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Problematic Aspects of Criminal Adjudication in Cases of Sexual Violence against Minors

Although sexual violence and coercion against minors are formally punishable in all modern societies, special attention is paid to the protection of minors, victim support, the rights of juvenile witnesses/victims in criminal proceedings, strict action against perpetrators and strengthening international cooperation to this end. However, combating it still poses considerable difficulties due to the latent nature of the crime and the paucity of incriminating evidence.

The article reviews positive obligations of the State with regard to the crime of the mentioned category in the context of criminal legal proceedings, significance of the testimonies of minor victims/witnesses and issues related to the assessment of testimonies, interrelation of the rights of minor victims/witnesses and right of accused/defendant to a fair trial.

Keywords: *testimony of minor witnesses/victims, their rights, sexual violence.*

1. Introduction

Sexual abuse on juveniles can take different forms (e.g. touching, incest, molestation, rape, etc.), take place at different times and in different venues (at home, in educational and medical institutions, foster and care facilities, in church, in cyberspace, etc.); for a variety of reasons (including socio-economic and/or gender, racial or social discrimination, migration, lack of education, traditions, etc.);¹ by a wide range of people (family members and relatives of the victim, legal representatives, people caring for the child, social workers and any person),² but usually – privately and without eyewitnesses, and therefore it's latent character creates additional difficulties in obtaining incriminating evidence.

Despite the increase in the number of institutions and structures involved in combating violence against minors and cross-border cooperation, conviction rates still do not reflect the real situation, partly due to the difficulties in obtaining the evidence necessary for conviction in the aforementioned category of offences³ and partly due to the refusal of victims to cooperate with law enforcement authorities.

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¹ See Stockholm Declaration and Agenda for Action, World Congress against Commercial Sexual Exploitation, 1996, par. 6.

² UN CRC, General Comment №13, The Right of the Child to Freedom from all Forms of Violence, CRC/C/GC/13, 18/04/2011.

³ *Marchese C. L.*, Child Victims of Sexual Abuse: Balancing a Child's Trauma Against the Defendant's Confrontation Rights – *Coy v. Iowa*, 6 J. Contemp. Health L. & Pol'y, 411, 1990.

2. Positive Obligation of the State

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Violence⁴ (hereinafter – the Lanzarote Convention), the UN Convention on the Rights of the Child⁵ (hereinafter – the UN Convention), Directive N0 2011/93/EU “on the Prevention of Sexual Abuse and Sexual Exploitation of Children and Child Pornography” (hereinafter – 2011/93/EU Directive)⁶, the “European Convention for the Protection of Human Rights and Fundamental Freedoms” (hereinafter – the European Convention) and the case law of the European Court of Human Rights (hereinafter – the ECHR⁷, as well as other international legal instruments⁸ taken together, they impose negative and positive obligations on Member States to protect minors from violence.

Despite the plethora of international legal instruments in the field of protection of minors from sexual violence and exploitation, European law is mainly based on the UN Convention, which obliges Member States to ensure: the primacy of the best interests of the juvenile in all decisions concerning the minor (Article 3(1)); protection of minors from all forms of violence, including sexual violence and exploitation (Articles 19 and 34). General Comment № 13⁹ sets out measures to protect minors from violence, explains Article 19 of the Convention and the concept of sexual abuse and exploitation of juveniles, and General Comment № 5¹⁰ identifies legislative measures and policies to be implemented by Member States at national level. At the same time, the importance of the Lanzarote Convention lies in it’s multidisciplinary approach, in the obligation to harmonise national legislation with the provisions of the Convention (which facilitates international cooperation in this field) and in the collection and unification of standards established by international law in this field.

According to the case law of the ECHR, Member States are responsible for the protection of minors placed in special institutions,¹¹ as well as obligation to protect juveniles from private individuals¹² – family members, and for these reasons¹³ to establish both the effective criminal law provisions and the effectiveness of their enforcement – investigation and prosecution,¹³ punishment of

⁴ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse CETS 201, Lanzarote, 25/10/2007.

⁵ UN Convention on the Rights of the Child, Gen. Assembly Res. 44/25, 20/11/1989.

⁶ Directive 2011/93/EU, “Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography”, and replacing Council Framework Decision 2004/68/JHA, 13/12/2011

⁷ X. and Others v. Bulgaria, №22457/16 [GC], [2021], ECHR, 179, 192; Demir and Baykara v. Turkey [GC], №34503/97, [2008], ECHR, 69, 74; Streletz, Kessler and Krenz v. Germany [GC], №34044/96 and 2 others, [2001], ECHR, 90; Al Adsani v. the United Kingdom [GC], №35763/97, [2001], ECHR, 55.

⁸ Resolution 1307(2002), Sexual Exploitation of Children: Zero Tolerance, 27/09/2002; Rec (2001)16, Protection of Children Against Sexual Exploitation, 31/10/2001; Directive 2012/29/EU of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, 25/10/2012, OJ 2012 L 315/55; UN Guidelines on Justice in Matters Involving Child Victims or Witnesses of Crime, ECOSOC, 22/07/2005, E/RES/2005/20; European Social Charter, ETS №035.

⁹ UN CRC, General Comment №13 (2011).

¹⁰ UN CRC, General Comment №5, CRC/GC/2003/5, 27/11/2003.

¹¹ Nencheva and Others v Bulgaria, №48609/06, [2013], ECHR.

¹² O’Keeffe v Ireland, [GC], №35810/09, [2014], ECHR; M.C.v Bulgaria, №39272/98, [2003], ECHR.

¹³ R.B. v. Estonia, №22597/16, [2021], ECHR, 79.

offenders,¹⁴ compensation for minor victims and mandatory reporting mechanisms for cases.¹⁵ Implementation of the so-called 4P approach (Prevention, Protection, Prosecution and Punishment of perpetrators). However, this is a means obligation and not a final obligation, because there is no absolute right to prosecute or convict a particular person if the impossibility of holding the perpetrator criminally responsible is not related to the culpable failure of responsible bodies to fulfil their obligations.¹⁶

Major part of decisions of the European Court on cases of sexual violence against minors¹⁷ refer to the fulfilment of a positive obligation by the State.¹⁸ Although the extent of positive liability depends on the foreseeability of the threat,¹⁹ in all cases this means giving priority to the best interests of the minor,²⁰ appropriate consideration of the minor's vulnerability and needs.²¹ This includes: establishing a legal framework for physical and psychological integrity; safe and accessible reporting mechanisms at every stage of the process; appropriate, minor- and gender-sensitive and timely response to reports of sexual violence and exploitation;²² taking operational measures to protect those at risk; protecting the minor and inviolability of their private life, providing support services,²³ the effective investigation of reports of violence regardless of the victim's cooperation with investigating authorities;²⁴ implementation of criminal justice response mechanisms taking into account the special vulnerability and best interests of the minor victim/witness,²⁵ application of child-friendly and protective measures,²⁶ including consideration of the individual needs and opinions of the minor,²⁷ minimisation of the number of interrogations/interviews of minors; the irrelevance of the victimogenic

¹⁴ CRC, 2013b, 52-52; CRC 2014b, 43-44.

¹⁵ CRC, 2001a, 52; CRC 2015b, 235a.

¹⁶ A.B. C v Latvia, №30808/11, [2016], ECHR, 149; X. and Others v Bulgaria, Ibid, 183, 186, 210; A and B v Croatia, №7144/15, [2019], ECHR, 110, 129; M.P. and Others v Bulgaria, №22457/08, [2011], ECHR, 111; Z. v. Bulgaria, №39257/17, [2020], ECHR, 65.

¹⁷ O'Keeffe v. Ireland, №35810/09,[2014], ECHR; A and B v. Croatia, 106; Blokhin v. Russia, [GC], №47152/06, [2016], ECHR, 138; Neulinger and Shuruk v. Switzerland, [GC], №41615/07, [2009], ECHR, 134; Scozzari and Giunta v. Italy, [GC], №39221/98 and №41963/98, [2000], ECHR, 169.

¹⁸ E. and Others v. the United Kingdom, №33218/96, [2002], ECHR; E.S. and Others v. Slovakia, №8227/04, [2009], ECHR; O'Keeffe v. Ireland.

¹⁹ *Lursmanashvili L.* (transl.), Handbook of the European Law of Child Rights, Tbilisi, 2020, 87, (in Georgian); eg. O'Keeffe v Ireland.

²⁰ See M.G.C. v. Romania, № 61495/11, [2016], ECHR, 56-57; Rulings of the Chamber of Criminal Affairs of the Supreme Court of Georgia: № 640AP-20, 1/03/2021; № 856 AP-20, 9/03/2021.

²¹ See A and B v. Croatia, Ibid 111; M.M.B. v. Slovakia, №6318/17, [2019], ECHR, 61.

²² Council of Europe, 2012; UN Committee on the Rights of the Child, 2019, art. 8.1.a; Concluding Observation: Czech Republic (2003). para 62b.

²³ See UN Committee on the Rights of the Child, 2019, art. 8.1.

²⁴ S.M. v. Croatia, 314; Y. v. Bulgaria, 93; S.Z. v. Bulgaria, №29263/12, [2015], ECHR, 50; M. and Others v. Italy and Bulgaria, №40020/03, [2012], ECHR, 104; G.U. v. Turkey, №16143/10, [2016], ECHR, 73.

²⁵ R.B. v. Estonia, § 87; A and B v. Croatia, §121.

²⁶ Judgment of the Chamber of Criminal Affairs of the Supreme Court of Georgia on case № 297AP-21, 8/10/2021; eg Lanzarote Convention, Article 30 and its Explanatory Report. R. B. v. Estonia, 99; G.U. v. Turkey, 73.

²⁷ See ECOSOC, Resolution 2005/20 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Resolution 2005/20, 22/07/2005, par. 9.

behaviour and previous sexual life of minor to the assessment of the truthfulness of his or her testimony; the irrelevance of the minor's age to the assessment of the reliability of a minor witness/victim's testimony when his or her developmental level provides the opportunity to determine the truthfulness of the testimony; the right to be heard; perception of the juvenile as a full-fledged witness, taking into account his or her individual abilities and needs, in order to facilitate communication with the body conducting the proceedings, both during the investigation and during the trial;²⁸ providing information regarding child rights, judicial proceeding, support services, appeal mechanisms,²⁹ on the right to compensation;³⁰ conduct of investigations and prosecution regardless of the existence of a complaint by the victim (even if claim is withdrawn) in the language and form comprehensible for child upon first contact with minor victim and his/her legal/procedural representative taking into account gender/cultural/religious aspects; identifying a minor as a victim, regardless whether the alleged perpetrator is identified and prosecuted, or readiness and capacity of the victim to provide information to the investigating body about crime committed against him/her and/or giving incriminating testimony in court,³¹ "regardless of the victim's role in the crime or in the prosecution of the alleged perpetrator(s)";³² the inadmissibility of attaching decisive importance to the question of the presence of traces of physical damage for the confirmation of violence; swift, efficient,³³ commitment to an objective, comprehensive and complete investigation – using all appropriate means to obtain evidence,³⁴ to identify and, if necessary, to punish the persons responsible.³⁵

It is unacceptable to limit investigations only to responding to the victim's requests and the implementation of investigative/procedural measures be depend on the victim's initiative,³⁶ on the victim's position or level of involvement (hence, the victim's position – in terms of reconciliation with the accused / conviction and lack of a claim – is irrelevant for the purposes of prosecution under the Criminal Procedure Code of Georgia and is not an obstacle to prosecution, however the victim's active participation in the investigation must be ensured to the extent necessary to protect his/her legitimate interests.³⁷

Investigation of sexual violence against minors is difficult mainly due to the age of the victim, as it is usually quite difficult to obtain a legally significant statement from a frightened minor – due to

²⁸ Ibid, par. 19.

²⁹ Ibid, par. 19

³⁰ Conducting measures for physical, psychological and social rehabilitation and reintegration of child victims – including providing shelter, legal assistance and information, access to education; UN Committee on the Rights of the Child, 2019, Article 8.5, 9.3.

³¹ UNICEF Guidelines on the Protection of Child Victims of Trafficking, New York, 2006, 14.

³² ECOSOC, UN Guidelines on Justice in Matters Involving Child Victims or Witnesses of Crime, 22/07/2005, E/RES/2005/20, par. 9a.

³³ See *Söderman v. Sweden*, №5786/08, [2013], ECHR, 82-83; *R.B. v. Estonia*, 0330, 79; *X. and Others v Bulgaria*, [GC], 213.

³⁴ See *S.Z. v Bulgaria*, 44; *V.B. v Belgium*, №61030/08 [2017], ECHR, 56.

³⁵ *R.B. v. Estonia*, 80.

³⁶ *X. and Others v Bulgaria*, 213.

³⁷ Ibid, 189.

the private nature of the crime (in most cases the crime takes place in a private space and very rarely are there eyewitnesses to the crime), the stereotypes established in society or lack of information, minors often do not realise the criminal nature of the acts committed against them until long after the crime – under the influence of independent factors.³⁸ In most cases – the minor involved is “ashamed to talk about this subject; he/she is afraid because the perpetrator threatens him/her with physical consequences”³⁹ or due to a psychological influence (assures that the mentioned behaviour is normal and the victim is obliged to believe him, blackmails minor by giving personal data to his/her relatives) or dependence on the offender, victim's lack of awareness of the antisocial/criminal nature of the act, the authority of the perpetrator and/or the feeling of gratitude towards him, shame and other reasons) and in most cases it takes a long time to realise the criminal nature of the act committed against him/her.

Although according to the Article 71, Part 5¹ of the Criminal Code of Georgia, the limitation period does not apply to the acts provided by Articles 137-141 and 253-255² of the Code committed in respect of minors (in accordance with the requirements of Article 33 of the Lanzarote Convention) and for victims of violence there is the possibility of reporting sexual offences committed against them during childhood even after they have reached the age of majority – the possibility of convicting the perpetrator decreases due to the length of time between the commission of the offence and the start of the investigation, the latent nature of the offence, the lack of witnesses and destruction of evidence.⁴⁰ There are four major challenges in dealing with cases of sexual violence against minors: Identifying the victim; Protecting the victim; Listening to the victim and believing the information he or she gives; Supporting the victim.⁴¹

3. Rights of a Minor Witness/Victim

For the protection of the best interests and rights of minor victims and minor witnesses and their protection against secondary and re-victimisation⁴² the Juvenile Justice Code⁴³ (hereinafter JJC) provides, inter alia, for free legal assistance for minor victims/witnesses to crimes against sexual freedom and inviolability; obligatory presence of the minor's legal representative and participation of the minor's lawyer in the procedural acts conducted with the involvement of the minor and questioning of the minor⁴⁴ obligation of the body conducting the proceedings to ensure the participation of a

³⁸ See Judgment of the Supreme Court of Georgia of June 28, 2022 in case № 433AP-22. The victim reported about the action taken against him approximately 1 year after the incident, after the meetings held at the school within the framework of the awareness raising campaign on the issues of violence against minors.

³⁹ M.G.C. v. Romania.

⁴⁰ Judgment of the Supreme Court of Georgia on case № 433AP-22, *ibid*. It turned out to be impossible to conduct an investigative experiment due to the repairs carried out in the apartment and the replacement of the partitions of the rooms indicated in the testimony of the victim.

⁴¹ See *Field N., Katz C.*, *The Experiences and Perceptions of Sexually Abused Children as Participants in the Legal Process: Key Conclusions from a Scoping Literature Review, Trauma, Violence and Abuse*, 2022.

⁴² 15 and 16 of Article 3 of the Juvenile Justice Code.

⁴³ Juvenile Justice Code, Departments of the Parliament of Georgia, 3708-II, 12/06/2015.

⁴⁴ See Parts 15 and 16 of Article 3 of the Juvenile Justice Code.

psychologist and the witness and victim coordinator⁴⁵ in the proceedings, taking into account the best interests of the minor; at all stages of the proceedings provide minors (regardless of their status) with information in a form appropriate to their development; if necessary – the use of the services of an interpreter free of charge; the right to be accompanied by a legal/procedural representative (including the obligation to remove a legal representative), consular assistance;⁴⁶ proceedings by a person specialised in juvenile justice;⁴⁷ the involvement of a social worker and a psychologist etc..

However, the JJ Code does not establish the principle of immutability of persons. Moreover, although it specifies the purpose of the psychologist's involvement,⁴⁸ it does not clearly distinguish between the functions and role of the psychologist and the social worker; it does not determine the form of their involvement and their rights and obligations. Therefore, it is important that the court clearly defines the role of the psychologist, his/her rights and duties and the form of his/her involvement and takes into account his/her comments/recommendations; provides minor witness/victim with the help of the same social worker/psychologist at all stages of the proceedings.

As the juvenile finds the trial the most difficult examination, especially when facing the accused,⁴⁹ alike international acts, Articles 24 and 52 of the JJC in order to prevent re-victimisation and secondary victimisation of minors, establish, on the one hand, procedural safeguards for the questioning and interrogation of minors and the use of protective measures, including – remote questioning of the victim during a court session without the victim being physically present in the courtroom,⁵⁰ using devices altering minor's image/sound; interrogation of minor under the conditions of removal of the defendant from the courtroom; interrogation and video recording of the interrogation with the participation of the accused's lawyer behind an opaque screen or before the court session; audio-video recording of the questioning/interrogation of minors in cases of sexual violence and showing this recording in the court session instead of re-interrogating the minor⁵¹ and accepting these recordings as admissible evidence;⁵² However, there is no provision for submitting the testimony in written form to the competent officer.

⁴⁵ For the coordinator's rights, see JJC Article 23, Section 7-71. Meanwhile, on the one hand, Article 29 connects the issue of the coordinator's participation in the court session to the desire of the minor witness/victim, and parts 4-5 of Article 23 to the involvement of the coordinator – the decision of the prosecutor/investigator, which is made based on the interests of the minor witness/victim. Regardless of wish – therefore, the minor witness/victim and his legal representative have the right to refuse to cooperate with the coordinator, but cannot request his removal (and not avoidance) from the criminal case (JJC, Art.23, para 6; CPC Article 52, paras 8-9).

⁴⁶ Part 2 of Article 15 of the Juvenile Justice Code.

⁴⁷ Ibid. Articles 17-21.

⁴⁸ Ibid. 1 para of Article 23.

⁴⁹ See *S.N. v. Sweden*, №34209/96, [2002], ECHR.

⁵⁰ See UN CRC, General comment № 13 (2011), *Ibid.*, 54-56; Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 17.11.2010, Council of Europe, 2011; ECOSOC Resolution 2005/20 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

⁵¹ Para 3, Article 52 of the Juvenile Justice Code.

⁵² *X. and Others v Bulgaria*, 214.

3.1. The Right to be Heard by the Court

Although the JJC (Article 10, Par. 1) grants a person in conflict with the law the right to be heard, this right is not explicitly stated for a minor victim. According to the Committee on the Rights of the Child, a child can form an opinion at a young age, even if he or she cannot express it verbally.⁵³ According to General Comment № 12, minor victims and witnesses should be given the opportunity to freely express their opinions and views during the court proceedings.⁵⁴ To this end, they should be provided with the explanation of the rights and guarantees provided by the legislation, the role and importance of the minor victim/witness, the process of questioning the minor (methods, course) and other issues important to the criminal process. An incomplete/incorrect interpretation of rights may render major incriminating evidence inadmissible and jeopardise the fulfilment of the state's positive obligation.⁵⁵

The right to be heard enshrined in the Convention and the definition of the rights of minors refer to the practical implementation of support mechanisms in the participation of minors in investigations and judicial proceedings – including the involvement of relevant professionals (e.g. psychologists), coordinators, representatives,⁵⁶ the appropriateness of the time and place of the hearing, the method of questioning with the best interests of the minor in mind, communicating with the minor in a simple manner and in a language the juvenile uses and understands; taking into account the individual characteristics of the minor (including limited abilities) that may affect the minor's ability to perceive or communicate,⁵⁷ availability of effective protection measures, remedies and redress mechanisms.⁵⁸

At the same time, the right to be heard includes not only the right of the minor to provide information, but also the possibility for the juvenile to choose the manner in which he or she testifies⁵⁹. In the case of sexual violence, this means the choice of the right by the minor victim, including the form of expression – directly or through an intermediary.⁶⁰

In the adversarial proceedings where the parties decide what evidence and arguments will be presented to the court and what will be the major question for discussion – the main task of the judge is to provide the parties with such an opportunity,⁶¹ according to the CPC, participation of the victim in criminal proceedings depends upon: 1. Request/ motion of the defence/prosecution side to question the

⁵³ UN CRC, General Comment №12 (2009): the Right of the Child to be Heard, CRC/C/GC/12, 20/07/2009, 20.

⁵⁴ Ibid, 62-64.

⁵⁵ See, for example, R.B. v. Estonia, 83. A procedural error in the interrogation of a minor victim and later the court's "rigid" application of procedural law in assessing the admissibility of said evidence resulted in an acquittal; see Also G.U. v. Turkey, 73.

⁵⁶ ECOSOC/RES/2005, Article 21.

⁵⁷ Directive №2012/29/EU, Article 3(2).

⁵⁸ See UN CRC, General Comment №12 (2009): the Right of the Child to be Heard, CRC/C/GC/12, 1/07/2009, 63-64.

⁵⁹ ECOSOC/RES/2005/20, Article 21 (b).

⁶⁰ E.g., Lanzarote Convention, Article 31 (1c).

⁶¹ See Decision of the Constitutional Court of Georgia of September 29, 2015 № 3/1/608,609 on the constitutional submission of the Supreme Court of Georgia, II-15.

victim; 2. use of the right enshrined by the article 57 of the CPC to give a testimony concerning the damage he/she has incurred as a result of the crime or submit, in writing, that information to the court.

The “quality” of the victim's participation in the criminal proceedings depends largely on the parties, because under procedural law the victim does not have the right to obtain evidence (e.g. interviewing the victim, carrying out investigative/procedural activities with his/her participation – taking samples, conducting investigative experiments, scientific examination, seizure or withdrawal of computer data of a minor victim or the computer equipment belonging to him/her), the right to present important information for the criminal proceedings and to request its use as evidence.

Although the CPC grants the victim the right to provide the court with information on the damage suffered, at his or her own discretion, regardless of the parties' opinion on the necessity of questioning the victim in court and filing a motion to that effect, the question arises as to the scope of the information provided to the court in exercising this right and the possibility of using it to justify the judgment. In particular, Article 57 of the CPC clearly delimits the scope of issues on which the victim has the possibility to address the court directly and provide information regardless of the will of the parties. In particular, subsection “d” of the first part of Article 57 links the use of the aforementioned right only to the damage suffered and not to other circumstances that are important for the case, as well as does not define possibility of introducing evidence to the court by the victim even in such case where the mentioned information corresponds to criteria of relevance and authenticity.

4. Rights of the Minor Witness/Victim v. the Right of the Accused to a Fair Trial

Although the legislation provides, on the one hand, for the victim's right to refuse to testify and, on the other hand, for the State's obligation to ensure justice regardless of the victim's degree of involvement and desire to participate in the proceedings, particular importance is attached to the victim's testimony, as this category of offences is not usually characterised by an abundance of witnesses/evidence. Information and evidence provided by a minor should not be considered less reliable or ineffective because of his or her age;⁶² Similarly, the simplified rules that procedural law provides for the testimony of a minor (including, for example, the absence of the obligation to take an oath or equivalent statement; procedural measures adapted to the juvenile) should not in themselves diminish the evidentiary weight of the juvenile's testimony.⁶³

At the same time, objective and subjective circumstances should be taken into account when assessing the victim's testimony in order to eliminate the risk of victim manipulation of the justice system and unjustified conviction of the person, as well as the risk of secondary and re-victimisation of the victim.

*“Sexual offences involve considerable difficulties for the victim, especially if he or she is to be confronted accused against his or her will.”*⁶⁴ It is therefore necessary to ensure that juvenile victims

⁶² See Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 30-31, 64-74; For example, the decision of the Criminal Chamber of the Supreme Court of Georgia on March 2, 2022 in case № 925AP-21 (testimony of the 5-year-old victim).

⁶³ Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 70.

⁶⁴ S.N. v Sweden, 47.

testify in the most comfortable environment possible, taking into account their age, maturity, level of perception and communication difficulties, so that they can testify during the trial in the most appropriate and relevant conditions.⁶⁵ This includes the victim's right to testify under condition of removal of accused from the courtroom; use of audio-visual recordings of a minor's testimony⁶⁶ as evidence, to be questioned in court without being present in the courtroom – through using communication technologies.

At the same time, the implementation of measures to protect minor victims must not prejudice the right of the accused to an effective defence⁶⁷ and therefore to a fair trial,⁶⁸ which in cases in the said category is primarily related to the possibility of questioning witnesses.⁶⁹ The European Court takes into account the nature and gravity of the offence, the social stigma attached to the conviction of a person in the said category of offences⁷⁰ and the consequences of a conviction.⁷¹ Therefore, it is not permissible to grant minors such rights, which violate the conventional rights of the accused.⁷² At the same time, in view of the difficulties involved in the investigation and the vulnerability of the victims, the European Court sets a somewhat lower procedural standard⁷³ (in connection with the questioning of minor victims and witnesses), however, applies strict approach to cases when defendant lack an opportunity to challenge the testimony of the minor victim or to cross-examine the victim at all.⁷⁴ But even in this case, the fairness of the proceedings as a whole is assessed, not just the existence of the opportunity to question the victim – there is no absolute need for the defence to question the victim if the defence had the opportunity to challenge the legality and/or truthfulness of part of the

⁶⁵ Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 64.

⁶⁶ See, Lanzarote Convention, Article 35 (2).

⁶⁷ Kovac v Croatia, №503/05, [2007], ECHR.

⁶⁸ See C-105/03, Maria Pupino [2005] ECR I-5285, 53, 59; C-507/10, X., [2011], ECR

⁶⁹ W.S. v. Poland, №21508/02, [2007], ECHR – Non-interrogation of the victim by the prosecutor during the entire proceedings is a violation; A.S. v. Finland, № 40156/07, [2010], ECHR – the main and only incriminating evidence of the guilty verdict was the video recording of the victim's testimony; Ruban and Others v. Spain (dec.), № 41640/04, [2005], ECHR – National courts were given more flexibility in granting the defense the opportunity to cross-examine the victim in sex crime cases.

⁷⁰ For example, see Šubinski v. Slovenia, № 19611/04, [2007], ECHR; Sánchez Cárdenas v. Norway, № 12148/03, [2007], ECHR – Social stigmatization violated the right under Article 8 of the Convention; B.B. v. France, № 5335/06, [2009], ECHR – Database entry of sex offenders does not violate Article 8; Gardel v. France, № 16428/05, [2009], ECHR – Detention of convicted sex offenders is a “preventive measure” and not a punishment.

⁷¹ Similar to the Lanzarote Convention, the Law of Georgia “On Combating Crimes Against Sexual Freedom and Inviolability” (Departments of the Parliament of Georgia, 57-II, 17/03/2020) provides for: mandatory/possibility of deprivation of a wide range of rights along with the basic punishment (Article 3); to store the personal data (conviction, dactyloscopy and other identifying data) of the convicted person in the register of persons convicted and deprived of their rights for committing crimes against sexual freedom and inviolability (Article 8); Criminal liability for non-compliance with imposed restrictions (deprivation of rights) by the convict (paragraph 3 of Article 5).

⁷² Jendrowiak v Germany, №30060/04, 14/04/2011, ECtHR, 37.

⁷³ The absence of the opportunity to directly interrogate the victim does not violate the right to sentencing guaranteed by Article 6. e.g. Magnusson v. Sweden, № 53972/00, [2003], ECHR; S.N. v. Sweden.

⁷⁴ See P.S. v Germany, №33900/96, [2001], ECHR; R.B. v. Estonia, 95.

incriminating evidence.⁷⁵ However, the use of video recordings of the interrogation of minors requires special care and attention.⁷⁶ The right to a fair trial is violated when a minor witness/victim is questioned in court without the participation of the defence side, the accused/defence side did not have the opportunity to rebut this testimony at any stage of the proceedings, the court merely pointed out at the trial that the victim was questioned before the judge and the said victim's testimony became the sole and main basis of the conviction.

4.1. Sufficiency of the Evidence for a Conviction

The Georgian Criminal Procedure Code provides for the same standard of proof for a guilty verdict regardless of the category and nature of the offence and stipulates that a guilty verdict may only be based on a set of consistent, clear and convincing evidence, proving a person's guilt beyond reasonable doubt (para.2, Article 13 and para 3, Article 82 of the CPC), that the guilty verdict must be based only on unequivocal evidence, and that any doubts that cannot be proved in accordance with the law must be decided in favour of the accused (convicted person).⁷⁷

Since *“the accused may not be charged with a crime until it is proven by sufficient and convincing evidence that every element of the crime was present in his or her act”*⁷⁸ according to the CPC the guilty verdict may not be based on circumstantial / indirect evidence and only one direct evidence (the victim's testimony). When assessing the sufficiency of evidence to support a guilty verdict, the court takes into account the diversity of sources of information, as a factual plurality of evidence derived from the same main source does not constitute a legal plurality of evidence.⁷⁹ Although procedural law does not prescribe how much evidence is required for a conviction, according to the well-established case law, at least two direct incriminating evidence is necessary for conviction.⁸⁰ This does not include hearsay, as the use of hearsay to support a conviction is only permissible in exceptional cases under the conditions of clear legal regulation and adequate

⁷⁵ Vanhatalo v Finland, №22692/93, [1995], ECHR.

⁷⁶ See S.N. v Sweden. The main and practically the only direct incriminating evidence of the conviction was the testimony of the minor victim published at the trial. The minor was interrogated twice by an investigator with appropriate qualifications and experience, and video recording of the first interrogation was carried out, and audio recording of the second interrogation (the lawyer of the accused was not present at the second interrogation). The first and second instance courts examined the videotape of the first interrogation in its entirety, and the second interrogation tape was examined in the district court. The victim was not questioned directly at the court session, but the defense had the opportunity to challenge the victim's testimony, which is why the proceedings as a whole complied with the requirements of a fair trial.

⁷⁷ See the Judgment of the Criminal Chamber of the Supreme Court of Georgia dated July 21, 2022 in case № 575AP-22.

⁷⁸ Decision № 1/1/548 of the Constitutional Court of Georgia dated January 22, 2015 “Georgian citizen Zurab Mikadze against the Parliament of Georgia”, II-41-43.

⁷⁹ For example, the victim's testimony and the victim's own investigative experiment or restraining order represent information obtained from a single source.

⁸⁰ Verdicts of the Criminal Chamber of the Supreme Court of Georgia № 251AP-16, 26/07/2016 and № 453AP-15, 9/02/2016.

constitutional guarantees, and not as a general rule set out in the the Criminal Procedure Code⁸¹. Accordingly, each and every evidence in a criminal case must be evaluated in terms of both its' connection to the subject of proof, as well as to the source of the information, and only the part of the testimony that is direct may be used for conviction, regardless of whether the testimony, as a whole, is direct or circumstantial.⁸² When evaluating the testimony of medical personnel/doctors, experts, psychologists, the court shall take into account both the standard set out in Article 82 of the CPC and their connection with the source of information, and shall use only the part of the testimony in which the aforementioned persons state what they themselves saw/examined/heard (in person) to justify a guilty verdict.

Under the above-mentioned conditions and the latent nature of sexual violence, in many cases the absence of obvious, visible or measurable traces (e.g. crimes foreseen by the Articles 140-141 of the Criminal Code of Georgia), the testimony of a minor victim/witness is often of crucial importance. The use of the victim's and witness's testimony in criminal proceedings is associated with several problematic issues: assessment of the truthfulness of the victim's testimony and the possibility of using it for a conviction; change of the testimony; refusal to testify and the sufficiency of other evidence in the case to support a guilty verdict.

4.2. Evaluation of the Testimony of a Minor Witness/Victim

When evaluating the testimony of a minor victim, the court takes into account, on the one hand, the special vulnerability of juvenile victims of offences against sexual freedom and integrity⁸³ and psychological factors⁸⁴, characteristics that explain the victim's hesitation, both in giving information about the violent act and in describing the facts of the case⁸⁵ and, on the other hand, the circumstance, that testimonies of witnesses, and even more so of victims, always contain a component of subjectivism, which, taking into account age and individual abilities and/or attitudes, may have a different impact on the witness's ability to objectively perceive, remember and pass on information important to the case, as well as – being related to subjective circumstances (e.g. fear of telling the truth), protection of another person, bias towards the victim/accused, influence/impact on minors (e.g. persuasion, the importance of relatives' opinion for the child, fear of parents, etc.). Therefore, the court examines the nature of the relationship between the minor victim/witness and the defendant/accused, the influence of the minor's relatives (family members) on the minor, and the motives that may lead the minor to testify or refuse to testify, how correctly the minor perceives or reproduces the circumstances related to the offence and to what extent he or she was able to perceive the criminal nature of the offence committed⁸⁶, the consistency of the content of the statements of the minor

⁸¹ Decision № 1/1/548 of the Constitutional Court of Georgia dated January 22, 2015 “Georgian citizen Zurab Mikadze against the Parliament of Georgia”, II-37-52.

⁸² See Verdict № 97AP-20, 14/07/2020 and Verdict № 575AP-22, 21/07/2022 of the Chamber of Criminal Affairs of the Supreme Court of Georgia.

⁸³ Z v. Bulgaria, 69.

⁸⁴ M. and C. v. Romania, №29032/04, [2011], ECHR, 115-117, 119.

⁸⁵ C.A.S. and C.S. v. Romania, №26692/05, [2012], ECHR, §81; M.C. v. Bulgaria, 183.

⁸⁶ Judgment № 356AP-21 of the Criminal Chamber of the Supreme Court of Georgia dated August 31, 2021.

victim/witness, – how uniformly they present the same circumstances that are crucial to the case – including the information given by them at the stages of the investigation and trial (e.g. time of the offence, location, parties involved and the actions they took),⁸⁷ The comprehensiveness and consistency of the account given at the different stages of the proceedings (investigation and court), – as well as when communicating with family members, relatives, social workers and psychologists.⁸⁸ Therefore, when assessing the truthfulness of a minor's testimony, in addition to checking the content of the testimony in accordance with the evidence in the case and the existence of a biased attitude of the minor, the conclusion of the forensic psychological examination and the testimony of the expert should be taken into account, including the correlation of the juvenile's thinking and attention, the level of depression and anxiety during the examination, coefficient of reliability of the victim, expert's definition of the main factors causing the minor's character change,⁸⁹ on mental development and the adequacy of the information provided (level of detailing and lexical aspects) for his age, the ability to store in memory and then reproduce what he has seen, the persuasiveness of the non-verbal expression (e.g. the way of speaking, non-inertia, the feeling of embarrassment when it comes to certain details).⁹⁰

In assessing the reliability and truthfulness of the testimony, both the concluding and the descriptive-motivational parts of scientific examination report, the methodology used, the extent and completeness of the examined information and the difficulties encountered in the process of examination are relevant.

For example, when evaluating the testimony of a 9-year-old victim, the court took into account that the victim described all the details convincingly and logically, although he had emotional moments during the testimony, could not be fully coherent and focused on the details of a different kind, described the sexual acts against him completely and clearly, every episode, answered the questions with convincing accuracy, there was no room for his interpretation of the facts, which would be unbelievable for a child his age at his developmental level;⁹¹ the testimony of his friend – a minor witness – about the mental-motional state of the victim during the crime.

There is a violation of the requirements of the European Convention if the court changes the qualification of the complaint or pronounces an acquittal just because the evidence presented does not prove that the applicant did not consent to sexual intercourse; there are no traces of violence on the applicant's body. The question of the presence of traces of injury should not be given too much importance because, on the one hand, a criminal offence can also be committed without physical violence – by psychologically influencing the victim (e.g. threats, conviction of the habitual nature of

⁸⁷ See Decisions of the Chamber of Criminal Affairs of the Supreme Court of Georgia: № 550AP-21, 21/12/2020 and № 459AP-21, 2/11/2021.

⁸⁸ Ruling № 459AP-21 of the Criminal Chamber of the Supreme Court of Georgia.

⁸⁹ See For example, the ruling of the Criminal Chamber of the Supreme Court of Georgia of October 3, 2022 № 685AP-22.

⁹⁰ See *M.M.B. v. Slovakia*, 70; Rulings of the Criminal Chamber of the Supreme Court of Georgia № 513AP-21 and № 356AP-21. The conviction was also based on the testimony of a minor; Verdict № 854AP-20.

⁹¹ See Judgment of November 2, 2022 of the Criminal Chamber of the Supreme Court of Georgia on case № 459AP-21 and judgment on case № 856AP-20.

the act, persuasion); on the other hand, the absence of traces of injury at the opening of the case can be caused by the victim's late notification of the criminal offence.⁹²

The victim's behaviour before and after the offence should also be carefully examined. For example, it is not permissible to justify an acquittal by referring to the provocative behaviour of the victim and the victim's repeated visits to the same place after the commission of the offence.⁹³

4.3. Forensic-psychological Expert Opinion to Determine the Truthfulness of Witness Statements

When using the expert opinion of a forensic psychological examination, it is important to ensure the infallibility of the expert opinion – the exclusion of manipulation of the expert by the minor and/or errors in the examination report. The infallibility of the expert report is problematic, on the one hand, if there are two contradictory conclusions in the criminal case and, on the other hand, in connection with the methods of investigation used. Therefore, in determining the probative value of the conclusion, the reliability of the method used and the completeness of the research, the significance of the research material, the experience of the expert and the agreement between the conclusions of the expert and the psychologist should be taken into account,⁹⁴ as well as to what extent are the circumstances, mentioned in the conclusion, confirmed by other evidence in the criminal case (e.g. changes in behaviour after the accident, the history of the victim's treatment in the psychosocial and medical rehabilitation centre and the testimony of his attending physician), etc.

If there are several forensic psychological conclusions in a criminal case, each of which points to a different result, these conclusions cannot be mutually exclusive if a similar/same guiding methodology was used in both psychological examinations, but the examinations were conducted under substantially different conditions, the experts and the subject differed in terms of the scope and quality of the information obtained during the clinical interview. For example, if in the first case the process of interviewing the victim was uninformative for answering the questions posed to the expert (the victim did not talk to the expert and left the questions unanswered, hence it could not be managed

⁹² For example, the ruling of the Criminal Chamber of the Supreme Court of Georgia on case № 433AP-22 of June 28, 2022. The victim reported the crime against him under Article 137 of the Civil Code of Georgia 1 year after the incident.

⁹³ For example, in the case of *M.G.C. v. In Romania* (cited above), the national court changed the qualification of the act – finding the accused guilty of sexual intercourse with a minor but not of rape. In establishing the acquittal verdict in the case of rape, the court indicated that the victim did not tell her parents about the violence and after the crime she went to the place where the crime (rape) was committed – to the neighbor's house – to play. The court did not take into account the victim's age and the expert opinion, according to which the victim had post-traumatic stress; Due to his youth, he could not understand the consequences of his actions; Age and vulnerability have conditioned his attitude towards violence. The European Court found a violation of Articles 3 and 8 of the Convention, since the national court's approach violated the positive obligation of the state to effectively use the criminal justice system to punish all forms of sexual violence and rape against children. The court explained that the approach of the national courts – not sharing the position of the victim when the victim was unable to provide evidence of physical violence in the case of rape charges – the standard of proof does not correspond to the factual circumstances related to the rape victims and indicates the ineffectiveness of the appeal.

⁹⁴ See Establishment of the Criminal Chamber of the Supreme Court of Georgia in case № 685AP-22.

to gather objective data through expertise and assess psycho-emotional condition of the victim in relation to the emerged situation, the victim was emotional, unreliable, confused and inconsistent before the end of examination),⁹⁵ whereas in the second case – the investigation material was sufficient to draw a categorical conclusion.

4.4. Alteration of Testimony and Refusal to Testify by a Minor

The CPC provides for public prosecution for all categories of offences, the initiation and termination of which is not dependent on the victim's wishes (continues even if the victim reconciles with the defendant and changes the statement in favour of the defendant). When the minor victim/witness changes the statement in favour of the defendant/ accused or refuses to testify, it may result in an acquittal unless other direct incriminating evidence is found in the criminal case to support a conviction. In particular, if:

1. a minor victim/witness cooperates with the investigating authority during the investigation phase, but refuses to testify in court⁹⁶ – in such a case, the main problem is the possibility to use the expert's opinion and to reach a guilty verdict based on it.

According to the Principle of *in dubio pro reo*, when the only and/or main incriminating evidence is the conclusion of the psychological examination and the minor witness/victim refuses to testify in court, the use of the expert opinion to support a guilty verdict is not allowed because the expert opinion is based on the information given by the minor to the expert and the truthfulness of it can't be verified as the defence did not have the opportunity to challenge the reliability of the information given by the minor victim/witness at the investigation stage.

In order to prevent secondary and re-victimisation and to protect the most important potentially incriminating evidence, it is important (in cases in the above mentioned category) to ensure from the very beginning the interrogation of the minor, the audio and video recording of the interrogation and the examination of the said recording during the court hearing.

2. in some cases the position of the minor is contradictory – the minor changes his position several times with regard to both the fact of the crime and the subject who committed the crime, pointing to different objective/subjective circumstances as the reason for the change of position.⁹⁷ In such cases, it is questionable whether the testimony meets the standard of reliability.

A minor's refusal to testify at the hearing in court or to substantially deny or change the statements he or she made at the investigation stage is not a reason for the court to uphold the statement made at the investigation stage, even if the credibility of the original statement is confirmed by part of the evidence collected in the criminal case, because according to the Article 3 of the CPC

⁹⁵ Judgment of the Criminal Chamber of the Supreme Court of Georgia N 683ap-22, October 3, 2022

⁹⁶ Refusal can be caused by a feeling of shame, dependence on the abuser, bullying by the abuser of the victim/her family members, the desire of the victim's parents to avoid the negative attitude and stigma of society, etc. see Guide for Parliamentarians, Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Abuse (Lanzarote Convention), Parliamentary Assembly of the Council of Europe, 2013, 15.

⁹⁷ See Decision of the Criminal Chamber of the Supreme Court of Georgia dated November 16, 2021 on case № 467AP-21.

testimony of a witness is information on the circumstances of a criminal case provided by a witness *to a court*.

At a court hearing the publication of substantially different statements of the same witnesses, made during investigation, only serves impeachment of the witness.

The court assesses how coherent the statements made at the different stages of the proceedings (during questioning and interrogation) are in relation to the main issue, how important changes are in relation to the main issue of the evidence and the reasons for the changes, and how well the statements made are consistent with the statements made by other witnesses in the criminal case.

Thus, the minor's refusal to testify or changing his testimony in favour of conviction in the absence of other direct incriminating evidence results in acquittal under the principle of “*in dubio pro reo*”, as the Georgian Criminal Procedure Code does not provide for the possibility of establishing a guilty verdict only on the basis of indirect evidence (regardless of its number), including – on the basis of the victim's deviant behaviour, changed mood (locked in his mind, suicidal, etc.) or other circumstantial evidence. At the same time, it becomes problematic to use the result of the forensic psychological examination as the main direct incriminating evidence for the purposes of sentencing.

5. Conclusion

To prevent re-victimisation and secondary victimisation of minors, to reduce the threats of influence to change or refuse a minor's testimony and to preserve the probative value of a minor's testimony for the purposes of the administration of justice, procedural legislation, including Article 52 of the JJC, should preferably provide that the minor victims and witnesses, in cases of sexual violence against minors, should not be interrogated by the investigating authority and should be questioned before a magistrate not only in the cases prescribed by para 1 Art. 52, but in each and every case when minor witness/victim express willingness to cooperate with the investigation and give testimony (therefore a new subparagraph should be added to the part 1 Art 114 of the CPC stating: “e) juvenile witness/victim in the case of a crime under Chapter XXII of the Criminal Code of Georgia”).

The study of the case law confirms that when minors are cross-examined in court, the defence uses aggressive tactics which, together with the excitement of being questioned in court, make an additional stressful environment for minors, regardless of whether the minor attends the hearing from a distance or is present in the courtroom. In some cases, this is not followed by an appropriate response from the court, and psychologists' comments often refer to a request to rephrase the questions/take a break. It is therefore important to proactively involve the court in the interrogation process to prevent a hostile environment for minors; pinpoint audio-video interrogation with the purpose to investigate recording at the court hearing and consider possibility of re-interrogation of the minor only in case of necessity to additionally clear up or specify questions having essential significance for the case.

Taking into account the specifics of the mentioned category of cases, the possibility of using hearsay as an exception, based on a thorough examination of the admissibility of the testimony and the necessity of its use by the court in accordance with the standard set by the Constitutional Court of

Georgia – on the basis of clearly defined and detailed procedural standards, respecting appropriate procedural safeguards – is increasingly discussed.

Given the limited rights granted to the victim by the procedural legislation, it is important to consider the minor's right to be heard and have his or her views taken into account not only for persons in conflict with the law but also for the minor victim (the minor victim's right to compensation is directly related to the nature of the judgment).

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