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CRIMINAL OFFENCE OF EXTRAMARITAL UNION WITH A MINOR DE LEGE LATA AND DE LEGE FERENDA**

Abstract: *As juveniles fall into the category of insufficiently mature and vulnerable persons, Serbian law has traditionally recognized the special status of minors within the framework of criminal law protection, regardless of whether they are perpetrators or victims of crimes. In recent times, certain steps have been taken to ensure their more comprehensive protection. However, in all these efforts to strengthen the criminal-law protection of minors, one of the criminal offences against marriage and family seems to have remained “under the radar”: the criminal offence of cohabitation with a minor (Article 190 of the Criminal Code). While life in an extramarital union can be harmful for minor’s health, education, economic situation (etc.), this cohabitation community with a minor may be just a cover for sexual, labor or other forms of exploitation and abuse of minors. In this context, the subject matter of research in this paper is the normative framework of this criminal offence, and its application in domestic judicial practice, particularly in view of achieving the criminal-policy goals de lege ferenda.*

Keywords: *criminal offence, extramarital union with a minor, Serbian criminal legislation.*

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1. Introductory remarks

In the criminal legislature of the Republic of Serbia, juveniles or minors traditionally enjoy a special status in terms of legal protection, regardless of whether they are perpetrators or victims of criminal offences. It is fully understandable and justifiable considering the characteristics of this social category, which includes young people who are still in the process of biological, psychological and social formation, development and maturation. Although Serbian law has traditionally recognized the need for rules adapted to this social category, certain steps have been taken in recent times to ensure their more comprehensive protection. Thus, the Act on Juvenile Criminal Offenders and Criminal Law Protection of Juveniles (2005)¹ unified specific legal solutions from the area of substantive, procedural and enforcement criminal law within a single source of law. This tendency was furthered in the Act on Special Measures for Preventing the Commission of Sex Crimes against Minors (2013)² which *inter alia* envisaged a special record of sex offenders, introduced a ban on punishment reduction and parole, prescribed that there shall be no statute of limitations on criminal prosecution and execution of punishment in sex offences involving minors, and introduced other special legal consequences of punishment.³ This was in line with the earlier amendments to the Criminal Code, introduced in compliance with the CoE of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007),⁴ and the latest amendments to the Criminal Code (2019),⁵ which introduced a sentence of life imprisonment in order to ensure an adequate punishment for the perpetrators of the most serious sex crimes against life and limb in case the consequence of the crime is death of a child, a minor, a pregnant woman or an infirm person of impaired physical or mental health. The same conceptual framework was pursued by the working group created by the Ministry of Justice which was tasked to draft the legislative act on the so-called *Amber Alert*, a special mechanism for instituting a faster and

1 Act on Juvenile Criminal Offenders and Criminal Law Protection of Juveniles, *Official Gazette*, no. 85/05.

2 Act on Special Measures for Preventing the Commission of Sex Crimes against Minors, *Official Gazette*, no.32/13.

3 For more, see: Миладиновић-Стефановић, 2013: 377-393, Миладиновић-Стефановић, 2014а: 567-584, and Миладиновић-Стефановић, 2014b: 447-462.

4 The Act on the ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *Official Gazette – International contracts*, no. 1/10.

5 The Criminal Code of the Republic of Serbia, *Official Gazette*, no. 85/05, 88/05–corr., 107/05–corr., 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19.

more efficient search for missing or abducted children.⁶ Yet, in these efforts to strengthen the criminal-law protection of minors, one criminal offence against marriage and family seems to have remained “under the radar”: the criminal offence of cohabitation with a minor in an extramarital union (Article 190 CC). There is no need to elaborate on the thesis that life in an extramarital union can be harmful for a minor in terms of physical and mental health, education, economic dependence, etc. Such cohabitation may also be just a cover for sexual, labor or other forms of exploitation and abuse of minors. In this context, the subject matter of research in this paper is the normative framework of the criminal offence of extramarital cohabitation with a minor (Article 190 CC) and its application in domestic judicial practice. The analysis aims to examine its appropriateness and applicability *de lege ferenda* in view of achieving the policy goals which triggered the criminalization of this offence.

2. Object of protection in an extramarital union with a minor

The criminal offence of cohabitation with a minor falls into the group of criminal offences against marriage and family (envisaged in Articles 187-197 of the Serbian Criminal Code). Given the fact that Article 190 CC envisages a dual object of protection, the incriminated offences are classified into two groups: criminal offences against marriage and criminal offences against family (Делић, 2021: 111-112, Јовашевић, 2017: 102). In light of this classification, there is a question concerning the classification of the criminal offence of cohabitation with a minor in an extramarital union, i.e. which of the two groups it falls into. It is evident that such a union does not protect marriage,⁷ nor is it formally and theoretically supported that it protects the institution of extramarital unions as such. It could perhaps be argued that this criminal offence indirectly protects the family because the functionality of an extramarital union with a minor may be disputable, considering the fact that the minor is still immature, in the process of biological, cognitive, psychological and social development, and still in great need of assistance and support to gain their own independence. However, it seems that the *ratio legis* of this incrimination is to be found in the need to protect minors from entering into extramarital unions, which may be harmful to their physical and mental health, which may considerably hinder or completely obstruct their education, and thus limit their future prospects. For this reason, in the legislations of some foreign countries, the group of crimes including the

6 Ministry of Justice (2020). Working group of the Ministry of Justice for introducing Amber Alert, 11.03.2020; <https://www.mpravde.gov.rs/sr/vest/29094/radna-grupa-ministarstva-pravde-za-uvodjenje-amber-alarma.php>

7 There is a contrary (minority) opinion that the incrimination protects marriage indirectly since it prohibits “alternative” extramarital unions (Јовић, 2001: 727, Ђорђевић, 2014: 78).

cohabitation with a minor was designated as *criminal offences against marriage, family and children*, which is the case in the legislation of Croatia and some other neighboring countries.⁸

The Croatian legal theory emphasizes that Chapter XVIII of the Croatian Criminal Code (Articles 167-179a) protects a number of correlated social goods: marriage (by prohibiting bigamy, illegal marriage, and forced marriage), family (by envisaging penalty for violation of family obligations, abandoning a next of kin in times of hardship, breach of maintenance obligation, incest, and domestic violence) and children⁹ (by prescribing penalty for an adult living in an extramarital union with a child, child abduction or taking a child from their family, adoptive or foster family, guardian or guardianship authority, child abandonment, fraudulent change of child's family conditions, violation of children's rights and privacy (Cvitanović, Derenčinović, Turković, Munivrana Vajda, Dragičević Prtenjača, Maršavelski, Roksandić Vidlička, 2018: 227-228). Yet, in Croatian criminal law theory, there are different standpoints on the object of protection in this criminal offence: protection is primarily provided to children and indirectly to the family (Hirjan, Singer, 1991: 235); children and marriage are protected concurrently (Novoselec, Turković, Derenčinović, Cvitanović, Bojanić, Grozdanić, Kurtović, 2007: 205); there is an exclusive protection of children only (Šeparović, 1987: 94).

In view of the internal systematization of these subgroups, it should be noted that the Serbian criminal law literature includes a similar opinion: thus, besides the first group of offences which are undoubtedly related to the criminal acts against marriage, there is the second group of criminal acts that are definitely committed against *family and minors* (Мрвић Петровић, 2019: 146); the latter group includes: cohabitation with minors in an extramarital union (Art. 190 CC), child abduction (Art. 191 CC), change of child's family status (Art.192 CC),

8 See: Chapter XVIII of the Criminal Code of Croatia, *Narodne novine*, no. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21 and 114/22. Similar but less precise provisions are envisaged in the Criminal Code of the Federation of Bosnia and Herzegovina (*Official Gazette of FB&H*, no. 36/03, 21/04-corr., 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16, 75/17 and 31/23), which envisages criminal offences against marriage, family and young persons (Ch. XX). The criminal offences against marriage, family and youth are also part of the Criminal Act of the Brčko District (*Official Gazette of the Brčko District of FB&H*, no. 19/20-consolidated text) and the Criminal Code of the Republic of Northern Macedonia (*Official Gazette of RM*, no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 185/11, 142/12, 166/12, 55/13, 82/13, 14/17, 27/14, 28/14, 115/14, 132/14, 160/14, 199/14, 196/15, 226/15, 97/17, 248/18 and 8/23), but neither act provides a definition of young persons or youth (respectively).

9 Under the Croatian criminal law, a child is defined a person under the age of 18 (Art. 87 para.7 CC RC). In Serbian criminal law, there is a distinction between a juvenile (a person under the age of 18), a minor (a person over 14 who has not turned 18), and a child (a person under the age of 14) (Article 112, items 8, 9, 10 of the CC).

child abandonment, neglect and abuse (Art. 193 CC), serious (qualified) forms of domestic violence (Art. 194, para.3 CC), and incest (Art. 197 CC). The former observations indicate that it may be justified to consider renaming this group of criminal offences (as criminal acts against marriage, family and children) and clearly designating which of these crimes are committed against minors, which will ensure their adequate protection and relevant punishment for the offender.

3. The essential elements of the criminal offence of extramarital union with a minor

This criminal offence is committed by an adult person who lives in an extramarital union with a minor (Article 190 para.1 CC). The Serbian CC does not define the concept of an extramarital union but comparative law shows otherwise.¹⁰ The lack of an authentic interpretation of this concept in the context of criminal law implies that the provisions of the Family Act (hereinafter: FA) have to be taken into account as relevant.¹¹

In the Family Act, an extramarital union is defined as a more permanent union of life of a woman and a man, whose relationship is not barred by any marital obstacles (Art. 4 FA). This definition contains certain constituent elements that are the basic preconditions for the existence of an extramarital union: the presence of the community of life, different gender of extramarital partners, monogamy, stability and duration of the union, which is a notorious fact (Поњавић, Влашковић, 2019: 139); some authors identify additional elements: the community of life, the length/duration of the union, and the absence of marital obstacles (Панов, 2022: 151-152).

The community of life means that extramarital partners live together (co-habitate), share a place of residence, eat together, equally contribute to earning and spending their finances, have joint responsibilities, spend free time together, have intimate sexual relationships, etc. An extramarital union is not to be identified solely with sexual relations between partners, even if they are of permanent nature. It should be also borne in mind that a consensual sexual

10 The Criminal Code of Croatia defines an extramarital union as a life union of a more permanent character, or a union of less permanent character as a result of which the partners have a child (Art. 87 para. 10 CC RC). This concept was not a subject matter of authentic interpretation in the original version of this Code, for which reason the courts resorted to applying the definition of an extramarital union from the family law. In order to provide for the application of this concept within the framework of the Criminal Code, the legislator decided to introduce this definition, whose effectiveness is still questionable. For more, see: Garić, 2006: 30; Lucić, 2015: 109.

11 The Family Act, *Official Gazette RS*, no. 18/05, 72/11, and 6/15.

relationship (intercourse) with a person under the age of 14 is not treated as a criminal act, unless committed under the conditions prescribed in the criminal offences envisaged in Chapter 18 (Articles 178-186) of the Serbian Criminal Code (sexual offences). This is an additional argument in favor of the conclusion that the purpose of this incrimination is not only the protection of minors from engaging in sexual relations early in their lives but also from cohabitation which implies various obligations and constraints imposed by an extramarital union. Unlike marriage, an extramarital union excludes the possibility of living in separate residences. In case spouses decide to live apart, marriage still formally exists. In out-of-wedlock relations, the union ends in case of separation, due to its extramarital nature and the fact that Serbian law does not require any formal registration of such unions.¹² In other words, without the community of life which binds together the emotional, sexual, procreative, economic, intellectual, cultural and other needs of a man and a woman, marriage still formally exists (albeit only as “an empty shell”); on the other hand, an extramarital union is terminated without the community of life.

The essential elements of an extramarital union are its *permanence and stability*. Yet, permanence is a rather flexible term and competent courts assess the actual substance of this legal standard on the basis of relevant circumstances in each single case. Thus, some foreign legislations tend to specify this legal standard in the interest of legal equality and certainty.¹³ However, there are cases where Serbian criminal courts did not insist on permanence as an essential element of extramarital union. For example, in a number of judicial decisions, the court concluded that the criminal act was committed “*when the accused lived with the injured party in his sister’s apartment for two days although they planned to live in a rented apartment*”,¹⁴ or that “*the termination of the extramarital union after eight days because the accused made the injured party return to her parents has no relevance for the commission of this act*”.¹⁵ Although quite similar, these examples are substantially different. Namely, the second case completely dismisses the

12 For more on the registration of extramarital unions, see: Kaščelan, 2012: 92 et seq.

13 Under the Croatian law, an extramarital union must last for at least three years; it may be shorter if the partners have a child or if the union results in marriage (Art. 11 para.1 of the Family Act, *Narodne novine RC*, no. 103/15, 98/19, 47/20 and 49/23). This formulation significantly differs from the provision in the Croatian Criminal Code (see *supra* footnote 10). A similar solution is envisaged in the Art. 12 of the Family Act of Montenegro (*Official Gazette RM*, no. 1/07 and *Official Gazette RM*, no. 53/16 and 76/20). Yet, the time limits cannot solve all problems as they can result in absurd situations. For example, an extramarital union could have lasted three years, but this status would not be legally recognized if the union was terminated a little before the termination of the prescribed period.

14 Judgment of the Supreme Court of Serbia, no. 1351/88.

15 Judgment of the Basic Court in Belgrade, no. 31/95.

element of permanence because the period of eight days is too short to be considered relevant, while the first case is based on the intention of extramarital partners to have a long and permanent relationship, considering that the partners planned to live in a rented apartment after living together in the accused sister's flat. It is interesting to note that the Justification of the Preliminary Draft of the Family Act explains that the length/duration of an extramarital union is not of crucial importance as is the intention of extramarital partners to get involved in a long-lasting relationship (Панов, 2022: 152). While it may be difficult to determine the impact of this justification on criminal courts, there is a dilemma about how helpful this instruction actually is because it introduces the element of intent, which is subjective and often more difficult to prove than the objective fact of the actual length of an extramarital union.

The next essential element and precondition for establishing the presence of an extramarital union is the *different sex of extramarital partners*, which clearly shows that this union can be only the union between a man and a woman. In light of the criminal offence of cohabitation with a minor, it means that the active and the passive subject are not defined only in relation to their age (an adult person and a minor), which is evident in the legal formulation of the criminal offence, but also in relation to their sex, particularly considering the concept of an extramarital union accepted in Serbian family law. Here, we may observe one of the drawbacks of the envisaged criminal offence. Namely, in terms of sex the legislator was not consistent in its intention to protect minors because the minors who live in a permanent homosexual extramarital unions have remained without any legal protection. Some authors consider this to be one of the reasons for the decriminalization of the offence envisaged in Article 190 CC (Стојановић, 2022: 649). However, there are arguments in favor of a completely different stance. Relying on the principle of special protection of minors, it is possible to redefine this criminal offence in the manner which has already been applied in the legislations of other countries.¹⁶ Thus, the term "extramarital life" should be used instead of the term "extramarital union". On the other hand, as criminal law relies on the interpretation of the family law provisions, this problem may be resolved indirectly by amending the current definition of an extramarital unit (which is unlikely to occur in the near future). While the Draft Civil Code does not propose a new solution,¹⁷ the problem is further complicated by the

16 See Art. 170 of the Criminal Code of Croatia. This criminal offence is an example of formal subsidiarity because the act is committed by an adult person who lives with a child under the age of 16, provided that cohabitation with a minor does not constitute a more serious criminal offence which is punishable by a more serious punishment.

17 See: Art. 2215 of the Preliminary Draft of the Civil Code, Government of the Republic of Serbia, Commission for drafting the Civil Code, Belgrade, 29 May 2015; <https://www.mpravde.gov.rs/files/NACRT.pdf>, (20 May 2023).

slow process of adopting the Act on Same-sex Civil Partnerships¹⁸, which does not provide a solution either. Even if we assume that homosexual unions with minors are quite rare and that minors are thus less likely to be victimized in such partnerships, victimization may not be ruled out in same-sex partnerships. Given the fact that some other offences were formulated in a “gender neutral” manner, the legislator could have applied the same approach to the offence of cohabitation with a minor by simply replacing the term “extramarital union” with the term “extramarital life”.

The extramarital union is also characterized by *monogamy*, which is open to interpretation due to its dual meaning. Namely, the Serbian family law prescribes that a person is not allowed to enter into two or more extramarital unions simultaneously, nor is he/she allowed to be married and live in an extramarital union with another, and enjoy the rights that are analogous to the rights granted to spouses. This proves that borrowing the term “extramarital union” from civil law is not appropriate since it is very difficult to deny that minors may be victimized even if they live in an extramarital union with an adult partner who is still formally married but does not actually live with his/her spouse. The same applies to some other possible arrangements which are not recognized as extramarital unions in the Serbian legal system, such as “dual” extramarital life (e.g. when an adult person permanently works and lives with a partner in one city and has another partner in another city whom he/she sees at the weekends), or “group” extramarital life (i.e. having several extramarital partners at the same time, which is analogous to polygamy).

An extramarital union is a *notorious* (indisputable) fact when it is public, apparent and generally known to the community. This essential element distinguishes it from all other forms of covert love affairs or temporary partnerships. However, it seems that insisting on this feature may not be quite in favour of providing a special protection of minors because it may prompt covert and disguised extramarital life with a minor.

Another essential element in the legal definition of an extramarital union is *the absence of marital obstacles* (impediments). Under the Serbian Family Act, these obstacles are: already existing marriage, mental incapacity or impaired reasoning capacity, consanguinity (blood relationship), age of minority, lack of free will (voluntary consent), and guardianship relationship (Art. 17-24 FA). It is important to explore the relevance of these impediments in criminal law. As already noted, in the context of criminal law, the existing marriage of an

18 Ministry of Human and Minority Rights (2021): Public debate on the Proposed Draft Act on Same-sex Unions, <https://www.minljmpdd.gov.rs/javne-rasprave.php>, (accessed on 20 May 2023).

adult person would not exclude the existence of an extramarital union with a minor; however, the other obstacles might be relevant due to their potential impact on the legal qualification of the criminal offence. For example, in case of a sexual intercourse with a minor, the minor's impaired reasoning capacity (mental incompetence) may result in qualifying the act as a sexual intercourse with a helpless person who is incapable of giving consent (Art. 179 CC); in a guardianship relationship, it may be qualified as a sexual intercourse involving the abuse of position (Art. 181 pagra.3 CC); in case of blood relations, it may be qualified as incest (Art. 197 CC).¹⁹ The lack of will (voluntary consent) implies that a person who is not free to decide cannot be compelled to enter into an extramarital union (Art. 24 CC). This condition is significant for criminal law because the criminal offence of cohabitation with a minor is committed only if the extramarital union is concluded with a minor's consent. Otherwise, due to the lack of free will (voluntary consent), this may be treated as a criminal act against sexual freedom (sex crime) or a criminal act against individual rights and freedoms. The consent of a passive subject does not exclude the unlawfulness of the act, which is accepted as a solution in some other criminal acts, such as sexual intercourse with a child (Art. 180 CC). Finally, as noted in judicial practice, an adult person shall not be exculpated not even if he/she has acted upon a minor's persuasion or imitative to establish an extramarital union (Judgment of the Supreme Court of RS, 1009/80).

In terms of the *commission* of this criminal offence, it should be noted that the very act of entering into an extramarital relationship is sufficient to consider the offence completed. Namely, for the act to be punishable, the occurrence of some negative consequence from life in such an extramarital union is not required, but this should be taken into account when determining the punishment, particularly considering the impairment of a minor's normal psycho-physical development, health hazards in case of early pregnancy, termination of education, loss or abandonment of employment, and similar circumstances. In terms of classification, it should be said that cohabitation with a minor is an iterative

19 Under the Serbian Family Act, blood relationship is an obstacle when it comes to first-degree relatives and second-degree relatives, such as brother and sister, half-brother or half-sister, uncle and niece, aunt and nephew, brother's and sister's children, or half-brother's and half-sister's children (Art. 19 FA). Adoptive relations are an obstacle in the same way as blood relations (Art. 20 FA). As for in-law relations, there is a ban on marriage between father-in-law and daughter-in-law, mother-in-law and son-in-law, stepfather and stepdaughter, stepmother and stepson; yet, marriage between these persons may be allowed by the court for justifiable reasons (Art. 21 FA). On the other hand, incest is a criminal act only in case an adult has a sexual intercourse with a minor who is his/her first-degree relative or with a minor brother or sister.

criminal offense because it establishes an unlawful situation which lasts from the moment of entering into an extramarital union with a minor to the moment of terminating that union; this period is taken into account in calculating the time limits for the expiry of the statute of limitations for criminal prosecution.

The active subject is an adult, while the passive subject is a minor (a person who has turned 14 but is still under the age of 18). Therefore, an extramarital union between two adult persons and an extramarital union between two minors is not punishable by law. It cannot be denied that the community of life can be established with a person under the age of 14, which cannot be subsumed under this act but it may be qualified as a sexual intercourse with a child (Art. 180 CC). However, given that this act presupposes a sexual intercourse or a similar act, there is a dilemma related to the situation where there is the community of life devoid of any sexual contact (intercourse). Even without any sexual intercourse, the community of life with a minor may be harmful in case there is any other form of abuse, such as work exploitation of a minor.

In terms of *age*, this criminal offence can refer to various situations: when the age difference between the active and the passive subject is significantly great, or when it is so small that it is irrelevant, which is not recognized in this incrimination, although the inconsiderable difference in physical and mental maturity is taken into account in other criminal acts. Thus, some scholars conclude that the act *de lege ferenda* may be partially decriminalized, whereas the current solutions may indicate that a less serious criminal offence has been committed (Стојановић, 2022: 648). The situation is not the same in case the passive subject has just turned 14, or has turned 16, which is the age limit when the court may allow the minor to marry in certain exceptional cases: if the subject has attained physical and mental maturity for exercising marital rights and duties, and if there are justified reasons for marriage (Art. 23 FA). Under Serbian law, the minor's age can only have an impact on determining the length of a sentence, which is different in some other legislations (e.g. Croatian CC) where the act does not exist unless a person is over the age of 16.

The subjective element of this criminal act is intent. The perpetrator should be aware of all the elements of this act, particularly of the idiosyncratic properties of the passive subject (e.g. age), and exercise free will to establish an extramarital union with a minor. The perpetrator is not required to know the exact age of the passive subject, but only that he/she is a minor. However, considering the *de facto* nature of this union which is not formally registered, we may not rule out the active subject's misconception (mistaken belief) about the passive subject's age. In case the offender wrongly believes that his/her partner is an adult, there is an actual misconception in the narrow sense. Depending on whether it may

be discarded or not, mistaken belief may completely rule out the presence of the act (*actus reus*) and the offender's culpability (*mens rea*), or it may have a significant impact on the sentence as a possible basis for reducing the punishment. The motive for establishing an extramarital union with a minor is not crucial for establishing the presence of this criminal offence. This act may be driven by the partners' plan to enter into marriage, and this fact is taken into account in the process of determining the sentence.

Under the current Serbian Criminal Code, another form of this criminal offence exists when a parent, adoptive parent or a guardian enables a minor's cohabitation with an adult person or induces a minor to establish such an extramarital union (Article 190 para.2 CC). Compared to the earlier legal solution (Art. 115 CC), this act has a narrower scope; namely, the former solution envisaged that a parent, adoptive parent and guardian were to be held responsible whenever they allowed a minor to live in an extramarital union or when they induced a minor to do that; the new provision specifies that it refers only to enabling and inducing such a union with an adult.²⁰ This means that the establishment of an extramarital union between two minor partners used to be punishable by law, which is not the case under the present Criminal Code. Yet, the comparative law offers examples of a more comprehensive approach to the issue; for example, the Croatian Criminal Code envisages that any form of extramarital union between the persons under a certain age is considered harmful for the minor and forbidden (Art. 170, para. 2 CC RC). On the other hand, in the former legal solution, the act was defined by using the term "allowing", which resulted in incorporating some other elements in the framework of this criminal offence, such as consent or compliance (which is not part of the current legal frame). This issue will be discussed in more detail further on in this paper.

Enabling and inducing a person to act are acts of complicity, which have been raised to the rank of criminal acts due to the necessity to provide for a better protection of minors. In effect, considering the general rules on limited accessory liability, these acts would not be punishable, considering the fact that a minor (child under the age of 14) cannot be held liable for this criminal act. Thus, enabling the act should be understood as facilitating or creating conditions for an extramarital life, which can be accomplished by providing some residential space for extramarital partners to live in or accommodating the extramarital partners in the perpetrator's apartment, by assisting them to organize their extramarital life, by providing finances, etc. The mere act of parents, adoptive parents or guardians' compliance with (consent to) establishing an extramarital union with a minor cannot be regarded as facilitation of this union (Делић, 2021: 116). In these examples, the very nature of facilitation implies the commission

20 For more, see: Стојановић, Перић, 2002: 194.

of this act. Yet, we may raise the question whether this act can be committed by failure or omission to act, for example, when a parent, adoptive parent or guardian fails to prevent the establishment of an extramarital union, or when they fail to express their opposition to its establishment, even though such failure or omission may not be considered sufficient under the Serbian legislation to establish the presence of this criminal act. Inducing a person to act commonly implies fostering a minor to make a decision or reinforcing a minor's decision to enter into an extramarital union. It may be accomplished in various ways: by persuasion, promising a reward, indicating advantages of such a union, etc.; it is essential that the act of inducement does not entail coercion, which would alter the legal qualification of the act.

By its nature, the criminal act of enabling and inducing a minor to enter into an extramarital union falls into the group of *delicta propria*, offences that can only be committed by persons who have specific personal characteristics or properties. Thus, the perpetrator of this act (facilitation and inducement) can be only the person who has a special relationship with a minor, such as a parent, adoptive parent or guardian. These persons are obliged to take care of a minor and to look after his/her best interest; thus, facilitating or inducing a minor to live in an extramarital union with an adult is regarded as a special form of neglect of these duties. The passive subject is a person who has turned 14 but is still under the age of 18. In cases involving a child (under the age of 14), the act of facilitating and inducing an extramarital union with a child will be qualified as facilitation or inducement to commit a sex crime.

The basic form of the criminal offence of extramarital cohabitation with a minor (Art. 190, para.1 CC) is punishable by a term of imprisonment of up to three years. Although the analyzed criminal offence *inter alia* implies sexual relations with a minor, it should be noted that sexual intercourse was not included in the scope of the aforementioned Act on Special Measures for the Prevention of Criminal Offences against Sexual Freedom involving Minors (2013).

The criminal offence of extramarital union with a minor also has a more serious (aggravated) form; thus, in case an act committed by a parent, an adoptive parent or a guardian is motivated by gain, it is punishable by a term of imprisonment ranging for six months to 5 years (Article 190, para.3 CC). Gain implies obtaining financial or material benefit, such as: money or gifts, debt relief, labour exploitation, etc. For the act to be punishable, it is necessary to prove that the perpetrator was motivated by such gain at the time of committing the act; but, in order to be deemed completed, the act does not necessarily have to include a specific benefit. The fact that the offender has obtained some benefit is not irrelevant; it is not taken into account when determining the legal qualification of the act but in the process of determining the sentence.

The Serbian Criminal Code also envisages certain special rules related to prosecution. In case marriage with a minor has been concluded, prosecution shall not be instituted; in case it has been instituted, it shall be terminated (Article 190, para.4 CC). The fact that marriage has not been concluded is the procedural presumption for initiating a criminal prosecution against an adult.

4. An extramarital union with a minor in judicial practice

For the purposes of this paper, the author analyzed the available statistical data, annually published by the Statistical Office of the Republic of Serbia,²¹ on the judicial practice in the Republic of Serbia, concerning the criminal offences against marriage and family.

Table 1 (below) presents data on the total number of convictions in the observed five-year period (2017-2021), including the specific data on the frequency of criminal offences against marriage and family (in general) and convictions on the criminal offence of extramarital cohabitation with a minor (in particular) per year. The findings show that the criminal offence of extramarital cohabitation with a minor is not significantly present in the structure of criminal offences in general (1.1% to 1.77% in the observed period 2017-2021). Within the structure of criminal offences against marriage and family, cohabitation with a minor is the third most frequent offence, preceded by the criminal act of domestic violence and denial of maintenance or financial support.

Table 1. Convictions for the criminal offences against marriage and family and convictions for the criminal offence of extramarital union with a minor in the period 2017-2021

Year	Total number of convictions in RS	Total number of convictions for the acts against marriage and family	Total number of convictions for the act of cohabitation with a minor in an extramarital union
2017	31,759	4,400 (13.85%)	53 (1.20%)
2018	29,750	4,661 (15.67%)	63 (1.35%)
2019	28,112	4,173 (14.84%)	66 (1.58%)
2020	25,487	3,650 (14.32%)	40 (1.10 %)
2021	27,508	3,725 (13.54%)	66 (1.77%)

Source: The Statistical Office of the Republic of Serbia (2017-2022)

21 The data are taken from the official website of the Statistical Office of the RS; accessed on 20 June 2023 (<https://www.stat.gov.rs/oblasti/pravosudje/>). At the time of drafting this paper, the data for 2022 were still unavailable.

The general statistics reveals another interesting regularity related to the criminal offence of extramarital cohabitation with a minor. The statistical data presented in *Table 2* (below) indicate a consistent discrepancy between the total number of criminal reports on this criminal act and the total number of criminal charges and convictions. The data show that only half of the reported cases ultimately result in court convictions.

Table 2. Comparative illustration of reports, charges and convictions for the criminal offence of cohabitation with a minor in an extramarital union in the period 2017-2021

Year	Criminal Reports	Criminal Charges	Convictions
2017	108	60	53
2018	122	75	63
2019	117	72	66
2020	118	43	40
2021	119	73	66

Source: The Statistical Office of the Republic of Serbia (2017-2022)

Some studies offer more detailed explanations of these statistical data. The results of the research conducted by the non-governmental organization Praxis in the period from January 2019 to December 2021²² show that criminal reports on this crime are sometimes rejected for unusual and unacceptable reasons, such as: a minor (female) was sent back to her home; the extramarital partners (a girl aged 14 and a man aged 39) had a child; the community of life was established only after a minor gave birth to a baby; these unions are traditional in certain national minorities and generally accepted as something natural in these communities, for which reason it was concluded that the essential elements of the crime were not present; all persons involved agreed that the criminal report should be discarded, or the parent who reported the crime suggested that the report should be discarded because the parent had consented that a minor could enter into an extramarital union with an adult (Марковић, 2021: 8-12).

Although it might be assumed that there is nothing problematic in cases when reports were discarded because the extramarital partners entered into marriage in the meantime (as envisaged in Art. 190 para. 4 CC on the termination of criminal prosecution in case of marriage), the research proved otherwise. From a formal point of view, there was no oversight; however, social welfare centers and/or the police kept pointing out to a problematic possibility that a person aged 16 may be given permission in the course of non-contentious civil proceedings to

²² For more, see: Марковић, 2021: 8-12.

enter into marriage with an adult, which ultimately implies that the perpetrator will avoid criminal liability. It is very difficult to assess the legislator's rationale in the described cases: why the legislator sided with the perpetrator rather than with the victim, why a minor was allowed to keep living with an adult, even though their relationship was now formally designated as marriage. It is quite curious that criminal reports were dismissed in a number of cases where the marriage was concluded in accordance with the Islamic customary law, although religious marriages are not equated with civil marriages in Serbian law. It is also inexplicable why the court accepted a video of the wedding ceremony as proof of marriage although the only formally valid proof of marriage is a marriage certificate issued by the Marriage Registry.

As far as prosecution policy is concerned, it has been observed that criminal reports are rarely filed against parents for the commission of a special (aggravated) form of extramarital cohabitation with a minor (envisaged in Art. 190 para. 3 CC), and that no criminal charges were raised against parents for the commission of some other correlated criminal act (most frequently including domestic violence or neglect and abuse of a minor), even though there was evidence to that effect (Колаковић-Бојовић, 2022: 9). The aforementioned research results illustrate a rather lenient attitude towards the perpetrators of this criminal offence and a considerable lack of understanding concerning the long-term harm and irreparable damage inflicted upon a minor.

Yet, the presented research did not examine the possibility that filing a criminal report on extramarital cohabitation with a minor may incur additional victimization of a minor person. Namely, an adult who is accused of living in an extramarital union with a minor can "elegantly" avoid the charges by swiftly concluding marriage with a minor; while the perpetrator may not be familiar with this opportunity, it may be suggested by the offender's legal representative as defense tactics (unless the police and social welfare centers react inappropriately, as mentioned above). The minor thus faces a *fait accompli*; the victim practically becomes the culprit; for, if a minor does not consent to enter into possibly unwanted marriage, he/she will incriminate the extramarital partner, or a parent, an adoptive parent or a guardian. Due to aforesaid procedural rule, this criminal offence may generate forced marriage. As there is no dispute that this legal situation is profoundly and substantially wrong, it may be used as another argument in favor of a detailed reconstruction of this criminal offence. Introducing certain changes in family legislation will inevitably lead to cancelling this criminal procedure rule. The Preliminary Draft of the Act amending the Family Act prohibits a person under the age of 18 to enter into marriage; in case

it is concluded, such marriage shall be deemed null and void (Art. 4).²³ If this provision is adopted, it will inevitably trigger a change to the Criminal Code *de lege ferenda*, not only in terms of repealing the provision on the prosecution in case of an extramarital cohabitation with a minor.

The general statistics from the observed period (2017-2021) may be also used for the analysis of the *court penal policy*. The presented statistical data show that the most commonly imposed punishment for the commission of the criminal offence of extramarital cohabitation with a minor was suspended sentences (a total of 237 judgments or 82.29%). The second most frequent sentence was imprisonment (24 judgments or 8.33%); but, in more than 70% of cases, it is a short-term imprisonment (six months). Notably, there were a couple of cases of house arrest (2 judgments or 0.69%), which raises a dilemma whether this penalty should be applied, considering the nature of this criminal act. Other sanctions included: a fine (14 judgments or 4.86%), community service (7 judgments or 2.43%), court warning (2 judgment or 0.69%), educational measure (1 judgment or 0,35%), and acquittal (1 judgment or 0.35%). The imposed educational measure indicates that one of the perpetrators was a younger adult (aged 18-20). The statistical data yielded an unexpected finding: among the convicted perpetrators of this criminal act, there were 15 women (15 judgments or 5.2%).

5. Concluding Remarks

The presented analysis of the criminal offence of an extramarital union with a minor (Article 190 CC) indicates that there is some space for the intervention *de lege ferenda*, with the purpose of making it more operative from the perspective of criminal law policy. First, the entire group of criminal offences against marriage and family (Chapter 19 of the Serbian Criminal Code) should be designated as criminal offences against marriage, family and children; the new subgroup should clearly indicate that the criminal offense of cohabitation with a minor and some other related acts are criminalized with the primarily aim of protecting minors and not marriage and family. Second, the term “extramarital union” should be replaced by the term “extramarital life”, which more precisely reflects the essence of this offence. It would contribute to removing certain constraints created by adopting the term “extramarital union” from the Serbian family law; due to these constraints, minor living in “unorthodox” extramarital unions (e.g. same-sex unions) cannot be efficiently protected from the harmful impact of

23 See: Preliminary Draft of the Act amending the Family Act, available at the website of the Ministry of Family Welfare and Demography of the RS; <http://minbpd.gov.rs/zakoni/zakoni-u-pripremi/> (accessed on 20 June 2023). It offers a different definition: “A child is every human being under the age of 18 years, unless he/she has been granted full contractual capacity before the age of 18 in accordance with the conditions prescribed in this Act” (Art. 1).

extramarital life because those “alternative” unions are not recognized in Article 190 CC and do not fulfill the requirements for extramarital unions (to be monogamous, heterosexual, permanent and notorious). The constraints may be removed by providing an authentic interpretation of the concept, and introducing the definition of an extramarital union with a minor in the Serbian Criminal Code which would reflect the need for a more comprehensive protection of all minors living in such unions. In that case, it may be necessary to thoroughly examine the relevance and applicability of the new definition in the entire of the criminal law system. Next, it would be useful to emphasize the subsidiary nature of this criminal offence, by pointing out that it exists only in case the essential elements for establishing a more serious criminal act against a minor (e.g. sexual abuse, which is punishable by a more severe penalty) have not been fulfilled.

The brief analysis of the domestic judicial practice has shown that it is not without flaws. A number of contentious issues have been observed. The first issue refers to incorrect application or abuse of the prosecution rules, which resulted in repealing this criminal offence from the criminal codes in some foreign legislations. The second issue refers to the failure of the judicial practice to recognize the responsibility of parents, adoptive parents or guardians even in cases where their behavior reveals the elements of a special (aggravated) form of extramarital cohabitation with a minor or some other related criminal acts. The third issue refers to penal policy, given that courts sometimes do not take into account the specific features of this criminal offence which are important in terms of qualifying the committed criminal act and sentencing.

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КРИВИЧНО ДЕЛО ВАНБРАЧНА ЗАЈЕДНИЦА СА МАЛОЛЕТНИКОМ DE LEGE LATA И DE LEGE FERENDA

Резиме

Малолетна лица уживају посебан статус у оквирима кривичног права, било да су учиниоци било жртве кривичног дела, што је потпуно разумљиво и оправдано с обзиром на карактеристике ове категорије која се још увек налази у фази развоја, у процесу биолошког, психолошког и социјалног формирања и сазревања. Иако је у праву Србије традиционално препозната потреба за постојањем правила прилагођених овој категорији, у новије време су учињени одређени кораци у циљу њихове потпуније заштите. Тако је донет Закон о малолетним учиниоцима кривичних дела и кривичноправној заштити малолетних лица, којим су први пут у нашем правном систему обједињена у оквирима самосталног извора специфична решења у области материјалног процесног и извршног кривичног права. Ова интенција је потом настављена Законом о посебним мерама за спречавање кривичних дела против полне слободе према малолетним лицима којим је, поред поменутих мера, предвиђена и посебна евиденција за учиниоце, уведена забрана ублажавања казне и условног отпуста, незастаревање кривичног гоњења и извршења казне, као и посебне правне последице осуде. Исто је и са ранијим новелирањањем Кривичног законика, извршеним у процесу усаглашавања са Конвенцијом Савета Европе о заштити деце од сексуалног искоришћавања и сексуалног злостављања, као и са последњим из 2019. године, којим је уведен доживотни затвор, управо са циљем да се тиме обезбеди адекватан одговор за учиниоце најтежих кривичних дела против живота и тела и полне слободе, када је услед извршења дела наступила смрт детета, малолетника, бремените жене или немоћног лица. Исту идејну линију прати и формирање радне групе при Министарству правде за израду закона о тзв. Амбер аларму (Amber Alert), посебном механизму за брже и ефикасније проналажење нестале деце.

Међутим, чини се да је у поменутих настојањима да се појача кривичноправна заштита малолетних лица некако „испод радара“ остало једно од кривичних дела из групе против брака и породице – ванбрачна заједница са малолетником (чл. 190 Кривичног законика). Не треба посебно образлагати тезу да живот у ванбрачној заједници може бити вишеструко штетан за малолетника, у медицинском, образовном, економском смислу и слично, до тога ова микро

заједница може представљати параван иза којег се врши насиље, сексуална или радна експлоатација и злоупотреба малолетника. У том смислу, предмет проучавања овог рада представља питање да ли је начин на који је нормативно уобличено ово дело, као и начин на који се примењује у пракси домаћих судова, подобан за постизање одређених криминално-политичких циљева ради чијег остварења је и уведено.

Кључне речи: *кривично дело, ванбрачна заједница, малолетник, кривично законодавство Србије.*