

Paedophile registry, pro et contra

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Sažetak

U ovom radu, autor analizira argumente za i protiv registra pedofila kao instituta u svijetu i kao instituta koji je u Republici Hrvatskoj 01. siječnja 2013. stupio na snagu putem Zakona o pravnim posljedicama osude, kaznene evidencije i rehabilitacije. Kao temelj rasprave u radu, uzeta je temeljna funkcija države, koja služi kao kriterij opravdanosti različitih vrsta registra pedofila koje autor izlaže u radu. Kao glavni *pro* i *contra* argument, pojavljuju se načelo razmjernosti, pravo na privatnost, pravo na pristup informacijama, podaci o tamnoj brojci i recidi vizmu počinitelja kaznenih djela na štetu djece. Nadalje, rad obrađuje delikatnu problematiku instituta rehabilitacije u ovoj tematici. Na kraju članka, posebna je pozornost poklonjena poredbenom pravu i Konvenciji Vijeća Europe o zaštiti djece od seksualnog iskorištavanja i seksualnog zlostavljanja.

Ključne riječi: kaznena evidencija, načelo razmjernosti, recidivizam, informacijska privatnost, pravo na pristup informacijama

1. Introduction

Does the Republic of Croatia need to have a paedophile registry? A concrete question needs a simple answer that has only two letters. At first sight the subject matter may seem to be simple, not complicated, and easily comprehensible. However, when we notice that an answer consisting of just 2 letters may be „yes” or „no”, *i.e.*, it can take two opposite directions, we have to find a justification for our, seemingly simple, answer. For the beginning, we have to find out what „*paedophilia*” is in terms of positive Croatian criminal law. The justification of (not) establishing paedophile registry could consist of values debate that seeks answers from political philosophy and raises the question: „*what is the basic function of the state?*” The answers to the fundamental question: „*why was the state constituted and what for?*” could give us important theoretical justification for establishing paedophile registry.

Prof. Bogdan Zlatarić was right when he described criminal law dogmatism with the saying: *theoria sine praxi - rota sine axi* (the theory without practice is like a wagon without wheels) because such a theory loses a contact with reality and life necessities.¹ Due to the aforementioned, we have to deal with criminology and take a look at potential effects

¹ P. NOVOSELEC, Opći dio kaznenog prava, Zagreb, 2009, page 23.

of paedophile registry regarding the general and special prevention against the doer *i.e.*, the impact of the paedophile registry to the protection of the society, and parallel with this, psychological and sociological science should be advised in order to consider the consequences of stigmatization and labelling of the perpetrator. Labelling theory may often serve as an argument for discussion but we always have to bear in mind the real scope and impact of the labelling theory in a particular case. It is important to take into account qualitative and quantitative differences between the open, half-open and closed paedophile registry and their effects on the improvement of the protection of the society, *i.e.* children as well as on the violation of human rights of the convicted perpetrators.

Although sociology requires of us to be sceptical when we take over solutions from abroad, rarely do even similar states have equal sociological, historical, cultural, moral and legislative characteristics. Therefore I deem that comparative method is needed when studying the relevant knowledge of other states. Having that in mind, paedophile registries from the USA and UK will have their due attention in this paper.

At the end, the European Court of Human Rights and its case-law will show us which method in the current European practice regarding sex perpetrator registry got a good mark, whereas the 2007 European Council Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse gave us guidelines for theoretical compiling of the paedophile registry.

The Republic of Croatia has a noble and justified goal - the improvement of the protection of children but it should ensure that its means are justified and in accordance with modern accomplishments of democratic societies.

2. Definition of paedophilia

Let us start *ab ovo* - from the definition of the term „*paedophile*”, *i. e.*, paedophilia. Paedophilia can be defined as a sexual intercourse between an adult person and a child. According to the Croatian Criminal Act, the „*child*” is a person under the age of 18.² In Criminal Law one form of paedophilia is child pornography and the other is child prostitution. Although our Criminal Act does not mention paedophilia explicitly, it incriminates sexual abuse of a child under the age of 15 and sexual abuse of a child older than 15, *i.e.*, sexual intercourse or equivalent sexual acts on a child and lewd acts with the child.³ Previous⁴ Criminal Act regulated „*sexual intercourse with the child*” as a criminal offence,⁵ which will be mentioned because of statistics and legal continuity with new criminal offences. Sexual intercourse with the child or equivalent sexual acts are incriminated regardless of the consent of the child, and the confirmation for that is given by the Supreme Court of the Republic of Croatia in the Decision I Kž-662/03 of 30th October 2003: „*it is not disputable that the victim was at the beginning only 10 years of age, that he received money from the accused, and that he himself was taking it after the accused satisfied himself, and that the victim, in order to take the money, initiated the intercourse himself, although for him it was ugly, disgusting, and traumatic since the initiative or the consent of the child for the sexual intercourse does not affect the existence of the criminal offence. In fact, just because children are not fully matured psychically or physically, they cannot give resistance nor*

² Croatian Criminal Act, NN 125/11, 144/12 (hereinafter: CA, NN 125/11, 144/12), art. 87, p. 7.

³ CA, NN 125/11, 144/12, art. 158 and art. 159.

⁴ „*Previous*” Croatian Criminal Act that is mentioned in certain parts of the paper is Croatian Criminal Act, NN 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07 i 152/08 which was in effect until 1st of January, 2013, when the „*new*” Croatian Criminal Act (NN 125/11, 144/12) came into effect.

⁵ Croatian Criminal Act, NN 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07 and 152/08, art. 192.

comprehend the meaning of sexual freedom and unwanted sexual intercourse, the legislator offered special protection through criminal law repression to this population that is a frequent target of sexual violence."⁶

Criminal Act also incriminates sexual intercourse or equivalent sexual act if they come from the abuse of position or authority with the use of force or threat, fraud, his/her status or relationship towards a juvenile who is entrusted to him/her for education, upbringing, custody or care. These are qualified forms of child abuse younger and older than 15 years of age for which more severe punishments are prescribed. These qualified forms of criminal offence come into the category of special criminal offences (*delicta propria*) since the perpetrator can only be the person to whom the child was entrusted for education, upbringing, custody or care. In other words, such an act cannot be committed by anybody - in order to accomplish the features of a criminal offence, there should be a certain feature of the perpetrator that makes the constituent element of the criminal offence.⁷ E.g. from case law of 14th May 1963 we can see in the court decision of the Supreme Court of the Republic of Croatia, Kž-1221/63: "*When a mother entrusts the care and upbringing of her minor female child under 14 years of age, and after that age, to her extramarital partner who takes care of a child as if he was a step father – the extramarital partner in such circumstances and in such position could become a perpetrator of a criminal offence of sexual intercourse by abuse of trust.*"⁸ Moreover, Croatian Criminal Act incriminates a lewd act committed toward the child, inducing a child to commit such acts with another person or lewd acts committed upon oneself or abuse of children or juveniles in pornography or pornographic shows, introducing children with pornography.⁹

Professor Emeritus Dr. Sc. Uroš Dujšin said in one of his lectures: "*Do you know which science evolves fastest and most efficiently? - Crime!*" The law may be slow to respond to modern challenges but it always tries to respond to new questions. Computer crime poses great problem today and therefore Croatian Criminal Act incriminates introducing pornography to children, not only through sale, donation, showing, and public exhibiting but also by means of computer system, network, storage medium for computer data or by other means with which pictures, audiovisual material or other objects of a pornographic nature are made available or if the child is shown a pornographic show.¹⁰ More detailed explanation of this criminal offence can be seen in the Decision of the Supreme Court of the Republic of Croatia I Kž-923/05 of 28th December 2005: "*criminal offence of introducing pornography to children from Article 197, paragraph 1. of Criminal Act is a criminal offence against morality from international criminal law, sanctioned according to international documents on preventing and repressing children and juveniles pornography, according to 1923 International Convention for the Suppression of and Traffic in Obscene Publications and Convention on the Rights of the Child of 1989, whereas a criminal act of lewd acts from Article 193, p. 2 of the Criminal Act, as well as the criminal offence of sexual intercourse with the child from Article 192, p. 1 of the Criminal Act – present criminal offences with which freedom of decision in sexual life by juvenile abuse.*"¹¹

We can see from the Criminal Act that committing the criminal offence of incest can be a form of paedophilia, whereas for the protection of children from paedophilia, i.e. sexual exploitation and prostitution, the Criminal Act foresees incrimination of slavery and human trafficking.¹²

⁶ A. GARAČIĆ, Kazneni zakon u sudskoj praksi, posebni dio, Zagreb, 2006, page 228.

⁷ P. NOVOSELEC, Posebni dio kaznenog prava, Zagreb, 2011, page 165.

⁸ A. GARAČIĆ, *ibid.*, page 226.

⁹ M. VIDAKOVIĆ MUKIĆ, Opći pravni rječnik, Zagreb, 2007, page 773.

¹⁰ CA, NN 125/11, 144/12, art. 165.

¹¹ A. GARAČIĆ, *ibid.*, page 249.

¹² CA, NN 125/11, 144/12, art. 105. and 106.

When the majority of people is mentioned the word „*paedophilia*” they would think of what the previous Croatian Criminal Act defines as a „*sexual intercourse with the child*”, and the new Croatian Criminal Act as a „*sexual abuse of a child*”, but by further analysis of the Criminal Act and by defining the notion of paedophilia we showed that the notion of paedophilia is much broader term than that of a layman’s understanding.

3. Praxis sine theoria – caecus in via (practice without theory is like a blind man on the road)¹³

Before we start discussing the justification of a concrete decision of the state and the ways of its implementation, we have to ask ourselves why the state was established and what is its fundamental function and according to this we should make a value judgement whether the state has the right and/or duty to implement paedophile registry and in which ways to apply it.

We are acquainted with the works of Rousseau, Hobbes and Locke, each of them in his own way contributed to the theory on social contract and an answer to the question why the state was established and what is its use. „*Man is born free; and everywhere he is in chains. How did this change come about? What can make it legitimate?*”¹⁴ This is a sentence at the beginning of „*Social Contract*” by J.J. Rousseau.

3.1. Why people live in the state?

In order to reply to Rousseau and understand better the sense of the state, we have to come back to the hypothetical, original „*state of nature*”.¹⁵ State of nature is a state where each individual has unlimited freedom and there is no state to forcefully make boundaries to his freedom. State of nature is a state without the state, without organized community, without the authorities, law, rules of the game, code of conduct, without obligations and duties. In that state there is no police, schools, work or shops... At first sight natural state is a perfect state, freedom is absolute, and the nuisance from others is minimal. Unfortunately, this medal has two sides, the other side of the story reveals that it is not as nice as it seems. Although there is no law in a formal sense, there is only one law – the law of the stronger one. Therefore the freedom of the individual depends directly on strong muscles and fast feet. In a state of nature bigger fish eat smaller one.¹⁶ The problem with the natural state arises when two persons wish the same thing, at that moment they become enemies, and without the organized state they don’t have a neutral and objective arbitrator to adjudicate and settle their disputes. Hobbes describes such state of nature in a pessimistic way: „.... *in such condition there is no place for industry, because the fruit thereof is uncertain, and consequently no culture of the earth, no navigation nor use of the commodities that may be imported by sea, no commodious building, no instruments of moving and removing such things as require much force, no knowledge of the face of the earth; no account of time, no arts, no letters, no society, and, which is worst of all, continual fear and danger of violent death, and the life of man solitary, poor, nasty, brutish, and short*”.¹⁷

On the other hand, John Locke deems that in a natural state there is a „*natural law*” that obligates all individuals to limit their own freedom so that they do not threaten the

¹³ P. NOVOSELEC, Opći dio kaznenog prava, ibid., page 23.

¹⁴ J. J. ROUSSEAU, Origin and Foundation of the Inequality of Mankind & Social Contract, London 1978, page 94

¹⁵ J. LOCKE, Two Treatises of Government, London, 1993, § 95.

¹⁶ T. REŠKOVAC, Vrlo kratki uvod u političku filozofiju – nastavni materijal za Ljetnu školu demokracije Hrvatskog debatnog društva, Zagreb, 2005, page 9.

¹⁷ T. HOBBS, Leviathan, Harmondsworth, 1968, page 186.

other and his „*property*“. For Locke the „*property*“ contains four rights. These are: right to live, freedom, unlimited acquisition of property and the right to „*condemn and punish*“ each attacker who dares to threaten our first three basic rights. However, the problem is that in the natural state, there is not one mechanism of coercion, the mechanism of respecting our „*ownership*“, therefore the fourth right to „*condemn and punish*“ could be neglected if the attacker is stronger than we are. Since the life in the natural state is equivalent to anarchy being unbearable, short and hard, some people have given up their fourth right to „*condemn and punish*“ anyone who threatens and/or derogates their rights and have given it to a third party that is neutral and objective; to the state.

However, we are only halfway. We have answered to the question why we established the state but we have not answered what the state serves for, what its function is and is there a justification for (not) establishing paedophile registry.

3.2. Fundamental function of the state

The fundamental function of the state, as mentioned above, is the protection of „*property*“ but what it stands for and what it comprises? The right to live, it is obvious. Maximization of ownership is a term that evolves continuously; so at the end of the 20th century the property has been extended to „*intellectual property*“, unfortunately, the more detailed explanation of the evolution of the terms of ownership and property go beyond the scope of this paper. The main issue of this paper is what is exactly right to freedom? Justice of the Supreme Court of the United States Oliver Wendell Holmes once said in the courtroom: „*the right to swing my fist ends where the other man's nose begins*“.¹⁸ We may add that our right to wave with our hands freely, ends at our and (or) someone else's nose. We conclude that the role of the state is to set up limitations to our freedom, and these limitations end at the point where the freedom of the other starts or where we inflict damage to ourselves.

The right to freedom has a broad spectrum of concrete, different, derived rights such as right to personality, freedom of movement, freedom of religion, freedom of speech, and the rest of the first generation of human rights and some rights from the second generation. For us, the most relevant right for this discussion regarding establishment of paedophile registry is right to privacy, or, as Justice of the Supreme Court in Michigan Thomas M. Cooley said: „*the right to be let alone*“.¹⁹ The right to privacy is manifested in various ways, so in the report of the *Privacy International* there is a difference between information privacy, communication privacy, physical and spatial privacy. In such division *information privacy* includes setting up the rules of management, selection and usage of personal data such as: *e.g.*, loan or health information; *privacy policy* refers to physical protection of a person from various procedures such as drug testing or searching; *communications privacy* refers to security and privacy of mail, e-mail and other means of communications; whereas *spatial privacy* refers to defining the borders of illicit access to family or other environment (*e.g.*, public or work place). Roger Clarke has added *media privacy* that comprises various aspects of human behaviour particularly the sensitive ones as sexual orientation and habits, political activities, religious customs, in man's private as well as public life.²⁰

We may conclude that the fundamental function of the state is the improvement of the protection of „*property*“, *i.e.*, of human rights owing to which we established the state but sometimes it may mean protection from threats to freedom coming from the state itself, *i.e.*, the minimization of the state intervention in order to ensure the maximization of the

¹⁸ Available at: <http://www.wellofwisdom.com/liberty/0/quotes-cat.html> (15.04.2012.)

¹⁹ S. WARREN; L. D. BRANDEIS, *The right to privacy*, Harvard, 1890, page 145.

²⁰ D. DRAGIČEVIĆ, *Privatnost u virtualnom svijetu*, Zbornik Pravnog fakulteta u Zagrebu, Zagreb, no. 3-4, 2001, 51, page 620.

freedom of the individual. In the „*natural state*” the biggest challenge was how to ensure the protection of life, freedom and property of the individual by other individuals, whereas in „*the state*”, the biggest challenge is how to ensure the protection of the individual from the state, even if it restricts the authority and the power of the state for the purpose of broadening the space of individual freedom.

In the discussion regarding establishment of paedophile registry, there are two values. On the one hand there is a value of improving the protection of the society's *security*, in this concrete case – the protection of children. On the other hand, we have the right to *freedom* that goes hand in hand with the dignity of the individual. The dilemma between freedom and security is a frequent one for the state. This is also the dilemma whether the states should be more repressive, *id est* should it give more authority to the police or not.

I believe that in the discussion of establishing paedophile registry, we need to bear two things in mind: a) the justification of the means with which we wish to reach our goals, and b) will our goal be attained. I do not agree with Machiavelli who advocates the concept: „*the end justifies the means*”²¹, because I deem that the unjustified means may be harmful to the same extent as the good coming from the attained legitimate goal.

4. Types of paedophile registry

There are three types of paedophile registry - closed, open, and half-open. Openness is measured by the amount and the type of people that are authorized to access criminal records. We will start our analysis with the closed paedophile registry.

4.1. Closed paedophile registry

Only national authorities, such as the police, The Office of the Public Prosecutor, the Court and the social welfare centre have access to the closed paedophile registry. When discussing this type of registry, the term national authority needs to be interpreted with great amount of restriction. Main advantages of the closed paedophile registry are: minimized violation of rights of privacy of convicted persons and precluded possibility of their public lynch after the served sentence. Some would argue that the main disadvantage of that system is its inability to prevent convicted criminals from repeating the same criminal offence. People who are afraid of recidivists base their arguments on the private person's inability to find out if their neighbour is a convicted paedophile or not, employer's inability to find out if their potential employee for a child-related job is a convicted paedophile or not. Thanks to that or not, *in status quo*, the closed paedophile registry is the least popular type of registry in comparative law.

4.2. Open paedophile registry

In the U.S. there is the most open type of paedophile registry. The characteristics of the paedophile registry vary from state to state, so for example information from the paedophile registry of federal state of Florida, *i.e.*, perpetrator's personal data such as name and surname, his picture, *etc.*, together with the qualification of a „*sexual predator*”, are available to anyone over the Internet. On the other hand, the data from the paedophile registry of federal state of Indiana contains the full address of the perpetrator's residence. If you intend to visit a former criminal offence perpetrator of sexual abuse of a child younger than 15, you may, with a few clicks, find the map on the Internet that shows where the perpetrator

²¹ N. MACHIAVELLI, Vladoar, Ljubljana, 1998, page 19.

lives and how to arrive to his place.²² Unfortunately, the power of Internet and the access to information is being misused in the worst possible way. People are in panic and out of merciless revenge they take justice in their own hands and use brutal force towards perpetrators. 35 days after the convicted perpetrator Michael A. Dodele was released from jail, sheriff deputies found him dead in his house. He was killed by the man who was a parent, and the reason for the murder was „*a wish to protect my child*“.²³ Unfortunately, there are many similar examples in the U.S.²⁴

The open type of a paedophile registry is a system in which the entire public has the right of access to information that are to be found in the registry, and most often they end up in the Internet or even state bodies release the information on their official web pages. The U.S. has shown clearly why the open type of a paedophile registry seriously violates human rights and does not fulfil the fundamental function of the state. Taking justice into one's hands has to be banished by the state and not stimulated by publishing information such as name, surname, picture, address of residence, *etc.* With such doings, the state directly jeopardizes the right to life of the perpetrator. The state tries to justify itself with general and special prevention of the future perpetrators, instead of arguing the efficiency of the registry and its effects on the decrease of the recidivism. We may conclude in an ironical way that the state at the end reaches the goal of special prevention. That is, we can be sure that the already mentioned Michael A. Dodele will not be tempted to harm a child because he is not among the living. If this is the true intention of the U.S., why they don't have death penalty for perpetrators of criminal offences against children? Moreover, even if there is no lawful killing of the perpetrator, some rightly call it: „*conditional freedom in a prison without walls*“!²⁵

It is hard to „*proceed to another chapter*“, when all of the neighbourhood knows your past sins and it is difficult to expect any kind of social integration when nobody wishes to socialize with such a person, especially not in public. The problem of reintegration in this case is even bigger, since it is the case of special perpetrators and a specific criminal that in most cases causes the fury of the society, greater than that for instance of a simple theft. The possibilities of an employment (not only in the institutions such as kindergarten or schools) are minimal, if not none. All of this brings out suffering, social withdrawal, and resignation of the former perpetrators. The worst blows to the dignity of the perpetrator come from federal courts themselves. For example, a man who had admitted molesting a boy, Leroy Schad from a small town in Kansas was under judge's order to post signs around his house and a decal on his car proclaiming: „*sex perpetrator*“.²⁶ Even worse example is, when during the Halloween night, it is obligatory for the registered paedophile to put the sign: „*There are no treats in this house*“.²⁷ Although at first sight, the sign could seem funny, I believe that the sex perpetrators who „*paid their debt to society*“ do not see anything funny in the fact that the society put a demonizing label to their home, the label whose meaning everyone knows. Although such acts by the state are not closely connected to paedophile

²² Paedophile registry of Indiana, <http://www.city-data.com/so/so-French-Lick-Indiana.html> (16.04.2012.)

²³ News in a daily newspaper, <http://art.s.latimes.com/2007/dec/10/local/me-molester10> (17.04.2012.)

²⁴ Available at: http://www.cbsnews.com/8301-201_162-57413451/2-men-killed-at-registered-nh-sex-perpetrators-home/ (19.04.2012.)

²⁵ D. DERENČINOVIĆ; A. M. GETOŠ; M. DRAGIČEVIĆ PRTENJAČA, Uvjjetna sloboda u zatvoru bez zidova - kaznenopravna i kriminološka analiza zahtjeva za „*liberalizacijom*“ pristupa kaznenoj evidenciji, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, vol. 15, no. 2/2008, page 1007.-1045.

²⁶ M. MUCIĆ, Sud mu naredio da postavi znak "Ovdje živi pedofil", <http://www.24sata.hr/crna-kronika-news/sud-mu-naredio-da-postavi-znak-ovdje-zivi-pedofil-55478>, (30.04.2012.)

²⁷ "There are no treats in this house" - obvezan natpis na domovima registriranih pedofila na Noć vještica, <http://www.index.hr/vijesti/clanak/u-ovoj-kuci-nema-slatkisa--obavezan-natpis-na-domovima-registriranih-pedofila-na-noc-vjestica/406109.aspx> (12.07.2012.)

registry, they are a good indicator of potential consequences of not obeying rights to privacy of child abuse perpetrators.

Last year, there was even one step further in violation of the right to privacy and jeopardizing of former sex perpetrators. The new act in the U.S. federal state Louisiana that came into effect in on 1st August 2012, stipulates that sex perpetrators are obligated to put forward his convictions and sexual deviations on social network such as Facebook, Twitter and similar. In addition to the fact that they are sexual perpetrators, in Louisiana they are obligated by law to put description, photo and their home address and a copy of the judgement on the social network.²⁸

I believe that Louisiana seriously violates its fundamental function: protection of human rights and the right to life which is *per se* the most fundamental human right. In general, with the open paedophile registry, the state unjustifiably threatens to violate right to life of the person who has already „paid their debt to society” in prison. Moreover, the state is inconsistent, and, instead of sending a message to its citizens to ensure the rule of law and fair proceedings for the perpetrators, it stimulates lawlessness and private justice. I conclude that open type of paedophile registry is not a justified means with which the protection of society is secured and it should not come into consideration in any state that obeys the rule of law, respects human rights, and fulfilment of its fundamental function.

4.3. Half - open paedophile registry

The practice of the USA is a good example of an open paedophile registry. In the half-open type of paedophile registry, under specified conditions, it is extended to persons that are referred by these data or to the interested third, natural or legal persons.²⁹ For our discussion the most interesting one is the half-open type of paedophile registry because on 1st of January 2013 in the Republic of Croatia the Act on Legal Consequences of Conviction, on Criminal Record and Rehabilitation (hereinafter: ALCCRR) came into effect.³⁰ The Act regulates legal consequences of conviction, organisation, management, availability, presentment and deleting data from criminal record and international data exchange from criminal records and rehabilitation. The stated reason for drafting the Act was „former under-regulation”,³¹ which means that the proposal of the legal profession³² has been adopted - to regulate this matter by law and not with bylaws as it has been until now. Moreover, the new Act brought the necessary implementation of the Council of Europe’s Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse from 2007 that the Republic of Croatia ratified in 2011 as well as the regulation of the rules on international data exchange from criminal records and the usage of ECRIS³³ system of information exchange with the European Union member states.³⁴

„Croatian paedophile registry will not be published openly but all relevant bodies will have access to it: Office of the Public Prosecutor of the Republic of Croatia, police, courts, as well as all institutions and bodies whose work is related to children”, explained the

²⁸ Available at: <http://edition.cnn.com/2012/06/20/tech/louisiana-sex-perpetrators-social-media/>, (15.07.2012.)

²⁹ D. DERENČINOVIĆ; A. M. GETOŠ; M. DRAGIČEVIĆ PRTENJAČA, Uvjetna sloboda u zatvoru bez zidova – kaznenopravna i kriminološka analiza zahtjeva za „liberalizacijom” pristupa kaznenoj evidenciji, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, vol. 15, no. 2/2008, page 1009.

³⁰ Croatian Act on Legal Consequences of Conviction, on Criminal Record and Rehabilitation, NN 143/12 (hereinafter: ALCCRR)

³¹ Available at: <http://www.mprh.hr/konacni-prijedlog-zakona-o-pravnim-posljedicama-os?dm=2>, (01.02.2013.)

³² D. DERENČINOVIĆ; A. M. GETOŠ; M. DRAGIČEVIĆ PRTENJAČA, *ibid.*, page 1041.

³³ European Criminal Records Information System

³⁴ Available at: <http://www.vecernji.hr/vijesti/ustanovama-koje-rade-djecom-uvjed-registar-pedofila-clanak-384793> (10.09.2012.)

Minister of Justice Orsat Miljenić on 19th July 2012 – the date when the Government sent the draft proposal of the ALCCRR to parliament procedure.³⁵ In other words, there will be a direct and an indirect access to the paedophile registry. When the criminal prosecution commences against an individual, the Ministry of Justice will provide the Office of the Public Prosecutor and the Court with direct access to the data contained in the criminal records.³⁶ Due to prevention, detection and prosecution of criminal offences, direct access to data regarding persons convicted with a judgment with final force and effect will be granted to the police and the Office of the Public Prosecutor.³⁷

Pertinent to the new law, the indirect access will be used during job applications, because certain jobs will require a confirmation that a person is not in the registry of convicted paedophiles.³⁸ The Ministry will issue two certificates – general and particular one. Whereas the general certificate is the one in which the whole criminal record of a person is written, particular certificate, *i.e.*, confirmation gives only specified criminal offences. To say it simply, national authorities that need such certificates for various administrative proceedings (application for citizenship, weapon license *etc.*) could obtain general certificate, and a particular one is left for other cases. Employers from schools, kindergartens, children clinical hospitals and similar institutions can receive special certificates regarding the candidates for the job, but data will be given only in relation to criminal offences against sexual freedom and sexual morality, that is against children.³⁹ This new act brought an exception to the rule that no one has a right to demand citizens to prove their non-conviction. In the described case, the employer can, with consent from the person for whom the data is being asked for, require the national authority to issue a particular certificate regarding data from the criminal record.⁴⁰

An argument for giving the authorization to employers dealing with children is the right to know about their future employee. Today there is fewer and fewer information that employers are allowed to ask potential employees during job interviews. Although it is right not to ask female candidates about the potential pregnancy as well as disabling other examples of direct or indirect and potential discriminations, it could be argued that in this case the employers should have the right to know delicate information closely related to job description. The employers who are looking for an employee who will work with children full time should have the right to know if the potential employee has previously been convicted for criminal offence of child abuse. I justify the wish to know with the risk of taking a concrete employee for a job. Many people will say that recidivism is not necessary, but it is also not necessary that the employer rejects a better qualified person who has already „paid their debt to society” and who has been rehabilitated psychosocially.

Even if we think that chances are minimal for the former sex perpetrator to become recidivists, we have to bear in mind that employers are looking for the best, most qualified and most diligent person. In case that a person does not commit equal criminal offence, and has a sincere wish and intention not to make the same criminal act, will that person be equally psychically stable, concentrated, calm and sure in himself/herself as well as the person who has not committed any criminal sex offence at the expenses of a child?

³⁵ Available at: [http://www.hrt.hr/index.php?id=48&tx_ttnews\[tt_news\]=173743&tx_ttnews\[backPid\]=38&cHash=c74d03e039](http://www.hrt.hr/index.php?id=48&tx_ttnews[tt_news]=173743&tx_ttnews[backPid]=38&cHash=c74d03e039) (11.09.2012.)

³⁶ ALCCRR, art. 9, p. 1.

³⁷ ALCCRR, art. 9, p. 2.

³⁸ Available at: <http://www.roditejski.info/magazin/2012/07/osudeni-pedofili-vise-nece-moci-raditi-s-djecom/> (10.10.2012.)

³⁹ ALCCRR, art. 13, p. 4.

⁴⁰ ALCCRR, art. 14.

We can make an analogy with the employers of taxi drivers who are for example owners of a private company: „*Fast and Safe Transport*“, and say that they should have the right to know if their potential employee has been convicted for criminal offences and traffic violations against traffic safety since skilfulness and traffic safety is the essence of taxi driving business and it is in the interest of the company to employ the best and the most reliable taxi driver. Performance and psychical stability of a driver is most important for them, not only because of possibility to increase profit and offer better service but to avoid the responsibility for the accident and potential indemnification of the damage that person can cause again.

5. Clash of arguments

The following chapter's motto is - every medal has two sides. It will concentrate on a variety of direct clashes of arguments from both sides regarding the labelling theory, the right to accesses of information, dark figure, recidivism and rehabilitation.

5.1. Labelling theory

Arguments against employer's authorization for access to the data from the paedophile registry can be found in the Labelling theory by the sociologist David Matza⁴¹ who would condemn the records of former sex perpetrators even in the form of half-open paedophile registry whose right to access would be given to employers of certain institutions and firms. According to his theory, this would be classified as „*marking out*“ of the perpetrator, and such marking comes after „*affinity*“ and „*affiliation*“ and makes third and the final phase in achieving „*the carrier of the criminal*“. Stigmatization, labelling, and marking out... Regardless of which term we use, the result will always be the same: social rejection of the perpetrator as a deviant person which leads to his being asocial, non-integrated and alienated. Alienation and social isolation results in his internalization of the values of the deviant subculture. In other words, if there are records of the former perpetrators of children sex abuse and the access to them has a headmaster of a school, there is small chance or none for such a person to get a job in that or any other school. Unfortunately, the problem is not only economic, but psychological and sociological one, because the perpetrator, after being rejected by the community, finds himself in depression and in the „*vicious cycle of self-defeating behaviour*“ which is only one step away from the so-called recidivism.⁴² Therefore we may conclude that chances for recidivism can be even bigger if there is a (half-open) paedophile registry resulting in labelling.

Opponents of the (half-open) paedophile registry conclude that the registry does not accomplish its goal – special prevention and improvement of the protection of the safety of the society, but, it, unfortunately, brings more harm than good. With such argumentation, the intention is to prove that the half-open paedophile registry (the right to whose access have also certain employers) is in fact a „*double-edged sword*“.

Contrary to this, the proponents of the half-open paedophile registry deny the argumentation of the labelling theory because it applies only when employers are in the institutions or companies that have direct contact with children. We have to bear in mind that not all of child abuse perpetrators work or have worked in kindergartens, schools, play houses, *etc.* Even if most of former sex perpetrators worked in such institutions, it does not mean that they could not get a job in some other type of institution or have another kind of job. The

⁴¹ J. KREGAR; D. SEKULIĆ; S. RAVLIĆ; K. GRUBIŠIĆ, *Uvod u sociologiju*, Zagreb, 2008, page 350 and 351

⁴² D. DERENČINOVIĆ; A. M. GETOŠ; M. DRAGIČEVIĆ PRTENJAČA, *ibid.*, page 1031.

advantage of the half-open paedophile registry is in the fact that broader public does not have an access to the data which it contains nor other employers who do not have direct contact with children do not have access to these data (e.g. the owners of restaurants who are looking for waiters and cooks, owners of shops who need shop assistants, salesmen, workers in storages, etc.). In other words, the scope of forbidden and difficult chances to find a job for former sex perpetrators has been reduced to jobs related to the work with children and thus the damage resulting from the logic of labelling theory is being minimized.

5.2. The right of access to information

The formulation: „*the right of access to information*” has been used in this and in other papers dealing with the same topic.⁴³ I deem that those arguments that include the right of access to information should be discussed before we start a deeper analysis of statistical research on the recidivism of child sex perpetrators, dark figure for these criminal offences and the efficiency of paedophile registry in special and general prevention. Homeland defenders registry and paedophile registry are two different things at first sight but they have similarities. Of course, *differentia specifica* is in the fact that the „defenders” are honourable and glorified people who fought in the Homeland War to defend their country, whereas „paedophiles” are perpetrators of criminal offences against children incriminated by the Criminal Act. My intention is not to equalize „defenders” with „paedophiles” but to point out the similarities between the two registries and the arguments that (do not) justify them. Both registries intend to protect certain values of the Croatian society. Defenders registry wishes to keep the dignity and the honour of the persons who took an active part in the defence of the Republic of Croatia, to express respect and financially help only those persons that really took an active part in the Homeland War, and to deny privileges to those persons who did not earn them in a justifiable way. It can be said that the defenders registry wishes to keep values from the past: the respect and glorifying the persons and remembrances of „*the victory of the Croatian nation and Croatia’s defenders in the just, legitimate and defensive war of liberation, the Homeland War (1991-1995), wherein the Croatian nation demonstrated its resolve and readiness to establish and preserve the Republic of Croatia as an independent and autonomous, sovereign and democratic state*”.⁴⁴

On the other hand, the paedophile registry is directed to the protection of children and their well-being, i.e., its goal is general and special prevention. Although the paedophile registry is more future oriented, and the defenders registry is past oriented, their common argument against each of them is the violation of privacy of personal data. Such violation has been regulated by The Act on Personal Data Protection that stipulates the following in Article 1: „*The purpose of personal data protection is to protect the privacy of individuals, as well as other human rights and fundamental freedoms in the collecting, processing and use of personal data. The protection of personal data in the Republic of Croatia has been ensured for every natural person irrespective of his/her citizenship or place of residence, and regardless of race, skin colour, sex, language, religion, political or other convictions, national or social background, property, birth, education, social standing or other characteristics.*”⁴⁵ The opponents of the registry as a general phenomenon refer to the protection of personal data and in this way, the protection of personality, private life and dignity. For them, all or most of personal data should remain secret. The proponents of the half-open paedophile registry could argument that the violation of the protection of personal

⁴³ E. g. D. DERENČINOVIĆ; A. M. GETOŠ; M. DRAGIČEVIĆ PRTENJAČA, *ibid.*, page 1032.

⁴⁴ Constitution of the Republic of Croatia, NN 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, Historical foundations

⁴⁵ Croatian Act on Personal Data Protection, NN 103/03, 118/06, 41/08, 130/11, 106/12, art. 1.

data is minimal because only a limited number of people has an access to it, and that the criminal records are considered as a official secret and whoever spreads the information will be prosecuted.

According to the ALCCRR, the paedophile registry will have the following data: name and surname, birth surname, personal identification number, name and surname of the mother and father, birth surname of the mother, date, place and state of birth, citizenship, residence, address of residence, and for the legal person: the company *i.e.*, the full name of the legal person, headquarters and identification number, data of the verdict, criminal offence and criminal conviction, changes of the verdict.⁴⁶ I agree with the argument regarding the protection of personal data, but I deem that certain rights may and should be sacrificed in certain circumstances in order to achieve „*the higher goal and common good*”.

Everybody thinks that the right to freedom is a value that we all need to protect, but the majority of us agree that it is justifiable to restrict this very freedom when the state prescribes the following: „*the driver and the passengers who are driving in a motor vehicle seated in the seats with in-built safety belts are obligated to use them in a way proposed by the manufacturer*”.⁴⁷ The obligatory use of safety belts in traffic is a classical example of the sacrifice, *i.e.*, of the restriction of a right (*to freedom*) for „*the higher goal and common good*” (*safety*). Moreover, even the principle of the protection of personal data has evident exceptions that sacrifice and limit this right in the name of „*the higher goal and common good*”. The Croatian Identity Card Act contains the Article that stipulates: „*A person older than 16 year of age that has a residence in the Republic of Croatia is obligated to have an identity card*”.⁴⁸ Without this restriction of the right to protect personal data, life in the Republic of Croatia would be unthinkable, and particularly the police would have great difficulties in identification of its citizens and their obedience of the law and order of the Republic of Croatia.

My argument refers to the fact that not one right should be either absolute or unrestricted. The Constitution of the Republic of Croatia opens up the possibility for the restriction of freedom and rights only under the condition of satisfying the principle of proportionality contained in the general provision of Article 16 paragraph 2 which stipulates: „*any restriction of freedoms or rights shall be proportionate to the nature of the need to do so in each individual case*”. Constitutional theory deems that principle of proportionality obliges the legislator to pass three tests which he needs to fulfil by cumulation if he wants to enact measures or actions that restrict somebody’s rights and freedoms, and if they are not fulfilled, this enacted act cannot be deemed compatible with other constitutionally protected rights and it cannot represent a legitimate barrier between the fundamental right or citizen’s freedom and the power of the national authority to restrict it. These tests are: suitability, necessity, proportionality *stricto sensu*.⁴⁹ Suitability of a certain action, measure or an act is measured by its capability to achieve its goal in a satisfactory amount. An act can pass the necessity test if the measure is necessary to achieve the legitimate aim, which means in particular that no alternative and less intrusive measures are available, and it can fulfil the test of proportionality *stricto sensu* when the severity and nature of restriction of certain right is in balance with the achieved legitimate aim.⁵⁰

I believe that it is justified to restrict certain rights if that restriction is suitable and necessary to lead to a „*higher goal and greater good*”, and if there is a balance between

⁴⁶ ALCCRR, art. 6.

⁴⁷ Croatian Road Traffic Safety Act, NN 67/08, 48/10, 74/11, art. 163.

⁴⁸ Croatian Identity Card Act, NN 11/02, 122/02, 31/06, art. 3.

⁴⁹ Cf. S. RODIN, Pravo na slobodno razvijanje osobnosti u njemačkom ustavnom pravu, Zbornik Pravnog fakulteta u Zagrebu, 1-2/1997, 47, page 141.

⁵⁰ Cf. RODIN, *ibid.*

the severity of the restriction of rights and the achieved good. Therefore, I deem that it is justifiable to restrict certain rights if these restrictions necessarily result in „*the higher goal and common good*“. Therefore, I deem that it is justified to restrict the right to protection of personal data, private life, personality and dignity, if, and only if, it results in „*the higher goal and common good*“. We find similar logic in Article 8 of Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms: „*right to respect for private and family life: Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*“.⁵¹ It is evident that sex perpetrator's rights to privacy, guaranteed by the Convention, are being violated, but the Council of Europe leaves the possibility to sacrifice this right for the sake of protection of „*the higher goal and common good*“. For this discussion, the most important justification for the sacrifice of the right to privacy is „*the prevention of crime, the protection of morals, and the protection of the rights and freedoms of others*“, but we have to bear in mind that justification for sacrificing the right to privacy is allowed only if it „*is necessary in a democratic society*“.

Deeper analysis of the statistics of the dark figure and recidivism of perpetrators of criminal offences will give us an answer to the question whether the half-open paedophile registry passes the suitability test, that is leads to „*the higher goal and common good*“, in this case – to the protection of children from sex perpetrators and if it passes the necessity test, *i.e.* it is „*necessary in a democratic society*“.

5.3. Dark figure and the recidivism

Proponents of the paedophile registry should assess how many criminal sex offences against children are reported in the Republic of Croatia, and how many are left unreported, *id est* how large is the so-called *dark figure* so that we can argue the efficiency of the register, *eo ipso* its capacity to achieve its purpose - protection of children. Unfortunately, a large number of criminal sex offences remain unreported and thus unpunished, and the reasons for these are: fear of children, ignorance, inability, threats, and the fact that very often the perpetrators are members of the family. Crime researches formed a possible ratio of reported and unreported sex criminal offences against children and it show us that the percentage of unreported offences ranges from 83% to 95%.⁵² Gordana Buljan Flander, PhD, a psychologist and psychotherapist specialised in the field of child psychology, and Director of the Child Protection Centre of Zagreb, said that even when we would have paedophile registry, it would contain only 10% or real perpetrators, whereas 90% of cases would be left unreported because they happen within the family. According to the statistics, even 25% of the girls and 16% of the boys have undergone some kind of sexual abuse.⁵³ Such a large dark figure, *i.e.*, the percentage of unreported sex offences brings into question the purpose of the special prevention against the perpetrator. The paedophile registry, with all of its advantages and shortcomings, would refer to just 5% to 17% of the total number of sex perpetrators. When we try to define what the social benefit of the (half-open) paedophile registry is, on one hand we have the violation of the right to information privacy through the violation of the protection of personal data, manifestation of the labelling theory

⁵¹ European Convention on Human Rights and Fundamental Freedoms, art. 8; available at: http://www.echr.coe.int/ECHR/Homepage_EN, (15.11.2012.)

⁵² D. DERENČINOVIĆ; A. M. GETOŠ; M. DRAGIČEVIĆ PRTENJAČA, page 1029.

⁵³ Available at: <http://david-udruga.hr/novosti/bez-komentara/2010/02/14/971/>, (29.11.2012.)

and stigmatization, whereas on the other hand, there is a paedophile registry containing only 5-17% of actual perpetrators. We conclude that the paedophile registry does not fulfil its goal of protecting the safety of children in the extent that we could justify sacrificing other human rights, *eo ipso* it does not pass the suitability test.

A small number of perpetrators in the paedophile registry gives the public false sense of security, and this presents a problem from an individual and a collective perspective. In such a way, a parent will be even more disappointed when his/her child unexpectedly experiences traumatic event caused by a paedophile. I conclude that the individuals in our society are wrong if they think that all problems related to paedophilia are solved by one incomplete paedophile registry. The problem in a collective false feeling of security is not only in individual disappointment, but also in the lack of the public initiative for the pressure on national authorities to come out with more effective solutions regarding paedophilia.

Main argument of the proponents of (half-open) paedophile registry is special prevention and general prevention indirectly. In order to justify their arguments, the proponents should prove high or higher than usual rate of recidivism in a concrete sex offence for instance sexual intercourse with a child, because the higher the rate of recidivism, greater the need for more efficient mechanisms of special prevention and the more convincing their argumentation will be for justification of the paedophile registry. Statistical data for the year 2007 in the Republic of Croatia points out that an average rate of recidivism amounts to 26%, whereas for the concrete criminal offence of the sexual intercourse with the child, the general rate of recidivism is 21%,⁵⁴ and according to the data of the Ministry of the Interior, there are 853 reported perpetrators of criminal offences against sexual freedom and sexual morality against children while only 15 of them returned to criminal behaviour which is only 1.7% of the rate of general recidivism.⁵⁵

Croatian Bureau of Statistics shows us that the average rate of general recidivism in the year 2009 was 28.3%, in 2010 29.6%, and in 2011 it was 33.9%.⁵⁶ However, for this discussion the most important information is the average rate of general recidivism for the identical or similar criminal offences, and not for all criminal offences, because we are interested in the degree of possibility that a perpetrator will iterate his crime at the expense of children, and not the possibility of general iteration of criminal behaviour by persons that were once convicted for sexual offences at children's expense. Average rate of general recidivism for identical or similar criminal offences in the year 2009 was just 5.9%, in the year 2010 6.6%, and in 2011 6.3%. Rate of recidivism is even smaller when we look at the specific statistics regarding the adult perpetrators of criminal offences against sexual freedom and sexual morality, and their previous conviction for identical or similar criminal offences. In year 2009 the rate was an insignificant 2.6%, in 2010 3.64%, and in the year 2011 a very slight 1.8%. I must emphasize that the results of the Croatian Bureau of Statistics unfortunately do not show how much of criminal offences against sexual freedom and sexual morality were targeted against children, whereby we cannot determine the exact rate of recidivism of perpetrators of criminal offences aimed at children, but we can see general recidivism regarding that type of criminal offences, no matter the age of the victim. Laymen frequently associate the word „*paedophilia*” exclusively with something that the previous Croatian Criminal Act called „*sexual intercourse with a child*”, and the new Croati-

⁵⁴ D. DERENČINOVIĆ; A. M. GETOŠ; M. DRAGIČEVIĆ PRTENJAČA, *ibid.*, page 1031.

⁵⁵ Available at: <http://www.dijete.hr/>, (12.12.2012.)

⁵⁶ Croatian Bureau of Statistics, Adult perpetrators of criminal offences, reports, accusations and convictions in 2009, Statistical reports, Zagreb, 2010, no. 1421.

Croatian Bureau of Statistics, Adult perpetrators of criminal offences, reports, accusations and convictions in 2010, Statistical reports, Zagreb, 2011, no. 1451.

Croatian Bureau of Statistics, Adult perpetrators of criminal offences, reports, accusations and convictions in 2011, Statistical reports, Zagreb, 2012, no. 1478.

an Criminal Act „*sexual abuse of a child*“. Recidivism rate for that criminal offence in the last year with available data is 16.6%, although that number is bigger than the recidivism rate from the scope of all criminal offences that belong to the XIV chapter of the old Croatian Criminal Code, called „*criminal offences against sexual freedom and sexual morality*“, that is still more than two times less than the average general recidivism rate in the Republic of Croatia which was 33.9% in year 2011.

Criminological researches have shown several times that the previous conviction for a criminal offence is not the most reliable predictor of future delinquent behaviour.⁵⁷ Due to the abovementioned detailed statistics, the arguments of the proponents of the paedophile registry lose their significance because the rate of recidivism is not high, not even higher than a usual one or an average one, it is even below average, and therefore we cannot help but to ask ourselves in what amount would the paedophile registry fulfil its goal, when already in status quo the recidivism rate is very low, and since it brings broad restrictions to rights and freedoms, can it pass the proportionality test *stricto sensu*.

Unfortunately, in Croatian media another and a false picture is being presented. In the following text we can see a good example from a daily newspaper with the title: „*Sex perpetrators are mostly recidivists*“: „*According to the available statistics, sex perpetrators against children are most often recidivists and are very often responsible not for just one but for several sex offences against one or more children. This tells us that there is a high risk of repeating a similar criminal offence just because the self-control is not possible due to the distorted libido and a danger for children after the perpetrator served a prison sentence. Very often after that, they search for the possibilities or are looking for a job related to children which leads them to great temptation and increases the risk to repeat the abuse of children, they travel a lot, find new destinations where they will be close to their victims in order to satisfy their sexual urge and sometimes they unite in groups so that they can exchange data, experiences, inform themselves how to reach new victims or to avoid the possibility of being caught.*“⁵⁸ Frankly, the text is in conflict with the reality. It is in no way possible to justify the thesis that the perpetrators are mostly recidivists, when official statistics shows that the maximum rate of general recidivism is 21%. It could be said that „*one swallow does not make a spring*“, but unfortunately there are many similar texts and disinformation and they result in futile public discussions on paedophile registry backed up by the citizens due to their fears, not arguments.

On the other hand, even serious and trustworthy institutions such as Parliamentary Assembly of the Council of Europe and its Committee on Legal Affairs and Human Rights state that „*sex perpetrators are thought to be amongst the most frequent recidivists*“.⁵⁹ Unfortunately, no proof in a form of researches, statistics or analysis is attached to the Council of Europe's report, so we cannot take for granted this statement since we do not know what the exact rate of general recidivism is, neither to which countries it refers to nor which method of the research was used, if the research was done at all.

If we wish to defend the sex perpetrators, we may say that it would be illusory to expect that the paedophile registry or any other legal or criminological measure would ensure the achievement of the goal, *i.e.*, the necessary protection of the security of children, their sexual freedom and sexual morality. Police and customs officers do not necessarily ensure us that they will prevent *e.g.* the smuggling of all quantities of cocaine into the territory of the Republic of Croatia, but this does not prevent us to strive towards our goals; anti-theft doors will not necessarily stop all burglars, but this will not prevent us from buying such do-

⁵⁷ D. DERENČINOVIĆ; A. M. GETOŠ; M. DRAGIČEVIĆ PRTENJAČA, *ibid.*, page 1029.

⁵⁸ Available at: <http://www.vjesnik.hr>, (27.12.2012.)

⁵⁹ Council of Europe's report „Reinforcing measures against sex perpetrators“, par. 2; available at: <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc10/edoc12243.htm>, (21.01.2013.)

ors and raise our chances in the fight against criminals. The proponents of the paedophile registry deem that the improvement of the protection of children is a valuable goal to strive to. Unfortunately, the goal cannot be reached completely, and not all children would necessarily be safe from paedophiles, but the duty and the fundamental function of the state is to do anything that is in its power in order to raise the security of children, and decrease the rate of general recidivism through various mechanisms of special and general prevention.

Against each argument there is a counter-argument, and the proponents of (half-open) paedophile registry could end the debate with the conclusion: to provide the security for children's sexual freedom and sexual morality is a valuable goal towards which we should strive. However, the opponents deem that the logic - „*the end justifies the means*” is unacceptable since the half-open paedophile registry is absolutely unjustified means that results in labelling, stigmatization of the perpetrator, violation of his privacy and his dignity. Moreover, that the protection of the security of children is achieved only to the small extent by special prevention of only those sex perpetrators that are reported and are not a part of the dark figure and those perpetrators that make below average rate of general recidivism and *de facto* does not fulfil the fundamental function of the state, does not lead to a great extent towards „*the higher goal and common good*”, and that it is not „*necessary in a democratic society*”.

The state should not give up its goal and the special prevention against perpetrators; it should find alternatives, *i.e.*, other means in achieving its goal. For example, this may mean a stronger emphasis on psycho-social rehabilitation of the sex perpetrator. A more effective rehabilitation of the perpetrator in the Republic of Croatia could be achieved by greater number of psychologists and psychiatrists who would spend adequate amount of time with former sex perpetrators. Moreover, my proposal for *de lege ferenda* is to extend the protective measure of a compulsory psycho-social treatment to criminal offences against children. In other words, the measure in *status quo* could be passed only for the perpetrator who committed a violent criminal offence if there is a danger that he will commit similar or the same act.⁶⁰ I deem that the restriction of that protective measure to violent criminal offences is not enough for the protection of society and that it should be extended to criminal offences against children which would help reducing the number of recidivists. Opponents of the (half-open) paedophile registry would say that it does not even pass the necessity test.

5.4. Rehabilitation

During the first reading of the bill, some Members of the Croatian Parliament said that rehabilitation deadlines are too short and that they should be permanent. I think that while we discuss the prolongation in the institute of rehabilitation, we have to bear in mind what is the goal of that legal instrument. The purpose of the legal rehabilitation is to facilitate social reintegration and enabling the normal life of the perpetrator after he has completed the sentence. This is necessary because the perpetrator suffers negative impact of the judgement that puts him in unequal position with other citizens so during that time he is still exposed to a significant legal degradation.⁶¹ The award in the form of rehabilitation is a motivation for good behaving after the completed sentence, but it is also one of the important ways of preventing recidivism, so it is not only relevant to the interest of an individual but of a society as well.⁶² Unfortunately, the legal order cannot ensure that after the completed sentence, the

⁶⁰ CA, NN 125/11, 144/12, art. 70.

⁶¹ Cf. B. ZLATARIĆ, *Rehabilitacija i pravne posljedice osude*, Zbornik Pravnog fakulteta u Zagrebu, Zagreb, 1960, no. 1-2, page 46.

⁶² B. ZLATARIĆ, *ibid.*

convicted person is accepted in the community, but the state should make legal presumptions for such acceptance and make it all the more possible in this way.⁶³ It has been shown that it is necessary to add other criminal law measures to the criminal justice system that would serve as its completion because they are in accordance with contemporary criminal justice concept, and, finally, because they are useful for fighting and preventing crime in general. One of those measures is rehabilitation.⁶⁴ Because of all abovementioned reasons I deem that prolongation of the time of the rehabilitation would bring more harm than good, from the perspective of the society and of the individual as well.

6. Comparative law

Since Croatia has just recently implemented a paedophile registry, we should take a look at the comparative law for valuable experiences. This chapter will show us the experiences of France and the United Kingdom as well as what the requirements of the Council of Europe are.

6.1. France and The European Court of Human Rights

European Court of Human Rights would not agree with the statement that the paedophile registry is not justified, that it does not fulfil the fundamental function of the state, does not lead towards „*the higher goal and common good*” and that it is not „*necessary in a democratic society*”. On 17th December 2009 the Court brought an interesting decision regarding the paedophile registry. The Decision of the European Court of Human Rights in cases Bouchacot versus France, Gardel versus France and M.B. versus France has shown that French paedophile registry does not violate articles 7 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 with its right to privacy has been stated already (see *supra*), and Article 7 with the title: „*no punishment without law*”⁶⁵ states: „*no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations*”.⁶⁶

Plaintiffs: Bouchardot, Gardel and M.B. were sentenced, in 1996, 2003 and 2001 respectively, to terms of imprisonment for rape of 15 year old minor by a person in a position of authority. In 2004 the Act was brought out in France with regards to establishing the national court paedophile registry and came into effect on 30 June 2005. The Act from 2004 included the data of the plaintiffs retroactively in the paedophile registry of which the plaintiffs were informed in November 2005 and February 2006. The plaintiffs deemed that with this act their rights, guaranteed by Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms in Article 7 and 8, were violated.

The court determined that being included in the paedophile registry and all other obligations (it is necessary to submit the valid address of residence and a notice on the change of address within two weeks and no later than 30 days) does not constitute „*a penalty*” within

⁶³ B, ZLATARIĆ, *ibid*.

⁶⁴ D. JAKOVLJEVIĆ, *Rehabilitacija u krivičnom pravu*, Naučna knjiga, Beograd, 1990, page 48.

⁶⁵ *lat. Nulla poena sine lege.*

⁶⁶ European Convention on Human Rights and Fundamental Freedoms, *ibid.*, art. 7.

the meaning of Article 7, paragraph 1 but they are regarded as a preventive measure to which the principle of non-retrospective legislation, as provided for in that Article, is not being applied. The court has also found out that the records in French national paedophile registry provide a just balance between the opposed private and public interests and that the French Republic does not violate Article 8 that guarantees the right to respect for private and family life. The court has concluded that the length of the data conservation (from 20 to 30 years, depending on the gravity of the criminal offence), is not disproportionate in relation to the goal it wishes to reach, *id est* the prevention of sexual offences. In favour of the paedophile registry goes the fact that the French legislation foresees an effective possibility of submitting a request for the deletion of the data when they are not necessary anymore with regards to the goal that wishes to be achieved. Due to the closed type of its paedophile registry, France has a favourable treatment by the European Court of Human Rights. The access to the French closed national paedophile registry of the 2004 Act is given only to those state institutions that are bound by strict commitment of keeping the data secret.⁶⁷ I think that it is disputable whether the impact would be identical with the half-open paedophile registry, but with the open type paedophile registry the impact would surely not be the same.

6.2. United Kingdom

In the United Kingdom criminal sex offence perpetrators are obligated to submit once a year their personal data such as name and surname, residence address, and the change of these data. The United Kingdom has a closed type of paedophile registry whose data is revealed only to the authorities of prosecution and the courts. The paedophile registry contains personal data of the perpetrators who were sentenced to more than 12 months of imprisonment and non-convicted persons who are on reasonable suspicion for criminal offence. The access to the paedophile registry is allowed to: police, judicial police, the Serious Crime Analysis Section, Child Exploitation and Online Protection Centre, border police, traffic police, probation centres and similar institutions.⁶⁸ Ministry of the Interior (Home Office) has the authority over the management of the registry and the data inside of it are classified as „*secret*“.

The processes of „*liberalization*“ of the access to criminal records and the evolution of closed type of registry to the half-open one has started in 2008 with the Criminal Justice and Immigration Act. The new Act enforces Multi-Agency Public Protection Arrangements as a responsible authority to consider every request for the access of information in the paedophile registry from a member of the general public. The access should be given only if there is a justified reason for that, *i.e.*, if there is a serious threat that the former perpetrator may harm seriously a child or children and if the giving of information to a member of the general public is absolutely necessary for the protection of the child or children from the former sex perpetrator. In September 2010, the UK Home Office considered the plan for expanding the number of those who can have the access to the data from the paedophile registry and conducted a kind of experiment.

„*The experiment*“ was conducted for a year in four police area and enabled the search for information from the paedophile registry about the persons who were suspected of committing sexual offence and who had contacts with a child or children, and submittal of a request was made possible to parents, custodians and persons who take care of children. In the first six months more than 150 requests were received, and only 10 of them

⁶⁷ Cases: Bouchardot v. France, 5335/06, Gardel v. France, 16428/05, and M.B. v. France, 22115/06; source: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (05.02.2013.)

⁶⁸ Council of Europe's report „*Reinforcing measures against sex perpetrators*“, *ibid.*, par. 4.

were approved. Independent and expert analysis of the experiment is underway and Alan Campbell, then Home Office Minister, stated: „*if this concludes that the pilot has been a success, the Government will consider rolling out the scheme nationally*”.⁶⁹ We may conclude that there could be further tendencies toward „*liberalization*” of child sex perpetrators’ records from the executive authority. However, it is important to mention the judgement of the Supreme Court of Judicature of the United Kingdom in the case of JF and Angus Aubrey Thompson versus Secretary of State for the Home Department. The judgement established the right to appeal that child sex perpetrator’s data be removed from the paedophile registry, on the condition that the former perpetrators show clearly that they do not pose any danger to children.⁷⁰ The right to renewed appeal against databases in the paedophile registry is important because these data were kept in the UK for a lifetime of these persons. This judgement of the Supreme Court of Judicature of the United Kingdom was also influenced by the abovementioned Decision of the European Court of Human Rights in cases Bouchacourt versus France, 5335/06, Gardel v. France, 16428/05, and M.B. v. France, 22115/06 (see *supra*).

The European Court of Human Rights deems that the paedophile registry system in the United Kingdom is pertinent to the Convention. In order to make a deeper analysis of the practice of the European Court we shall observe the following two cases: Adamson versus United Kingdom and Massey versus United Kingdom. In the case of Adamson v. United Kingdom the applicant sued the state because he had to give his personal data to the police based on the Sex Perpetrators Act due to his previous criminal offence incriminated by this Act. The applicant considered that there was a violation of Article 8 (the right to privacy) of the Convention of Human Rights and Fundamental Freedoms but the European Court of Human Rights found that these measures of restriction and sacrificing the right to privacy were necessary and proportionate to „*the prevention of crime and the protection of the rights and freedoms of others*”. The applicant also deemed that the principle of non-retrospective legislation was breached regarding Article 7, with the title: „*no punishment without law*” (see *supra*) because the provisions of this Act did not come into effect at the time he committed a criminal offence and the principle of the „*prohibition of torture*” of Article 3 that states: „*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*”.⁷¹ The applicant referred to Article 3 because he deemed that branding someone for life as a sex perpetrator is inhuman and degrading treatment and may jeopardize his family’s position too. Both arguments were rejected. The Court found out that the measures were preventive ones and not additional punishments in the spirit of Article 7 and that the requests regarding the Article 3 do not fulfil minimum conditions for the violation of that Article.⁷²

Ibbotson v. United Kingdom is a case in which the applicant was among the first sex perpetrators who were obligated to give their personal data to the paedophile registry under the Sex Perpetrators Act. The applicant claimed that his presence in the registry was in fact the additional penalty imposed on him after he was sentenced to imprisonment and that such treatment seriously violates Article 7 of the Convention. However, European Commission for Human Rights did not accept this appeal. The Commission held that the obligation to register was preventative, not punitive and therefore necessary for the prevention of further sexual offending against children.⁷³

⁶⁹ Council of Europe’s report, *ibid*.

⁷⁰ Source: <http://www.bailii.org/ew/cases/EWCA/Civ/2009/792.html> (07.02.2013.)

⁷¹ European Convention on Human Rights and Fundamental Freedoms, *ibid.*, art. 3

⁷² Case Adamson v United Kingdom 42293/98; source: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, (08.02.2013.)

⁷³ Case Ibbotson versus United Kingdom 40146/98, *ibid*.

6.3. European Council's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

The goals of the European Council Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse are prevention and combat against sexual exploitation and sexual abuse of children, protection of the rights of child victims, enhancing national and international cooperation in a combat against sexual exploitation and sexual abuse of children. The measures for the fight against paedophilia are: employment, education, raising the awareness of the persons working with children, education of the children, raising the awareness in the public. This Convention presents new international legal document that thoroughly regulates the issue of special and general prevention of sexual exploitation and sexual abuse of children, prescribes the obligatory criminalization of certain acts, as well as a duty of raising of the awareness of citizens on non acceptance of some types of behaviour. In addition to that, the Convention enables easier combat against „sex industry”, prescribes series of measures for the protection and support to the victims of sexual exploitation and sexual abuse, introduces the possibility of using secret investigators, prescribes the protection of the so-called „whistleblowers”, introduces special intervention programmes for the criminal perpetrators, the duty to inform the public, especially children on their rights and dangers that lead to sexual exploitation and sexual abuse.⁷⁴ The provision on the protection of the whistleblowers from the Convention is unfortunately a novelty for the Croatian legislation since there is no general act on the protection of the whistleblowers.

The most interesting for us is Article 37 with the „*recording and storing of national data on convicted sexual perpetrators*”, and it states: „*for the purposes of prevention and prosecution of the offences established in accordance with this Convention, each Party shall take the necessary legislative or other measures to collect and store, in accordance with the relevant provisions on the protection of personal data and other appropriate rules and guarantees as prescribed by domestic law, data relating to the identity and to the genetic profile (DNA) of persons convicted of the offences established in accordance with this Convention. Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the name and address of a single national authority in charge for the purposes of paragraph 1. Each Party shall take the necessary legislative or other measures to ensure that the information referred to in paragraph 1 can be transmitted to the competent authority of another Party, in conformity with the conditions established in its internal law and the relevant international instruments*”.⁷⁵

It is evident that the Convention not only wishes to implement the paedophile registry in as many countries as possible, but it indirectly tries to establish the greatest cooperation possible in preventing paedophilia. The effectiveness is the argument for the great majority of countries for the paedophile registry and a large access to information (the countries could request each other the right of the access) but our dilemma regarding its justification still remains unsolved.

7. Conclusion

The aim of my paper has not been to give an one-sided answer to the question put at the very beginning, nor was my goal to conclude whether Croatia's implementation of

⁷⁴ Available at: www.legalis.hr (23.04.2012.)

⁷⁵ Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; available at: www.coe.int, (25.04.2012.)

paedophile registry was justified or not. I deem that it is worth more to know both sides of the medal than to have a mere and sometimes blind selection of one side. Lawyers, attorneys, prosecutors for the most of their time don't have the luxury of picking sides. Their (and my future) profession has its ethics which is very similar to the doctor's ethics: you should not choose whom you will cure or defend. For the purpose of preparing myself for the future profession, I approached this topic as a discussion, as a debate in which I represent both sides. I think that nothing in this world is neither good nor bad *per se* but it all depends on what we think of it, *i.e.*, in this concrete example, it depends on how convincing our arguments are. Due to all abovementioned, I deem that it is most important to find out and analyze advantages and disadvantages, losses and benefits, arguments and counter-arguments in favour and against the paedophile registry in the Republic of Croatia.

The thesis of this discussion is: „*does the Republic of Croatia need to have the national sex perpetrator i.e. paedophile registry?*” The proponents have the same „*criteria*” that states: „*achieving the fundamental function of the state*”. What is the criteria? The criteria is the means with which we measure whether the thesis is justified, and in this concrete example we measure if the Republic of Croatia has to do something concerning the abovementioned or not. Our criteria is our value which we wish to reach, and if we have a thesis that abortion is justified, and our criteria, *i.e.*, the value is the right to life, we shall conclude that abortion is not justified because it is not in accordance with our criteria *i.e.*, our measure. With regards to our criteria, we may conclude that the logic is: everything that leads to the accomplishment of the fundamental function of the state should be implemented. Due to this logic, the proponents and opponents would prove their thesis if they show that establishing paedophile registry leads to the fulfilment of the fundamental function of the state. Furthermore, the abstract term of „*the fundamental function of the state*” has been given flesh and blood and has been defined as the „*improvement of the protection of human rights*” and we may conclude that anything that contributes to the improvement of the protection of human rights should be implemented in the Republic of Croatia. I deem that this is the most relevant criteria for this discussion because each time we think the state should do something, forbid, legalize, or permit something, we have to make a step backwards and rethink why we have created the state, what its purpose and essence is?

For a start, we have narrowed the discussion to the half-open paedophile registry since the Act on Legal Consequences of Conviction, on Criminal Record and Rehabilitation came into force on 1st January 2013. But what is more important, the discussion has had its limits due to the open paedophile registry. The US has served as an example of all shortcomings of the open paedophile registry. Such registry openly gives the possibility of jeopardizing the right to life of an individual and it often ends with private justice and the death of the former perpetrators who have already „*paid their debt to society*”. Even if this does not lead to the killing of a perpetrator, his dignity has been shaken which leads to alienation and difficult reintegration into society.

The proponents of the paedophile registry introduce two groups of Croatian citizens into the discussion: children (up to 18 years of age) and the employers of people working directly with children. If we start with the last ones, the proponents deem that the employers have the right to know what kind of persons they employ, their history and whether they have certain characteristics that can bring into question the quality of their work at their working place. The interest of the employers is even greater when we take into account the fact that they are responsible for the damage done toward a third person caused by their employee, and that this is very delicate for the employers shows us the fact that under certain circumstances there is a possibility that they have penal responsibility in accordance with the provisions of the Act on the Responsibility of Legal Persons for Criminal Offences. Counter-argument of the opponents is that the broadening of the authorization of the em-

ployers may result in greater manifestation of the labelling theory and the stigmatization of the perpetrator, *eo ipso*, former perpetrators are in this way punished twice.

Opponents state the right to (information) privacy and the necessity of the protection of the personal data of the perpetrator, and the absurdity of their logic is in the hypothetical world where certain rights are protected in an absolute way and the people are not obliged to have their identity cards with them or belts while driving in a car since those activities would jeopardize their absolute rights. During the discussion a phrase has been coined: „*sacrificing one right for the higher goal and common good*” which is used as an argument as well as a counter-argument for the paedophile registry.

Finally, when we put everything on a scale, key numbers are those relating to the recidivism of the perpetrators and actual number of perpetrators shown in the paedophile registry. Just because of the small number of recidivism and big dark figure, the opponents deem that the paedophile registry does not lead to the higher goal and common good in a satisfying extent. What is more, the paedophile registry not only does not lead to the goal in a justifying extent, nor it has a justified means because alongside with the manifestation of the labelling theory the principle of information privacy is being violated and the dignity of the perpetrator. Therefore, the opponents think that the paedophile registry does not lead to the fundamental function. Contrary to that, the proponents deem the role of the state is to do anything in its power to provide the security of its citizens, although it may mean to restrict the rights of an individual.

Although the discussion regarding the paedophile registry may seem at first glance as a discussion about the effectiveness of the registry and its impact on various rights of an individual, it is much more than that. It is in fact the debate of two different political and philosophic views on the state and its role; should the state put greater emphasis on the society, community, on the security of the society or should the individual be the one whose human rights should be protected, his psycho-social rehabilitation and reintegration. This is a debate that has not ended yet and will not end in the near future not only in relation to the paedophile registry but to any other issue concerning the state as such.

If I were asked to give my personal opinion about this issue it would be difficult to give a simple „*for*” or „*against*” opinion. As a student of law, as a future lawyer, as a person who tries to think in an analytic way and consider arguments rationally, I would be among the opponents of the paedophile registry. While I have been thinking about this issue and writing this paper, I have concluded that the paedophile registry does more harm than good. The main reason of my opposition is non-fulfilment of three requirements of the proportionality principle, *i.e.* suitability test, necessity test, proportionality test *stricto sensu*. The only type of paedophile registry that could pass my assessment is close type of paedophile registry. I deem that this one is „*the best of both worlds*” because there is a record that could be used for various purposes, and restriction of fundamental rights and freedoms is minimalized.

On the other hand, I understand that the opinion of the majority of the public because this is a very delicate issue. When we talk about the welfare of the children, the discussion is usually very emotional which could be seen in the recent discussion on introducing health education in the curriculum. It is not pleasant when I imagine how I would feel if my children would be victims of paedophilia. From that standpoint, statistics are absolutely insignificant, they mean nothing to me that the recidivism for the equal criminal offence is only 1.7%, when I would not want my child to be among this 1.7%. With such emotions I could take side with those who think that the open paedophile registry is justified, if only one child is saved from trauma.

What to do, should we follow the heart or the head, how to reach compromise, what will the state do with such dilemma of its citizens?

These are permanent dilemmas of each individual and every state managed by people, and the answers to these questions will be left to you, the reader.

Summary

This paper analyses arguments for and against the paedophile registry as an institute in the world, and as something implemented on 1st January 2013 in the Republic of Croatia through the Act on Legal Consequences of Conviction, on Criminal record and Rehabilitation. The basis for the discussion was the fundamental function of the state which served as criteria of justification of different types of the paedophile registry analyzed in the paper. As main *pro* and *contra* arguments: principle of proportionality, right to privacy, right of access to information, dark figure data and recidivism rates. Moreover the paper presents the delicate problematic of rehabilitation. At the end of the paper, special attention was given to comparative law and the European Council's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

Keywords: criminal record, proportionality test, recidivism, information privacy, right of access to information

