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COMPENSATION OF NON-PECUNIARY DAMAGES IN THE CRIMINAL PROCEEDINGS TO CHILDREN VICTIMS OF SEXUAL VIOLENCE

Aliquorum maleficiorum supplicia exacerbentur, quotiens nimium multis personis grassantibus exemplo opus sit
(The penalties for some offenses should be increased to serve as a warning to many offenders)
Saturninus – D.48,19,16,10
(Stojčević, Romac, 1971: 36)

Summary: This paper addresses the issue of compensation of damage to children who have been victims of sexual violence from a civil law perspective. In doing so, special emphasis was placed on the right of the child, as a victim, to receive adequate compensation for the suffered violence. Following the general remarks in the introductory section, the paper outlines the positive legal aspect of sexual offenses against a child, and subsequently explains the main problems that accompany the issue of non-pecuniary damage, from its establishment to the determination of the amount of an adequate amount of compensation. The jurisprudence is rich in examples of disputes concerning compensation of non-pecuniary damage, which is, to a certain extent, set out in this paper. As problems of compensation of damage from the perpetrator of violence may arise in practice, the authors, following contemporary trends in comparative and international law, put forward proposals de lege ferenda, modeled on individual solutions of other countries that have successfully changed their positive law and set up compensation funds for victims of criminal offenses from which compensation is paid to all victims, including children. The modalities and the way in which these funds are financed are presented in detail in the last chapter of this paper, as a solution to the current practice problem, which could be implemented pro futuro, in future laws.

Key words: children, sexual violence, non-pecuniary damage, victim, property claim, compensation fund, civil law

Initial consideration

Domestic violence is a negative social phenomenon that, in addition to directly affecting the life of the abuser and the victim, has wide repercussions on

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society in general. Each family individually shapes its behavior patterns, which are generally aligned with moral, cultural and socially acceptable patterns of behavior. In societies based on patriarchal and traditional grounds, the family, as the nucleus of every society and the legally regulated community of man and woman, is still primary. However, in such societies a certain hierarchy is established within the family, with the dominant and prominent position of the father as the "head of the family". This position of a man in the family hierarchy is one of the reasons why domestic violence was tolerated and considered socially acceptable and there was no appropriate response from society. Not only wives but also children were in a subordinate and oppressed position.

Until the adoption of the Law on Prevention of Domestic Violence in 2016, there was no generally accepted definition of domestic violence in Serbian positive law. The legal definition has greatly facilitated the identification of all deviant behaviors within the family, and thus their legal sanctioning: "Domestic violence, is the act of physical, sexual, psychological or economic violence of the perpetrator towards the person with whom the perpetrator is in the present or former marital or extra-marital or partnership relationship or with the person with whom the perpetrator is the blood relative in a straight line and in a sideline to the second degree or with whom the perpetrator is in-law to second degree or to whom the perpetrator is an adopter, adoptee, foster child or foster parent, or to another person with whom the perpetrator lives or has lived in a joint household."[1]

As can be seen from the legal definition, violence can take many forms, and one of them is sexual violence against children. The legislator did not make a gender commitment on the perpetrator, which in our view is correct, because sexual violence can be committed by both men and women. The definition of domestic violence is not limited to marital and extramarital affairs or partner relationship, the circle of potential victims has already been extended to blood relatives in the straight line and sideline, in-laws, adopters, adoptees, as well as all other persons who live with the perpetrator in a joint household, which makes the circle of victims set quite wide. What is also notable about the fact that the Law on Prevention of Domestic Violence differs from the practice so far is that it changed the long-established terminology and adopted the term victim instead of the injured party. We also consider this a good solution and it is a terminological alignment of positive legal regulations with international regulations.

Violence against children of a sexual nature is not exclusively related to family relations, as it is possible for the perpetrator to be a person who is not in a family relationship with the child. Most often, the purpose of engaging in sexual intercourse with a child is coercion, force or threat, abuse of trust or influence over the child, as well as the child's vulnerable position in terms of physical or mental handicap or addiction.

[1] Law on Prevention of Domestic Violence,*Official Gazette, RS*, No. 94/2016, art. 3. par. 3. (*serb. Закон о спречавању насиља у породици)*

Sexual violence against children is not a new phenomenon and has been prevalent in all cultures throughout human history. Sexual violence has not changed, but society's attitude towards it has changed (Garza, 2002: 317). Children are not considered to be anyone's property and their rights cannot be so easily violated. Today, children are an integral and equal part of our community, so any form of violence against them must be strictly sanctioned.

Sexual offenses against children

Human sexuality is an inalienable part of human nature, and as such, it is not simply an act of satisfying sexual desire, but is also a psychological and biological need of each person, limited by moral, social, customary and cultural norms. Therefore, sexual delinquency is a complex model of behavior that deviates and violates the aforementioned social norms.

Sexual offenses represent one of the oldest types of amoral behavior, and the forms of social reaction to their appearance differed depending on which society and what historical period it was.[2] Today, sexual offenses are mostly sanctioned in all legislatures[3], and especially their most serious form - rape. However, the rape offense was not treated and sanctioned in the same way because it differently views the manner of execution and the circle of victims of this crime. This is a consequence of different understandings in certain cultures, so rape is mostly viewed as an act that offends the morals and customs of a given environment, not as a crime that directly attacks the freedoms and rights of the individual and is a direct attack on the victim's bodily integrity. There is another major problem with regard to the crime of rape as regards its proving, especially in situations where no physical harm was caused by the act of rape. A feature of sexual offenses is that, apart from property offenses, they belong to the group of offenses with the highest rate of recidivism, which is a consequence of psychological and pathological disorders of the personality structure.

Sexual abuse and harassment of children as well as incest offenses are the most serious forms of sexual offenses by the category and age of the victim. They are characterized by the subordination and inability of the victim to effectively resist the perpetrator and prevent him from committing the crime the perpetrator intended to commit. At the same time, an important feature of this work is the subjective sense of superiority, the manifestation of power and dominance over the inferior victim. Child sexual abuse involves a fairly wide range of be-

[2] Thus, for example, in Roman law, the intercourse between blood relatives was not criminalized, but only marriage was forbidden among them. In the period of feudalism, the attitude towards incest was changed, the sentences were more drastic, and death sentences were pronounced for this act.

[3] However, there are exceptions. Thus incest, if voluntary, is allowed in some European and Latin American countries: Turkey, France, Belgium, Brazil and Argentina. See: Бошковић, М. (2009): „Криминолошка обележја кривичних дела против полних слобода“, *Зборник радова Правног факултета у Новом Саду*, год. 43, бр. 2, стр.127.

haviors and actions: contact activities that include rape, forcing children to have sexual intercourse, touching, using the child for self-gratification, but also non-contact activities such as sexual abuse. Voyeurism and exhibitionism before the child. These can be isolated incidents committed by an unknown person, but also constant abuse by a family member for many years. In its most severe form, it can occur in the form of sexual exploitation through prostitution, pornography or pedophilia in terms of sexual strangeness and mental disorder manifested in sexual attraction to children of the same or opposite sex.

a) Child sexual abuse [4]is any act of exploitation of children for sexual gratification, and includes all forms of sexual intercourse in which the dependent position of children is used and their powerlessness in relation to the perpetrator of the crime. "Studies of sexual violence state that girls are more likely to be victims of this type of violence."[5] "In criminal terms, these are all forms of sexual intercourse (intercourse and prohibited sexual acts) with a child without the consent of the child or, even with his consent, if he is under 14 years of age for the purpose of sexual satisfaction" (Бошковић, 2009: 125). The two most serious types of sexual delinquency are rape and incest (in terms of sexual intercourse with a close blood relative in a straight line). The aforementioned UNICEF report states that of all forms of violence against children registered at social welfare centers (*serb. "Centar za socijalni rad"*), sexual abuse is the least represented with "only" 1.8% of the 6520 cases recorded.[6]

b) Sexual harassment is a lighter form of sexual offenses that most often consists in verbal and physical acts of sexual connotation directed at another person or child. It is also important to mention a specific form of sexual abuse in the form of sexual exploitation, which, as an emergent form, "represents the introduction of a child into child prostitution or the use of a child for pornographic film, photography, or as a pornographic model" (Грбић – Павловић, 2010: 164). According to some data, "every other identified victim of human trafficking in Serbia is a child" (Бјелајац, 2013: 220).

The Criminal Code of the Republic of Serbia[7] (hereinafter CCRS) incriminates several manifestations of sexual delinquency. Of all the standardized, some

[4] UNICEF National Report for 2017 entitled: "Violence against children in Serbia - determinants, factors and interventions" on page 25. states that: "Child sexual abuse involves a wide range of behaviors: contact activities such as rape, coercion of a child to sexual intercourse, touching, the use of the child for adult self-gratification, as well as non-contact activities such as voyeurism, exhibitionism in front of the child. It can be an isolated incident committed by an unknown person, but also continuous abuse of a family member over the years, or it can occur in the form of sexual exploitation through prostitution and pornography."

[5] *Ibid.,*pg. 13.

[6] On the other hand, according to research by the Belgrade-based Incest Trauma Center, the results are not encouraging. Based on their research, one in three girls survives sexual abuse by the age of eighteen. Information available at:
http://www.incesttraumacentar.org.rs/files/onlinebiblioteka.pdf (19/MARCH/2020)

[7] Criminal Code of the Republic of Serbia,*Official Gazette, RS, No*. 85/2005, 88/2005 –corr., 107/2005 –corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 и 35/2019 (*serb.Кривични Законик Републике Србије)*

have a special weight because they have minors for the victim. Of all sex offenses, juvenile offenses are:

– Sexual Intercourse with a Child (*art. 180 CCRS*),
– Sexual Intercourse through Abuse of Position (*art. 181.CCRS*),
– Prohibited Sexual Acts (*art. 182. CCRS*);
– Sexual Harassment (*art. 182a. CCRS*);
– Pimping and Procuring (*art. 183. CCRS*);
– Mediation in Prostitution (*art. 184. CCRS*);
– Showing Pornographic Material and Child Pornography (*art. 185. CCRS*);
– Induce Minor to Attend Sexual Acts (*art. 185a. CCRS*)
– Abuse of Computer Networks or other Technical Means of Communication for Committing Criminal Offences against Sexual Freedom of the Minor (*art. 185b. CCRS*);
– Incest (*art. 197. CCRS*) and
– Human trafficking (*art. 388. CCRS*).

The criminal offense of intercourse with a child is the most serious of this group of offenses, which the CCRS standardizes in basic and two more serious, qualified forms. The basic form of an intercourse with a child is that it was executed with the consent of the victim (otherwise it would be a criminal offense of rape) and for it the CCRS foresees imprisonment for five to twelve years. (art. 180 par. 1 CCRS) For the first qualifying form, if a serious bodily injury to a child is committed by the perpetration of an act or the act is committed by several persons, or if the act results in pregnancy, the CCRS provides for imprisonment ranging from five to fifteen years. (Art. 180 par.2 CCRS) As a particularly qualified form of this atrocity, when the death of a child negligently occurs as a result of the perpetration of an act, the CCRS foresees a minimum sentence of ten years, or life imprisonment. (Art. 180, par. 3 CCRS) This legal provision has undergone changes in 2019 regarding the severity of the prescribed sentence. Namely, for all the most serious acts in which there was a legally prescribed maximum sentence of imprisonment of 30, i.e. 40 years was replaced by life imprisonment for: aggravated murder, rape, intercourse with a child, pregnant woman and helpless person, acts against the constitutional order and murder of representatives of the highest state bodies.

The purpose of this incrimination is to protect all those persons who have not reached the appropriate level of sexual, biological, social and intellectual maturity. "Children as victims are understood to have special protection needs because of their vulnerability and sensitivity to secondary and repeated victimization, intimidation and retaliation." (Шкулић, 2018: 54).

The basis and the legal framework for non-pecuniary damage compensation to children

Unlike domestic violence, where family members appear as the perpetrator and the victim, in the case of sexual offenses, the perpetrators may be third par-

ties, who indirectly contact the victims, i.e. children. Viewed in a historical context, the traditional dominance of men in the family over women and children has created an atmosphere of tolerance for violence, and in some societies (e.g. Saudi Arabia)[8]violence against other family members is still socially acceptable. Therefore, the right to compensation (especially non-pecuniary) damages resulting from such violence is also questionable. Legal rights and obligations between parents and children have varied throughout history. In Roman law, the *pater familias*, as head of the family, had absolute authority (*patria potestas*) over the persons under his rule (*alieni iuris*). (Стефановић, 2020: 235-244) This authority also included deciding the life and death of subordinates, but the father was not responsible for the damage he would cause by his behavior. Therefore, it was also pointless to speak of any compensation for pecuniary and non-pecuniary damage to the child by the father. In the Middle Ages, the position of the child was slowly improved and its right to own property was recognized, and society recognized the need to impose moral and legal sanctions on abusive parents (Hollister, 1981: 491). Today, the right of children to claim damages (both pecuniary and non-pecuniary) is not disputed in either legal theory or jurisprudence. However, the question is how achievable it is in practice for many reasons. Children, as a particularly emotionally sensitive category of persons during court proceedings and participating in it, may again go through all the traumas experienced by the act of sexual violence, which can have a negative impact on their psychic and mental health. Since it is the practice of criminal courts not to rule on a claim made in property, victims are forced to seek compensation for non-pecuniary damage in a new, civil procedure, which causes a recurrence of stressful situations and a recapitulation of a relentless event.

The legal sources on which the basis for non-pecuniary damage compensation is based could generally be divided into domestic and international ones. The two most important international instruments governing the issue of compensation for victims of domestic violence are: *the European Convention on the Compensation of Victims of Violent Crimes*, which promotes the idea of a State obligation to compensate victims of crime[9]and *the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.[10]

"Damages may be awarded for compensation for non-pecuniary damage only in legally prescribed conditions and independently of pecuniary damage" (Бећировић-Алић, Ахматовић-Љајић, 2018: 141-144). From national sources, as the primary and most significant, certainly it is the Law on Contracts and

[8] The website of an international human rights watchdog organization (Human Rights Watch) has published a ruling by the Supreme Court of Saudi Arabia recognizing the right of a husband to physically discipline his wife and children, to the extent that this leaves no visible trace. available at: *http://www.hrw.org/news/2010/10/19/uae-spousal-abuse-never-right*, 10.03.2020.

[9] *European Convention on the Compensation of Victims of Violent Crime*, 24.11.1983.

[10] *Declaration of basic principles of justice for victims of crime and abuse of power* – GA Res. 40/34, Annex 1985.

Torts (hereinafter LCT)[11] which lists all legally recognized forms of non-pecuniary damage that exist in our law:

1. For physical pains suffered (*art. 200 par. 1 LCT*),
2. For mental anguish suffered due to reduction of life activities (*art. 200 par.1 LCT*),
3. For mental anguish suffered for becoming disfigured (*art. 200 par. 1 LCT*),
4. For mental anguish suffered for offended reputation and honor, (*art. 200 par. 1 LCT*),
5. For mental anguish suffered for offended freedom (*art. 200 par. 1 LCT*),
6. For mental anguish suffered for offended rights of personality (*art. 200 par. 1 LCT*),
7. For mental anguish suffered for death of a close person (*art. 200 par. 1 LCT*),
8. Fear suffered(*art. 200 par. 1 LCT*),
9. For mental anguish suffered in case of death or serious disability (*art. 201 LCT*),
10. For mental anguish suffered for criminal offence ofunlawful intercourse or lewd act by deceit, force or misuse of a relationship of subordination or dependence, as well as a person being a victim of some other criminal offence in violation of personal dignity and morale (*art. 202LCT*),
11. Damages for future general loss if, according to regular course of events, it became certain that it will continue (*art. 203 LCT*).

Apart from the Law on Contracts and Torts, the Law on Prevention of Domestic Violence of 2016, the already mentioned Criminal Code of the Republic of Serbia, as well as two procedural laws: the Law on Criminal Procedure (which contains norms on property claims) and the Law on Civil Procedure (which standardizes the civil procedure for compensation of pecuniary and non-pecuniary damage) are undoubtedly of great importance.

Compensation of non-pecuniary damage caused by sexual violence against children

Compensation for non-pecuniary damage is one of the most controversial issues in the field of contract law. Historically, in legal doctrine regarding non-pecuniary damage, legal theorists have represented conflicting opinions, and jurisprudence has offered rather restrictive solutions. "It was thought that mental and physical pain could not be expressed in money. In addition, there was a fear that commercialization of a person's personal goods might be contrary to the purpose of this institute" (Bubalo, 2012: 273).After the Second World War, due to the lack of positive legal regulations, in Yugoslavia were in force regulations valid prior to the war, and consequently, non-pecuniary damage was not recognized. A pivotal year for a change in attitude on this issue was 1968, when the judges of the highest courts of the SFRY stood in defense of the view to alleviate the rigid attitude hitherto and move towards more liberal recognition of non-pecuniary damage. All this created a long-standing jurisprudence, so that by the time the Law on Contracts and Torts was passed in 1978, the jurisprudence had

[11] *Official Gazette SFRJ*, No. 29/78, 39/85, 45/89, 57/89, *Official Gazette SRJ*, No. 31/93, *Official GazetteRS,*No. 18/2020(serb. Закон о облигационим односима)

already taken positions on this issue and they had been adopted in the Law on Contracts and Torts. "Today, the existence of the right to compensation for non-pecuniary damage is no longer in dispute in either legal theory or case-law, but the question of the form of compensation, the circle of entities entitled to compensation for non-pecuniary damage, and in particular the question of the criteria for determining the amount of compensation, remain controversial issues that deserve full attention to both legal science and jurisprudence" (Радованов, 2010: 22-23).

The purpose of compensation is to eliminate the adverse effects caused by the action of a person and possibly to return to a previous state. Pecuniary damage can be repaired, however, in non-pecuniary damage there is no way to restore it to previous state (*restitutio in integrum*). Pursuant to Article 155 LCT, the damage is divided into: simple loss i.e. diminishing one's property and for the profit loss, that is, preventing one's property from increasing. As a criterion for determining the amount of material damage compensation, the court takes the principle of full compensation, i.e. reparations. In determining the amount of non-pecuniary damage compensation, a problem arises in the practice of the courts: how to measure the fair amount of non-pecuniary damage compensation, while ensuring complete satisfaction of the injured person? As it is not possible to establish a prior condition in non-pecuniary damage, the only way is to achieve the purpose is by paying monetary compensation in order to achieve satisfaction for the injured parties, i.e. to the victims.

The jurisprudence has over time established criteria for determining the amount of just compensation for certain types of non-pecuniary damage, as well as the views on some other contentious issues concerning non-pecuniary damage. Thus, regarding the basis of non-pecuniary damage at the Counseling held on problems related to non-pecuniary damage, the following attitude was taken: "Non-pecuniary damage within the meaning of the Law on Contracts and Torts refers to physical pain, psychological pain and fear. Therefore, compensation to the injured party for non-pecuniary damage can only be awarded when the injury has manifested itself in one of the aforementioned forms of such damage and provided that the severity and duration of pain and fear and other circumstances justify it, in order to restore the injured person's mental balance."[12]

Particularly interesting is the decision of the Supreme Court of Serbia regarding the statute of limitations on claims (Кастратовић, 2013: 56-60) compensation for certain types of non-pecuniary damage: "Obsolescence for non-pecuniary damage compensation for physical pain - starts from cessation of pain, for fear – starts from cessation of fear, mental pain due to impairment of life

[12] Conclusion of the Consultation of Representatives of the Federal Court, Supreme Courts of the Republics and Autonomous Provinces and of the Supreme Military Court on Problems of Non-pecuniary Damage of 15 and 16 October 1986 - *Bulletin of the case law of the Supreme Court of Serbia*, No. 3/2008, Intermex, Belgrade.

activity – starts from termination of treatment and knowledge of permanent impairment of life activity or deterioration of health status – starts from the day of finding out about a new grave consequence."[13] Pursuant to Article 376 of the LCT, the claim for damages becomes obsolete within the subjective period of three years from the knowledge of the injured party for the damage and the perpetrator, or objectively, within five years from the occurrence of the damage.

With regard to interest on monetary sums awarded as a result of non-pecuniary damage, Article 277 of LCT provides that "A debtor being late in the performance of a pecuniary obligation shall owe, in addition to the principal, default interest, at the rate determined by federal law." While the stance of the jurisprudence is: "The default interest on just monetary compensation for non-pecuniary damage shall run from the day of the first-instance judgment by which the compensation was determined. In deciding the amount of equitable remuneration, the court will also take into account the time elapsed from the occurrence of the damages to the decision, if the length of the wait for satisfaction and the other circumstances of the case warrant it."[14] We consider this jurisprudence position to be applicable for pecuniary damage. If a payment has been made and the debtor's obligation has grown into a monetary obligation, it is logical that the default interest will start to run from that day. However, the question is why would interest on the monetary sums awarded in respect of non-pecuniary damage start from the day the judgment was rendered? We believe that a different legal solution would have an impact on the procedural economy if the law provided that interest would start from the filing of a lawsuit. In that case, the perpetrator would have no interest in delaying the proceedings, and the number of judgments rendered within a reasonable time would certainly be higher.

The decision of the Court of Appeal in Novi Sad upheld the first instance judgement of the Higher Court in Novi Sad, awarding non-pecuniary damage to a minor female child as a result of mental distress suffered as a result of violations of honor, reputation, freedom, personality and dignity, as well as fear suffered. and because of sexual abuse and incitement to underage prostitution. The Court explains its decision as follows: "The fact that the Plaintiff did not contribute in any way to the damage suffered or made it greater than it was, since as a juvenile she had been misused without fault by an organized group of defendants who by unlawful actions and the use of methods of intimidation, violence and threats led and maintained the Plaintiff in a situation of sexual misconduct, and, on the other hand, the facts about the existence and intensity of the mental pain and fear Plaintiff suffered in connection with the situation in which she found herself by the guilt of the defendants."[15]

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[13] Decision of the Supreme Court of Serbia, Rev 1427/05 of 26 May 2005 - *Bulletin of the case law of the Supreme Court of Serbia*, no. 4/2005, Intermex, Belgrade.

[14] Joint Session of the Federal Court, Supreme Courts and Supreme Military Court of 29 March 1987 -*Bulletin of the case law of the Supreme Court of Serbia*, No. 3/2008, Intermex, Belgrade

[15] Judgment of the Court of Appeal in Novi Sad, Gž.3536/13 of 28 November 2013.

The number of claims for non-pecuniary compensation for sexual violence against children is small. It is assumed that the reasons are as follows: the overall representation of these crimes is, overall, compared to other crimes, small, even when prosecuted and a substantive claim in criminal proceedings, the courts generally refer the injured party i.e. victim to litigation. The situation is similar in foreign law, where only a small number of cases are compensatory (Cobley, 1998: 228), and the problem of a fair assessment of the amount of compensation for non-pecuniary damage suffered by the child victims is attempted to be solved through a lump sum method (Swanston, Parkinson, Shrimpton, O'Toole & Oates, 2001: 58).

Comparative overview of positive legal solutions in French and German law as representatives of the continental legal system

Comparatively speaking, the position of the injured party in criminal proceedings under European and common law legislation differs greatly. "Common law legislations most consistently accept the model of exclusion of a victim of a criminal offense from criminal proceedings, which is why there are no procedural possibilities for the injured party to be involved in criminal proceedings other than as a witness, nor to obtain a claim for damages (Мрвић-Петровић, 2018: 1). Continental legal systems are divided into two groups: Roman and Germanic, whose most typical representatives are French or German legislation. A comparative legal analysis of these legislations will show the position of the injured party and therefore the child as a victim of the crime and his / her right to claim damages.

Since the position of the injured party, i.e. victim in common law legislation reduced to the role of a witness, without the possibility of filing a claim in criminal proceedings, its position will not be analyzed, but only solutions of continental law countries with a focus on France and Germany shall be presented.

a) French law, as a typical representative of the Roman subtype of continental law, is characterized by a long tradition and a strongly incorporated position of the injured party as a claimant of civil claim in a criminal proceeding. All of this results in cheaper and faster criminal proceedings than litigation.

The concept of injured party which is injured by the perpetration of a criminal offense (*personne lésée*) i.e. the victim is directly related to the concept of damage suffered, and on the basis of it is defined, and according to the rules of the French law on contracts (Art. 1382 and 1166 of the French Civil Code - *Code civile*). "Any conduct that causes harm to another creates an obligation on the offender to compensate for that harm"[16]Children who have been victims of sexual violence are the immediate victims (*la victime initiale*), but the adverse

[16] In the original the provision reads: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer. "

consequences can extend to the indirect victims (*victimes per ricochet*), such as family members or other close persons. The peculiarity of this legal system is that the injured party can initiate criminal proceedings if it has not already been initiated by the decision of the public prosecutor or if it has already started, to join it by filing a civil lawsuit seeking damages from the defendant (*l 'actio civile'*). In this way, the injured party, by emphasizing his claim, becomes a private party (*partie civile*) in a public-law criminal proceeding. Filing a claim for damages in criminal proceedings is a matter of choosing the injured party as it may also initiate civil proceedings and seek damages in a lawsuit. However, once the injured party chooses to go to trial, civil or criminal, the decision cannot be changed. (Stipulated by Art. 3, 4 and 5 of the French Criminal Procedure Code) The court shall only decide on the claim for damages if the defendant pleads guilty. If this is not the case, the court directs the injured party to litigation. (Мрвић-Петровић, 2018:18-22).

b) In German law, the term "victim" ("*Opfer*") is defined in the Law on Compensation for Victims of Violence[17]which by the term "direct victim" implies the person who personally suffered the harm, and by the term "indirect victim" implies the relatives of the person to whom the violence was committed. Given that in German law criminal proceedings are initiated and conducted *ex officio* by the public prosecutor, the injured party, apart from being a witness, appears in the proceedings as a prosecutor in a secondary, adhesive procedure as an incidental prosecutor.[18]

Authorized claimants in the criminal proceeding (which are stipulated by Art. 403 to 406 of the German Criminal Procedure Code) are the injured party and its successors as well. The position of the injured party has been significantly improved since 2004, when the Law on Improvement of the Position of the injured party in the criminal proceedings was enacted.[19]There are numerous advantages of the adhesion proceeding. By applying it, it is possible in a simple and less formal way than a civil proceeding, to obtain a claim for damages in a criminal proceeding. The request can be filed at any moment during the proceedings, until the conclusion of the main hearing. The criminal court may approve a property claim, but not adjudicate negatively on a civil action brought in criminal proceedings, but only refer the injured party to civil proceedings. An injured party may file a property claim alone or through its attorney, which in the case of children who have been victims of sexual violence, would be a *condio sine qua non* given that they are persons without litigation capacity. Since litigation is

[17] Gesetz über die Entschädigung für Opfer von Gewalttaten (OEG), 11. Mai 1976 (BGBl. I S. 1181), Letzte Änderung durch Art. 28 G vom 17. Juli 2017 (BGBL. I S. 2541, 2572).

[18] The position of the injured party as an incidental prosecutor is regulated in Art. 395 to 402 of the German Criminal Procedure Code in a similar manner to that of the Serbian Criminal Procedure Code.

[19] Gesetz zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsreformgesetz –OpferRRG), vom 24. Juni 2004 (BGBl. I S. 1354).

related to legal capacity, children could take legal action through their legal representatives. Germany has done a lot to protect and recognize the rights of victims of crime, including children victims of sexual violence. Thus, in addition to the aforementioned laws, the Law on Securing the Civil Claims of Victims of Crime in 1998 (*Opferanspruchssicherungsgesetz*) was adopted earlier.[20] Work on improving the situation of victims has been continued in this century, and in September 2004 the Law on the Improvement of the Rights of Victims of Criminal Procedure (*Opferrechtsreformgesetz*) was adopted.,[21]and in October 2009 the Law on Strengthening the Rights of Victims and Witnesses in Criminal Procedure (*Zweiten Opferrechtsreformgesetz).*[22]

De lege ferenda propositions

Effective implementation of any reform in the legal system is not possible unless there is a national strategy, which currently does not exist in the Republic of Serbia. It is necessary to establish a national body tasked with creating a strategy and overseeing all activities related to victim assistance. Formation of the State Compensation Fund is required[23]which primary function would be: compensation of all costs of crime victims, and therefore compensation for non-pecuniary damage to children who have been victims of sexual violence. Reference is also made to the United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power. The basic purpose and point of forming such funds are found in moral and humane reasons, which would express social solidarity with powerless members of society who have been victims of crime. This symbolizes that the state is in solidarity with the victim of the crime, as well as in solidarity with other citizens who find themselves in social need or fall victim to war, natural disasters (floods, earthquakes, etc.) or other disasters caused by human factor (for example, ecological catastrophes, traffic accidents, etc.). Therefore, the conditions under which this compensation is granted must be set very rigorously. The compensation is given only exceptionally, in limited amounts and under extremely strict conditions. Beneficiaries can only be victims of serious crimes committed intentionally (for example: victims of the crime of murder, persons who have been seriously injured, victims of rape

[20] Shortened: OASG, Gesetz zur Sicherung der zivilrechtlichen Ansprüche der Opfer von Straftaten (*BGBL I,* 1998, S. 905).

[21] Gesetz zur Verbesserung der Rechte von Verletzten im Strafverfahren, *BGBl* I 2004, S. 1354.

[22] Gesetz zur Stärkung der Rechte von Verletzten und Zeugen im Strafverfahren (2- Opferrechtreformgesetz), *BGBl I* 2009, S. 2280.

[23] Some authors have been pointing to the formation of compensation funds for a long time. See more: Мрвић-Петровић, Н. и Ћирић, Ј. (2013): „Обештећење жртава насиља из јавних фондова“, *Социолошки преглед*, год. 47, бр. 2, стр. 211-229;Бачановић, О. (2009): „Фонд за обештећење жртава кривичних дела“, *Стање криминалитета у Србији и правна средства реаговања* (ур. ИгњатовићЂ.), IIIстр. 368-381.

and other sexual offenses, robbery, terrorism, etc.). Children who have been victims of sexual violence would be at the top of the list of priority beneficiaries of the Fund. An additional requirement is that no compensation can be regularly obtained from the perpetrator of the crime (for example: because he is insolvent or not caught) and that the resulting damage cannot be recovered from insurance (social, health or accident risk insurance or death).

A property claim is one of the most important civil law institutes that guarantees victims of a crime that they will not be harmed by the perpetration of the crime. However, there is no such law in the Republic of Serbia that regulates the existence of a Fund to compensate for the damage caused by the criminal offense.[24]

Budgetary funds are not sufficient to finance the Fund and therefore alternative ways of financing need to be found. Based on the experience of other states that have already enacted the aforementioned law, the most effective sources for filling the Fund are gambling proceeds, amounts paid through deferred prosecution and plea agreements, as well as foreign and private donations.

Concluding Remarks

The jurisprudence in Serbia, as well as abroad,[25]indicates to us that in the past there has been a limited number of cases that had for a subject compensation of non-pecuniary damage to victims of sexual violence, especially children. However, this does not mean that sexual violence against children is low. One of the forms of prevention are certainly campaigns that would raise the awareness of the population about sexual abuse of children.

Non-pecuniary damage compensation is the ultimate measure intended to compensate the victim for all the pain, fears and trauma the child endured during and after the sexual act. However, the fact is that compensation is more of a comforting character because the consequences remain for the rest of their lives.

Although compensation for non-pecuniary damage has often been contested in the past and its application made difficult, there is a clear shift in the

[24] Regarding neighboring countries, in Montenegro, as of 2015, there is a Law on Compensation for Victims of Violent Crime (*Official Gazette of Montenegro*, No. 35/2015 – *Serb*. "*Закон о накнади штете жртвама кривичних дјела насиља*") enacted on the basis of the European Convention on Compensation for Victims of Violent Crime, bringing the Montenegrin justice system in line with European standards. However, the application of this law has been delayed until Montenegro's accession to the European Union. In 2008, the Republic of Croatia adopted the Law on Financial Compensation for Victims of Crime. *(Official Gazette*, No. 80/08, 27/11, *cro*. "*Zakon o novčanoj naknadi žrtvama kaznenih djela*") It regulates the right to financial compensation to all victims of intentional crime. Interestingly, the aforementioned Law provides for the right to compensation of damages to both the direct and indirect victims (spouse and partner, child, parent, adopter, stepmother, stepfather...) (Art. 5 par. 2, 6 and 7).

[25] See more: Cobley, C. (1998): Financial compensation for victims of child abuse. *The Journal of Social Welfare & Family Law*, 20(3), 221.

sense that neither jurisprudence nor legal theory call into question its application anymore. Special attention should be given to children as victims of sexual violence. Children and young minors as victims of sexual violence have the same rights as victims of serious crimes: the right to an attorney financed from budget funds, the right of secrecy of personal data and the right to exclude the public from the proceeding. Considering that this is a socially sensitive category of the personas who need additional help in the realization of their rights and prominent demands, we consider justified the proposal put forward in this paper, and that is to establish as soon as possible a Fund from which the compensation would be paid to children victims of sexual violence under the legally prescribed conditions.

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НАКНАДА НЕМАТЕРИЈАЛНЕ ШТЕТЕ У КРИВИЧНОМ ПОСТУПКУ ДЕЦИ, ЖРТВАМА СЕКСУАЛНОГ НАСИЉА

Сажетак: Овај рад се бави проблемом накнаде штете код деце која су била жртве сексуалног насиља и то из угла грађанског права. При том је посебан акценат стављен на право детета, као жртве, да добије адекватну компензацију за причињено на-

сиље. У раду се након општих напомена у оквиру уводног разматрања, излаже позитивноправни аспект сексуалних деликата над дететом, да би се након тога објаснили главни проблеми који прате питање нематеријалне штете, од њеног утврђивања до одређивања висине адекватног износа накнаде. Судска пракса је богата примерима у вези спорних питања који се тичу накнаде нематеријалне штете, што је и изложено, у извесној мери, у овом раду. Како се у пракси могу јавити проблеми накнаде штете од починиоца насиља, аутори су, пратећи савремене трендове у упоредном и међународном праву, изнели предлоге *de lege ferenda*, по узору на поједина решења других земаља које су успешно измениле своје позитивно право и формирале фондове за накнаду штете жртвама кривичних дела насиља из којих се исплаћује обештећење свим жртвама, укључујући и децу. Модалитети и начин како би се финансирали ти фондови детаљно су приказани у последњој глави овог рада, као решење актуелног проблема из праксе, који би се *pro futuro* могао имплементирати у будуће законе.

Кључне речи: деца, сексуално насиље, нематеријална штета, жртва, имовинскоправни захтев, фонд за накнаду штете, грађанско право