenschaftlichen Interesses am Strafvollzug, das sein Leben stark prägte. Das Referendariat absolvierte er in Freiburg und Umgebung (1974-1976), nebenbei war er als wissenschaftliche Hilfskraft beim damaligen Direktor des Max-Planck-Instituts

für ausländisches und internationales Strafrecht, *Günther Kaiser*, tätig. Nach Abschluss des zweiten juristischen Staatsexamens ergab sich die Gelegenheit zur Promotion bei *Günther Kaiser*, die *Frieder Dünkel* Ende 1979 abschloss. Seit 1979 bis 1992 war er wissenschaftlicher Referent am Max-Planck-Institut, Forschungsgruppe Kriminologie, und führte verschiedene Projekte zum Strafvollzug, zu strafrechtlichen Sanktionen und zum Jugendstrafrecht und -vollzug durch (vgl. Schriftenverzeichnis Bücher Nr. 2-6). Das Projekt zum „Freiheitsentzug für junge Rechtsbrecher" im nationalen und internationalen Vergleich (vgl. Bücher Nr. 8) führte zur Habilitation im Jahr 1989.

1990/91 vertrat *Frieder Dünkel* den Lehrstuhl für Kriminologie von *Hans-Joachim Schneider* in Münster und erhielt sodann einen Ruf nach Greifswald, dem er mit Begeisterung und Pioniergeist gerne folgte. Seit Mai 1992 war er bis zu seiner Emeritierung im Jahr 2015 Inhaber des Lehrstuhls für Kriminologie, den er an der nach der Wende wiedereröffneten Rechts- und Staatswissenschaftlichen Fakultät der Universität Greifswald mit viel Leidenschaft und Tatkraft aufbaute.

Frieder Dünkel war und ist sehr engagiert in der Lehre. In seiner aktiven Zeit am Lehrstuhl für Kriminologie in Greifswald hielt er vor allem die klassischen Wahlfachvorlesungen bzw. seit 2006 die Vorlesungen im Schwerpunkt „Kriminologie und Strafrechtspflege", bot aber auch strafrechtliche Lehrveranstaltungen an. Aus der Zeit der Lehrstuhlvertretung in Münster führte er das Prinzip ein, die Vorlesung „Kriminologie I" zugleich als Grundlagenvorlesung zu den „gesellschaftlichen und politischen Grundlagen des Rechts" anzubieten und dabei Kriminologie und Rechtssoziologie zu verschränken. Dass der Schwerpunkt zu den beliebtesten und nachgefragtesten gehörte, lag sicherlich auch daran, dass Studierende bereits im ersten Semester mit der Kriminologie konfrontiert und dafür interessiert werden konnten. Zugleich wurde die Grundlagenvorlesung von Nebenfachstudierenden der Psychologie, Kommunikationswissenschaften und anderer Studienfächer besucht und nicht wenige Studierende der Psychologie konnten später als studentische Mitarbeiterinnen und Mitarbeiter für die empirischen Forschungsprojekte gewonnen werden.

Die logische Konsequenz eines fakultätsübergreifenden Lehrkonzepts war die Eröffnung des Masterstudiengangs „Kriminologie und Strafrechtspflege", den er 2006 aufbaute und bis zu seiner Emeritierung und dem Auslaufen des Programms betreute. Einige der Masterabsolventinnen und -absolventen – vor allem auch aus dem Ausland – haben das erfolgreich abgeschlossene Masterstudium als „Sprungbrett" für eine nachfolgende Promotion an der Rechts- und Staatswissenschaftlichen Fakultät in Greifswald genutzt.

Frieder Dünkel hat aber auch im Ausland regelmäßig Lehrveranstaltungen abgehalten bzw. war zu Gastprofessuren eingeladen. 1994-2010 organisierte er im Rahmen verschiedener Tempus-Projekte der Europäischen Union an den sibirischen Universitäten Krasnojarsk, Tomsk, Irkutsk etc. Vorlesungen und Sommerschulen. 2006-2015 war er Gastprofessor an der Université de Pau et des Pays de l'Adour (Pau und Bayonne), im Rahmen des Erasmusaustauschprogramms hielt er Vorlesungen in Nottingham, Aix-en-Provence und Catania. Nach seiner Emeritierung hat er Gastprofessuren an der Sigmund-Freud-Universität Wien, der Universität Luzern und in Fukuoka bzw. Kyoto, jeweils Japan, wahrgenommen.

Er war und ist regelmäßiger Teilnehmer an Kongressen, u. a. der European sowie der American Society of Criminology (ESC, ASC), der International Society of Criminology und der World Society of Victimology. Die ESC-Tagungen hat er seit 2001 alle besucht und jeweils Workshops organisiert.

Der Praxisbezug in der Lehre kommt ferner durch die Organisation von Fortbildungsveranstaltungen und die Arbeit in dem von *Frieder Dünkel* 1992 mit gegründeten „Landesverband Straffälligenhilfe Mecklenburg-Vorpommern e. V." und der 1993 gegründeten Regionalgruppe Mecklenburg-Vorpommern der Deutschen Vereinigung für Jugendgerichte und Jugendgerichtshilfen (DVJJ), deren Vorsitzender er seither war und ist, zum Ausdruck.

Frieder Dünkel war von Anfang an auch mit Aufgaben in der Universitätsselbstverwaltung gefordert. 1995/96 war er Prodekan, 1996/97 Dekan der Rechts- und Staatswissenschaftlichen Fakultät; zudem war er Mitglied des Fakultätsrats, des Senats und des Konzils. 1994-2015 nahm er die Funktion des Auslandsbeauftragten und Koordinators für Erasmus-/Sokrates-Projekte wahr und schließlich wurde er für den Zeitraum Oktober 2010 bis März 2013 zum Prorektor der Universität (Aufgabenbereiche Internationales und Forschung) gewählt.

Wenden wir uns nun den vielfältigen internationalen Vernetzungen und Kooperationen von *Frieder Dünkel* näher zu. Seit seiner Zeit am Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg hat er zahlreiche Kontakte genutzt, um internationale Netzwerke zu knüpfen. So kam es 1989 zu einer ersten strafvollzugsorientierten Tagung („Imprisonment Today and Tomorrow – International Perspectives on Prisoners' Rights and Prison Conditions") in Buchenbach bei Freiburg i. Br. mit Experten aus mehr als zwanzig Ländern. Die Publikation (*van Zyl Smit/Dünkel* 1991, 2. Aufl.

2001) und mehrere Sammelbände von Nachfolgetagungen des Forschungsnetzwerks (vgl. Schriftenverzeichnis Bücher Nr. 13, 19, 26, 31, 33 und jüngst 47) belegen die Nachhaltigkeit dieser Kooperationen, die nicht zuletzt auch auf intensiver freundschaftlicher Verbundenheit basierten und basieren.

Das Gleiche gilt für das Netzwerk zu europäischen Jugendstrafrechtssystemen, das ebenfalls aus Kontakten am MPI in den 1980er Jahren entstand (vgl. Schriftenverzeichnis Bücher Nr. 7 und 12). Dabei auch Ost und West zusammenzubringen, wurde in Greifswald schon aufgrund seiner geopolitischen Lage und der Nachwendezeit nahegelegt. Erste Tagungen wurden 1993 und 1995 von ihm in Greifswald organisiert. Der Publikation von 1997 (Bücher Nr. 15) folgte 2003 geradezu paradigmatisch ein Sammelband „Youth Violence: New Patterns and Local Responses – Experiences in East and West" (*Dünkel/Drenkhahn* 2003, Bücher Nr. 23). Das Netzwerk zum Jugendstrafrecht erlebte mit dem vierbändigen Werk „Juvenile Justice Systems in Europe" (*Dünkel/Grzywa/Horsfield/Pruin*, 2010, 2. Aufl. 2011, Bücher Nr. 32) einen gewissen Höhepunkt. Auch hier gab es aber bis in die jüngste Zeit Nachfolgeprojekte, etwa zu den Themen „Restorative Justice" (*Dünkel u. a.* 2015, Bücher Nr. 38, 41) oder „Elektronische Überwachung von Straffälligen im europäischen Vergleich" (*Dünkel/Thiele/Treig* 2017, Bücher Nr. 45).

Auch auf internationaler Ebene hat *Frieder Dünkel* neben zahlreichen Mitgliedschaften in Vereinigungen und Beteiligungen in Editorial Boards von Zeitschriften Verantwortung übernommen. 1994-2010 war er Mitglied des Executive Committee der Internationalen Jugendrichtervereinigung, Sion, Schweiz (International Association of Youth and Family Judges and Magistrates, IAYFJM), 1999-2001 Präsident der International Association for Research into Juvenile Criminology, 1998-2004 Mitglied des Scientific Criminological Council des Europarats (European Committee on Crime Problems, CDPC), 2001-2004 als dessen Präsident, und schließlich 2015-2016 Präsident der European Society of Criminology (ESC).

Besonders am Herzen lag und liegt *Frieder Dünkel* die Förderung des wissenschaftlichen Nachwuchses. Er hat über fünfzig Doktorarbeiten betreut, die vorwiegend empirisch und/oder international vergleichend orientiert waren. Häufig entstanden sie aus den von ihm konzipierten Drittmittelprojekten. Die insgesamt in Höhe von nahezu fünf Mio. Euro eingeworbenen Drittmittel ermöglichten ein lebendiges Lehrstuhlleben mit zahlreichen Mitarbeiterinnen und Mitarbeitern, Doktorandinnen und Doktoranden sowie studentischen Hilfskräften. Die Forschungsförderung kam vor allem aus Mitteln der Euro-

päischen Union (AGIS-Programme etc.), des Landes Mecklenburg-Vorpommern (vgl. z. B. die Exzellenzinitiative „Mare Balticum“, s. Bücher Nr. 27 und 33), der Universität Greifswald (zahlreiche Promotionsstipendien der Landesgraduiertenförderung und des sog. Bogislaw-Stipendienprogramms der Universität Greifswald), der Volkswagenstiftung und der Deutschen Forschungsgemeinschaft (DFG).

Das Forschungsprogramm ist an anderer Stelle ausführlich beschrieben.[1] Man kann es mit dem Kürzel, das auch das oben erwähnte Master-Programm kennzeichnete, umschreiben: „Kriminologie und Strafrechtspflege“. Zu den eher grundlagenorientierten kriminologischen Projekten gehörten die Forschungen zur Jugendkriminalität (z. B. die in Anlehnung an das Kriminologische Forschungsinstitut Niedersachsen (KFN) konzipierten Schülerbefragungen) und zum Rechtsextremismus bzw. zur Fremdenfeindlichkeit in Mecklenburg-Vorpommern (Bücher Nr. 18, 22 und 28), im Zusammenhang damit entstanden Dissertationen wie diejenige von *Angela Kunkat* (s. Schriftenreihe Bd. 12). Die Themen wurden aus aktuellen kriminalpolitischen Problemlagen generiert, z. B. Rechtsextremismus und Fremdenfeindlichkeit, Mehrfach- und Intensivtäterschaft und Jugendgewalt in den 1990er Jahren, Alkohol und Straßenverkehrsdelinquenz in Mecklenburg-Vorpommern als einem der insoweit am stärksten belasteten Bundesländer (vgl. *Edzard Glitsch*, Schriftenreihe Nr. 17). Die Dissertationen wurden und werden jeweils in der von *Frieder Dünkel* begründeten und nunmehr gemeinsam mit seinem Nachfolger *Stefan Harrendorf* fortgesetzten Schriftenreihe „zum Strafvollzug, Jugendstrafrecht und zur Kriminologie“ (Stand bis heute: 66 Bände) veröffentlicht.

Die zweifellos besonders wichtigen international vergleichenden Forschungen betrafen den Strafvollzug und die Jugendkriminalrechtspflege. Zahlreiche Doktorarbeiten wurden aus den entsprechenden Forschungsprojekten entwickelt. Im Bereich des Strafvollzugs sind die Dissertationen von *Gescher* (Bd. 3 der Schriftenreihe), *Koeppel* (Bd. 5), *Fritsche* (Bd. 22), *Sakalauskas* (Bd. 24), *Zolondek* (Bd. 28), *Rieckhof* (Bd. 32), *Yngborn* (Bd. 42), *Grzywa-Holten* (Bd. 52), *Kromrey* (Bd. 62) und *Janssen* (Bd. 66) der Schriftenreihe zu nennen. Hinsichtlich des Strafvollzugsrechts gewann nach der Föderalis-

1 Vgl. *Pruin, I., Drenkhahn, K., Grzywa-Holten, J., Morgenstern, C.* (2015): Kriminologische Forschung und Lehre durch Frieder Dünkel. Ein Zwischenstand. Bewährungshilfe 62, S. 272–277; *Dünkel, F.* (2019): Kriminologische Forschung zur Strafrechtspflege – Möglichkeiten und Grenzen universitärer Forschung. In: Dessecker, A., Harrendorf, S., Höffler, K. (Hrsg.): Angewandte Kriminologie – Justizbezogene Forschung. Göttingen: Universitätsverlag, S. 233-258.

musreform der nationale Bundesländervergleich von Vollzugsgesetzen zunehmend Bedeutung (vgl. *Hillebrand* (Bd. 34), *Kühl* (Bd. 43), *Faber* (Bd. 47), *Blanck* (Bd. 54), *Thiele* (Bd. 58) und *Schulze* (Bd. 65)).

Zum internationalen Jugendstrafrecht sind die Disserationen von *Tiffer-Sotomayor* (Bd. 7), *Pergataia* (Bd. 9), *Pruin* (Bd. 26), *Gutbrodt* (Bd. 40), *Zaikina* (Bd. 44), *Gensing* (Bd. 48), *Horsfield* (Bd. 51), *Castro Morales* (Bd. 55), *Păroşanu* (Bd. 59) und *Dorenburg* (Bd. 64) von Bedeutung.

Mit diesem umfassenden Forschungsprogramm hat *Frieder Dünkel* gezeigt, dass die gelegentlich beklagten engen Spielräume universitärer kriminologischer Forschung doch zu einem konsistenten und für Theorie und Praxis bedeutungsvollen Ganzen geformt werden können. Vor allem die Strafvollzugsforschung und der Systemvergleich zum Jugendstrafrecht haben nachhaltige Wirkungen in Gesetzgebung und Praxis gehabt. Damit ist ein weiterer wichtiger Bereich von *Frieder Dünkels* wissenschaftlichem Leben angesprochen: Die Politikberatung.

Forschung war und ist für ihn kein Selbstzweck, sondern immer intentional, um kriminalpolitische Verbesserungen zu erreichen, sei es hinsichtlich der Menschenrechte im Strafvollzug, sei es, um ein „rechtsstaatlich gebändigtes" und zugleich evidenzbasiertes Strafensystem bzw. eine entsprechende Strafzumessung zu erreichen, oder um schlichtweg „gute Praxismodelle" aus dem Ausland in die kriminalpolitische Debatte einzubringen. Den heute modernen Gedanken eines systematischen Managements des Übergangs vom Strafvollzug in die Nachentlassungssituation (Bewährungs- und Straffälligenhilfe) hat er schon in den 1980er Jahren unter dem Begriff der durchgehenden Betreuung propagiert.

In der Folge der Föderalismusreform und der nach 2006 notwendig gewordenen Gesetzgebung der Länder zum Strafvollzug war *Frieder Dünkel* in zahlreichen Landtagsanhörungen zu Strafvollzugs-, Jugendstrafvollzugs-, Untersuchungshaft- und Sicherungsverwahrungsgesetzen präsent, häufig ohne sichtbare Wirkungen, gelegentlich aber doch, weshalb er immer optimistisch blieb und dem oft beklagten schwindenden Einfluss der Kriminologie auf die Kriminalpolitik vehement widersprach. Dazu hatten nicht zuletzt seine Mitarbeit im Europarat bei der Entwicklung von Empfehlungen und Mindeststandards beigetragen. Sein wichtigster Beitrag insoweit war der zusammen mit *Andrea Baechtold* und *Dirk van Zyl Smit* erarbeitete Entwurf der European Rules for Juvenile Offenders Subject to Sanctions or Measures (ERJOSSM) von 2008, die wegen ihrer Entstehungsgeschichte in Gestalt langer

Zusammenkünfte in Greifswald in Anlehnung an UN-Gepflogenheiten scherzhaft auch als „Greifswald Rules“ bezeichnet werden.

Die Idee, kriminologische Forschungsergebnisse in die Kriminalpolitik zu transferieren, lag auch der von ihm 1988 mitbegründeten Zeitschrift „Neue Kriminalpolitik“ zugrunde. Ein anderes von ihm mit initiiertes Forum war und ist der sogenannte *Ziethener Kreis*, ein aus einer Rotweinlaune geborener loser Kreis von Wissenschaftlerinnen und Wissenschaftlern sowie kriminalpolitisch engagierten Praktikerinnen und Praktikern, der sich zu aktuellen kriminalpolitischen Themen immer wieder zu Wort meldet (zuletzt in Forum Strafvollzug 2019, S. 356 ff. zum Thema „70 Jahre Grundgesetz – Zwischenruf des Ziethener Kreises zur Entwicklung des Strafvollzugs“).

„Kriminalpolitik für Menschen“ – wäre dieser Titel nicht bereits eng mit dem von *Frieder Dünkel* sehr geschätzten Kollegen und Freund *Horst Schüler-Springorum* verbunden, so wäre er ganz sicher eine überaus passende Überschrift für diese Festschrift. Das bedingungslose Streiten für die Würde aller Menschen, mit überzeugenden Argumenten und der ihm so sehr eigenen umfassenden Menschenliebe sehen wir als das Hauptmerkmal seines Wirkens und Seins. Und so ist der gewählte Titel „Kriminologie und Kriminalpolitik im Dienste der Menschenwürde“ Ausdruck und Quintessenz des wissenschaftlichen Schaffens von *Frieder Dünkel*, aber zugleich auch treffende Charakterisierung der in der Festschrift versammelten Beiträge.

Wir danken allen Autorinnen und Autoren, die den vorliegenden Band mit ihren Beiträgen bereichert haben. Er würde nicht erscheinen ohne die vielfältige und qualifizierte Unterstützung, die die Herausgeberinnen und Herausgeber erfahren haben, und zwar insbesondere durch *Marcella Henglein* (Berlin), *Judith Treig* und *Dominique Koevoets* (Bern), *Alexandra Fusch* (Greifswald) sowie *Carl Werner Wendland* vom Forum Verlag Godesberg.

Lieber *Frieder*, liebe Leserin, lieber Leser – wir wünschen freudvolle, bereichernde, anregende, aber auch nachdenkliche Lektüre und freuen uns sehr auf weitere gemeinsame akademische Unternehmungen mit Frieder und im „*Dünkelschen* Spirit“!

Greifswald, im März 2020

Kirstin Drenkhahn, Bernd Geng, Joanna Grzywa-Holten,
Stefan Harrendorf, Christine Morgenstern, Ineke Pruin

Inhalt

Vorwort V

I. Kriminologie und Kriminalpolitik

Gewalt, Vergeltung und Schattenwirtschaften
Hans-Jörg Albrecht 3

The Future of Imprisonment – the Spanish Case
José Cid 17

Migration und Kriminalität
Rudolf Egg 39

Der „administrative Ansatz“ in der Kriminalprävention – am Beispiel der sog. „Rockerkriminalität“
Thomas Feltes 55

Wertorientierungen und Kriminalität – zugleich ein Beitrag zur Didaktik der Kriminologie
Bernd Geng und Olivia Kühn 73

Kriminalität und Kriminalitätskontrolle in Mecklenburg-Vorpommern
Wolfgang Heinz 101

Migration und Kriminalität – Entwicklungen in Deutschland und England & Wales
Jörg-Martin Jehle und Chris Lewis 135

Regulating Prison Populations – Exploring Nordic Experiences with Frieder Dünkel and his Comparative Project
Tapio Lappi-Seppälä 161

Frieder Dünkel – Weggefährte und Mitstreiter seit 1973
Bernd Maelicke 185

Kriegsdienstverweigerer und Überläufer in literarischer Perspektive
Heinz Müller-Dietz 191

Online Child Pornography Offences – A Brief Overview
Lorenzo Picotti 207

Professionalisierungsschub oder politische Wertedebatte – Was braucht die Straffälligenhilfe angesichts von erstarkendem Rechtspopulismus?
Arno Pilgram 229

Elektronische Überwachung in Brasilien im Licht der Kriminologie
Ellen Rodrigues, Eduardo Khoury, Marcella Pádua und Otavio Lacerda 249

„Slowenischer Exzeptionalismus" in der Kriminalitätspolitik – im Übergang vom autoritären zum demokratischen System
Alenka Šelih 265

Letzte Ausfahrt Schweiz – Kriminalpolitische und strafrechtsdogmatische Überlegungen zum Sterbetourismus
Christoph Sowada 285

II. Strafrechtliche Sanktionen

Electronic Monitoring in Belgium and the Netherlands – a Substitute for Detention Versus a Means to Facilitate Reintegration
Kristel Beyens und Miranda Boone 309

Article 10-1 of the French Code of Criminal Procedure in the Light of International and European Texts Relating to Restorative Justice
Robert Cario 333

Plädoyer für eine umfassende Entkriminalisierung des Umgangs mit Betäubungsmitteln zum Eigenkonsum
Stefan Harrendorf 351

Kontroversen um Maßnahmen gegen gefährliche Straftäter in Polen
Krzysztof Krajewski 381

Schrittweise Reform des Betäubungsmittelstrafrechts – „Drug Checking"
Arthur Kreuzer 397

Über die freiheitsentziehenden Sanktionen des ungarischen Strafrechts
Ferenc Nagy 415

Akteure, Verantwortlichkeiten und Kooperation bei der Wiedereingliederung nach Haftentlassung im europäischen Vergleich
Ineke Pruin und Judith Treig 431

Verwertungsverbot für getilgte Vorstrafen bei Sanktionsentscheidungen
Heinz Schöch 457

Die Mitwirkung der Gesellschaft im Prozess der Resozialisierung als aktuelle Herausforderung
Bernd-Rüdeger Sonnen 471

Sanktionspraxis in Deutschland – Entwicklung und Struktur, Bewährung und Probleme
Gerhard Spiess 485

Bürgerliches Rechtsempfinden und der Ausbau der Sanktionspalette – Überlegungen anhand des erweiterten Fahrverbots (§ 44 StGB n.F.)
Franz Streng 507

Die Ersatzfreiheitsstrafe und Alternativen in der aktuellen Diskussion
Bernd Villmow 523

Zum Missbrauch der „Behandlung von psychischen Störungen“ zu Sicherungszwecken im schweizerischen Strafrecht
Jonas Weber 545

III. Jugendstrafrecht

The Spanish Juvenile Justice Penal System – National Legislation, Regional Policies and Practices
José-Luis de la Cuesta 567

Das Jugendstrafrecht in Katalonien – 40 Jahre später
Esther Giménez Salinas y Colomer 585

Reform of Juvenile Criminal Justice in Estonia – Substantive and Procedural Aspects
Jaan Ginter und Jaan Sootak 605

Die EU-Richtlinie 2016/800 über Verfahrensgarantien in Strafverfahren für Kinder, die Verdächtige oder beschuldigte Personen in Strafverfahren sind – ausgewählte Aspekte der Umsetzung in das deutsche Recht
Theresia Höynck 625

Jugendgerichte als „Problem Solving Courts"?
Johannes Kaspar und Katrin Höffler 641

Die Einziehung zur Vermögensabschöpfung im Jugendstrafrecht
Heribert Ostendorf 667

Concise Observations on the Treatment of Juveniles According to the Law on Drugs in Greece
Angelika Pitsela und Theofili Chatzispyrou 681

Children and Juveniles between Support and Punishment
Anette Storgaard 689

Informelle Konfliktlösungsverfahren im costaricanischen Jugendstrafrecht
Carlos Tiffer-Sotomayor 701

Including Young Adult Offenders in the Juvenile Justice System – German Principles and Dutch Pragmatism
Jolande uit Beijerse 721

IV. Straf- und Maßregelvollzug

Realitäten eigener Art – Ein Abgleich von Gefangenenpersonalakten mit Befragungsdaten junger Frauen und Männer im Jugendstrafvollzug
Johanna Beecken und Frank Neubacher 737

Schutz der Menschenrechte von Gefangenen durch die Rechtsprechung des Interamerikanischen Gerichtshofs für Menschenrechte
Álvaro Castro Morales 757

Jugendstrafvollzug in Berlin und Brandenburg – langfristige Legalbewährung im Kontext von Biographie und Vollzugsgeschehen
Heinz Cornel 777

Bildung als Katalysator für Desistance?
Kirstin Drenkhahn 801

Restorative Gefängnisse
Otmar Hagemann 817

Piranesis Welt der „Carceri"
Heike Jung 835

Strafvollzug – Ein beweglicher Sinnbezirk
Karl-Ludwig Kunz 851

Internationale Menschenrechte im Justizvollzug – Wo stehen wir im Jahr 2020?
Christine Morgenstern und Dirk van Zyl Smit 861

Strafvollzug in Neuseeland – das Ende einer Krise in Sicht?
Andrea Păroşanu 893

Wie überwindet man den Totalitarismus im Strafvollzug?
Gintautas Sakalauskas 909

Empirical Prisoners' Rights – Challenges and risks of Proceduralisation of Dignity in Prison
Sonja Snacken 927

Execution of Prison Sentences in Poland – 20 Years of Application of the 1997 Code of the Execution of Penalties
Barbara Stańdo-Kawecka 941

Reform des Strafvollzugs – Chronische Probleme und Hindernisse auf dem Weg zu einem effizienteren Vollzug der Freiheitsstrafe in Tschechien
Helena Válková 955

Does the German Prison Litigation System Comply with the European Standards?
Anton van Kalmthout 965

Förderung – Begleitung – Nachhaltigkeit – Pädagogische Annäherungen an die Gestaltung der Sicherungsverwahrung
Philipp Walkenhorst 985

Der dornige Weg zu Vollzugslockerungen – Eine Fallstudie
Joachim Walter 1009

Behandlung im Strafvollzug – Unklarer Begriff, vielfältige Befähigungsziele und offene Wirkungsfragen
Wolfgang Wirth 1025

Schriftenverzeichnis von Frieder Dünkel 1049

Schriften zum Strafvollzug, Jugendstrafrecht und zur Kriminologie 1083

*Verzeichnis der Autor*innen und Herausgeber*innen* 1087

Online Child Pornography Offences – A Brief Overview

Lorenzo Picotti[*]

1. Foreword

My tribute to *Frieder Dünkel* arises out of the memories of our long-term friendship, mutual respect and scientific cooperation that brings us together since our first encounter at the beginning of the 1980s at Max Planck Institute for Foreign and International Criminal Law in Freiburg im Breisgau. At the time, I was a young grant holder studying comparative law at the Institute in order to write my book on *dolus specificus*,[1] which demanded a lot of time and effort, but in the end, a decade after, led me to the results I was looking for. Therefore, I immersed myself in the theory of criminal law: my starting point was German doctrine (Strafrechtsdogmatik) and its development, which is a necessary starting point for a serious scientific study because of its acknowledged influence on the contemporary theories of criminal law.

Frieder Dünkel, who worked in the criminology research department at the Institute, was also dealing with comparative methods, and his efforts were not less intense than mine. According to a correct empirical methodology and approach, he was not only considering legal theories and regulations, but (most of all) practice: in particular, at the time he was investigating penalties and detention with regards to minors. The Max Planck Institute was the symbol of both criminal law and criminology "under the same roof" – pursuant to the wish of its founder and director, Prof. Dr. *Hans-Heinrich Jescheck* and his

* Translated by *Jacopo Governa*, PhD candidate at the University of Verona and the University of Göttingen.

1 *Picotti, L.*, Il dolo specifico. Un'indagine sugli "elementi finalistici" delle fattispecie penali, Milano, 1993. For an updated synthesis in German see Id., „Dolo specifico" und Absichtsdelikte – der sog. Handlungszweck zwischen gesetzlicher Formulierungstechnik und dogmatischen Begriffen, in Festschrift für Wolfgang Frisch zum 70. Geburtstag, Berlin 2013, pp. 363.

inseparable colleague and co-director Prof. Dr. *Günther Kaiser*.[2] Therefore, I was addressed to *Frieder Dünkel* to work together, with my wife's scientific collaboration. She had graduated from Bologna University defending her thesis under the supervision of the late Prof. *Massimo Pavarini*, who introduced her to a criminological approach in criminal law.[3] Her thesis concerned a report on the Italian juvenile criminal justice system, which was to be included in the research on several European States, wisely directed by *Frieder Dünkel* together with Prof. *Klaus Mayer*.[4]

This is how my wife and I met *Frieder Dünkel*, working together in the meticulous editing of our report about Italy, which had been particularly difficult with respect to research, elaboration and systematic reading of statistical and empirical data. At the time in Italy these data were almost disregarded by official sources and very difficult both to find and, above all, to scientifically organize in a long time perspective, since they were constantly changing. Moreover, the criteria chosen to collect and publish data in criminal justice statistics were not always clear. We had the chance to learn a lot about the methodology and perspectives of the criminological approach, as well as on juvenile criminal law.

But above all we got to know and sincerely appreciate *Frieder Dünkel* and his open, reliable, helpful, patient and constantly cheerful and friendly character. We became friends, and so did our families. With the passing of years, we shared scientific experiences and symposia, in our home countries and beyond,[5] as well as free time and sport, football and skiing. We visited each

2 On the scientific foundations and research of the Institute, see the summary of the volume edited by U. Sieber, H.G. Albrecht (Eds.), Strafrecht und Kriminologie unter einem Dach. Kolloquium zum 90. Geburtstag von Professor Dr. Dr. h.c. mult. Hans-Heinrich Jescheck am 10. Januar 2005, Freiburg im Breisgau, 2006.

3 After her thesis on Il pensiero e l'opera di Martino Beltrani Scalia, Bologna, 1982, which deserved the Casella Price 1984, see G. de Strobel, Analisi critica della statistica giudiziaria e criminale in tema di giustizia minorile dal 1947 ad oggi, in L. Bergonzini, M. Pavarini (Eds.), Potere giudiziario, enti locali e giustizia minorile, Bologna, 1985, pp. 235.

4 The results of the wide comparative research are published in F. Dünkel, K. Meyer (Eds.), Jugendstrafe und Jugendstrafvollzug. Stationäre Maßnahme der Jugendkriminalrechtspflege im interntionalen Vergleich, Vol. 1-3, Freiburg im Breisgau, 1986, for the Italian system see L. Picotti, G. de Strobel, Freiheitsentziehende Maßnahmen gegenüber Minderjährigen und Jugendstrafvollzug in Italien, pp. 905.

5 On the one side, I would like to refer to the Conference I organised in Bolzano in 1997 about mediation in the juvenile criminal justice system: L. Picotti (Ed.), La mediazione nel sistema penale minorile, Padova, 1998, and the contribution by F. Dünkel, la mediazione autore-vittima in Germania, pp. 117; on the other side, I would like to refer to my contribution to research that F. Dünkel directed, in which I engaged my assistants and

other, enjoyed our mutual hospitality and always met with the enthusiasm and joy of sincere friends, respecting each other and happy to open our home to welcome a friend, talk to him, have a glass (or more) of good wine together.

In this essay that I dedicate him on his 70th birthday I adopt an opposite perspective to his usual approach, which focuses on minors as offenders. I am in fact focusing on the equally tragic topic of minors as victims of criminal offences. In the global and technological context we are living in, child pornography is now sadly a manifestation of this multi-faceted phenomenon.[6]

My approach aims at working in a supranational perspective: starting from the empirical acknowledgement of new criminological phenomena, based on the development and influence of new IT and communication technologies in social relationships, the purpose is to frame the Italian criminal law system into the inevitably global contemporary context.

2. Historical background

2.1 The UN level

The need for criminal prosecution and punishment of child pornography goes back to the United Nations "Convention on the Rights of the Child" (CRC), adopted by the General Assembly with Resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990 and it is the most widely ratified human rights convention in this field. To this date 194 Countries have already ratified it. The Convention deals with child (defined as "every human

---

pupils as well. We often participated in conferences he organised. See: L. Picotti, I. Merzagora, Landbericht Italien, in F. Dünkel, A. van Kalmthout, H. Schüler- Springorum (Eds.), Entwicklungstendenzen und Reformstrategien im Jugendstrafrecht im europäischen Vergleich, Bonn - Godesberg, 1997, p. 193-226; L. Picotti, A. Di Nicola, E. Mattevi, B. Vettori, Landbericht Italien, in F. Dünkel, T. Lappi-Seppala, C. Morgenstern, D. van Zyl Smit (Eds.), Kriminalität, Kriminalpolitik, strafrechtliche Sanktionspraxis und Gefangenenraten im europaïschen Vergleich, Band 37/1, Godesberg, 2010, p. 495-554; L. Picotti, R. Flor, I. Salvadori, E. Mattevi, Origins, Aims And Theoretical Background Of Restorative Justice Matters in Italy, in J. Grzywa-Holten, P. Horsfield , F. Dünkel (Eds.), Restorative justice and mediation in penal matters in Europe, Berlin, 2015, pp. 417.

6 Minors in particular, but also adults are likely to become victims and offenders in cyberspace, as a consequence of the great development of social networks and their widespread use and abuse. See L. Picotti, I diritti fondamentali nell'uso ed abuso dei Social Network. Aspetti penali, in Giurisprudenza di merito, 2012, n. 12, pp. 2522.

being below the age of 18 years": art. 1)[7] specific needs and rights and according to Article 34 Governments should protect children from all forms of sexual exploitation and abuse and take all possible measures to ensure that they are not abducted, sold or trafficked.

In order to achieve the purposes of the Convention and implement its provisions, the General Assembly adopted the "Optional Protocol on the sale of children, child prostitution and child pornography" by Resolution A/RES/54/263 of 25 May 2000 that entered into force on 18 January 2002. The Protocol recognises that because of "the growing availability of child pornography on the Internet and other evolving technologies", "the worldwide criminalization of the production, distribution, exportation, transmission, importation, intentional possession and advertising of child pornography" is necessary. Therefore, it stresses the importance of closer cooperation and partnership between Governments and the Internet industry. In particular, article 1 provides that "States Parties shall prohibit the sale of children, child prostitution and child pornography" and article 2(c) provides a definition of "child pornography" as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes". Moreover, article 3(1)(c) requires State Parties to criminalize the production, distribution, dissemination, import, export, offer, sale or possession (for the abovementioned purposes) of child pornography. The offences shall be punishable "by appropriate penalties that take into account their grave nature".

2.2 The Council of Europe level

Only one year after the adoption of the Optional Protocol, the Council of Europe adopted the "Convention on Cybercrime" signed in Budapest on 23 November 2001 with the purpose of combating the development of cybercrime.[8]

7 The age limit to consider the victim of these offences as a "minor" does not always coincide (as in Italy and other European countries) with the age limit to apply juvenile criminal sanctions to offenders: there are different legal regulations on the subject matters. See F. Dünkel, Jugendstrafrecht im europäischen Vergleich im Licht aktueller Empfehlungen des Europarats, in Neue Kriminalpolitik, Vol. 20, No. 3 (2008), pp. 102.

8 On the concept of Cybercrime and, in general, on the technical and "social" elements of offences committed in cyberspace which play a role in criminal law, see in Italian literature L. Picotti, Diritto penale e tecnologie informatiche: una visione d'insieme, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (Eds.), Cybercrime, Milan, 2019, pp. 35, and its bibliography. From the abundant international literature see in particular D. Wall, Cybercrime: the transformation of crime in the information age, Cambridge 2007 and, more

The Convention also commits State Parties to repress child pornography as "content related offences" committed "through a computer system".

For this purpose, Article 9 criminalises various aspects of the electronic production, possession and distribution of child pornography under the belief that "such material and on-line practices, such as the exchange of ideas, fantasies and advice among paedophiles, play a role in supporting, encouraging or facilitating sexual offences against children" (Explanatory Report § 93). This provision offers an analytical definition of child pornography, distinguishing at para. 2 three different situations: next to the real pornography (letter a), which consists in "a material that visually depicts […] a minor engaged in sexually explicit conduct", it introduces the new notions of "appearing" child pornography (letter b), which depicts "a person appearing to be a minor engaged in sexually explicit conduct" and "virtual" child pornography (letter c) which consists in "realistic images representing a minor engaged in sexually explicit conduct". As a consequence, only the first definition requires the subject of the pornographic material to be a real person under 18 years of age (minor as defined by art. 9(3)).

The list of punishable conduct encompasses "producing for the purpose of distribution", "offering", "making available", "distributing or transmitting", "procuring for oneself or another person" and "possessing" (art. 9(1)(a) to (e)), and all such conduct should be committed "through a computer system".

Furthermore, on 25 October 2007 in Lanzarote, the Council of Europe adopted the "Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse" with the aim to create a "comprehensive international instrument focusing on the preventive, protective and criminal law aspects of the fight against all forms of sexual exploitation and sexual abuse of children".[9]

Article 20 lists offences concerning child pornography, which include – in addition to the list of article 9 of the Convention on Cybercrime – "knowingly

---

recently, A. Gillespie (Ed.), Cybercrime. Key issues and debates, 2nd ed., London, 2019; for Germany see U. Sieber, Straftaten und Strafverfolgung im Internet. Gutachten C zum 69. Deutschen Juristentag, München, 2012. In the end, for an updated description of supranational sources surrounding the Cybercrime Convention, see R. Flor, Cyber-criminality: le fonti internazionali ed europee, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (Eds.), Cybercrime, cit., pp. 98.

9 For a systematic comparative research, which demonstrates the need to harmonisation on the subject matter, see U. Sieber (Ed.), Kinderpornographie, Jugendschutz und Providerverantwortlichkeit im Internet, Mönchengladbach, 1999.

obtaining access through information and communication technologies to child pornography" (art. 20(1)(f)).

2.3 The European Union level

The Council Framework Decision 2004/68/JHA of 22 December 2003 "on combating sexual exploitation of children and child pornography" was adopted as a Third Pillar instrument. Art. 1(b) defines child pornography as "material that visually depicts or represents a child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child" encompassing also a "real person appearing to be a child" and "realistic images of a non-existent child" respectively at number (ii) and (iii). The list of offences concerning child pornography provided by article 2 includes (a) production, (b) distribution, dissemination or transmission, (c) supplying or making available and (d) acquisition or possession. In comparison with the Convention of Cybercrime, the framework decision does not require the perpetration "through a computer system".

The Directive 93/2011/EU of the European Parliament and the Council of 13 December 2011 replaced the mentioned Framework Decision, taking into account the Convention of Lanzarote and the last developments of the phenomenon. The Directive was adopted on the new legal basis of Articles 82(2) (for procedural law) and 83(1) (for substantive law) of the Treaty on the Functioning of the European Union after the entry into force of the Treaty of Lisbon (2009).This new source distinguishes three different but connected groups of offences against children: sexual abuse, sexual exploitation and child pornography and provides not only the definition of the offences but also minimum rules for the typologies and gravity of criminal sanctions.

3. Definition and reasons for incrimination of child pornography: real, appearing, virtual

3.1 Definition of child pornography

The Convention on Cybercrime requested States Parties to criminalize not only child pornography directly connected to real minors in flesh and bones, but also virtual ones. According to the first notion of child pornography, minors are victims or at least objects of the visual content of this kind of material.

The Convention extended this concept including even material visually depicting adults only *appearing* to be minors engaged in sexually explicit conduct and *realistic* images. These images do not in fact involve real children (§ 101 Explanatory Report), but can be produced by every means, often with graphic processing techniques that benefit from the most recent technologies and electronic devices and include pictures which are altered or even generated entirely by computer (Explanatory Report § 101), resulting in a visual representation of subjects who look like minors engaged in sexually explicit conduct.

The international instruments following the Convention further extended the object of the visual material defined as pornographic relevant for criminal law. From the limited definition of "sexual conduct involving minors" they included also the "representation of a child's sexual organs"(Article 20 par. 2 of Lanzarote Convention and Article 2 (c)(ii) of Directive 93/2011/EU), but no more the "lascivious exhibition […] of the pubic area of a child" as provided by Article 1 (b) (i) of the European Framework Decision 68/2004/JHA, which was criticized for its excessive subjective and moralistic approach.[10]

The last EU Directive 2011/93/UE defines real "child pornography" as "any material that visually depicts a child engaged in real or simulated sexually explicit conduct". "Sexually explicit conduct" includes real and simulated acts, intercourse with sexual organs and intimate parts, masturbation, bestiality, sadistic or masochistic abuses perpetrated in sexual context.

The definitions given by article 2(c)(ii), (iii) include also "any depiction" - and in article 2(c) (iv): "or realistic images" – "of the sexual organs […] for primarily sexual purposes". The use of the adverb "primarily" referred to the "sexual purposes" represents a significant innovation and improvement: in this way the Directive recognizes that despite a possible "double" significance of a picture, its use "primarily" for sexual purposes is still a reason for criminal liability. The goal of these provisions is clearly to prevent that pictures that in itself lack pornographic nature, such as of naked children playing on the beach, could be misused for sexual purposes. Nevertheless, it is adamant that the existence of the "primarily" sexual purpose must be determined on objective elements related to the content of the images and to their interpretation in

10 In the Italian literature, see in particular A. Cadoppi, sub art. 600 ter, I e II comma c.p., in A. Cadoppi (Ed.), Commentario delle norme contro la violenza sessuale e contro la pedofilia, 4th ed., Cedam, Padova 2006, pp. 125.

the context where they appear and where they are communicated. For example, their sequence or their inclusion among other images or videos and the addition of a description could be clues, as the punishable behavior cannot be determined by only relying on a mental element.

The need to criminalize conduct related to material with a possible double nature, but "primarily" pornographic, emerges also from the 17th Whereas of the Directive, according to which only conduct with an objectively licit aim, or better, justification (for example, a medical, scientific, artistic or similar purpose) should be excluded from criminal responsibility.

3.2 Reasons for the incrimination of child pornography

The evolution of the concept of child pornography determined not only an extension of the criminal liability but also changed the perspective of criminal protection. Better said and using the general terminology of the penal doctrine, the legal interest protected by these criminal provisions changed with the changing of the meaning of *child pornography.*[11]

As highlighted by the Explanatory Report to the Convention on Cybercrime, the punishment of appearing and virtual pornography aims "at providing protection against behavior that, while not necessarily creating harm to the 'child' depicted in the material, as there might not be a real child, might be used to encourage or seduce children into participating in such acts, and hence form part of a subculture favoring child abuse" (Explanatory Report § 102).

In this perspective the Italian *Corte di Cassazione* (Supreme Court)[12] decided that also electronic pictures of comic strips showing minors engaged in sexual activities fulfil the elements of virtual (child) pornography (article *600 quater.1* of the Italian Criminal Code). According to this provision, the protected object is no more an identified minor involved in sexual engagement and represented in the material produced, shared or used by pedophiles, but it is the broader "category" of minors – the children as a whole – whose singular entities are not and cannot be identified. The significance of such communication

11 On this subject, see, in Italian scholarship: L. Picotti, I delitti di sfruttamento sessuale dei bambini, la pornografia virtuale e l'offesa dei beni giuridici, in M. Bertolino, G. Forti (Eds.), Scritti per Federico Stella, Napoli, 2007, vol. II, pp. 1267, in particular pp. 1297.

12 Corte di Cassazione., Section III, 13 January 2017 (filed on 9 May 2017), no. 22265, Pres. Fiale, Rel. Rosi, Ric. Z. B. on realistic pedo-pornographic "comic strips", available in Diritto penale contemporaneo, 6/2017, with commentary by Chibelli.

is in any case that body and sexuality of children are and can be abused in order to satisfy the adults' sexual desire.

Some scholars criticized this new broader perspective, as it leads to the incrimination of form of behavior that despite their depravity do not cause concrete harm.[13] Therefore, they claim a breach of the harm principle (*nullum crimen sine iniuria*). An immoral conduct is not as such worthy of criminal repression in a secular State. Nevertheless, it must be highlighted that the repression of child pornography and the protection of minors from concrete abuse or sexual exploitation do not overlap. Rather, the perspective adopted by the international and the domestic legislations is grounded on the criminological practice of the last years, strictly connected to the development and the mass use of cyber technology. The incrimination of child pornography aims at preventing and reducing the more dangerous offences of sexual abuse and sexual exploitation.

Various factors contribute to increasing the risk for exploitation and instrumentalization of children in general and for the subsequent sexual abuse perpetrated by an audience of adults. First of all, the electronic data processing of images, videos and records that everybody can shoot and upload to the Internet in real time without intermediaries is nowadays highly sophisticated and it seems certain that it will further evolve in the next future. This fact, in conjunction with the properties of the pornographic material that can easily and frequently be shared among users and remains in cyberspace for a long time adversely affects minors' protection and increases the potential audience in an exponential way. Moreover, it is accessible everywhere and at every time through smartphones and tablets spreading around like wildfire.

Despite the allusions of some scholars, criminalizing virtual and appearing child pornography does not only relieve the burden of proof for the prosecutor. It is true that the identification of the victims and the demonstration of their minor age, or even their existence, is onerous, and there is no doubt that the proposed solution can overcome and solve these difficulties. Nevertheless, the two new variants of the concept are not always equated in each respect to the basic crime of child pornography: according to article 600 *quater*.1 of the Italian Criminal Code the sanction is reduced by one third.

---

13 See. S. Delsignore, La tutela dei minori e la pedopornografia telematica: i reati dell'art. 600-ter c.p., in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (Eds.), Cybercrime, cit., pp. 374.

The repression of virtual and appearing child pornography is a clear sign of the awareness for the real and concrete danger of this phenomenon for children. There is no doubt that pornographic comic strips with realistic pictures of children suggest the idea of the minor as a mere object or means in the hands of adults who use it to satisfy their sexual desire in an egoistic research for pleasure. Such an attitude provokes not only an abstract violation of human dignity as a fundamental right recognised by many international instruments, first of all at article 1 of the Charter of Fundamental Rights of the European Union, but also an aggression towards the child as a growing subject that requires particular "protection and care" (article 24 of the Charter). The specific needs of minors as non-adult persons are exploited in these cases, as minors are still unable to self-determine themselves and discover the sexual life with full awareness and liberty. In order to grant a balanced and appropriate psycho-physic development and growth, for their safety and personal state children must be protected not only against concrete forms of abuse, but also against concrete and frequent risks of prejudice.

It is scientifically proven that forced and premature sexual experiences, inadequate to the age and maturity of minors, irreparably damage their balanced growth, cause an uneven ripening of the person and endanger the possibility to live a peaceful and satisfying sexual and emotional life. All these needs constitute a protected legal interest of the person that deserves high consideration, even if referred to the broader category of "children" rather than specific individuals. Its safeguard is of primary importance for the whole human society and it contributes to peaceful coexistence, as it grants the development of the new generations. For this reason, it is justifiable, or even better, mandatory, to ensure the widest possible prevention of child pornography, even recurring to criminal law in order to fight the otherwise inevitable escalation of behavior affecting the sexual sphere of minors, pushed to act or even only be represented as an easily accessible object of pornography.

4. The criminally relevant conduct

The list of criminally relevant conduct significantly developed from the first provisions of the UN Optional Protocol on the sale of children, child prostitution and child pornography to the article 20 of Lanzarote Convention and article 5 of European Directive 93/2011.

Near the "production", which represents the source of such materials, "offering" of child pornography implies that the person can actually provide it, meanwhile "making available" is intended to cover, for instance, the placing of child pornography online for the use of others by means of creating child pornography sites. As highlighted by the Explanatory Report to the Convention (§ 136), this provision also intends to cover the creation or compilation of hyperlinks to child pornography sites in order to facilitate access to child pornography. Therefore, the Directive criminalizes also the conduct of "supplying" (Article 5 paragraph 5).

"Distribution" and "transmission" of child pornography represent the active dissemination of the material, sending it through a computer system to another person, as well as the selling or provisioning of materials such as photographs or magazines.

An effective way to curtail the production and dissemination of child pornography is prosecuting all conduct of each participant in the chain from the production of the material to the use (§ 139). Therefore, not only the "offer" deserves to be punished, but also conduct influencing the "demand and supply" of child pornography. In fact, users increase the supply through their demand, which is fostered and endorsed by ITC and electronic means. Therefore, not only "acquisition" and "possession" of that pornographic material shall be an offence (article 5, par. 2 of the Directive) but also merely viewing it online ("knowingly obtaining access, by means of information and communication technology" as provided by article 5, par. 3 of the Directive), without any download or buying or storage of child images in a computer system or on a data carrier as well as a detachable storage device, a diskette or CD ROM (§ 139 Explanatory Report).

This extension of criminalization was subject to strong criticism by some scholars. According to them, the incrimination of the mere online access of child pornography is incongruous, as it is a private affair, immoral at best. Quite the opposite, these crimes are grounded on the empirical threats quickly emerging from new conduct, encouraged by new technologies. Nowadays, it

is much easier to share and have access to pornographic material through mobile devices, such as smartphones or tablets with no need to download it thanks to servers or shared systems, websites located everywhere, clouds, peer to peer chains etc. In conclusion, it is possible to use pornographic material even if the user does not physically possess it.[14] Access to child pornography proves not to be less harmful than possession, also in light of its criminogenic nature, and causes not less harm than viewing it on devices after having downloaded and possessed it. The threat of child pornography is not the mere risk of its active spread, but also its only existence and availability online, as this already leads to an increase of demand and therefore of supply, as previously illustrated.

In relation to the mental element, the Explanatory Report to the Convention underlines that to "be liable the person must both intend to enter a site where child pornography is available and know that such images can be found there. Sanctions must not be applied to persons accessing sites containing child pornography inadvertently. The intentional nature of the offence may notably be deduced from the fact that it is recurrent or that the offences were committed via a service in return for payment" (§ 140).

5. Problems of applicability

5.1 The risk of dissemination of child pornography as an element of the crime of production of child pornography

The first problem of applicability is related to the dangerousness of the conduct, in particular to the risk of dissemination following the production of child pornography. The provision of art. 9, paragraph 1, letter a) of the Convention on Cybercrime of 2001 criminalizes "producing child pornography for the purpose of its distribution through a computer system", but does not require an objective risk of distribution. Neither the Lanzarote Convention nor the European Framework Decision nor the subsequent Directive of 2011 expressly require an objective risk of dissemination as a condition for the punishment of the production of child pornography.

---

14 For a systematic analysis of the concept of "possession" in criminal law, also in light of new IT and communication technologies, see in the Italian literature I. Salvadori, I reati di possesso. Un'indagine dogmatica e politico-criminale in prospettiva storica e comparata, Napoli 2016.

This problem has been highlighted by the Italian jurisprudence and it has been solved by a recent decision of the *Sezioni Unite* (plenary) of the Italian *Corte di Cassazione*.[15] The Court overruled the previous orientation expressed by the same *Sezioni Unite* in the decision n. 13 of 31. Mai 2000, and touches the roots and rationale of the criminalization of child pornography.

According to the previous Italian case law on the provisions introduced and amended after the adoption of Framework Decision 68/2004, only the production of child pornography, which for its quantity and for its spreading through means of communication realizes a "concrete risk" for dissemination, was punishable. Otherwise only the less dangerous conduct of "filing of child pornography" would have been fulfilled (see art. 600 *quater* of the Italian Criminal Code).

The most recent jurisprudence does not require the "concrete risk of dissemination" in the singular case, because it is mentioned by neither the national nor the international provisions. Instead, it has been introduced on the basis of mere symptomatic elements, deduced from the characteristics of the technology used. For example, the risk of dissemination was derived from the use of *Whatsapp,* from the introduction of child pornography to an electronic folder accessible to third persons by file sharing applications such as *eMule*, from posting child pornography on *Facebook,* or even from saving a video of a minor on a mobile device that can be accessed by third persons.

Ultimately, on the basis of the question posed by Order no. 10167/18 of the 3rd Section of our *Corte di Cassazione* issued on 30 November 2017 and filed on 6 March 2018, the *Sezioni Unite* decided that it is no more necessary to verify the existence of a concrete risk for dissemination in order to satisfy the elements of the crime of "production" of child pornography. The Court took into account the evolution of national and international legislation and noted the modern technology and the permanent possibility to connect with an indeterminate number of users available to each individual, e.g. through smartphone, tablet, laptop etc.[16]

---

15 Corte di Cassazione, Sezioni unite (plenary), 31 May 2018, filed on 15 November 2018, n. 51815, Pres. Carcano, Rel. Andronio, published in Diritto di Internet, 2019, no. 1, pp. 177 with commentary by L. Picotti, La pedopornografia nel cyberspace: un opportuno adeguamento della giurisprudenza allo sviluppo tecnologico ed al suo impatto sociale riflessi nell'evoluzione normativa, pp. 187.

16 As I highlighted above, the Supreme Court enhanced, through a broad historical and systematic reconstruction of the evolution of the national and supranational law, the essential impact of new information and communication technologies on criminal behavior in order

5.2 Intent as mental element

The first problem while assessing the intent as required *mens rea* of these crimes is related to the awareness of the age of the persons involved who must be minors under the age of 18 years. This is different for *appearing* pornography, where the intent need to refer only to persons looking like minors and *virtual* pornography, where the intent refers to realistic images of non-existing minors.

The EU Directive of 2011 only generally requires the Member States to criminalize "intentional" conduct, but without any clarification regarding the knowledge of the very age of the victim. Former article 609 *sexies* of the Italian Criminal Code, whose applicability was limited to sexual crimes, included a presumption in order to prevent defendants from using the excuse of an assumed higher age of the victim in order to exclude criminal liability. But the Italian Constitutional Court stated that the knowledge of the age of the minor cannot be presumed, as it would be in contrast with the culpability principle recognised both by the Italian Constitution and the European Convention of Human Rights, respectively at art. 27 and 7 (as interpreted in recent case law of European Court of Human Rights).[17] After this decision of the Italian Constitutional Court, Law no. 172 of 1 October 2012 ratifying the Lanzarote Convention amended art. 609 *sexies* of the Italian Criminal Code and introduced a new provision (art. 602 *quarter*) also applicable to the crime of child pornography, according to which the accused cannot invoke the lack of knowledge of the age of the victim to exclude criminal liability, unless the ignorance was inevitable. Therefore, with regard to the knowledge of the age of the minor, the perpetrator can be responsible not only for intent, but also for negligence, while for all the other elements of these crimes intent is still required.

---

to counter them. The Supreme Court also distinguishes this crime from the less serious offence of the mere "filing" of pornographic material and from lawful behavior in which it is not possible to recognize any "child abuse" because of the consent of the minor given in a private relationship.

17 Constitutional Court, 11 July 2007, no. 322 which, despite declaring inadmissible the constitutionality question, specified in the reasoning that "the culpability principle – as described in this Court's judgements no. 364 and 1085/1988, is not only a limit for the legislator in the construction of criminal law principles and single criminal law provisions; but also an interpretive criterion for the judge, in reading and applying the provisions in force".

Regarding the intent of “dissemination”, the features of the new ICT must be taken into consideration, too. The *Corte di Cassazione*[18] clearly states that using programs such as *eMule* and other file sharing programs that put users in contact with a peer-to-peer circuit allowing the searching and sharing of files can show the intention to disseminate the material.

5.3 Minor’s consent and sexting

The consent possibly given by the child and, *a fortiori*, its mere assumption by the perpetrator, are absolutely irrelevant and do not exclude criminal liability for child pornography. Art. 8 of Directive 93/2011/EU leaves the States the possibility to avoid the criminalization of consensual sexual activities between pairs, who are close in age and degree of psychological and physical development or maturity in so far as the acts do not involve any abuse. A similar provision applies to pornographic performances that take place in the context of a consensual relationship in so far as the acts do not involve any abuse or exploitation and no money or other form of remuneration or consideration as payment in exchange for the performance. Moreover, paragraph 3 leaves to the discretion of Member States to extend the relevance of consent to the production, purchase and possession of child pornography involving children who have reached the age of sexual consent, if the material is produced and possessed with the consent of those children and only for the private use of the persons involved, in so far as the acts do not involve any abuse. Such an exemption is not foreseen in the Italian system, but it is nevertheless useful in order to introduce the next topic: *sexting*.

Sexting is closely linked to the mass use of new technologies that allow anyone to shoot photos and videos, save them on devices and share them with one or more persons immediately or later. This phenomenon is crucial for child pornography, if the persons who create, spread, share, save and possess the pornographic material are minors themselves, in particular teenagers who do not consider this practice illegal, but a natural and inoffensive introduction to their sexuality. For this reason, they create, save, share and sometimes show other people their own and others’ sexual experiences. But it also happens that at the end of a love affair one of the persons involved puts the abovementioned

18 Corte di Cassazione, III Section, decision no.14001 of 14 December 2016, filed on 26 March 2018; III Section, decision no.45922 of 30 September 2014, filed on 6 November 2014.

material into circulation, without the consent of the former partner for revenge, cyber-bulling or for bragging. Whether these forms of behavior should be punished as child pornography is debatable, if the production and distribution has not adults as recipients and does not aim to satisfy adults' sexual desires. Therefore, such conduct cannot be characterized by an instrumentalization of the sexuality of minors, on the contrary, mostly it can be traced back to minors' self-determination.

Both jurisprudence and scholars believe that grounds for exemption would be applicable to these forms of conduct, even if they formally possess all the features of child pornography.[19] They would be part of the freedom of expression of minors, granted by art. 13 of the UN Convention of 1989 and art. 10 of the European Convention on Human Rights, and, in light of the jurisprudence of the European Court of Human Rights, of the right to private life (art. 8). On these grounds, Common Law systems tend to recognize the existence of an exempting defense, unless the conduct is determined by revenge (the so-called revenge porn), discrimination, bullying or defamation.

Article 8 of the EU Directive offers an equal solution to many situations. As authoritatively sustained by scholars, only conduct instrumentalizing children's bodies and sexuality for purposes that go beyond an affective relationship satisfy the requirements for child pornography, despite the material where a ground of exemption is applicable is objectively pornographic. The limit is the principle of self-determination of the minor, which must be appreciated bearing in mind the features of the relationship, the psycho-sexual maturity of the partners, while an appreciable diffusion of the material and sharing with third persons should be considered child pornography and judged with the same harshness.

19 On the subject matter see I. Salvadori, I minori da vittime ad autori di reati di pedopornografia? Sui controversi profili penali del sexting, in Ind. pen., 2017, pp. 789; and M. Bianchi, Il "Sexting minorile" non è più reato? Riflessioni a margine di Cass., Sez. III, 21.3.2016, n. 11675, in Riv. trim. dir. pen. cont., 1/2017, pp. 145.

6. Instruments to prevent child pornography

6.1 Solicitation of children

The importance of the protected legal interest as previously described influences the attitude towards preventive techniques. There are two possible alternatives: the first one is the introduction of an anticipatory criminalization. This means that preparatory acts, preliminary to the commission of child pornography offences, are considered as an offence themselves. In this perspective, article 6 of the EU Directive of 2011 refers to the solicitation of children for sexual purposes, also known as child grooming.[20] Solicitation is "the proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent, for the purpose of committing" child pornography or sexual abuse offences, "where the proposal is followed by material acts leading to the meeting".

This is a separate crime that does not replace the attempt to commit child pornography or sexual abuse as it does not require the features of an attempt (in the Italian system these are suitability and unambiguousness of the acts that therefore are close to the crime), while the intention to commit these subsequent crimes is enough. This intention is the teleological content of the mental element (*specific intent*) and it is not necessary to assess the existence of the objective risk for the commission or the proximity to the commission of the intended crimes.[21] Sometimes the assessment will not be easy because the Directive requires not only the exchange of e-mails or texts which can easily be discovered by police and prosecutors, but also material acts intended to meet the minor (i.e. the purchase of bus tickets to let the minor reach the place of the appointment). This element is not included into art. 609 *undecies* of the Italian Criminal Code that, as already mentioned, adjusted the national system to the Lanzarote Convention, anticipating even more the moment of the commission of the crime to the capturing of the minor's trust.

20 On the subject matter see in the Italian literature I. Salvadori, L'adescamento di minori. Il contrasto al child-grooming tra incriminazione di atti preparatori ed esigenze di garanzia, Torino, 2018.

21 On the subject matter see L. Picotti, Zwischen „spezifischem" Vorsatz und subjektiven Unrechtselementen – Ein Beitrag zur typisierten Zielsetzung im gesetzlichen Tatbestand, LIT Verlag, Zürich 2014, pp. 49.

6.2 The responsibility of legal persons and Internet Service Providers for child pornography

For a long time scholars and jurisprudence debate on the possible criminal responsibility of Internet Service Providers and other legal persons in order to increase the efficiency of the prevention of child pornography.

Art. 12 of the EU Directive, repeating the content of Art. 26 of the Lanzarote Convention and Art. 6 of the Framework Decision of 2004, imposes a duty on Member States to sanction (not necessarily with criminal sanctions) legal persons, when the offences referred to in the Directive "are committed on their benefit by any person acting either individually or as part of an organ of the legal person, and having a leading position within the legal person based on" its power of representation of the legal person, the authority to take decisions on behalf of the legal person or an authority to exercise control within the legal person. Moreover, Member States "shall also take the necessary measures to ensure that legal persons may be held liable where the lack of supervision or control by one of these persons has made possible the commission, by a person under its authority, of any of the offences for the benefit of that legal person".

The liability of Internet Service Providers is much more difficult as Art. 14 of Directive 31/2000/CE on e-commerce states that service providers, and in particular hosting providers, are not liable for the information stored at the request of a recipient of the service, on condition that the provider does not have knowledge of illegal activity or information and has not been ordered to remove or disable the access to the information. In any case, according to Art. 15 of the same Directive "Member States shall not impose a general obligation on providers to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity".

Nevertheless, some additional, specific provisions are available in a decision of the Council of the European Union of 29 May 2000 imposing duties to introduce filter programs that can intercept and stop the uploading and diffusion of child pornography online (art. 5). Other provisions include duties for the registration and reporting of sites and subjects using, spreading and keeping child pornography (art. 3). In these cases, legal obligations to act are set forth, in order to prevent or to stop the perpetration of offences (also child pornography). Their violation incorporates an omission, which can be criminally relevant as long as it enables or facilitates the perpetration of the abovementioned offences or the continued online availability of illicit contents.

Therefore, if the providers' mental element is *awareness* and *will*, it is possible to hold them criminally liable on the grounds of co-perpetration by omission in the offences committed by perpetrators or participants in the production, dissemination or possession of child pornographic material.[22]

In an important judgement of 2 December 2008, N. 2872/02 (*KU v. Finland*), the European Court of Human Rights recognized the State's responsibility in this regard. Finland had not guaranteed the necessary protection to a minor, who was photographed in pornographic acts and whose image and address had been put online, together with the offer of sexual favors. The provider had not removed these images and text, in spite of being notified by the police of the injunction, invoking the freedom of expression and of economic activity.

Also the European Court of Justice seems to acknowledge the providers' liability for failure to intervene directly to stop violations with regard to different offences committed online (such as intellectual property rights offences committed on protected music or cinematographic works). The providers are held liable as long as the measures requested to avoid the offences are proportionate to the interests at stake.

Nowadays, the continuing nature of the offence is problematic, also bearing in mind the general rules of the penal doctrine. Once uploaded to the Internet, pornographic material continues to be available for a long and indefinite time, aggravating and reiterating in time and space the violations of criminally protected rights and interests. It is not impossible to assume a co-perpetration in the offence also in this phase, which is subsequent to the perpetration of the offence itself, but not to the fulfilment of the related harm. The Italian *Corte*

---

22 See L. Picotti, Fondamento e limiti della responsabilità penale dei Service-providers in Internet, in Diritto penale e processo, 1999, no. 3, pp. 379; Id., La responsabilità penale dei Service-providers in Italia, ivi, 1999, no. 4, pp. 501. More recently A. Ingrassia, Il ruolo dell'ISP nel ciberspazio: cittadino, controllore o tutore dell'ordine? Le responsabilità penali dei provider nell'ordinamento italiano, in L. Luparia (Ed.), Internet provider e giustizia penale, Milano, 2012, pp. 47; V. Torre, Sulla responsabilità penale del service provider e la definizione del comportamento esigibile alla luce delle norme contro la pedopornografia, in L. Picotti (Ed.), Tutela penale della persona e nuove tecnologie, Padova, 2013, pp. 183; A. Manna, M. Di Florio, Riservatezza e diritto alla privacy: in particolare, la responsabilità per omissionem dell'internet provider, in A. Cadoppi, S. Canestrari, A. Manna, M. Papa (Eds.), Cybercrime, cit., pp. 909. With regard to case law see recently Cass. Pen., Section. V, 20 March 2019, no. 12546, in Ilpenalista.it (13 May 2019).

di Cassazione convicted a blogger, who had kept libelous texts and expressions on his website, despite the fact that he was aware of their staying online and their content harming the reputation of another individual.[23]

7. Conclusive remarks

In my conclusive remarks I wish to refer to the pertinent observations of Alisdair Gillespie:

“Digital technology changed the nature of child pornography. Digital cameras mean that a person can now take or record images of a child with a reduced likelihood of detection since there is no third-party development process, the camera is simply connected to a computer, television or even printer and the resultant photograph or footage can be displayed, stored or printed”.

Cyberspace “has led to an exponential growth in the size of collections obtained by offenders and it became significantly easier to swap material and meet like-minded offenders”. It “had an impact on victims, too. The ubiquitous nature of the Internet and its very architecture means that victimization becomes permanent. Once an image is placed onto the Internet it is impossible for it to be retrieved due to downloading, mirroring and dissemination.”[24]

The children shall be protected not only as individual victims, but as a whole: therefore it is necessary to criminalize appearing and virtual child pornography, and to punish also the mere access to child pornography, that increases the demand for such material and its supply.

More efficient and preventive instruments are also necessary: preparatory acts must be criminalized as an autonomous offence (child grooming), and the liability of Internet Service Providers needs a new broader regulation in respect to the old Directive of 2000.

---

23 Corte di Cassazione, V Section, 27 December 2016, N. 54946, so-called Tavecchio case. For an updated framework of Italian case law on the persisting harm on legal goods in Cyberspace and the connected identification of the moment when the offence is committed and a possible distinction from the moment of the exhaustion of cybercrimes and on the possible criminal liability of Internet Service Providers and bloggers see L. Picotti, Diritto penale e tecnologie informatiche, cit., pp. 89, and the updated work by B. Panattoni, La temporalità dell’informazione nel Cyberspace. Spazi di incertezza in un recente contrasto giurisprudenziale, in Diritto penale contemporaneo - www.penalecontemporaneo.it, 2019.

24 *Gillespie, A. A.*, Jurisdictional issues concerning online child pornography, in International Journal of Law and Information Technology, 2012, Vol. 20, No. 3, pp. 152.

But “[s]ince data is accessible from anywhere in the world and indeed can be moved from one location to another regardless of where the data owner is physically located” it is not easy to apply traditional rules of criminal law and penal jurisdiction to the Internet. The “Cyberspace” is not yet recognized as a separate entity with its own rules. The protection of children would probably commend to exercise penal jurisdiction even if the harmonization of criminal laws relating to child pornography and jurisdiction over the Internet has not been completely achieved.

Criminal law must constantly try to keep pace with social and technological changes in a necessarily global dimension. Therefore, the contribution of committed and aware scholars like Frieder Dünkel plays a crucial role, especially with regard to methodology. For this reason, I dedicate him my essay, since he is particularly attentive to the personal and social specificities which the law is in charge of when dealing with minors, not only when they are offenders, but also when they are victims of criminal offences.