

THE CONCEPT OF MORAL (NON-MATERIAL) DAMAGE IN SERBIAN, CROATIAN AND SLOVENIAN LAW *

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ABSTRACT

The paper gives a comparison of the concept of moral (non-material) damage in the Serbian, Croatian and Slovenian law. In Serbia, with some amendments, the 1978 Obligations Act is still in force. However, these have not modified the notion of moral damage: moral damage must have, as a consequence, a meaningful distress in the injured party's intimate sphere, manifested either in bodily pain, mental pain or fear. Infringement of personality rights itself does not give rise to claim for compensation, if not manifested in at least one of the three categories. The basic consequence of this approach is that legal persons are not considered to be able to sustain moral damage, hence they cannot claim compensation either. In the Draft of the Civil Code a certain shift towards the objectivization of the concept can be identified. Such tendency is supported in the recent doctrine as well (M. Karanikić Mirić). In the Croatian Obligations Act from 2005 the notion of moral damage is defined purely objectively: infringement of personality rights. The Slovenian Obligations Code, in defining moral damage, basically retained the trichotomy of bodily pain, mental pain and fear, inherited from the 1978 OA, but supplemented it with the infringement of personality rights. Both in the Croatian OA and Slovenian OC, legal persons are entitled explicitly to claim compensation for moral damage.

Key words: moral damage, non-material damage, compensation for moral damage, infringement of personality rights.

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1. INTRODUCTION

The undisputed crown-jewel of the former Yugoslav civil law legislation was the federal Obligations Act from 1978. Its qualities greatly preceded the time in which it was enacted.¹ In relation to some specific legal institutes, though, the Act opted for legal solution in relation to which different approaches appeared in the doctrine. In time, especially after the change from a milder form of administratively planned to market economy, on the one hand, and after the dissolution of the federation when all constituent entities became independent countries and began to pave different paths in the shaping of their laws of obligations, on the other, these conceptual dilemmas grew even stronger. One of them is the concept of moral (non-patrimonial/non-material/immaterial) damage and the conditions of awarding pecuniary compensation for it. The doctrine differentiates two possible approaches to the concept of moral damage. One is to identify it with certain forms of intimate distress in the psyche of the injured party. This is properly designated in the literature as the ‘subjective’ understanding of moral damage.² The other understanding separates moral damage from the distress caused in the intimate sphere of the injured party and associates it with the infringement of personality rights or personal values and legally protected personal interests, whether or not it caused any distress in the intimate sphere of the injured party. This has been designated as the ‘objective’ notion of moral damage.³

The aim of this paper is to give an overview of the concept of moral damage, as envisaged by the former federal law from 1978, and in the current Serbian law. Due regard shall be given to the different legal solutions that appeared during the preparation of the Draft of the Serbian Civil Code. In addition, a comparison shall be made with the legal solutions applicable in Croatia and Slovenia, which have enacted new laws on obligations, and hence had the possibly to devise the concept of moral damage differently, compared to the former federal law. An overview of the recent literature shall be also given, especially of the works of Marija Karanikić Mirić, Aldo Radolović, Marko Baretić and Petar

¹ The qualities of the 1978 Law on Obligations are hallmarked by the fact that it is still applicable in Serbia, and has been amended only few times. It is still in application in Bosnia and Herzegovina. The other former constituent Republics, today independent countries, adopted new laws on obligations (Slovenia and FYR of Macedonia/North Macedonia in 2001, Croatia in 2005, and Montenegro in 2008), but they have all been decisively influenced by the 1978 Law on Obligations.

² Karanikić Mirić, M.: Subjektivna koncepcija neimovinske štete, In: Slakoper, Z., Bukovac Puvača, M. Mihelčić, G. (Eds.): *Liber amicorum Aldo Radolović: zbornik radova u čast prof. dr. sc. Aldu Radoloviću*, Rijeka, 2018, pp. 398–399.

³ *Ibid.*, p. 399.

Klarić, who, to our understanding, have given the greatest contribution to the doctrinal debate on the concept of moral damage in the countries that share the common legal heritage of the 1978 federal OA.

The main focus in this paper shall be on the provisions of the former federal/Serbian OA, and the respective provisions of the Croatian OA and Slovenian OC, pertaining to the statutory designation of legally relevant forms of moral damage. This is the major guideline in determining whether a ‘subjective’ or ‘objective’ understanding of moral damage is adopted, or a sort of a hybrid solution, somewhere between the two. This shall be supplemented with the analysis of the provision pertaining to the conditions on which the court may award a pecuniary compensation for sustained moral damage.⁴ The other remedies for redressing the infringement of personality rights, that is the claim to request cessation of the infringement and claim to publish the judgment or correction, or obliging the respondent to revoke a statement, are less relevant in the analysis of the evolution of the concept of moral damage in these countries, since they have always been considered applicable whether or not the injured party sustained intimate distress.⁵ Finally, an important manifestation of the shift towards the ‘objective’ concept of moral damage is whether the given legal order entitles legal persons to claim compensation for moral damage, usually for the infringement of their reputation, good will or personality rights intrinsic to their specific legal personality.

2. THE CONCEPT OF MORAL DAMAGE ACCORDING TO THE FORMER FEDERAL/SERBIAN LAW ON OBLIGATIONS FROM 1978

Long before the enactment of the former federal Obligations Act from 1978 there had been scholarly considerations in the Yugoslav doctrine of civil law in relation to the concept and prospective regulation of moral damage.⁶ The most

⁴ An important, though somewhat indirect consequence of the ‘subjective’ understanding of moral damage is the restrictive approach to transferability and inheritability of the claim to pecuniary compensation for moral damage in the 1978 OA. See in more details Karanikić Mirić, M.: *Nasledivost prava na naknadu moralne štete*, In: Ignjatović, Đ. (Ed.), *Kaznena reakcija u Srbiji*, SSRN, 5 2015, pp. 172–191.

⁵ As for the remedy by publishing the court judgement or the rectification, see with the overview of the relevant Serbian case law Karanikić Mirić, M.: *Objektivizovanje moralne štete*, *Zbornik Matice srpske za društvene nauke*, 152 2015, p. 498.

⁶ See for detailed and elaborate analysis of the Yugoslav and Serbian doctrine and case law in the second part of the XIXth century until the enactment of the Yugoslav Obligations Act in 1978 in Karanikić Mirić, M.: *Istorija ideje o moralnoj šteti u modernom srpskom građanskom pravu*, In: Ignjatović, Đ. (Ed.) *Kaznena reakcija u Srbiji*, Beograd, 6 2016, pp. 183–192.

important scholar in this respect is the late Obren Stanković, a professor of the Faculty of Law in Belgrade. In his works,⁷ he supported the idea that moral damage is inseparable from the personal sphere of the injured person to such a degree that any pecuniary compensation should serve only the purpose to provide a reasonable and just satisfaction to the injured person.⁸ Moral damage is nothing else but a distress or suffering in the intimate sphere of the individual.⁹

The views of professor Stanković prevailed in the Law on Obligations from 1978.¹⁰ Interestingly, in this regard the 1978 OA departed from its primary legislative model, the “Sketch” (*Skica*) of professor Mihailo Konstantinović from 1969.¹¹ The “Sketch” envisaged that moral damage is the infringement of any a) legally recognised interest, b) personality rights such as freedom, honor, reputation, decency, personal and family peace and other personality rights, c) inflicting bodily or mental pain to another person.¹²

The 1978 OA, in its wording still in effect today in Serbia¹³, prescribes that moral damage is either bodily or mental pain, or fear.¹⁴ It did not take over from the “Sketch” the legally recognised interest and infringement of personality rights as possible sources of moral damage, but rather introduced a new category, fear, which was not explicitly mentioned in the “Sketch”. However, the literature pointed out quite soon after the enactment of the 1978 OA that

⁷ In the period between 1963 and 1975 he published four monographs pertaining to different aspects of compensation for moral and material (patrimonial damage), that have been posthumously published in 1998, in a single book edited by Zoran Ivošević. Stanković, O.: *Naknada štete*, Ivošević Zoran (Ed.), Beograd, 1998.

⁸ *Ibid.*, pp. 25–27.

⁹ Karanikić Mirić, M.: *Objektivizovanje moralne štete* (n 5), p. 489.

¹⁰ *Ibid.*, p. 488.

¹¹ Konstantinović, M.: *Obligacije i ugovori – Skica za Zakonik o obligacijama i ugovorima*, Beograd, 1969, reprinted in the series ‘Klasici jugoslovenskog prava’ (Službeni list, 1996). Professor Konstantinović properly identified the difficulties of not having a common statutory act regulating the subject-matter of law of obligations in Yugoslavia, in a country with parts with different civil law tradition. For this purpose, he drafted a text of a prospective code of obligations. He modestly named it *Skica* („Sketch“), but it was a full-fledged normative proposal. The 1978 OA mostly followed the content of the *Skica*. There are, however, some legal institutes in relation to which the 1978 OA deviated from the *Skica*.

¹² *Skica*, s 124.

¹³ *Zakon o obligacionim odnosima*, Službeni list SFRJ, n 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89, Službeni list SRJ, n. 31/93, Službeni list SCG, n. 1/2003 – Constitutional Charter and Službeni glasnik RS, n 18/2020 (Serbian OA).

¹⁴ Serbian OA, s 155. See Cigoj, S. In: Blagojević, B., Krulj, V. (Eds.) *Komentar Zakona o obligacionim odnosima*, Beograd, 1 1980, p. 430; Cigoj, S., In: Perović, S. (Ed.) *Komentar Zakona o obligacionim odnosima*, Beograd: Kulturni centar Pravnog fakulteta, 1995, p. 329.

the concept of moral damage is too narrow and it should encompass the infringement of personality rights as such.¹⁵ Some assert that the 1978 OA adopted a mixed, subjective-objective understanding of moral damage.¹⁶

In addition, in the provision pertaining to pecuniary compensation, the 1978 OA prescribes that a fair compensation in money, independent of the compensation for material damage as well as in its absence, may be awarded for bodily pain, mental pain suffered due to reduced life activities, humiliation, injury to reputation, honor, freedom or personal rights, death of a close person, as well as for fear, provided that the court finds that the circumstances of the case, especially the intensity of pain and fear and their duration justifies it.¹⁷ The law, therefore, makes the claim to pecuniary compensation subject not to the infringement of personality rights but to a distress in the intimate sphere of the injured party.¹⁸ This means that the infringement of personality rights needs to cause mental suffering in order to be redressed by pecuniary compensation.¹⁹

The inseparability of moral damage from the personality of the injured person has been confirmed as early as 1986 by the joint session of former federal courts, the highest judicial assembly competent to deliver interpretation in relation to issues implying different possible interpretations in the practical application.²⁰

¹⁵ Boris Vizner as early as 1978, that is in the very same year when the 1978 OA was enacted and came into force, also implied that the essential element of moral damage, that is the true source of bodily pain, mental pain and fear, is the infringement of personality rights or personal interests. See Vizner, B., Bukljaš, I.: *Komentar Zakona o obveznim odnosima*, Zagreb, 1 1978, p. 655, Vol. II. P. 914. Only few years later Radolović supported the opinion that the 1978 OA actually protected personality rights as such, Radolović, A.: Neimovinska (nematerijalna) šteta po ZOO-u, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 2(2) 1981, p. 143.; Radolović, A.: Građanskopravna zaštita subjektivnih neimovinskih prava u građanskom pravu, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 5(1) 1984, p. 145; Similarly, the solution of the 1978 OA was subject to critical remarks by Zdravko Petrović. See. Petrović, Z.: *Naknada nematerijalne štete zbog povrede prava ličnosti*, Beograd, 1996, pp. 12-13.; Petrović, Z., Petrović Mrvić, N.: *Naknada nematerijalne štete*, Beograd, 2012, p. 268.

¹⁶ Klarić, P.: Zašto objektivna koncepcija neimovinske štete, *Hrvatska pravna revija*, 12(12) 2012, p. 15; Klarić, P., Vedriš, M.: *Građansko pravo*, Zagreb, 2014, p. 591.

¹⁷ Serbian OA, s 200(2).

¹⁸ Toroman, M., In: Blagojević, B., Krulj, V. (Eds.): *Komentar Zakona o obligacionim odnosima* (n 14), p. 536.

¹⁹ Alishani, A.: Nematerijalna šteta i njena naknada zbog povrede prava ličnosti, *Pravni život*, 56(11) 2007, pp. 890-891.

²⁰ Conclusion of the consultation of representatives of the Federal Court, Supreme Courts of the Republics and Autonomous Provinces and the Supreme Military Court from 15 and 16 October 1986. See in more detail Andrejević, S., Milutinović, Lj., Petrović, Z.: Promene stavova sudske prakse prema naknadi nematerijalne štete In: Vukadinović, R. (Eds.): *Trideset godina*

The solution adopted in the 1978 OA has been properly designated in the literature as the ‘subjective concept of moral damage in its purest form’.²¹ One of the major implications of the subjective concept of moral damage is that in Serbian law legal persons are not entitled to claim pecuniary compensation for the infringement of their reputation or other personality rights²² as such, since they are incapable of feeling physical pain, mental suffering or fear. This interpretation has also been confirmed in the case law.²³ Legal persons may be entitled to compensation for the infringement of reputation and other personality rights only under special statutes on the protection of the right to access justice in reasonable time, on loyal competition and trademarks, for instance.²⁴

3. EVOLUTION OF THE CONCEPT OF MORAL DAMAGE IN THE PRELIMINARY DRAFT OF THE CIVIL CODE OF SERBIA FROM 2019

In 2006, a committee was formed by the Serbian Government entrusted with the task to prepare a draft of a civil code. The committee published the results of its work consecutively in separate books, each pertaining to a specific branch of civil law. The first was the one relating to the law on obligations, published as early as 2009. The 2009 Draft was not yet complete and final, in terms that it did not contain rules that could be directly adopted by the legislator. At many points it contained alternative proposals. Therefore, its major aim was more to initiate a scientific and professional debate than to offer the legislator a text that could be easily transposed into a legislative proposal.

In the basic provision pertaining to various types of damage, the 2009 Draft contained two alternative proposals. According to the main proposal, the corresponding provision from the 1978 OA was adopted, but with a major novelty: an infringement of guaranteed personality rights also qualifies as moral damage.²⁵ This approach, adopted in the 2009 Draft, was in the doctrine properly

Zakona o obligacionim odnosima – de lege lata i de lege ferenda, Beograd, 6 2009, pp. 273-275; Karanikić Mirić: *Objektivizovanje moralne štete* (n 5), pp. 488–489.

²¹ Karanikić Mirić, M.: *Objektivizovanje moralne štete* (n 5) 488.

²² Karanikić Mirić, M.: *Subjektivna koncepcija neimovinske štete* (n 2) 397.

²³ See for example the Judgment of the Supreme Court of Serbia Prevl 611/2011 and Legal Interpretation by the civil law section of the Supreme court of Serbia from 5 February 2001. Cited from Karanikić Mirić, M.: *Istorija ideje o moralnoj šteti u modernom sprskom građanskom pravu* (n 1).

²⁴ Savčić, S.: O novčanoj naknadi neimovinske štete pravnom licu u srpskom pravu – prilog reformi odštetnog prava, *Zbornik Pravnog fakulteta u Novom Sadu*, 56(3) 2022, pp. 775-782.

²⁵ 2009 Draft, s 168, main proposal.

identified as a turn to a subjective-objective notion of moral damage.²⁶ The Draft in a note to the text of the proposed provision states that the notion of guaranteed personality rights would be specified in the general part of the future civil code. However, the Draft hints that these should be personality rights guaranteed by the Serbian Constitution, international treaties and generally accepted rules of international law. The second alternative also intended to introduce the infringement of personality rights. It specified that damage comprises, in addition to proprietary damage, infringement of any lawful interest, infringement of personality rights, such as honor, reputation, decency, personal and family peace and other inherent personal values, just as inflicting bodily or mental suffering to another.²⁷ It is common to both versions that in neither is causing fear considered a legally acknowledged form of moral damage.

Regarding the provision on pecuniary compensation for moral damage, the 2009 Draft took adopted verbatim the legal solution from the 1978 OA, without any alternative proposals being offered.²⁸ A novelty of major importance in the 2009 Draft was, however, that it envisaged a new subsequent section granting a claim to a special pecuniary compensation for legal persons. It specified that legal persons are entitled to just compensation for damage caused by the infringement of their reputation and other values stemming from the nature of their legal personality.²⁹

In the upcoming years the drafting committee published gradually the remaining books of the Draft. In 2015, a consolidated text of the entire draft was published into which the previously published separate books had been integrated. In this process, most of the provisions, including the ones pertaining to the law of obligations, underwent some modifications. The consolidated text of the Draft still contained alternative proposals, but unambiguously fewer than in the 2009 Draft. However, there were no alternative proposals in the 2015 Draft relating to the notion of moral damage. The 2015 Draft qualified the infringement of any lawful interest as a form of proprietary damage, which was not the case in the 2009 Draft. In terms of moral damage, it envisaged that damage also comprises the infringement of personality rights, such as the right to life, health and physical integrity, the right to human dignity, freedom, honor and reputation, decency, personal and family peace and other personality rights provided for the Civil Code, as well as inflicting bodily or mental pain on another.³⁰

²⁶ Karanikić Mirić, M.: *Objektivizovanje moralne štete* (n 5), p. 495.

²⁷ 2009 Draft, s 168, alternative proposal.

²⁸ 2009 Draft, s 220(1).

²⁹ 2009 Draft, s 226.

³⁰ 2015 Draft, s 296(2).

Concerning the provisions on pecuniary compensation for moral damage, the 2015 Draft contained a great number of new solutions in comparison to the 2009 Draft. It envisaged that for the inflicted bodily pain, just as for fear, worry, sadness and other mental suffering the court may, according to the circumstance of the case, award just pecuniary compensation.³¹ However, in the alternative text, it proposed to retain verbatim the wording of the provision from the 1978 OA, just as the 2009 Draft had done. In relation to the right of legal persons to pecuniary compensation for moral damage, the 2015 Draft contained three different proposals. According to the first, in the case of the infringement of reputation of legal person or other personality rights inherent to their legal nature, the court may, taking into account all the circumstances and especially the gravity of the infringement and the degree of fault, award just pecuniary compensation.³² The wording of the second alternative is somewhat simplified: legal persons are entitled to just pecuniary compensation in case of the infringement of reputation or other personality rights inherent to their (legal) nature.³³ Finally, there was a third text according to which legal persons are entitled to pecuniary compensation for the infringement of their reputation or other values stemming from their personality.³⁴

The 2015 version of the Draft was made available for public debate. After the public debate had been closed, the committee reviewed the text of the Draft and published a finalised version in 2019. However, regarding the definition of moral damage, the 2019 Draft envisages verbatim the same wording as the 2015 Draft.³⁵

Concerning the provision on pecuniary compensation, the 2019 Draft opted for the basic wording offered by the 2015 Draft, adopted it verbatim, and rejected the alternative text which complies with the wording of the OA in effect. Regarding the right of legal persons to pecuniary compensation, the 2019 Draft retained the main proposal from the 2015 Draft, with some minor changes. It envisages that, in case of the infringement of reputation and honor of a legal person or other personality rights, inherent to its legal personality, the court may award compensation, taking into account the gravity of the infringement and fault.³⁶

³¹ 2015 Draft, s 359(1).

³² 2015 Draft, s 360.

³³ 2015 Draft, s 360, alternative I.

³⁴ 2015 Draft, s 360, alternative II.

³⁵ 2019 Draft, s 287(2).

³⁶ 2019 Draft, s 346.

4. THE CONCEPT OF MORAL DAMAGE IN THE CROATIAN OBLIGATIONS ACT FROM 2005

The Croatian Obligations Act from 2005³⁷ introduced a fundamental change in the concept of moral damage.³⁸ In the provision pertaining to the various types of damage it narrows down the notion of moral damage to the infringement of personality rights of the injured party. Most laconically, it states that, in addition to proprietary, damage is also the infringement of personality rights (moral damage).³⁹ Nothing has remained in the definition of moral damage in the Croatian Obligations Act from the 1978 Obligations Act's trichotomy (bodily pain, mental pain and fear). One of the major proponents of the introduction of a fully objective understanding of moral damage in the Croatian literature is prof. Aldo Radolović. He supported the idea of objectivization of moral damage as early as in the first years of the application of the 1978 OA, as indicated earlier, and reinforced his arguments after the 1978 OA continued to be applied in Croatia as an independent state.⁴⁰ He claimed that the rule in the 1978

³⁷ Zakon o obveznim odnosima, Narodne novine no. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22 (Croatian OA).

³⁸ For the relevant literature in relation to the concept of material damage according to the 2005 Croatian OA see Alaburić, V. et al. (Eds.) *Odgovornost za neimovinsku štetu zbog povrede prava osobnosti*, Zagreb: Narodne novine d.d., 2006; Baretić, M.: Pojam i funkcije neimovinske štete prema novom Zakonu o obveznim odnosima, *Zbornik Pravnog fakulteta u Zagrebu*, 56(5-6) 2006, p. 461; Bukovac Puvača, M.: Deset godina nove koncepcije neimovinske štete, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 36(1) 2015, p. 157; Crnić, I.: *Pravo fizičke osobe na popravljjanje neimovinske štete*, In: Klarić, P. (Ed.) *Naknada štete u primjeni novog Zakona o obveznim odnosima*, Zagreb, 2005, pp. 5-52; Kačer, H.: Koncept nematerijalne štete po Zakonu o obveznim (obligacionim) odnosima iz 1978. usporedba sa konceptom iz hrvatskog Zakona o obveznim odnosima iz 2005, In: Vukadinović, R. (Ed.) *Trideset godina Zakona o obligacionim odnosima – de lege lata i de lege ferenda*, Zagreb, 6 2009, p. 24; Kačer, H.: Tri novote iz novog koncepta neimovinske štete po Zakonu o obveznim odnosima iz 2005, *Zbornik Pravnog fakulteta u Zagrebu*, 62(5-6) 2012, p. 1491; Pichler, D.: Problematika opsega naknade neimovinske štete zbog povrede poslovnog ugleda pravne osobe javnog prava, *Zbornik radova Veleučilišta u Šibeniku*, (3-4) 2015, p. 7; Proso, M., Štambuk, M.: Principi europskog ugovornog prava s osvrtom na ugovornu odgovornost za neimovinsku štetu prema novom ZOO-u, *Zbornik radova Pravnog fakulteta u Splitu*, 45(4) 2008, p. 901; Radolović, A.: Pravo osobnosti u novom Zakonu o obveznim odnosima, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 27(1) 2006, p. 129; Klarić, P.: Zašto objektivna koncepcija neimovinske štete, *Hrvatska pravna revija*, 12(12) 2012, p. 14; Klarić, P.: Neimovinska šteta pravne osobe, In: Klarić, P. (Ed.): *Naknada štete u primjeni novog Zakona o obveznim odnosima*, Zagreb: Narodne novine d.d., 2005, pp. 53-74.

³⁹ Croatian OA, s 1046.

⁴⁰ Radolović, A.: Moguće (i pravno poželjne) promjene koncepta neimovinske štete u pravnom sustavu Hrvatske, *Pravo u gospodarstvu*, (11-12) 1994, p. 1083; Radolović, A.: Pravo ličnosti u građanskom pravu Republike Hrvatske, *Vladavina prava*, (2) 1998, p. 73; Radolović,

OA stating that moral damage is either bodily pain, mental pain or fear, should not be construed literally, since these are only external manifestations of the infringement of personality rights. The essential content of moral damage is, according to Radolović, the infringement of personality rights.⁴¹ As Marija Karanikić Mirić summarizes properly ‘just as the subjective understanding of moral damage was a distinctive feature of the 1978 OA, so were the consistent critical remarks of Aldo Radolović of the solution adopted in the 1978 OA and his support to the objective understanding of moral damage the main feature of his scholarly opus’.⁴² Similarly to Aldo Radolović, other contemporary Croatian scholars, such as Marko Baretić⁴³, Petar Klarić⁴⁴, Ivica Crnić⁴⁵, Hrvoje Kačer⁴⁶, Maja Bukovac Puvača⁴⁷, for example, also supported the idea of the objectivization of moral damage in the Croatian OA of 2005, and considered it a progressive step in the evolution of the concept of moral damage. Attaching the notion of moral damage to the infringement of personality rights in the Croatian literature is attributed to the influence of Swiss law.⁴⁸

In this regard, another novel legal solution in the Croatian OA, in comparison to the former 1978 OA, is of great relevance. The Croatian OA in the chapter dedicated to subjects of obligational relationships, after the provisions on legal capacity and capacity to contract, defines and gives a list of personality rights. It declares that all natural and legal persons are entitled to a protection of their personality rights, under the conditions specified by the OA.⁴⁹ In the next provision, the OA gives an open enumeration of personality rights: right

A.: Naknada neimovinske štete u teoriji i praksi, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 21(1) 2000, p. 219; For the analysis of the views of Aldo Radolović see above else Karanikić Mirić, M.: *Subjektivna koncepcija neimovinske štete* (n 2), pp. 400, 406–411.

⁴¹ Radolović, A.: Neimovinska (nematerijalna) šteta po ZOO-u (n 15), p. 145.

⁴² Karanikić Mirić, M.: Subjektivna koncepcija neimovinske štete (n 2), p. 412.

⁴³ Baretić, M. (n 37), pp. 488, 495-497.

⁴⁴ Klarić, P.: Zašto objektivna koncepcija neimovinske štete (n 16), p. 17.

⁴⁵ Crnić, I.: Pravo fizičke osobe na popravljanje neimovinske štete (n 37), p. 6.

⁴⁶ Kačer, H.: Koncept nematerijalne štete po Zakonu o obveznim (obligacionim) odnosima iz 1978. usporedba sa konceptom iz hrvatskog Zakona o obveznim odnosima iz 2005. (n 38) pp. 251–255; Kačer: Tri novote iz novog koncepta neimovinske štete po Zakonu o obveznim odnosima iz 2005. (n 38), p. 1506.

⁴⁷ Bukovac Puvača, M. (n 38), p. 176.

⁴⁸ Tot, I.: Poredbeno pravni utjecaji na Zakon o obveznim odnosima, In: Tot, I. and Slakoper, Z. (Eds.) *Hrvatsko obvezno pravo u poredbenopravnom kontekstu: Petnaest godina Zakona o obveznim odnosima*, Zagreb, 2022, p. 72; Baretić, M., Nikšić, S.: Legal culture and legal transplants: Croatian national report, In: Sánchez Cordero, J. A., Berman, G. (Eds.) *Legal Culture and Legal Transplants*, Mexico: Universidad Nacional Autonoma de Mexico, 2012, p. 224.

⁴⁹ Croatian OA, s 19(1).

to life, physical and mental health, reputation, honor, dignity, name, privacy of individual and family life, freedom, etc.⁵⁰ Finally, the OA specifies that legal persons have all the mentioned personality rights, except those that are related to the biologic nature of natural persons. The OA explicitly emphasizes that legal persons have a right to reputation and good will, honor, designation or company name, trade secrets, freedom of conducting business activities, etc.⁵¹

A similar change can be observed in relation to the rule on pecuniary compensation for moral damage. The Croatian Obligations Act specifies that in the case of the infringement of personality rights the court shall, if it finds that the gravity of the infringement and the circumstances of the case so demand, award just pecuniary compensation.⁵² The list is left open to be adjusted to new types of personality rights that may evolve in the future.⁵³

Interestingly, the OA did not abandon the subjective dimension of moral damage entirely. In the subsequent provision, almost literally adopted from the former federal OA, it retained an element of the three-pronged conceptual frame of moral damage from the former federal statute. Namely, it prescribes that in deciding on the amount of a just pecuniary compensation, the court shall take into account, among others, the intensity and duration of physical pain, mental pain and fear, caused by the infringement of personality rights.⁵⁴ Both Aldo Radolović and Marko Baretić criticized the decision of the Croatian legislature to retain bodily pain, mental pain and fear as the criteria according to which the amount of compensation is determined for the infringement of personality rights.⁵⁵

The provision of the Croatian Obligations Act, perfectly in line with the aforementioned and new in comparison to the former federal act, explicitly enables the court to award just pecuniary compensation for moral damage to legal persons for the infringement of their reputation and other personality rights, provided the court finds that the gravity of the infringement and the circumstances of the case so justify.⁵⁶

⁵⁰ Croatian OA, s 19(2).

⁵¹ Croatian OA, s 19(3).

⁵² Croatian OA, s 1100(1).

⁵³ Klarić, P., Vedriš, M.: *Građansko pravo*, Zagreb, 2014, p. 592.

⁵⁴ Croatian OA, s 1100(2).

⁵⁵ Radolović, A.: *Pravo osobnosti u novom Zakonu o obveznim odnosima* (n 38), p. 158; Baretić (n 38), p. 472. Cited from Karanikić Mirić, M.: *Subjektivna koncepcija neimovinske štete* (n 2), pp. 401-402.

⁵⁶ Croatian OA, s 1100(3).

For more details on the evolution of the right of legal persons to claim compensation for moral damage see Klarić, P.: *Neimovinska šteta pravne osobe*, In: Klarić, P. (ed.): *Naknada štete u primjeni novog Zakona o obveznim odnosima*, Zagreb: Narodne novine d.d., 2005, pp. 53-72.

5. THE CONCEPT OF MORAL DAMAGE IN THE SLOVENIAN OBLIGATIONS CODE FROM 2001

In comparison to the Croatian Obligations Act, the Slovenian Obligations Code from 2001⁵⁷ deviated much less from the content of the former federal act. Its structure and content can be paralleled to the 1978 Obligations Act to such a degree, that it may be said that its enactment was more a formal ‘slovenization’, than an actual reform of the law of obligations, as it was aptly formulated in the recent Slovenian literature.⁵⁸

Such a great deal of parallelism between the Slovenian Obligations Code and the 1978 Obligations Act, that is the current Serbian regulations, is evident also in relation to the provisions on moral damage.⁵⁹ The Slovenian Obligations Code retained the three-pronged concept of moral damage from the former federal statute.⁶⁰ In the provision pertaining to various forms of damage, it prescribes that moral (non-material) damage consists of physical pain, mental pain or fear caused to another person. In addition, it considers the infringement of the reputation of a legal person also a form of legally relevant non-material damage.⁶¹ It is worth to note that the Slovenian code, in the basic provision specifying the legally relevant manifestations of damage, names explicitly the infringement of reputation of legal persons as a form of moral damage.

Similarly, in the provision pertaining to pecuniary compensation for moral damage, the trichotomy from the former federal statute can be detected. The Slovenian Obligations Code prescribes that a just pecuniary compensation

⁵⁷ Obligacijski zakonik, Uradni list n 83/01, 28/06, 40/07, 97/07 and 64/16 (Slovenian Obligations Code).

⁵⁸ Možina, D., Vlahek, A.: *Contract Law in Slovenia*, Amsterdam: Wolters Kluwer, 2019, p. 28.

⁵⁹ For the relevant literature see Možina, D.: *Povrnitev škode zaradi diskriminacije in trpinčenja na delovnem mestu: nekaj misli ob 8. členu ZDR-1*, In: Damjan, M., Koritnik, B., Žnidaršič Skubic, V. (Eds.) *Liber Amicorum Lojze Ude*, Ljubljana: PRavna fakulteta Univerze v Ljubljani, 2016, pp. 371-389; Rijavec, V.: *Pojem premoženjske in nepremoženjske škode v slovenskem obligacijskem pravu*, PhD dissertation, Nova Gorica: Nova Univerza-Evropska pravna fakulteta, 2012; Križaj, M., Blažič, J.: *Denarna odškodnina za kršitev osebnostnih pravic*, Ljubljana, 2013; Koman Perenič, L.: *Denarna odškodnina za nepremoženjsko škodo (v Republiki Sloveniji in drugih srednje- in zahodnoevropskih državah)*, *Pravnik* 54(4-5) 1999, p. 279–295; Finžgar, A.: *Varstvo osebnostnih pravic po Zakonu o obligacijskih razmerjih*, *Pravnik*, 35(10-12) 1980, pp. 295-302; Plavšak, N. (Ed.) *E-komentar Obligacijskog zakonika*, www.tax-fin-lex.si, commentaries to s 132, 179 and 182.

⁶⁰ See Možina, D.: *Povrnitev škode zaradi diskriminacije in trpinčenja na delovnem mestu: nekaj misli ob 8. členu ZDR-1 (n 59)*, pp. 379-384.

⁶¹ Slovenian Obligations Code, s 132.

shall be awarded to the injured party for bodily pain, for mental pain due to a reduction in life activities, disfigurement, the defamation of good name or reputation, the infringement of freedom or a personal right, or the death of a close person, and for fear, if the circumstances of the case, particularly the intensity and duration of the pain or fear, so justify.⁶² The wording complies fully with the one in the former federal statute.⁶³

In comparison to the former federal statute, the Slovenian Obligations Code introduced a novel provision enabling explicitly legal persons to claim pecuniary compensation. It prescribes that the court shall award a legal person a just monetary compensation for defamation of reputation or good will, independent of the reimbursement of material damage, if it finds that the circumstances so justify.⁶⁴

6. CONCLUDING REMARKS

This brief survey has demonstrated that the ‘subjective’ notion of moral damage, that is the trichotomy of legally relevant forms of moral damage (bodily pain, mental pain and fear) instituted by the federal Obligations Act from 1978, in the light of the works of professor Obren Stanković from the 1960s and 1970s, inspired critical considerations in the literature. A tendency of shifting to ‘objective’ concept of moral damage, that is abandoning the distress in intimate sphere of the injured party as the sole source of moral damage and granting a remedy even when there is no distress, but their personality rights have been infringed, has been accurately described by Marija Karanikić Mirić as a process of ‘objectivization of moral damage’.⁶⁵

The current Serbian Obligations Act has not departed from the concept of moral damage from the former federal OA yet. This means, on the one hand, that the infringement of personality rights alone does not prompt liability of providing compensation, unless a meaningful bodily pain, mental pain or fear is also caused. On the other hand, legal persons cannot sustain legally relevant moral damage, since they are not capable of feeling bodily pain, mental pain or

⁶² Slovenian Obligations Code, s 179(1).

⁶³ The recent commentaries of the Slovenian CO define moral damage as the violation of non-pecuniary (personal) sphere of the injured party, whereby the personal sphere is determined by their personality rights. However, pecuniary compensation is awarded only if such violation of personal sphere caused bodily pain, mental pain or fear. See Plavšak, N. *E-komentar Obligacijskog zakonika* (n 59), commentary to s 179.

⁶⁴ Slovenian Obligations Code, s 183.

⁶⁵ Karanikić Mirić, M.: *Objektivizovanje moralne štete* (n 5), p. 490.

fear. In the process of preparing the Preliminary Draft of the Civil Code, different legal solutions appeared. A perfect objectivization of moral damage has never been seriously considered.⁶⁶ According to the latest version from 2019, the drafting committee proposes a solution very similar to the one suggested by professor Konstantinović in the 1969 “Sketch”. It has been described accurately by Marija Karanikić Mirić as a ‘mixed’ concept of moral damage⁶⁷, a solution which basically retains the subjective concept of moral damage based on distress in intimate sphere of the injured party, in the form of bodily or mental pain, but adds the infringement of personality rights as an additional possible cause of moral damage. The Draft does not specify fear as a case of moral damage, but rather mentions it in the provision pertaining to the claim for pecuniary compensation for moral damage.

From the three countries compared in this paper, the Croatian legislator departed from the common heritage of the 1978 OA the most. By eliminating bodily pain, mental pain and fear from the statutory definition of moral damage and linking it solely to the infringement of personality rights, the Croatian OA made a principal shift from the subjective to the objective concept of moral damage. However, as Marija Karanikić Mirić properly assessed, the Croatian OA should have retained from the former federal law the provision on the moral damage in relation to grave invalidity of a close person, as a separate case of moral damage, since it cannot be explained by the infringement of personality rights only.⁶⁸ The similar reasoning can be supported in relation to moral damage due to death of a close person, as well.

In addition, the Croatian legislator explicitly envisaged the right of legal persons to claim compensation for moral damage, which is completely in line with the objective concept of moral damage affirmed in the Croatian OA. The Act, however, retained bodily pain, mental pain and fear in the provision per-

⁶⁶ Karanikić Mirić, M.: *Subjektivna koncepcija neimovinske štete (n 2)*, p. 401.

⁶⁷ Karanikić Mirić, M.: Non-pecuniary loss in Serbian tort law – time for a change in paradigm?, *South Eastern Europe and the European Union - Legal Aspects Cluster of Excellence in European and International Law Series of Papers*, 2016, p. 36. This assessment of Marija Karanikić Mirić is formulated regarding to the 2015 Draft, but it is fully applicable to the 2019 Draft as well.

A similar proposal for the objectivization of the concept of moral damage in the OA of the entities of Bosna and Hercegovina has been suggested by Medić, D.: O konceptu nematerijalne štete u Bosni i Hercegovini de lege ferenda, In: Medić, D., Nedić, D., Zivlak Radulović, N. (Eds.) *Naknada nematerijalne štete*, Banja Luka, 2017, pp. 136-139. Similarly, the necessity of objectivization of moral damage is implied by Branko Morait as well. See Morait, B.: Aktualnosti naknađivanja nematerijalne štete, In: Lukić, V. R. (Ed.) *Collection of Papers: twenty years of the Dayton Peace Agreement*, Istočno Sarajevo, 2015, pp. 506–507.

⁶⁸ Karanikić Mirić, M.: *Objektivizovanje moralne štete’ (n 5)*, p. 500.

taining to the criteria according to which pecuniary compensation is awarded. This is construed in a way that the infringement of personality rights is itself considered moral damage, whereby the pain and fear are the measurement of the gravity of the infringement and, hence, the criteria according to which the means of the rectification of harm are determined.⁶⁹

Similarly to the Serbian law, the Slovenian legislature has not fundamentally changed the concept of moral damage as defined in the 1978 OA either. It remained at the subjective concept of moral damage based on bodily pain, mental pain and fear, both in the definition of moral damage and in the provision pertaining to the claim to pecuniary compensation. However, it supplemented the subjective concept of moral damage with the infringement of reputation and personality rights of legal persons. A recent commentary of the Slovenian CO tends to associate moral damage with the infringement of personality rights, supporting pecuniary compensation only if it has caused bodily pain, mental pain or fear.

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⁶⁹ Klarić, P., Vedriš, M. (n 53), p. 591; Perkušić, A., In: Gorenc, V. et al. (Eds) *Komentar Zakona o obveznim odnosima*, Zagreb: Narodne novine d.d., 2014, p. 1715.

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