Kosovo Judicial Institute
Instituti Gjyqësor i Kosovës
Kosovski Institut za Pravosudje

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

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Miftar Jasiqi,
Judge at the Supreme Court of Kosovo

PUNISHMENTS – THE PURPOSE AND TYPES OF PUNISHMENTS

Cases from the court practice on the execution of imprisonment punishment pursuant to Article 38 of Provisional Criminal Code of Kosovo (PCCK).

The measures that are undertaken by the society against the perpetrators of criminal offences in the criminal law are called criminal sanctions. Criminal sanctions may be imposed only on the perpetrators of criminal offence through which the society protects itself from criminality it protects the most important values of an individual and society.

Only the criminal sanctions that are foreseen by the law may be imposed on the perpetrator of criminal offence in the moment of commission of criminal offence.

Criminal sanctions against perpetrators of criminal offences are restrictions of liberty or some other rights, they may be imposed only by the court in a procedure foreseen by the law.
Our criminal law incorporates in itself multiple systems of criminal sanctions and Article 3 of PCCK provides for 4 types of criminal sanctions:

-principal punishments
-alternative punishments
-accessory punishments
-judicial admonition

During my short presentation I shall try to focus my attention in the:

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The purpose and types of punishments

The purpose of punishment in our criminal law has been determined in the provisions of Article 34 of the Provisional Criminal Code of Kosovo, which provision provides for the following purposes of punishment:
-to prevent the perpetrator from committing criminal offences in the future and to rehabilitate the perpetrator;

-to deter other persons from committing criminal offences.

Pursuant to this provision, the punishment serves first of all as an individual prevention that aims to prevent the perpetrator from committing criminal offences in future either to intimidating or improving him or her as a person by changing the negative behavior, and secondly to have an influence in other persons so that they will refrain from commission of criminal offences.

Article 35 of PCCK provides for three types of punishments:

-principal punishments
-alternative punishments and
-accessory punishments

The principal punishments are foreseen by the PCCK as punishments that may be imposed as the main measure against the perpetrator of criminal offence, which means that these punishments may be imposed alone against the perpetrator of criminal offence, irrespectively of the other types of punishments. The provisions of Article 36 of PCCK provides for the following principal punishments:

-punishment of long term imprisonment
-punishment of imprisonment and
-punishment of fine

Article 41 of PCCK provides for alternative punishments. The lawmaker has foreseen the possibility of imposing a community service work whenever a suspended sentence is imposed on the perpetrator.

There is exclusion to the rule that the principal punishment is the main measure of punishment, the exclusion is with the punishment of fine which may be imposed as both the principal and accessory punishment. The punishment of fine is imposed as principal punishment when the law provides that the punishment of fine as the only possible fine, whereas this punishment may be imposed as accessory punishment when the law provides that for the certain criminal offence the punishment should be imprisonment and fined punishment. When the imprisonment punishment or punishment of fine are foreseen for one criminal offence than the punishment that we impose is considered as principal punishment. Pursuant to Article 67 par 1 sub par 6 of PCCK the punishment of fine may be imposed for other criminal offences for which this punishment is not foreseen by law – when there is a mitigation of punishment, when the punishment is not foreseen as the mildest measure of the punishment.

These obligations represent the severest form of the measure which is imposed on a perpetrator of criminal offence, since this type of measure is related to the restriction (deprivation) of liberty which is one of the most fundamental rights, for certain period of time or as a measure against the economy of the perpetrator. Criminal Code of Kosovo acknowledges two types of punishment of imprisonment which are punishment of long term imprisonment (Article 37) and punishment of imprisonment (Article 38).

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PUNISHMENT OF LONG TERM IMPRISONMENT

This type of punishment is foreseen in Article 37 of the Provisionsl Criminal Code of Kosovo and it is there as a result of abolishment and replacement of capital punishment (death sentence) which was foreseen in the previous

criminal law of Kosovo. This type of punishment pursuant to Article 37 par 1 of PCCK is foreseen for the aggravated criminal offences and is imposed on the time length from 21 to 40 years of imprisonment and this punishment can not be imposed as the only

principal punishment for a criminal offence. For example Article 147 par 1 of PCCK for a criminal offence of Aggravated murder expressively says that: a person who deprives a child from life or uses other forms laid out in sub paragraph 1 through 12 is punished with at least 10 years of imprisonment. This indicates that this punishment is provided only as alternative to the imprisonment punishment and it leaves the possibility with the court to choose from them when calculating the punishment.

The appeal against the judgment for imposing the long term imprisonment is allowed and it should be made in the third instance, this indicates that when we are dealing with long term imprisonment the appeal against the decision of the second instance may be filed with the third instance before the special panel of the Supreme Court of Kosovo (Article 430 of PCPCK) where another judicial decision is rendered. Unlike the punishment of imprisonment which is imposed on calendar years, months and days as provided for in the provisions of Article 38 of PCCK, the punishment of long term imprisonment although this is not provided for by the law it should be imposed only on full calendar years.

PUNISHMENT OF IMPRISONMENT

This type of punishment is foreseen for the vast majority of criminal punishments pursuant to Article 38 of PCCK. The punishment of imprisonment depending on what the law provides may be imposed as principal punishment and can also serve as secondary punishment and can be imposed together with the punishment of fine. Pursuant to the Provisions of Article 38 of PCCK the punishment of imprisonment may not be imposed with less that 15 days or over 20 years.

PUNISHMENT OF FINE

This type of punishment is one of the punishments against the economy of the accused. This punishment is mainly imposed for light criminal offences. Unlike the punishment of imprisonment the punishment of fine means that the punished person should pay certain amount of money for the commission of criminal offence to the benefit of the society.

The purpose of punishment of fine is to clarify for the perpetrator that he or she has committed an illegal criminal offence and this is why they need to pay. When calculating this punishment the court should always take into consideration the overall material situation of the perpetrator, so that every perpetrator feels the gravity of the punishment equally.

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When speaking about the short term imprisonment for example three months, the law provides for a possibility of replacing the punishment of imprisonment with punishment of fine or with community service work upon heaving the consent of the perpetrator. (Article 38 par 3 of PCCK).

The provisions of Article 38 par 8 of PCCK – punishment of imprisonment – allows

the court to impose any of the punishments provided in this article and this fact has given rise to many dilemmas in the court practice all over the country, the judges have problems establishing what kind of punishment is mentioned in this provision and who is competent to impose or replace such punishment.

There are different opinions on this and this provision may have been subject to wrongful use and was miss interpreted because of unclear content in Albanian language text.

Article 38 par 3 of OCCK in Albanian has the following content "when the court pronounces a punishment of imprisonment up to three months the court may order that the punishment of imprisonment be replaced with a fine or a community service work upon the consent of the perpetrator. Whereas the text in Serbian language has the following content: When the court pronounces a punishment of imprisonment of up to three months it may order that the punishment of imprisonment be replaced with a fine or upon the consent of the perpetrator with community service work. The text in Serbian is similar to the one in English.

The content of the text in question indicates that there are three preconditions for imposing the punishment according to this legal provision:

The first condition is related to the pronunciation of punishment with maximum three months.

The second condition is related to the possibility that was left with the court to decide which is to replace the punishment of imprisonment with fine.

The third condition was also left with the court to decide whether they want to replace the punishment of imprisonment with community service work, nevertheless this can be done only upon a consent by the perpetrator.

The question that arises here is; why has the lawmaker foreseen three alternatives instead of one because as it was mentioned earlier in this text the punishment of fine may be imposed as both special and alternative punishment for certain criminal offence. There is a prevailing opinion related to this issue that this provision speaks only of the punishments which can not be further mitigated under the minimum sentence foreseen by the provisions for mitigation of punishments – Article 66 and 67 of PCCK.

This opinion is justified by saying that if the court had the legal possibilities to pronounce the punishment of fine there wouldn't be a need to initially impose the punishment of imprisonment in order to than replace it with fine, but the court would immediately impose the punishment of fine.

Another dilemma that was noticed in practice is who may impose and when may this punishment be imposed.

We are aware that our courts work without a certain criteria in different manners when applying this provision.

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In some cases this punishment and its replacement with another punishment is imposed by trial panels in the judicial trial, and in some other cases the replacement of punishment of imprisonment imposed by the trial panel upon the request of the accused is done by the extra-trial panel or this is done in the execution procedure.

When analyzing the content of Article 38 par 3 of PCCK it comes out that based on this legal provision it is only the trial panel which is competent to render a decision within the session and nobody else after the session, this is based on the provision itself which states in part "when the court pronounces a punishment of imprisonment of up to three months it may order that the punishment of imprisonment be replaced with a fine or upon the consent of the perpetrator with community service work. The law does not foresee that the replacement of punishment of imprisonment may be replaced later on, with request by the accused, nor does it foresee the possibility of granting a consent of the accused for imposing community service work later on after the judicial session as it was the case in some of the courts. The opinion that I just stated prevails in the Supreme Court of Kosovo and it is also shared by Prof.Dr. Ismet Salihu.

There is a lot more to be said in relation to this topic nevertheless I think that this issue will be supplemented and enriched further during the discussion.

Some examples from the court practice.

Forthcoming events
September 2006

Seminar on European Convention on Human Rights

Target group: judges and prosecutors from Pristina region. KJI will organise a training On the European Convention on Human Rights in Pristina region. This will be a two day session which aims to give a detailed overview on the implementation of provisions of Article 2 and 3 of the Convention with the purpose of increasing the knowledge of Kosovar judges and prosecutors in relation to the case law of the European Convention on Human Rights. Four national trainers who have been certified by the Council of Europe will act in t he capacity of trainers in this session.

Planned date: 04 and 05 September 2006.

Practical skills training: Simulation of a trial

Target group: civil judges

KJI is planning a practical simulation of a trial for civil judges from the region of Gjilan. A problematic case from the court practice will be selected for the purpose of this simulation. The participants will discuss the problems related to the civil procedure in the cases similar to the selected case.

Planned date: 07 September 2006

Workshop - Confiscation and the procedure of confiscation

Target group: judges and prosecutors

The main purpose of this workshop is to present and analyse the problems of the judicial practice through cases from the court practice that are related to the confiscation and the procedure of confiscation.

Planned date: 12 September 2006.

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Workshop on Code of ethics

Target Group: judges and prosecutors

Within the scope of its training activities throughout the regions of Kosovo KJI will organize a workshop on the Code of Ethics. This time the beneficiaries of this training will be judges and prosecutors from Mitrovica Region. The purpose of this training will be to give a detailed overview on the experience and practice where the independence of a judge may be worrying. The training will focus on the position of a judge as individual decision maker and as decision maker in a panel.

Planner date: 19 September 2006

Simulation of a trial – Criminal field

Target group: judges and prosecutors

Simulations of trials from the criminal field have been organized in different regions in Kosovo, this time such training will be organized in Prizren region.

A case study from the court practice will be selected for the purpose of this training, this case will contain a lot of problematic issues related to the difficulties which are encountered by judges and prosecutors from Prizren region.

Planned date: 21 September 2006

Seminar – Investigation of corruption related criminal offences

Target group: judges and prosecutors

In cooperation with the Council of Europe KJI is planning to relies a seminar related to investigation and hearing of the corruption related criminal offences. It is envisaged that during the work of this seminar there will be international experts with vast experience in this field in the capacity of trainers who will pass their knowledge into participants.

Planned date: 22 September 2006

Seminar for lay judges in Peja region

Target group: lay judges

In accordance to its mandate KJI is organizing trainings for lay judges in the regions throughout Kosovo. This time training for lay judges will be organized in the region of Peja. The training will focus on the practical aspects of the procedures in criminal and civil fields, including some aspects of the Code of Ethics.

Planned date: 26 September 2006

Workshop – the procedure for announcing the missing person dead

Target group: civil judges

Taking into consideration the general post war situation, the huge number of missing persons and the reflection of this issue in property relationships the non-contested procedure provides for conditions which have to be met for a missing person to be announced as dead. These and other issues foreseen in the legal provisions elaborated through case studies from the court practice will be subject of discussion during his workshop.

Planned date: 28 September 2006

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