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CALCULATION OF PUNISHMENT, EXECUTION AND ITS PURPOSE

1. CALCULATION OF PUNISHMENT

By the **calculation of punishment we imply setting the type and the degree** of the punishment for the perpetrator, in order to award him/her the type and the degree of the punishment which would correspond to the weight of the criminal offense and social danger of the perpetrator by which the purpose of the punishment would be achieved the best.

Kosovo Criminal Code envisages the degree of punishment for every specific criminal offense, thus the highest and the lowest threshold of the punishment which could be awarded to the perpetrators. To set the degree of the punishment, the lawmaker starts from the social danger that the concrete criminal offense represents, to prevent the perpetrator from committing criminal offenses in the future, to provide for his/her rehabilitation and to refrain other people from committing criminal offenses.

Article 64 of the KCC recognizes the right of the court to take into account the purpose of punishment when setting the degree of the punishment, all circumstances affecting mitigation or aggravation of the punishment (mitigating or aggravating circumstances), especially the degree of criminal liability, motives that the criminal offense has been committed with, the intensity of endangering or damaging the protected value, circumstances under which the criminal offenses are being committed,

previous behaviour of the perpetrator, acceptance of guilt, personal circumstances of the perpetrator and his/her behaviour after committing a criminal offense.

Besides the punishment with the long-term imprisonment, the lawmaker has also envisaged the opportunity of awarding the punishment by fine, to award this type of punishment the court must hereby take into account financial situation of the perpetrator especially the amount of personal income and other income, his/her wealth and debts.

The Criminal Code envisages also alternative punishments for the same criminal offenses, among which the court has the choice of selection to award against a certain individual, for which preliminary legal conditions must be met in accordance with the law. The Code also recognizes the right of the court to award additional punishments to the perpetrators of criminal offenses.

To award the punishment, it should be characterized by the social benefit of the punishment and its individualization.

Social benefit of the punishment is related to the effect of the punishment in a concrete case, if the type of punishment awarded is the most suited for the concrete case. The benefit requires proper individualization of the punishment that the court will award to the defendant, by which it will achieve the purpose of the punishment. The suitable punishment not only prevents further criminal activity of the perpetrator, but it also extends its effects in other parts of the society, which means it refrains other individuals from committing criminal offenses.

Individualization of the punishment is the execution of punishment on the basis of provisions envisaged in the criminal offense, within the constraints envisaged by the law as well as in compliance with the character and the degree of social danger of the criminal offense and its author – perpetrator, the degree of guilt considering mitigating and aggravating circumstances which would effectively influence the re-education of the perpetrator, which means the punishment is to be adapted to the criminal offense and its perpetrator. This basic requirement of individualized punishment is the

observation of the principle of legality, which means that when awarding the punishment, the court has the obligation to take into account provisions of the general part and special part of the Kosovo Criminal Code, based on the principle *nullum crimen sine lege*, which means that an offense cannot be considered as a criminal offense if it is not envisaged in the law beforehand, as well as it has to be based on the principle *nulla poena sine lege* which means that no punishment can be awarded unless it has been envisaged in the law beforehand.

In Article 65 of the Criminal Code, in paragraph 1 it is expressly said that the perpetrator is awarded and envisaged punishment for the committed criminal offense, whereas mitigated or aggravated punishment may be awarded only according to the conditions envisaged by the Code, which means that in accordance with this paragraph, the principle of legality *nulla poena sine lege* consists of the forbiddance to award a mitigated or aggravated punishment unless that opportunity is envisaged in the Criminal Code.

Also the principle of legality of awarding the punishment respectively setting the degree of punishment due to its specific nature was regulated in a specific way with regards to the assistance in committing the criminal offense, criminal association, attempt, for which the awarded punishment must not be higher than three thirds of the maximum punishment envisaged for that criminal offense.

It is necessary that there is a criminal offense in order for the court to award the punishment. So that in actions undertaken by the individual there must be elements of a criminal offense figure, which means that awarding punishment against an individual for the offense which does not contain objective and subjective elements which according to the law establish the specific criminal offense figure is a violation of the law and at the same time is a violation of the convicted person's rights, the rights which are guaranteed by the European Convention.

When awarding the punishment, the court must take into account the unlawfulness of the concrete offense as well as the social danger of the offense. So for the criminal offence to be punishable there must be elements

of a criminal offense figure as set in the law, but we have the cases when there are elements of a criminal offense figure spelt out in the law, but because of its minor importance, its danger is insignificant due to its nature or its weight, lack of harmful consequences which are minor, the circumstances under which the criminal offense has been committed, low degree of criminal liability of the perpetrator or due to personal circumstances of the perpetrator, in the concrete case although it may contain features of the criminal offense as envisaged by the law, such offense is not a criminal offense.

There are cases when individuals committing criminal offenses under the conditions envisaged by the law, concretely the actions of individuals committing criminal offenses from the legal provisions such as in cases of necessary protection -Article 8, Extreme necessity - Article 9, irresponsible individuals Article 11, shall be considered as not to have committed the criminal offense respectively their actions do not represent a criminal offense.

In individualizing the punishment, important is general and special prevention as the purpose of the punishment. The extent of the punishment awarded by the court must be capable of rehabilitating and preventing the perpetrator from committing criminal offenses in the future, as well as at the same time influence other individuals in refraining them from committing criminal offenses.

Advantage to the punishment individualization has the social danger of the offense which is determined by the subject, which is related to social relations affected by it, as well as the degree of social danger of the concrete criminal offense. The evaluation of these occurred circumstances, during or after the criminal offenses being committed, can show a higher or lower danger of the criminal offense. To evaluate the degree of the social danger of the concrete criminal offense, the consequences of the socially dangerous criminal offense must also be taken into account. Damage inflicted by the criminal offense affects the degree of social danger of the criminal offense and as a result it affects the degree of punishment as well.

In formal criminal offenses where the consequence is not required to take the criminal offense as committed, the importance of the inflicted damage

is taken into account, proportions of damage that could have been inflicted as well as higher or lower chances of inflicted consequences. To determine the social danger of the criminal offense, for example when the offense has remained in the stage of being prepared or attempted, or when the criminal offenses being committed in association, the court must take into consideration the degree of offense's preparation, the closeness of inflicting consequences and the reasons that the offense was not committed. The higher the degree of preparations is the higher is the degree of social danger and the perpetrator.

With regards to the association, the role of each individual must be looked at in a criminal offense. The association of two or more individuals may appear as a necessary element, as a qualifying element or as an aggravating circumstance. We have qualifying elements of the criminal offense, for criminal offenses of which the element of association is expressly envisaged in the respective provision. If the element of the association is expressed in the provision itself, in this/her case we are dealing with qualifying circumstances – a qualified form for example Article 193, paragraph 3, subparagraph 5, Article 195, paragraph 3, subparagraph 5 of the Kosovo Criminal Code etc.

Whereas it will be an aggravating circumstance when this element of association is not mentioned in the respective provision, but if the offense has been committed in association, the person will be qualified in accordance with the concrete offense in relation to Article 23 of the Criminal Code as an accomplice.

Inciter holds criminal liability the same as the perpetrator of the criminal offense, who could be awarded a punishment as he had committed the criminal offense himself. The accomplice has also the criminal liability, but such perpetrators are awarded a mitigated punishment; respectively in accordance with the Criminal Code it cannot be higher than three fourths of the maximum punishment envisaged for the criminal offense.

As we know the purpose of the punishment is to prevent the person from committing a criminal offense and from committing criminal offenses in the future. Therefore it is important to adapt the punishment to the personality

of the perpetrator. The concrete criminal offense committed by the perpetrator in a way brings up to the surface the social danger of the perpetrator, but the court must also take into account other circumstances that can be the age of the defendant, his/her mental development, his/her intellectual and educational development, readiness to rectify – repair consequences, the degree of the repentance shown for the committed offense, etc.

Place and time of committing a criminal offense, motive, mode, subject or legal value towards which the commission of a criminal offense is addressed, affect also the degree of social danger of the crime – criminal offense. Area, zone or specific center where the criminal offense was committed is also important for the social danger of the criminal offense. The state of criminality in a specific area or zone, higher or lower proliferation of a certain category of criminal offenses, as well as the time, state of war, extreme situations etc., shows the degree of the danger of the criminal offense.

When issuing the decision to award the punishment, the court must also take into account the stance of the perpetrator, his/her actions to repair the consequences, his/her mental and intellectual development etc. In determining the degree and the type of punishment, the court must also take into account the subjective side, guilt, motives and purposes. The court must also take into account the way the person reacts towards the punishment or the effect that the punishment can have over him/her. Age, profession, being recidivist makes a prosecuted individual to feel more or less the punishment awarded to him/her by the court.

1.1. Aggravating and mitigating circumstances

These circumstances are various objective and subjective factors which show a higher or lower degree of danger of a criminal offense and the perpetrator, which affect the degree of punishment.

Aggravating circumstances prove high level of social danger of a criminal offense or of a perpetrator, whereas the mitigating circumstances prove lower social danger degree of crime, criminal offense and the perpetrator. These circumstances affect the determination of the degree of punishment both for aggravated or mitigated punishment against the perpetrator of the

criminal offense. In general for every concrete situation, both aggravating and mitigating circumstances are to be assessed completely by the court, in order to set their importance and influence to the danger of the criminal offense and the perpetrator and then to finally determine the type and the degree of punishment.

Besides mitigating circumstances envisaged in Article 64 of the Criminal Code, the lawmaker gives the court an opportunity to take into consideration other circumstances as well, especially those mitigating by affecting this way the mitigation of the punishment degree, which are the age, health situation, family troubles etc, which show a lower degree of danger of the criminal offense and the perpetrator, which are also to be taken into account by the court when determining the degree of punishment against the perpetrator within the constraints set by the law.

1.2 The degree of criminal liability

It is a circumstance dependent on the degree of two main components, one on the degree of liability and two on the degree of guilt. The liability as a psychological state implies different degrees of intellectual ability which can be complete, with reduced mental ability and with mental disability, which indicate that the perpetrator of the criminal offense was completely or partially liable, whether he/she had committed the criminal offense with direct or eventual intent, because of major or minor negligence. Reduced ability also reduces the degree of a criminal liability, which will also be taken by a court as mitigating circumstance with the condition that the perpetrator should not have brought him/her to that situation.

1.3 Personal characteristics of the perpetrator

These are the circumstances that affect the court in determining whether it will award the punishment; these are mental state of the perpetrator, marital status, age, health state, employment, profession etc.

1.4 Motives from which the criminal offence was committed

Psychological reasons are the ones that have urged an individual to commit a criminal offense, but in no way do they justify the commission of a

criminal offense; they can in no way indicate the reason of committing the criminal offense and therefore they carry a special character when determining the degree of punishment.

Motives are ethical categories and so by their character they can be positive and negative, respectively egoistic and altruistic and in this sense they can be taken as aggravating or mitigating circumstances. If a criminal offense has been committed because of egoistic motives, envy, hatred, evil-heartedness or revenge, gaining financial benefit, racial and religious hatred, than these motives will present aggravating circumstances, if in the law they are not mentioned as elements of the respective criminal offense figure, as for example Aggravated Murder, Article 147 of the Kosovo Criminal Code, whereas the compassion, affection, honour or the feeling of obligation etc, if for example the offense is committed to feed the family, then those can be taken as mitigating circumstances.

Commission of a criminal offense against individuals who due to their situation, old age, physical and mental disorder, disability or pregnancy cannot be protected from the criminal actions, prove greater danger of the perpetrator. To implement these aggravating circumstances it is required for the perpetrator to have had the knowledge of the victim's specific situation.

In the provisions of the special part the circumstances are envisaged as a special element of the criminal offense, for example Article 193 – Rape, Article 195 – Sexual assault etc. in this case the individual will be punished with that degree of punishment that the concrete provision envisages and so these aggravating circumstances will not be taken into account.

1.5 The intensity of endangering or damaging the protected value

It is an objective circumstance from which it depends how much was the good damaged or threatened to get damaged, always considering the nature of the offense, what the question is about, for the offenses against property, life and body, offenses against public traffic safety, attempted or committed criminal offense, for which in this case we must also assess means and the mode of commission, whereby the most attention is to be paid to the damage caused by the criminal offense.

1.6 Circumstances under which a criminal offense was committed

These are circumstances that can be of an objective and subjective nature, which are referring to the criminal offense and its perpetrator such as time, means, mode and place of committing the criminal offense, relations between the perpetrator and the casualty as well as the psychological situation between them.

1.7 Previous behaviour of the perpetrator

These are important circumstances to assess the personality of the perpetrator and his/her social danger, his/her behaviour in harmony with the applicable norms before the commission of a criminal offense; did they have correct behaviour in the area and the ambient they were living, recidivism, improper behaviour in the area where he/she lives, divagation, gambling etc., for which circumstance the court in its assessment must come to an understanding that the criminal offense is a consequence of improper behaviour of the perpetrator or as a consequence of unwanted and accidental circumstances which have affected the commission of a criminal offense, which will be taken either as aggravating or mitigating circumstances.

1.8 Acceptance of guilt

Hereby the perpetrator indicates that he has been repented and that he promises not to commit criminal offenses in the future which would be considered as mitigating circumstances, whereas the lack of acceptance of guilt indicates that the perpetrator did not or does not wish to understand that he has committed a harmful offence which was envisaged as a criminal offence by the law, as well as he gives indications at the same time that he can repeat the same offence or commit other criminal offences, a circumstance which by the court will be taken as an aggravating one.

1.9 Personal circumstances of the perpetrator and his/her behaviour after committing the criminal offence

These are circumstances which indicate the attitude of the perpetrator towards the criminal offence and his/her behaviour after committing the criminal offence as well as after passing of some time, his/her attitude

towards the injured party and the damage caused, (provision of assistance to the injured party and his/her family, reparation or compensation of the damage inflicted), as well his/her stance during the criminal procedure, from which depends the determination of the degree and the type of punishment.

1.10 Commission of the criminal offence in association

The law in these cases speaks about the criminal offences committed by the two or more individuals in association between them. This is considered as aggravating circumstance because the association of many individuals in committing the criminal offense facilitates its commission. This circumstance cannot be taken as aggravating in determining the degree of punishment when the commission of the offense in association is a qualifying element according to the concrete provision, for example Article 274 of the Kosovo Criminal Code, Organized crime, which are special forms of association.

1.11 Voluntary surrender to the competent authorities after committing a criminal offense

These mitigating circumstances are applied when the perpetrator of the criminal offense reports the criminal offense before the perpetrator of the criminal offense has been discovered. Besides this, the person must show himself to be sincere in explaining the circumstances of committing the criminal offense. The acceptance of committing the criminal offense after its discovery or after he/she has been summoned by the competent authorities does not justify the disclosure of such circumstance.

1.12 When perpetrator shows deep repentance

This is related to the person's behaviour after the commission of the criminal offense, which means not only complete acceptance of the criminal offense but also explanation of circumstances, motives, purposes, disclosing accomplices, seeking public forgiveness etc.

1.13 Normalization of relations

Between the injured party and the perpetrator it is taken as a mitigating circumstance by the court. So when they have reconciled with one another and that normal relations have been established between them.

Kosovo Criminal Code foresees mitigating circumstances also in cases when it is related to criminal offenses committed by mental disability and reduced mental ability that offences have been qualified as such.

When a person commits a criminal offence as per order of his/her superior – shall be taken into account by the court in determining the degree of punishment, Article 10 sub-paragraph 1, 2 and 3 of the Criminal Code, so in these cases the court must take it into account as mitigating circumstance.

Characteristics of the Kosovo Criminal Code is that it foresees also severe cases of criminal offences; those are when they are committed by the officials as well as situations related to cases when the criminal offence was committed by making use of family relations, which are also qualifying elements of the criminal offences.

1.14 Other circumstances related to the character of the perpetrator

According to this category of circumstances, law obligates the court, when assessing the degree of punishment to take into account and assess all other circumstances which are related to the character of the perpetrator, which naturally cannot be related to the above mentioned circumstances. Hereby the law in fact specifically emphasizes the importance of subjective circumstances, however the opportunity must not be ignored that those can be some other circumstances for which the court deems important when assessing the punishment. In fact on the basis of this, the list of these circumstances becomes quite extensive, which depends on each individual case, for example for aggravating circumstances, our courts often take the fact that some criminal offenses are constantly increasing, such as criminal offenses of keeping under ownership, control, possession or unauthorized use of firearms, immigrant contraband, human trafficking, purchase,

possession, distribution and sale of dangerous narcotics and other psychotropic substances, or for mitigating circumstances they take the fact that long time has passed from the time the criminal offense was committed, with an exception that the perpetrator himself should not have contributed to this, then this could not be taken as mitigating circumstances.

1.15 General rules of calculating punishment

Before anything the law foresees the most important circumstances that the court must take into account when calculating the punishment, whereby first of all no circumstance is attributed as aggravating or mitigating circumstance. According to their character they are of an ambivalent character, as each of them considering how they have been created and are concrete specific circumstances may contain a character of aggravating or mitigating circumstances. So they may not influence for the punishment to be higher or lower, but within the constraints of the punishment envisaged for the criminal offense. On the basis of this we must make a difference between qualifying circumstances and those privileging, which also alternate the qualification of a criminal offense to a more severer or softer criminal offense, hereby the degree of punishment as well.

Circumstances that attribute an offense as qualified or privileged are determined by the law itself, for which in some criminal offenses the same circumstance may be a qualifying circumstance, on the other hand it may be an aggravating circumstance, or privileged at one side and mitigating at the other.

2. Punishment mitigation

Besides mitigating circumstances which are a factor that assist the court to understand the low social danger of the person, perpetrator of the criminal offense and determination of a softer punishment, Kosovo Criminal Code recognizes also the lowering – mitigation of the punishment within the boundaries envisaged by the law. Article 66 of the Criminal Code recognizes the right of the court when assessing the criminal offense and its perpetrator to have low social danger and there are some specific mitigating circumstances, it has the right to award a punishment under the minimum

or a type of a softer punishment than that envisaged by the respective provision for that criminal offense. When the court looks into the existence of some mitigating circumstances, instead of punishment with effective imprisonment it can award a suspended sentence, in cases when provisions of mitigation are implemented for criminal offenses for which the punishment is envisaged up to 10 years. Besides this when the court looks into the existence of some mitigating circumstances it can replace the punishment of imprisonment with the punishment of a fine, but only if some specific mitigating circumstances do exist.

2.1 Waiver of punishment

Besides the mitigation of punishment, irrespective of constraints envisaged for the mitigation of punishment, the court may also waive the perpetrator from the punishment, but only in cases when expressly envisaged by the law, which are spelt out in Article 68 of the Criminal Code, in this case the court determines that the criminal offense has been committed and that its perpetrator is criminally liable, but awarding the punishment would not be justifiable due to the low intensity of the criminal offense or because of criminal – policy reasons. In such cases the court is authorized by the law to pronounce such perpetrator guilty for the committed criminal offense, but it can also waive him of punishment in accordance with its discretion. Kosovo Criminal Code recognizes two groups of cases when the perpetrator may be waived of punishment, envisaged in the general and special part of the Criminal Code.

According to provisions of the general part, the opportunity of giving the waiver has been envisaged for criminal offenses such as for example exceeding the limits of necessary protection, exceeding the limits of extreme necessity in cases of an improper attempt, in cases of a voluntary withdrawal from the commission of a criminal offense, voluntary withdrawal from the criminal association, in cases of legal error etc.

Whereas in accordance with provisions of the special part of the Criminal Code, waiver of punishment has been envisaged for cases such as for example when the expert, interpreter, witness revokes false statement before the final verdict has been issued; if the person deprived from freedom resigned voluntarily from rebellion before he/she had used

violence or serious threat, if the assaulter against the official was provoked by the unlawful or brutal action.

These provisions both in general and special part of the Criminal Code have facultative character, as it was given to the court's discretion to decide whether or not it should waive the perpetrator from the punishment.

There are also cases of obligatory waiver from the punishment which is anticipated for the cases of punishable criminal offense attempts if such person resigns voluntarily from the commission of a criminal offense that he/she had started or if after such criminal offense was committed he/she prevents infliction of consequences.

Also in accordance with the Kosovo Criminal Code **special waiver grounds for punishment** have been envisaged for criminal offenses committed due to negligence, which are envisaged in Article 69 of the Kosovo Criminal Code. According to this provision this comes into expression for those criminal offenses which because of their nature, waiver from punishment may be used preliminarily for criminal offenses of endangering public traffic, in which first of all the damage inflicted by the perpetrator reflects consequences against his/her relatives, spouses or close next of kin.

The rationale of waiving from punishment in such cases consist of the fact that the perpetrator was struck so hard by the consequences inflicted, which in their substance exceed his/her deficiencies that he should have been punished for, for which reason in this case the cause of justice as well as the general and special reasons do not require punishment. In this case, the personal tragedy which is greater punishment for the perpetrator, makes awarding the punishment entirely irrelevant and insignificant.

In relation to implementing this rule a waiver from punishment, the law has envisaged two conditions related between each other and specify in a cumulative matter. First stands on the point that the criminal offense should have been committed by the negligence, the second is the consequence of the criminal offense has struck the perpetrator so hard so that awarding the punishment in these cases would not justify the purpose of the punishment.

According to this rule, the lawmaker has envisaged waiver from punishment also for the cases when the perpetrator after committing the

criminal offense has compensated the inflicted damage completely or partially.

For these cases the opportunity of giving waiver to punishment is facultative, as the court must beforehand ascertain if all legal conditions have been met for such a thing.

2.2 Aggravation of punishment

Besides mitigating the punishment or waving the punishment, the court has also a legal authority to aggravate the punishment; it has to do with cases related to multiple recidivism, Article 70 of the Criminal Code, taking into account the fact that the previous punishment did not exercise the effective influence in improving the criminal offense perpetrator. Even in these cases the opportunity of aggravating the punishment is facultative.

2.3 Alternatives to the imprisonment sentence

In the Kosovo Criminal Code there is a special chapter with alternatives awarded to the perpetrator. This once again shows the human character of the Kosovo Criminal Code. Usually these alternatives of imprisonment sentence are awarded when the court assesses that social danger of the perpetrator and the criminal offense is low, as well as when this court thinks that through the application of such measures the purpose of the punishment would be best achieved.

Punishment alternatives are not specific types of punishment but are a way of their execution. In this case the court decides beforehand the weight of the punishment against the perpetrator and if it sees that respective conditions have been met it decides to apply one of the punishment alternatives.

2.3.1 Semi-liberty

One of the alternative measures envisaged in Article 53 of the Criminal Code is also the semi-liberty.

This punishment alternative is applied against the perpetrators in those cases only when the court has given the punishment before which must by all means be imprisonment and should not be less than a year. In this case the punishment is executed in such a way that the convicted person is forced to go back to prison after completing the obligations outside the prison within the time set by the court. Application of this alternative punishment takes place as set when the person is convicted up to 1 of year imprisonment and only in cases when he/she has obligations related to his/her job, education, professional qualifications or training, essential family responsibility or a need for medical training or rehabilitation. Application of imprisonment sentence against an individual will not have any greater effect if he/she will not be given the chance of doing the semi-liberty. In any case the court will apply the punishment of semi-liberty when these conditions exist as well as when it is convinced that the purpose of the punishment can be reached with semi-liberty too; it might be reached even better.

However Kosovo Criminal Code envisages the opportunity of revoking the execution of imprisonment sentence with semi-liberty in cases when the individual benefiting from the semi-liberty does not meet the requirements as set by the court decision. In this case the individual shall spend the remaining part of the sentence in prison.

2.3.2 Suspended sentence

Besides the semi-liberty, the court can also put a condition to the execution of the awarded punishment for the perpetrator if he/she does not commit another criminal offense during the time of verification by the court, which time cannot be shorter than one year or longer than five years. In these cases envisaged by Article 42 of the Criminal Code the question is about conditioning the execution of imprisonment sentence for a specific time by the court, in order for the person not to commit another criminal offense during the time of verification. Effective spending of the sentence is not necessary in every case to deliver the purpose of the punishment, so especially on this principle this does the punishment alternative rely on. In this case the court awards an imprisonment sentence for the individual but the execution of this punishment in the future depends on the attitude of the perpetrator during the verification as decided by the court.

Conditioning of the punishment execution is awarded by the court when it assesses that the degree of social danger of the criminal offense and the perpetrator is such that the application of effective imprisonment sentence against him/her is not necessary. So for the application of a suspended sentence, we must first of all see the social danger of the perpetrator and the concrete criminal offense. The less social danger the criminal offense and the perpetrator represent the more will the court be leaned towards applying – awarding this type of alternative punishment. If the criminal offense is not of a social danger and the perpetrator has had a proper attitude at the court by repenting, and that the court has reached to a conclusion that by application of conditioning the execution of punishment would reach the purpose of punishment in the best way, then it may apply the conditioning – suspension of punishment execution with effective imprisonment.

Conditioning – suspension of punishment execution is related to a punishment in its own and must strive to achieve those purposes that the effective imprisonment sentence contains. If by applying the conditioning to punishment, special and general prevention purposes of the punishment are not achieved, then it is inappropriate for this type of punishment to be executed against the convicted person.

Also when applying the suspended sentence, mitigating circumstances of the criminal offense commission must also be taken into account, for example circumstances of the criminal offense commission, attitude of the convicted person after committing the offense, repentance shown by the person, his/her personal characteristics etc.

In any case towards a suspended sentence, several legal conditions are to be met in order for the perpetrator to be charged with punishable criminal offenses up to five years imprisonment, as well as for criminal offenses punishable up to 10 years imprisonment sentence, if punishment mitigating provisions are applied.

According to Kosovo Criminal Code, the court may also revoke the suspended sentence in any case when the perpetrator commits one or more other criminal offenses for which the punishment was awarded with imprisonment of at least two or more years during the time of verification.

Suspended sentence can also be revoked when the perpetrator commits one or more criminal offenses for which there was an award of punishment with less than two years of imprisonment or punishment with a fine whereby circumstances have been assessed which pertain the committed criminal offense as well as the convicted person and especially the similarity of the committed criminal offenses, their significance and motives for committing the criminal offenses, also if after awarding the suspended sentence, by a final verdict it is ascertained that the convicted person has committed another criminal offense before he/she was given a suspended sentence and if the court assesses that there would be the basis for awarding these suspended sentence if it would have known about that criminal offense.

In cases when it comes to the revocation of the suspended sentence, the court awards its unique punishment for the criminal offense committed previously as well as for the new criminal offense, by considering the revoked or suspended sentences as determined.

Timelines that the court can put an individual into probation ranges from one year to five years and are set considering the degree of social danger of the concrete criminal offense, which depends on the danger of the threatened subject by it, social danger of the individual, which depends on his/her personality, his/her attitude towards the committed criminal offense, the level of his/her repentance, stance at the court and presence of mitigating circumstances. During the verification, the person must not commit one or more same or other criminal offenses.

When awarding the suspended sentence and when verifying the convicted person, the court has the right to decide about the debts against him/her, such as return of the financial benefit gained with the commission of a criminal offense, compensation of the inflicted damage by a criminal offense as well as other debts foreseen by the legal provisions, which indicate that by the application of these measures, the person is given the chance of reintegration and retraining as well as the opportunity of getting included once again in the society as well as to positively influence its functioning. In case the individual against whom debts have been applied does not meet them for unjustifiable reasons, then the court shall decide to revoke the decision on suspended sentence. This is expressly foreseen in Article 43, paragraph 2 of the Criminal Code.

2.3.3 Replacement of the punishment with the order for community service work

Our Criminal Code authorizes the court to decide with the consent of the convicted person **to replace the imprisonment sentence** up to three months or punishment with a fine **with an order for community service work**. This is envisaged in Article 40 of the Criminal Code. Community service work is something from its character and substance which is to the public interest as maintenance, utility service, construction etc. Community service work cannot be awarded if the person does not want to do it. The court may never decide against the wish of the convicted person. Replacement of the punishment with the community service work may be given when the danger of the person and the criminal offense is low and when the concrete circumstances of committing the criminal offense, the court deems that it will achieve the purpose of the punishment. The community service work is given for a specific time that is from 30 to 240 hours and it must be completed within the time specified by the court, a time which must not exceed one year, by emphasizing that this work is with no reward.

If after the specific time expires the convicted person did not complete the community service work or has completed such work partially, the court may revoke such decision and set an imprisonment in proportion with the length of the community work time which was not completed. The imprisonment period may not exceed the initial imprisonment time when awarding the community service work order issued in accordance with Article 38, paragraph 3 or it should not exceed six months with the community service work order issued in accordance with Article 39, paragraph 3 of the Criminal Code. In cases when the convicted person does not agree with the replacement of the punishment of fine with the order for community service work as envisaged in paragraph 3, Article 39 of the Criminal Code, the court awards one day of imprisonment with equal of 15 Euros from the fine, with the condition that the imprisonment period does not exceed six months.

For the type of community service work, weekdays, specific organization where the community service work will be carried out and its supervision shall be carried out by the Probation Service.

2.3.4 Judicial admonition

The purpose of the judicial admonition is to admonish the perpetrator when taking into consideration all circumstances regarding the criminal offense and the perpetrator, the judicial admonition is sufficient to reach the purpose of the punishment. By the judicial admonition, the perpetrator is made aware that he/she has committed a punishable and dangerous offense, which presents a criminal offense that if he/she commits such offense again the court will award a more aggravated criminal sanction.

Judicial admonition is awarded for criminal offenses for which the law envisages punishment with imprisonment for up to one year or punishment by a fine, but with the law it is envisaged that it can be awarded for criminal offenses as well for which the law envisages imprisonment for up to three years, when such offenses have been committed in specifically mitigating circumstances. The law also envisages the opportunity of awarding judicial admonition for more than one criminal offense committed in association.

3. Execution of punishments

3.1 Association of punishments

Essential condition for association of punishments is if the perpetrator with one or more actions commits criminal offenses for which he/she is prosecuted at the same time. When they are not just at the same time and by the same court, there are cases when the decisions of punishing the person are met during their execution, so hereby the association of punishments takes place. In order to have the association of punishments we must have two or more criminal offenses committed.

Article 71 of the Criminal Code foresees association of punishments, whereby the court first of all pronounces the punishment for each offense and then awards and unified punishment for all those criminal offenses. Conditions for associating punishments are the following:

- if for any of the criminal offenses the court has pronounced the punishment with long-term imprisonment, then it awards only this punishment;

- if for each of the criminal offenses the court has pronounced the sentence with imprisonment, the unified punishment must be higher than any individual punishment, but the punishment may not reach the sum of all punishments as specified or exceed the period of 20 years;
- if the court has awarded the imprisonment sentence with three years for each of the criminal offense, the unified imprisonment punishment may not be higher than eight years;
- if the court has awarded punishments with fine for each of the criminal offense, the unified punishment with the fine may not exceed the amount of 25.000 euro, respectively 50.000 euro when one or more criminal offenses have committed in order to gain financial benefit;
- if the court has awarded imprisonment sentence for some criminal offenses, whereas for the others it has awarded a punishment by a fine, it awards the unified punishment with imprisonment and a punishment with a fine in line with item 2 to 4, paragraph 2 of this Article;
- supplementary punishment is awarded by the court if it is foreseen for at least one of the criminal offenses or if the court has awarded the punishment with a fine for many criminal offenses, then it awards one unified punishment with a fine in accordance with item 4, paragraph 2 of this Article.

3.2 Calculation of punishment of the convicted persons

If the convicted person is trialled for a criminal offense committed before he/she has started to spend the punishment awarded by a previous punishment, or for criminal offense committed during the time of spending the imprisonment sentence or long-term imprisonment, the court awards a unified punishment for all criminal offenses (Article 71 of this code), taking into account previously awarded punishment. The punishment or part of the punishment that the convicted person has spent is calculated in the unified awarded punishment.

Regarding the criminal offense committed during the time of spending the imprisonment sentence or long-term imprisonment, the court awards a

punishment to the perpetrator irrespective of the punishment awarded previously if the application of provisions from Article 71 of this code will not reach the purpose of the punishment, considering the length of the unspent time of the previously awarded punishment.

3.3 Conditional release

Article 80 of the Kosovo Criminal Code foresees cases that convicted person may file a request for early conditional release from spending the rest of the punishment.

Person filing the request for conditional release must have spent at least half of the punishment awarded by the court and that during the spending of the punishment he/she must have had a good attitude and by his/her behaviour must have shown that this punishment has really reached its purpose to re-educate the individuals. Conditional release request may be filed by a convicted person also who has spent 1/3 of the imprisonment sentence, he/she can be exceptionally conditionally released when specific circumstances related to the convicted person indicate that he/she will not be committing new criminal offense, as well as a person who has spent 3/4 of the long-term imprisonment punishment may be conditionally released.

This conditional release is decided by the trial panel established by the competent public body in the field of judicial affairs in accordance with the law. If the person enjoying the conditional release commits one or more criminal offenses for which the punishment award exceed one year imprisonment, the court may revoke the conditional release. The court may also revoke the conditional release in cases when the convicted person during the conditional release commits one or more criminal offenses for which the punishment award of imprisonment has been given for up to one year considering the similarity of committed criminal offenses and the motive.

In cases when the court revokes the conditional release, it implements provisions for punishment association, whereby the remaining part of the unspent punishment from the first criminal offense will be associated to the punishment to be awarded for the second criminal offense.

In cases when the conditionally released person is punished with not more than one year of imprisonment, the court may not decide the revocation of the conditional release, whereby the conditional release is expected for him/her as long as the convicted person has spent such punishment in imprisonment.

4. The purpose of punishment

The overall purpose of the criminal sanction is to determine and award punishment in order to eliminate harmful social activity, by which social protected values with the applicable legislation are endangered or violated, whereas the purpose of punishment is to hinder the perpetrator in committing criminal offenses in the future as well as his/her re-education (special prevention), educational influence to the others not to commit criminal offenses (general prevention) as well as strengthening social morale and influencing the development of social responsibility and civic discipline.

5. Brief summary related with the topic

Punishment awarding from the court is one of the most important moments, if not finalizing of the criminal process. By determining the criminal offenses, the law sets the boundaries of punishment for every criminal offense, by setting the type and the degree of punishment through the determination of the lowest and highest punishment degree, because in this way determining various levels of social danger of the criminal offense and the perpetrator. After proving the criminal offense, the court under the conditions set by the law, in terms of punishment awarded to the perpetrator sets an adequate punishment, which means that punishment awarding belongs exclusively to the court's competency. The law in its general provisions also foresees the opportunity of changing the punishment ceilings, besides this it also envisages waiver from punishment. Also in accordance with our code opportunity is envisaged of changing the punishment exceptionally with softer type of criminal sanction such as suspended sentence, judicial admonition or community service work, that the court has complete authority by the law to make such changes to the punishment.

On the basis of this, the court will assess the punishment of the perpetrator on the ceilings as provided by the law for that criminal offense, taking into account the purpose of punishment and considering all circumstances which affect the punishment to be higher or lower.

On the basis of all this, it derives that we have legal weighing of punishment, which is conducted by the lawmaking body, which when foreseeing the criminal offense has set the type and the degree of punishment, whereby we also have judicial weighing of the punishment, which is conducted by the court itself preliminarily in the criminal procedure when the perpetrator of the criminal offense is criminally liable for the criminal offense.

Semi-liberty – is a type of alternative punishment which consists on the fact that the person that has been awarded imprisonment sentence, can be allowed each day, within certain hours (six, eight or ten hours), to be able to spend time in freedom in order to continue his/her professional work that he/she has been performing even before the commission of a criminal offense, or to perform family business, attend education, attend treatment etc. so after he/she performs all works within permissible hours to spend time in freedom, the convicted person is obligated to return to the entity to spend the sentence.

Suspended sentence- in a way this is a forewarning measure which is awarded to the perpetrator whereby that could be a reasonable expectation that under the warning to execute the punishment, which is contained within the suspended sentence, whereby through non-execution of punishment the purpose of the punishment can be achieved. Based on this, the suspended sentence is a replacement of punishment with effective imprisonment. Hereby the perpetrator is warned and at the same time is made aware that at the time of specific verification by the court if he/she commits another new criminal offense or does not fulfil the obligations specified by the suspended sentence, the suspended sentence punishment will be executed.

Minor significance offense For an offense to be of a minor significance two conditions are to be met in a cumulative way, so on the basis of this social danger, the criminal offense should be insignificant as well as consequences are to be insignificant or harmful consequences in general must not have been caused.

Judicial admonition- is a special sanction which in its essence and in accordance with the purpose it is not a punishment but in fact a non-punitive measure, which in accordance to its nature is a measure to replace the punishment, especially the short-term imprisonment sentence which for the perpetrator represents a serious and public admonition which is conducted by the court against the perpetrator who is at the same time forewarned not to commit criminal offenses because on the contrary he/she will be punished with a more aggravated criminal sanction.

Waiver of punishment- is a new way to do with avoidance from the rule that a criminally liable perpetrator must always be awarded punishment. The question is about extraordinary legal opportunity which shows the best how high is the courts authority when weighing the punishment , which in a way can be called legal or judicial amnesty, whereby the existence of the criminal offense and the criminal liability of the perpetrator are proven but the punishment is not awarded, so the punishment is not awarded due to specific reasons. In fact the perpetrator is convicted without a punishment.

The rationale behind this institute consists of the fact that in specific situations, considering circumstances under which the criminal offense has been committed, the degree of dangerousness of the criminal offense and the perpetrator which had been slightly reduced, or because there are specific reasons which indicate that the perpetrator should not be awarded with the punishment.

7. Calculation of punishment for criminal offenses in association

In the science of the criminal law, as well as in the criminal legislations of contemporary countries there are three types of systems recognized in weighing the unified punishment for criminal offenses in association, such as absorption system, asperacion system and cumulation system, systems recognized by the Kosovo Criminal Code too, whereby the asperacion system is the most emphasized one because it is applied in practice the most, whereas the absorption system and the cumulation system are how should we say supplementary systems.

ABSORPTION SYSTEM- is a regular system in those criminal systems that recognize the severest punishment such as death punishment or life time imprisonment, because according to their nature they are the severest punishments and absorb other punishments, except for the fine punishment in the life time imprisonment.

Our code envisages this system too in the cases when we deal with some criminal offenses in association, in these cases the court proves the punishment with long-term imprisonment which absorbs all other punishments.

In legal literature we can encounter opinions that such a solution is not adequate, because there are situations when application of such criminal policy system is debatable, respectively it does not comply with the reasons of justice and the requirements of the criminal policy.

Although the law has omitted regulating it, to the application of the absorption system comes then when a criminal offense has been verified with the imprisonment sentence of 20 years maximum legal punishment. According to the system, the unified punishment will not be awarded even in cases in which for one criminal offense imprisonment of 6 months punishment or more has been awarded, and for another criminal offense and imprisonment of 20 days, although the question is about the imprisonment sentence, the absorption system cannot come to function here, as the sentence above 6 months imprisonment cannot be expressed in days, whereby in accordance with the asperacion system the unified punishment cannot reach the amount of all punishments.

ASPERACION SYSTEM – this system in our criminal law is essential and the most important. This is proven by the judicial practice which uses this system the most when awarding a unified punishment. Initially the asperacion system is consisting of the fact that the unified punishment is given that way that the court awards imprisonment sentence for every criminal offense, the unified punishment may not be higher than the individual punishments, but the punishment may not reach the amount of all punishments specified nor exceed the period of 20 years. We must emphasize that this stance is justified, as in these situations the two other systems are unjustifiable as they would bring non-justification to a higher

or lower punishment for criminal offenses in association. With the application of cumulative system we would have sometimes very high punishments for which it would be impossible to execute as they would exceed itself the lifespan of the perpetrator.

Also according to this punishment calculating system for relatively mitigating criminal offenses committed in association, for which the court awards punishment up to three years for each criminal offense, the unified punishment may not be higher than eight years.

The cumulation system - it is the system on the basis of which the punishment is not proven that way so that for all punishments that the court has proven all criminal offenses are calculated in association. This system is used very seldom, mainly with punishments in fine, whereby the fine punishment awarded for each of the criminal offense cannot exceed the overall amount of the fine punishment specified as the overall maximum as provided by in the law. With imprisonment sentences, this type of a system is mainly avoided because it is considered unjust, because with mechanical accumulation of punishment, the overall effect is emphasized too much, and thus generally severe punishment is gained from the one sought and justified by the given – emphasized criminal situation.

CONCLUSION

At the end we try to treat in a detailed way the manner – methodology of calculating punishment, mitigating and aggravating circumstances envisaged by the Criminal Code as well as their execution and the purpose of punishment. We have tackled that more, considering the fact that it is a legal obligation of the court to take these circumstances into consideration which help it assess the social danger of the perpetrator and the criminal offense in a more objective way. Only by doing this weighing, the court may be assisted in awarding a just punishment, which would have proper educational and preventive effect.

In this elaboration we have also tried to treat the association of punishments. In this collaboration we have also treated the alternatives to imprisonment sentence, community service work, judicial admonition, suspended

sentence, as well as punishment calculation for criminal offenses in association.

LITERATURE:

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