Prohibition of Minor Marriages

Milan B. Počuča[1], Dalibor M. Krstinić[2], and Nebojša Šarkić[3]

[1, 2]University Business Academy in Novi Sad
Faculty of Law for Commerce and Judiciary in Novi Sad
[3]Union University in Belgrade, Faculty of Law

Article Information

Review Article ● UDC: 347.62/.625-053.6
Volume: 20, Issue: 2, pages: 101–129
Received: March 25, 2022 ● Accepted: April 26, 2023
https://doi.org/10.51738/Kpolisa2023.20.2r.101pks

Author Note

Milan B. Počuča https://orcid.org/0000-0002-5433-1134
Dalibor M. Krstinić https://orcid.org/0000-0002-9731-9178
Nebojša Šarkić https://orcid.org/0009-0005-8700-1587
We have no known conflict of interest to disclose.
Corresponding author: Dalibor M. Krstinić
E-mail: dkrstinic@pravni-fakultet.info

*Cite (APA):
Počuča, M. B., Krstinić, D. M., & Šarkić, N. (2023). Prohibition of minor marriages. *Kultura polisa*, *20*(2), 101–129.
https://doi.org/10.51738/Kpolisa2023.20.2r.101pks

Abstract

In the national marriage legislation, minors belong to the group of material restrictions for entering into a valid marriage. From the aspect of human rights, underage marriage is recognized as a form of gender-based discrimination against girls and boys. Minority, as an element concerning the status of a natural person, is perceived as a certain preparatory phase of life characterized by a lack of intellectual and volitional maturity, as well as the absence of life experience, which affects the prevention of minors from independently protecting their rights and interests. The above is one of the reasons why we believe it is of great importance, in the normative sense, to fully protect, that is, to prohibit the conclusion of underage marriages. The aim of this paper is to indicate the international standards in this area, as well as the need for reform in the legislation of the Republic of Serbia, in terms of the prohibition of underage marriages and their harmful consequences for the persons who conclude them.

Keywords: underage marriage, marital capacity, gender discrimination, underage

Prohibition of Minor Marriages

Throughout history, marriage has evolved from a part of custom and tradition to a social institution regulated by law. Observed from a sociological aspect, marriage represents an institution by which society gives permission to members of two sexes to establish a joint life, including the relationship of procreation, as it simultaneously recognizes the consequences arising from that relationship – offspring, which ensures the social position of new members in the community (Milić, 2001).

In the aforementioned definition of marriage, it is emphasized that marriage is a socially recognized relationship, which should satisfy certain, socially accepted norms, such as customs, religion and law. We believe that it is necessary to point out that when we talk about marriage, it is a social, legal or religiously based institution of cohabitation of adult persons of the same or different sex, which is the basis of the family and which includes the mutual rights and obligations of the spouses, as well as obligations towards the offspring. It is important to state that in the last few decades, a large number of states have legalized different forms of same-sex unions, the strongest of which is same-sex marriage, which is entered into by two partners of the same sex. And when it comes to religious marriages and within them Sharia marriages, the definition of marriage is broader, since a man is allowed to be married to four women (minor or adult), which means that monogamy is in fact the basic form of marriage, but if necessary and in accordance with the spirit of the Koran (Andrić, 2006, p. 102). The bottom line is that in marriage, spouses satisfy many of their needs, such as psychological, sociological, biological, and even economic. In order for the spouses to fulfill the stated needs, the question arises as to what conditions should be met for marriage? A condition that is extremely important for marriage is marriage maturity, that is, the age at which a person acquires the ability to enter into marriage. So, in order for a person to be fit for marriage and to be able to fulfill the duties imposed on him by the marriage union, he must reach a certain level of maturity.

When it comes to underage marriage, the level of maturity of the persons entering into this relationship is questionable. Underage marriage is a specific form of marriage. When concluding this marriage, it is necessary that one of the marriage partners be a minor, and both can be. In the literature, underage marriages are denoted by different terms such as early marriage, forced marriage and arranged marriage and are used as synonyms, although they are not. In the document entitled Instructions on the way of work of centers for social work – guardianship bodies in protecting children from child marriage, the definitions of the concepts of child, early and forced marriage are specified, in accordance with the report of the United Nations Human Rights Council.

> Child marriage is any formal or informal marriage in which at least one of the partners is a child, i.e. a person under the age of 18. An early marriage is a marriage in which the partner is under 18 years of age in countries that allow the marriage of a minor who has reached the physical and mental maturity required to exercise the rights and duties in marriage. A forced marriage is any marriage entered into without the full and free will of one or both partners and/or in which one or both partners cannot end the marriage due to family or wider societal pressure/ coercion. It does not necessarily mean that it is concluded between persons under the age of 18 (Ministry of Labour, Employment, Veterans and Social Rights, 2019).

We believe that all the mentioned "types" of minor marriages lead to the violation of the basic rights of children, primarily the right to unhindered psychophysical development, the right to health protection and the right to education. By giving birth to children, while they are still children themselves, at the "dawn of life" they face life situations for which they are not prepared, and very often children from these marriages grow up in conditions that do not

ensure their proper growth and development. Current understanding of underage marriage shows that it is not known when, where and why this type of marriage first appeared. Nevertheless, in order to have a more comprehensive understanding of the institution of underage marriage, we will make a special review of this institution through a historical prism.

Underage Marriage – A Historical Review

Underage marriage is "present" in all geographical latitudes, from the most primitive human communities to today, among members of all nations, religions and skin colors. Modern theoreticians are inclined to believe that early marriages occurred more often in certain socio-historical circumstances, that they are more present in some ethnic communities and that they are common in a certain, that is, a narrower territory, as well as that they are transient in nature, that is, they disappear with social progress and emancipation (Dinić, 2016).

The fact is that the capacity of minors to enter into marriage has been subject to legal regulation since the earliest days. This ability was denied to minors or recognized upon reaching a certain age, or else it was combined with the requirement that the minor be given the consent of a legal representative in order to enter into marriage. It is known that in the law of ancient Athens, minors did not have special legal capacity to enter into marriage. They were married by their father, under whose authority minors were also. The father, who was the head of the family, decided whether and to whom he would marry his son, that is, marry his daughter (Kulaž, 1956, p. 96). In terms of marital capacity, minors had the same position in the earliest phase of Roman law. In this period, the basis of the family was the pater familias, who had absolute and unlimited authority over persons and things (Stefanović, 2020). The pater familias decided which of his children would marry, with whom and when. In this period, there was no set age for the acquisition of marital capacity, but only the head of the family made the decision on the marriage of

the children. And in the later phase of Roman law, a general uniform age was determined for the acquisition of marriageable capacity for minors, which coincided with reaching puberty and was fourteen for men and twelve for women. However, even upon reaching the age of majority, the consent of the head of the family was required (Horvat, 2008). In addition to marriage, Roman law recognized some other forms of community (see Stefanović & Zarubica, 2020).

The age that was determined by Roman law for the acquisition of marital capacity in the Middle Ages was accepted by canon law. In this period, the institution of marriage acquired the character of a sacred secret that should achieve the moral perfection of people. For this reason, canon law supported a low marriageable age. Also, canon law did not require the consent of the parents of minors for marriage (Troicki, 1934 as cited in Mitić, 1962, p. 87). And in medieval Serbian law, marriage capacity was acquired at the age of fifteen for men and at twelve for women. It is considered that these years, for the acquisition of marital capacity, simultaneously represented the years when coming of age was attained (Taranovski, 2002). On the other hand, the marriage capacity of minors in different countries was acquired at different ages. So, for example, in the English law of that time, the age for acquiring marital capacity was determined by canon law, with the fact that, unlike canon law, minors needed the consent of their parents to get married. And for members of the royal house, this consent was required until the age of twenty-five. At the end of the 18th century, French law determined the age of fifteen for men and thirteen for women. Parental consent for marriage was required until the age of majority. According to the Civil Code project, a man acquired marital capacity at the age of fourteen and a woman at the age of thirteen. However, due to the opposition of Napoleon, who actively participated in the passing of this Law and who paid great attention to all issues concerning life, those years were not accepted as too low. The Civil Code stipulated that even adults must have their parents' consent to get married. For a man, this consent was required until the age of twenty-five, and for a woman until the age of twenty-one. However, in the

second half of the 19th century in France, this provision was harshly criticized, which caused the passing of a law that abandons the absolute character of paternal authority, and requires parental consent only until the age of majority. The Austrian Civil Code from 1811, i.e. the General Civil Code, prescribed the age of fourteen for both sexes to acquire special marriage capacity (Gurvič, G. S, et al., 1951, as cited in Mitić, 1962, p. 89).

According to the Serbian Civil Code, women attained marriageable age at the age of 15, and men at the age of 17, significantly earlier than the age of majority, which was attained at the age of 21. The marriage could be concluded at a younger age, in the case of a dispensation obtained from the competent archbishop. To get married before the age of 18, for both boys and girls, the permission of a parent or guardian was required, unless permission was obtained from the competent authority (paragraph 37 and paragraph 69 of the Serbian Civil Code). According to the Marriage Rulebook of the Serbian Orthodox Church, the impediment to marriage, which cannot be removed, was the underage age of sixteen for a boy and age of fourteen for a girl. Also, paragraph 37 of the same Rulebook stipulated a marriage ban for the marriage of a person under paternal authority, guardianship or guardianship, without the consent of the father, that is, the mother, tutor or guardian. The Holy Synod of Archbishops abolished this ban in 1946. According to the rule that was valid in Vojvodina at the time, boys who had reached the age of 18 and girls who had reached the age of 16 could marry, with the Minister of Justice being able to grant a dispensation for this disturbance. In order to enter into an underage marriage, the approval of the legal representative was required. Without such approval, the marriage of a minor under the age of 20 was not valid (Piškulić & Đerđ, 1924). Article 23 of the Basic Law on Marriage from 1946 did not prescribe the minimum age for acquiring marriage capacity. Therefore, when granting permission to marry minors, the courts took different ages as relevant. In order to equalize the judicial practice, the Supreme Court of the FNRJ, at its general session on March 22, 1949, issued an Instruction on the Court's Procedure in Resolving Applications for

Marriage Licenses under Article 23 of the Basic Law on Marriage. Point 1 of the Instructions stipulates that the court cannot allow marriage to a person under the age of 14 (Babić, 1999, p. 67).

Inadmissibility of Underage Marriage – International Aspect

The presence of underage marriages in modern society is a fact. As a confirmation of the above are the data of UNICEF, according to which we come to know that ten years ago in the world over 400 million women aged 20 to 50 entered into marriage before reaching adulthood, and 23 million, aged 20 to 24 entered into marriage before the age of fifteen. According to estimates, it is concluded that in developing countries, excluding China, this trend will continue, that is, one out of three girls will probably be married before the age of eighteen, and one out of nine before the age of fifteen (United Nations fund for population activities, 2012). Nevertheless, we can say that underage marriages are more widespread and represent a deep-rooted tradition in many countries, among which the countries of South Asia and sub-Saharan Africa are leading. Underage marriages, although on a much smaller scale, are also present in Latin American and Eastern European countries, with the fact that they are mostly related to certain ethnic communities and are generally concluded between the ages of sixteen and eighteen (Thomas, 2009). The phenomenon of child marriage is mainly related to girls, that is, to the marriage of girls to older men, which is confirmed by numerous studies. However, it cannot be ignored that a large number of boys in many countries are forcibly married, and they are introduced into the "world of grown men" without their consent and we can say prematurely. According to UNICEF data, over 150 million men who are adults today were married prematurely and forcibly (Strochlic, 2017). In the Republic of Serbia, there is a practice of underage marriages, which is mainly related to the Roma community. As a confirmation of the above are the data obtained based on the research of multiple indicators for the year 2019, on the basis of which it was found out that 34% of young women from

Roma settlements aged 15 to 19 are currently married or living in a cohabitation and that the percentage increases among women from the poorest households (41%). On the other hand, young women who are not of Roma nationality and of the same age are significantly less likely to get married or live in a cohabitation (4%), with this percentage rising to 13% among women from the poorest households (Unicef, 2019, p. 32).

At the international level, underage marriage is recognized as a violation of the basic rights and interests of children, primarily their unhindered psycho-physical development, damage to health and denial of education that occurs as a result of establishing marriage unions while they are still children. For this reason, a protection mechanism was developed, which is reflected in the advocacy of preventing the conclusion of underage marriages. A relevant legal act in this area is the Convention on Consent to Marriage, on the Minimum Age for Marriage and Registration of Marriages from 1962, which obliges states to take all necessary measures in order to ensure complete freedom in choosing a spouse, as well as the complete elimination of children marriages and engagements of young girls before puberty, then the establishment of adequate punishment where necessary and the introduction of civil and other registers in which all marriages will be recorded. It is envisaged that the signatory states of this Convention will take all legislative measures to determine the minimum age for marriage (National Assembly of the Republic of Serbia, 1964).

The United Nations Convention on the Rights of the Child from 1989 defines the catalog of human rights that are recognized for persons under the age of 18. This Convention specifies age as a prerequisite for exercising the child's rights. According to Article 1 of the aforementioned Convention, "... a child is any human being who has not reached the age of eighteen years, if, according to the law applicable to the child, majority is not reached earlier" (Narodna skupština Republike Srbije [Narodna skupština], 1990). From the mentioned article, we can conclude that the signatory states are left with the possibility to determine the age for reaching the majority of the child in their national laws, which violates and even undermines

universality in the field of children's rights. For this reason, the Committee on the Rights of the Child proposes to provide a legislative instrument at the national level in order to provide a legal definition of the concept of a child in accordance with Article 1 of the Convention on the Rights of the Child. In addition to the above, the Committee's proposal is for the signatory state to amend its Family Law by removing all exceptions that allow marriage for persons under the age of eighteen (Center for Children's Rights, 2017, p. 19).

And the Committee, which monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women, made final comments in which it advocates the position that the minimum age for marriage, for members of both sexes, must be eighteen years, regardless of parental consent or the decision of the competent authority (Government of the Republic of Serbia). In the UN Recommendations for the fight against child and forced marriage, it is emphasized that member states should harmonize national family legislation in terms of preventing or abolishing child marriages, as well as abolish formal conditions for ending child marriage and provide legal measures for the protection of girls who leave such marital union (United Nations human right, 2012).

The Council of Europe recognized the violation of children's human rights through child, early and forced marriages. The above is confirmed by Resolution 1468 on forced marriages and child marriages, which calls on the member states of the Council of Europe to harmonize their national legislation by precisely specifying the following guidelines: to determine or raise the limits of the legally prescribed minimum age for marriage between men and women to eighteen years, that every marriage be reported and entered by the competent authority in the official register, that the registrar, before entering into marriage, conducts an interview with the future spouses, and in case of doubts about free and full consent, invite one or both parties to another meeting, that the member states do not recognize forced and underage marriages, unless recognition is in the best interest in terms of the effects of marriage on the victim and to facilitate the

annulment of forced marriages, that is, such marriages are automatically annulled (Resolution 1468, 2005).

The Convention of the Council of Europe on preventing and combating violence against women and domestic violence obliges the signatory states to undertake legislative, i.e. other measures aimed at ensuring that forced marriages are considered voidable and can be annulled without undue financial or administrative burden on the victim (Article 32), as well as in the case where an adult or a child is deliberately forced to enter into marriage (Article 37) (Council of Europe Treaty Series – No. 210). The Charter of Fundamental Rights of the European Union guarantees human rights to children for the first time. Children are guaranteed the right to protection and care necessary for their well-being, as well as the opportunity to freely express their opinions in accordance with their age. What is very important, and what is foreseen in this Charter, is that in all procedures related to children, the best interest of the child must be taken into account (Article 24) (Council of the European Union, 2007).

In order to suppress child marriages, in 2017 the European Parliament passed a Resolution on stopping the practice of child marriages, which, among other things, calls on member states to cooperate with the UN, Women, UNICEF and other partners in order to draw attention to the problem of early and forced child marriages. of marriages, with a special focus on empowering women in the field of education, strengthening their economic position and greater participation in decision-making. They then call on Member States to cooperate with law enforcement and judicial authorities in third countries to provide training and technical assistance to assist in the adoption and implementation of legislation related to the prohibition of early and forced marriage, including a minimum age for marriage (European parliament resolution, 2018).

In 2018, the European Union adopted the report of the European Parliament entitled Towards the EU's external strategy against early and forced marriages – advanced steps (Report – A8-0187/2018). The reason for the adoption of the mentioned report is the fact that some member states of the European Union allow marriages for

persons who have reached the age of sixteen, with the consent of their parents. Therefore, the aim of this report is to indicate the need for legislators in the member states of the European Union and in third countries to prescribe the age of eighteen as the minimum age for marriage and to introduce the necessary administrative, financial and judicial measures. The primary intention is to prevent the practice of underage marriages, because they threaten human rights and violate the basic rights of children, such as the right to express their will, the right to physical integrity and mental health, the right to education, etc. States' activities should be directed at the causes of underage and forced marriages, such as customs, traditions, non-respect of gender equality and the rights of women and girls to health. In order to achieve the stated goal, the European Union calls on the member states to harmonize and improve the implementation of international agreements, as well as to supplement the existing legislative restrictions with a more comprehensive set of laws, through adequate strategies and programs, including the abolition of discriminatory norms on marriage, as well as the adoption of incentive measures for empowerment girl (Count 2 and 3, Report – A8-0187/2018).

Underage Marriage in the Legislation of the Republic of Serbia

Although the Constitution of the Republic of Serbia does not explicitly mention child marriage, it points to this issue in certain articles. So, for example, according to the provisions of Article 26 of the Constitution, slavery or a position similar to slavery is prohibited, any form of human trafficking is prohibited, forced labor, as well as sexual or economic exploitation of a person who is in a disadvantageous position is also considered forced labor. And by Article 64, children are "protected from psychological, physical, economic and any other exploitation or abuse" (Narodna skupština, 2006). Children's rights and their protection in the Republic of Serbia are regulated by many laws, but in this research we will focus on certain provisions of the Family Law, the Law on Non-litigation Procedure and the Criminal Code.

In Serbian law, marriage maturity is attained at the age of 18, equally for women and men, and at the same time as business capacity (National Assembly of the Republic of Serbia 2005a, Art. 23). So, marriage maturity and full business capacity coincide, being tied to the moment of reaching adulthood. The exception to this rule, which is prescribed by law, refers to the case when a minor, based on the permission of the court, concludes a marriage, and thus acquires full legal capacity even before reaching the age of majority. Our legislation provides that the court can, for justified reasons, allow the marriage of a minor who has reached the age of 16 and has reached the physical and mental maturity required to exercise the rights and duties in marriage (National Assembly, 2005a, Article 23, paragraph 2). Minority as a marital obstacle can be viewed from two directions, as a minor under 16 years of age and a minor over 16 years of age. On the other hand, if it is a person who is older than 16 years, this marital obstacle can be removed (Počuča & Šarkić, 2011, p. 109). Only obstacles that are provided by law are prohibitions, not those that are derived from custom or that are against morality. Prohibitions are an obstacle to concluding a marriage, but they can be removed, that is, dispensed with. Granting permission is a way to remove the effect of marital impediment (dispensation). And in our law, it is regulated by the Law on non-litigation procedure. We can say that the prohibitions are actually a warning to the married partners and a warning to the competent state authorities not to allow the conclusion of the marriage before the court makes a legally binding decision to allow the conclusion of the marriage. By obtaining a marriage license, a minor acquires marital capacity, and by concluding a marriage, with the permission of the court, he also acquires general business capacity (Stanković, 1982, p. 197). And in case that person later, for some reason, dissolves a valid marriage, he will not cease to be capable of business in the sense of civil law (Počuča & Šarkić, 2011, p. 109). However, in order for the court to make a decision on the acquisition of marital capacity of a minor, the conditions must first be met, primarily those concerning the minor, namely that he has reached the age of 16, that he is physically and mentally mature for the

exercise of rights and duties in marriage and that There are valid reasons for concluding a marriage. The very term "justifiable reasons" is a legal standard, the meaning of which is determined by the court in each individual case. In previous judicial practice, pregnancy of a minor is most often cited as a justified reason, which the courts consider a sufficient reason for dispensation, in order to protect the interests of the minor and especially to protect the interests of the conceived child (Cvejić Jančić, 2001, p. 87). The procedure for the marriage of a minor is initiated by the proposal of the minor who wants to conclude the marriage, or by a joint proposal, if both parties are minors. The court's obligation is to obtain the opinion of the health organization, to achieve appropriate cooperation with the guardianship authority, to hear the petitioner, his parents or guardian, the person with whom the minor intends to conclude a marriage, and, if necessary, he can present other evidence and obtain other data. A parent who has been deprived of parental rights will not be heard, and the court will decide at its discretion whether to hear a parent who does not exercise parental rights without justifiable reasons. It is an interesting fact that underage marriage in our law does not require parental consent. Namely, their opinion is examined, but their consent is not a condition for marriage. As a rule, the court hears the minor without the presence of other participants. Also, the court is obliged to examine the personal characteristics, property status and other important circumstances related to the person with whom the minor wishes to conclude a marriage, and examines in a suitable manner all the circumstances that are important for determining whether there is free will and desire a minor to conclude a marriage. In addition to the above, the court determines whether a minor has reached the physical and mental maturity required to exercise rights and duties (Narodna skupština, 1982, Article 82). The relevance of this special juvenile procedure is reflected "in the fact that the court is entrusted to accept or reject the proposal of a minor for early marriage, based on the assessment of all the circumstances of importance for making a decision" (Jović, 2003, p. 193). A minor who is dissatisfied with the court's decision can file an appeal against

the decision rejecting his proposal for dispensation (National Assembly, 1982, Article 84). According to the provisions of Article 21 of the Law on non-litigation proceedings, the legislator foresees that the first-instance court can proceed by changing or canceling its earlier decision in the event of an appeal. If he does not do so, he submits the appeal together with the documents to the second-instance court for resolution. No review is allowed against the final decision of the second-instance court made in the procedure for granting a marriage license (Narodna skupština, 1982, Article 86).

In addition to family law, problems related to minors and extramarital unions are also regulated by criminal law, i.e. the Criminal Code in Chapter XIX, which establishes "Criminal offenses against marriage and the family", namely: forced marriage (Article 187a) and extramarital union with a minor (Article 190). The criminal act of forced marriage is more recent and is the result of harmonization with the Council of Europe Convention on preventing and combating violence against women and domestic violence. The incrimination of this criminal offense can be applied in the case where a minor is forced to conclude a marriage by force or threat. The prescribed legal punishment for this form of criminal offense ranges from three months to three years. Another form of this criminal offense is related to taking another person abroad or leading another person abroad for the purpose of forced marriage. The prescribed prison sentence for this form of criminal offense is two years in prison. The perpetrator of the criminal act of extramarital union with a minor can only be an adult, while the passive subject of the act is a minor, which according to Article 112, paragraph 9 of the Criminal Code, is a person who has reached the age of fourteen and has not reached the age of eighteen. In this case, a sentence of three years is stipulated, not only for the extramarital partner, but also for the parent, adoptive parent or guardian who made it impossible for the minor to live in such a union or induced him to do so. And if this act was committed out of self-interest, the penalty for the perpetrator is from six months to five years. The provision of Article 190, paragraph 4 of the Criminal Code refers to the exclusion

of the illegality of the act, if the marriage is concluded, only in the case of older minors, which would imply the fulfillment of other required conditions for the conclusion of marriage. Based on the data obtained from 45 prosecutor's offices, in the period from January 1, 2019 to December 1, 2021, no prosecutor's office received a report for the criminal offense of forced marriage. On the other hand, 360 criminal reports were received for the criminal act of extramarital union with a minor (Marković, 2021), which we can say is a worrying fact and all the more reason for banning minor marriages. The newly established standards in international law, which are related to the prevention of the practice of underage marriages, put the Serbian legislator in front of a serious task that entails revising the material provisions of the Family Law. In this sense, the Government of the Republic of Serbia predicted in 2019 that among the acts proposed by the Government to the National Assembly will be the Bill on Amendments and Supplements to the Family Code, which, among other things, will propose the abolition of underage marriages. This is confirmed by numerous headlines in the media from that period (Đorđević, 2019). However, this change has not yet occurred, the Draft Law on Amendments to the Family Law has not yet "entered the procedure", that is, it has not "found its way" to the National Assembly. On the other hand, on March 10, 2022, the National Council of the Roma National Minority adopted the Declaration on the Abolition of Child Marriage, which "calls on Roma leaders, men and women, as well as Roma associations, to reconsider the practice and belief that child marriage is part of the cultural heritage of the Roma". Also, the National Council of the Roma National Minority calls both the institutions of the Republic of Serbia and local governments to implement and support laws and policies that prevent child marriages and protect children from risk categories (Adopted Declaration 2022). The adoption of the mentioned Declaration is of great importance, because it represents the "first step" towards the achievement of the final goal, i.e. the complete prohibition of underage marriages.

Why Ban Marriage Between Minors

The problem of underage marriages can be viewed from several angles, legislative, economic, social, but regardless of which angle it is viewed, one thing is certain, and that is that these unions leave consequences for children and their psychophysical development. The influence of tradition, low level of education, lack of information or any other factor that contributes to the conclusion of underage marriages cannot be a justification for the lack of interest of adults and their attitude towards this problem. When minor children get married, they face difficulties in life that they are unable to "bear". Their life changes suddenly and they are expected to take responsibility for their decisions, and the question arises whether they are psychophysically ready to take responsibility. Young people, and most often girls, who enter married or extramarital unions during adolescence are exposed to many health and psychosocial risks. The period of adolescence is a period in which intense physical, psychological, emotional and personal changes occur. In terms of time, it includes the period of biological, psychological and social maturation between the beginning of puberty and adulthood, which begins at the age of 11–13 and lasts until the age of 18–20. Puberty is a more biologically determined period characterized by sexual maturation, which implies the development of sexual organs to full functionality, while physical changes in this period usually occur faster than emotional ones. Therefore, in the adolescent period, there is often a great discrepancy between the biological ability and the possibility of its realization, as well as the mature desire to establish a marriage union and achieve parenthood. The above indicates the necessity of specific health care for children and young people of school age, whose organization and content should be directed to their needs (Letić, 2010).

The World Health Organization affirms the position that health is not only the absence of disease, but also the possibility of optimal psychophysical and social development of an individual. The ideal environment for the birth and development of an individual is the

family and marriage, and only through them the wider social community. Therefore, "society has a clear interest in preventing underage marriages for several reasons" (Počuča, 2010, p. 88). And the first and most important reason is the medical aspect, because minors are not sufficiently or completely formed in the psychophysical sense. The end of puberty represents the stabilization of the work of all glands, including the sex glands, as well as the regulation of the menstrual cycle in women, which is crucial for motherhood. Doctors point out that before the age of eighteen, the process of maturation of a woman's sexual organs is not fully completed. For this reason, sexual and reproductive activity before the age of eighteen can leave permanent consequences on a woman's body and psyche, and there is also a great risk for the child that a minor would give birth to. In this regard, it is suggested that it is desirable to start having sexual relations after the age of eighteen, and that marriage should be entered between the ages of twenty and twenty-four. The above is confirmed by statistical data from 2002 from the area of Belgrade, namely: that there is a high percentage of minors who give birth to children with a body weight of less than 1500 grams (premature children), that 63.6% of children whose mothers were under the age of 19 some pathological condition was recorded and that more than 30% of minors gave birth prematurely and with unwanted consequences (Dinić, 2016).

For an adolescent, the birth of a child can be extremely traumatic due to the emotional development level, which has not reached a certain maturity, despite the physical maturity, and due to insufficient support from the environment. Adolescent mothers in 20% to 50% of cases have symptoms of post-traumatic stress disorder and postpartum depression, which is accompanied by feelings of anxiety, loss of energy, obsessive thoughts, loss of interest, etc. Adolescent girls with low self-confidence, poor socioeconomic support, those who had to leave school, etc., are more susceptible to the development of these disorders. Young mothers are often unable to respond to the demands of a newborn child, which can cause emotional and cognitive difficulties, behavioral disorders, and even

delinquent behaviors in the later development of the mother (Spremo, 2010). So we can say that the education of girls about psychophysical development in puberty, reproductive health and health in general is of great importance, especially in the context of the harm of underage marriages (Childhood, not marriage, 2021, p. 20).

Based on the research conducted in the area of Timočka krajina (Serbia), Dinić (2019) singled out certain results that argue the theoretical implications about early marriages. As a rule, partners from underage marriages come from multi-generational and multi-member families, and young people form their own marriage under the auspices of one of the primary families. This kind of family in which children are born is a classic type of traditional patriarchal family that has a strict hierarchy and at the bottom of which is a minor woman. And that minor woman interrupts her education and very rarely succeeds in finishing high school, which means that she does not have a diploma, without which she does not have the qualification that gives her the chance to get a job and gain economic independence. If he gets a job, there is very little chance that he will advance in his job and leave his parents' house. From the above situation arises a new "challenge" that the uneducated, dependent and subordinate young mother is facing, and that is how she will raise and nurture her own child, when she is still a child herself. Premature marriage and the creation of offspring in the early phase of life affects that the spouses remain at a low level of education, which in later life represents a major obstacle for the independent material and economic development of the family (Počuča, 2010, p. 88). That the level of education of young people affects their attitudes about marriage and parenthood is confirmed by research conducted in our area, that is, in the region of Southern and Eastern Serbia. Based on the results of the conducted research, it was concluded that the biggest differences are registered in the actual and ideal time for marriage and parenthood, i.e. young people with a lower level of education get married much earlier and decide to have offspring earlier than young people with a higher level of education (Pešić Jenaćković, 2020).

Conclusion

Underage marriages represent a specific form of marriage between minors (one or both). They are known in all ethnic communities and are continuously present in every time period. These marriages produce a series of negative consequences for the partners themselves, their children, the families themselves, and society as a whole. For this reason, society has an interest in completely eliminating such marriages or reducing them to a minimum. It is evident that underage marriages are recognized as a form of discrimination in international law, which in our opinion is justified, for the many reasons we have stated. Therefore, we believe that the states should establish adequate mechanisms in order to suppress, that is, ban underage marriages. While we are "waiting" for the Family Law to be amended in the Republic of Serbia and the possibility of underage marriages to be abolished, based on a review of the relevant legal issues that arise in connection with the dispensation, we can conclude that the procedure for granting a marriage license should not be symbolic, because the decision allowing the conclusion of marriage produces important legal effects. Judicial control of each individual proposal should be carried out conscientiously, carefully and thoroughly, all in order to best protect the interests of minors and the entire social community. On the other hand, it is certain that even the prohibition of underage marriages will not represent a sure guarantee for the eradication of this practice, which of course does not mean that we should not work on harmonizing the normative and institutional framework in terms of harmonization with international standards that proclaim the prohibition of underage, early and forced marriages. In addition to the necessary harmonization of national legislation with international standards in the studied area, we believe that it is of crucial importance to work on prevention in terms of developing campaigns to combat underage marriages, which should be permanent, well thought out and organized and which must include all reference organizations and individuals in order to gave the desired result.

The words of Duško Radović testify to how important the decision is regarding "choosing" a spouse: "In life, it is enough to be smart only twice: when you choose your profession and your spouse".

References

Andrić, M. (2006). Osnovi šerijatskog prava (sa posebnim osvrtom na odnose između polova prema bračnim pravilima šerijatskog prava). [Basics of Sharia law (with special reference to relations between the sexes according to the marriage rules of Sharia law]. *Religija i tolerancija, 6*, 99–110.

Babić, I. (1999). *Porodično pravo* [Family law.] Službeni glasnik.

Centar za prava deteta (2017). *Prava deteta u Srbiji: zaključna zapažanja UN Komiteta za prava deteta sa preporukama* [Children's rights in Serbia: concluding observations of the UN Committee on the Rights of the Child with recommendations]. Centar za prava deteta. http://cpd.org.rs/wp-content/uploads/2017/10/Prava_deteta_u_Srbiji_Zakljucna_zapazanja_UN_Komiteta_za_prava_deteta.pdf

Council of Europe Treaty Series – No. 210 Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, 11.V.2011. https://rm.coe.int/168008482e

Cvejić Jančić O. (2001). *Porodično pravo: knj. 1: bračno pravo* [Family law: Vol. 1: marriage law.]. Univerzitet u Novom Sadu: Pravni fakultet, Centar za izdavačku delatnost.

Dinić, D. (2016). *Maloletnički brakovi u Timočkoj Krajini* [Underage marriages in Timok Krajina]. Beograd: Institut za političke studije.

Dinić, D. (2019). Maloletnički brak kao obeležje prošlosti i sadašnjosti [Underage marriage as a feature of the past and present]. *Paradigma: časopis za teoriju i praksu socijalnog rada, specijalne edukacije i rehabilitacije. 2*(2), 79-97

Đorđević, K. (2019, September 11). Srbija će zabraniti maloletničke brakove [Serbia will ban underage marriages]. *Politika*. https://www.politika.rs/scc/clanak/437589/Srbija-ce-zabraniti-maloletnicke-brakove

European Parliament resolution of 4 October 2017 on ending child marriage (2017/2663(RSP), (2018/C 346/09) (2018). Official Journal of the European Union P8_TA(2017)0379. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0379&from=EN

European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1. https://www.refworld.org/docid/50ed4f582.html

Horvat, M. (1958). *Rimsko pravo* [Roman law]. Pravni fakultet Sveučilišta u Zagrebu

Jović, S., O. (2003). Postupak za davanje dozvole za stupanje maloletnika u brak [Procedure for granting permission for the marriage of minors] In G. Stanković (Ed.), *Dvadeset godina Zakona o vanparničnom postupku* (pp. 187–194). Univerzitet u Nišu: Pravni fakultet & Institut za pravna i društvena istraživanja & Centar za publikacije

Kulanž, de F. (1956). *Antička država* [*Antička država*]. Plato.

Letić, N. (2010). Psihološki aspekti dece koja stupaju u bračne i vanbračne zajednice [Psychological aspects of children entering married and extramarital unions]. In A. Stanković, (Ed.), *Problemi i rizici maloljetničkih brakova* (pp. 7–10). Ombudsman za djecu Republike Srpske, Banja Luka.

Marković, J. (2021). *Godišnji izveštaj o dečijim brakovima u Srbiji za 2021. godinu sa posebnim osvrtom na praksu javnih tužilaštava* [Annual report on child marriages in Serbia for 2021 with special reference to the practice of

public prosecutor's offices]. NVO Praxis. https://zadecu.org/wp-content/uploads/2022/02/Godis%CC%8Cnji-izves%CC%8Ctaj-o-dec%CC%8Cjim-brakovima-za-2021.-godinu_Praxis.pdf

Milić, A. (2001). *Sociologija porodice* [Sociology of the family]. Čigoja štampa.

Ministarstvo za rad, zapošljavanje, boračka i socijalna prava (2019). *Instrukcije o načinu rada centara za socijalni rad – organa starateljstva u zaštiti dece od dečijih brakova* [Instructions on how social work centers work – guardianship bodies in protecting children from child marriage]. https://www.minrzs.gov.rs/sites/default/files/2019-06/Deciji%20Brakovi%20Instrukcija0001.pdf

Narodna skupština Republike Srbije [Narodna skupština] (1946). *Osnovni zakon o braku* [Basic law on marriage]. (Službeni list FNRJ, br. 29/1946).

Narodna skupština Republike Srbije [Narodna skupština] (1964). *Uredba o ratifikaciji Konvencije o pristanku na brak o minimalnoj starosti za sklapanje braka i o registrovanju brakova* [Decree on the ratification of the Convention on Consent to Marriage on the Minimum Age for Marriage and on the Registration of Marriages]. (Službeni list SFRJ – Međunarodni ugovori i drugi sporazumi, br. 13/1964).

Narodna skupština Republike Srbije [Narodna skupština] (1990). *Zakon o ratifikaciji Konvencije ujedinjenih nacija o pravima deteta* [Law on the ratification of the United Nations Convention on the Rights of the Child]. (Službeni list SFRJ – Međunarodni ugovori, br. 15/90 i Službeni list SRJ – Međunarodni ugovori", br. 4/96 i 2/97). Paragraf. https://www.paragraf.rs/propisi/zakon_o_ratifikaciji_konvencije_ujedinjenih_nacija_o_pravima_deteta.html

Narodna skupština Republike Srbije [Narodna skupština]. (1982). *Zakon o vanparničnom postupku* [Law on non-litigation procedure] (Službeni glasnik SRS, br. 25/82 i 48/88 i Službeni glasnik RS, br. 46/95 – dr. zakon, 18/2005 – dr. zakon, 85/2012, 45/2013 – dr. zakon, 55/2014, 6/2015, 106/2015 - dr. zakon i 14/2022). Paragraf. https://www.paragraf.rs/propisi/zakon_o_vanparnicnom_postupku.html

Narodna skupština Republike Srbije [Narodna skupština]. (2005a). *Porodični zakon* [Familiy Law]. (Službeni glasnik RS, br. 98/2006 i 115/2021). Paragraf. https://www.paragraf.rs/propisi/ustav_republike_srbije.html

Narodna skupština Republike Srbije [Narodna skupština]. (2005b). *Krivični zakonik* [Criminal law]. (Službeni glasnik RS, br. 85/2005, 88/2005 – ispr., 107/2005 – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019). Pragraf. https://www.paragraf.rs/propisi/krivicni-zakonik-2019.html

Narodna skupština Republike Srbije [Narodna skupština]. (2006). *Ustav Republike Srbije* [*Constitution of the Republic of Serbia*]. (Službeni glasnik Republike Srbije, br. 98/06 i 115/2021). Paragraf. https://www.paragraf.rs/propisi/ustav_republike_srbije.html

Pešić Jenaćković, D. (2020). Obrazovanje kao determinanta bračnog i reproduktivnog ponašanja mladih iz Jugoistočne Srbije [Education as a determinant of marriage and reproductive behavior of young people from Southeast Serbia]. *Kultura polisa, 17*(43), 393-407.

Piškulić, Z. & Đerđ, I. (1924). *Osnovi privatnog prava u Vojvodini* [Basics of private law in Vojvodina]. Geca Kon.

Počuča, M. (2010). *Porodično pravo* [Family law]. Pravni fakultet za privredu i pravosuđe u Novom Sadu

Počuča, M., & Šarkić, N. (2011). *Porodično pravo i porodično pravna zaštita* [Family law and family legal protection]. Pravni fakultet Univerziteta Union u Beogradu & JP Službeni glasnik

Report – A8-0187/2018. Towards an EU external strategy against early and forced marriages – next steps, European Parliament. https://www.europarl.europa.eu/doceo/document/A-8-2018-0187_EN.html

Resolution 1468 (2005). Forced marriages and child marriages. http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17380

Spremo, M. (2010). Rane trudnoće: posledice po zdravlje i psihofizički razvoj [Early pregnancy: consequences for health and psychophysical development]. In A. Stanković (Ed.), *Problemi i rizici maloljetničkih brakova* (pp. 11–14). Obusman za djecu Republike Srpske.

Srpski građanski zakonik iz 1844. godine, [Serbian Civil Code from 1844] (2023, January, 15). https://www.overa.rs/gradanski-zakonik-kraljevine-srbije-1844-god-sa-kasnijim-izmenama.html

Stanković, G. (1982). Postupak za davanje dozvole za stupanje u brak u slučaju maloletnosti [Procedure for granting permission for marriage in the case of minors]. *Zbornik radova Pravnog fakulteta u Nišu*, 22, 197–214.

Stefanović, N. (2020). Patria potestas in roman law. *Kultura*

polisa, 17(41), 235–244.

Stefanović, N. D., & Zarubica, S. (2020). Koncept braka u rimskom pravu i položaj žene u njemu [The concept of marriage in Roman law and the position of a woman in it]. *Pravo – teorija i praksa, 37*(2), 35–47. https://doi.org/10.5937/ptp2002035P

Strochlic, N. (2017, April, 14). The Sad Hidden Plight of Child Grooms, https://www.thedailybeast.com/the-sad-hidden-plight-of-child-grooms?ref=scroll

Taranovski, T. (2002). *Istorija srpskog prava u Nemanjičkoj državi.* [The history of Serbian law in the Nemanjic State.]. Lirika.

Thomas, C. (2009). Forced and Early Marriage: A focus on Central and Eastern Europe and Former Soviet Union countries with selected laws from other countries. United Nations Division for the Advancement of Women, 8, 1–19. https://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Cheryl%20Thomas%20revised_.pdf

Unicef (2021). Detinjstvo, ne brak: vodič dobre prakse u sprečavanju dečijih brakova za lokalne zajednice [Childhood, not marriage: a good practice guide to preventing child marriage for local communities]. *Unicef*. https://www.unicef.org/serbia/media/18966/file/Detinjstvo,%20ne%20brak.pdf

Unicef. (2019). Srbija – Istraživanje višestrukih pokazatelja položaja žena i dece 2019. i Srbija – Romska naselja istraživanje višestrukih pokazatelja položaja žena i dece 2019. [Serbia – Survey of multiple indicators of the position of women and children in 2019 and Serbia – Roma settlements survey of multiple indicators of the

position of women and children in 2019]. *Unicef*. https://www.unicef.org/serbia/media/16056/file/MICS%206%20Istra%C5%BEivanje%20vi%C5%A1estrukih%20pokazatelja%20za%202019.%20godinu.pdf

United nations fund for population activities. (2012). *Marrying too young: end child marriage*. https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf

United nations human right (2012). *Recommendations for action against child and forced marriage*. https://www.ohchr.org/sites/default/files/RecommendationsForActionEbook.pdf

Usvojena Deklaracija o ukidanju dečijih brakova u Srbiji. (2022, March 22). *Novosti*. https://www.unicef.org/serbia/medija-centar/vesti/usvojena-deklaracija-o-ukidanju-de%C4%8Dijih-brakova-u-srbiji

Vlada Republike Srbije. Opšte preporuke Komiteta za ukidanje svih oblika diskriminacije žena [General recommendations of the Committee for the abolition of all forms of discrimination against women]. https://www.rodnaravnopravnost.gov.rs/index.php/sr/dokumenti/medunarodni-dokumenti/opste-preporuke-komiteta-za-ukidane-svih-oblika-diskriminacije-zena

Kultura polisa
20(2), 101–129

Zabrana maloletničkih brakova

Milan B. Počuča[1], Dalibor M. Krstinić[2] i Nebojša Šarkić[3]

[1, 2]Univerzitet Privredna akademija u Novom Sadu
Pravni fakltet za privredui pravosuđe u Novom Sadu
[3]Univerzitet Union u Beogradu, Pravni fakultet

Sažetak

U nacionalnom bračnom zakonodavstvu maloletstvo pripada grupi materijalnih ograničenja za sklapanje punovažnog braka. Iz aspekta ljudskih prava maloletnički brak je prepoznat kao oblik rodno zasnovane diskriminacije prema devojčicama i dečacima. Maloletstvo, kao element koji se tiče statusa fizičkog lica percipira se kao određena pripremna faza života za koju je karakterističan nedostatak intelektualne i voljne zrelosti, kao i odsustvo životnog iskustva, što utiče na sprečavanje maloletnog lica da samostalno štiti svoja prava i interese. Navedeno predstavlja jedan od razloga zbog koga smatramo da je od velike važnosti u normativnom smislu u potpunosti zaštiti, odnosno zabraniti sklapanje maloletničkih brakova. Cilj ovog rada jeste ukazivanje na međunarodne standarde iz ove oblasti, kao i potrebu za reformom u zakonodavstvu Republike Srbije, u smislu zabrane maloletničkih brakova i njihovih štetnih posledica na lica koja ih zaključuju.

Ključne reči: maloletnički brak, bračna sposobnost, rodna diskriminacija, maloletstvo