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UDC 343.122(043.2)

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PARTICIPATION OF THE INJURED PARTY IN SLOVENIAN CRIMINAL PROCEDURE

The historical development of the criminal process has led to the idea of the public nature of the criminal justice system. The view that the state is the injured party in criminal cases evolved to a stage where the public prosecutor was given a monopoly of the criminal charge (Krapac, 1985; Sebba, 1982). Some authors have argued that the victim had, therefore, been “totally forgotten by the penal system” (Sebba, 1982, p. 226). However, in recent decades, the role of the victim of crime is becoming increasingly important (O’Hara, 2005, p. 237). International and supranational organisations, in particular the Council of Europe, the European Union, and the United Nations have adopted various victims’ rights instruments. The most significant European instrument on victims’ rights is arguably the Directive 2012/29/EU of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime (Androulakis, 2014; Buczma, 2013). The Directive grants victims, inter alia, the right to participate in the criminal procedure [1].

The Slovenian legal system provides various possibilities for victims to

participate in criminal proceedings. For this reason, many of the Directive's requirements regarding victim participation had already been met in pre-existing legislation. For example, the existing legislation already guaranteed that any victim of a crime had the right to be heard, the right to legal aid, and the right to reimbursement of expenses [2]. The strong position of the victim in the Slovenian legal system is rooted in the Yugoslav legal heritage. The Yugoslav Criminal Procedure Act of 1976 contained, as Krapac pointed out (Krapac, 1985, 2002), "a whole array of provisions concerning the victims' role in the criminal process", including the victim's right to participate in the criminal procedure and contribute to the procedural material (provide evidence). These provisions were later incorporated into the Slovenian Criminal Procedure Act (CPA) in 1994.

Under the CPA, the victim of a crime may assume different procedural roles. The right to prosecute a criminal offence mainly rests in the domain of public prosecutors and if the criminal offence is subject to public prosecution, the victim may participate in criminal proceedings merely as an injured party. For certain criminal offences the CPA allows victims to institute and conduct the prosecution (thus acting as a private prosecutor), and in some instances, the victim may appear as a subsidiary prosecutor in the case of the dismissal of charges by the public prosecutor [3]. The private and the subsidiary prosecutor exercise the rights of an authorised prosecutor (they have the status of a party to criminal proceedings).

In criminal cases, in which the criminal offence is subject to public prosecution, the rights granted to the injured party include: the right to be present during criminal justice proceedings, the right to inspect the case files, the right to produce evidence, pose questions to the witnesses and experts with the permission of the presiding judge, the right to make a closing argument upon completion of the hearing of evidence, and the right to appeal against the final verdict on limited grounds [4].

Despite the wide range of procedural rights of the injured party, until recently the case law of the Slovenian Constitutional Court (hereinafter: the Constitutional Court) maintained the idea of criminal law as the *ius puniendi* of the state [5]. In 2001, the Court had to decide whether the right to an appeal stemming from Article 25 of the Constitution had been violated by the provision, which had not provided the injured party the right to appeal a judgment of the first instance criminal court [6]. The Constitutional Court answered negatively. Its decisions established that the object of the criminal procedure was (still) a decision on the criminal charges and not on the rights of the injured party. In 2017, however, the Constitutional Court released nothing short of a "revolution" in relation to the understanding of criminal procedure. The Constitutional Court linked the procedural rights of the injured party to the principle of human dignity, and, in a key part of the decision, proclaimed that "a criminal court decides not only on the criminal charges but also on the

interests of the injured party, including civil claims arising from the criminal offence, as well as the interest that his or her personal dignity as the victim of the criminal offence be adequately respected in the criminal proceedings” (Republic of Slovenia Constitutional Court, 2017) [7]. Based on this argument, the Court concluded that the provision of the CPA limiting the injured party’s right to appeal to the costs of criminal proceedings was unconstitutional.

The Court’s decision represents an interesting manifestation of blurred boundaries between criminal and civil law [8]. The criminal proceedings are no longer seen as a matter between the defendant and the state. However, as much as the victim’s interests deserve legal recognition, a too strong position of the victim could interfere with the fundamental principles of criminal procedure, especially with the legitimate interests of the accused [9], by indirectly strengthening the position of the state and other prosecutors (Plesec & Gorkič, 2019). Since the CPA Amendment, which implemented the Constitutional Court’s decision [10], does not provide any precise criteria, the challenge of finding the right balance between the injured party’s right to appeal and the principles of modern criminal procedure seems to be left almost entirely in the hands of the Slovenian judiciary.

As described above, Slovenian criminal procedure provides various possibilities for victims to participate in criminal proceedings. However, some unanswered questions regarding the injured party’s right to appeal and its integration in the modern (Slovenian) criminal procedure still remain. When answering these questions, one must consider that rethinking victims’ procedural rights means rethinking the fundamental principles of our criminal system.

References

1. Chapter 3 (Participation in criminal proceedings) of the Directive 2012/29/EU.
2. See Art. 10, 13 and 14 of the Directive 2012/29/EU.
3. See Art. 19 of the Criminal Procedure Act (CPA).
4. See Art. 165a, 178, 288, 380, 59, 177, 289, 329, 334, 346, 367 of the CPA.
5. See Up-285/97-15 from May 10, 2001.
6. Under the former Art. 367 of the CPA, the injured party could only challenge a judgement with respect to the court decision on the costs of criminal proceedings.
7. See U-I-5/17 from September 14, 2017.
8. The distinction between civil and criminal law was traditionally clear: the state was seen as the injured party in the criminal cases, whereas the victim fulfilled this role only in civil cases (Sebba, 1982, p. 225).
9. See See U-I-5/17 from September 14, 2017, paragraph 40. Similar considerations are to be found in the work of German authors (See, e.g. Kanz, 2017, p. 233; Schünemann, 1999, p. 42).
10. Act Amending the Criminal Procedure Act from March 26, 2019.