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PERMISSION FOR UNDERAGE MARRIAGE: DENYING THE CHILD'S RIGHT TO PROTECTION

The purpose of this paper is to identify, through the analysis of the rules of court procedure and established practice, the various implications of the license for child marriage on the key players in the procedure – the child, the parents, the guardian, in order to provide additional insight into the way in which protection of children at risk of early marriage is organized and ensured in Serbian legislation, and to make a scientific contribution to the research of this topic on a critical, contextual and conceptual level and support the national implementation of the recommendations of the UN Committee on the Rights of the Child regarding the removal of exceptions that enable the conclusion of child marriages.

***Keywords**: child, underage marriage, child marriage, guardianship authority, court, marriage license.*

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1. Introduction

A cursory glance at the statistics leads to the conclusion that underage marriages in Serbia are a rare phenomenon and that the number of such marriages is decreasing year by year. The number of marriage-like child partnership unions, of which the competent authorities have knowledge and which they record on the basis of reports submitted for various reasons, is also not large, but the big question is whether that number reflects the actual situation.[1] According to the latest published data, in 2023, centers for social work in Serbia identified a total of 182 children (170 girls and 12 boys) in the so–called child marriages[2]. These are children, mostly girls, who established a life union that was not formalized as a marriage, but is that in its essence, and this number also includes children who requested court permission to enter into a underage marriage (there are 47 court requests). The most affected by the so-called by child marriages are Roma children. Of the total number of registered cases, only 7.9% were girls who do not live in Roma settlements. Among registered Roma girls, 32.7% are under 15 years

[1] On the trends and prevalence of underage marriages, see the report Kljajić, S. *The role of the social protection system in preventing child marriages* (presentation at the Second Meeting of the Coalition for the Prevention of Child Marriages, held in Belgrade, 17 June 2019). The report states that the survey conducted by the Republic Institute for Social Protection in 2019 showed that 73% of centers for social work had only one to five reported cases of so-called of child marriages on an annual basis, only 2% of centers for social work had more than 10 cases, while 19% had no reported cases. According to the latest available report of the Republic Institute for Social Protection, in 2023, 27.6% of the total number of centers for social work in the Republic of Serbia had children victims of child marriage on their records.

[2] "Child" and "underage marriage" are terms that refer to a union in which one of the spouses is under 18 years of age, i.e. is not an adult, with the fact that "underage marriage" in domestic literature generally means a regularly concluded marriage (with court permission) in which both or one of the spouses are minors, while the term "child marriage" is broader and includes minor unions that were not concluded before the competent authority in the form of marriage, for which no court permission was given or even requested, but they actually exist as a marriage. The term "early marriage" is often used as a synonym for child marriage and underage marriage, but in the literature it is also used to denote marriages in which both partners are 18 or older but are not mature enough to give their consent to the marriage for various reasons, such as the level of physical, emotional, sexual and psychosocial development or the lack of information about possible life choices, etc. On the content of these terms in international law, see Rangita de Silva de Alwis, 2008, *Child marriage and the law, Legislative Reform Initiative Paper Series*, UNICEF, New York; UN Human Rights Council, Preventing and eliminating child, early and forced marriage: Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/26/, 2 April 2014, 3-4, https://undocs.org (accessed 4 April 2024).

old. A quarter of all registered children in child marriages are under 16 years of age. Compared to 2022, 10.3% fewer children were identified as having entered into some type of marriage-like underage union.[3]

Various factors contribute to the existence of underage, i.e. child and early marriages, among which poverty, structural inequality and lack of education, customs and cultural practices stand out. Hence, this phenomenon, in Serbia, as well as in the world, is most often related to girls and is mostly present in marginalized groups. Research shows that 22.6% of girls from the poorest households, and as many as 55.7% of girls from segregated Roma settlements enter some kind of cohabitation (extramarital partnership or marriage) before the age of 18 (UNICEF, 2021: 8). In some parts of eastern and southern Serbia, such as the Timočka Krajina, Banat, the area around Soko Banja, Kosovo and Metohija, the custom of underage marriages and the entry of minors into extramarital unions has persisted for a long time (Stanković, G., 1982: 197). The social attitude towards different social groups is generated through the creation of certain institutions. Institutions are the answer to the problems that life itself poses to society (Stevanović, A, 2022: 32). In addition to the institutional one, society's response to certain phenomena and problems is given through the legislative framework. In fact, one of the functions of legislation is to reflect the legal, political and institutional approach of the state to a certain problem. It is a kind of platform for policies and programs to support changes in society. The establishment of legal and institutional guarantees of human rights in practice is largely determined by the commitment of legislators.

International law, whether through universal or regional instruments, frames and shapes national legislation (Kolaković-Bojović, 2022: 64). The Republic of Serbia is a member of the UN Convention on the Rights of the Child and its national legislation is largely aligned with that document. And yet, some of the recommendations of the UN Committee on the Rights of the Child, including recommendations related to child marriage, await national implementation. More than two decades ago, the UN Committee on the Rights of the Child acknowledged that early marriage and childbearing are significant factors in

[3] Source: Republic Institute for Social Protection, data was taken from the *Report on the work of centers for social work for the year 2023* and the *5th Report on the work of social welfare institutions in the protection of children from child marriage for the year 2023* (hereinafter: RISP, 2024).

health problems related to sexual and reproductive health, including HIV/AIDS, and that the legal minimum age for marriage, especially for girls, is still too low in some contracting parties (CRC/GC/2003/4). Other concerns were also noted that are not only related to health, but also to other rights of children entering marriage, which is why they are often forced to drop out of school and are socially marginalized. In addition, in many countries, married children are considered to be legally of age (with full working capacity) even though they have not reached the age of 18, thus denying them all the special protection they are entitled to according to the UN Convention on the Right of the Child. The Committee's recommendation is that the contracting parties review and, where necessary, amend their laws and practices so as to raise the minimum age for marriage, with or without parental consent, to 18 years of age, for both boys and girls (CRC/GC/2003/4, Par. 21).

Within the framework of the Council of Europe, forced marriages and child marriages[4] are also recognized as a violation of the human rights of children, which is why all member states of this regional organization, by adopting Resolution 1468 (2005) on forced and child marriages, are invited to harmonize their national legislation, inter alia, by determining or raising the legal minimum age limit for men and women to get married - to 18 years.

Eliminating child marriages by 2030 is a goal within the Sustainable Development Goals (UN Resolution A/RES /70/1, 2015). However, no region is on track to eliminate underage, early and forced marriage by 2030, as outlined in *The 2030 Agenda for Sustainable Development.* Serbia is not an exception in this regard. To end the practice globally, progress must be significantly accelerated and sustainable. Without further acceleration, it is estimated that by 2030, more than 170 million girls in the world will be married before their 18th birthday, and that there will be about 14,000 of them with that status in Serbia (UNICEF, 2021: 6).

[4] Forced marriages are marriages in which one or both parties have not personally expressed their full and free consent to such a union, and in this context child marriage is also considered a form of forced marriage. For the full definition of forced marriage, see the first *EU directive to combat violence against women and domestic violence*, approved by the European Parliament and the Council, 16 April 2024.

Serbian family legislation is harmonized with the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962), which obliges the signatory states to take all necessary legislative measures to specify the minimum age for marriage.[5] In the Republic of Serbia, the age limit for getting married is specified and is equal to the age limit for acquiring full working capacity – 18 years. And yet, if there are "justifiable reasons", the court can allow marriage to "a minor who has reached the age of 16 and has reached the physical and mental maturity required to exercise the rights and duties in marriage" (FL, 2005, art. 23. par 2). The procedure is conducted at the request of the minor, before a non-litigation court. Before deciding on the permission for underage marriage, the court is obliged to listen to the minor, his/her parents, i.e. guardian, the person with whom he/she intends to enter into marriage, obtain the opinion of the health institution and "achieve appropriate cooperation" with the guardianship authority (LNLP, 1982, art. 82. par. 2). Legal theory did not particularly address this procedure, or the position of the guardianship authority (centers for social work) in that procedure, except to the extent that, mostly in family law textbooks and in some commentaries on procedural laws, strict legal norms are interpreted, with sporadic presentation of positions on certain procedural issues. Thus, in a small number of texts, the prevailing opinion is that the legal wording "to achieve appropriate cooperation" indicates that the guardianship authority appears in these proceedings in the role of an associate of the court, i.e. an expert, who collects certain data by order of the court and submits a finding and expert opinion to the court, and that the law did not grant them other procedural powers (which they normally have in long non-litigation proceedings in which the rights and interests of minors, as persons under special social protection, are decided). In practice, the involvement of the guardianship authority in the procedure of granting permission for the conclusion of an underage marriage is really reduced to a mere formality. That authority mainly limits its participation in the procedure to the formal submission of a report to the court (findings and expert opinion), which is deprived of critical insight and deeper research into the motives and assessment of the circumstances in which the child is, which

[5] According to Article 2 of the Convention, marriage cannot be legally concluded by a person who has not reached the prescribed age, unless there is an exemption given by the competent authority "for serious reasons and in the interest of the future spouses".

should be its basic function. Thus, one of the problematic areas of this procedure becomes the issue of protecting the best interests of the child and applying the legal standard "justifiable reason" (for entering into a marriage). An already established and functioning union, pregnancy and the birth of a child, cultural patterns of the community to which the minor belongs and respect for customary norms are most often cited as "justifiable reasons" for granting a marriage license. The prevailing position, according to which the guardianship authority does not have the right to appeal against the court decision allowing the conclusion of a child marriage, leads to the fact that that authority does not essentially engage in the assessment of the best interests of the child, but only states the established facts (the existence of a minor union, pregnancy, customs, etc.). These procedures also lack an assessment of relevant aspects of the exercise of parental rights, although underage marriage is high on the risk scale of abuse of parental rights. Moreover, decisive importance is given, without a deeper analysis, to the attitude, opinion and wishes of the parents of the minor applicant. Thus, the opinion and position of the parents actually grows into the opinion and position of the guardianship authority, and since the court most often bases its decision on the position and opinion of the guardianship authority, it is further translated into a court permit. This renders the entire court proceedings meaningless.

The recommendations made by the Committee for the Rights of the Child to the Republic of Serbia in relation to the elimination of exceptions that allow the conclusion of underage marriages and the establishment of a system for monitoring these cases (CRC/C/SRB/CO/2-3, par. 20 & 21) propelled the relevant ministry to require a change in the practice of the guardianship authority, thus, by adopting the Instruction on the way of work of the Center for Social Work – guardianship authority in protecting children from child marriage, on 20 May 2019, the Ministry of Labor, Employment, Veterans and Social Affairs obliged the guardianship authority to form a team of experts, after receiving the court's request for the submission of findings and opinions, in order to raise the protection of children at risk of child marriage to a higher level – the level of team assessment (par. 8.2). The instruction specified the measures and services undertaken to protect the child at risk of child marriage, aimed mainly at informing about the harmfulness of early marriages, counseling, and empowering the child and his/her family of origin (par. 10). Although the formal prerequisites for the

improvement of the practice were created in this way, the fact is that no significant progress has been made in terms of assessing the "justification" of the reasons for granting permission for underage marriages. In truth, that was not even the goal of the Instruction, given that the text of that document itself foresees its limited application – until domestic laws are harmonized with international law regarding the minimum age for marriage (par. 13).

When considering everything presented above, the question arises as to whose interests are protected by the granting a permission to enter into a marriage before the adult age, and that, primarily, in the context of the consequences – legal effects of the court permission. Are these the interests of the minor who intends to enter into marriage (and what exactly are his/her interests that take precedence over the right to health, education, development and special protection) or are the interests of others at issue: adult partner, parents, family, wider community? Society has a clear interest in preventing child marriages, for several reasons. The first and perhaps the most important is the health aspect, because children at that age, in the psychophysical sense, are not sufficiently or completely formed, and the consequences of early entry into intimate relationships and early pregnancies can be extremely serious. In addition, premature marriage and the creation of offspring at an early stage of life most often leaves minors with a low level of education, which later represents a major obstacle for the independent economic and material development of the family (Počuča, Šarkić, 2016: 109), thus creating a new circle of people dependent on the social welfare system. By entering into a marriage with the court's permission, the minor him/herself acquires full legal capacity before reaching the age of 18, and thereby loses the right to special protection that belongs to children. In certain situations, parents benefit from child marriage. In these cases, the child is often used as a means to realize certain interests of the parents. It is mainly about the financial benefits associated with various types of illegal activities, such as, for example, child trafficking, and even when this is not the primary motive, parents are certainly freed from the duty of supporting a child who has entered into a marriage. It is indicative that as many as 49.1% of parents of children who have been registered as being in child marriage in the last five years are unemployed. In addition, the permission to marry before the child reaches the age of majority provides

the parents (and the same applies to the adult partner of the child) with protection from criminal prosecution.

Even Immanuel Kant, a prominent German philosopher, asserting that human being as a rational being exists by himself, excluded any possibility of using a human being as a means, promoting the right to life and the right to dignity as immanent categories (Kant, 1932). In order to eliminate the danger of turning a human being into a means to an end, the theory emphasizes the necessity of eliminating existential fear, non-discrimination and preserving the identity and integrity of the person, and a special category of that framework is to limit and determine the extent to which state power and the rule of law can be applied to an individual (Pavlović, 2020: 47). This aspect of the use of children is by no means to be ignored, especially if one takes into account the fact that among children who have been recorded as being in "child marriage" in the last five years, the share of children who are under parental care is continuously high, with an average share of 87.9% and that it is clear that parents are responsible for their early entry into a partnership and early marriage, that they encourage, support or, at the very least, have a positive attitude in relation to this phenomenon. By the very fact that it is legally possible to allow a child to marry, centers for social work are essentially unable to apply appropriate protection mechanisms.

2. Court proceedings deciding on the permission to enter into an underage marriage

2.1. Process aspects - law, theory, practice

As stated, in Serbian family legislation, underage represents a marital impediment. And yet, for "justifiable reasons", the court may allow the marriage of a minor who has reached the age of 16 and has reached the physical and mental maturity required for the exercise of rights and duties in marriage (FL, art. 23). Therefore, minors over the age of 16 are a rectifiable marital impediment, and making a decision on dispensation from this marital impediment, i.e. on the recognition of marital capacity, falls within the jurisdiction of the court. Getting married before reaching the age of majority with the permission of the court is one of the ways to acquire full legal capacity before reaching the age of 18 (FL, art. 11. par. 2).

The judicial procedure in which the fulfillment of the conditions for granting permission to enter into marriage before the age of majority is granted is regulated by Chapter VI, Art. 79-86 of the Law on Non-Litigation Procedure (hereinafter: LNLP). According to that Law, the court is obliged to investigate in an appropriate way all the circumstances that are important for determining whether there is a free will and desire of the minor to enter into marriage and whether the minor has reached the physical and mental maturity required to exercise the marital rights and duties. In order to determine this, the court is obliged to obtain the opinion of the health institution, to achieve appropriate cooperation with the guardianship authority, to hear the minor (as a rule without the presence of other participants), to hear his/her parents or guardian, the person with whom the minor intends to enter into marriage, and if necessary, it can present other evidence and obtain other data. The law also stipulates that a parent who has been deprived of parental rights will not be heard, and that the court is free to evaluate and decide whether to hear a parent who does not exercise parental rights without justifiable reasons. The court is obliged to examine the personal characteristics, property status and other important circumstances related to the person with whom the minor wishes to enter into marriage.

Court proceedings can be initiated only at the proposal of a minor who wants to enter into marriage, which is in accordance with the rule that only one who is affected by a certain marital impediment can request a dispensation from marital impediment (LNLP, art. 80. par. 1). Therefore, a minor who intends to enter into marriage and has reached the age of 16, regardless of other personal characteristics, has the recognized procedural and postulation capacity in this procedure. If both persons intending to enter into marriage are minors, the procedure is initiated at their joint proposal. If the person with whom the minor wishes to enter into marriage is an adult, then he/she is not a party to the proceedings, but has the procedural position of a witness "who should provide the court with the necessary data regarding the economic, financial and other circumstances in which the future married life would take place" (Stanković, Trgovčević Prokić, 2015: 410).

Unlike other procedures related to minors, in this procedure the guardianship authority does not have the position of the petitioner. It would not be able to initiate the procedure for granting a license for the conclusion of a minor's

marriage, even if the minor is under its immediate guardianship.[6] For the same reason, the position of the petitioner is not recognized by law even for the parents of minors, who exercise parental rights.

The court decision allowing marriage before the age of majority is a legally transformative act. It is adopted in the form of a decision that has constitutive effect. It establishes a new right for minors - the right to marry.

With regard to legal remedies, special rules apply, both in relation to the circle of authorized subjects, and in relation to the type of decision that can be contested by legal remedy. In the special part of the Law, in which this procedure is regulated, it is prescribed that an appeal is allowed against the court decision rejecting the proposal to allow a minor to marry (negative decision) and that appeal can only be filed by a minor (LNLP, art. 84). There are no other special rules regarding legal remedies. The modest normative substrate opens up numerous questions, above all when it comes to who has the right to contest the so-called positive court decisions. It is quite certain that a minor, as the authorized initiator of the procedure (petitioner), could not file an appeal against the decision that approves his/her proposal and grants permission to enter into a marriage (positive decision), because he/she lacks a legal interest in filing an appeal. Among legal theorists, this interpretation is not disputed, but in the case law there is also an opposite point of view - that the petitioner can file an appeal against the decision allowing the conclusion of the marriage. It was presented by the Court of Appeal in Belgrade, in response to the question (*Collection of Sentences from Civil Law and Civil Procedure Law*, 2018: 521), in which response it is stated that an appeal against a decision allowing the conclusion of a marriage can only be filed by a person who submitted the petition for the adoption of that decision. The cited interpretation of the Court of Appeal is unacceptable. Apart from having no legal interest in refuting the decision by which his/her proposal was adopted, the minor does not even need to, because he/she does not have to use the granted court permission - the minor has the right to change his/her mind and to give up the marriage at any time and after receiving the court's permission.

[6] In certain situations, the guardianship authority may decide not to appoint a guardian for a minor without parental care, but to perform this duty directly. By the decision on the immediate performance of the duties of the guardian, the expert of the guardianship authority will be determined who will perform the duties of the guardian on behalf of that body (FL, art. 131).

Parents and guardians of minors cannot file an appeal against the decision allowing a minor to marry, because they do not have the right to represent the minor in this procedure, and they do not have the status of a party. For the same reason - the lack of party status, the person with whom the minor intends to marry, if he is of age, does not have the right to file an appeal. Regarding the position of the guardianship authority and its right to exercise legal remedy, there is no uniform position in legal theory. Therefore, more will be said about this issue in the appropriate place in the continuation of the text.

The applicable law does not prescribe to whom the court decision is to be delivered. In one of the comments of the LNLP, it is stated that the decision approving the petition shall be delivered to the minor petitioner, as well as the parents, i.e. the guardian and the guardianship authority (Stanković, Trgovčević Prokić, 2019: 412), without specifying the reason for delivering the court decision to those subjects. In older legal literature, one can find the point of view that the decision on the granting of permission to enter into a minor marriage is delivered to the minor petitioner, but that it is also delivered to the parents, i.e. the guardian and the guardianship authority, "because they are also authorized to file an appeal against the decision".[7] However, it should be pointed out that the aforementioned legal position was built by the case law established before the entry into force of the current LNLP, applying the legal rules of pre-war law.[8]

2.2. Substantive legal aspects

2.2.1. Maturity and will of minors

In order to obtain permission to enter into an underage marriage, in addition to the prescribed age (16 years of age), the law stipulates a special substantive legal condition - that the minor has reached the physical and mental maturity to exercise rights and duties in marriage (LNLP, art. 82. par. 1). In legal theory, maturity is also interpreted as the ability of minors "to understand the significance and consequences of a decision made" (Šarkić, Počuča, 2013: 170). The condition "maturity to exercise rights and duties in marriage" requires consideration in a

[7] See Stanković, 1982: 209 (par. 35).

[8] See Instruction of the Supreme Court of the FNRY on the procedure of the courts when resolving applications for marriage, Su 165/49, issued at the General Session held on 22 March 1949.

broader context, one that takes into account the legal consequences of marriage. It is necessary to look at the overall physical, psychological, emotional and social maturity of the minor, i.e. his/her ability to assume and perform the rights and duties implied by emancipation, as such. In other words, to determine the minor's ability to make thoughtful life decisions and take responsibility for them. This is a rather complex task for the court, which, in order to fulfill it, requires the engagement of experts, professionals of various specialties (psychologists, psychiatrists, etc.). In connection with the stated requirements regarding the maturity of a minor intending to enter into marriage, an objection could be made that even persons who have acquired full legal capacity upon reaching adulthood sometimes lack such maturity. However, the question of the maturity of a person who has reached the age of 18 and thereby acquired full legal capacity is not in the domain of the individual decision and responsibility of the court and the guardianship authority, but is a matter of general social consensus embodied in an imperative legal norm for which neither the court nor the guardianship authority is responsible. Therefore, both the court and the guardianship authority are required to act with increased care in the status matter in question. Both the court and the guardianship authority are obliged to conduct an interview with the minor, as a rule, without the presence of other persons; the guardianship authority - to apply the rules of professional social, psychological and pedagogical work in examining the fulfillment of this condition, and the court to obtain the opinion of the health institution.

The physical and mental maturity of minors is an important element of the assessment because without the required level of psychophysical maturity there is no legally relevant will to enter into marriage. The will must be free. The absence of free will is an obstacle to entering into marriage (FL, art. 24), and it is of crucial importance to establish that there is a real intention, that is, the desire and freely expressed will of a psychophysically capable minor to enter into marriage with a certain person. Free will implies the absence of defects of the will. Therefore, in this procedure, it is necessary to establish that there is no pressure from parents or other persons (Ponjavić, 2017: 111), that there is no coercion, blackmail or other impermissible influence on the will of the minor from anyone,

and to eliminate the suspicion that the minor may be a victim of human trafficking.[9]

Despite all of the above, the question arises whether the best interest of the child is exhausted in respecting the desire and freely expressed will to enter into marriage or the content of that principle in this case is somewhat more complex. The freely expressed will and desire of a minor is not always and not necessarily in his/her best interest.

2.2.2. Justification of reasons for granting permission to enter into marriage before the age of majority

In order to obtain permission to enter into an underage marriage, it is also required that there are "justifiable reasons" (FL, art. 23). According to the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (art. 2), a dispensation from marital impediment related to minors can be granted "for serious reasons and in the interest of the future spouses". The existence of "justified" or "serious" reasons for early marriage should be evaluated by the court in each specific case. Some legal writers believe that it is necessary to assess "whether it is more in the interest of the minor to stay in his/her parents' family or to marry" (Draškić, 2016: 87). There are also opinions that, when assessing whether there is a justified reason, the court should take into account the established moral principles and cultural patterns of behavior in a certain community, i.e. "the customs and understanding of the environment in which the petitioner lives" (Stanković, Trgovčević Prokić, 2015: 410), as well as "whether the possible conclusion of the marriage will have implications for third parties" (Stanković, Boranijašević, 2022: 682). The justification of the reasons for entering into marriage, as a legal standard, the content of which is determined in each specific case by the authority conducting the procedure (taking into account all specific, objective and subjective, circumstances of the specific case), belongs to the sphere of value assumptions and ethical principles that apply in a society and it largely depends on the value judgments and subjective value system

[9] If, during the evaluation procedure, the existence of indicators that preliminarily point to human trafficking is established, the guardianship authority is obliged to immediately inform the Center for the Protection of Victims of Human Trafficking, for the sake of coordinated action (Instructions on the work of the center for social work - guardianship authority in the protection of children from child marriages, par. 10. 2).

of the acting judge. What is "justified" in one value system may be completely unacceptable for others, and this is a problem when proving the fulfillment of conditions related to general legal standards.

In order to determine the fulfillment of the conditions and the justification of the reasons for entering into an underage marriage, the subject of assessment is also "personal characteristics, property status and other important circumstances related to the person with whom the minor wishes to enter into marriage" (LNLP, art. 82. par. 4). Since the list of mandatory assessment elements prescribed by FL and LNLP is rather short, the court is left with the possibility to "produce other evidence and obtain other data if necessary" (LNLP, art. 82. par. 2). Identifying "important circumstances" and "other data" on which the decision about what a justified reason for marriage in a specific case is and what represents the best interest of minors depends to a large extent on the court's ability to recognize these factors. Since judges do not have this specific knowledge, they, in this regard, mainly rely on the specific professional knowledge and skills of guardianship authority experts and on their ability to apply standards and recommendations arising from relevant domestic and international legal acts, professional documents, guidelines and rules of professional work. At the same time, everything that has been said regarding the value judgments of the acting judge and the question of the application of general legal standards, equally applies to the value judgments and subjective value system of the experts of the guardianship authority participating in this procedure.

Practice shows that already established extramarital unions and pregnancy are the most common situations that the court accepts as a "justifiable reason" for granting a license to enter into an underage marriage (Jović Prlainović, 2019: 106; UNICEF, 2016: 21) and that the courts are "generally sympathetic to such requests and very rarely reject them" (Ponjavić, 2017: 111). From the perspective of the legal system, the existence of an underage extramarital union and the pregnancy of a minor require the competent state authorities to take various measures of family law, criminal law and social protection of the minor who founded that union. It is part of his/her right to special protection. In this context, the question arises whether the special protection of a minor who is already living in an extramarital union and is expecting a child is achieved by simply granting permission to marry before reaching the age of majority, or is it just the opposite

- marrying before reaching the age of majority cancels the child's right to special protection they are entitled to according to the Constitution, the Law and the CRC. It seems that the issues of protecting the best interests of a minor intending to marry (and his/her unborn child) require a more comprehensive consideration and a different response of the state.

The criminal law aspect of this phenomenon deserves special attention. In Serbian law, extramarital union with a minor is a criminal offense (CC, art. 190), and child marriage is recognized as an instrument of abuse of parental rights. Abuse of parental rights is prohibited (FL, art. 7, par. 3). The guardianship authority, as an exponent of the state, is obliged to supervise the way in which parents exercise their parental rights (FL, art. 79 & 80), and this is one of the ways to prevent abuse of the child by the parents. Prison sentences are envisaged for a parent (and the same applies to an adoptive parent or guardian) who allows a minor to live in an extramarital union with an adult or induces him/her to do so, (prison for up to three years, and if the act was done out of self-interest - imprisonment for six months up to five years; if human trafficking is proven, imprisonment for at least five years). The law, in the above context, is used as an instrument for prohibition and punishment. However, practice shows that the law can also be used as a means to avoid punishment. Since underage is a rectifiable marriage impediment, in the event that the marriage is subsequently concluded (for justified reasons, with court permission), the prosecution of the parents for enabling or inducing the child to live in an extramarital union will not be undertaken, and if undertaken, it will be suspended (CC, art. 190. pat. 4). It follows that granting permission to enter into an underage marriage is a way to remove the mark of illegality from a parent's behavior that has all the features of a criminal act. In the introductory part of this paper, it was already mentioned that among minors at risk of early marriage, the majority are those under parental care (87.9%), and that almost half of the parents of those minors are unemployed. In her scientific work "Child Marriages in the Shadow of Crimes" (2022), the author Slađana Jovanović considered this situation from the aspect of practice, with an emphasis on the criminal legal context in which this phenomenon can be found, bearing in mind the observed connection with criminal acts such as coercion, neglect and abuse of a minor or domestic violence, extramarital union with a minor, adultery with a child, human trafficking. Along with the remark that refers to the unequal

treatment by public prosecutors, the aforementioned author cites very indicative reasons for rejecting criminal charges against the parents of children who are in the so-called child marriage: "the consent of all actors, the beginning of a union after the birth of a child, belonging to a certain national minority, i.e. the observance of customary norms, and in several cases the institute of "deed of minor importance" was applied, with the explanation that the minor is pregnant, that harmony reigns in the community, etc. (Jovanović, 2022: 57). With reference to the Annual Report on Child Marriage in Serbia for 2021 with special emphasis on the work of public prosecutors, N. Marković /2022/: Belgrade, pp. 8-12, the same author states that there have been cases in which the criminal complaint was dismissed after the conclusion of an underage marriage, after a significant period of time had passed since the filing of the criminal complaint (one to two years) expressing the logical conclusion that it can be reasonably suspected that they were just waiting for the fulfillment of the conditions for concluding the marriage.

2.3. The position of parents, i.e. guardians and guardianship authorities

2.3.1. The legal and factual significance of the position and opinion of the parents

In this procedure, the parents do not appear as representatives of their minor child (because in this procedure the child is recognized by the law as having procedural and postulation capacity), but they are in the role of witnesses (Stanković, Trgovčević Prokić, 2015: 408). The same applies to the guardian of a minor who is not under parental care. The law establishes the duty of the court to listen to the parents exercising parental rights, and if the minor is without parental care, to listen to the guardian. The court has the discretion to decide whether to hear a parent who does not exercise parental rights without justifiable reasons. Parents deprived of parental rights are not heard (LNLP, art. 82. par. 2).

The limitation that applies to the court does not apply to the guardianship authority. In the procedure before the guardianship authority, data can be collected from all persons who can provide relevant information, including from a parent who is deprived of parental rights or does not exercise that right without a justified reason - if such a parent is available and if during the procedure it is assessed that it is useful and that in this way relevant information can be obtained (Rulebook on organization, norms and work standards of the center for social work, art. 54 & 55).

The hearing (before the court), i.e. interview with the parents (before the guardianship authority) is part of the prescribed procedure and one of the elements of the expert assessment. The opinion of the parents, their consent, as well as their opposition aimed at preventing the conclusion of an underage marriage, from the point of view of the law, is not of decisive influence. Legal theory is also of the opinion that in this procedure the parents' opinion can only have a consultative character (Ponjavić, 2017: 111; Jović Prlainović, 2019: 106).

However, sporadic and limited practice research indicates that both the court and the guardianship authority attach decisive importance to the opinion and position of the parents, without critically evaluating and checking the obtained data in relation to the facts of the case. In the report (findings and opinion) submitted to the court, the guardianship authority relies heavily on the consent of the minor's parents for marriage,[10] so in a situation where such consent exists, as a rule, a deeper analysis of the minor's ability and capacity to respond to the demands of the new life situation and other elements on which the assessment of his/her best interest depends.[11] If we add to that the fact that the court largely relies on the opinion of the guardianship authority, and that the court decision as a rule summarizes the results of the work of the guardianship authority, and there is no explanation why the court accepted the findings and opinion of that specific expert (Nedeljković, 2019: 78), it is clear that neither the court nor the guardianship authority fully responded to the task.

2.3.2. The position and role of guardianship authority in court proceedings

The *ratio legis* of the guardianship authority's participation in this procedure is related to the child's right to special protection - in order to, on the one

[10] An illustrative example of the usual model of action is given in the research conducted in 2019 for the purposes of preparing a master's thesis at the Faculty of Law in Niš. The analysis has included the actions of a municipal center for social work in central Serbia, according to the court's requests for the delivery of findings and opinions in the procedure of granting permission for underage marriage, received in the previous three consecutive years. It was established that in all the procedures conducted (there were three of them), the finding and opinion of the guardianship authority had the same content: "Taking into account the personality of the minor [...], the fact that she is emotionally mature, well socialized, and has no disorders in her personality structure and behavior , as well as the fact that her parents gave declarations of consent before this authority that their daughter […] can marry […], I believe that she should be allowed to marry before reaching the age of majority." (Nedeljković, 2019: 77).

[11] UNICEF, 2016, p. 21.

hand, take into account the interests and ensure the protection of the minor from him/herself, "from his/her own weaknesses, inexperience and uncertainty" (Mitić, 1969: 351), and on the other hand, to prevent the abuse of minors by their parents and other persons who have legal or factual responsibility for their upbringing and development. Child abuse related to child marriage is, as previously noted, real, and child marriage is often just a cover behind which human trafficking, child trafficking for sexual exploitation, labor exploitation, forced begging and other criminal activities hide, which inflict harm and violate children's rights (Aleksić, 2015: 44-63; Božić, 2017: 48). In spite of this, some courts grant permission for the conclusion of an underage marriage without notifying the local competent guardianship authority about the initiation and conduct of the proceedings, that is, without any participation of the guardianship authority in the proceedings.

Until the adoption of the Instruction on the Way of Work of the Center for Social Work - the guardianship authority in the protection of children from child marriage, in 2019, the relevant facts were mostly collected and evaluated by one professional worker - the case manager. With the adoption of the Instruction, that segment of professional social work was raised to the level of team assessment (Instruction, par. 8.2).

Since the basic role of the guardianship authority is to perform, among other things, family and child protection tasks, in implementing the necessary professional procedures and making decisions related to children, the guardianship authority must have in mind the best interests of the child (FL, art. 6. Par. 1). The protection of the best interests is not only a fundamental right of the child from Article 3, paragraph 1 of the CRC, but also an interpretive principle and procedural rule. The value of that principle is manifold. It is a dynamic concept that requires assessment in accordance with the circumstances of each specific case. Through this prism, the outcomes of the court proceedings, i.e. the effects and scope of the court decision, are viewed (Vujović, 2019: 175). The court's decision on permission to enter into an underage marriage would have to meet that standard - to be in accordance with the best interests of the child. This means that the guardianship authority is obliged to determine which elements of the child's best interest should be evaluated and taken into account when making a decision. In a situation where underage marriage is legally allowed, this request

seems impossible: early marriage is simply not in the best interest of any child. It may just be less harmful than some other option under the circumstances.

In legal theory, there are different points of view regarding the position of the guardianship authority in the procedure of granting permission for the conclusion of an underage marriage. Some legal writers are explicit in their position that the guardianship authority, since it does not have the status of a party in the proceedings, does not have the legitimacy to file an appeal against the court decision (see, for example, Stanković, Trgovčević Prokić, 2015:. 412). However, different conclusions can (and must) be drawn from the overall position and role of guardianship authority in the legal system of the Republic of Serbia. From the way in which the legal norm is designed in Article 82, paragraph 2 of the LNLP: "the court shall *achieve* appropriate cooperation with the guardianship authority", it follows that the participation of the guardianship authority in this procedure is mandatory. The guardianship authority is an associate of the court, which collects data on the personal and family circumstances of the parties by order of the court. In this way, "it helps the court to exercise its official and inquisitorial powers, which it has in terms of collecting the necessary procedural materials that represent the basis for decision-making" (Stanković, 2013: 15). In addition to the position of an associate (auxiliary investigative body of the court), in this procedure the guardianship authority simultaneously has the procedural role of a mandatory expert - an expert ex officio. By collecting data by order of the court, the guardianship authority also collects the data necessary to take a position on the best interests of the child, because its basic, systemic role is to protect the interests of the child. The guardianship authority is expected to carefully determine the decisive facts during the proceedings on the order of the court and, if it establishes a risk of abuse of the child through the institution of underage marriage, to have a ready effective protection strategy and a set of alternative measures to ensure the safety and protect the rights of the child (Instructions, par. 10). This implies its right to a legal remedy against the court decision that decides on the rights and legal position of the child - if the court decision contradicts the opinion of the guardianship authority about the best interests of the child.. This position is based on the general provisions of the LNLP that apply to all non-litigation procedures (unless otherwise prescribed in a separate part of that law). According to LNLP, art. 5, "the guardianship authority that participates in the procedure even when it

is not authorized by law to initiate the procedure, is authorized to undertake all actions in the procedure for the purpose of protecting the rights and interests of minors and other persons under special social protection, and in particular to present facts that the participants failed to state, to propose presentation of evidence and to declare legal remedies". And yet, some legal writers believe that the guardianship authority does not have the right to appeal against the decision allowing the conclusion of a minor marriage (Stanković, Trgovčević Prokić, 2015: 412). This position leads to the conclusion that an appeal cannot be filed at all against a decision allowing a minor to marry, although an appeal in this case is not excluded by any special provision of the LNLP.[12] From Article 5 of the LNLP, which stipulates the general authority of the guardianship authority to declare legal remedies in non-litigation procedure for the protection of the rights and legal interests of minors "even when it is not authorized by law to initiate proceedings", it follows that the guardianship authority (although it is not authorized to initiate proceedings in this legal matter) has the right to file an appeal against the court's decision allowing a minor to enter into marriage, if such a decision contradicts its findings and opinion. Since the status and rights of minors are decided in the procedure for granting permission to enter into an underage marriage, the general powers from Art. 4 and 5 of the LNLP are also applicable in that procedure. The fact that the guardianship authority is not authorized by law to initiate this non-litigation procedure does not affect its general authority to take part in the procedure concerning minors, at any time during the procedure, and to declare legal remedies against court decisions that in its opinion are not in the best interest of minors. To be honest, this question has a purely theoretical significance. In the case law, there are no examples of the guardianship authority using the aforementioned procedural powers, since the courts base their decisions in these proceedings, without exception, on the (positive) opinion of the guardianship authority presented in the report submitted to the court, thus there was no need to file an appeal.

[12] According to the general rule of non-litigation proceedings from Art. 19 of the LNLP, an appeal against the decision made in the first instance can be filed within 15 days from the date of delivery of the copy of the decision, unless otherwise stipulated by that or another law. Among the special rules of the LNLP, which regulate the procedure for granting a marriage license, there is no provision with a different content.

2.4. Legal consequences of a court license to enter into marriage before the age of majority

Both the court and the guardianship authority must take into account the legal consequences of the court's permission - the fact that the act of entering into a marriage with the permission of the court leads to emancipation. In truth, the mere adoption and submission of a decision on granting the license to a minor to marry does not automatically affect his/her legal capacity. With such a court decision, one marriage impediment is eliminated and the effect of that decision stops there. Also, that permission is not given in general, but only for marrying a certain person.[13] But, once a minor marriage has been concluded on the basis of court permission, the legal consequence is permanent - by entering into a marriage with the permission of the court, a minor has acquired full legal capacity, so in the event that the marriage ends before reaching the age of majority, the same minor can enter into another marriage without a new court permission. Therefore, through the act of marriage, a minor acquires complete emancipation. With that act, he/she has acquired the right to divorce the marriage, but also the right to enter into a new marriage, without anyone's special permission. And he/she lost the right to special protection guaranteed to children under the age of 18 by the Constitution of the Republic of Serbia and the CRC.

3. Conclusion

The phenomenon of underage marriages, sometimes referred to in the literature as child or early marriages (although these terms are not entirely the same) and their impact on the further life and development of children have long been recognized in the field of human and children's rights as a serious social problem and a harmful practice. Marrying before adulthood carries a higher risk of child trafficking, sexual exploitation, abuse, psychological trauma, risk of death or injury during childbirth, and the likelihood of dropping out of school. Despite this, many modern legislations permit the conclusion of underage marriages.

[13] In the decision granting a marriage license, the court is obliged to state the names of the persons between whom the entry of marriage is permitted (LNLP, art. 83).

In Serbian law, permission to enter into an underage marriage is given in an extremely formalized court procedure in which the best interests of the minor are not fully considered. The guardianship authority also participates in this procedure, in a role that seems to move away from the primary one - protecting the best interests of the child and focuses on "justifying" the reasons for entering into a marriage with a minor, mainly with the arguments advocated by the parents. The obscure normative substrate opens up space for different interpretations, among other things, regarding the position and role of the guardianship authority in that procedure, to the extent that the possibility of using the procedural powers it has in other procedures, which are in the function of special protection of minors, is denied.

The legal consequences of underage marriage are irreversible. Marriage directly emancipates the minor. Married children are considered adults even though they have not reached the age of 18, further denying them all the special protections to which they are entitled under the CRC.

The established international standards regarding the prevention of the practice of child marriages put the Serbian legislator in front of the serious task of revising the family material and procedural legislation, in order to ensure a more complete protection of children's rights. At the same time, it must be taken into consideration that the prohibition of underage marriages is not a guarantee for eradicating the harmful practice of establishing underage partnerships, but it is a condition for completely eliminating the space for dispensation of parents from criminal responsibility in this case. In addition, it is a way to manifest the state's attitude towards a certain issue and thus establish a platform for policies and programs to support changes in attitudes, cultural patterns and value systems.

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