MARIJA'S LAW – TEN YEARS LATER – (NON) APPLICATION OF THE LAW AND FUTURE SOLUTIONS

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Introductory Remarks

As a widely accepted truth, it is indisputable that criminal acts directed against sexual freedom, the so-called "sexual crimes" cause serious and long-term, if not lifelong, consequences for the injured person, both physically and especially psychologically. Linguistically and legally, child sexual abuse is a term used to describe sexual activities between a child and an adult or an older child. Ergo, this is criminalized as a criminal offense in almost all countries of the world, for which very strict criminal sanctions are prescribed (Merdović & Vujović, 2022: 66). Knowing different aspects of this phenomenon, different definitions of sexual abuse can often be found in the literature, and no clear line can be drawn between sexual offenses such as pedophilia, illicit sexual acts and sexual violence via the Internet and digital technologies. Sexual abuse of women (girls) is what people usually mean when they speak about sexual abuse in general, and it is almost always assumed that the victim of sexual abuse is female, and some international documents are aimed specifically at protecting women from sexual abuse. Also, women, thanks to the primary drives on both sides, have always been the natural target of men's instinctual animalistic sexual aggression (Filipović, 2022: 118). Noting that the violence against women is a negative phenomenon (Vujović & Filipović, 2022: 332) which has existed from almost the beginnings of human civilization, that is, from the end of matriarchy. Due to these facts, and without diminishing the consequences of sexual offenses against adults, we consider it indisputable that the consequences of these crimes on children and minors are far more pronounced, lasting and particularly serious, which significantly hinders or affects the development of their personality, causing them, as a rule, serious psychological trauma and scars (Matijašević-Obradović & Dragojlović, 2020: 104). Accordingly, this conclusion simply stems from the fact that minors, and especially children, are a particularly sensitive category of every society, as a result of which society and the state, through law, provide this category of persons with special protection and a special status (Matijašević & Dragojlović, 2022). Reasonable are, therefore, the measures and intense interest both the international community as a whole and the national legislators take when it comes to protecting children from sexual abuse, giving them special status and protection.

Dealing with this issue, proceeding from international standards - adopted, first of all, within the framework of the Council of Europe - special criminal legal protection for minors is provided, as a rule, on the one hand by prescribing as serious or the most serious forms of all criminal offenses when they are directed against children and minors, while, on the other hand, in the case of certain criminal acts directed against minors, special measures are prescribed that must be applied to the perpetrators of these acts, as a consequence of conviction. Underlining previously stated, in 2007, within the framework of the Council of Europe, the Convention on the Protection of Children from Sexual Abuse and

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Sexual Exploitation was adopted[2], which foresees a complex mechanism of measures, from preventive measures aimed at persons who work with children, measures towards children themselves[3] and the wider public, through measures of psychological and social assistance to victims, to those measures that should be incorporated into the national substantive and procedural criminal legislation. Respectively, in parallel with this, another initiative was developed that resulted in the drafting of the Convention on the prevention and fight against violence against women and domestic violence, the so-called Istanbul Convention, which partly deals with sexual violence against women and children. Deeming it fundamental for the protection of children, the Republic of Serbia signed the Lanzarote Convention immediately after its adoption by the Council of Europe. Eventually, as the Convention became a part of our legal order through ratification, there was a positive obligation to prescribe the measures provided for in the Convention by the national legislation and to elaborate them in more detail. Viewing the mandates and desired effects of the Convention, this obligation was partially fulfilled by the amendment of the Criminal Code (Criminal Code of the Republic of Serbia (CC), *Official Gazette* RS, 35/2019), and partly by passing the Law on Special Measures for the Prevention of Criminal Offenses Against Sexual Freedom against Minors (Act on Special Measures for the Prevention of Crimes against Sexual Freedom involving Minor ("Marija's Law"), *Official Gazette* RS, 32/2013), which was adopted only three years after the ratification of the Convention.

The Convention, also, as the first international legal instrument that includes all forms of sexual violence against children, establishes a broad prohibition of discrimination (Article 2), thus following the general principle of non-discrimination contained in the corresponding article of the UN Convention on the Rights of the Child. Starting, therefore, from this general principle, the Lanzarote Convention prescribes specific preventive measures and requires the coordination of national and local agencies in charge of protection against sexual exploitation and sexual abuse of children, but this Convention also prescribes appropriate protective measures, i.e. effective social programs designed with the aim of providing the necessary support to the victims, their close relatives and persons in charge of taking care of them, and other short-term and long-term preventive and protective measures (see: Petković & Pavlović, 2016: 185).

With regard to the procedural-legal aspect of protecting the position of the child, Petković & Pavlović (2016: 187) point out that the Lanzarote Convention also contains certain criminal procedural standards aimed at improving the position of the child as a victim, where they include the urgency of the procedure, informing the victim about his rights, protecting privacy and striving to avoid confrontation between the victim and the perpetrator, changes regarding the initiation of *ex officio* prosecution, even when the victim withdraws from a previously given statement.

In the further consideration of this paper, we will look at the circumstances that preceded the adoption of Marija's Law, and we will look critically at the individual provisions of the Law on Special Measures.

Circumstances Preceding the Enactment of "Marija's Law"

Certainly, before moving on to the analysis of the provisions of this Law, it is necessary to point out certain contextual peculiarities that caused the adoption of the Law on Special Measures. Also, based on the content of public debates in the Republic of Serbia, cases of sexual violence, especially against

2 *Council of Europe Convention of the Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote Convention (CETS 201)*; in the future to the text: Convention or Lanzarote convention.

3 According to Article 3 of the Convention and for the purpose of the Convention, any person under 18 is considered to be a child.

children, have been attracting significant public attention for the last ten years. The thesis that is presented is that these are irreparable categories of perpetrators of criminal acts, with a high rate of recidivism (Dragojlović & Bingulac, 2019: 240). As a result, an atmosphere was created about the necessity of stricter punishment of sex offenders, especially when the victims are minors. Also, the sequence of events, i.e. legislative activities regarding and in connection with the Convention, is closely related to legislative activities on the plan of passing the Marija's Law.

First of all, it should be noted that the national penal legislation, i.e. the CC, was amended before the ratification of the Lanzarote Convention. Namely, the criminal acts from Articles 185a and 185b of the CC were introduced by the Law on Amendments to the Criminal Code of 2009 (Law on Amendments to the Criminal Code of 2009 (LACC), *Official Gazette* RS, 72/2009). The convention was ratified on July 29, 2010. It is not so unusual and rare for a country to actually take over provisions from an international act and introduce them into its internal legislation even before ratifying that international act, as well as before that international act enters into force. However, as Stojanović (2017: 597) points out, the immediate basis and reason for the adoption of the LACC from 2009, which criminalized these behaviors, was Article 22 of the Convention, which orders the contracting countries to take all necessary legislative measures to criminalize imagining the criminal act of inducing a child to witness sexual acts. These amendments to the CC, therefore, took place in 2009 – almost a year before the legislator would ratify the Convention, and a whole four years before they would pass the Marija's Law.

When it is taken into account that the Convention served as the immediate legal basis for the adoption of both amendments to the Criminal Code and for the adoption of the Law on Special Measures, and based on the fact that more than four years passed between the adoption of these two legal text , that in the meantime, the Convention was also ratified, that almost three years passed from the ratification to the passing of the Law on Special Measures, what other conclusion can reasonably be drawn than that the legislator was not sincere enough in his intention, consistent enough nor, obviously, was there sufficient political will for the actual implementation of assumed international obligations. It was only the tragic events of 2014[4] that forced the domestic legislator to adopt the Law on Special Measures, which will be known in the public as *Marija's Law*, thus finally complying with the international obligations assumed by the Convention. One would have to wonder if the inactivity, reluctance and inconsistency of the domestic legislator had any consequences.

Critical Review of Marija's Law

From the content aspect, Marija's Law is one of the extremely short legal texts, with a total of 19 relatively short articles. As with all modern legal regulations, the first legal provisions are dedicated to defining the field and subject regulated by this legal text.[5] Thus, Article 1 of this Law defines the field and subject of regulation of this Law, and it prescribes *"special measures to be taken against the perpe-*

4 Popularly, the law has been named after Maria Jovanović, an eight-year-old little girl from Stari Ledinci, the suburbs of Novi Sad, who was killed on June 26, 2010 by the perpetrator who was previously convicted of sexual criminal offences against children and minors. After this crime, father of the girl started the initiative for the enactment of the law which would prevent similar events in the future. The initiative was supported by all Serbian political parties and the biggest part of public, and enacted unanimously by the Assembly.

5 This legislative trend of the domestic legislator in the past period can be criticized for simple unnecessariness. It is not disputed that these provisions do not take anything away from the legal text. But they also do not add anything to it. Given the fact that they are mostly empty political declarations, they are not useful in the interpretation or application of the rest of the law. In our opinion, such provisions unnecessarily burden the legal text with platitudes or wordings that have no real meaning or place in legal texts. For example, one of the most basic and important legal regulations - the Criminal Code - does not contain these declaratory and introductory provisions, but no one has ever had a problem understanding what and how the Criminal Code regulates.

trators of crimes against sexual freedom committed against minors specified in this Law and regulates the keeping of special records of persons convicted of those crimes." Although the goal, purpose and content of the legal text can be clearly determined from its name, the legislator had the need to repeat all this in the legal text itself. This provision, from a linguistic and substantive point of view, is derogatory in nature - it establishes a special regime: special measures for individual (special) criminal acts. Ćorović (2016: 416) points out that, due to the existence and application of the principle of *lex specialis derogate legi generalis*, there should be no problem here. Nevertheless, the problem can be posed from the aspect of the absence of a clause of the CC that would allow a special regime by its express provision. Ćorović (2016: 416) also correctly states that it is common for special criminal law regimes to have their own *"iustus titulus in the Criminal Code, as is the case with juvenile offenders and legal entities, but not with Marija's law.*" Although this is common, there is, however, no explicit requirement that for each special criminal law regime there is a corresponding general clause in the CC. The legislator would, thus, be extremely limited when dealing with secondary criminal legislation. Nevertheless, we consider, bearing in mind the general rule on the codification of criminal legislation, as well as the principles of *lex stricta*, the legislator should not lightly and/or too often resort to secondary criminal legislation, and especially should not introduce reforms of criminal legislation and penal policy through the back door of secondary criminal legislation (similarly, Ristivojević, 2013).

The goal of the Law is defined in Article 2, and the goal is to *"remove the conditions that may influence the perpetrators of crimes against sexual freedom committed against minors to commit these crimes in the future.*" Defining the goal of a particular law is, as a rule, of a declarative-political nature and connotation, and the legal value is insignificant. This Law is no exception to that rule. It does not even seem completely clear to us what exactly are the "conditions that may be of influence" that the proposer and the legislator had in mind.

As it is a special criminal law regime, the provisions of this Law do not apply to all criminal acts, but this Law is limited in its application to only certain criminal acts which are, as a *numerus clausus*, listed in Article 3 of this Law. The criterion for distinguishing these criminal acts is completely indisputable: they are criminal acts against sexual freedom with the condition that they were committed against a minor. However, regardless of the fact that they are criminal offenses with the same protective object, the large difference in the severity of the mentioned criminal offenses makes this group extremely incoherent, bearing in mind that within this group of criminal offenses there are also offenses ranging from the most severe to the least serious.

Starting from the goal of passing Marija's Law, Dragojlović (2022: 88) points out that the provisions of the Law on Special Measures will not be automatically applied to all perpetrators of the criminal acts listed in Article 3 of this law. Namely, in order for the provisions of this Law to be applied, it is necessary that a special qualifying circumstance be met during the commission of a criminal act: that the act was committed against a minor, i.e. that a minor was harmed by a criminal act (Dragojlović, 2022: 89).

The Law itself, in Article 4, prescribed that if the provisions of this law do not prescribe otherwise, the provisions of the CC, the Law on the Execution of Criminal Sanctions (LECS, *Official Gazette* RS, *35/2019)*, the Law on Juvenile Offenders and the Criminal Protection of Minors (Juvenile Offenders Act-JOA), *Official Gazette* RS, 85/2005) and the Code of Criminal Procedure (Code of Criminal Procedure (CCP), *Official Gazette* RS, 62/2021) shall be applied accordingly. This provision clearly defines that the provisions of Marija's Law derogate the entire system of criminal law in Serbia; the provisions contained therein are derogated from both the provisions of the general criminal law regime (by derogation from the CC and the CCP), as well as the special criminal law regime that applies to minors

(by derogation from the Law on Juvenile Offenders and Criminal Protection of Minors; JOA). Thus, as the JOA is already a special law in relation to the Criminal Code, it is, consequently, Marija's law "more special" than the JOA in relation to the Criminal Code. It follows that the provisions of Marija's Law will be applied in the first place, then the JOA, and only finally the provisions of the general criminal law (CC and CCP). With this approach, our criminal justice system has become even more complex, which may not have been necessary.

Article 5 of Marija's Law is entitled *"Prohibition of mitigation of punishment and parole and non-statutory limitation of criminal prosecution and execution of punishment"*. Thus, the current Article 5 prescribes that the punishment of a person convicted of a criminal offense from Article 3 of this Law cannot be mitigated by applying the general rules on mitigation of punishment from Article 57 of the CC (paragraph 1), that a person convicted of a criminal offense from Article 3 of this Law cannot be conditionally dismissed (paragraph 2) and, as a result, the criminal prosecution for criminal offenses from Article 3 of this Law, as well as the execution of the punishment for these offenses, does not become statute-barred (paragraph 3). Therefore, the provisions of this article derogate from three basic institutes of criminal law. In its campaign to tighten the penal policy to its extremes, the only thing that is surprising is that the possibility of a suspended sentence has not been ruled out.

In any case, according to the express provisions of Article 5, Paragraph 1 of the Law on Special Measures, for criminal acts from Article 3 of this Law, the sentence cannot be reduced and parole is not possible. This ban on mitigating punishment in connection with sexual offenses in Serbian legislation is based on Article 27 of the Convention, which specifies that "each (state) signatory shall take the necessary legislative or other measures to ensure that criminal offenses established in accordance with this Convention are punished by effective, proportionate and dissuasive sanctions, taking into account their seriousness." However, we believe that this provision of the Convention does not insist on the introduction of an absolute blanket ban on mitigation of punishment, although it does not exclude this possibility (similarly to Miladinović-Stefanović, 2014: 571; Ćorović, 2016: 418). Nevertheless, we believe that the domestic legislator has decided to go a step further than what is required by the Convention, and to prescribe such an absolute ban, which, in our opinion, has no criminological and criminal justification.

We believe that this kind of tightening of the penal policy, and the introduction of a blanket, absolute *in abstracto* ban on mitigation of punishment has no place in our criminal legislation. Even for some of the most serious crimes, this possibility is not absolutely excluded.

Stojanović (2012: 316) points out that these provisions of Marija's Law directly disavow certain institutions of the general part of the CC, and Ristivojević (2012: 46) notes that the difference between, for example, an attempted and completed criminal offense, complicity and execution, diminished capacity and insanity, etc. has been significantly reduced. We believe that with this kind of prescription, the legislator has certainly gone beyond the scope of the *lex specialis derogate legi generali*, so, essentially, he passed a criminal "super-law". No matter how noble the motives of such a regulation may be, we believe that the legislator went too far in derogating from the general rules of criminal legislation.

In the second place, Article 5 of the Law on Special Measures also prescribes the prohibition of conditional release of persons sentenced to prison for criminal offenses from Article 3 of this Law. And this ban, although at first glance more reasonable than the ban on mitigation of punishment, seems inexpedient. Namely, it is generally accepted that the institution of parole is an important instrument for controlling the behavior of prisoners and achieving the purpose of punishment (Stojanović & Kolarić, 2012: 11-12). Tanjević & Đorđević (2014: 113) point out that according to the current legislation, parole becomes a right for the perpetrators of most criminal offenses (with the fulfillment of certain

conditions), and for the perpetrators of some, mostly serious crimes, it remains a possibility (also with certain conditions). The parole facility established in this way with the modalities of mandatory and optional release is in accordance with international standards in this area and is very suitable for achieving its goals, primarily contributing to the rehabilitation of convicted persons and achieving the purpose of punishment, but also relieving the burden of overcrowded correctional institutions. The provision of Article 46 of the CC does not leave the possibility to extend the prohibition of conditional release of convicted persons by means of a special law. However, as in other aspects, the absence of a permissive general clause in the Criminal Code did not prevent our legislator from expanding this prohibition with the Law on Special Measures, so according to Article 5, paragraph 2 of this Law, persons who have been sentenced to prison for a criminal offense against of sexual freedom committed against a minor listed in Article 3, cannot be released conditionally. Absolute denial of the right to parole is not criminologically and criminally acceptable and justified, especially bearing in mind the special measures and consequences of conviction to which persons convicted of these crimes are exposed.

Finally, paragraph 3 of Article 5 of the Law on Special Measures limits, or excludes, the application of the statute of limitations for criminal prosecution and execution of punishment for criminal offenses from Article 3 of this Law. Although some authors believe that such a prescription is not without precedent (see for example Đorđević & Simeunović-Patić, 2015: 240), we believe that this action of the domestic legislator is absolutely unprecedented. The statute of limitations for criminal prosecution from Article 103-106 of the Criminal Code is an almost absolute category. The statute of limitations for criminal prosecution suffers from rare and narrow exceptions. In this sense, there is no legal regulation that foresees a deviation from this rule. The only exceptions are contained in the Constitution of the Republic of Serbia (Constitution of Republic of Serbia, (CRS), *Official Gazette* RS 98/2006; 115/2021) and the CC itself. Thus, the CRS in Article 34, paragraph 6, stipulates that *"criminal prosecution and execution of punishment for war crimes, genocide and crimes against humanity shall not become* statute-barred". In addition to this exception contained in the constitutional norm, the only exception is provided by the provision of Article 108 of the CC, which stipulates that *"criminal prosecution and execution of punishment do not become statute-barred for criminal offenses provided for in Art. 370 to 375 of this Code, for criminal offenses for which a sentence of life imprisonment is prescribed, as well as for criminal offenses for which, according to ratified international treaties, the statute of limitations cannot apply"*. By prescribing the norm within Article 5, Paragraph 3 of the Marija's Law, the legislator went beyond the limits and framework of the criminal legislation, and made significant changes to the domestic criminal justice system, for which he had no sufficient justification or reason. Putting the criminal acts from Article 3 of this Law in the same rank as the criminal acts from Article 108 of the CC is devoid of any sense, logic and criminal law reason.

Dragojlović (2022: 89) points out that the key operational provisions of this Law are contained in Articles 6 and 7, which govern the special measures and legal consequences of conviction. Article 6 of the Law on Special Measures regulates the issue of legal consequences of a conviction, which, again, to some extent expands the general institute of criminal law. Namely, in accordance with the provisions of Article 6 of the Law, with a criminal conviction for the criminal offenses listed in Article 3 of this law, the following legal consequences must occur: 1) termination of public office; 2) termination of employment, i.e. termination of calling or profession related to work with minors; 3) prohibition of acquiring public positions; 4) prohibition of establishing an employment relationship, i.e. performing a calling or occupation related to work with minors. Furthermore, according to paragraph 2 of this provision, the legal consequences of the conviction from paragraph 1 of this article occur on the day the judgment becomes final. These legal consequences of conviction are subject to two-pronged criticism. First, it is found that it was neither necessary nor justified to include them in this legal text, bearing in mind the complete identity with the legal consequences of conviction contained in Article

95 of the CC. Secondly, the insufficiently precise determination of these consequences of conviction is criticized, which makes their concretization and application difficult. In addition, the question of the duration of these consequences of the conviction imposes a serious dilemma.

The provisions of Article 6 of the Law on Special Measures, in their essence, only repeat the provisions of the Criminal Code on the legal consequences of a conviction, with the exception of the legal consequences of a conviction of the loss or prohibition of obtaining certain permits, which is provided for by the CC, and which the Law on Special Measures does not mention. Also, in Marija's Law, the legislator failed to specify which legal consequence follows a criminal conviction for which of the criminal acts from Article 3 of this Law. Article 6 of Marija's Law only stipulates that a conviction for a criminal offense from Article 3 of this law necessarily entails the legal consequences of the conviction, so they are enumerated. As the legislator did not clearly decide when the consequence of the conviction occurs, linguistic interpretation leads to only one conclusion: all listed legal consequences of the conviction will occur. In addition, the question of "concurrent" application of the provisions of the CC, in the sense of Article 4 of Marija's Law, is also raised. Does Article 6 limit the range of legal consequences of a conviction that can occur to persons convicted of criminal offenses from Article 3 of Marija's Law, or can the general rules from the Criminal Code still be applied, i.e. the legal consequences of a conviction that the legislator failed to repeat in Marija's Law? We are of the opinion that the legislator prescribed the legal consequences of conviction from Article 6 according to the *numerus clausus* principle, and that by a conscious choice, i.e. by excluding other legal consequences from the CC, he decided that those legal consequences cannot be applied to persons convicted of one of the criminal offenses from Article 3 of Marija's Law. It is considered that the legislator in the field of penal legislation was perfect and that he prescribed everything he wanted, as he wanted. Therefore, in the absence of express sanctions prescribed by a special law, when there is doubt about the legislative intent, we believe that the interpretation result that is more favorable to the defendant must be taken as correct.

With regard to the legal consequences of a conviction for the loss or prohibition of obtaining public functions, it is emphasized (Ristivojević, 2013: 331; Đorđević & Simeunović- Parić , 2015: 240) that the public functions to which these legal consequences of a conviction refer are not precisely determined. Ristivojević (2013: 331) points out that the interpretation that this legal consequence of a conviction applies to all public functions would violate the nature of the legal consequences of a conviction, which should eliminate dangerous situations from which the re-commitment of criminal acts may arise, and not be some kind of moral sanctions to all public office holders. Agreeing with the nature of the legal consequences of the conviction, although we believe that Ristivojević's objections are justified, we still take a different position. Without going into its justification, we believe that this legal consequence of the conviction refers to all public positions held by the person, that is, to the prohibition to hold such positions in the future. This simply results from the language formulation of the legal provision itself, which is linguistically clear and precise enough - whatever public office the defendant holds, it ends when the criminal conviction becomes final. It seems that the intention of the legislator was to attach a certain social moral stigma to the convicted person with this legal consequence of the conviction, and prevent him from participating in social life in that way, i.e. doing business in the name and on behalf of society, to which he clearly does not belong. However, as Đorđević & Simeunović-Patić (2015: 241) note, the legislator did not define the term "public function" either here, nor in the CC, so in that part it remains disputed which functions and positions can be defined as "public" and to which this legal consequence of the conviction would apply.

Also, the problem of imprecise definition arises with the legal consequences of a conviction related to the termination of the employment relationship, where it is determined that they affect the employment relationship "relating to work with minors", where it is not decided nearly enough what those

jobs and working relationships related to work with minors exactly are. As a novelty provided by Marija's Law in relation to the existing solutions in the Criminal Code, it is determined that a person convicted of a criminal offense from Article 3 of that Law cannot establish an employment relationship related to work with minors. We are of the opinion that the legal consequence of the ban on employment refers to the jobs that involve working with children, where working with children is the primary activity (educator, teacher, professor, social worker, etc.). Although the provision is imprecise and even potentially unconstitutional since it violates the principle of legality, as long as it stands and forms part of the legal order, the court, applying the provisions of Marija's Law, would have to assess in each specific case whether the specific workplace, i.e. jobs and tasks, represent such jobs and tasks that there is a danger that the defendant will be able to commit a criminal offense again, which the legal consequence of the conviction should prevent.

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

In relation to the legal consequences of the conviction from points 3 and 4, i.e. the ban on obtaining public positions and the ban on establishing an employment relationship, i.e. performing a calling or occupation related to working with minors, bearing in mind that their duration is precisely defined in advance at 20 years, there is no possibility of shortening the duration of these legal consequences of conviction (Dragojlović, 2022: 89-90). A special problem, and what characterizes this entire Law on Special Measures, is its relationship with the Criminal Code, as a general regulation.[6] Namely, Article 96, paragraph 3 of the CC prescribes that "*The legal consequences of a conviction consisting in the prohibition of acquiring certain rights can be prescribed for a maximum duration of up to ten years*." The CC, therefore, allows for a special law to prescribe the time period of the legal consequences of a conviction, but sets a clear framework for the maximum duration of the legal consequences of a conviction. By prescribing Article 6 of Marija's Law, i.e. that the legal consequences of a conviction last a fixed 20 years, the legislator far exceeded the limits set by the Criminal Code. Consequently, we believe, this provision of Marija's Law in the part about the duration of the legal consequences of the conviction, is not in accordance with Article 96 of the Criminal Code, which violates the unity of the legal order, so it is unconstitutional and has no legal effect.

Furthermore, Article 7 of Marija's Law provides for special measures to be imposed on a convicted person for criminal offenses from Article 3 of the Law, which measures are the main objective for the adoption of this Law. The very name "special measures", that is, the name of the law as the Law on Special Measures, was strongly criticized by the professional public. Thus, Ristivojević (see 2013: 324-325) criticizes the legislator because he was not able to determine the nature of these measures (even the Law itself), and consequently, neither the name, so measures are introduced for the perpetrators of these criminal acts that do not have a name; they are special measures, but it is not clear in relation to what they are special - if they are special measures, what are the general measures? These criticisms of the legislator regarding the names of the measures and the law itself are certainly not unfounded. However, we believe that so much attention should not be paid to the name itself, but to the essence of these *special measures*. In other words, unlike Ristivojević , who opts for the Latin *Nomen est omen,* we opt for *Forma non dat esse rei.*

6 Although, as already pointed out, we believe that the relationship of the Law on Special Measures (Marija's law) and Criminal Code, due to numerous and radical deviations and derogation, is not relationship *lex specialis* and *lex generalii*, but a relationship of one general law (Criminal code) and a "super law" (Law on Special Measures).

When talking about the legal nature of these special measures, they are truly special; *sui generis* measures which, in themselves, are closest to criminal sanctions. The only thing they lack in order to fully fall under the category of criminal sanctions is the jurisdiction of the court to impose them, and not that they automatically result in a criminal conviction, regardless of the will of the criminal court, as well as the fact that these special measures are implemented against the perpetrator ***after they served a prison sentence***. The automatic occurrence *of the measure* is inherent in the legal consequences of conviction, and not in security measures or other criminal sanctions. And, as Ristivojević (2013: 327-328) points out, these *special measures* cannot be considered legal consequences of a conviction, since the Law already contains a provision (Article 6) dedicated to the legal consequences of a conviction, and the article itself is called *Legal Consequences of a Conviction,* so it is not logical that these special measures should also be the legal consequences of a conviction. On the other hand, bearing in mind that these special measures limit the human rights and freedoms of persons who have been convicted of criminal offenses from Article 3 of this Law (and who have served their prison sentences), these measures have certain similarities with certain obligations that can be impose as part of protective supervision along with a suspended sentence. Indeed, it is not possible to clearly define the legal nature of these special measures; they are a bit like a punishment (such as the revocation of a driver's license, which is carried out after serving a prison sentence), but also like security measures and legal consequences of conviction and obligations with protective supervision. As they clearly do not fall under any of these categories, these *particular measures* (so unnamed) constitute a category unto themselves; in our opinion, they represent a category of *sui generis* criminal sanctions. Also, we believe that there was no real need for the legislator to resort to prescribing these special measures, thus creating *sui generis* criminal sanctions, destroying along the way the long-existing criminal justice system of the country, but could have achieved its goal within the framework of the existing criminal legislation, with possible minor changes and amendments (in which he is not shy, bearing in mind the number of legislative interventions in the area of criminal substantive and procedural legislation). It seems to us that the hasty usurpation of the criminal justice system in the country, and the introduction of special rules and *sui generis* sanctions, was rather the result of the desire to be original and the desire to provide the public with something special, rather than to truly solve, in a consistent and adequate way, the issue that was subject of this special law.

In any case, against the perpetrator of the criminal offense from Article 3 of this law, after serving the prison sentence, the following special measures are implemented: 1) mandatory reporting to the competent authority of the police and the Administration for the Execution of Criminal Sanctions; 2) prohibition of visiting places where minors gather (kindergartens, schools, etc.); 3) mandatory visit to professional counseling centers and institutions; 4) mandatory notification of change of residence, place of residence or workplace; 5) mandatory notification of travel abroad.

Paragraph 2 of the same article prescribes that the measures referred to in paragraph 1 of this article shall be implemented for 20 years after the prison sentence has been served, and paragraph 3 states that after the expiration of every four years from the beginning of the application of the special measures referred to in paragraph 1 of this article, the court that issued the first-instance verdict, will *ex officio* decide on the need for their further implementation. A request for reconsideration of the need for further implementation of special measures from paragraph 1 of this article can be submitted by the person to whom these measures apply, and the request can be submitted to the court that issued the first-instance verdict after the expiration of every two years from the beginning of the application of special measures. This, therefore, means that these special measures, in the best case per convicted person, will be applied to the convicted person for a minimum of 2 years after serving the prison sentence.

From the aspect of the (im)precise formulation of these measures, we find the measure under point 2 - the ban on visiting places where minors gather (kindergartens, schools, etc.) - to be the only one that is disputed from the aspect of specificity. Namely, Article 9 (conditionally speaking) elaborates this special measure, by prescribing that under it is meant *"the duty of the perpetrator of the criminal offense from Article 3 of this law to refrain from visiting places where minors gather, such as school buildings, schoolyards, kindergartens, playgrounds, children's events, etc."* There are two problems with such a normative solution. First, although mostly determinable, the convicted person is not defined by the behavior that he must observe; the duty[7] of the offender to refrain from visiting places where minors gather is determined. However, it is a fairly broad provision, and it covers or can cover a number of places. The exemplary statement made by the legislator does not sufficiently determine the behavior required of the convicted. Can a convicted person take his child to a child's birthday party? Does this quasi-incrimination include, for example, a public swimming pool in summer, when it is common knowledge that children go to such places? We believe that the legislator should have been more precise in defining the places where the convicted cannot be found. As it stands, this provision is quite controversial from a point of legality; that is, the convicted person can easily refer to both legal and factual error. Another problem is that the legislator left no room for exceptions to this "duty of restraint". The question arises as to whether the convict would violate his duty if he takes his child to and from school; should he drop him off and meet him around the corner and not at the school? Can a single parent take their child or grandchild to a child's birthday or to the playground? According to the provisions of Article 9 of Marija's Law, as it stands now, the answer to these questions would have to be negative. However much the legislator wanted to be retributive with this Law, we believe that it was not his intention to introduce such prohibitions and restrictions, and that, if he did want to do so, he was neither wise nor justified in doing so.

Other prescribed measures do not have such shortcomings. However, as with other aspects of this particular law, the legislator was not correct in tying the court's hands almost entirely. This is because the law does not leave any possibility of assessment and discretion to the criminal court when deciding, but all legal consequences of the conviction and all special measures are automatic and occur and are applied by force of law, regardless of the will of the court. The court cannot decide that only some legal consequences of a conviction should occur or that only some special measures be applied.

As in the case of the legal consequences of a conviction, the legislator failed to determine when and what specific measures will be implemented. This means that everything is carried out simultaneously, without the possibility of deviation. It is expressly stipulated that all special measures nominally last 20 years, unless the court shortens the measure every four years. In doing so, the legislator predicted that the court will decide *ex officio* on the need for further implementation of special measures, while not prescribing a single element that the court should take into account, so that the court is completely free to decide on the basis of whatever the criteria you want; the only thing that is necessary is for the court to obtain the reports of the authorities and organizations that implement these measures (Article 7, Paragraph 6 of Marija's Law). On the one hand, therefore, the legislator completely separates the matter from the hands of the criminal court (determination of special measures and legal consequences of conviction), while on the other hand, he leaves all discretion to decide on the need for further implementation of measures. This approach of the legislator is inconsistent and opens the door to complete arbitrariness of the criminal court (Dragojlović, 2022: 93). Apart from the reasons stated above, the inadequacy of the abstract and linear sanctioning of all the perpetrators of the mentioned criminal acts in an equal and identical manner, apart from elementary unfairness, is also problematic

7 It is interesting that the legislator opted for this wording - that this measure implies *"the duty of the perpetrator of the criminal act"*, and that the legislator did not decide to establish an obligation or impose a ban, even though the article itself is called *Prohibition of visiting places where minors gather.*

due to the nature of the acts themselves, which are so mutually heterogeneous that the same sanctioning cannot be justified in any way.

When it comes to restricting human rights guaranteed both by the European Convention on Human Rights and the CRS, although there are opinions that the special measure under point 1 - mandatory reporting - violates freedom of movement (Ristivojević, 2013: 329), we are of the opinion that the convicted person does not limit his freedom of movement in any way; but he undertakes to report to the competent authority occasionally, once a month, and by the 15th day of the month (Article 8 of Marija's Law). Freedom of movement is not restricted here. The same is the case with the special measure from point 5 - the obligation to inform about travel abroad. Namely, their trip is not subject to approval or any other procedure, but only notification. With that, freedom of movement is not limited. With regard to the measures from points 1 and 5, we can possibly talk about the encroachment on the right to privacy, that is, the right to private and family life from Article 8 of the European Convention, however, in this case as well, all requirements for the permissibility of encroachment on this right have been met. As for the measure from point 4 - the obligation to notify about a change of temporary residence or place of permanent residence - this obligation is, of course, already provided for all citizens of the Republic of Serbia by the Law on Temporary Residence and Residence of Citizens, so it can only be criticized from the aspect of the absence of the need to specifically state, but the legislator probably tried to emphasize it as particularly important, and to sanction it more strictly as a misdemeanor. As for the notification about the change of workplace, we believe that here too there is no violation of human rights, i.e. the right to work from Article 60 of the Constitution. Imposing the obligation to notify about a change of workplace does not limit the right to work, nor does it make work more difficult, nor is this change conditional on consent. The special measures from points 2 and 3 of Article 7 - the ban on visiting places where minors gather and the obligation to visit professional counseling centers and institutions - are, in our opinion, on the border of constitutionality. Ristivojević (2013: 329) correctly notes that, from a technical point of view, Article 39 of the Constitution allows restriction of freedom of movement for 4 reasons: conduct of criminal proceedings, protection of public order and peace, prevention of the spread of infectious diseases and defense of the Republic of Serbia. However, this restriction is provided for by law, it truly serves the legitimate interest of the state and society, and is necessary in a democratic society. Although one could argue the opposite, an argument could be made that imposing such an obligation on those convicted of these specific crimes against minors protects public order and peace. It is not difficult to imagine the state and atmosphere in society and the public if this measure, which serves as a protective measure for children, were declared unconstitutional. Public order and peace would certainly be disturbed. Finally, regarding the measure related to mandatory visits to professional counseling centers and institutions, we agree with the caution that Ristivojević points out and suggests, and with the allegations about the ineffectiveness of involuntary therapies. However, we also point out that this type of obligation does not represent a constitutionally disputed issue, bearing in mind that the same measure is applied within the framework of protective supervision, and this type of special measure is not sufficiently different to require a different constitutional treatment.

In conclusion, therefore, although some authors argue the opposite, these measures cannot be considered unconstitutional, and we believe that these special measures *in abstracto* would pass the constitutionality assessment, even though this issue did not yet reach our Constitutional Court.

In addition to the stated legal consequences of conviction and special measures, Articles 13-15 of the Law on Special Measures stipulate that the ministry responsible for judicial affairs keeps special records of persons convicted of crimes from Article 3 of the Law. This regulation creates, *de facto,* a register of sex offenders against minors. This record contains: 1) name and surname of the convicted

person; 2) the unique identity number of the convicted citizen; 3) the address of the convicted person's residence; 4) data on the convict's employment; 5) data on importance for the physical recognition of the convict and his photograph; 6) DNA profile of the convict; 7) data on the criminal offense and the sentence to which he was sentenced; 8) data on the legal consequences of the conviction; 9) data on the implementation of special measures prescribed by this law. The law also prescribes the manner of keeping these records as well as the availability of the data contained therein. In contrast to "ordinary" criminal records, the maintenance of which is regulated by the CC, the Law on Special Measures stipulates that these records are maintained by the Directorate for the Execution of Criminal Sanctions. One of the objections is that there is no clear record of medical and pedagogical measures in the process of treatment and resocialization of sexual offenders in institutions for the execution of criminal sanctions where perpetrators of sexual offenses are located (Bjelajac et al. 2020: 24). The illogicality of this provision lies in the fact that the general record of all criminal sanctions is kept by the courts, so it is not clear why this type of record was separated and given to the Directorate. In addition, it is obvious that the work in that part of the records is duplicated, which seems inexpedient. It was probably better and more rational to determine within the existing records kept by the courts that the records when it comes to these criminal offenses must also contain the specified data that are not contained in the records kept for other criminal offenses. However, contrary to this, as well as the criticism of the professional public (Ćorović, 2016: 422-423; Ristivojević, 2013: 322; Miladinović-Stefanović, 2014: 580), we believe that this solution was in accordance with the provisions of Article 37 of the Lanzarote Convention, and by which the member states of the convention are obliged to undertake all the necessary legislative measures to collect data related to the identity and genetic profile (DNA) of persons convicted of criminal offenses established by this convention, and the legal provision that special records are kept by the Ministry of Justice, i.e. the Directorate for Execution of Criminal Sanctions is in accordance with Article 3 of the Law on the Ratification of the Convention of the Council of Europe on the Protection of Children from Sexual Exploitation and Sexual Abuse, which designates the Ministry as one of the competent authorities to ensure the implementation of the provisions of this Convention. Bearing that in mind, criticisms of the "transfer" of the competence for managing this register to the Directorate for the Execution of Criminal Sanctions do not stand. Also, it is pointed out that in this way the centralization of keeping data from special records is achieved, which enables more efficient monitoring of the implementation of this law and facilitates access to the necessary data to the authorities responsible for suppressing criminal offenses against sexual freedom, both in the country and abroad.

The legislator, in addition to criticism for maintaining a special register, taking DNA samples and entering a DNA profile into that register (see Ćorović, 2016: 422-423; Ristivojević, 2013: 322; Miladinović-Stefanović, 2014: 580 et seq.), nevertheless established a special register for the perpetrators of criminal acts from Article 3 of the Law on Special Measures, but provided for the possibility that the authorities of other countries have access to this register. Namely, Article 15 of Marija's Law determines the availability of data from special records, and stipulates the obligation for state and other authorities, as well as legal entities or entrepreneurs who work with minors to request information on whether the person who is to establish an employment relationship with them has been entered in this special record. Thus, according to the position of the proponent (Explanation, 2012: 3), it is possible to consistently apply the legal consequences of the conviction, which consists in the prohibition of establishing an employment relationship, that is, performing a calling or profession related to working with minors. Also, it should be pointed out that access to data from special records can be achieved by foreign state authorities, in accordance with the international agreement, which is necessary for the purpose of suppressing the criminal acts of sexual abuse and exploitation of minors on the international level, and which is prescribed in Article 37, point 3 of the Convention.

However, this Law was subject to criticism not only by the professional public, but also by the members of later convocations of the Parliament, as shown by the constant attempts to amend and supplement this Law. There are many problems with the non-application of this legal regulation in practice, starting with the (non)keeping of the register from Article 13 of Marija's Law, the failure to determine the application of special measures and the legal consequences of a conviction, etc. The very application of the Law in practice is disputed. Thus, after the late start of implementation, the first legally binding judgment under Marija's Law was pronounced only in the middle of 2016, while the last data that is publicly available on the Internet indicates that at the end of 2019 there were a total of 279 persons in this special register, and that 58 persons were subject to special measures.

Concluding Remarks

When it comes to sexual crimes, the tightening of the criminal policy towards the perpetrators, the establishment of special records and the introduction of special mandatory measures that impose various restrictions on sex offenders after the sentence has been served, or direct stigmatization of sex offenders aimed at their social exclusion, are part of the modern world trend in opposing this form of criminality and it is certain that such a trend will last, and states will lead joint efforts to achieve this goal at the supranational level, as evidenced by the Lanzarote Convention and its wide reception.

Through an exhaustive and comprehensive analysis and criticism of the legal solutions contained in Marija's Law (or the Law on Special Measures), as well as pointing to the Lanzarote Convention as the immediate legal basis (and source of obligation) for the adoption of this legal text, we tried to point out the omissions made by the legislator when prescribing different legal solutions. By presenting the arguments for and against a certain approach, we indicated the reasons why we decided on a certain position, and indicated how the legislator should correct the observed shortcomings. It is time for this special criminal law from the sphere of populist measures to be integrated into normal and well-established criminal legislation.

It seems indisputable that the legislator, by enacting this Law on Special Measures, violated a large number of fundamental, indisputable and well-tested institutes and categories of criminal law, and with his pretentious approach showed ignorance and misunderstanding of the relationship between basic and secondary criminal legislation in our legal system. Inadequate norming, unskillful nomotechnics, repetition and overlapping of content disrupts the logical and thought coherence of the criminal law system as a whole. Marija's law produces a whole series of hybrid and *sui generis* solutions that call into question the provisions of some of the fundamental and well-established institutes of criminal law, while certain provisions that we pointed out, in our opinion, cross the line of constitutionality. As we have seen, most of the interventions undertaken by the legislator in enacting Marija's Law were carried out without being grounded in the Convention, or with a completely wrong understanding of it, while with other legal solutions, the legislator brought into question the very logical consistency of the entire system of criminal law, by going beyond what the Convention mandates, as well as due to repetition, overlapping content, and aspirations for particular type of repression.

De lege ferenda, remaining faithful to the obligations assumed by confirming the Lanzarote Convention, the domestic legislator should remove from the legal system the provisions that are unconstitutional, as pointed out in this paper, and should adapt the hybrid solutions contained in the legal text to the general criminal legislation, with possible minimal changes to the Criminal Code. The legislator should especially allow the criminal court a certain discretion, setting the framework in which the criminal court will move for determining and imposing special measures, but also the legal

consequences of the conviction, or to prescribe when any of them will be applied; applying all legal consequences of conviction and all special measures is so retributive that it borders on fundamental unfairness. The legislator should not usurp the criminal justice system in our country like this again.

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