

CHILD PROTECTION AND CRIMINAL JUSTICE

FAMILY ASSISTANCE, PROTECTION AND PENALISATION: THORNY ISSUES IN A SENSITIVE RELATIONSHIP

The obligation of the state to prohibit and punish human rights violations faces a unique challenge when violence against children occurs within the family. Under the premises of the UN Convention on the Rights of the Child (CRC), state parties are both obliged to protect children from violence and to support families by providing any necessary support for the child and those who have the care of the child (art. 19 para. 2 CRC).

The ensuing duties of the state to secure children's fundamental rights and protect them from violence are threefold:

- to respect and support the child's fundamental right to grow up in a family whenever possible, implying a duty to help the family to provide an environment in which the child can be safe from harm and supported towards healthy development;
- to protect children who have suffered abuse from further harm, if necessary without consent of the parents or other carers;
- to penalise child abuse and neglect, thus setting and enforcing clear limits to permissible behaviour.

There are tensions here between family assistance, protection and penalisation. Children are vulnerable in a way that adult citizens are not: unlike adults, they are not in a position to make autonomous choices about leaving a family when they are abused, seeking help, or involving the criminal justice system. Invoking criminal law when parents have acted abusively may not be in the child's best interests, and may compromise children's right to stay with a primary carer if penalisation of the parents is the first aim.

Different patterns and priorities can be observed across Europe, from a strong preference for investigation of every suspected case of violence against a child and prosecution where the evidence allows, to a legal priority for assistance to families and protection with or without consent of the parents, here prosecution is only pursued if serious and lasting harm has been done to the child. While the law in all states defines the threshold at which States may intervene in parental rights to protect children from further harm, not all states regulate the involvement of the criminal justice system explicitly.

DIFFERENCES IN CRIMINAL LAW FRAMEWORKS BY TYPE OF CHILD ABUSE

Comparative research across 38 European states found that all have provisions in criminal law to penalise the different forms of child maltreatment, but their application varies. Sexual abuse of children generally falls under specific offences and definitions in criminal law. Sexual activity with children who have not yet reached the age of sexual consent is forbidden irrespective of the child's will or the kind of sexual activity. Above the age of consent (which may be between 13 and 18) the situation is less clear.

For physical and emotional abuse, as well as neglect, in most countries no specific legal concepts are established. Legal definitions are rare and frequently vague. To some extent this is unavoidable, since the potential of certain acts to cause harm depends on the developmental stage of the child, the relationship of trust or dependency, and other factors. In most European countries, criminal prosecution is not the preferred route for addressing physical abuse and even less so with respect to emotional abuse and neglect. This applies equally to states with a highly developed child protection system and a wide range of support for families, as to those where neither are well established.

EVIDENCE FROM PERPETRATION RESEARCH

Based on a comprehensive review of research knowledge about the factors at play in perpetration, a multi-level model has been developed with the aim of guiding policy and legislation (<http://ec.europa.eu/justice/funding/daphne3/multi-level-interactive-model/understanding-perpetration-start-unix.html>).

The findings on abuse within the family indicate that physical and emotional abuse and neglect are frequently linked to aversive experiences in the parent's own childhood, past experience of violence, mediated by adolescent peer-groups where conflicts are dealt with violently, emotional dysfunction and cognitive distortions with respect to children. Stressed families with depleted resources are particularly susceptible to child abuse and neglect, and the presence of intimate partner violence is also a strong predictor of child abuse. The high influence of factors pointing to parental inability to develop the skills and sensitivity for good child-rearing suggest that measures of support, early intervention and parental skills training have the potential to meet both the duty to protect children and the goal of enabling the family to provide an environment conducive to healthy development.

Child sexual abuse can sometimes develop from similar patterns of negative childhood experience and current family stress, but the research indicates that opportunity and gratification play a much larger role, factors largely absent from the picture of physical child abuse. While some abusers direct their sexual interest towards children early on, with others it is antisocial behavior patterns,

emotional deficits and an ability to manipulate that incline them to prefer impersonal or coercive sex. Cultural messages and media images sexualising children, and in particular consuming child pornography, seem to play a significant part as well. The overall picture suggests that it will be difficult to integrate perpetrators of sexual abuse into programmes that help the family develop a healthy environment for the child. However, because it is difficult to identify and prove sexual abuse within the family, prosecution is not particularly frequent, and child protection agencies will often settle for solutions that prevent a suspected perpetrator from having further access to the child.

CORPORAL PUNISHMENT: THE CHILD'S RIGHT TO GROW UP FREE OF VIOLENCE, AN ISSUE FOR CRIMINAL LAW?

Legal and policy frameworks for child protection differentiate between corporal punishment and physical abuse. The UN Committee on the Rights of the Child has defined corporal punishment as “the deliberate and punitive use of force to cause some degree of pain, discomfort or humiliation to children”, and call for its abolition, since deliberately inflicting pain, however light, is considered to be a violation of children’s rights. Child abuse is, by contrast, defined in terms of actual or emerging significant harm already inflicted or the risk of future significant harm. Because the harm caused by any act varies greatly with the age and developmental stage of the child, abuse is rarely defined in legal terms by penalising specific actions. The point of reference for identifying ill-treatment by a parent or carer as abusive can be the severity of the violence or its repeated use.

Slightly over half of European states have prohibited all corporal punishment, with only a few making it a criminal offence as such. Frequently the prohibition is framed in family law, in a Children’s Act, or some other area of social protection law. This explicitly aims at setting a normative standard rather than at punishing parents for methods of discipline that have long been considered acceptable. There are arguments to be made for each approach.

COMPETITION BETWEEN THE SYSTEMS

On the question of who has the first access to the child when maltreatment is suspected, tensions between the criminal justice and the child protection systems emerge. To clarify if there has been a crime and if so, to secure best evidence, the criminal justice system usually seeks to interview the child before any other professional talks to her/him. A professional working in health care or child welfare may prefer to undertake the first interview to facilitate gradual disclosure and offer emotional and practical support, including protection.

Problems arise when

- Criminal investigations cause delays in protective measures, necessary support or treatment for the child, or when being required to give evidence for the prosecution causes fear and distress and leads to denial of the abuse.
- Supportive or therapeutic exploration of the abuse prevents the use of the child’s statements as evidence in criminal proceedings.

Prioritising evidence for prosecution can result in a shift of perspective from the developmental approach to child protection in the CRC to a focus on actions in the past, but can also provide a stronger basis for protection by imposing clear sanctions.

BEST INTERESTS OF THE CHILD: CONFLICTS BETWEEN CRIMINAL INVESTIGATION AND CHILD PROTECTION

When there are strong indications of child maltreatment, investigation will usually require interviewing the child. Some States give specialised training to the police and, to a far lesser extent, prosecutors tasked with investigating child sexual abuse; their duty is to enforce the law and the purpose of the interview to gather evidence. Nonetheless, the purpose is to punish those guilty of offences; the needs of the child or victim are secondary at best.

While adult victims can sometimes choose not to lay a complaint or to make a statement, children do not have these formal options. For a child who has been maltreated by a family member or a person in a position of authority or trust, interrogation for the purpose of prosecution can cause anxiety, distress and feelings of guilt (unless they have asked for prosecution themselves). The effect on the child may be confusion, inconsistency, or denial. If the perpetrator is tried but not convicted, the child may feel that s/he was not believed and develop severe self-doubts. The dilemma faced by a policy of criminal prosecution is, thus, that the investigation, if begun too early or without due caution, may actually add to the harm done to the child.

Under the primacy of the best interests of the child (art. 3 para. 1 CRC) criminal justice responses to maltreatment require more than protecting children from further harm during proceedings. There needs to be space for reflection not only on *how* but also on *whether* investigation, prosecution and penalisation should proceed. This can be ensured by giving trained social workers in the child protection system the task of deciding whether the situation calls for informing the criminal justice system. To protect children, criminal investigation and prosecution is often needed, especially if sexual abuse is involved. But within the family, child protection offers the best overall framework for balancing the duties of the state.

Meysen, T. & Hagemann-White, C. 'Institutional and legal responses to child maltreatment in the family'. In: Kelly, L., Hagemann-White, C., Meysen, T. & Römkens, R. (2011). *Realising Rights? Case Studies on State Responses to Violence Against Women and Children in Europe*. London. Available at www.cwasu.org.