

THE MINORS AS VICTIMS IN A CRIMINAL PROCEEDINGS FOR CRIMINAL OFFENSES AGAINST SEXUAL FREEDOM¹

ABSTRACT: It is undeniable that the minors represent a particularly sensitive group of the modern society. Criminal acts have a particularly hard impact on the minors, especially children. For this reason, the domestic legislator almost always incriminates an act committed against a minor and/or a child as the most serious or heaviest form of a criminal act. However, in addition to prescribing special, more serious forms of criminal offenses when they are directed against a minor, and in addition to punishing such offenses much more severely, the domestic legislator also intervenes from another angle, guided by the best interest of a child as an absolute imperative, so he prescribes special rules under which the minors can participate in a criminal proceedings for criminal acts directed against them. This paper, starting from the general rules on the position of the injured party, provides an overview of the special rules referring to the minors as the injured parties.

Keywords: *minors; criminal proceedings; victims.*

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¹ This paper was created as a result of the work on the project entitled “Legal framework for preventing and suppressing violence against children” which was financed by the Provincial Secretariat for Higher Education and Scientific Research, decision number: 142-451-2205/2022-01/01.

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1. Introductory Notes on the Damaged as a Subject of Criminal Procedure

From a historical point of view, the position of the injured party in the past was considerably less favorable than it is today because the rights and interests of the injured party were not taken into account. However, with the development of criminal procedural law, the interests of the injured party are considered more carefully and seriously, because the state, including the court, is obliged to provide the injured party with appropriate protection of material and moral interests, which is why his active participation in the criminal proceedings is enabled.

At the end of the sixties of the twentieth century, Professor Packer presented his theoretical conception of *crime control* and *due process* modality of criminal proceedings (Packer, 1968, p. 159 et seq.; for more details see: Stefanović, 2017, pp. 34-36), he did not dedicated to the procedural position that the victim of a criminal offense has in the criminal proceedings for that offense, which seems unusual if one takes into account that in the sixties of the 20th century, a movement for the protection of victims' rights began, which was supposed to shed more light on the experiences and protection of victims in criminal proceedings (Trumbull, 2008, p. 780 et seq.).

The absence of the victim from the aforementioned theoretical models is explained by the conflict that would arise between the interests of the victim, on the one hand, and the public prosecutor's interest in effective prosecution within the framework of *crime control* model, or defense rights within the *due process* model, on the other hand (Beloof, 1999, p. 299). As a result, the concept of *victim participation* model of criminal procedure was theoretically shaped, which is based on fairness to the victim, her respect and respect for her dignity (Masahiko, 2010, p. 149). The origin of this concept was significantly contributed by victimological ideas about the rights of victims, under the influence of which there were gradual changes in national criminal legislation, both materially and procedurally (Reynald, 2004, pp. 519-520).

The increased attention paid to this issue in comparative criminal law is also a consequence of the influence of universal and regional international human rights documents. Of these, the International Covenant on Civil and Political Rights and, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms should be mentioned (Ilić, 2012, p. 139). The importance of the European Convention on Human Rights is reflected in the fact that states, in terms of the protection of basic human

rights, in addition to the basic duty of ensuring the right to life by establishing certain criminal legislation, also have a positive obligation to take preventive measures to protect an individual whose physical integrity or life is threatened other people's criminal behavior (Jakšić, 2006, p. 89 et seq.).

Although our criminal procedural legislation adopts the term injured party, it must be noted that the term victim itself is used more often in relevant international documents, comparative law and foreign literature (Ilić, 2012, p. 140).²

In the light of the above stated, this paper deals with some issues of the general position of minors as victims in criminal proceedings, and points out certain similarities and differences in the position of minors in relation to the general position of victims in domestic criminal proceedings. In addition to the above, a separate chapter of the paper is dedicated to special measures and legal consequences of conviction against the perpetrators of crimes against sexual freedom committed against minors, and with which our legislator tried to prevent the commission of these crimes.

The aim of the paper is to provide an overview of the position of minors in criminal proceedings, and to highlight certain issues concerning the positive legal measures that the legislator has adopted in order to prevent and specifically punish these crimes, and a proposal is made so that the future legislator could change and improve the existing solutions.

² The question can be raised whether there is a basis for adopting this term in our law as well. Although in the procedural theory there were attempts to make a conceptual difference between the victim (*la victime*) and the *injured party* – *le lésé*), there is still a lot of vagueness in this regard, which is a consequence of the inconsistency of the authors of various international legal documents that refer to the position of the victim in criminal proceedings. Ilić (2010, p. 78) uses property that has been damaged by a criminal act as a basis for differentiation. Accordingly, Ilić points out, the concept of victim would include a person whose personal rights were violated by a criminal act, while the concept of injured party would be related to the violation of property rights. This position, in principle, can be accepted as correct, but it should not be viewed narrowly only from the property aspect. Broadly speaking, in our opinion, anyone who is in any way affected by the commission of a criminal offense can be considered a victim of that criminal offense, while the term “injured party” implies a criminal procedural status which, as a rule, is conditioned by the existence of a certain legal qualification. Certainly, we are of the opinion that this terminological meaning has no practical consequences, bearing in mind that the legislator, as a rule, opts for only one of these two terms, while in our region these terms are often used as synonyms. Certainly, we can state that the term “victim” is primarily related to criminal substantive law and criminology, while the term “injured party” is mainly related to the procedural subject, that is, to criminal procedural law.

2. General Remarks on the Position of the Victim in Criminal Proceedings in the Republic of Serbia

While the previous Code of Criminal Procedure did not specifically define the injured party, but rather it was considered a matter of fact, according to the provisions of Article 2, paragraph 1, item 11 of the “new” Code of Criminal Procedure from 2011, the injured person should be understood as a “person whose personal or property rights were violated or threatened by a criminal act”. By adopting the new Code of Criminal Procedure, the Republic of Serbia has fulfilled the assumed obligation of the state to provide special rules on the protection of witnesses in certain criminal proceedings depending on the category of witnesses, the category of criminal acts or the category of courts (Brkić, 2005, p. 125). Therefore, in order for a person to be characterized as a victim, two conditions must be met: the first is that a criminal offense was committed, and the second is that, during the commission of that criminal offense, some personal or property right was violated or endangered. Both conditions must be cumulatively met (Stefanović, 2017, p. 44).

Following the general trend at the international level, and in our positive criminal procedural legislation, the victim gets an increasingly important role in criminal proceedings, and the provisions of the new Code of Criminal Procedure confirm such a conclusion (Lukić, 2011, p. 161).

Regarding the status of the injured party, in criminal proceedings the injured party may have different characteristics. Therefore, the injured party can appear in the criminal proceedings in different procedural roles: 1) as a private prosecutor (in the case of criminal acts for which he is prosecuted under a private criminal lawsuit); 2) the injured party as a prosecutor (for criminal offenses that are prosecuted *ex officio* in cases where the injured party took over the prosecution from the public prosecutor); 3) the injured party as a subject of pressure on the public prosecutor to initiate or continue criminal prosecution; 4) with a proposal for criminal prosecution; 5) with a proposal for the realization of a property claim arising from the commission of a criminal offense and 6) as a witness (Bejatović, 2016, p. 176; See more Stefanović, 2017, pp. 45-85, Matijašević-Obradović, 2016, pp. 153-179).

In order to realize its features, that is, to achieve the purpose of the defendant's participation in criminal proceedings, the injured party has the rights that are exhaustively listed in Article 50 paragraph 1 of the Code of Criminal Procedure. Thus, the injured party has the right to: “1) submit a proposal and evidence for the realization of a property claim and to propose temporary measures for securing it; 2) point out the facts and propose

evidence that is important for the subject that's being proved; 3) engages a representative from the ranks of lawyers; 4) examines files and inspects items that serve as evidence; 5) be notified of the rejection of the criminal complaint or of the public prosecutor's withdrawal from criminal prosecution; 6) file an objection against the public prosecutor's decision not to undertake or to abandon criminal prosecution; 7) be instructed on the possibility of taking over the criminal prosecution and representing the prosecution; 8) attends the preparatory hearing; 9) attends the main trial and participates in the presentation of evidence; 10) file an appeal against the decision on the costs of criminal proceedings and the awarded property claim; 11) be informed about the outcome of the procedure and be served with a final judgment; 12) takes other actions when determined by this Code."

The participation of the injured party in the procedure is evidenced by the possibility that, in the case of "lighter" crimes, the criminal charge may be dismissed if the damage has been fully compensated (Code of Criminal Procedure, 2011, art. 284, paragraph 3), or the criminal prosecution may be postponed in order to compensate for the damage caused or to fulfill due maintenance obligations. (Code of Criminal Procedure, 2011, Art. 283 para. 1 items 1 and 4 (Ilić, 2010, p. 153). Ilić points out that a statement of the defendant's acceptance to fulfill one of the obligations contained in Art. 283 st. 1 of the Code of Criminal Procedure, with the fact that its execution can begin even before submitting the agreement to the court, provided that the nature of the obligation allows it (Code of Criminal Procedure, 2011, Art. 314, paragraph 2, point). A key step forward is the obligation of the court to award the property claim in whole or in part in the conviction or in the decision on the imposition of a security measure of mandatory psychiatric treatment, and refer the injured party to civil proceedings for the excess (Code of Criminal Procedure, 2011, article 258 paragraph 4).³ The injured party's right to file an appeal against the decision on the awarded property claim is in accordance with the practice of the European Court of Human Rights in

³ The above-mentioned legal provision foresees an exceptional referral to the injured party to pursue the property claim in its entirety in litigation, provided that the data of the criminal proceedings do not provide a reliable basis for either a full or partial adjudication of the claim. However, no matter how much the legal provision talks about exceptional reference to litigation, in practice, it is generally known, the situation is reversed. As a rule, the criminal court will refer the injured party to litigation, while it will only exceptionally decide on a property claim. The reasons for this behavior of the criminal courts, we believe, lie partly in the insufficient skill of the judges of the criminal court in compensation law (lack of knowledge of court practice, etc.), but also in the personal views of the judges of the criminal court that they do not need to decide on issues that, according to their by nature itself, litigation issues, i.e. issues from the domain of civil (private) law. For different views, see: Stefanović (2017, p. 205 et seq.).

Strasbourg, according to which the injured party cannot be required to, after the property claim has been asserted in criminal proceedings and a certain period of time has passed since the disputed event, before the civil court demands compensation for damages (Ilić, 2012, p. 154),⁴ and only denying the opportunity to the injured party to file an appeal against the first-instance court decision would constitute a violation of the right to access the court in the sense of Article 6 of the European Convention on Human Rights.

Ilić (2012, p. 154) points out that if the rights that belong to the injured party as a prosecutor or a private prosecutor from Articles 58 and 64 of the Code of Criminal Procedure are added to what has been exposed, it can be concluded that the injured party, depending on his procedural role, has significant procedural possibilities at his disposal, which leads certain writers to the conclusion that in this way (by introducing “prosecutorial” powers of the injured party) the position of the defense is weakened, that is, the equality of arms is violated. This position, in our opinion, can be criticized. Namely, when the injured party acts as an authorized prosecutor, either in a private lawsuit or as a subsidiary prosecutor, he does not have any new or special powers that are not otherwise available to the public prosecutor when he acts as an authorized prosecutor, nor are these prosecutorial powers characterized by special quality when used by the injured party. Quite the opposite. In practice, private prosecutors and subsidiary prosecutors never have the same effective prosecutorial powers as public prosecutors do, because the prosecuting authorities (police and public prosecutor’s office) are still, unfortunately, not inclined to assist private prosecutors and subsidiary prosecutors in representing their charges. On the other hand, when the injured party participates in the criminal proceedings along with the public prosecutor, he again has prosecutorial powers in a narrower scope than those of the public prosecutor. In addition, the public prosecutor and the injured party, as a rule, come forward with a joint approach. Therefore, in our opinion, we cannot speak of a violation of the equality of arms by enabling the injured party to participate more actively in the criminal proceedings. The weapons remain the same. And the fact that both the public prosecutor and the injured party are on the opposite side may favor the defendant’s position, depending on the defense strategy.

⁴ See in particular the decision of the European Court of Human Rights in the case of *Boris Stojanovski v. the former Yugoslav Republic of Macedonia*, May 6, 2010, § 56.

3. The Position of a Minor as a Vicim in Criminal Proceedings in Domestic Legislation

Following the trends set by international legal standards⁵ regarding the position of minors in criminal proceedings, and taking into account the inherently sensitive position, the domestic legislator envisages special rules relating to minors appearing in criminal proceedings – this area is also called juvenile criminal law in theory (Škulić, 2003, p. 368).

Juvenile criminal law can be defined as a separate, rounded and autonomous area that contains a number of specific solutions in relation to adult perpetrators of criminal acts, and which represents legal regulations that determine the criminal legal status of minors (Jovašević, 2008, p. 466). It is, therefore, an area of the law that is based on the personality of the perpetrator (Dragojlović & Matijašević, 2013, p. 48), so it can be said that juvenile criminal law exceeds the framework of criminal law because it includes not only criminal law provisions of substantive legal content, but also provisions of procedural and executive criminal law to the extent and in scope that refers to minor perpetrators of criminal acts.

The Law on Juvenile Perpetrators of Criminal Offenses and Criminal Protection of Minors appears as the main regulation that contains criminal material and procedural provisions on the position of minors in criminal proceedings.

The Law on Juvenile Perpetrators of Criminal Offenses and Criminal Protection of Minors (hereinafter referred to as the Law on Minors) entered into force on January 1, 2006. In this way, juvenile criminal law was formally separated from the Criminal Code, that is, the Code of Criminal Procedure and the Law on Execution of Criminal Sanctions. Today, in the Republic of Serbia, the Law on Minors is the basic, direct source of juvenile criminal law, which, as a special regulation, has primacy in application to juvenile perpetrators of criminal acts, and under certain legal conditions also to adults (Jovašević, 2008, p. 468). In this sense, it is indisputable that the Law on Minors is *lex specialis* in relation to the Code of Criminal Procedure, while the provisions of the Code of Criminal Procedure, as well as other regulations in the field of criminal law, according to Article 4 of the Law on Minors, are applied subsidiarily to those issues that remain outside the regulations of the Law on Minors, i.e. they will be applied when they do not contradict the provisions of the Law on Minors.

⁵ For a detailed description, see: Jovašević, 2008, 475 et seq.; Vojinović, 2019, p. 28 and further.

Before presenting individual legal solutions that regulate the position of minors as victims in criminal proceedings, it should be pointed out, as a general note, that the current Law on Minors is not in full agreement with the provisions of the new Code on Criminal Procedure, and there are certain essential and terminological deviations, which is a consequence of the fact that the new Code on Criminal Procedure was adopted much later than the Law on Minors. However, the legislator should have made the necessary corrections in the special law, so that the entire criminal procedural law of the country would represent a rounded and coherent system.

In the first place, defining the scope of application of this law in a personal sense, and respecting international standards in this matter, Article 3 of the Law on Minors defines which persons are considered minors and to what extent this law applies to them. Thus, according to the introductory provisions of this law, a person who has “reached the age of fourteen at the time of the commission of the criminal act, but has not reached the age of eighteen, is considered a minor.” The Law on Minors also recognizes the division into younger minors, who have reached the age of fourteen at the time of the commission of the criminal act, but have not reached the age of sixteen, and older minors who are between the ages of sixteen and eighteen at the time of the commission of the criminal act. As a special category, minors are mentioned, that is, persons who have reached the age of eighteen at the time of the commission of the criminal act, but have not reached the age of twenty-one at the time of the trial.

However, these legal provisions from Article 3 do not refer to minors in all procedural roles, but refer to the age of the *perpetrator*. However, in the third part of the Law on Minors, which contains special provisions on the protection of minors as victims in criminal proceedings, no distinction is made between minors of different ages, and there is no division into victims as children, older and younger minors and younger adult persons, so it can be taken as the authoritative prescription of the Criminal Code, according to which a minor is considered a person who has not reached the age of eighteen (similarly, Jovašević, 2008). This conclusion is the only legally possible one. However, we believe that it is not entirely correct. Namely, children, younger and older minors do not suffer the consequences of a criminal offense equally. By its very nature, this is not possible. It is quite expected and reasonable that an act will hit a minor of a certain age much harder, while it will hit a minor of an older age somewhat more mildly. The legislator must have been aware of this, and should, in our opinion, have left room for stronger or more adequate protection of minors at a more sensitive age.

The provisions of the third part of the Law on Minors, which refers to the protection of minors injured by a criminal offense in criminal proceedings, among other things, stipulates that the panel will try adult perpetrators of certain criminal offenses prescribed by the Criminal Code, if the injured party in the criminal proceedings is a minor. The judge who presides over the aforementioned panel must be a judge who has acquired special knowledge in the field of children's rights and the criminal protection of minors (See more: Marković & Spaić, 2021, pp. 149–150). The following crimes are in question: aggravated murder (Article 114), incitement of suicide and assisting suicide (Art. 119), grievous bodily harm (Art. 121), kidnapping (Art. 134), rape (Art. 178), rape against a helpless person (Art. 179), adultery with a child (Art. 180), adultery by abuse of position (Art. 181), illicit sexual acts (Art. 182), pimping and enabling sexual intercourse (Article 183), organization of prostitution (Art. 184), display of pornographic material and exploitation of children for pornography (Art. 185), extramarital union with a minor (Art. 190), taking of a minor (Art. 191), change of family status (Art. 192), abandonment and abuse of a minor (Art. 193); domestic violence (Art. 194), failure to provide support (Art. 195), incest (Art. 197), armed robbery (Art. 205), larceny (Art. 206), extortion (Art. 214), facilitating the consumption of intoxicating drugs (Art. 247), war crimes against the civilian population (Art. 372), human trafficking (Art. 388), trafficking in children for adoption (Art. 389), establishing a slave relationship and transporting persons in a slave relationship (Art. 390).

However, this kind of prescription is somewhat imprecise, and this impreciseness is reflected in the fact that the legislator only states “if the victim in the criminal proceedings is a minor”, and therefore it is unclear whether this provision applies to a person who is a minor at the time the commission of a criminal offense or a person who is a minor at the time of the criminal proceedings, and amendments to the law should also resolve and specify this issue (Knežević, 2010, p. 325). When conducting proceedings for criminal acts committed to the detriment of minors, all persons participating in the proceedings, especially the public prosecutor and judges in the panel, shall treat the injured party with particular care, while taking into account his age, personality characteristics, education and the circumstances in which lives, and all in order to prevent possible harmful consequences of the procedure on his personality and development (Škulić, 2009, p. 56). The legal possibility that eases the situation of minors is that the evidence collected in criminal proceedings can be used in civil proceedings, thus speeding up the course of the proceedings and reducing the costs of the proceedings. Such a legal solution means that in civil proceedings the minor would not have to be heard

again before the court and thus prevents the repeated feeling of discomfort and fear that minors may have during interrogation. If the criminal proceedings were legally concluded with a conviction before the civil proceedings, the civil proceedings would not have to discuss issues that have already been discussed in the criminal proceedings, because in accordance with the provisions of Art. 13 of the Law on Civil Procedure, in civil proceedings the court with regard to the existence of a criminal offense and the criminal responsibility of the perpetrator is bound by the final judgment of the criminal court declaring the accused guilty. The principle of immediacy stipulates that the evidence is presented immediately before the court. In order to protect a minor, it would be expedient for the panel acting in the civil procedure to request the consent of the parties that the evidence presented in the criminal procedure that was not legally concluded with a conviction should not be presented again, but should be read at the main hearing, which is a deviation from the general rule of criminal proceedings on the direct presentation of evidence. The provisions of Article 102 of the Code of Criminal Procedure stipulate that the procedural body is obliged to protect the victim or witness from insults, threats and any other attack, and in the event that someone violates this prohibition, the procedural body is authorized to impose a fine. The provisions of the Code of Criminal Procedure protect the injured minor in another way by providing for special procedural protection, namely Article 103, which regulates the status of a particularly sensitive witness, and which provides that a “witness who, due to age, life experience, lifestyle, gender, state of health, nature, manner or consequences of an enforceable criminal offense, i.e. other circumstances of the case that are particularly sensitive, the procedural authority may ex officio, at the request of the parties or the witness himself, determine the status of a particularly sensitive witness.” The decision on determining the status of a particularly sensitive witness is made by the public prosecutor, the president of the panel or a single judge in the form of a decision. A separate appeal is not allowed against the decision by which the request was accepted or rejected.

In this way, the Code of Criminal Procedure, as *lex generali* in relation to the Law on Minors, provides similar protection, because it regulates the rules on the examination of a particularly sensitive witness so that questions can only be asked to a particularly sensitive witness through the procedural authorities, who will treat him with special respect and attention, trying to avoid the possible harmful consequences of the criminal procedure for the personality, physical and mental state of the witness, and further states that the examination can be carried out with the help of a psychologist, social worker or other expert, which is decided by the authority of the procedure.

The provisions of the Code of Criminal Procedure provide for the possibility that the authority of the procedure decides to examine a particularly sensitive witness using technical means for the transmission of images and sound, the examination is conducted without the presence of the parties and other participants in the procedure in the room where the witness is located, and that it can be to interrogate a particularly sensitive witness in his apartment or another room, that is, in an authorized institution that is professionally qualified for the examination of particularly sensitive persons. Such solutions provided by the Code of Criminal Procedure are identical to the provisions of the Law on Minors, with the difference being that the provisions of the Law on Minors applies only to minors, and the provisions of the Code of Criminal Procedure also to other groups of sensitive witnesses. A particularly sensitive witness cannot be confronted with the defendant, unless the defendant himself requests it, and the procedural authority allows it, taking into account the degree of sensitivity of the witness and the rights of the defense. According to the provisions of the Law on Minors, it is certainly forbidden for minors to confront the defendant, regardless of whether the defendant requests it or not. Therefore, it can be concluded from the above that the new Code of Criminal Procedure for the protection of sensitive and especially sensitive witnesses was inspired by the provisions of the Law on Minors.

In particular, it should be noted that, in accordance with the provisions of Article 157 of the Law on Minors, criminal proceedings for criminal offenses from Article 150 of this law are urgent. This provision is particularly important in order to shorten the period of uncertainty, fear and discomfort experienced by a minor injured person.

The position of minors as victims of criminal offenses is also regulated by special laws from different areas, in the effort of the domestic legislator to prevent the commission of criminal offenses against minors and, in the case of a committed criminal offense against a minor, to improve the position of that person as a victim in criminal proceedings. These laws are, by the nature of the matter they regulate, special laws.

One of such special laws is the Law on Special Measures for the Prevention of Criminal Offenses Against Sexual Freedom of Minors, which entered into force in April 2013 (hereinafter: Law on Special Measures). The Law on Special Measures is one of the shorter legal texts, with a total of 19 relatively short articles.

According to Article 1 of this Law, "this Law prescribes special measures to be implemented against perpetrators of crimes against sexual freedom committed against minors specified in this Law and regulates the keeping of

special records of persons convicted of those crimes”, while this Law for its purpose, according to Article 2, “the conditions that may have an influence on the perpetrators of criminal acts against sexual freedom committed against minors to commit these acts in the future have to be eliminated.”

As decisive reasons for the adoption of this law, the proponent (Government of the Republic of Serbia) points out that Article 37 of the Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Abuse, which was ratified by the National Assembly in May 2010, obliges the member states of this convention to prevent and prosecution of criminal offenses established in accordance with this convention, take all necessary legislative or other measures to collect data related to the identity and genetic profile (DNA) of persons convicted of criminal offenses established in accordance with this convention. In addition, bearing in mind the increased number of crimes against sexual freedom committed against minors, it is necessary that, in addition to the existing system of criminal sanctions, which have not been fully proven to be effective, special measures should be introduced to eliminate the conditions that can be from the influence that the perpetrators of these criminal acts commit these acts in the future. For the aforementioned reasons, it is proposed to adopt a special law that would prescribe additional measures to be implemented against persons convicted of crimes against sexual freedom committed against minors, after serving a prison sentence, and also to establish a special criminal record for these convicted persons. This Law is limited in its application to only certain criminal acts which, by nature of the *numerus clausus* norm, are listed in Article 3 of this Law. These are 1) rape (Article 178, paragraphs 3 and 4 of the Criminal Code); 2) rape of an incapacitated person (Article 179, paragraphs 2 and 3 of the Criminal Code); 3) adultery with a child (Article 180 of the Criminal Code); 4) fraud by abuse of position (Article 181 of the Criminal Code); 5) illicit sexual acts (Article 182 of the Criminal Code); 6) pimping and facilitating sexual intercourse (Article 183 of the Criminal Code); 7) organization of prostitution (Article 184, paragraph 2 of the Criminal Code); 8) showing, obtaining and possessing pornographic material and exploiting a minor for pornography (Article 185 of the Criminal Code); 9) inducing a minor to attend sexual acts (Article 185a of the Criminal Code); 10) using a computer network or communication by other technical means to commit crimes against sexual freedom against minors (Article 185b of the Criminal Code).

However, the provisions of the Law on Special Measures will not be automatically applied to all perpetrators of the criminal acts listed in Article 3 of this law. In order for the provisions of this law to be applied, it is necessary

that the qualifying circumstance be fulfilled during the commission of the criminal act: that the act was committed against a minor, that is, that a minor was harmed by a criminal act (Article 3 of the Law on Special Measures).⁶

The key operational provisions of this law are contained in Articles 6 and 7.

Thus, Article 6 of the Law on Special Measures regulates the legal consequences of a conviction.⁷ Namely, a conviction for a criminal offense specified in Article 3 of this law necessarily entails the following legal consequences:

- 1) termination of public office,
- 2) termination of employment, i.e. termination of calling or profession related to work with minors,
- 3) prohibition of acquiring public positions,
- 4) prohibition of establishing an employment relationship, i.e. performing a calling or occupation related to work with minors.

Furthermore, according to paragraph 2 of this provision, the legal consequences of the conviction from paragraph 1 of this article occur on the day the judgment becomes final. Regarding the duration of these legal consequences of a conviction, it is prescribed that the legal consequences of a conviction from paragraph 1 point 3) and 4) of this law last for 20 years, and, according to an express provision, the time spent serving a prison sentence is not included in the duration of the legal consequences of a conviction. The legally binding judgment from paragraph 2 of this article must also be delivered to the convicted person's employer.

Therefore, a clear conclusion can be drawn that with regard to points 3 and 4, i.e. the ban on acquiring public positions and the ban on establishing an employment relationship, i.e. performing a calling or occupation related to working with minors, their duration is precisely determined in advance to a duration of 20 years, and there is no possibility of a shorter duration of these

⁶ At this point, it should be noted that on several occasions since 2012, various representatives of the National Assembly of the Republic of Serbia have initiated a procedure for the adoption of a law on amendments to the Law on Special Measures, so that it does not only apply to minors, but to applies to all persons, i.e. that the provisions of this law apply to all perpetrators of the criminal acts listed in Article 3 of the LSM, regardless of whether they were committed against a minor or not. (See available proposals for amending the Law on the website of the National Assembly of the Republic of Serbia – www.parlament.gov.rs); These proposals of MPs did not enter the parliamentary procedure.

⁷ These legal consequences of conviction for criminal offenses against minors occur independently of the legal consequences of conviction provided for in the Criminal Code.

legal consequences of conviction in these cases. This type of prescription can only be justified from the aspect of the legislator's effort to be particularly punitive. However, looking at it from the aspect of criminal sanctioning, setting a fixed duration of legal consequences in advance and for such a long period of time, cannot be fully accepted. This is all the more so since this law includes truly diverse acts, where we can imagine a situation where it would not be justified to set the legal consequences of a conviction, in any case not for a duration of 20 years. However, the legislator completely tied the hands of the court, that is, the legal consequence of the conviction occurs without the possibility of the court, taking into account the special circumstances of the case, to decide that this consequence does not occur, or that it lasts for a shorter duration of 20 years. All the more so since this duration is twice as long as the time period prescribed by the Criminal Code.

Regarding the other legal consequences of the conviction, no particular criticisms can be directed at the legislator. On the contrary, the legislator was reasonable and measured when prescribing these consequences of conviction.

Furthermore, Article 7 of the Law on Special Measures provides for special measures imposed on convicted persons, which represent the main motive for the adoption of this special law. Thus, according to the perpetrator of the criminal offense referred to in Article 3 of this law, *after serving the prison sentence*, the following special measures are implemented:

- 1) mandatory reporting to the competent authority of the police and the Administration for the Execution of Criminal Sanctions,
- 2) prohibition of visiting places where minors gather (kindergartens, schools, etc.),
- 3) mandatory visit to professional counseling centers and institutions,
- 4) mandatory notification of change of residence, place of residence or workplace,
- 5) mandatory notification of travel abroad.

Paragraph 2 of the same article prescribes that the measures from paragraph 1 of this article shall be implemented 20 years after the prison sentence has been served, and paragraph 3, that after the expiration of every four years from the beginning of the application of the special measures from paragraph 1 of this article, the court that issued the first-instance verdict, *ex officio* decides on the need for their further implementation. A request for reconsideration of the need for further implementation of special measures from paragraph 1 of this article can be submitted by the person to whom these measures apply, and the request can be submitted to the court that issued the

first-instance verdict after the expiration of every two years from the beginning of the application of special measures.

According to the explanation for the adoption of the Law on Special Measures, bearing in mind the goal of the Law prescribed in Article 2, which is to eliminate the conditions that may have an influence on the perpetrators of criminal acts against sexual freedom committed against minors in the future committing these acts, Article 7 of the Law provides are special measures that are implemented after serving a prison sentence (Draft, 2012, p. 8).

Of the prescribed measures, we believe that each would pass the constitutionality muster, even though they violate human rights to a certain extent – freedom of movement, first of all. Namely, we believe that the prescribed measures really limit the human right to freedom, which includes freedom of movement, both in the sense of the European Convention on Human Rights and in the sense of the Constitution of the Republic of Serbia. It is not disputed that, in terms of the “balance test” applied by the Strasbourg Court, the restriction in question is based on law and serves a legitimate state objective. The only element that could be disputed is the fulfillment of the conditions “necessary in a democratic society” – that is, the requirement that there is a balance between the goal that the state wants to achieve and the means by which it is achieved, that is, the measure that limits human rights. This is because the duration of special measures of 20 years after serving a prison sentence can, at first glance, seem like an unreasonably long period of time. Then it could be argued that the state went too deep into the right of a convicted person to freedom. However, the duration of the special measure is only nominally set at 20 years. Namely, this is due to the fact that paragraphs 3 and 4 of the same article prescribe that the court *ex officio* decides every 4 years on the need for further implementation of these measures. In addition, it is possible for the person to whom the measures refer to, every two years, to submit a request to the court to decide on the further need to implement special measures. Therefore, if the competent court effectively and really pays attention to the examination and decision on the need for further implementation of special measures, without it being reduced to the automatic extension of special measures, then the state has ensured a fair conduct of the proceedings, and there is no *prima facie* disproportion. Therefore, although one could argue the opposite, these measures cannot be considered unconstitutional.

However, as a general criticism, it should be stated that the legislator almost completely tied the court’s hands. There is no possibility of assessment and discretion of the court when deciding, all legal consequences of conviction and all special measures occur and are applied by force of law. As much as half

of the legal consequences of a conviction last for 20 years without exception or possibility of shortening. The court cannot decide that only some legal consequences of a conviction should occur or that only some special measures be applied. All special measures nominally last 20 years, unless the court shortens the measure every four years. In doing so, the legislator predicted that the court will decide *ex officio* on the need for further implementation of special measures, while not prescribing a single element that the court should take into account, so that the court is completely free to decide on the basis of whatever criteria you want. On the one hand, the legislator completely submits the matter to the court's discretion (determination of special measures and legal consequences of the conviction), while on the other hand, he leaves all discretion to decide on the need for further implementation of measures. This approach of the legislator is inconsistent and opens the door to the complete arbitrariness of the court.

In addition, the inadequacy of the abstract and linear sanctioning of all perpetrators of the aforementioned criminal acts, apart from elementary unfairness, is also problematic due to the nature of the acts themselves. Thus, on a hypothetical example, which is quite present in practice, we can see the problem of such prescription. Namely, if two persons, one aged 13 and one aged 16, are in a love relationship and consummate the same relationship, this would further mean that, with the strict application of the Criminal Code and the Law on Special Measures (which does not make a difference in the application of measures and of the legal consequences of the conviction against the age of the perpetrator), that person had to be convicted of adultery with a child, with all the legal consequences of the conviction and special measures. No discretion of the court could be exercised (except for the deliberate reclassification of the act). This was certainly not the intention of the legislator, but with clumsy formulations and complete exclusion of the freedom of the court, this situation is completely possible.⁸ In addition, according to the express provisions of Article 5 of the Law on Special Measures, for criminal offenses from Article 3 of this law, the sentence cannot be reduced and parole is not possible (see in detail on this issue Đorđević & Simeunović-Patić, 2015, p. 239 and further).

⁸ The case of the High Court in Pancevo, which convicted a person, a member of the Roma national minority, for having sex with a child is well known, so that the Court of Appeal in Belgrade, with the president of the panel, Miodrag Majić, changed the first-instance verdict and acquitted the defendant.

In addition, in Articles 13-15 of the Law on Special Measures, it is stipulated that the Ministry responsible for judicial affairs keeps special records on persons convicted of criminal offenses from Article 3 of the Law.⁹ This is a *de facto* registry of sex offenders against minors.

We can therefore say that the legislator started from valid reasons, with the right motive when enacting this legal regulation, but he had to be wiser in his prescription. However, as shown by the constant attempts to amend this law, and especially as pointed out in the proposal of MP Nenad Konstatinović from September 2016, there are many problems with the non-application of this legal regulation in practice, starting with the (non) keeping of the register from Article 13 Law on Special Measures, by failing to apply special measures and legal consequences of conviction and others.

4. Conclusion

As one of the most sensitive social groups in modern society, minors require and enjoy special protection in all proceedings in which they participate and which concern them. Thus, minors are especially protected when they appear as injured persons in criminal proceedings. A special position primarily refers to the rules on hearing and questioning an injured minor, which fundamentally recognizes the status of a sensitive witness. Our legislator followed the standards set by international legal documents, thus fulfilling his assumed obligations. However, the Law on Juvenile Offenders and Criminal Protection of Minors is not perfect. Namely, we believe that it would be necessary to further elaborate the third part of this law, which refers to the protection of minors as injured persons, in order to foresee new and extend existing protections for these persons, and that the level of protection of minors as injured persons differs according to the age of that person. Thus, this chapter would be harmonized with the rules of the same law that exist when it comes to juveniles.

On the other hand, with regard to the Law on Special Measures, we believe that it should undergo significant substantive changes. Although the legislator started from a valid goal of regulation, also respecting international

⁹ It is interesting to point out the clumsiness in formulating the legal provision from Article 13 of the LSM. Namely, this article refers only to those persons “convicted of a criminal offense” from Article 3 of that law. It is not clear whether this provision includes insane persons, who were not convicted of a criminal offense, but of an offense defined by the criminal law as a criminal offense, and were sentenced to mandatory psychiatric treatment. If we know that these persons are not guilty of these acts, the question arises whether they fall under the determination of the legislator in the sense of Article 13 of the LSM.

standards, we believe that he went too far, so this law is of a highly punitive nature. *De lege ferenda*, it would be necessary to leave the possibility for the court, according to the circumstances of each specific case, to apply one or more measures at the same time, and not for them to be automatically applied simultaneously. Also, greater autonomy should be given to the court when determining the legal consequences of a conviction, as well as their duration, as well as the duration of special measures. The legislator would be justified in prescribing the minimum and maximum duration of the legal consequences of conviction and special measures, where the court, *in concreto*, would determine the exact duration of these sanctions. However, in the first place, it would be necessary to start applying the existing law in its entirety. It's not like it was enacted way back in 2013.

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MALOLETNA LICA KAO OŠTEĆENI U KRIVIČNOM POSTUPKU ZA KRIVIČNA DELA PROTIV POLNE SLOBODE

REZIME: Nesporno je da maloletna lica predstavljaju naročito osetljivu grupu savremenog društva. Krivična dela naročito teško pogađaju maloletna lica, a posebno decu. Iz tog razloga domaći zakonodavac gotovo uvek kao teži ili najteži oblik nekog krivičnog dela inkriminiše delo koje je učinjeno prema maloletnom licu i/ili detetu. Međutim, pored toga što propisuje posebne, teže oblike krivičnih dela kada su ona uperena protiv maloletnog lica, te pored toga što takva dela znatno strože kažnjava, domaći zakonodavac interveniše i iz drugog ugla, te, vodeći se, kao apsolutnim imperativom, najboljim interesom deteta, propisuje posebna pravila pod kojima maloletna lica mogu da učestvuju u krivičnom postupku za krivična dela uperena protiv njih. Ovaj rad, polazeći od opštih pravila o položaju oštećenog, pruža prikaz posebnih pravila koja se odnose na maloletna lica kao oštećena.

Ključne reči: maloletna lica, krivični postupak, oštećeni.

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