Abstract

In criminal proceedings in the Republic of Kosovo, the injured party enjoys considerable rights that favor its position. In addition to constitutional guarantees, which are now standard for democratic countries, the Criminal Procedure Code (henceforth: the CPC) considers injured parties an equal party in the procedure, with rights identical to those of the prosecution, with the exception of certain rights that are understandably exclusive for the prosecution (e.g. the right of the prosecutor to withdraw the indictment). However, this paper will argue that certain stances in the CPC are contradictory when regulating the status and rights of injured parties in criminal proceedings. Kosovo legislation does not distinguish between injured parties in criminal proceedings and the victim of a criminal offence, but refers to both as injured parties. This paper finds that it is necessary to change this approach, and that the Kosovo legislators should follow the Croatian model in determining the status of parties in proceedings, and clearly distinguishing between an injured party and a victim of the criminal offence, as the victim should enjoy certain rights that can’t be attributed to an injured party, especially in relation to giving testimonies. The paper also analyzes discrepancies between the Criminal Procedure Core and Article 54 of the Constitution of the Republic of Kosovo.
Keywords: Criminal Procedure; constitution; injured parts; claim; legislation;

1. Notion of an Injured Party in Criminal Proceedings

The expression ‘injured party’ in the CPC is defined as follows: “Injured party or victim – a person whose personal or property rights are violated or endangered by a criminal offence”.¹ The very definition shows that terminologically the CPC equates the victim with the injured party. The legal condition to be met in order for a person to be attributed the status of the injured party is to have its personal or property interests harmed by the criminal offence which is subject to review. Hence the status of an injured party may be attributed to both natural and legal persons. In terms of personal rights, a criminal offence can threaten and endanger a vast array of personal rights, such as: physical and moral integrity, right to life, freedom, security, etc. Criminal offences may also threaten and endanger property rights, such as: right to property, right to freedom of competition, right of the state to collect taxes, etc. Hence, it is necessary to divide the procedural position of an “injured party” from that of a “victim” in criminal proceedings. A victim is the person that was the object of a criminal offence, whereas an injured party may also be a person that was not the object on which the criminal offence was committed (e.g. parents of an individual deprived of life). This distinction imposes the need to define strict legal rules that do not allow the re-traumatization of the victim, including, for instance, the conduct of specific measures for interrogating crime victims. Pursuant to Rules of Procedure and Evidence of Specialized Chambers of Kosovo², the judicial panel may impose special measures to facilitate the testimony of traumatized or vulnerable witnesses, including victims of sexual and gender based violence, elderly witnesses, or those under the age of 18, such as:

(i) attendance of a psychologist, counsellor or immediate family member during the testimony of the witness;
(ii) one-way closed circuit television;

¹ Article 19, Paragraph 1.7 of CPC.
(iii) shielding the witness from the direct view of the Accused; or
(iv) submission of questions in advance for transmission through a Panel;³

It is recommendable for similar solutions to be incorporated in the Kosovo CPC, as abovementioned rights affirm the procedural position of the victim, and make a clear distinction between the position of a victim and the injured party, which undoubtedly encompasses a wider procedural notion.

1.1 Rights of the Injured Party in Criminal proceedings

In criminal proceedings, the injured party enjoys that status of a party in procedure⁴. This status makes it possible for the injured party to play a key role in the epilogue of a criminal procedure. In the event that the state prosecutor fails to perform with due diligence, the injured party may take the “scene”, as according to the CPC they enjoy vast rights, including: proposal of evidence, presentation of objections of procedural nature, objection of defense counsel proposals, etc.⁵ Therefore, the rights of the injured party derive from its status as party in the procedure. In fact, such procedural authorizations for the injured party may serve as a corrector of the state prosecutor’s work, when, for instance, the prosecutor fails to propose any evidence that may be of crucial significance for the epilogue of the criminal matter, such proposals may be put forward by the injured party. Our Code does not envisage the participation of the injured party in initial review⁶ when the court deliberates on the foundation of the indictment, respectively while deciding on whether legal conditions for judicial review of the matter and on admissibility of evidence. In criminal prosecution, the prosecutor’s office exercises a public function entrusted to this important state body by the Constitution and applicable laws. In accordance with the Law on the State Advocacy Office, public authorities of the Republic of Kosovo are represented in court proceedings by the State Advocacy Office.⁷ Taking into account the abovementioned function of the

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³ Rule 80, Paragraph 4, Sub-paragraph (c).
⁴ Article 62, Paragraph 3 of the CPC.
⁵ Article 9 of the CPC.
⁶ Article 245 of the CPC: “At the initial hearing, the state prosecutor, defendant or defendants, and defense counsel shall be present.”
⁷ Article 8, Paragraph 1 of the Law on State Advocacy Office: “The State Advocacy Office shall represent, give advice and protect the public authorities of the Republic of Kosovo, defined by the
prosecutor’s office, it is argued that the participation of the state advocate in criminal proceedings in which Kosovo public authorities (e.g. Ministries of the Kosovo Government) are an injured party is unnecessary. It is considered that the right of representation as an injured party should be granted only to natural persons and legal persons subject to private law. This due to the fact that the state prosecutor, even by the very virtue of its title, among other protects state interest in criminal proceedings. To this end, the state prosecutor should be allowed to present the damage claim on behalf of state institutions.

The injured party is also a bearer of the damage claim in criminal proceedings. Very often relevant facts on the criminal offence and on the perpetrator are at the same time relevant for proving the existence of damage/injury and its extent, especially when the extent of the damage represents an element of the criminal offence. The realization of damage claims in criminal proceedings serves the function of procedure economization, as the realization of damage claims through criminal procedure makes redundant the initiation of a civil procedure to address the matter. The avoidance of civil procedures for the realization of damage claims resulting from a criminal offence would both contribute to the efficiency of damage claiming for the injured party, and would prevent its tertiary victimization which would result from the reliving of traumatic events from the criminal offence and facing the perpetrator again in the conduct of the civil procedure. Hence, for this reason too, it would be appropriate for the criminal procedure to also deliberate and adjudicate the damage claim of the injured party. It would be rather easy for the court to deliberate on the claim of the injured party in all cases when experts of different spheres are commissioned in the proceedings, as facts verified by them are relevant for both determination of guilt but also very often for the determination of facts significant for the damage claims made by the injured party.

The injured party is entitled to submit an appeal to the judgement only if it is not satisfied with the height of the sentence imposed on the

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Law on public financial management and accountability, in judicial, arbitration an administrative proceedings, in accordance with the Law.”

defendant in criminal proceedings on charges on criminal offences against life and body, security of public traffic and sexual integrity.\textsuperscript{9}

If the criminal procedure also deliberates on the damage claim of the injured party, the defendant is ordered to compensate the damage to the injured party. If the defendant is unable to compensate the damages, the injured party may request compensation from the Crime Victim Compensation Fund.\textsuperscript{10}

In the event the court does not deliberate in relation to the damage claim submitted by the injured party, the judgment finding the defendant innocent or guilty instructs the injured party to resort to civil proceedings for the realization of its demands.

The injured party is also entitled to certain rights in the investigation phase. For instance, it is entitled to request access to the case file\textsuperscript{11}. In addition, it is entitled to present an appeal in the event that the prosecutor, for reasons stipulated by law, rejects the access of the injured party in the case file\textsuperscript{12}. In this phase of the criminal procedure, the injured party should be considered a worthy aid of the prosecution, due to its acquaintance with the environment in which the criminal offence was committed and of the possible suspects, and may, hence, provide an invaluable contribution during the investigation and may contribute to a successful conclusion of criminal proceedings.\textsuperscript{13}

During the investigation phase, the injured party is entitled, based on Article 199 of the CPC, to demand obtainment of evidence which may reveal the harm incurred by the criminal offence. The CPC has not defined any time limitation for the Prosecutor’s decision on the request of the injured party, nor the exercise of any legal remedy by the injured party in the event of dissatisfaction with the prosecutor’s decision. However, other than evidence related to the damage caused to the injured party in the perpetration of the criminal offence, the injured party is also entitled to obtain other evidence that is relevant to the conclusion of the criminal procedure. In the event that such requests are not approved by the

\textsuperscript{9} Article 381 of the CPC.

\textsuperscript{10} Article 62, Paragraph 1.5 of the CPC.

\textsuperscript{11} Article 214, Paragraph (i) of the CPC.

\textsuperscript{12} Article 214, Paragraph (i) of the CPC.

prosecutor, the injured party is entitled to appeal said decision of the prosecutor with the Preliminary Procedure Judge\textsuperscript{14}.

When injured parties are also witnesses, they are also entitled to request protective measures for their safety, as stipulated in articles 220 to 228 of the CPC.

The injured party also play a procedural role in the procedure for forfeiture of assets gained through the commission of a criminal offence, as Article 284, Paragraph 5, makes the injured party eligible to request that forfeited assets are used for its compensation.

The injured party is entitled to request the prolongation of pre-trial detention for the defendant in all phases of the procedure. The injured party submits said request to the state prosecutor and not to the court, hence it is in the discretion of the prosecutor to subsequently decide whether to take into account such requests presented by the injured party.

The injured party may present its damage claim even when the defendant and prosecution have reached a plea agreement, which also needs to contain an address of the injured party and its demand\textsuperscript{15}.

The injured party is entitled to professional representation in the proceedings by an attorney or through the victim protection office\textsuperscript{16}.

2. Legal Discrepancies pertaining to the Procedural Position of the Injured Party

The significance of clear legal regulation of the constitutional principle of legal certainty is best defined by the Constitutional Court of Albania, one of the resolutions of which states: “According to the Court, in order to understand and implement this principle justly, it is necessary, from one side, for the law of a society to provide safety, clarity and continuity, in order for the individuals to direct their actions correctly and in compliance with it, and on the other, for the law not to stand static if so required.”

The abovementioned stand of the Constitutional Court of Albania, reflects the significance of legal clarity for the legal safety of citizens. Below the paper presents a number of legal discrepancies related to the procedural status of the injured party.

\textsuperscript{14} Article 217 of the CPC.
\textsuperscript{15} Article 233, Paragraph 8 of the CPC.
\textsuperscript{16} Article 63 of the CPC.
Article 62, Paragraph 3 of the CPC defines that the injured party is a party in the procedure. Article 218, Paragraph 5, of the CPC defines that “A Court may consider a damaged party who refuses to file a declaration of damage not to be a party to the criminal proceedings”. It is considered that for purposes of legal clarity, Article 62, Paragraph 3, of the CPC should be reformulated as follows:

2.1 The injured party has the status of a party to the criminal proceeding, under the conditions prescribed in the CPC.

The current legal unclarity has affected courts in Kosovo, which also award the status of an injured party to those parties that have not presented a declaration of damages.

An additional argument for amending Article 62, Paragraph 3, with the formulation from above, stands in Article 218, Paragraph 1 of the CPC which regulates: “During the investigatory stage or within sixty (60) days of the filing of the indictment, the injured party may file a simple declaration of damage from the charged criminal offence”.

The term defined in the abovementioned provision has an instructive and not a preclusive character, as it prescribes no “sanction” for the failure to present the declaration of damages during the investigatory phase, or within sixty (60) days from the indictment. However, confusion is caused by the current formulation of Article 62, Paragraph 3 of the CPC which sets no time limitation to be followed by the injured party in order to attain that status in the procedure.

Additionally, provisions of Article 218, Paragraph 1, are also not in compliance with the provision set in Article 322, Paragraph 2 of the CPC, according to which: “If the injured party is present and has not yet filed his or her property claim, the single trial judge or presiding trial judge shall remind him or her that he or she may file a motion to realize such claim within criminal proceedings”.

Clearly, Article 322 authorizes the injured party to present its damage claims during court proceedings.

In relation to the participation of injured parties in initial review according to the CPC, there is a discrepancy between Article 245, Paragraph 1, and Article 248, Paragraph 2. The Code does not envisage the participation of injured parties in initial review, whereas in the event that the defendant pleads guilty during such initial review, it is foreseen that in the assessment of guilt admission by the defendant the single trial judge or
the presiding trial panel member may request the opinion of the prosecutor, defense or the injured party. The discrepancy is evident, as on side the court is not obliged to invite the injured party in initial review, whereas on the other if the accused admits its guilt during initial review, among other, the opinion of the injured party is also requested.

3. **Inconformity of CPC with article 54 of the Kosovo Constitution**

Criminal procedure in the Republic of Kosovo in general applies the highest human rights standards guaranteed in the Kosovo Constitution and the European Convention on Human Rights. To this end, CPC guarantees the application of the principles of contradiction, equality of arms, defense, etc. However, CPC does not envisage a legal remedy for the injured party when the prosecutor retracts the indictment or ends criminal proceedings. With the removal of the “subsidiary claimant” from the CPC, upon amendment of the Provisional Criminal Procedure Code, the prosecution is left with no effective control of its work in pre-criminal and criminal phases. This legal gap deprives the injured parties of their right to a legal remedy in protecting its legal interests. The lack of a legal provision that would authorize the injured party in a criminal proceeding to address the court in the events when its criminal reports are cancelled, or when the prosecutor terminates investigations after their initiation, comprises a violation of Article 54 of the Constitution of the Republic of Kosovo, according to which: **“Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated”**.

Of great importance in the protection of rights is the fact that the contents of the right to protection in the event of violation or denial of a right does not include only the right to address the court but also the right to remove consequences caused by the violation of a given right, meaning

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17 Article 248, Paragraph 2 of the CPC.
18 Other than cases under Articles 225 and 227 of the Code, when the public prosecutor finds that there is no basis for conducting an investigation or prosecution for a criminal offence prosecuted ex officio, respectively when it finds that there is no basis to prosecute against any of the co-perpetrators reported, or when according to this Code it is considered that prosecution has been withdrawn, the public prosecutor is obliged to inform the injured parties on such decision within eight days and instruct them to take over the prosecution as subsidiary claimants. The court shall follow the same procedure in the event when the public prosecutor withdraws from prosecution prior to judicial review.
the right to an efficient legal remedy in all cases when it is concluded that a right has been violated.\footnote{Kosovo Constitution – Commentary, GIZ, 2013, p. 204-205.}

As mentioned above, CPC regulates the procedural position of the injured party, but in some phases of the criminal process the CPC excludes the injured party from the right to judicial protection of its rights. This exclusion is made in the manner that the injured party is unable to apply rights awarded to it in the CPC for the criminal procedure in the event that their criminal report is not upheld or if the prosecutor terminates the investigations for reasons stipulated in the CPC.\footnote{Article 158 of the CPC: The state prosecutor shall terminate the investigation if at any time it is evident from the evidence collected that: 1.1. there is no reasonable suspicion that a specific person has committed the indicated criminal offence; 1.2. the act reported is not a criminal offence which is prosecuted ex officio; 1.3. the period of statutory limitation for criminal prosecution has expired; 1.4. the criminal offence is covered by a pardon or an amnesty issued prior to the enactment of the Constitution of the Republic of Kosovo; 1.5. the criminal offense has been included in an amnesty that was issued before the adoption of the Constitution of the Republic of Kosovo; or 1.6. there are other circumstances that preclude prosecution.}

This restricts the rights of the injured party by a criminal offence in terms of the realization of its rights in a judicial manner, as it precludes the injured parties’ right to a legal remedy in the event that criminal prosecution is illegally terminated.

As stated above, criminal procedure in the Republic of Kosovo no longer provides for the subsidiary claimant, which makes it impossible for the injured party to continue criminal proceedings in the event that the prosecutor opts to withdraw from prosecution. The injured party’s inability to attack prosecutor’s decisions in the preliminary phase in one way or another avoids judicial control over procedural authorizations of the prosecutor, and also violates a right guaranteed in the Constitution.

In addition to the fact that CPC does not provide judicial protection for the injured party in the investigatory phase, the CPC also contradicts the second part of Article 54, according to which “everyone enjoys the right to effective legal remedies if found that such right was violated”. The right to an effective legal remedy is also sanctioned in Article 13 of the ECHR:

\textit{“Article 13 of the ECHR – Right to an effective legal remedy
Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority”}

19 Kosovo Constitution – Commentary, GIZ, 2013, p. 204-205.
20 Article 158 of the CPC: The state prosecutor shall terminate the investigation if at any time it is evident from the evidence collected that: 1.1. there is no reasonable suspicion that a specific person has committed the indicated criminal offence; 1.2. the act reported is not a criminal offence which is prosecuted ex officio; 1.3. the period of statutory limitation for criminal prosecution has expired; 1.4. the criminal offence is covered by a pardon or an amnesty issued prior to the enactment of the Constitution of the Republic of Kosovo; 1.5. the criminal offense has been included in an amnesty that was issued before the adoption of the Constitution of the Republic of Kosovo; or 1.6. there are other circumstances that preclude prosecution.
notwithstanding that the violation has been committed by persons acting in an official capacity”.

The only difference between Article 13 of the ECHR and Article 54 of the Kosovo Constitution consists in the fact that Article 13 takes into consideration violation of rights envisaged in the ECHR, whereas Article 54 speaks of the rights guaranteed in the Constitution and laws of the Republic of Kosovo. Therefore, it is clear that Article 54 of the Constitution of Kosovo has a wider scope of action in relation to the right to access to courts and use of effective legal remedies.

The European Court of Human Rights stipulates, in relation to the right to use effective legal remedies:

“Where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus, this Article must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated.”

The inexistence of an effective legal remedy for the injured party during the pre-criminal phase and investigatory phase, respectively the legal vacuum in the CPC, among other, precludes the injured party’s access to the court and thus disables him from being treated as a crime victim.

As stated above, the party injured by the criminal offence is entitled to compensation from the Crime Victim Compensation Fund, in the event that the perpetrator doesn’t possess sufficient means to compensate the crime. In fact, this clarifies the legal interest of the injured party to enjoy this status in the criminal proceedings, because if they resort to civil proceedings alone they seriously risk failure to accomplish compensation of damages in the event that the perpetrator doesn’t possess sufficient assets to cover such compensation.

Under abovementioned circumstances it is clear that the issue of realization of injured parties’ rights in criminal proceedings comprises a practical problem. The only conclusion that derives from this is that the

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21 See Klass vs. Germany, Judgement of 6 September 1978, paragraph 64.
CPC does not provide judicial protection of the rights of injured parties in pre-criminal and investigatory phases.

4. Conclusions

CPC considerably affirms the procedural position of the injured party, granting it the status of a party in procedure. Also, the Injured Party is entitled to active participation in proceedings in the investigatory phase, which provides him the opportunity to provide an invaluable contribution in the revelation of criminal offences and their perpetrators. However, in order to further advance the position of the injured party, a number of amendments and supplements of the CPC are necessary, all of which aiming to eliminate legal ambiguities addressed in this paper. In addition to the elimination of contradictions, it is necessary for any future CPC amendments to incorporate the right of the injured party to attack decisions of the state prosecutor to reject criminal reports or terminate investigations. This demand is of urgent and immediate nature, as the denial of this right of the injured parties deprives them of the rights guaranteed and granted in Article 54 of the Constitution of the Republic of Kosovo.

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