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"Brief Overview of Novelties Within the New Criminal Code of Republika Srpska Regarding Legal Protection of Children and Juveniles from Sexual Violence"

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Abstract

After fourteen years of implementation of the reformer Criminal Code of Republika Srpska, in July 2017 a new Criminal Code of Republika Srpska came into force, and with it (partially) a new, post-reform stage in the development of contemporary criminal law in Bosnia and Herzegovina has begun. Although, the Code brings a number of novelties in the field of criminal law, the subject of this article are novelties regarding the legal protection of children and minors from sexual violence in Republika Srpska. The aim is to determine, after an analysis of relevant legal provisions, whether and to what extent the new Code has modified the legal protection of this group of passive subjects with respect to sex offenses (which, in addition to the standard consequences that they generally leave on the victims, can leave indelible consequences for victims whose psychophysical development is still not completed). Also, based on this analysis, the question whether the prescription of new legal protection of children and minors in the Republic of Srpska has been harmonized with or got distant from other positive criminal laws in Bosnia and Herzegovina will be answered. In this article descriptive, normative and comparative scientific methods will be applied.

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1. Introduction

Based on its Constitutional organisation, Bosnia and Herzegovina consists of two entitites: Federation of Bosnia and Herzegovina, Republika Srpska (Article3, Constitution of Bosnia and Herzegovina) and Brčko District BH. According to Tomić (2008, 75) "criminal substantive law has been regulated in accordance to the principles of horizontal and vertical division of legislative jurisdiction". Regulation of criminal law is given to several levels of authorities: Bosnia and Herzegovina, Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District BH. Consequently, that means that within Bosnia and Herzegovina, there are four criminal laws on force. With the entry into force of the new Criminal Code of Republika Srpska (hereinafter CCRS) in July 2017, a new stage in the development of contemporary criminal law in Bosnia and Herzegovina has begun[1]. The new code derogated the old Criminal Code from 2003 (Hereinafter CCRS), which in its essence, just like the Criminal Code of Bosnia and Herzegovina, the Criminal Code of the Federation of Bosnia and Herzegovina and the Criminal Code of the Brčko District of BH, was reformative by its nature[2]. Although the new code has brought with it a number of criminal law novelties in general, this article is dedicated to

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[1] H. Sijerčič-Čolić in her textbook *Krivično procesno pravo I (Krivičnoprocesne radnje i krivičnoprocesn subjekti) [Criminal Procedure Law I – Criminal procedure actions and criminal procedure subjects], Pravni fakultet Univerziteta u Sarajevu, 2008.*, str. 57., gives detailous overview of stages of development of criminal law in Bosnia and Herzegovina. Aslo see in: Borislav Petrović and Dragan Jovašević (2005) *Krivično/kazneno pravo Bosne i Hercegovine, Opći dio (Criminal Law of Bosnia and Herzegovina – General Part),* Pravni fakultet Univerziteta u Sarajevu; Zvonimir Tomić (2008) Krivično pravo I (Criminal Law I), Pravni fakultet Univerziteta u Sarajevu. Those stages can be devided in the period after the war, until 1998, from 1998-2003 (Criminal Code from 1998), 2003-2017 (reformal criminal codes in 2003), 2017 and ongoing period.

[2] Many has noted that within its reformer part, there is notable influence of an Anglosaxonic legal system and tradition in the domestic law. That effect is primary present in the criminal procedure law, through its basic principles, the role of prosecutor, short criminal procedures and plea arrangement. See more in: http://www.rs.cest.gov.ba/index.php/pocetna-obuka/231-modul-3-krivina-oblast/file, p. 1- 37.

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analysis of novelties related to the legal regulation of the protection of children and minors from sexual violence.

Sexual violence, as defined[3] by the *World Health Organization*, is "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic or otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work" (World Health Organization, 2002). The definition shows the basic characteristics of this type of violence, and implies the importance of its prevention and punishment. The mere fact that sexual violence is any committed or attempted sexual act that was unwanted, and that was committed against a person's sexuality, indicates its far-reaching consequences[4]. In doing so, it is understandable that the consequences of sexual violence are more complex when they affect people whose psychophysical development is yet not complete, such are children or minors. Overcoming these consequences, healing mental and physical wounds, being able to engage in daily life, re-developing a sense of confidence are certainly a great challenge for children and minors.

[3] Other definition(s) include: „illegal sexual contact that usually involves force upon a person without consent or is inflicted upon a person who is incapable of giving consent (as because of age or physical or mental incapacity) or who places the assailant (such as a doctor) in a position of trust or authority" (Marriam Webster's Dictionary, https://www.merriam-webster.com/dictionary/sexual%20assault); "Any sexual act committed against the will of another person, including sexual mockery and teasing, staring, undesirable comments, exhibitionism, abusive phone calls, unwanted sexual initiatives, forced engagement in pornography, unwanted touching, forced sex, rape, incest, painful or degrading sexual act, forced pregnancy, trafficking in women and exploiting them in the sex industry " (Addition II to the Recommendation 5/2002 of the Committee of Ministers of the Council of Europe to States members On The Protection Of Women Against Violence). The content of sexual violence and its forms are differently regulated within national criminal laws of states, so what is criminalized as a form of sexual violence in one country isn't necessarily criminalized in the other country.

[4] World Health Organization in it World Report on Violence and Health stated that consequences of sexual violence are those related to reproductive, mental health and social wellbeing. See more at: WHO Report, p. 162. At the web site: https://www.rainn.org/effects-sexual-violence, most common conequences of sexual violence include: PTSD, depression, flashbacks, self harm, STD, panic attacks, suicidal thoughts, eating and sleep disorder, pregnancy, social isolation, incompetence of creating and keeping relationships, and many types of physical consequences, etc.

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Therefore, efforts are being made, both internationally[5] and nationally, to provide additional protection for these two types of passive subjects against sexual violence.

2. Systematic interpretation of protection of children and juveniles that had been prescribed by the new Code

Fully aware of these facts, international standards, comparative solutions, but also the need for proper regulation within the domestic law, the legislator regulated the protection of children and minors against sexual violence in the new Criminal Code of Republika Srpska in such a way that, after Chapter XIV (“Offenses against Sexual Integrity") which contains statutory offenses involving sexual violence with generally prescribed passive subjects[6], have prescribed a special, Chapter XV, which is wholly dedicated to protection of children and minors from sexual abuse and exploitation. It is entitled "Offenses of Sexual Abuse and Exploitation of a Child" (articles 193-201, CCRS[0])[7].

Criminal justice protection of minors against sexual violence was also present in the old Criminal Code of Republika Srpska (articles 193-201, CCRS[0]), with criminal offenses of sexual violence being prescribed in Chapter XIX ("Offenses against sexual integrity"). Mostly, the dispositions

[5] Some international sources of prevention of sexual violence include: Declaration on the Elimination of Violence Against Women, The Convention on the Elimination of all Forms of Discrimination against Women, The Council of Europe Convention on preventing and combating violence against women and domestic violence, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, The Council of Europe Convention on Action against Trafficking in Human Beings, The Convention on Cybercrime of the Council of Europe, the Recommendation 5/2002 of the Committee of Ministers of the Council of Europe to States members On The Protection Of Women Against Violence, etc.

[6] From the above mentioned, the crime of Rape stands out, since its qualified form exists when the act of basic form is committed against a minor. Other criminal offenses have generally prescribed passive subjects, therefore, they include both juveniles and adults.

[7] In Criminal Code of Federation of Bosnia and Herzegovina and Criminal Code of Brčko District of BH, there is no special chapter devoted to children as passive subjects of sex offences. That approach corresponds to the former regulation in Criminal Code of Republika Srpska. There is only one chapter that covers all criminal offences agains sexual liberties and moral and within those criminal offences, perpetration towards juveniles is an aggravating circumstance that sets aggravating form of that criminal offence (with harder punishment). See articles 203-214 of Criminal Code of Federation of Bosnia and Herzegovina and Criminal Code of Brčko District BH.

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of offenses in this group, in their basic form, referred to all persons as passive subjects, regardless of their gender or age, while the qualified forms of these offenses (among others) contained qualifying circumstances - the age of the passive subject (child or minor), so in these cases more severe punishment had been prescribed. For example, the qualified form of the criminal offence of Rape had been prescribed in Article 193 (2) of the CC RS^{0}, and the qualified form of that crime existed when the basic act that had been prescribed in paragraph 1 was committed against a minor. It is also one of the qualifying forms of the crime *Sexual intercourse with a Powerless Person (*Article 194 par. 2. CCRS^{0}) that existed if it was committed against a minor. Thus, the fact that the offense was committed against a minor represented a qualifying circumstance in most of the offenses in this group, and thus sought to provide protection to the minor against sexual violence.

Systematically interpreted, by prescribing the crimes of sexual abuse and exploitation of a child in a separate chapter, the new Code sought to provide additional protection for children and minors, not only by imposing more severe penalties (when they are passive subjects), as has been the case so far, but also devoting special chapter of Criminal Code to them emphasised:

- the importance of protection of this vulnerable group from sexual violence, as they were singled out as the subject of protection of the entire chapter of the Code;
- dedication of the whole chapter of the Code only to those crimes of sexual violence, in which the potential victims might be children (and minors), from the nomo-technical point of view, provided sufficient opportunity for more detailed prescription of the acts of those crimes;
- Positive examples of comparative law (such as Croatia[8]) has been followed.

[8] Criminal Code of Croatia with Chapter XVI named „Criminal Offences of sexual abuse and exploitation of child", articles: 158-166, also separated children and minors as special subjects of protection from adults.

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3. Substantive novelties in regulation of protection of children and minors from sexual violence

The criminal protection of minors under the new Criminal Code of RS is dual. It has been provided primarily through prescription of offences in the Chapter XIV which gave grounds for general protection from criminal offences against sexual integrity offenses. Then, through Chapter XV of the Criminal Code of RS, special protection from the sexual abuse and exploitation of a child has been set.

Chapter XIV contains criminal offenses: rape, sexual blackmail, sexual intercourse with a helpless person, sexual intercourse with abuse of power, instigation of prostitution, sexual harassment and indecent activities. Chapter XV contains following offenses: sexual abuse of a child under the age of fifteen, sexual abuse of a child over the age of fifteen, inveiglement of a child to attend sexual activities, exploiting children for pornography, exploiting children for pornographic performances, introducing children to pornography, exploiting a computer network, or communication or other technical means for committing crimes of sexual abuse or exploitation of a child, satisfying sexual passions in front of others and forcing a child into prostitution.

If the new Code is compared with *lex priori*, it can be concluded that in addition to the different Nomo-technical solutions, there are substantive novelties related to the prescription of crimes of sexual violence.

3.1. New criminal offences

One of these novelties is the prescription of new criminal offenses. The new general offenses related to sexual violence are: *sexual blackmail* and *sexual harassment*. Sexual blackmail was part of earlier criminal legislation, but it was prescribed as a form of criminal offence Rape. With the new code, that act has become an independent criminal offence named Sexual blackmail. Sexual blackmail exists in the case of "coercion to sexual intercourse or equal sexual activity by threatening to reveal something about the person or about their close ones, that would damage their honour or reputation or threat of some other grave evil" (Article 166 of the CCRS). The act of this crime is to coerce to sexual intercourse or an action equivalent to it, and threat to discover something that can hurt honour, the reputation of a passive subject, or the threat of some other grave evil. A passive subject can be any person, regardless of gender and age, as well as

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the nature of the relationship with the offender. The sentence prescribed for this offense is imprisonment from one to eight years.

Another substantively new crime is Sexual Harassment, which is prescribed by Article 170 of the Criminal Code of Republika Srpska. Its prescription was expected since Bosnia and Herzegovina signed the Council of Europe's *Convention on Combating and Preventing Violence against Women and Domestic Violence*[9], which in its Chapter V-related to Material Law, specifies the obligation of the member states to prescribe in their national legislation (among other offenses) criminal offence Sexual Harassment as well. Although it was expected from Bosnia and Herzegovina to prescribe this crime, so far Republika Srpska took the first step in criminalizing this (new) crime, while in the Federation of Bosnia and Herzegovina and the Brčko District of BH is still expected for that step to be conducted.

According to the Article 170, paragraph 1 of the Criminal Code of Republika Srpska, imprisonment of up to two years is prescribed for "sexual harassment of another person who is in a relationship of subordination or dependence or who is particularly vulnerable due to age, illness, disability, addiction, pregnancy, or has severe physical or mental disabilities". With this the essential elements of the substance of this crime have been prescribed and they include:

- the particular nature of the relationship of the offender and the victim (subordination);
- the age or the condition of the passive subject (illness, disability, addiction, pregnancy, severe physical or mental disability).

Given that the act of this criminal offense (Article 170. par 3. CC RS) consists of sexual harassment, and that the interpretation of what constitutes sexual harassment may be a *legal standard*, which can be interpreted differently in different case, the legislator has skilfully avoided the possibility of an uneven interpretation of it in a way that, in paragraph

[9] The Council of Europe Convention on Combating and Preventing Violence against Women and Domestic Violence was adopted in Istanbul in 2011 (hereinafter: the Istanbul Convention) and within Article 40 sets the obligation to the parties "to take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction."

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2 of Article 170 of the CCRS, it prescribed the definition of sexual harassment. Based on that provision, it is "any verbal, non-verbal or physical unwanted conduct of a sexual nature that seeks to violate the dignity of a person in the sexual sphere and which causes fear or creates a hostile, degrading or abusive environment" (Article 170. par 2. CCRS).

The crimes of rape, sexual intercourse with a helpless person, sexual intercourse with the abuse of position, inveiglement to prostitution, are still being prescribed within the new Code.

Regarding the Chapter XV of the Code, given that it is entirely devoted to the offenses with child and minors as the passive subjects, it prescribes criminal offenses which in relation to the earlier regulation, were qualified forms of general offenses of sexual violence, and with the new code they were transformed into several independent crimes. For example, previously prescribed criminal offense of Exploitation of children and minors for the production, possession and display of child pornography (Article 200 CCRS[0]) is no longer part of the criminal legislation of Republika Srpska under this title, but has been broken down into several specific criminal offenses (Articles 175-178 of CCRS):

- exploitation of children for pornography;
- exploitation of children for pornography performances and
- introducing children to pornography).

The earlier crime of *Sexual intercourse with a child* had the same fate as this previously stated. In the New Code its actions have been broken down into the criminal offenses of *Sexual intercourse with a child under the age of fifteen* and *Sexual abuse of a child over the age of fifteen* (Articles 172. and 173. CCRS).

In addition to these novelties, substantively new offenses (within Chapter XV) have been prescribed: *Inveiglement of a child to attend sexual activities* (Article 174 CCRS) and *Exploitation of a computer network or communicating with other technical means for committing crimes of sexual abuse or exploitation of a child*. The criminal offense of *Inveiglement of a child to attend sexual activities* is incriminating inveiglement of a child to attend a rape, a sexual intercourse or an equivalent sexual activity. The imprisonment of six months to five years has been prescribed as a sanction for it. The rationale for prescribing this crime was to prevent the moral corruption of the child.

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The criminal offense of *Exploitation of a computer network or communicating with other technical means for committing the criminal offenses of sexual abuse or exploitation of a child* prescribed in the Article 178 of the CCRS, as mentioned above, is a novelty in the CC of the RS, and has been largely influenced by international standards. Namely, the Council of Europe's *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* in Chapter VI of 2007, as well as the Convention on Cybercrime (2007), emphasize the importance of preventing sexual abuse and exploitation of children through technological means. One of these, quite commonly used in the modern world, is computer networking or communication by technical means. According to the Article 178 of the CCRS, this crime might be committed by anyone who, "by a computer network or communication or other technical means, arranges a meeting with a child over the age of fifteen to perform a sexual intercourse or to produce pornographic material or other forms of sexual exploitation and appears at an agreed location for a meeting". The offense has its basic and qualified form. The basic act of this crime consists of arranging a meeting and appearing on site for a meeting. The sentence for this offense is one to five years of imprisonment (article 178 paragraph 1 of CCRS). The qualified form of this crime will exist when if it is committed against a child under the age of fifteen. The punishment is imprisonment of two to eight years (Article 178 paragraph 2 of CCRS).

3.2. Novelties in description of criminal offences and in criminal politics

As noted above, the criminal offence Rape (Article 165 CCRS.) is being prescribed in the same way as before, except that the qualified form related to sexual coercion (blackmail) is excluded from this provision and prescribed as an independent criminal offence. Regarding the criminal sanction, a more severe sentence is prescribed for both the basic form (formerly 2-10, under the new Code 3-10 years of imprisonment) and the first qualified form (earlier sentence was 3-15 years of imprisonment, under the new Code is 5 -15 years of imprisonment).

The criminal offence of sexual intercourse with a helpless person (Article 167 CCRS) is prescribed in the same way as it was done within the former Code, except that the status of a passive subject (a minor) is not a qualifying circumstance of the first qualified form of this criminal offence anymore, which is quite understandable given that such situation is covered with the

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criminal offences Sexual intercourse with a child under the age of fifteen (Article 172. Par.3., Article 173. Par. 2.CCRS.) and the Sexual abuse of a child over the age of fifteen. The punishment for this offense has been increased within the special minimum[10].

A similar modification is also present regarding criminal offence Sexual intercourse with the use of power (Article 168. CCRS), since in the basic form it was prescribed in the same manner as the previous criminal offence, except that the second form of this criminal offense under the former Code became part of the basic form of the sexual offense Abuse of a child over the age of fifteen from the new Code (Article 173. Par. 1 CCRS). The sentence prescribed for this crime is more severe than the one prescribed by the former code[11].

Criminal offence Instigation of prostitution has been modified in terms of the criminal sanction, since a more severe punishment is prescribed within the new Code. Specifically, a cumulative sentence of five years of imprisonment and a money fine are prescribed.

Finally, all this leads us to the conclusion that, in addition to prescription of new offenses and modifying existing ones, a significant change was made in regard to criminal politics, which is obviously stricter than the one from the former Criminal Code of Republika Srpska.

3.3. Leaving out criminal offences

It is worth noting a few more changes that have been introduced with the new Code. The new code, in comparison with the former Code, in the group of criminal offenses against sexual integrity and crimes of sexual abuse and exploitation of a child, does not contain three offenses that had been previously classified as criminal offenses of sexual violence. These are: Trafficking in human beings, Trafficking in children and Incest. They were not decriminalised, instead, they were transferred to other groups of offenses. Therefore, Chapter XIII ("Criminal offenses against liberties and rights of the citizen"), prescribes criminal offenses of Trafficking in human beings (Article 145 of CCRS) and Trafficking in Children (Article 146 of CCRS), while Chapter XVI ("Crimes against marriage and family") prescribes the criminal offense of Incest (Article 193 of CCRS). The

[10] It is 2 years of imprisonment, while the sanction prescribed by *lex priori* was 1 year of imprisonment.

[11] Earlier sentence was six months to five years of imprisonment, now it is two to five years of imprisonment.

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legislator therefore found that the main object(s) of protection in these crimes was not sexual integrity, but family and human freedoms.

3.4. Registry of paedophiles

One of the biggest novelties of this Code was setting grounds for establishment of registry of persons who are convicted for sex offences against children (Registry of Paedophiles). Based on the provision of article 92 paragraph 2, aside from the regular registry of convicted persons, special registry of paedophiles was established. Since all the details related to its content, management, preservation of data should be regulated by special legislation, consequently, after the Criminal Code of Republika Srpska entered in the force, in April of 2018, *lex specialis* named *Code on special registry of finally convicted persons for sexual abuse and exploitation of children* was created.

With the aim of protection of children from sexual violence and prevention of pedophiles to reoffend (Article 2 of the Code) this Code regulates all the details regarding the Registry, including determination of the personal data to be entered, the manner in which the data is being stored and put to use, the degree of its confidentiality, as well as special measures which can be applied to persons legally convicted of criminal offenses of sexual abuse and exploitation of children (article 1 of the Code). All the data is confidential and permanent (article 5 of the Code) and it is managed by the Ministry of internal affairs (article 5). All convicted individuals who are convicted for perpetration of any of criminal offences of sexual abuse and exploitation of children are obliged to deliver very wide scope of data, including even their DNA samples, together with personal data and data related to the conviction (article 4 par. 1 of the Code).

Establishment of sex offender registries is not a new motion in the world, since there are already decades passed from the first ones that had been established in the USA. It is understood to be a preventive mechanism made in order to prevent sex offenders to reoffend, by *keeping an close eye on them* after they serve the sentence. According to Letourneau (2010, 11) "registration and notification policies were predicated, in part, on the belief that sexual offenders are at exceptionally high risk of sexual recidivism and require substantial surveillance to reduce that risk". Its preventive function was confirmed by the *Resolution 1733/10 of European Parliament on reinforcing measures against sex offenders*, where in the paragraph 5 it was

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said that "the information in the register may be used to assess the risk that the offender poses to the community and therefore to manage that risk. If a large amount of relevant and up-to-date information is stored on the register, it can play a key role in rapidly detecting perpetrators of offences...". In addition to this strong argumentation in favor to its establishment, some international documents, such is *Convention Of Council Of Europe On The Protection Of Children From Sexual Exploitation And Sexual Abuse,* strongly suggest states to establish sex offender registries.

However, despite to those international standards who recommend their establishment, many states still didn't establish them. Until 2017, one of them was Bosnia and Herzegovina. With the step undertaken by Republika Srpska, it can be said that the concept of establishment of specific sex offender registries (of Pedophiles) has entered in Bosnian and Herzegovinian legal system, through entity regulation. This step hadn't been yet undertaken by legislators in the state level, nor in Federation of Bosnia and Herzegovina and Brčko District. Therefore it can be discussed whether Republika Srpska rushed with; should only one sex offender registry exist in the level of entire territory of Bosnia and Herzegovina; or should have it been established first in the State level, so that entities can also follow the lead of the State, to set harmonised rules in legal regulation of sex offender registries. Not to mention the fact the flow of data that are part of registries is important to fluctuate within the entire territory of Bosnia and Herzegovina, in order for it to be effective in its protective and preventive function.

4. Conclusion

The legal regulation of crimes related to sexual violence has undergone its metamorphosis with the new Criminal Code of Republika Srpska and has been significantly improved compared to the earlier legal solutions. It offers new Nomo-technical solutions as well as substantive changes to the legal regulation of criminal offences related to sexual violence (in which passive subjects are minors). By separating these offenses into a separate chapter, the intention of regulating these offences in more details and systematic way is more than obvious. By prescribing new offenses: sexual harassment, inciting a child to attend sexual acts and exploiting a computer network or communicating with other technical means to commit sexual abuse or exploitation of a child, the new legislation is set in line with

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international standards. The new Criminal Code prescribes stricter criminal sanctions than the *lex priori*, which further indicates the interest in better prevention of sexual violence against children and minors.

Even though the new Code was made in accordance to the international standards and in general offers better regulation than the one from before, there are many questions opened with its existence. The fact that it criminalised new criminal offences that are not criminalised in other parts of Bosnia and Herzegovina indicates that Republika Srpska left the intention of harmonisation with other criminal codes in Bosnia and Herzegovina. That results with the fact that one action is punishable in one part of territory of one country, while the same action is not criminal offence in the other part of that same country. That brings the people of the state in an uneven and discriminatory position, and moreover brings legal uncertainty. Similar outcome has prescription of the same criminal offences but in different way with different criminal sanctions in state and entity levels. That effect might have been avoided with synchronised changes within all criminal codes. Even though the establishment of registry of paedophiles is a remarkable decision, its establishment is more reasonable to be in the state level, or at least synchronised with the level of Federation of Bosnia and Herzegovina, so that the entire territory of Bosnia and Herzegovina is covered with the data about sex offenders. The *lex ferenda* about sex offenders registry in Federation of Bosnia and Herzegovina and *lex lata* in Republika Srpska should open possibility for data covered with registries to be approachable not only to institutions that manage them, but also to managing institution between themselves, because that is the only way such registr(y)ies can achieve their function.

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