Criminal Legal Confrontation with Evil in Cases of Sexually Abused Children

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Abstract
The evil committed with a criminal offence has been defined in Criminal Law by legislative and court punishing policy. The legislator creates this policy by prescribing criminal offences and their sanctions, and furthermore, by measuring sanctions according to the protected value from criminal offence and severity of harm inflicted by the offence. The court punishing policy acquires its contours through the judgments of courts which in concrete cases select and measure a sanction prescribed in the Criminal Law. Once a court pronounces sanction on a certain perpetrator for unlawful conduct, the sanction, except from being a definition of the inflicted evil, is a result of assessment of other circumstances of a case in the light of general and special prevention. When deciding about the sanction in cases of sexual crimes against children the courts should take into consideration the fact that inflicted evil is multidimensional and that the extent of it has not been exhausted within the primary victimisation. In most cases, after the offence was committed, a child victim lives through that evil experiencing secondary and tertiary victimisation. Trying to find causes for the described phenomenon, the author researched court practice on the heaviest sexual crimes against children in the Republic of Croatia. On the basis of conducted research the author presents solutions to suppress this occurrence *de lege ferenda*.

Key Words: Court punishing policy, legislative punishing policy, primary, secondary, and tertiary evil, sexual abuse of children, solutions *de lege ferenda*.

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1. Defining Evil in Criminal Law

The history of criminal law has been the history of reactions to evil inflicted by prohibited actions. Nowadays, the evil, wrong or harm committed with a criminal offence has been defined by legislative and court punishing policy. The first policy has been created by the legislator who defines criminal offences and their sanctions. Sanctions are measured according to the protected value from criminal offence and the severity of abstract harm inflicted by the offence. Therefore, the type and severity of criminal offence mostly define the evil within the Criminal Law according to the principle that

severity of punishment should be commensurate with the seriousness of the evil.[1]

The court punishing policy acquires its contours through the judgments of courts, which in concrete cases select and measure a sanction prescribed in the Criminal Law. In this way courts, taking the legislative punishing policy as a starting point, create their own punishing policy as a response to the evil inflicted by a criminal offence. Due to the fact that the legislator defines evil by prescribing and courts by measuring the criminal legal repression, it can be concluded that these two policies are interrelated and mutually conditioned coexisting in a dynamic relationship.

Defining evil in cases of sexually abused children is extremely complex. First of all, a pronounced sanction is not only a definition of inflicted evil - it contains the assessment of other circumstances of the case which have to be taken into consideration according to the Criminal Law in order to achieve general and special prevention.[2] The pronounced sanction has to be the result of a deep and refined judicial analysis of personal and objective circumstances with deterring effect.

2. Specifics of Evil Inflicted by Sexual Offences against Children

One of the circumstances which should be definitively taken into consideration it the fact that inflicted evil is multidimensional not being exhausted within the primary victimisation.[3] A victim lives through that evil during the criminal proceedings and experiences its traces after the proceedings are closed. The inflicted harm leaves its tracks and goes through the metamorphosis causing secondary and tertiary victimisation.

Academic community and criminal legal practitioners define secondary victimisation as a phenomenon of victim's abuse that occurs not as a direct result of the criminal offence but through the response of institutions and individuals to the victim.[4] The tertiary victimisation is defined as revictimisation of the victim or recidivist victimisation. According to this victimological model, the every new assault is a solid predictor of future revictimisation.[5]

To verify scientific conclusions on metamorphosis of evil inflicted by sexual offences against children and to find possible causes for it the research was conducted at the Supreme Court of the Republic of Croatia and three county courts (Zagreb, Rijeka and Split) with the largest territorial jurisdiction. All 42 final court judgments delivered against perpetrators of the heaviest sexual crimes against children from 1993 to 2005 have been analysed in detail.

Judges paid special attention to secondary victimisation in only six cases. Tertiary evil was detected in only three cases. The fact that traces of secondary victimisation could be only found in 14%, and tertiary in 7% of all cases, raises a great concern. Croatian courts incidentally discuss

multidimensionality of inflicted evil, and for the most part while evaluating the testimony of a child victim or gathering evidences on the gravity of the criminal offence committed.

In four cases the courts found elements of secondary assault due to the lack of reaction of child victim's immediate environment. In the 2004 County Court in Zagreb case, family members discovered the offence, however, treated it with silence. The atmosphere of silence additionally traumatised the child who started to feel shame and guilt and with time developed mechanisms to suppress traumatic events.[6] In three remaining court cases the crucial trigger of secondary injuries was a missing or negative reaction of a mother. In 2003 judgement of the County Court in Slavonski Brod, the mother failed to protect her child against father's sexual advances. This passivity was the main cause of the daughter's psychological suffering resulting in verbal aggression and impulsiveness.[7]

The County Court in Zagreb in I Kzm-6/00 case concluded that the mother's disbelief after her two daughters complained about the father's abuse contributed to their lasting negative emotional, sexual and social consequences.[8] In another case from 2000 the same court established that the victim's mother, after hearing complaints, believed the stepfather more than her daughter. The distrust of the mother, accusation and rejection additionally damaged the girl.[9]

In the remaining two cases the child victim suffered consequences of secondary victimisation due to procedural actions conducted in accordance with the Law on Criminal Procedure that was in force at the time. According to the I Kzm-5/98 Zagreb Court judgment, visiting the court and being examined before the judge had a traumatizing effect on the child. Even the mere thought of re-examination of details of abuse caused the victim extreme anxiety.[10]

This extremely intensive secondary evil was experienced by a boy in criminal proceedings in the case of 6/98 County Court in Zagreb. The boy's conditions drastically worsened after he testified in the court in the presence of his abuser. He experienced anxiety attacks, discomfort and manifested problems while taking public transportation.[11] Having in mind the intensity of possible devastating effects of the insensitive procedural rules, in the last twelve years the Croatian legislator abandoned such rules. A legal reform of the criminal procedure has been carried out with the aim to develop a system of protection for victims of criminal offences.[12]

Better protection of witnesses from secondary duress could reduce negative effects of tertiary evil suffering. Although on an exceptional basis, Croatian courts have considered victims' revictimisation and called for procedural amendments. For example, the County Court in Bjelovar in 2001 criminal case emphasised that factors which increase child victimisation

sensitivity were separation from a parent, especially from the mother, fear from separation, physical abuse, child neglect and emotional deprivation.[13]

In another 2001 case the same court concluded that children who wish for affection, attention, care and appreciation as well as children who are timid, depressive, shy or socially isolated could find themselves in risk situations and could be yet again victimised. Trying to find something positive in their lives, they could face dangerous situations which had previously ended badly.[14]

The conclusion of the courts is supported with facts established in 2001 County Court in Slavonski Brod case. The offender committed a number of identical criminal offenses of sexual intercourses with an 11-year-old girl who grew up without a mother in poor family environment. Emotionally immature, anxious for love and with light mental retardation she responded to offender's invitations to 'do that', 'to make arrangements about sexual intercourses' or vulgar hand gestures without making critical assessment of the situations she found herself in.[15]

3. The Evil in Croatian Legislative Punishing Policy

In the last few years legal protection of children as the most vulnerable members of the society has intensified in Croatia. However, having no criminal legal projects designed to prevent sexual abuse of children or projects focused on reducing secondary victimisation, criminal law strategy for combating this evil is mostly based on the application of criminal repression. Implementing such policy, the legislator amended the Criminal Code nine times and according to the latest official reports of the Ministry of Justice, substantial provisional alterations are to be expected in the near future. The most important amendments designed to suppress sexual abuse of children were introduced in 1998 and 2006.[16]

The 1998 provisions substantially altered criminalization of sexual crimes in general and the 2006 considerably increased the penalties. According to the new 1998 Code it is forbidden to influence a child in any corruptive manner and to harm a child affecting his innocence and lack of knowledge about sexuality and sexual intimacy. Using various combinations of circumstances, motives and conditions to sexually abuse children Croatian legislator has created different criminal offences in the Criminal Code.

The most of heaviest sexual crimes against children are proscribed by the article 192 of the Code. Paragraph 1 of the Article forbids any sexual intercourse or an equivalent sexual act with a child, a person who has not reached the age of fourteen years. Before the amendments sexual acts did not constitute this criminal offence, and therefore, any penetration of anus or vagina with a finger or an object would constitute a criminal offence of lewd act. Forcible sexual intercourse or an equivalent sexual act on a child is forbidden by the paragraph 2. The same paragraph equalizes sexual abuse

with a use of force and sexual abuse of a helpless child. A person who abuses his or her position to perform a sexual intercourse or an equivalent sexual act on a child commits a criminal offence from the paragraph 3 of the same Article. Paragraphs 4 and 5 incriminate aggravated sexual intercourses or equivalent sexual acts on a child.[17]

4. The Evil in Croatian Court Punishing Policy

Having in mind the fact that provisions of the 1998 Code opened a new chapter in suppression of the sexual offence, all 42 final court judgments from the research sample were divided in two periods, the first one starting from 1993 until 1997, and the second one from 1998 until 2005. The purpose of such methodological division is to compare court punishing policy before and after the enactment, to track signs of legislative influence over court sanctioning in the second period, and therefore, to conclude whether the last 2006 amendments had reasonable grounds.

In the first period courts delivered 15 final judgements sentencing offenders for the criminal offence of sexual intercourse with a child from the article 83 of the 1993 Criminal Code.[18] In almost every case the sentence is higher than four years of imprisonment (four years, four years and six months, five, eight and 10 years for the forcible intercourse or intercourse with a helpless child; one year, five years and six months, seven years and six months and 10 years for the aggravated sexual intercourse with a child,). There is no single case of suspended sentence. A lower level of punishment was broken only in two exceptional cases.

In the second period a mitigated punishment was pronounced only in one case. The same case is also the only example of a suspended sentence. The rest of the punishments for heaviest sexual crimes against children are unconditional prison sentences from two to 12 years. With the lowest level of criminal repression courts sanctioned two voluntary sexual intercourses with a child from the article 192, paragraph 1 (two years of imprisonment). However, in one case the court sentenced the offender with five years of imprisonment for the same criminal offence. The analysis revealed that the court pronounced harsher punishment than usual assessing the offender's efforts to attach the victim to himself giving him small monetary gifts after each abuse.[19]

Perpetrators who committed the forcible sexual intercourse or intercourse with a helpless child were punished with imprisonment of four to 12 years. In one case the court sentenced the juvenile offender with four years and six months of juvenile prison sentence. The range of punishment for the sexual intercourse by abuse of position is lower (from three years and six months to six years). Aggravated sexual intercourses were sentenced with seven and eight years of imprisonment.

Comprehensive analysis reveals a certain pattern followed by courts while making a decision on the selection of the type and range of punishment. Except from the fact there were no cases of voluntary sexual intercourse with a child in the first period, the court punishing policy of heaviest sexual offences against children prior and after the enactment of the 1998 Criminal Code did not significantly differ. Regardless of the application of 1993 or 1998 Criminal Code, the range of punishments for individual forms of sexual abuse is more or less equal in both periods.

5. Final Remarks

Legal analysis of legislative punishing policy and research results of the courts' sanctioning point at strategic inconsistency and contradictions in suppression of the heaviest sexual crimes against children. First of all, Croatian preventive policy has being primarily based on criminal legal repression of such offences. However, it is proven that courts do not follow legislative instructions to punish more heavily the sexual offenders due to the fact that pronounced sanctions are already harsher in regards to court general punishing policy. Frequent Criminal Code amendments with increased sanctions only undermine legal security and offer no long-lasting solutions for prevention of sexual crimes against children.

Moreover, judges while deciding on the selection of the type and range of punishment do not think about sexual abuse of children as a multidimensional phenomenon. The primary concern is to punish the perpetrator for the evil inflicted by the criminal offence. Collateral secondary and tertiary evils are considered in exceptional cases and for the most part while evaluating the testimony of a child victim or gathering evidences on the gravity of the criminal offence committed. Having this in mind, it is indispensible that future parliamentarian and government decisions concern prevention per se and are not exhausted in heavier sentencing. Any future actions to stop sexual abuse of children should be about and for the children.

Notes

[1] DC Brody, JR Acker & W A Logan, *Criminal Law*, Aspen Publishers, Gaithersburg, 2001, p. 131.

[2] Criminal Code, 1997, 1998, 2000, 2001, 2003, 2004, 2005, 2006, 2007, 2008, a.6, a.49, a.65, a.74 and a.56.

[3] D Rittossa, *Seksualni delikti na štetu djece / Sexual Offences against Children*, Croatian Association for Criminal Law Sciences and Practice, Ministry of Interior of the Republic of Croatia, Police Academy, Zagreb, 2007, p. 3.

[4] L Wolhuter, N Olley & D Denham, *Victimology: Victimisation and Victims' Rights*, Routledge, Cavendish, London, New York, 2008, pp. 47-48.
[5] RC Davis, B Taylor & A Lurigio, 'Adjusting to Criminal Victimization: The Correlates of Postcrime Distress', *Violence and Victims*, vol. 11, no. 1, 1996, p. 22.
[6] Case I Kzm-8/04 of County Court in Zagreb, Judgment of 4 October 2010.
[7] Case K-19/03-51 of County Court in Slavonski Brod, judgment of 22 October 2003.
[8] Case I Kzm-6/00 of County Court in Zagreb, judgment of 30 March 2001.
[9] Psychiatric expert opinion in case I Kzm-3/00 of County Court in Zagreb, judgment of 8 February 2001.
[10] Case I Kzm-5/98 of County Court in Zagreb, judgment of 19 February 1998.
[11] Psychiatric expert opinion in case I Kzm-6/98 of County Court in Zagreb, judgment of 19 March 1998.
[12] The last victim sensitive procedural novelties were introduced in Criminal Procedural Code 2008.
[13] Case K-17/01-34 of County Court in Bjelovar, judgment of 10 April 2002.
[14] Case K-27/01 of County Court in Bjelovar, judgment of 27 February 2002.
[15] Case K-20/01-24 of County Court in Slavonski Brod, judgment of 18 September 2001.
[16] Criminal Code 1997; Amendments on Criminal Code 2006.
[17] Criminal Code 1997..., op. cit., a.192 (1, 2, 3, 4 and 5).
[18] Criminal Code, 1993, a.83.
[19] Case I Kž-662/03-3 of Supreme Court of Croatia, judgment of 30 October 2003.

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