

## **KJI NEWSLETTER**

### **January 2006**

This newsletter is published to fully inform the magistrates in Kosovo on the activities of the KJI. This publication is distributed to judges and prosecutors throughout Kosovo. The Monthly KJI Newsletter features articles from KJI Staff relating to issues of interest to judges and prosecutors working in Kosovo.

## **CALCULATION OF PUNISHMENTS**

### **General rules on calculation of punishments according to the Art. 64 of the PCCK\***

***Mr. SALIH MEKAJ, Judge at the District Court in, Pejë/Peć***

The imposition of punishment against the perpetrator who was found criminally liable is the main purpose of the entire criminal procedure. Therefore, the criminal procedure shall commence by verifying the facts which are related to the criminal offence, its perpetrator, verification of criminal liability and guiltiness in order to impose the penal sanction.

Chapter III, the provisions starting from Art 64 up to 73 of the Criminal Code of Kosovo, determine the general rules on calculation, mitigation and aggravation of punishments by determining the limit of mitigating and aggravating circumstances according to the Law. These provisions define also the conditions on imposing the punishment of the unification of criminal offences and calculation of punishments. However, during this presentation we will mainly focus on the rules applicable for calculation of the punishment according to the Art 64 of the PCCK.

At the beginning of this session is worthwhile to mention the issue of language formulation of the legal text of this provision which is not consistent and doesn't provide clear clarification of its purpose, because it provides that the Court shall determine the calculation of punishment for the criminal offence. But such determination shall be done by the law drafter having into consideration the abstract danger of the society that is posed by the criminal offence. In the same time the Law provides for that the Court shall determine the limit of the punishment for the criminal offence. As a result of this matter the function of the Court is to determine the punishment for the certain criminal offence within the limits provided for by the law.

Art 64 paragraph 1 of the PCCK determines the general rules on calculation of punishment. Meanwhile paragraphs 2 and 3 of the same Article provide for the conditions for calculation of the punishments of the repeated criminal offences and punishments of fine.

The determination of the general conditions for calculation of punishments according to the Art 64 paragraph 1 of the PCCK, aiming to determine the exact conditions and circumstances based on which the Court shall consider its determination, in order to respect the implementation of the principle "*nulla poena sine lege*", enabling the individualisation of the punishment based on circumstances corresponding to the concrete case law, the personality of the perpetrator and to avoid the arbitrariness of the court on determination of the punishment. Therefore, this legal provision bounds the court to determine the punishment within the limits provided by the law, by considering the purpose of the punishment and all circumstances that may have an impact on mitigation or aggravation of the punishment (mitigating and aggravating circumstances).

The Court shall ground its decision on the three aforementioned factors when calculating the punishment.

However, the determination of the punishment within the limits provided for by the law, doesn't always mean the absolute rule, because the Court is authorised to make an exception from this principle by imposing the mitigating or aggravating punishment for the certain criminal offence, if the conditions provided for by the Art. 66 and 68 para.2 of the PCCK, in relation to the mitigation of the punishment, or Art 70 of PCCK for aggravating of the punishment are met.

Both cases contradict to the principle of legality on determination of the punishment. What implies that the court is not always bound to the minimum and maximum of the punishments determined by the Law.

The purpose of the punishment is one of the three fundamental criteria's for calculation of the punishment, defined as preventive measure by Art 34 of PCCK for the perpetrator of the criminal offence and for his/her future rehabilitation, as well as preventive measure producing effectiveness for other potential perpetrators. So, the purpose of fundamental criteria for calculation of the punishment in general contains the bases and punitive policy and as such shall be assessed by the Court when calculating the certain criminal offence always aiming to protect the social values by mitigating or destroying the ruts of the crime.

Lately the assessment of the circumstances which have an impact on mitigating or aggravating the punishment, one of the main criteria on calculation of the punishment is the individualisation representing the major problem for the Courts in decision making for the certain criminal matter. This situation could be because the Criminal Code of Kosovo that provides for in general manner the circumstances on which the court shall asses and calculate the punishment, without separation of mitigating and aggravating circumstances.

Art 64, paragraph 1 of PCCK provides for that the Court shall determine the punishment of the criminal taking into the consideration the mitigating and aggravating circumstances in particular: 1). the degree of the criminal liability; 2). the motives for committing the act; 3). the intensity of danger or injury to the protected value; 4). the circumstances in which the act was committed, 5). the past conduct of the perpetrator, 6). the guilty plea, 7). the personal circumstances of the perpetrator of his or her behaviour committing the criminal offence.

Therefore, this provision results that the obligation of the court is to verify all mitigating and aggravating circumstances. The assessment of only several circumstances cannot be the base for the determination of the punishment. Those facts which serve as main base for the existence and inexistence of the respective circumstances are the decisive facts and the same ones shall be confirmed during the administration of the evidence, same as other relevant facts related to the existence of the criminal offence, its perpetrator, confirmation of the criminal liability and guilty plea. The wrong assessment of the facts leads to the annulment of the first instance decision, if the decision is animated in this direction. For the illustration of this I will mention one of the judgements rendered by the District Court in Pejë/Peć. P.no.21/03 of 16<sup>th</sup>.05.2003, among other circumstances, the court assessed as mitigating circumstance “the limited possibilities of the accused to have a fair trial”. This circumstance was not supported by any proof, but such conclusion was based on common sense of the Court during the hearing. Therefore, the Supreme Court of Kosovo in deciding based on the appeal renders a decision no.272/03, on 17<sup>th</sup>.12.2003 abrogating previous decision, reasoning it that in order to have the existence of this fact is necessary to have the opinion of the neuropsychiatry expert and conduction of the expertise.

In relation to these problems and ones actual in the judicial practice in cases of assessing circumstances on determination of the punishment, each circumstance shall be assessed separately as provided for by the law drafter.

The lack of legal determination on defining which are the mitigating and which aggravating circumstances often causes confusion in the courts practice, however, according to the implementation in practice, conclusion could be rendered that each one of these circumstances of the committed act can be mitigating aggravating circumstance.

In addition to I will give some concrete examples on how the courts render judgements without confirmation of the facts related to the existence or inexistence of these circumstances and without analytic assessment, but only by numerating them, which is insufficient for determination of the punishment.

One of the judgements rendered by the Municipal Court in Deçan P.no.70/2004, of 20<sup>th</sup>.12.2004 is stated that the court based its decision on mitigating and aggravating

circumstances. The aggravating circumstance was not identified, while the mitigating were taken based on that the defendant was not previously convicted nor prosecuted, his economic and family state, his elderly age and his behaviour during the main hearing. So, based on such enumeration of the respective circumstances the court imposed the punishment of 10 month imprisonment, its execution was conditioned if the perpetrator re-offends within a period of 1 (one) year.

Other judgement rendered by the Municipal Court in Gjakova/Djakovica P.no.225/03 is stated that the decision was based on determination of the type and weight of the punishment, considering all the mitigating and aggravating circumstances the Court found that the defendant was not previously convicted, he is a family head and had good behaviour during the trial.

Meanwhile, another of the judgements rendered by the Municipal Court in Klinë/Klina P.no.70/05 stated that when the court determined the punishment took into the consideration the circumstances provided for by Art 41 of Yugoslavian Criminal Law as mitigating circumstances were considered the average economical state of the defendant, and the fact that he was not convicted previously, while as aggravating circumstances were considered the represented danger for the society the degree of the criminal offence and its consequences.

Amongst these examples, and which are not the only ones we can conclude that the court in many cases had after difficult application of the procedure on administration of the evidence related to the confirmation of the existence of a criminal offence, the implementation of the circumstances on determination of the punishment are dealt with carelessness, without being assessed nor sufficiently considered, but only by paraphrasing the circumstances which have an impact in determination pursuant to the Art 64 para.1 of PCCK.

### **1. The degree of the criminal liability**

When speaking on behalf of the degree of criminal liability as such circumstance can have an impact in determination of the punishment regardless of it is a mitigating or aggravating circumstance, the Court shall pay special attention to this circumstance, because the penal sanction can be imposed only against the persons criminally liable, who act with intent or negligence. Thus, the degree of the criminal liability of the perpetrator is dominant circumstance for determination of the punishment.

If there is no legal base excluding the criminal liability, or enabling the imposition of the mitigating punishment lower than the one provided by the law, at this stage the Court is authorised to asses the degree of the criminal liability and impose the mitigating or aggravating punishment.

Thus, in order to clarify the manner for assessing the degree of the criminal liability, I will present one example from the judgement rendered by the District Court in Pejë/Peć P.no.277/04. In this case the court assessed the circumstances which can have an impact on determination of the punishment as it follows: “ ... based on the expertise and the opinion of the expert of the respective field confirming that the defendant at the time of the commission was aware of the importance and the punishment, the possibility to control his actions was limited because of his mental structure but not in that extend. The assessment of the Court related to this case was based on the professional psychiatric and psychological expertise of his personality, through which expertise was found out that the defendant belongs to the group of persons with under average intellectual capacity, limited disorder of his personality of the psychopathically. This manner of the assessment for the degree of criminal liability, was just, the assessment done by the court doesn't exclude the criminal liability of the defendant, either mitigates his liability for the committed act, however in any case shall be considered the mitigating and aggravating circumstances.

The degree of criminal liability can be considered as a circumstance for calculation of the punishment from the guilt point of view. Therefore, at the phase of the assessment of guilt the court shall assess whether the criminal offence was committed by intent or negligence, then whether it was direct or eventual intent, was the negligence intentional or unintentional. Within these forms of intents can be defined the degree of criminal liability all depending on whether the defendant was ready, decisive or brutal to commit the act. In one case the assessment of the District Court in Pejë/Peć was aggravated circumstance because of the fact the defendant murdered the victim with automatic gun shouting 21 bullets, after the victim fell on the ground the perpetrator shout the victim 4 times more and after he left the crime scene he shout in the air few times. The Court assessed this fact as criminal offence of intent, demonstrating cold blood and direct intent for committing the criminal offence. The issue of negligence shall also differ from the intentional negligence that shall be assessed as aggravated circumstance, while the assessment from different angle the unintentional negligence may have different mitigating features.

## **2. Motives for committing the criminal offence**

The motive for committing the criminal offence can be assessed as mitigating and aggravating circumstance, depending on the concrete case. Thus, the motive can be assessed as mitigating circumstance if the perpetrator is a thief, has committed a theft with purpose to secure some money for a family member who is ill, but, if this offence was committed with purpose to get some money to buy alcohol or drugs; in this case the motive shall be assessed as an aggravated circumstance. The motives can be of different nature the law drafter didn't specify them, but the same ones were assessed from the ethical point of view.

### **3. Intensity of danger or injury to the protected value**

This circumstance in fact it presents intensity of the consequences resulting from the commission of the criminal offence. Those consequences are constitutive element of the criminal offence, but sometimes they are of privileged and qualified nature. In the practice often we face dilemmas regarding the definition of the criminal offences element, when is a qualified and when privileged element, and when this circumstance shall be assessed in determination of the punishment. The intensity of danger or injury to the protected value often is an abstract possibility, but in case of determination this circumstance can be assessed in abstract manner. It shall be concert and verified on which extend the protected values posed to a danger. For example the criminal offences of fraud pursuant to Art 261 of PCCK, as a protected object it has the wealth of other persons without determining the degree either the type of the value, while paragraph 2 of the same provision provides for that the caused damage exceeding the 15.000 € it consists an qualifying element, but if the value of the damage is double than 15.000 € at this stage this is qualified as aggravated circumstance, without danger. Or when criminal offences of holding of possession, under control possession or use of unauthorised weapons, where the protected value is determined in abstract manner, but the court when deciding shall consider the mitigating circumstances that the defendant had in his possession only a pistol and five unloaded bullets, meanwhile the same circumstance shall be assessed as aggravated when the same pistol is loaded during the time he is drinking alcohol.

### **4. The circumstances in which the criminal offence was committed**

These are frequent circumstances and is impossible do define them concretely, but the issue of the free assessment of the Court on at what extend shall these circumstances be assessed. They can be imposed against the perpetrator, and in this case will have personal character, ex. the impact on the perpetrator, contribution of the victim, then the manner and place of commission, the instruments, relationship between the perpetrator and the victim, use of certain reports etc. according to these circumstances the court is bound to asses the facts which correspond to the concrete case and the same to be taken in the account in case of calculation of the punishment. Therefore, under such mitigating and aggravating circumstances, and in case of the commission of the criminal offence for many persons they consist mitigating and aggravating circumstances in such case the court shall asses their impact separately when the determination of the punishment is done. Example: if the parent has committed the criminal offence of unauthorised production of danger drugs and psychotropic substances in quantity of marihuana with purpose to sell these substances, and in this activity he engages juvenile of 18 years old therefore, such co-perpetration consists an aggravated circumstance for the parent, while for the child is mitigating circumstance. However, since we have a child abuse by the parent and in other way the child custody

for the activities of his parent. In relation to these circumstances many examples can be presented.

### **5. The past conduct of the perpetrator**

The past conduct of the perpetrator can be as well a mitigated or aggravated circumstance all depending on the character of the perpetrator. Thus, if the perpetrator endangered the traffic safety in the past and his conduction was consistent with the social norms and is not in contradiction to the law, there is no doubt that the purpose can be achieved by mitigating punishment. Meanwhile, in case when this person has committed a criminal offence, but in his past he committed several traffic minor offences, because he has driven in intoxicated state etc, at this stage we are speaking about his conflicts and problems from the past, so his previous behaviour shall be assessed as aggravated circumstance.

In this case shall make a difference between the criminal offence and recidivist person, since such circumstance shall be assessed as aggravated circumstance.

### **Entering the guilty plea**

The fact that the accused has pleaded guilty should always be assessed as a mitigating circumstance. The refusal to enter in the guilty plea can not be considered as grounds for imposing more grievous punishment.

Criminal code of Kosovo has expressly foreseen this circumstance as a result of changes and adoption of the criminal legislation with the protection of human rights. The Criminal Procedure Code of Kosovo has foreseen a special criminal procedure for the perpetrators of criminal offences who plead guilty at some stage of the procedure for the criminal offence that they are charged with.

Article 315 of the Criminal Procedure Code, determines the conditions for entering in a guilty plea, therefore not every guilty plea is assessed as a mitigating circumstance for the accused. When the guilty plea has been entered in consistency with the provisions of this code, this would than represent a beginning of the rehabilitation process of the perpetrator and will imperatively have privileging effects on the accused. In this context it is worthwhile to mention that if the guilty plea **was not** entered in accordance with the provisions of criminal procedure code, the court will **not accept** it and will continue to verify the facts and criminal liability of the accused and the entering of guilty plea in this manner shall not be considered as a mitigating circumstance.

Finally, with respect to calculating the punishment, it is important to know at what stage of the procedure the guilty plea was entered. If it has been entered during the examination by the police or it has been denied during the whole procedure until the main hearing as foreseen in Article 358 par 1 of PCPCK. The guilty plea shall

nevertheless be considered as a mitigating circumstance whenever entered, from the moment of commission of criminal offence until the main hearing.

### **7. Personal circumstances of the perpetrator.**

Personal circumstances of the perpetrator may also be considered as mitigating or aggravating circumstances these circumstances include: family, social, health, age level of education and other circumstances. Just for illustration I will mention the fact that the education level is considered as mitigating or aggravating circumstance based on the personal qualities of the perpetrator. If there is a criminal offence of forging the drivers license by an uninterested person and by a person that has a law degree this should be considered as aggravating circumstance, whilst if the offence was committed by an uneducated person this is considered as aggravating circumstance.

### **8. The behavior of perpetrator after the commission of criminal offence**

The conduct of perpetrator after the commission of criminal offence is a very important circumstance for calculating the punishment. This circumstance may be mitigating if for example the perpetrator of criminal offence –bodily injury- after the commission of criminal offence, offers assistance to the victim by sending it to the hospital, and than if it bags for pardon of the victim, if it compensates the damage caused, but it could also be an aggravation circumstance if for example, the perpetrator of criminal offence of –rape- as in Article 193 of PCCK takes the close of the victim by leaving the victim naked for the purpose of degrading the dignity of the victim.

### **Calculation of the punishment for the recidivists**

When imposing a punishment for the recidivists the court should always assess whether the same criminal offence was committed, whether the motives for commission of the offence the time length since the first criminal offence was committed.

As mentioned above recidivism is always considered as aggravating circumstance, but it should be distinguished whether we are dealing with recidivist *speciale* or we are dealing with another type of offence. The identity of the offence and its motives always represent a possibility for this offence to be considered as an aggravating offence as a contrast with other criminal offences. The time passed since the commission of the previous offence could be more favorable to the accused.

### **Calculation of punishment by fine**

When calculation the punishment by fine, besides the circumstances foreseen in par 1 of Article 64 of PCCK, the court is authorized to also assess the circumstances that are

related with the economic situation of the perpetrator, so that the punishment by fine achieves the desired aim, if should be affordable and harmonized with the possibilities of the perpetrator of criminal offence.

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*\*This material was presented in the seminar held at KJI in November 2005.*

## **Project activities January 2006**

### Workshop on Civil Law (Family Law)

On 17 January 2006 KJI held a Workshop on the aforementioned topic for the judges trying Civil Law Cases. Considering the expected changes in the Family Law, KJI aims to facilitate the harmonization of the judicial practice on cases concerning dissolution of marriage under the applicable law in Kosovo as well as on International matrimonial issues. Distinguished legal professionals from all over Kosovo participated at the Workshop as trainers and experts. The Workshop took place at the KJI premises in Prishtinë/Pristina. Thirty two participants attended the Workshop. Thirty judges were of Albanian ethnicity and two were of Serbian ethnicity.

## **Forthcoming events**

### Seminar on Judicial Ethics

*Target group: judges and prosecutors from Gijlan/Gnijlane region*

KJI will continue to organize training sessions in all the five regions in Kosovo focused on the practical aspects of judicial ethics. The training aims to give a deeper look into the position of the judge as a single decision maker or as a decision maker in the panel. The seminar will highlight the responsibility of the judge in regard to the Rule of Law and social order in the context of the newest amendments of the Codes of Ethics and Professional Conduct.

*Planned dates: 2 February 2006, Gijlan/Gnijlane*

### Induction Training for Lay-Judges

*Target group: Lay Judges*

In February 2006 KJI will conduct session of the specialized training programs for lay-judges. The first one-day session will be held in Prishtinë/Pristina. The following sessions will be organized in all the five regions in Kosovo. The training program gives an overview on the functions and responsibilities of the lay-judges in both criminal and civil procedure as well as main ethics related aspects of the position of lay-judge.

*Planned date: 7 February 2006*

Seminar: Combating trafficking in human beings.

*Target group: prosecutors and judges hearing criminal cases.*

The Seminar aims to examine some of the practical aspects of the combat against the trafficking in persons in Kosovo. The programme of the Seminar would be focused on the development and specific characteristics of the Trafficking in Persons as a phenomenon, as well as on the practical aspects of the investigation, international cooperation, and protection of witnesses in such cases.

*Planned date: 10 February, 2006*

Workshop: Labour law

*Target group: judges hearing labour cases*

The Workshop will provide the participants with relevant discussion on the most common problems in regard to the labor and employment relations. Different aspects of the labor and civil service legislation in Kosovo such as disputes arising from labor or employment relations will be discussed. Special focus will be given to the activities of the Internal Oversight Board and its jurisprudence on employment related cases.

*Planned date: 14 February, 2006*

Workshop on Cooperation in the pre-trial procedure

*Target group: Criminal Law judges, public prosecutors and police officers*

In February KJI will organize a Workshop focusing on the competences of the different bodies during the pre-trial procedure. The aim of this training is to initiate joint discussions between the prosecutor and the judicial police on their mutual relationship, so that they can take necessary instructions on improving their cooperation and harmonizing the standpoints in light of the new codes and practice that was used until now. During this workshop special focus will be given to the role of the courts in enriching the relationship, harmonization and improvement of the cooperation between the public bodies during the initial stages of the proceedings, as crucial acts for heaving a proper flow of the criminal judicial procedure.

*Planned date: 17February, 2006*

Workshop on Civil Matters – Compensation of Damages

Due to the demand coming from judges trying cases under the contested procedure, KJI designed training on the aforementioned topic. The general actions that are related to the material and non-material damage as a source of obligations will also be discussed. These and other issues mainly related to the level of remuneration for the damage, responsibilities and types are foreseen to be the subject of this Workshop.

*Planned date: 23 February, 2006*

### Workshop on PCPCK: Simulation of Trial

*Target group: Judges hearing Criminal cases and Prosecutors*

The simulation of a trial has proven to be one of the most efficient and preferred by the magistrates forms of judicial training, held by KJI. Upon a request from the judges and prosecutors from Prishtinë/Pristina region, KJI scheduled the aforementioned session as a simulation of the entire criminal trial procedure. Moderators of the session will be trainers from KJI, District Court President and District Public Prosecutor from Prishtinë/Pristina region.

*Planned Date: 21 February*

### Workshop on PCPCK: Detention, detention of persons with mental incapacities

*Target group: Judges hearing Criminal cases and Prosecutors*

The aforementioned topic appeared to be a challenge in the practice of the Kosovo judges and prosecutors. The KJI scheduled a Workshop to meet the demand for training of Kosovo magistrates who face multiple difficulties in applying the PCPCK in regard to Detention and particularly detention of persons with mental incapacities. One of the most experienced local trainers will be delivering the training session and facilitating the discussions. The Workshop will take place at the KJI premises in Prishtinë/Pristina.

*Planned Date: 28 February 2006*