Supreme Court of
Republic of Kosovo

GENERAL SENTENCING GUIDELINES

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General Sentencing Guidelines

REPUBLIKA E KOSOVES

REPUBLIKA KOSOVA - REPUBLIC OF KOSOVO

GJYKATA SUPREME E KOSOVES

VRHOVNI SUD KOSOVA- SUPREME COURT OF KOSOVO

Pursuant to Articles 25 and 26 of the Law on Courts No. 06/L - 054, the Supreme Court of the Republic of Kosovo, after reviewing the General Sentencing Guidelines in Kosovo, unanimously approved on 8th of November 2024:

GENERAL SENTENCING GUIDELINES IN KOSOVO

The Sentencing Guidelines enter into force on the day of publication on the official website of the Supreme Court, repealing the 2018 Sentencing Guidelines.

Reasoning

In recent years, criminal legislation in Kosovo has undergone significant reform with the adoption of the new Criminal Code (CCRK) and the Criminal Procedure Code (CPC). Numerous legal provisions have changed, aiming to improve the efficiency and effectiveness of the courts. These changes also have significantly impacted the sentencing practices, presenting new challenges, including shortcomings in the courts' approach to sentencing, as well as the courts' professionalism in issuing decisions on the defendants.

In this context, there has been a need to review the Sentencing Guidelines approved in

2018 by the Supreme Court and to draft new guidelines to ensure a more consistent and harmonized approach to sentencing. This revision aims to improve the methodology used by the courts and provide a clear legal framework for the fair treatment of each criminal case.

Although not legally binding, the Sentencing Guidelines aim to support courts in making decisions that are based on the fundamental principles of the rule of law, avoiding unjustified and unnecessary differences in sentencing policy.

The Sentencing Guidelines are essential for increasing public confidence in the criminal justice system and for strengthening the rule of law in Kosovo. By providing clear and structured content for determining sentences, these Guidelines help prevent arbitrariness and increase the likelihood that judicial decisions are uniform and fair, ensuring that every individual is treated equally before the law.

The implementation of these Guidelines plays an important role in legal certainty. The practical implementation of this document will also serve to increase transparency and professionalism in the judicial system, thus contributing to the respect of human rights and freedoms based on the Constitution of the Republic of Kosovo and international instruments.

Fejzullah Rexhepi

President of the Supreme Court of the Republic of Kosovo
[Original signed]

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Introduction

The sentencing practice in Kosovo courts is increasingly being subjected to more substantial scrutiny, considering the provisions of the Criminal Code[1] (CCRK or "Code") and especially those of the Criminal Procedure Code[2] (CPCRK). The first efforts to regulate sentencing policies in the country started as early as 2013, when the first initiatives for drafting of guidelines that would address the problem of disparity in approaches to sentencing, were presented. These initiatives culminated in February 2018, when the General Assembly of the Supreme Court adopted the first Sentencing Guidelines. Only a few months later, in August of the same year, the Advisory Sentencing Commission was established, consisting of judges from all instances of the judiciary, representatives of the prosecution authorities, the Academy of Justice, and the Bar Association. Since its establishment, this Commission continued to work on research, analysis, and meetings with various representatives in order to raise awareness and conduct wide consultation for the improvement of the Sentencing Guidelines in the country. The Commission, in cooperation with international partners, has continued the work in drafting of other Guidelines which were subsequently adopted by the Supreme Court. Thus, in addition to the general guidelines, the following specific guidelines were also developed and adopted:

The specific Guidelines for imposing fines as a sanction for criminal offenses according to the Criminal Code of the Republic of Kosovo, were adopted in February 2020 and followed by the development of the Calculator for calculating the criminal fine.

Sentencing Guidelines for Official Corruption and Offenses Against Official Duty, approved in June 2021 and developed after a series of consultations with all levels of the judicial system.

The current version of the General Sentencing Guidelines has undergone some changes in terms of addressing issues, based on suggestions of various stakeholders and following continuous consultations, but also based on internal observations of the justice system as well as findings from various external country reports. After the adoption of the CCRK in 2019 and the CPCRK in 2022 and 2023, the revision of the General Guidelines became a necessity, in order to address innovations in these two basic laws and beyond.

The purpose of the present Sentencing Guidelines is to provide an extended view of the applicable criminal legislation as well as both positive and negative practices at the Kosovo level as well as internationally. The aim of all this is to find adequate solutions for a more uniform approach to sentencing by all courts. Considering the massive publication of judgments, as never

[1]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.
[2] The Criminal Procedure Code of the Republic of Kosovo, Code No. 08/L-032, Official Gazette of the Republic of Kosovo/No.17, 22 August 2022 Prishtinë/Pristina.

before, there is a need to influence the quality of those judgments, which will in turn also affect the public trust in the courts' decision-making process.

It should be clear to the reader that the Guidelines do not establish binding rules for imposing a sentence. However, considering that unjustified differences and perceptions of injustice can bring the criminal justice system into question, the Council of Europe Recommendation on consistency in sentencing recommends that wherever it is appropriate to the constitutional principles and legal traditions and especially the independence of the judiciary, states must undertake the necessary measures for avoiding unreasoned disparity in sentencing. Therefore, these Guidelines are presented as a tool in this regard and should not be considered as interference in the discretion. The essence of the guidelines is to structure the judicial discretion – not to remove it. Ultimately, sentencing will always require an element of personal judgment, but that judgment should be exercised in a framework of principles that are clear, concise and established in advance. This results in a consistent approach and outcomes that are reasonably predictable.

These guidelines provide useful tools for a court in assessing a variety of individual circumstances of defendants as well as a framework for assessing the sentencing decision. The Guidelines represent a road map issued by the highest instance court, which is mandated by the Law on Courts Article 26, to draft Guidelines that aim to harmonize practices in Kosovo courts. More precisely, the guidelines provide examples and explanations for the approach and methodology of applying relevant provisions of the Code that are related to sentencing and reasoning of decisions. Although the Guidelines are mainly focused on sentences provided for under the CCRK, its principles are also valid for all other applicable criminal legislation.

The Guidelines consist of two parts: The first part, represents a revision of the 2018 General Sentencing Guidelines which provides for explanation of general principles of sentencing; and the second part contains an elaboration of the Criminal Code Chapters separately, including sentencing characteristics for chapters from the special part of the CCRK.

We thank the United States Embassy, respectively the United States Department of Justice (OPDAT), and its representatives, Benina Kusari for the extraordinary contribution, as well as John Hanley and Erin Cox for continuous support in drafting this Guideline.

In addition, we also express our gratitude for the contribution to the members of the Sentencing Advisory Committee, Agim Maliqi – Supreme Court Judge, Bashkim Hyseni – Appellate Judge, Agron Qalaj – Deputy Chief State Prosecutor, Albina Shabani Rama – President of Prishtina Basic Court, Enver Fejzullahu – Director of the Justice Academy, Supreme Court criminal judges Mejreme Memaj, Afrim Shala, Valdete Daka and Appellate Judge Skender Çoçaj.

I- General part

I. Sentencing in Kosovo - identified problems

1. Sentencing Disparity

The first meaning of the rule of law is the existence and effective enforcement of publicly known and non-discriminatory laws. To achieve this purpose, it is the duty of each state to establish institutions that safeguard the legal system, including courts, prosecution offices, and police. These institutions are themselves bound by human rights guarantees, as laid down in the universal and regional treaties for the protection of human rights, such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights, and other international conventions and treaties. One of the fundamental principles in the Magna Carta for Judges states: "*The judiciary is one of the three branches of any democratic state. Its mission is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, fair, and efficient manner"*[3]

The right to a fair trial relates to the administration of justice in both civil and criminal contexts. At the outset, it is important to understand that the proper administration of justice has two aspects: the institutional one (e.g. independence and impartiality of the courts) and the procedural one (e.g. fairness of the hearing). The principle of fair trial upholds a series of individual rights ensuring due process of law from the moment of suspicion to the enforcement of the judgment. All persons should be equal before courts and tribunals and are entitled to the minimum safeguards of a fair trial in full equality.[4]

Identical cases that cause harm to society must be met with identical responses on behalf of society, as part of the concept of equality before the law. Inequalities create uncertainty and damage the clarity in the application of legal social control…they encourage the commission of offenses. Only when it is clear to individuals and they know with certainty that any harm to society is treated adequately and proportionally, we can say that legal social control is being applied efficiently. When an individual knows that the commission of the offense triggers criminal proceedings that will end in a certain way, he/she may be deterred from choosing delinquency.

Different judgments by courts in similar cases lead to a social culture where the *de jure* law enforcement *differs from the de facto* one. When one court panel is excessively lenient with offenders whereas another panel hands down harsh punishments, a mechanism that deters offenders from re-offending, the identity of the panel becomes a consideration, and offenders will make efforts to be sentenced by one panel and not by the other.[5]

The Constitutional Court of the Republic of Kosovo, in deciding one of its cases ruled as follows:

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[3] Consultative Council of European Judges, Magna Carta of Judges, Fundamental Principles, Rule of Law and Justice, Strasbourg 17 November 2010.

[4] Understanding Human Rights, Edited By Wolfgang Benedek European Training and Research Centre for Human Rights and Democracy (Etc) Manual on Human Rights Education (p.205)

[5] Hallevy, Gabriel. The right to be punished: modern doctrinal sentencing. Springer Science & Business Media, 2012.

"The decision taken by the regular courts in legal issues that are completely the same and the inability or lack of willingness to create a consistent judicial practice seriously violates the legal certainty principle, therefore, there is no doubt that the decision under such circumstances consists violation of Article 6 of ECHR and article 31 of the Constitution (see: Case Beian vs Romania, 30658/05, 2007, ECtHR)[6]

In the context of sentencing, inequality before the law manifests itself in sentencing disparity. Disparity is generally defined as a form of unequal treatment that is often of unexplained cause and is at least incongruous, unfair, and disadvantageous in consequence. Simply stated, the concept is fairly straightforward – "generally offenders should expect that crimes of the same seriousness, committed in similar circumstances by comparable offenders should attract similar consequences.[7] In the context of legal principles, unequal treatment of incriminated individuals violates Kosovo's constitution and contradicts a host of universal and fundamental human rights protections.

Unfortunately, the principle is not being complied with. Consistent criticism regarding sentencing suggests that defendants are sentenced based on local or regional cultures. Thus different courts may impose a significantly different sentence for a crime, although the crime is the same and the offenders are similar. Such disparity exists to a great extent even within the same courthouses. This results in defendants not being treated equally before the law.

Since the adoption of the first Sentencing Guidelines in 2018, the Supreme Court has continued with the same practice but focusing on certain topics. Thus, in terms of sentence calculation, two separate Guidelines addressing specific topics have been approved so far:

Fine Calculation Guidelines exclusively address and break down the calculation of fines in accordance with the provisions of the CCRK, in such a way that the fine is used as an effective tool for punishing defendants. This is due to the fact that, unlike the prison sentence, which stipulates that punishments must be the same for everyone, the Fine Calculation Guidelines require that the fine be adapted to the defendant's financial situation, as defined by Article 69 paragraph 5 of the Criminal Code. This way, the purpose of the punishment is also achieved, by affecting similar defendants with different financial conditions the same.

Specific sentencing guidelines for criminal offenses of corruption and those against official duty (hereinafter the Corruption Guidelines) which, beyond regulating the sentencing aspect as adequately as possible, also intend to cover two other elements on which sentencing depends largely - these are the breakdown of the element of intent in this category of offenses and the element of official person. The corruption guidelines provide for a very interesting perspective regarding the determination of the degree of liability and damage which is not always quantifiable in monetary terms. The tables provided for each criminal offense within this chapter make it clear that the greater the responsibility a person is charged with, the higher the sentence will be.

The general Guidelines of 2018 as well as the subsequent specific guidelines mentioned above, provide for an indicative list of circumstances to be used by judges to mitigate and aggravate sentences, as well as an account of the gravity that such circumstances should have in

[6] Judgment, Prishtine, 20 July 2012. Ref No. AGJ 285/12, Case No. KI 04/12, Applicant Esat Kelmendi (par 26).
[7]Department of Justice "Consultation on a Sentencing Guidelines Mechanism," 2010.

the final sentence. If followed, these guidelines will not only impact the professionalism of courts but will also improve human rights compliance in Kosovo courts in general.

The development and adoption of the General Guidelines and other subsequent specific guidelines is an essential step in achieving the goal of greater harmonization of sentencing. However, the extent to which Guidelines can achieve this goal depends on the practical application of a consistent approach. In its current form, the existing sentencing legislation is very broad and offers little or no guidance. Instead, the court is given broad ranges of possible punishment without any guidance as to the starting point; general aggravating and mitigating circumstances to be considered without any guidance on how to assess, weigh, and/or compare them; and the opportunity to correct punishments. While this gives the courts considerable discretion, it has proven not to improve harmonization. The Guidelines approved by the Supreme Court from 2018 and onwards are intended to address this shortcoming.

On the other hand, setting a more narrowly defined approach with strong incentives for courts to follow it, narrows the scope of possible sentences. It still allows variation in sentences, but only when the court is able to clearly articulate circumstances that go beyond the defendant's typical or usual circumstances and that justify such departure. The role of the Guidelines is not to eliminate the court's discretion but to structure the approach by using the same methodology. The end result is a set of sentences that are similar for a certain offense committed in similar circumstances, while in situations that are not similar, the court will still have the opportunity to move as necessary within the ranges of the foreseen sentence.

In the case of Mučič and others, the Trial Panel gave a very complete statement regarding the reason for consistency in sentencing: *"One of the fundamental elements in any reasonable and fair criminal justice system is consistency in sentencing. This is an important reflection of the notion of equal justice. The experience of many domestic jurisdictions over the years has been that such public confidence may be eroded if these institutions give an appearance of injustice by permitting substantial inconsistencies in the punishment of different offenders, where the circumstances of the different offenses and of the offenders being punished are sufficiently similar that the punishments imposed would, be expected to be also generally similar. This is not to suggest that a trial panel is bound to impose the same sentence in one case as that imposed in another case simply because the circumstances between the two cases are similar. As the number of sentences imposed by the Tribunal increases, there will eventually appear a range or pattern of sentences imposed in relation to persons where their circumstances or the circumstances of their offenses are generally similar. When such a range or pattern has appeared, a Trial Panel would be obliged to consider that range or pattern of sentences, without being bound by it, in order only to ensure that the sentence it imposes does not produce an unjustified disparity that may erode public confidence in the integrity of the Tribunal's administration of criminal justice ".*[8]

Ultimately, guidelines help address this issue by providing more clearly defined methods for deciding sentences in particular cases and providing a means for producing similar outcomes in similar circumstances. Consistency in approach requires that there is a uniform, consistent approach towards sentence determinations across all cases. Therefore, the sentencing discretion

[8] Case No.IT-96-21-A, Judgment , Prosecutor v Zejnil Delalic, Adravko Mucic, Hazim Delic and Esad Landžo, International Criminal Tribunal for the Former Yugoslavia, (20 February 2001), Par.756-757.

should be exercised in a principled manner. There should be a coherent judicial approach to the exercise of discretion in sentencing, which requires all decisions to be based on common standards – general underlying principles – that are uniformly applied to the facts of each case.[9] Addressing these disparities is necessary to ensure compliance with Kosovo's constitution and fulfilling its obligations under several international instruments. Article 53 provides that *"Human rights and fundamental freedoms guaranteed by this constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights"*

In jurisdictions where there was initial apprehension and concern over limitations on independence, Courts have frequently embraced the practice. For example, in relation to the U.K's Magistrates' Court Sentencing Guidelines, one magistrate has commented: *"Life as a magistrate without sentencing guidelines now seems inconceivable. More than anything else they allow everyone in court - including the defendant and his or her solicitor - to see a transparent sentencing process at work... The guidelines, with their structured approach to offense seriousness, culpability, and harm, [are] invaluable in clarifying the issues".*[10]

The true meaning of the principle of judicial independence... is that in determining the sentence in each case, the judge must administer the law without fear, favor, compassion, or malicious intent. No pressure on the judge to decide one way or the other should be tolerated. Within the framework set by Parliament, discretion should not be exercised on personal or political grounds: it should only be manifested as an exercise of judgment in accordance with the principle of legality.[11]

2. Application of the proportionality principle

The principle of proportionality and the necessity of its observance in the case of sentencing is foreseen in the first provision of the Criminal Code which stipulates that:

"*The criminal offenses and the types of measures and the severity of the criminal sanctions for the perpetrators of criminal offenses are based on the necessity of criminal justice enforcement and the proportionality of the level and nature of the danger for human rights and freedoms and social values.*"[12]

This article makes it clear that the sentence imposed must take into consideration the degree of danger to the individual as well as social values. Unfortunately, not infrequently this principle is violated by courts that impose sentences beyond the legal minimum and without taking into consideration the legislator's intention when setting the legal minimums and maximums. Although

[9] Ashuorth. Towards European Sentencing Standards, European Journal on Criminal Policy and Research, 1994, p. 9.
[10] Tiede Lydia Brashear, OSCE Skopje, Macedonia, An Analysis of Macedonian Sentencing Policy and Recommendations for future Directions: Towards a more uniform system, (December 2012), Appendix 6: England and Wales use of sentencing guidelines. Pg.40:
[11] Andrew Ashworth, Sentencing and Criminal Justice; Part 2 Sentencing and the Constitution; 2.1 Separation of powers in sentencing pg. 58, Sixth Edition, Cambridge University Press, 2015.
[12]Criminal Code No.06/L-074 of the Republic of Kosovo, Basis and ranges of criminal sanctions, Official Gazette of the Republic of Kosovo/No.2, 14 January 2019, Prishtina.

the applicable laws in Kosovo allow for the discretion of the court in decision-making, such discretion must always be within the framework of the principle of proportionality.

While in developed countries such as the USA there is a tabular system with circumstances that can influence sentencing included within the tabular calculation, the CCRK of Kosovo is built in a way that many of these circumstances referring to dangerousness and degree of harm have been already incorporated within the provisions and sanctions included in different criminal offenses separately. However, what is usually missing in Kosovo laws or even in other laws in the region and beyond is a further breakdown of how the principle of proportionality should be determined for adequate calculation of sentences in individual cases.

An interesting example of a more detailed breakdown within the criminal legislation is presented with the sentencing reform developed in Israel in 2012 where the Criminal Code of this country has clarified how this principle can be achieved.

The basic principle in sentencing is proportionality between the seriousness of the offense committed by the defendant and the degree of his/her responsibility, as well as the type and range of punishment.[13] According to that law, the proportional sentencing range is determined by taking into consideration the social values damaged by the crime, the degree/level of damage, the sentencing practice for that crime, and the particular weight given to circumstances related to the crime committed. Only after defining the adequate ranges for the sentence, the court can take into account other circumstances that are not necessarily related to the offense but rather to the defendant.[14]

3. Inadequate assessment of factors and lack of Reasoning

Another problem relates to the failure of courts to adequately articulate reasons for imposing a particular sentence. This includes both the process followed by the court and the reasoning behind the finding or existence of a specific mitigating or aggravating factor. As the Council of Europe points out, "courts, in general, have to emphasize concrete reasons for imposing sentences"**[15]**.

In broad terms, Article 6 of the ECHR requires that courts give reasons for judgments in both civil and criminal proceedings. Courts are not obliged to give detailed answers to every

[13] Julian V Roberts and Oren Gazal-Ayal, Legal reform in sentencing in Israel: Exploring the 2012 Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2012], Annex A Israeli Penal Law (Amendment No 113) 2012, 2337 LSI 17065, Structuring Judicial Discretion in Sentencing, 40b Basic principles: Proporcionaliteti [Structuring Judicial Discretion In Sentencing, 40b The Guiding Principle: Proportionality], Israel Law Review 46(3) 2013, pp 455–479. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2013. doi:10.1017/S0021223713000162

[14] Ibid. 40c Determining the Proportionate Sentence Range/Determining the Sentence.
The Council of Europe Recommendation No. No. R(92)17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing, 19 October 1992..

question, but if a submission is fundamental to the outcome of the case the court must then specifically deal with it in its judgment.

For example, in *Hiro Balani v. Spain*[16] the applicant made a submission to the court which required a specific and express reply. By failing to adequately address the issue with specificity, it was impossible to ascertain whether they had simply neglected to deal with the issue or intended to dismiss it. Even if they intended to dismiss it, the party was unable to determine what the reasoning was. This was found to be a violation of Article 6 (1).

Arguably, other than a finding of guilt, there can be no more important decision for a Court than the decision of a sentence. Hence there is an absolute requirement of providing sufficient explanation as to how the sentence was arrived at to inform the defendant and preserve their rights. Additionally, it prevents any claims of discriminatory treatment. As noted by the ECtHR in Lithgov:[17] *"for the purpose of Article 14, the discriminatory difference in treatment is discriminatory if this difference has no objective or reasonable justification, i.e. if it does not pursue a legitimate aim".*

Even five years after the adoption of the General Sentencing Guidelines by the Supreme Court, the same problems persist despite some notable improvements:

- Generally, courts did not provide sufficient, or in many cases any, reasons for finding the existence of a mitigating factor. Finding any aggravating or mitigating factor that is not supported by any facts in the documents is also a violation of the law. Article 8 par 2 provides that "The court renders its decision on the basis of the evidence examined and verified in the main trial". Furthermore, Article 360 clearly states that "[t]he court shall base its judgment solely on the facts and evidence considered at the main trial". Hence the failure of a court to provide a factual basis for the establishment of a particular factor can be seen as a judgment on facts outside the record or no facts at all. The result is a decision that appears to be arbitrary.
- Courts often impose sentences far below the statutory minimum based on mitigating factors that are given excessive weight in sentencing in relation to the consequence caused or intended.
- Courts continue to refer to mitigating circumstances that are completely irrelevant to certain categories of crimes.
- Courts such as the basic courts as well as the Court of Appeal, in some cases have included some mitigating factors and aspects which are totally inadequate to be used as mitigating or extremely mitigating factors when compared to the gravity of the crime and the degree of damage.
- The imposition of criminal fines is not in accordance with the financial situation as a deterrent factor. It should be a principle that the determination of a fine must be in accordance with the provisions of the Code and the Fine Calculation Guidelines rather than

[16]Rita Hiro Balani v.Spain, Appl. No. 18064/91, Judgement of 9 December 1994; cited also on the Kosovo Constitutional Court Dissenting Opinion in Case No.KI 55/09, Constitutional Review of the Decision of the Supreme Court of Kosovo, No.2407/2006, 30 September 2009, par.26.
Lithgov and others v. United Kingdom, Application No. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Strasburg, 8 July 1986.

a copy-paste determination without taking into consideration differences in the financial situation of different defendants.

- Failure to provide adequate reasoning about the calculation of the weight and type of sentence is also a constant problem and an indication that the court has failed to adequately perform its duty under the law. No provision in the CPCRK relieves the court from such obligation or minimizes the court's obligation to provide full reasoning regarding the sentencing decision. While there are notable improvements in terms of reasoning, still the decisions with adequate reasons about the manner of deciding on the sentence and the breakdown of the adequate circumstances taken into account, are in small numbers compared to the decisions that are not well reasoned.

These systemic shortcomings in sentencing practice are significant and evidence of a lack of direction on the part of the courts. At its core, a failure to adequately explain the basis for a sentence prejudice both parties. For the accused, the failure to provide a sound justification for consideration of aggravating factors results in a sentence that is not supported by the facts. This is injustice. Likewise, the imposition of a lower sentence based on unsupported mitigating factors subjects the decision to an appeal that could be avoided, and the defendant is denied the right to a fair and speedy trial. Similarly, the prosecution, and the public in general, is denied the larger societal goals of sentencing because the defendant receives a lower sentence than would be received if the court actually adhered to its obligation to conform its sentence to only those factors that were proven. This problem is further compounded when unsupported mitigation is used to justify a sentence below the minimum sentence prescribed for the offense.

4. Transparency, legality and public trust

The current sentencing practice also leads to reduced transparency, violates the principle of legality, and greatly contributes to the negative outlook for the judiciary. All these three factors further undermine the rule of law.

4.1 Transparency

The failure of current practice negatively impacts overall transparency in the justice system. The CCRK and CPCRK have put in place requirements that increase the overall transparency of judicial decision-making – such as the public nature of judicial proceedings and requirements for announcement of judgments to the public. The publication of judgments, clear procedures for the conduct of the trial, and specific sentencing ranges also play a large part in the process. Information on the functioning of justice and the presence of the public at judicial proceedings contribute to the social acceptance of the judiciary. Judges ensure transparency through public hearings and by giving reasons for their decisions while maintaining the confidentiality required to respect the defendant or because of the need for public order.[18] Overall, the concept is that access to information on the functioning of the system will enhance the overall

[18] European Network of Councils for the Judiciary (ECNJ), Judicial Ethics Report 2009-2010, pg.9.

understanding of the system. It also improves the ability of the public and the appropriate governmental institutions to monitor, assess and, if necessary, modify the existing legal system.

However current sentencing practices do not support transparency – they decrease it. The parties, the public and a first-instance court cannot simply understand the basis for a particular sentencing decision if the court fails to refer to the relevant facts. By providing adequate reasoning and following an established procedure, the court and the process are more transparent and accessible.

4.2 The principle of legality

Current sentencing decisions also impact the principle of legality. Generally, the principle requires the law to be ascertainable by the parties, particularly the defendant, and that the rules should be declared beforehand. Increasing the clarity of the law yields an increase in the overall fairness of the proceedings for interested parties.

It also establishes a degree of predictability in outcomes and allows the accused access to the mechanisms that the justice system uses to calculate punishments. When an individual has access to such information, that individual may predict the nature and duration of the sentence that would be appropriate for a criminal offense

Predictability and the principle of legality also increase the efficiency of the justice system – an outcome sorely needed in Kosovo. For example, the CPC is quite clear in establishing requirements for the sharing of evidence with the defendant before the main trial. This allows the defendant to make a relatively adequate assessment of the likelihood of prevailing at trial. The CPCRK provides for limitations, under Article 230, for negotiated plea agreements which allow for expedited proceedings in exchange for a lesser sentence. A defendant is capable of receiving a known penalty in exchange for a plea. Both of these provisions establish the front-end process for improving the rate of dispositions. The current practice does not give any ability to assess the likelihood of a sentence at the end of a trial that results in conviction. **With current practices – such as unclarity in defining a starting point, departures from minimum sentences with no justification, and the assessment of mitigating factors not supported by the case file – there is no motivation to take advantage of a plea agreement.** There is simply no logical reason to not risk the outcome at trial, which may result in acquittal, or in a lower sentence below what was offered in a plea agreement.

Ultimately, the erosion of this principle by current practices harms the legitimacy of the justice system as a whole and drastically decreases the efficiency of the judiciary. Guidelines offer the possibility of improving the situation without undue restriction. By clarifying procedures and ensuring they are uniformly followed, the defendants, and society at large, is provided with the tools to understand and “know” the legal system, and the overall efficiency of the system is improved.

4.3 The public trust in the court decision-making process

Problems related to sentencing are not limited only to the impact on the parties; they have greater implications for society in general. A professional court has an impact far beyond the confines of its own courtroom. Their opinions and professionalism will influence how the citizens of Kosovo view the judiciary.

Ultimately, sentencing decisions are of great importance to society as a whole and how they view the judiciary is in large part how they view the court's ability to provide justice to them, their loved ones, and their friends. Justice must not only be done but it must also be seen to be done. With the publication of judgments, the public will increasingly have the opportunity to assess the way courts have acted during their decision-making process, therefore flawed decisions seriously damage the image of the judiciary. Conversely, trust in the impartiality of the justice system will ultimately translate into a sense of security and trust and will significantly reinforce the rule of law principles.

According to Public Pulse Summary-XXII[19] for 2024, of over 1300 respondents, 27.10% were satisfied with the judicial system and 26.50% with the prosecutorial system. The system has a lot of work to do, given that the percentage of satisfaction is lower than that of the President (69%), the Executive branch (53.30%) and the Legislative branch (52.10%).

The argument is that the sentences, at least for some offenses, are too low because the particular court does not agree with the level of punishment provided for that offense. In essence, this is a circumvention of the law. The fact that the court thinks, for example, that for the criminal offense "Rape" from Article 227 par.1 of the KPRK, the sentence of 2 to 10 years of imprisonment is high, results in many cases with the imposition of the minimum sentence. Thus the EULEX Report of 2022[20], after analyzing acquittals in cases of rape, finds that those acquittals were based on:

- Absence of evidence of violence (including absence of injuries to the victim's genital area);
- the subsequent inability by the courts to prove that the defendant committed the crime.
- withdrawal or changing of the statement by the victim during the judicial process.
- the implied consent of the victim, based on the fact that the person had a previous relationship with the defendant
- that the injured party had gone to the scene of the alleged crime with unknown persons. From these actions, the court concluded that the victim silently consented to sexual intercourse.

In the case Vertigo v. Philippines referenced in the same report, the findings of the Committee on the Elimination of Discrimination against Women (CEDAW) were presented as follows: *"The committee found that the court wrongly based its findings on gender-based myths and stereotypes about rape and rape victims, and stated that there should be no presumption in*

[19] UNDP in Kosovo, Summary of Public Pulse, XXVI, pg.6, UNDP and USAID, May 2024.
[20] Assessment of the handling of rape cases by the justice system in Kosovo, Monitoring report, EULEX, Page 26, July 2022.

law or practice that a woman gives her consent simply because she does not physically resist unwanted sexual behavior. These myths are often coupled with other common myths/assumptions about rape, such as those related to the victim's appearance and character that affect her credibility, and the time and place of the rape (i.e., if the victim went to a motel, he/she should have known what to expect).[21]

Unfortunately, such practices are also present in Kosovo. By justifying the violence by blaming the victim, exonerating the defendants, or imposing minimum sentences on them, the court expressly manifests its disagreement with the legal ranges for those crimes. By doing so, the court not only lowers its moral values but also exceeds its powers vested in it by the Constitution.

[21] Ibid pg. 28

II. Procedural aspects of sentencing

1. Novelties of the Criminal Procedure Code

One of the most significant innovations in the CPCRK that is expected to greatly contribute to the advancement of sentencing principles in the Republic of Kosovo is the introduction of a separate sentencing hearing. This hearing from Article 356 introduced for the first time with the latest amendments of the CPCRK[22] also enables an active engagement of parties in the procedure. Without the burden of determining culpability (since it has already been determined in advance), both the prosecutor and the defense are able to focus much more effectively on what is important for sentencing. This hearing will also give the injured party or victim, a very favorable chance to express himself/herself in terms of the physical, psychological, and financial impact of the crime committed by the defendant.

Of all the hearings that take place in court, none is more important, more emotional and more impactful than the sentencing hearing. The sentencing of the defendant is the culmination of the criminal investigation and prosecution. It is the time when the state punishes the perpetrator for criminal violations of social norms.[23]

This session resembles the process before the International Criminal Court (ICC). The provision of Article 76 paragraph 2 of the ICC creates the possibility of a separate sentencing hearing before the end of the trial, in order to examine additional evidence or submissions related to sentencing. As in the case of the ICC, in Kosovo, the hearing is not mandatory and is scheduled based on the party's request or set by the court *ex officio*.

The provisions of the sentencing hearing explicitly provide for the first time the role of the Probation Service in presenting the pre-sentence report with vital data for the adequate decision-making of the court, enabling individualization of the sentence as much as possible. This new practice, although challenging, will allow the justice system in time to build a consistent practice that leads to harmonization of sentencing. In fact, it is precisely this hearing that will enable a wider application of the Supreme Court's Sentencing Guidelines. Consequently, this also enables the equal treatment of defendants under similar conditions and circumstances.

The Sentencing Decision can be considered fair in terms of giving opportunities only if it allows for a full and strong presentation of arguments and evidence from all parties and is therefore less likely to be overturned or changed on appeal. This is also in accordance with the principle of equality of arms embodied in Article 6 of the European Convention on Human Rights,[24] which

[22] Criminal Procedure Code No. 08/L-032 of the Republic of Kosovo, Article 356, Sentencing hearing following guilty plea or conviction, Official Gazette of the Republic of Kosovo / No. 24/17 August 2022, Prishtinë/Pristina.
[23] Williams CJ, The Importance of Effective Sentencing Advocacy, Sentencing Advocacy, Principles and Strategy, p.3, McFarland & Company, Inc., Publishers, Jefferson North Carolina.

stipulates that all parties must have an equal opportunity in the proceedings to present and comment on all evidence presented to the court for consideration.

2. Standard of Proof

In some legal systems, the standard of proof for sentencing is separate and apart from the standard required for finding a defendant guilty of a crime. In most instances where that standard is separate, the court's conclusion on whether the existence of facts in aggravation and mitigation are proven is based on a standard of proof that is less than in the determination of culpability. This may in some cases be separated even further such that the burden of proving the existence of an aggravating factor is a higher burden than for mitigation. For example, in the latter case, a court might apply three separate standards: proof beyond a reasonable doubt to determine culpability, proof by articulable and convincing evidence to establish an aggravating factor, and proof by a preponderance of evidence to establish a mitigating factor.

Here again, the key to enhancing the overall fairness of the system and maximizing the principle of legality is to ensure consistency in application. Hence the more appropriate questions are the following:

Does the code, explicitly or implicitly, contain a standard of proof for determining the existence of aggravating and mitigating factors?

If it does contain a standard, is that standard any different than the standard that applies for determining culpability?

As to the first question, there is no explicit statement of what is the standard of proof that a court must apply when evaluating the presence of aggravating or mitigating factors. This is similar to the standard for determination of culpability, which also has no explicit provision. However, there are several standards within the code which provide some guidance.

There are five standards within the CPCRK that apply to various procedures: (1) reasonable suspicion, (2) grounded suspicion, (3) grounded cause, (4) sound probability, and (5) well-grounded suspicion. Each contains components of perspective, information, and some level of belief that the potential defendant committed the crime. When the components are combined, they form a clear standard of proof required to obtain whatever action or step is being sought in the process. At the highest level is the concept of a well-grounded suspicion, required for the filing of an indictment, which requires admissible evidence that would satisfy an objective observer that a criminal offense has occurred and that the defendant has committed the offense. As the prosecutor is required to meet this standard in order to obtain an indictment and move forward into the process of the main trial, it follows that the standard of proof required to find culpability is some quantum of proof above a well-grounded suspicion. Considering that the sentencing procedure is likewise part of this process, it makes sense that this standard is, at a bare minimum, a well-grounded suspicion.

As to what exact standard should be applied, the CCRK and CPCRK provide no definite solution. Generally, international sentencing practices and the practice of the ICTY place a higher standard of proof to establish the existence of an aggravating factor as opposed to a mitigating circumstance. Considering that an aggravating circumstance is designed to enhance the penalty

meted out against the defendant, the Court must ensure that the evidence submitted establishes the existence of the aggravating circumstance beyond a reasonable doubt. As to mitigating circumstances, there is no consensus, hence the standard, as stated earlier, is a well-grounded suspicion.

In deciding on sentencing the ICTY has also addressed the issue of standard of proof for both aggravation and mitigation in some of its cases. In Kunarac, Kovac, and Vukovic case the Trial Chamber stated: *"[F]airness requires the Prosecutor to prove aggravating circumstances beyond a reasonable doubt, and that the defense needs to prove mitigating circumstances only on the balance of probabilities."*[25] Similarly in Simic case, the Trial Chamber again reiterated: *"Mitigating circumstances need only be proven on the balance of probabilities and not beyond a reasonable doubt."*[26]

An example of how the standard of proof can be set in law can be found in the Criminal Law in Israel, more precisely in the amendments to this law made in 2012. According to Article 40j paragraph (c) of this Law[27]: *Courts will apply the reasonable suspicion standard to prove aggravating circumstances, while the civil probability standard to prove mitigating circumstances*."

The above-mentioned examples from the practices and laws of other countries are presented only to reiterate and emphasize how different standards can be applied for assessing mitigating and aggravating factors.

Considering the lack of guidance provided by the CPC on sentencing issues, a court struggling to adopt its own systematic approach may be applying some form of different standard, depending on whether we are dealing with mitigation of aggravation of punishment. While the court may be absolutely correct in seeking its own solutions to this deficiency, the problem is that not every court may be arriving at the same standard.

When the court wishes to take into account any factor that is not part of the definition of the criminal offense as an aggravating factor, it must make sure that the aggravating factor is proved beyond reasonable doubt, and before the court refuses to take into account any mitigating circumstance, it must make sure that the relevant factor does not exist.[28]

The types of evidence to be presented by the parties to establish aggravating or mitigating circumstances is fairly straightforward. Any evidence submitted for sentencing consideration

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[25] Case No.IT-96-23-T&IT-96-23/1-T, Judgment , Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, International Criminal Tribunal for the Former Yugoslavia, (22 February 2001), Par.847.

[26] Case No.IT-95-9/2-S, Sentencing Judgment, Prosecutor v Milan Simic, International Criminal Tribunal for the Former Yugoslavia, (17 October 2002), Par.40. citing Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement ("Krstic Judgement"), para. 713.

[27] Penal Law (Amendment No 113) 2012, 2337 LSI 17065, Structuring Judicial Discretion in Sentencing. Taken from Roberts, Julian V. and Gazal-Ayal, Oren, Sentencing Legal Reform in Israel: Exploring the 2012 Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2012 (November 1, 2013)]. Israel Law Review, 46(3), p. 455-479, Available at SSRN: https://ssrn.com/abstract=3181893

[28] Recommendation of the Council of Europe No. Council of Europe Recommendation no. r (92) 17, of the Committee of Ministers to member states concerning Consistency in Sentencing; Appendix to Recommendation No. R (92) 17; C. Aggravating and mitigating factors, sub.par.3.

should be subject to the same scrutiny as evidence submitted to establish the culpability of the defendant. What is particularly important is that courts must require the parties to actually submit evidence to support a claim that an aggravating or mitigating circumstance exists – assertions by counsel for the parties are not sufficient.

In conclusion, the above procedure will maximize the transparency of the sentencing process and both the implementation of the principle of legality and equality of arms. By clearly articulating the court's expectations prior to beginning the trial, all parties understand their obligations, the procedure to be followed, and the strategic choices they must make. They also understand what evidence must be submitted to establish the existence of any particular mitigating or aggravating circumstance. In the end, the process is uniform in application and results in a decision that is fully informed, based on the decisions of the parties, and ultimately less likely to be overturned on appeal.

3. Plea Agreement

Although alternative case resolution procedures are relatively new, they have gained popularity around the world as methods to conserve and prioritize resources. One of the most controversial procedures, which is also new, and has found application is the plea agreement.

Although the court has limited ability to get involved in the negotiation between the defendant and the prosecutor, it still has the final say on whether the plea agreement will be accepted or not. The provisions of the plea agreement are regulated by Article 230[29] of the CPCRK and the provisions related to sentencing in the CCRK. There are several important considerations that the court must adhere to.

In general, the prosecutor has the option of offering a sentence that is within the ranges provided for in the Code. Any sentence within legal ranges may be offered by the prosecutor and accepted by the defendant. This does not mean that the prosecutor must make the minimum offer whenever it is available. Determining the appropriate plea agreement is a decision within the prosecutor's discretion that must take into consideration a variety of factors. Despite this, the fact that the prosecutor presents a certain offer does NOT mean that the court MUST accept and implement it. The court is the final authority to determine whether the plea agreement is acceptable, however, it must comply with the prosecutor's decision to a certain extent. In the plea agreement, the prosecutor must include at least:

- The charges to which the defendant will plead guilty;
- Whether the defendant agrees to cooperate;
- The rights that are waived;
- Defendant's responsibility for restitution to an injured party and confiscation of all assets subject to forfeiture.

[29] Criminal Procedure Code of the Republic of Kosovo, Code No, 08/L-032, Article 230 Negotiation of the plea agreement, Official Gazette of the Republic of Kosovo/No. 24, 17 August, 2022, Prishtina.

Although the prosecutor has the opportunity to enter a plea agreement, this does not mean that the court is obliged to accept it. Article 230 explains that in order to accept the plea agreement, the court must assess positively certain factors, such as:

- 17.1. the defendant understands the nature and the consequences of the guilty plea;
- 17.2. the guilty plea is voluntarily made by the defendant after sufficient consultation with defense counsel, if the defendant has a defense counsel, and the defendant has not been forced to plead guilty or coerced in any way;
- 17.3. the guilty plea is supported by the facts and material evidence of the case that are contained in the indictment, or materials presented by the prosecutor to supplement the indictment and received by the defendant, and any other evidence, such as testimonies of witnesses, presented by the prosecutor or defendant; and
- 17.4. none of the circumstances under Article 248, paragraph 1 of the Code exists.

Undoubtedly, the main concern of the court will be the sentence offered/recommended by the prosecutor and whether the court finds the sentence to be acceptable. Procedurally, the code allows the court to accept the guilty plea of the defendant and ultimately determine a sentence that is higher than the offer made by the prosecutor. This is based primarily on the concern that after the court accepts the plea, it may determine that there are insufficient factors to ultimately arrive at a sentence offered by the prosecutor or there may be facts that change the court's position substantially. While this permits maximum flexibility for the court to determine a sentence that is justified by the facts, imposing a higher sentence than expected will destroy the motivation for plea agreements in the first place. Primarily that the defendant forgoes the uncertainty of trial for a known sentence.

To correct this potential problem, the court must reject a plea at the original acceptance hearing if there is any concern it will not be able to sufficiently justify the agreed to sentence. The court is permitted to do this under paragraph 17.1 (above) based on the argument that the defendant does not understand the nature and consequences of the plea agreement, i.e. that they are going to receive a sentence that is higher than what was actually negotiated. If the court has already accepted the initial agreement and learns of facts that will not permit imposition of the agreed to recommended sentence it may inform the defendant and reject the plea on the basis that the defendant no longer understands the consequences of the plea.

There are no specific requirements as to whether the defendant is to be offered a sentencing range or a specific sentence in exchange for a plea. Each case has its own merits. Likewise, there is no requirement for the defendant to plead guilty to every offense listed in the indictment. The court must evaluate the recommended sentence and charges in their entirety and determine whether there are sufficient facts to impose the requested sentence. The court must always ask the prosecution and the defense to justify the proposed sentence.

Ultimately, in order to facilitate plea bargaining and expedite case processing, courts are strongly encouraged to reject plea agreements that are unacceptable and allow renegotiation rather than impose a sentence outside the plea agreement and avoid resolution of the case at the appellate level.

III. Principal punishments according to the CCRK

Principal punishments form the basic sentencing provisions of the CCRK and are generally described in Articles 40-45. Article 40 establishes the three primary principal punishments: (1) life imprisonment, (2) imprisonment, and (3) a fine. However, not every option is available, and the court must read these general provisions in conjunction with the specific offense provisions. When read together, the court has the following options: 1) a range of imprisonment, consisting of a minimum term and a maximum term; (2) whether a fine is available as a substitute for a term of imprisonment; (3) whether a fine is available in addition to a term of imprisonment; and (4) whether there is a maximum or "cap" on the fine.

1. Imprisonment sentence

The range of imprisonment available depends upon the particular offense, and a variety of phrases and methods are used to describe it. The bulk of available sentences described in the code provide a definite term of years both for a minimum and a maximum. For example, one of the most popular ranges in the code is a sentence of 6 months as a minimum and 5 years as a maximum.

In addition to definite ranges, the code provides other sentences that contain descriptive terms for maximums and minimums. For a minimum term, the Code uses two phrases: "not less than" and "at least." Both of these phrases are interchangeable and provide the bottom end of the sentence available but are silent on the maximum. The Court must look to Article 45 paragraph 1 to provide the maximum, which is a term of twenty-five (25) years.

The Code contains a number of sentences (In 324 paragraphs distributed in 175 Articles of the CCRK) that provide the minimum. These use the descriptor "up to" "no more than" a period of X months/years. The minimum is likewise provided by Article 42 paragraph 1 which sets a minimum sentence of no shorter than thirty (30) days. Hence the available lower range for an offense for which the punishment is "up to 12 years" is 30 days.

The CCRK appears quite strict for some of the criminal offenses by providing rather high minimums of 10, 15, and 20 years. These punishments are observed in 67 paragraphs distributed in different chapters of the CCRK.

Unlike the 2018 Sentencing Guidelines, where the average between the legal minimum and maximum was determined as the starting point for all punishments provided for by the Criminal Code, a different approach has been taken in the present revised Sentencing Guidelines. Although the legislator has foreseen a legal minimum and maximum, the general opinion of the judges was that the revised Guidelines should be amended precisely in terms of determination of the starting point. Different starting points are determined even within the same chapter of the CCRK, depending on how dangerous those offenses are to the society, or whether the offenses of a certain category are more prevalent during a certain period of time, and it is in the country's interest that to have stricter policy both in legislation and in implementation.

Thus, as you will notice from the separate part for each chapter of the CCRK, different scales of starting points have been determined such as 1/3, 1/2, or 2/3 depending on

the specifics of criminal offenses. Through such scaling, the Supreme Court aims to make the Guidelines as applicable to the judiciary as possible. In general, the CCRK provides for wider ranges for more serious criminal offenses and narrower ranges for less serious criminal offenses.

2. Life sentence

Life imprisonment is provided for the most serious criminal offenses provided for in the CCRK, therefore they can only be imposed if it is expressly provided for that type of criminal offense. Life imprisonment is provided as an option for a multitude of criminal offenses provided for in the Code. Article 42 paragraph 2, gives the court the opportunity to impose a prison sentence of up to 35 years instead of life imprisonment. Article 41 stipulates that life imprisonment may be imposed for the most serious criminal offenses committed under "particularly aggravating circumstances" or for criminal offenses that "caused very serious consequences".

Another innovation of the revised Guidelines is the clarification that the starting point does not apply when the court imposes a sentence of life imprisonment. This is due to the fact that Article 41 provides that life imprisonment can be imposed for the most serious criminal offenses committed under "particularly aggravating circumstances" or for criminal offenses that "have caused very serious consequences". This means that the two factors determining whether someone will be sentenced to life imprisonment are the ones outlined above. Finding that these factors exist, results in the imposition of a life sentence by the court.

The issue that needs to be defined is the one related to cases where the above-mentioned factors are not of a very serious nature and, consequently, the conditions for the imposition of a life sentence are not met. In these cases, the court can impose a sentence ranging from the legal minimum up to the legal maximum of 35 years as defined in Article 42 par..2 of the CCRK[30]. Therefore, in order to determine the punishment, in addition to other factors the court must take into account the legal minimums for a particular offense as well as the legal maximum of 35 years according to Article 42 paragraph 2 of the CCRK. CCRK provides for different legal minimums of 5, 10, 15, and 20 years of imprisonment. This implies that the calculation of sentences for these types of criminal offenses is made from the legal minimums and maximums, depending on which criminal offense it is about:

- 5 and 35 years
- 10 and 35 years
- 15 and 35 years
- 20 and 35 years

Such a calculation allows for differentiation between cases where a prison sentence is provided and cases where the life sentence is provided under the law. Moreover if the conditions outlined

[30] Article 42, Imprisonment sentence, paragraph 2 states: *"For criminal offenses for which the law foresees the punishment of life long imprisonment, the court can impose a punishment of imprisonment up to thirty five (35) years.."*

in Article 41 paragraph 1 do not exist and when mitigating factors prevail then the sentence may be reduced depending on the gravity of those factors.

3. Punishment with a fine

The issue of fines as principal or alternative punishments is extensively regulated by the 2020 Supreme Court Guidelines.[31] Such Sentencing Guidelines have been drafted in full compliance with the provisions of the Criminal Code and the way this code provides for the calculation of fines. Referring to provisions of the Code regulating fines, the aim of the Guidelines was not only to harmonize the approach but also to provide the judiciary with a working tool that would ensure that the imposed fine also serves as an effective punishment. This is due to the fact that in line with the provisions of Article 69 of the Criminal Code, the imposed fine would be commensurate to the defendant's financial situation. The aim is for the fine to have an equal impact on defendants of different financial circumstances. Only this way it will be ensured that the sentence imposed would be proportionate and fair.

It must be clear that the purpose of the fine is not to take the financial benefit obtained from the criminal offense from the defendant. This is because the fine is a punishment and must be calculated in accordance with the provisions that apply to sentence calculation.[32]

In general, the CCRK provides for two situations where the punishment of fine is used. First, a fine is imposed in addition to a period of imprisonment. These appear in the codes with the modifier "and" in the offense description and impose a mandatory requirement on the Court to

impose a fine in addition to some other form of imprisonment. This solution was provided for most offenses of the CCRK. Second, the CCRK provides a fine as an alternative sentence instead of an imprisonment sentence, using the modifier "or" in the offense description. Such a solution is mainly applied to what would be considered less serious offenses.

It would be worrying if for very serious criminal offenses, which also constitute great harm to the individual and society, the defendant could get off very easily. This applies especially in cases where, in addition to the fine, the defendant has not imposed any other restrictive measure or additional sentence for the offense committed (eg, no compensation, additional obligation, or confiscation of assets is imposed).[33]

Due to the fact that separate Sentencing Guidelines for fines will also be drafted, the general Guidelines will not dwell in further elaboration on this matter. Immediately after the approval of the specific Guidelines, the electronic fine calculator was also developed[34], which has been installed on the website of each court. It is designed in full compliance with the provisions of CCRK and the specific Guidelines. Active engagement is strongly recommended in particular of the parties, to provide the court with sufficient data for a more accurate calculation of the fine.

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[31]Specific guidelines: Imposing a fine as a sanction for criminal offenses according to the Criminal Code of the Republic of Kosovo. Approved on February 27, 2020, by the General Meeting of the Supreme Court, Pristina.
[32] Ibid: pg.2
Ibid.pg.3.
[34] See https://supreme.gjyqesori-rks.org/kalkulatori-i-gjobes/

IV. Sentencing according to the principles of Article 69 of the CCRK

Criminal Code Article 69 states:

"1. *When determining the punishment of a criminal offense, the court must look to the minimum and maximum penalty applicable to the criminal offense. The court must then consider the purposes of punishment, the principles set out in this chapter, and the mitigating or aggravating factors relating to the specific offense or punishment."*

The following material will address each of the points highlighted by this article, focusing on a broader analysis.

1. The purpose of sentence

The purposes of the sentence defined in Article 38 are:

1.1. to prevent the defendant from committing criminal offenses in the future and to rehabilitate the defendant;

1.2. to prevent other persons from committing criminal offenses;

1.3. to provide compensation to victims or the community for losses or damages caused by the criminal conduct; and

1.4. to express the judgment of society for criminal offenses, increase morality and strengthen the obligation to respect the law.

1.1. Specific/Special Deterrence

Article 38 provides a general framework that should guide the court throughout the sentencing process. However, the CCRK does not establish any hierarchical structure. There is no requirement, for example, to place greater emphasis on the rehabilitation of the offender over general public deterrence. Moreover, there is no indication that the sentence must only meet one of the purposes. This lack of guidance places the Court in a particularly difficult situation as two courts faced with identical offenses and offenders can arrive at very different sentences when applying different purposes. For example, one court, focused on deterrence, may choose incarceration as a final sentence. While another court, focused on the rehabilitation of the defendant, may select a suspended sentence. Without any guidance, each sentence is equally valid under the law. This potential problem is generally recognized among sentencing theorists as problematic for enhancing sentencing inconsistencies and is partially addressed by the Council of Europe in stating that:

- The legislator, or other competent authorities where constitutional principles and legal traditions so allow, should endeavor to declare the rationales for sentencing.
- Where necessary, and in particular where different rationales may be in conflict, indications should be given of ways to establish possible priorities in the application of such rationales.
- Whenever possible, and in particular for certain class of offenses or offenders, a primary rationale should be declared.[35]

Although this issue is not specifically addressed in specific terms by the Code, the establishment of a starting point in combination with these guidelines, along with the available ranges for certain offenses does ameliorate the problem to a large degree. Generally, the code provides that as the seriousness of the crime increases, the availability of alternate forms of punishment diminishes. This places greater emphasis on specific and general deterrence as the overall purpose of punishment. As the seriousness decreases, rehabilitation becomes available as a possible sentence. However, it must be emphasized that the availability of alternate forms of punishment does not mandate their use. Finally, considerations of victim restoration must be present in all facets of sentencing. In large part, the individual circumstances the Court faces in any given situation will largely dictate where the specific purposes of punishment come into play and whether one should take greater priority than another.

Article 38 Paragraph 1.1 requires the Court to consider the traditional concept of special or specific deterrence. In this regard the Court is focused on the individual who committed the crime and whether the sentence prevents him/her from committing another crime in the future. According to the modern philosophy of penology, the punishment should fit the offender and not merely the crime. It is important to stress that the 'individualization' of the penalty implements the principle that criminal responsibility is an individual form of responsibility at the sentencing stage. In this sense, individualizing the sentence gives protection to accused individuals against punishments that do not strictly address their own acts, and thus ensures fairness. The offender is no longer an abstract violator of the law, but an individual that deserves specific attention.

This is more fully addressed by the second portion of the paragraph which incorporates the concept of rehabilitation. The theory of rehabilitation essentially posits that the objective of the sentence is to re-integrate the defendant into society after a certain period and to shape a sentence in such a way as to re-educate the defendant. Here the court is truly engaged in individualization of the penalty because it is required to address particular issues that may have been related to the commission of the crime. The ability to do this is contained in the accessory forms of punishment that may be included in the final sentence. For example, if a defendant commits an assault and is under the influence of alcohol, the Court may fashion a sentence that not only prevents them from committing future assaults but addresses a possible alcohol issue as well. Only by looking at the whole individual can the Court hope to prevent future crimes and reintegrate the defendant back into society as a productive member.

[35] Council of Europe Recommendation No. R (92) 17, of the Committee of Ministers to member states concerning Consistency in Sentencing; Appendix to Recommendation No. R (92) 92; A. Sentence objectives:

1.2. General Deterrence

Article 38 Paragraph 1.2 of the CCRK requires the Court to consider the purpose of general deterrence. In this traditional concept, the sentence serves the purpose of preventing other individuals from committing crimes, either of a similar nature or in general. General deterrence is not focused on the individual but on society as a whole. The hope is that a defendant will see that crime "does not pay" and factor the potential for punishment into the calculus of whether to commit a criminal act. In Naletilic and Martinovic case, the Trial Chamber held that "*Deterrence and retribution are the underlying principles in relation to the sentencing of an individual by the Tribunal. While retribution entails a proportionate punishment for the offense committed, deterrence ensures that the penalty imposed will dissuade others from the commission of such crimes"*[36]

While future perpetrators may not be "rehabilitated" in the traditional sense, they may just forgo the commission of the crime. In Mucic et al. case the Appeals Chamber held that *"Although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in sentencing, this cannot play a predominant role in the decision-making process of a Trial Chamber of the Tribunal".*[37]

1.3. Victims and the Community

Article 38 Paragraph 1.3 of the CCRK requires the Court to consider the impact of the crime on the victim or the community and requires that any sentence needs to include s compensation for losses. This purpose represents a relatively recent development in sentencing theory that recognizes the importance of the rights and needs of victims of crime. From this perspective, the primary aim of the sentence would be to ensure that the defendant compensates the victim(s) of crimes and the wider community. This has several implications.

First, it is an acknowledgment of the importance of the victim's rights in the calculus of the punishment. This is not an ancillary consideration for the Court that can be offloaded to societal compensation mechanisms if the offender has the ability to restore the victim to their previous state. **This must be a primary consideration in formulating the sentence.**

Second, the inclusion of the community in the purpose indicates a clear expression that victims can include the larger community. In crimes where this involves, for example, destruction of property, restitution will take the form of monetary compensation. But the consideration does not stop there. The impact to the community may take the form of damage to the overall psyche of individuals in the community. This may include feelings of safety and/or community reputation. While these may be somewhat intangible or quantifiable in monetary terms, the Court must strive to restore those intangibles to their previous state.

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[36] Case No. IT-98-34-T, Judgment, Prosecutor v. Mladen Naletilic and Vinko Martinovic, International Criminal Tribunal for the former Yugoslavia, (March 31, 2003), Par. 739, citing Todorovic Sentencing Judgment, paras 29&30; Plavsic Sentencing Judgment, para 23.

[37] Case No.IT-96-21-A, Judgment , Prosecutor v Zejnil Delalic, Adravko Mucic, Hazim Delic and Esad Landžo, International Criminal Tribunal for the Former Yugoslavia, (20 February 2001), Par.756-757.

1.4. Judgment of Society, Increased Morality, and the Obligation to Respect the Law

The final paragraph of Article 38 is a general statement of the purposes of punishment and their relationship to the overall concept of the rule of law. Here the consideration goes beyond the individual, the victim, and the community, to the impact of the sentence on society as a whole. This requires the Court to elevate its consideration beyond the corners of the community in which it sentences and seeks to establish consistency across Kosovo.

2. General rules for assessing evidence

In addition to requiring the purposes of punishment be considered, Article 69 requires the consideration of principles established in the chapter. Although no specific principles are established within a particular Article, general principles are embodied throughout the chapter when addressing particular circumstances. Hence the court is not mandated to consider a particular principle itself, but rather consider and apply any article aligning with the particular facts of a case. For example, under Article 74, the Court may waive punishment for offenses committed negligently in specific circumstances. This embodies the principle that not all crimes committed negligently deserve the same punishment as those committed with purposeful conduct. The principles are not addressed in individual detail as most of the articles contained in the chapter will apply to particular factual situations. The court must consider each provision that applies to the particular factual scenario and consider the particularities.

As stated in Article 69 of the CCRK, "The punishment shall be proportionate to the gravity of the offense and the conduct and circumstances of the defendant". In line with this and other provisions of the Code, when determining the sentence the court shall consider the level of criminal offense. Such assessment shall be done pursuant to Article 69 Paragraph 3, requiring the Court to consider a series of factors. These factors in large part are general categories under which the specific mitigating and aggravating circumstances fit. However, they can also be considered general principles under which the Court should be guided accordingly. They are:

3.1 the degree of criminal liability;

3.2 the motives for committing the offense;

3.3. the intensity of danger or injury to the protected value;

3.4. the circumstances in which the act was committed;

3.5. the past conduct of the defendant;

3.6. the entering of a guilty plea; and

3.7. personal circumstances of the perpetrator and his or her behavior after committing a criminal offense.

2.1. Degree of criminal liability

The degree of criminal liability is generally determined based on the degree of responsibility, the degree of culpability of the defendant and other circumstances that indicate a higher or lower responsibility. The general principle at work is that the degree of criminal liability of an individual will directly impact the degree of penalty imposed on the offender.

In determining the degree of accountability, the court shall consider whether the crime was committed in a state of significantly reduced or reduced accountability. This can take a variety of forms and requires an adequate assessment of the participation in the commission of the offense. The general concept is that the smaller the responsibility of the individual to direct commission of the offense, the greater there may be potential for reduction in the final punishment.

The level of guilt is to be assessed considering the type of culpability (premeditation or negligence), as required by the law for the particular crime committed. In determining the level of culpability, in cases of premeditated crimes, the court shall consider if there is a direct or prospective premeditation, as well as whether in the specific case, one may identify the presence of one of the special types of premeditation, which may be an indicator of a lesser or greater level of culpability. In establishing various levels of guilt for negligent crimes, the court shall have to consider whether the crime is a result of conscious or oblivious negligence and also whether the crime involves some special type of negligence.

2.2. The motives for committing the act

Whenever it is known and can be deduced from the statements of the parties, the court must take into consideration the motive for committing the criminal offense in cases where it is not already included as an element of the criminal offense.

The motive may take the form of a positive nature such as helping another person, humane reasons or other socially advantageous reasons or a negative reason such as hatred, abjection, greed, self-interest, envy, or socially detrimental incentives.

The concept that acts committed for respectable and altruistic motives or with the intention to benefit other members of society are generally considered to deserve lesser punishments is based on the theory that crimes committed because of "strong human compassion" are less reprehensible. For example, society generally considers that a defendant who commits a theft of money to purchase medication to treat the disease of a family member is deserving of a lesser punishment than one who commits the theft purely for financial gain. In contrast, those that are committed with unacceptable or reprehensible motives easily call for harsher punishments.

However, it is important for the court to cautiously apply these principles as they can be highly personal in nature. The court thus runs the risk of imposing its own personal principles into the assessment of a penalty that may not be considered universal or awarding greater significance to a value than may be generally held. This is particularly applicable to mitigation of punishment based on grounds such as nationalism or the so-called "honor" of the individual or the family.

2.3. The intensity of danger or injury to the protected value

When establishing the level of the specific crime, the court shall consider the severity of the committed crime. In the case of identifying seriousness, this will include an evaluation of the intensity of the harmfulness of the consequences of the crime. When the issue is primarily a threat or endangerment the evaluation will focus on the protected right and the probability of violation.

In assessing the seriousness of the endangerment or violation of the protected right, the court shall consider the following elements in particular:

- the nature of the criminal offense, whether it is a criminal offense against property, life and body, or public traffic;
- a distinction must also be made between acts that endanger and harm;
- the seriousness and permanence of the consequence;
- is the offense committed or remained in an attempted form;
- the number of injured parties or victims;
- has the health or life of the person or his property been endangered,
- the value of the crime proceeds or damages caused; and
- other circumstances which in the specific case, may indicate the higher or lower effect of the crime on the specific right, value, or interest in question.

This issue will be less important when the severity of the offense is largely included in the formulation of the offense itself, which is discussed in greater detail in later provisions of the guidelines.

Example 1:

Let's take as an example one of the cases handled in Kosovo, for the criminal offense of Accepting a bribe from Article 421 paragraph 1 of the CCRK. The sentence imposed by the court, in this case, was 1 year imprisonment and €3000 fine. In the reasoning of the verdict, the court gave the following rationale:

"*When determining the type of punishment and its severity, the court based on Article 69 of the Criminal Code, considered all the circumstances that affect the type and level of the punishment, thereby considering the following mitigating circumstances: that the accused plead guilty to the criminal offense, the circumstances in which the criminal offense was committed, the earlier behavior of the accused, the honesty shown during the hearing, the conditions in which the accused lives, the intensity of endangerment or damage to the protected value, and that there were no consequences from the criminal offense*."

In the above case, it can be concluded that all the circumstances except the entering of a guilty plea are unclear due to the fact that they are only listed without explaining why they are relevant in the present case. So it is not clear how those circumstances influenced the reduction of the sentence. Therefore if we are to consider:

- ***the earlier behavior of the accused***, there is no explanation of his behavior and his previous life;

- ***the honesty shown during the hearing***, is not elaborated on how this honesty was manifested;
- ***the conditions in which the accused lives***, there is no mention in what conditions the convict lives that have influenced the mitigation of the sentence;
- ***the intensity of endangerment or damage to the protected value***, despite the fact that in reality taking a bribe precisely because of the destructive effect it has on a state should be considered a high-risk offense, in this case it was considered as a mitigating circumstance. Moreover, in this particular case, the amount of accepting s bribe was €12,000, which indicates that the reasoning at this point is totally unsubstantiated.
- ***there were no consequences from the criminal offense***, how is this statement justified considering the fact that the criminal offense falls under the category of criminal offenses against official duty, thus we consider that this reasoning is unsubstantiated in this regard as well.

Example 2:

In another judgment related to the criminal offense Organization and participation in a terrorist group from Article 143[38] paragraph 2 of the CCRK, the court imposed a sentence of 3 years and 8 months.

When assessing the circumstances that affect the determination of the type and level of punishment for the defendant in the sense of Article 73 of the Criminal Code, the court has assessed the following particularly mitigating circumstances: the personal circumstances and character of the defendant, namely the fact that the same is married, is a father of 2 minor children, who live in a poor economic situation, also the fact that they have lived in Syria for several years, and that his work, namely the eventual hiring in any work is the only source of existence and that the defendant's presence close to the children, in the conditions after the return in order to adapt to life in Kosovo, is essential to their growth and well-being, also considering the fact that apart from the mother, the defendant being their father is the only supporter they have in continuing their life, in a country from which they were absent for several years. The court has also considered the behavior of the defendant after committing the criminal offense and returning to Kosovo as a mitigating circumstance. In his initial statement given to the police, he described the nature of his involvement in Syria in its entirety, and the fact that he was aware of the wrongful nature of his actions, expressing remorse. Despite not pleading guilty, his behavior and attitude during the trial were good, silently manifesting a kind of remorse for his actions, but without expressly admitting culpability for any of the criminal offenses he was charged with. While no aggravating circumstances have been found. Therefore, based on these circumstances, the court found that the conditions set forth in Article 75 paragraph 1 point 1.2 of the Criminal Code have been met, which provides that in cases where there are special mitigating circumstances that indicate that mitigation of the sentence can achieve the goal of the punishment, the court can reduce the punishment even below the minimum provided by law.

We consider that in this judgment the mitigating circumstances presented do not reflect a determining factor to warrant the exceptional mitigation of sentence. Thus, the court took as an

[38] The offense was handled under Criminal Code No. 04/L-082 of the Republic of Kosovo, Official Gazette of the Republic of Kosovo, No. 19, July 13, 2012, Pristina.

important mitigating circumstance the fact that the defendant has two minor children and that the defendant's stay with them is necessary for their well-being. However, the court completely ignored the fact that it is the defendant who put his family in danger by going and living in Syria, which is presented as an aggravating circumstance with an extremely heavyweight in the sentencing calculus. Moreover, joining such terrorist groups represents a threat to global peace, and it is surprising how the intensity of the danger that these crimes represent was overlooked when assessing the level of punishment. The court also mentioned the defendant's remorse but also mentioned in its own analysis that the defendant has decided to remain silent and has never pleaded guilty to the crime he is charged with.

2.4. The circumstances in which the crime was committed

When establishing the level of the crime, the court must take into consideration all the circumstances that characterize the specific crime and the conditions under which it has been committed. This will include a thorough assessment of all of the specific facts of the crime which may or may not directly apply to the determination of culpability, but may impact the ultimate sentence.

These shall include but should not be limited to:

- the time, location, and manner in which the crime was committed;
- the means used to commit the crime;
- the persistence in committing the crime;
- any difficulties and obstacles that the defendant had to overcome while committing the crime;
- any special circumstances that have been provided to the defendant, which he or she used and benefited from in order to commit the crime more easily;
- personality and character of the victim;
- abuse of any special relationships of mutual trust with the victim;
- the type and form of participation in the crime committed;
- Committing the crime during natural disasters (floods, earthquakes, etc.)
- whether it was just an attempt or the crime was actually committed; and
- other objective or subjective circumstances that existed prior, during, and after the perpetration of the crime, which can influence the type and duration of the sentence.

2.5. Defendant's prior conduct

Prior conduct indicates the appropriateness of the perpetrator and his adjustment within legal and social norms. This general category relates to the past behavior of the defendant that may have an impact on sentencing either through direct application of other provisions of the code or incremental modifications of the final sentence. Depending on these circumstances, they can be classified as mitigating or aggravating circumstances, although we find it more in mitigation than aggravation. Good behavior in court should be excluded from this category as a mitigating circumstance since the defendant has an obligation to behave within the legal framework. Meanwhile, if on the other hand, the defendant avoids the summons of the prosecutor or the court, then this is an indication of the defendant's inappropriate behavior and contempt of the authorities/institutions, therefore it should be taken into account in the aggravation.

Prior conduct as an aggravating circumstance:

- whether the person has any diagnosed addictions/dependences or exhibits behavior consistent with such;
- whether he or she is a violent person or exhibits indicative behavior;
- if the person avoids summons of the police, the prosecution, the court, the center for social work, etc.
- antisocial behavior;
- the person's reputation within the society, i.e. community in which he or she lives in; and
- other facts that might serve as indicators of the prior life and character of the defendant before committing the crime, which might have an effect on the sentencing.

Prior conduct as a mitigating circumstance:

- remorse,
- sincere remorse immediately after the crime followed by concrete actions of care for the victim or the victim's family.
- defendant's behavior in the area where he lives and acts, his relationship with other people and his way of life, work in the community, voluntary work, etc.

In practice, we continuously observe in most cases that the defendant's good behavior is considered as a mitigating circumstance, and often without clarifying why such "behavior" is relevant in that case. This circumstance is often overlapped or even quadrupled with other circumstances from Article 70. Some of the references that are made to this circumstance in terms of mitigation are e.g. that the defendant has not been convicted before, the defendant is educated or holds an important position/function, etc. The court should always exercise caution in using this circumstance in mitigation. While the Code allows the application of this circumstance in the sentencing, the court must always take into account the principle of proportionality between the offense committed, the consequence caused, the dangerousness presented by that offense and the defendant, and the application of this mitigating circumstance.

It should be borne in mind that these circumstances are not equated with recidivism, but rather have to do with the defendant's specific behaviors that indicate his affinity, for example for violence, the danger that the same may pose to individuals, a certain circle of people or society in general. Sentencing a person with a violent history, for example, should not only be assessed in the context of his actions related to that crime but also how dangerous it would be if he is released or sentenced to a lenient sentence and returns to society without being rehabilitated.

2.6. Guilty Plea

The issue of punishment mitigation in case of a guilty plea is regulated by the provisions of CCRK and CPCRK. The Court should be particularly cautious when applying mitigation based on the entering of a guilty plea as the lack of structure in this area can and does cause substantial deviation in similar factual situations.

Additionally, when a guilty plea is concerned, a proper assessment of the final sentence should also include the evaluation of a number of other circumstances 'surrounding' and related to the guilty plea. These include issues such as the genuineness of the assertion of guilt, the expression of remorse by the defendant, and the overall behavior of the defendant towards victims.

According to the general provisions of the CCRK:

*"The court **may** impose a punishment below the limits provided for by law or impose a lesser type of punishment:*

1.3. in cases when the perpetrator pleads guilty or enters into a plea agreement."[39]

The aforementioned provision includes the word ***"can".*** **This means that the court should avoid automatically applying the reduction of the sentence below the legal minimum if the other circumstances surrounding the way the criminal offense was committed or the degree of damage caused are so serious that a mere guilty plea or admission does not justify the reduction below the minimum or imposition of an alternative sentence.** It is not by chance that the guilty plea is at the end of the list of circumstances for consideration by the court in the case of sentencing (the sixth circumstance in a row in Article 69 and the 10th in Article 70). The entering of a guilty plea cannot be considered as a sufficient basis for the automatic sentence reduction below the legal minimum. This would be contrary to the principle of proportionality expressed in Article 69 paragraph 2 of the CCRK which stipulates that:

"The punishment shall be proportionate to the gravity of the offense and the conduct and circumstances of the perpetrator".

It is also important to differentiate between the admission of guilt in the early stages of proceedings and the admission in the stage of the main trial. The earlier the plea is made, the more weight it can be given at sentencing.

2.7. Personal circumstances of the defendant and his or her behavior after a criminal offense.

Individual/Personal Circumstances of the accused can take the form of mitigation or aggravation. While mitigation typically focuses on the defendants themselves and their personal characteristics and circumstances, aggravation tends more toward the defendant's role in the crime and circumstances related to the crime itself.

Personal mitigating factors

Personal mitigation is a complex series of considerations for the court. They can be confusing and sometimes at odds with the personal beliefs of a particular judge. What one judge considers personal mitigation, another may consider personal aggravation. They may also take on differing levels of significance depending on which purpose of punishment is driving the court's decision.

[39]Criminal Code No.06/L-074 of the Republic of Kosovo, Article 71 Mitigation of punishments, par 1.3 Official Gazette of the Republic of Kosovo No.2, 14 January 2019, Prishtinë/Pristina.

International practice in this area, while cognizant of the importance of this category to individualization of the sentence, has not established a clear set of circumstances that should always be considered personal mitigation. In many respects, personal mitigation may be determined by the culture of the sentencing authority or scientific advancements. For example, the development of psychology and research has led to a series of personal mitigation factors focused on the psychological condition of the defendant and the impact it has on culpability. In some cultures, these developments have been considered germane and included as specific mitigation factors for consideration, while in others they have been rejected.

Generally, personal mitigation refers to the defendant rather than the offense, and can include:

- the defendant's past (e.g. good character, productive life, deprived background);
- the defendant's circumstances at the time of the offense (e.g. financial pressures, psychiatric problems, intellectual limitations, immaturity);
- the defendant's response after the offense and during prosecution (e.g. remorse, acts of reparation, seeking help for problems contributing to the crime, cooperation with the police and prosecution);
- the defendant's present and future prospects for rehabilitation (e.g. family responsibilities, supportive partner, capacity to address problems underlying the criminal behavior).
    - They can also be categorized into a number of factors such as
- Circumstances that indicate reduced culpability, such as youth or mental health problems, pressing need, previous good character, and exceptional disadvantage those that indicate limited risk of further offending - relating to remorse and attempts to make reparation, the defendant's circumstances, or steps taken towards rehabilitation;
- Circumstances that require sensitivity in the sentencing due to various circumstances for example family responsibilities when family members are deeply dependent on his/her care and the 'collateral damage' that imprisonment would cause to the family, or the social contribution made by the defendant.

Considering the potentially controversial nature of these factors, courts should be particularly aware of whether they have been specifically included in legislation for evaluation or they are referred to generically. General references to personal mitigation of the defendant or allowances for any other considerations by the court should increase the level of scrutiny of the court to a particular personal circumstance and the evidence of its existence.

Personal Aggravation

As indicated, personal aggravation is less concerned with the inherent qualities of the individual and more focused on the facts of the crime itself and the role of the accused in committing it.

Circumstances and factors for consideration include

- the level of participation in the offense by the defendant,
- whether the defendant was in a leadership position,
- whether the defendant was in a superior position in a hierarchical structure,

- the domestic situation or relationship between the victim and the defendant;
- whether the defendant was in a position of authority in relation to the victim;
- whether the defendant was in a position of trust in relation to the victim;
- whether the defendant exhibited religious, ethnic, political, discriminatory, and/or revenge motivations,
- prior criminal conduct regardless of whether the same or similar in type, and
- lack of remorse.

As can be seen, some of the factors or concepts listed above are simply the opposite of those factors listed in personal mitigation. This is a further example of how convoluted and unsettled the personal aspects of mitigation and aggravation are.

V. Aggravation and mitigation according to Article 70 of the CCRK

1. General sentencing issues

The origins of the debate regarding a set of circumstances that may modify the penalty can be traced back to the XII century when penalties were so rigidly established and were frequently so harsh that legal scholars began to appreciate the need for a graduation of the penalty according to the specific factual situation of a particular case. The penalty provided for a certain crime would be known as the *poena ordinaria*, being the penalty established by the legislator in connection with a specific crime under the normal circumstances of a case; further, the judge would also have the power to dissociate him/herself from the statutory penalty, aggravating or attenuating it, in the presence of a reason, or particular circumstance which would modify the 'normality' of the case. The diversity and number of such circumstances impacting the penalty needed to be evaluated with regard to the 'ordinary penalty', in other words, the average penalty that would result from legislative prescriptions. A number of common mitigating and aggravating circumstances developed, within this complex and evolving theoretical process. The increased use of these circumstances led to the codification of the process of individualization of punishment and the development of a series of common radical changes.

In Mucic at al case, the Appeal Chamber stated:" The Trial Chamber found, in its general considerations before addressing the factors relevant to each individual accused, that by far the most important consideration, which may be regarded as the "litmus" test for the appropriate sentence, is the gravity of the offense… The sentence imposed must reflect the inherent gravity of the accused's criminal conduct. ***Determining the gravity of the offense requires consideration of the special circumstances of the case, as well as the form and degree of participation of the accused in the commission of the offense... The Appeals Chamber reiterates its support for those statements and confirms its acceptance of the principle that the gravity of the offense is the primary consideration in sentencing."***[40]

In many cases, judges lack a proper understanding of how different circumstances may, respectively should, affect the decision on punishment. Although the range of mitigating and aggravating circumstances is extensive, and the courts have discretion on how to apply these to the punishment, there are certain factors that clearly should or should not be taken into consideration. A mitigating or aggravating circumstance must be relevant to the criminal offense or to the offender's personal circumstances. Standard references to, or listing of, mitigating or aggravating factors sometimes lead to references being made to circumstances that are not relevant to the specific case.

The mitigation provisions in the CCRK are quite generic. To some degree this is attributable to the fact that it is impossible to account for every possible set of circumstances that may appear before a judge or authoritatively decide in what way a factor should be applied. But while this approach allows great flexibility, it provides little in the way of guidance, and increases the likelihood of divergent sentencing practices. This further contributes to inconsistencies in sentencing, decreases legal certainty, and increases criticism of the judiciary. In terms of

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sentencing, the CCRK provides few instructions regarding "legal individualization" and sufficient instructions on "judicial individualization".

The end result of analyzing these factors and other circumstances foreseen therein is to arrive at a sentence as stated in Article 69 of the CCRK that is "proportionate to the gravity of the offense and the conduct and circumstances of the offender."

Article 70 of the CCRK lists the following factors for the court's consideration:

2. When determining the punishment the court shall consider, but not be limited by, the following aggravating circumstances:

2.1. a high degree of participation of the convicted person in the criminal offense;
2.2. a high degree of intention on the part of the convicted person, including any evidence of premeditation;
2.3. the presence of actual or threatened violence in the commission of the criminal offense;
2.4. Whether the criminal offense was committed with particular cruelty;
2.5. Whether the criminal offense involved multiple victims;
2.6. Whether the victim of the criminal offense was particularly defenseless or vulnerable;
2.7. The age of the victim, whether young or elderly;
2.8. the extent of the damage caused by the convicted person, including death, permanent injury, the transmission of a disease to the victim, and any other harm caused to the victim and his or her family;
2.9. any abuse of power or official capacity by the convicted person in the perpetration of the criminal offense;
2.10. evidence of a breach of trust by the convicted person;
2.11. whether the criminal offense was committed as part of the activities of an organized criminal group; and/or
2.12. whether the criminal offense is an act of hatred, which means any criminal offense committed against a person, group of persons, or property, motivated on the basis of race, color, gender, gender identity, language, religion, national or social origin, affiliation to any community, property, economic status, sexual orientation, birth, disability or any other personal status, or because of proximity to persons with the aforementioned characteristics, unless any of these characteristics constitute an element of the criminal offense;
2.13. any relevant prior criminal convictions of the convicted person.
2.14. if the offense is committed within a domestic relationship.

3. When determining the punishment the court shall consider, but not be limited by, the following aggravating circumstances:

3.1. circumstances falling short of grounds for exclusion of criminal responsibility, for example, diminished mental capacity;
3.2. Evidence of provocation by the victim;
3.3. the personal circumstances and character of the convicted person;
3.4. evidence that the convicted person played a relatively minor role in the criminal offense;
3.5. the fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another;
3.6. the age of the convicted person, whether young or elderly;
3.7. evidence that the convicted person made restitution or compensation to the victim;

3.8. general cooperation by the convicted person with the court, including voluntary surrender
3.9. the voluntary cooperation of the convicted person in a criminal investigation or prosecution;
3.10. the entering of a plea of guilty;
3.11. any remorse shown by the convicted person;
3.12. post-conflict conduct of the convicted person; and/or
3.13. in cases where the person is convicted for the criminal offense of taking hostages, kidnapping, or illegal deprivation of liberty or as defined in articles 169, 191, or 193 of this Code, the contribution to the effective release or to bringing the abducted taken or stopped person alive, or the voluntary provision of information that contributes to the identification of others responsible for a criminal offense.
3.14 with regard to terrorism offenses laid down in this Code, the fact that the defendant renounces terrorist activity before any grave consequences have resulted therefrom and provides the police, prosecutors, or judicial authorities with information that they would not otherwise have been able to obtain; assists in the prevention or mitigation of the effects of the offense; identifies with sufficient detail to allow the arrest or the prosecution of another terrorist or terrorist group, finds evidence or prevents further terrorist offenses.

Courts are obliged to take into account the circumstances mentioned in the CCRK, but "are not limited" only to the circumstances listed therein. Hence the court is free to consider and incorporate any other factor it so chooses, for as long as it is relevant to the case at hand. Again, while this is certainly a consistent and legitimate international practice, it does little to guide the discretion of the court in any meaningful way. Courts should view the use of non-listed factors as reserved for very rare situations in which the factor is clearly appropriate and strongly supported by evidence.

Each of the factors listed under Article 70 of the Criminal Code of Kosovo will be elaborated in depth in the following Chapters.

2. Aggravating circumstances under Article 70 of CCRK

The following sections provide the court with a more specific approach to each aggravating circumstance and examples of what each of them may include in concrete cases but also an assessment of when a circumstance should be excluded. They also discuss how significant a factor should be in the court's overall assessment and what facts might change the assessment and/or what questions should be asked.

2.1. A high degree of participation of the convicted person in the criminal offense [41]

A correct assessment of the participation of the accused in the commission of crimes should distinguish between different forms of individual liability. Factors related to the position and role occupied by the accused in the commission of crimes (such as 'superior position', 'abuse of authority or trust') should always be very significant aggravating circumstances. However, the

[41] Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70, par. 2.1 Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

circumstance of 'direct participation' is a factor that relates more to the elements of the offense and the participation of the accused therein.

This circumstance is closely related to the provision of Article 69 paragraph 3.1, the degree of criminal responsibility which is very well explained, for acts of corruption, in the special Guidelines for corruption approved by the Supreme Court in 2021. This Guideline has made a different treatment of this circumstance by combining it with the circumstance from par. 2.2 and 2.11. The purpose of that approach has been to generally collect and then break down the circumstances which are very similar to each other so that they can be clarified more easily. It is of great interest, for matters related to official corruption and acts of a similar nature, that the court, but also the parties, refer to those Guidelines.[42]

Assessment of this factor is premised on several considerations. First, that the crime will involve participation by at least two individuals. Second, that there is a level of participation by one of those individuals that is considered "high" or greater than the other.

Although the first factor is relatively straightforward, the second is more challenging and will require careful consideration by the Court. As with many provisions in sentencing, this is not a factor that provides clear instruction to the Court as to exactly how it is to be applied. However, there are two assessments the Court should primarily focus on when considering whether this aggravating factor exists. The first is to consider the factual scenario of the crime and the relative contribution of each of the actors. The second is to consider the role of the defendant and whether he/she can be considered a leader.

Comparison of Individual Actions

As for the first evaluation, the Court should consider the individual contribution of each of the actors in relation to one another. However, what is clear from the language is that the Court is not engaging in a finely detailed assessment of whether one defendant has simply participated more than another. In most instances, once the requisite level of culpability has been achieved, all of the defendants will be ascribed the participation level of the "average" offender. Therefore, minor differences in participation that might lead to the conclusion that one participant has engaged in more "acts" than another should generally not be considered sufficient to warrant a finding of this aggravating factor.

Instead, the Court should consider whether the disparity in participation is significant and that the conduct is far more important to the success of the crime. The facts should leave no doubt in the Court's mind that this particular actor's participation is obviously more important than other actors and therefore deserving of more punishment.

Organization and Direction

The second consideration by the Court should focus on the leadership role of the defendant both in organization and direction in the overall criminal act. This evaluation can be broken down into two primary categories.

First, the Court should evaluate the defendant's role in any preparatory acts leading up to the completion of the criminal act. In most situations, the events leading up to the commission of the crime will have a strong influence on the Court's evaluation. This will be particularly relevant in the commission of complex crimes where the final crime itself is the outcome of a series of steps that may not be crimes themselves, but are important to the completion of the final crime itself.

[42] Specific Guidelines: Official corruption and criminal offenses against official duty, Supreme Court, pg. 33, June 2021, Pristina.

They can also be present in less complex crimes. In the above example, one defendant may have obtained plans of the building, obtained the weapons, or conducted surveillance of the location. This may all have taken several weeks before the event or only several hours. Regardless of the timeframe, it can contribute to the level of participation by the defendant in the crime and contribute to aggravation.

Second, the Court should look at any actions or facts that indicate that the defendant is controlling or directing the other individuals. This can be both prior to the commission of the crime during the preparation stage and during the actual act(s) amounting to the crime itself. In the latter, the defendant may tell other participants how to conduct themselves, and what to do during the actual robbery and direct their actions as the crime itself unfolds. In both instances, the Court can also look to whether there are relationships, both formally or informally that indicate direction by one of the others. These can be current or prior relationships. Examples include familial relationships, work structures (employer/employee), contracts, former military, and/or prior business relationships.

Double count and Caution

As with other offenses, it is particularly important to evaluate whether the charge already incorporates the role of the individual. With this factor, there is also a significant potential for overlap in other categories, particularly when the court considers the planning involved in the crime as well as the existence of an organization. When the court evaluates a situation where there is significant pre-planning, factor 2.2, a high degree of intention and/or pre-meditation may come into play as well. It is entirely possible for the pre-planning to indicate both a degree of premeditation as well as separating one defendant from another in terms of a high degree of participation. Likewise, there may be overlap when there is an organized structure that involves a more formal structure such as a government or military organization in which the defendant is a formal leader. In that case, it is possible to ascribe factor 2.9 because it will involve some "abuse of power or official capacity." Depending on the facts, the abuse of power may propel the defendant into a high degree of participation in the crime.

Ultimately the Court must be aware of the interplay between these factors and carefully consider the importance of each factor in the outcome. The Court must not simply ascribe maximum weight to each factor simply because they exist, but carefully apportion the degree that each weighs independently of one another. This is no easy task but considering the impact it may have in increasing the penalty it must be carefully considered. Nonetheless, when there is an overlap of all three factors, it will indicate to the Court that there is a need for aggravation.

Eagerness in Participation

This factor also does not require an assessment of "eagerness" to participate in a crime. While some sentencing structures consider the need to aggravate an offense where the defendant's state of mind shows particular zeal in the commission of the offense, the Criminal Code of Kosovo does not foresee that. Once the requisite state of mind is reached for criminal liability, there is no enhancement for a defendant who exhibits exuberance in carrying out the criminal acts. Similarly, a lack of willingness to participate in the crime is already considered in the mens rea associated with the offense. This is discussed more fully under the section on mitigation.

General considerations include:
Actions significantly greater than those of other participants.

- Planning activities to improve the likelihood of success of the crime
- Recruitment and funding of other participants
- Directing the activities of others
- Obtaining the instrumentalities to complete the crime
- Incremental steps to further the crime

Relevant questions include?

- Was the defendant in a hierarchical position?
- Was the structure formal or informal?
- Was the defendant a leader in the structure or group?
- Was the defendant's role important in the planning of the crime?
- Did the defendant's position contribute to the commission of the crime?
- Did the defendant's actions or authority enhance the seriousness of the crime?
- Would the crime have been successful without the participation of the defendant?

2.2. A high degree of intention on the part of the convicted person;[43]

Intent is presented as an element of the criminal offense explicitly included in most criminal offenses, with the exception of those where the law provides that the offense may also be committed through negligence. Determining the degree of intent, on the other hand, is one of the issues when it comes to assigning the individual's responsibility, therefore it affects the level of punishment. It is also quite a challenging process both for the prosecution which strives to prove the highest level of intent and for the defense which traditionally lobbies for the inclusion of a low level of intent on the part of the defendant. Considering the difficulty that is often presented in practice in finding direct evidence on this matter, CCRK in its Article 22 explicitly provided that

"Knowledge, intention, negligence or purpose required as an element of a criminal offense may be inferred from factual circumstances".

The obligation for the parties to present evidence in favor and against and the obligation of the court to assess this evidence at sentencing, results from this Article. In determining the degree of intent, the Guidelines, along with the analysis of various circumstances throughout its text, provides explanations and analysis for various circumstances, many of which can be considered as circumstantial evidence. Below are some indicators that can help determine intent. However, it should always be borne in mind that such indicators can be found throughout the text of the present Guidelines, but also in other specific guidelines, as is the case with the Guidelines for crimes of corruption.

Premeditation

Generally, the concept of premeditation is considered as planning prior to commission of the criminal act. Although the amendments of the CCRK, have removed premeditation from

[43]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par. 2.2 Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina. Criminal Code, Article 70, Par.2.2.

circumstances under 2.2, this does not mean that it should not be taken into consideration as indicator for determining the degree of intent. Premeditation is considered as a greater degree of threat to society as it is essentially an attack on social values and indicates a greater commitment and perhaps continuity than spontaneous crime. Its threat to society is primarily rooted in the concept that this heightened dedication to the commission of the crime indicates perhaps less likelihood for successful rehabilitation.

Premeditation is one factor in which there is potential application in multiple categories. It is generally considered as a circumstance that can be directly attributed to the actions of the defendant and the level of his/her responsibility. However, premeditation is provided for by law as a qualified form of the offense - by increasing the level of the foreseen punishment, premeditation can also be seen as an element of a criminal offense which consequently makes such an offense qualified. The Court should consider the degree of planning and particularly the time involved in the preparation of the offense.

In the former situation, it may be a factor to consider in penalty refinement by either aggravation or mitigation. For instance, where the defendant is found to have committed the offense charged with cold, calculated premeditation, suggestive of revenge against the individual victim or group to which the victim belongs, such circumstances necessitate the imposition of an aggravated punishment. The classic situation could be described as revenge motivated or defending of "honor." In these situations, the relevant assessment will be focused on the time and opportunity of the defendant to reflect on the circumstances causing the need for revenge. On the other hand, if the defendant is found to have committed the offense charged reluctantly and under the influence of group pressure and, in addition, demonstrated compassion towards the victim or the group to which the victim belongs, these are certainly mitigating factors that the judges will take into consideration in the determination of the appropriate sentence.

Lack of remorse

Cases where the defendant clearly shows no signs of remorse can be taken as indicators of determining intent and not necessarily as a special aggravating circumstance. This not only shows a lack of respect for the victim but also shows a general lack of respect for the law, as well as gives a reflection of an individual who has predispositions for a behavior that is antisocial and dangerous to society. A defendant who shows no remorse is a strong indicator that rehabilitation may fail.

Other circumstances under the Sentencing Guidelines for criminal offenses of corruption

Due to the importance of measuring the degree of intent, this paragraph will mention some of the specifics that are included in more detail in the Guidelines for criminal acts of corruption. In addition to the premeditation and planning which have already been broken down above, the Guidelines mention the following circumstances:

- The offense committed to further other criminal activity;
- Acts of transnational nature;
- Involvement of others through pressure.

Double counting and Caution

The existence of a high degree of intent or premeditation may have overlap especially with Factor 2.1 in situations where there are multiple perpetrators involved. In an effort to avoid double counting, the Court should ascribe planning to this factor. This is based on the fact that planning

is only one of several considerations that may impact the degree of participation. Whereas the existence of planning is direct evidence of premeditation.

In cases of violation of court orders, one should be careful not to include it as an aggravating circumstance if the offense from Article 393, Contempt of Court, is included as part of the charge.

Relevant questions include?

- Was there revenge or an alleged affront to the defendant involved?
- How much time elapsed between the alleged affront and the crime?
- How much planning was involved in committing the offense?
- How complex were the preparations for the commission of the offense?
- Was it possible to complete the offense without planning?
- Did the perpetrator purchase items to complete the crime?
- If there was a victim involved, did the defendant wait in ambush prior to committing the crime?

2.3. The presence of actual or threatened violence in the commission of the criminal offense [44]

Evaluation of this circumstance focuses on the use or threat to use actual violence in the commission of the crime. In most instances, the use of actual violence or a threat will already be factored into the penalty structure as an element of the offense. For example, the use of actual violence or the threat will qualify a simple theft to a robbery. In those circumstances, the aggravating factor should be ignored by the Court. Application of this factor will be limited to only those crimes in which violence by act or threat is absent from the legislative qualification of the crime. Generally, actual violence should be considered more aggravating than a threat of violence.

One consideration for the court will be the involvement of third parties. There may be situations in which the threat of violence is not directed at the victim of the offense, but rather at a third party. In these situations, the court should consider the totality of the circumstances and the relationship between the offense and the threat. If the threat bears some relationship to the overall crime, the court should consider it as an aggravating factor, regardless if the threat was not directed at the ultimate victim. The factor makes no distinction between the victim of the crime and a third party. Therefore, there should not be a reduction in the severity of the factor simply because the threat was directed towards a third party.

In the context of domestic violence offenses, the court should be particularly aware of the threat of violence and its possible use against 3rd parties.

Repetition of violence and threats to use violence

The proven record of violence or threats by the defendant is a key factor in assessing the seriousness of the offense. Evidence of constant repetition of the same or similar violent behavior or threat of violence is an indicator of both the defendant's character and an increased level of dangerousness.

[44]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 2.3 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

Double counting and caution

The court must be careful not to double-count the presence of violence when it was already used as an element of the crime. The same principle also applies when we have the aspect of the presence of a weapon, the court should avoid double count if the possession or use of a weapon was included as a separate offense from chapter XXIX[45].

Relevant questions include?

- Was there actual violence used?
- Have there been other instances of violence or threats of violence?
- Was a weapon involved?
- What were the nature and extent of any injuries?
- Was the use/threat of violence necessary for the completion of the offense?
- If a threat was involved, did the defendant have the ability to carry out the threat?
- Was the use/threat of violence against a third party?
- Was the threat overt and obvious?
- Was the threat implied?

2.4. Combination of Factors relating to Victims

A fundamental concept is that a victim for purposes of this evaluation can include more than those encompassed by traditional concepts of victims. A court may consider the impact on any of those who may have reasonably been impacted by the commission of the crime. For example, witnesses to the crime and family members or loved ones may all be considered victims of the direct actions of the defendant depending on their nature and impact.

The CCRK contains a range of factors related to "victimization," which comprises both the level of harm to the victim as well as the various circumstances and personal characteristics related to the victim. Factors 2.4, 2.5, 2.6, 2.7, and 2.8 of Article 70 all refer to victims and specific criteria that will aggravate the sentence for a conviction. The fact that five of the aggravating factors focus on the victims of crime is a testament to the importance this evaluation will play in the assessment of a final sentence. Such factors should always be considered significant aggravating circumstances likely to cause the imposition of harsher penalties and important to establishing the overall magnitude of the crime. Similar to the personal circumstances of the defendant, circumstances related to the victim(s) allow the court to take into consideration the particularities of the victim, ultimately tailoring a sentence that reflects the impact on the victim(s).

In many sentencing schemes, there is a direct correlation between the impact on the victim and the overall seriousness of the offense – and they are frequently considered the most important factors to be considered. As the seriousness of the offense increases in this manner, there is an increased need to protect the public through general deterrence and to compensate the victim for the impacts of the crime.

[45] Criminal Code Chapter XXIX Criminal offenses of weapons.

The importance of the treatment of victims is acknowledged in EU directive 2012/29/EU which succinctly states "[v]ictims of crime should be protected from secondary and repeat victimization, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice".[46] *This is further described in the directive itself and states that "Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence".*[47] *"When the Court considers an individual assessment of the victim and the circumstances of the crime it must "take into account the personal characteristics of the victim such as his or her age, gender, and gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, residence status, communication difficulties, relationship to or dependence on the defendant and previous experience of crime. They should also take into account the type or nature and the circumstances of the crime such as whether it is a hate crime, a bias crime or a crime committed with a discriminatory motive, sexual violence, violence in a close relationship, whether the defendant was in a position of control, whether the victim's residence is in a high crime or gang dominated area, or whether the victim's country of origin is not the Member State where the crime was committed".*[48] Ultimately, *"[j]ustice cannot be effectively achieved unless victims can properly explain the circumstances of the crime and provide their evidence in a manner understandable to the competent authorities".*[49]

While the primary focus of the directive is to establish a baseline of services and obligations each member state must offer to victims, it nonetheless clearly establishes the obligation of courts to comprehensively consider the victim throughout the proceedings. This not only includes the right to present evidence and be heard by the Court but also the obligation of the Court to consider the individual circumstances and status of the victim.

These principles are clearly embodied within both the CCRK and the CPCRK. As discussed earlier the CCRK provides that one of the overarching purposes of punishment is to provide compensation to victims and the community for losses or damages caused by criminal conduct.[50] This should not be seen as limited only to financial or property loss in the more traditional sense of the word, but to provide some degree of restorative justice – to make the victim whole. To that end, the CPCRK provides the victims' mechanisms through the opportunity to participate in the trial and present evidence. This includes contributing evidence and testimony to the court's evaluation of aggravating and mitigating factors for sentencing. It is important to keep in mind that some of the factors may involve considerations that may not normally be presented by the prosecutor to establish a *prima facie* case against a defendant. Hence the Court should provide latitude to the victim's presentation of evidence in order to fairly and adequately assess the full extent that any of these factors may play in determining aggravation.

The large scale of victimization is naturally a very important element and, very often, a significant indicator of the magnitude of the crimes(s). It generally encompasses several circumstances and factors, such as:

- the number of victims,

[46] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, replacing Council Framework Decision 2001/22/JHA (9).
[47] Ibid, Article 10, paragraph 1.
[48] *Ibid* (56)
[49] Ibid (34)
[50] Criminal Code of Kosovo, Article 38, paragraph 1.3.

- the length of time over which the crime was perpetrated,
- if the crime was in continuity perpetrated against the same victim/s,
- the degree of suffering and humiliation inflicted,
- intentional and inhumane increase of the suffering of victims;
- the vulnerability of the victims- defenseless victim;
- harm, trauma, and level of suffering caused to the victims,
- the age, infancy, or youth of the victims,
- commission of the offense by misuse of a position of superiority over the victim/exploitation of trust;
- physical and mental trauma suffered by the survivors as a consequence of the crime;
- commission based on racist, ethnical, religious, or gender-motivated discrimination or any other form of bias.

The court must always keep in mind that if the punishment is just, and in proportion to the seriousness of the offense, then the victim, the victim's family and friends, and the public will be satisfied that the law has been upheld and there will be no desire for further retaliation or private revenge.

2.4.1 Whether the criminal offense was committed with particular cruelty[51]

Cruelty is a common concept in sentencing systems when dealing with victims. It is a universal belief that actions committed against victims that include some component of cruelty should include an additional quantum of punishment beyond what would be considered punishment for the "average" offense. As such, the presence of the victim is often factored in so that the victim and her personal circumstances will be an important factor in sentencing. Whether as an element of the crime or as an aggravating circumstance, the Court should consider brutality, zeal, cruelty, or sadism used by the offender in carrying out the crime(s). However, it is important for the court to keep in mind that aggravation in these situations is limited only to those cases in which the cruelty reaches the level of "especially" cruel. The imposition of cruelty is directly attributable to the individual who inflicts it. The use of cruelty should be consistently considered a significant aggravating factor linked to the role of the accused in the commission of crimes and demonstrating particular evil towards the victims.

The CCRK does not provide any definition of what constitutes cruelty. The concept is generally considered to be an action that causes pain or suffering to another without any consideration or concern regarding the cause of this condition or its impact on the victim. The focal points for consideration then are the elements required for the commission of the crime in conjunction with the actions of the defendant i.e. the level of injury and the intent of the defendant to cause those injuries.

Any injury beyond that required to meet the requirements of the crime or typically associated with the crime will naturally infer some degree of cruelty. In other situations, the gradation of injury beyond that necessary to commit the crime is more difficult. For example in murder, the focus will be on the actions of the defendant that indicate that there was mutilation and/or suffering beyond that necessary to cause death and that the defendant intended such gratuitous violence.

[51]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 2.4 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

Whether the level of cruelty rises to the level of "particular" cruelty requires a more thorough evaluation of the overall circumstances, including the impact of the offense on the particular victim. Particular cruelty will exist when the offense involves the gratuitous infliction of pain and cruelty significantly in excess of what is usually associated with the commission of the offense in question. In appropriate circumstances, the level of the injury, in comparison to the level required for the offense, will be a compelling indicator when coupled with the intent of the defendant. This will involve to some degree the assessment of the offense by the Court in light of its prior experience and exposure to similar situations. There is no formulaic or quantitative approach to determine whether this factor is present.

Psychological Impact

Adequate assessment of this factor will require sufficient evidence indicating the nature and extent of the injuries. This should not simply be limited to physical injuries but must include injuries of a psychological nature as well. This can include both short-term and long-term psychological implications and the ability of the particular victim to recover after the crime.

Impact on 3rd Parties

The court may also consider the impact of the injury on others as well. For example, a murder case in which the defendant buries the body in an unknown location may have extreme psychological impacts on the family of the victim. These factors may be considered further evidence of the defendant's lack of concern for the impacts of the crime.

Double counting and Caution

As with other factors, the court must be aware of the potential for overlap. However, the court should not hesitate in essentially aggregating or combining a number of factors that do not independently qualify for aggravation into a single factor. For example, the defendant commits an act of violence against the victim and there are indications that it was committed with cruelty. However, the court is not convinced that there are sufficient grounds to truly consider it to be particularly cruel. After further review, the court concludes that, similarly, there are indications that the victim was defenseless, but not so defenseless as to warrant a finding of particularly defenseless under factor from paragraph 2.6. In this situation, it is reasonable to consider the two factors together to combine into a single finding of particular cruelty and hence aggravation under factor 2.4.

The key to this conclusion is that the two issues are so closely related. In many respects, it is difficult to isolate them completely into separate considerations. Any finding that a victim is defenseless/vulnerable will naturally lead the Court to believe that some degree of cruelty has been imparted on the victim. This is especially the case when the vulnerability is readily apparent to the reasonable observer. If, however, the basis of a finding of some level of cruelty is wholly dependent on the Court's conclusion that the victim was defenseless, there should be no aggregation.

Finally, there are no offenses in the Code that statutorily enhance the penalty based on an element of particular cruelty. However, there are several offenses that do increase the penalty range for the existence of any cruelty. If the particular offense for a finding of guilt has a cruelty component involved, there should be no aggravation based on this factor as it was already considered as an element of the crime.

Relevant questions include?

- Were the injuries significantly in excess of those required to meet the statutory elements of the offense?
- Are there separate injuries in addition to a primary injury that meets the statutorily required level of injury?
- Are there indicators that the defendant intended the level of injuries?
- Are there long-term side effects of the injuries?
- Are there mental injuries involved as either a direct or indirect result of the offense? If so, are they permanent or long term?
- Are there injuries or psychological implications for the family members? What are the nature and extent?
- Are there overt indications of gratuitous infliction of injuries?
- Are there indications that the defendant committed the crime against the victim with zeal or enjoyment?
- Did the defendant leave the victim in a helpless situation?

2.4.2. Whether the criminal offense involved multiple victims.[52]

The primary purpose of this factor is to codify the principle that a defendant who commits an act of violence or a crime likely to cause harm to several people is more culpable than a defendant who harms only one person. In such a situation, a sentence of the average level for the defendant is simply not sufficient acknowledgment that each individual victim received recognition in the overall sentence of the court. Depending on the nature of the crime and the number of victims, the court should adjust the range of the sentence to give due regard to the increased culpability of the defendant. It is important to keep in mind that this factor may apply to situations that do not fit traditional beliefs of what qualifies as a victim – namely that victims only exist when there is a formal charge for a crime and the victim is specifically identified or labeled as a "victim."

There are two primary situations where this factor will play a role in increasing the final sentence. The first is when there is a victim whose injuries are caused by a crime, but there are no charges linked to the victim. The second is when the charge by definition includes multiple victims, but makes no distinction based on numbers.

In the first situation, the victim is typically a third party who has not been injured in a physical manner but is subjected to some form of emotional or psychological injury. This is typically present when there is a significant degree of cruelty or violence used in the criminal act. It can be caused by a single act or over an extended period of time. These injuries, though not formally charged as a crime by the prosecution, are increasingly being considered in international practice as contributing to the overall harm caused by the act and the recipients are considered as victims.

The second situation involves criminal charges in which there is more than one victim but the sentence is not adjusted proportionately in relation to the number of victims. This situation will most frequently occur in large-scale economic crimes or atrocities. For example, although Article 283 on damaging creditors or debtors increases the sentence level when the aggregate damage

[52]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 2.5 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

changes from 5,000 to 250,000 Euros, it provides no reflection for the number of victims. Applying this factor to the ultimate sentence gives appropriate acknowledgment of the number of victims involved.

Double counting and Caution

Aggravation based on the number of victims is clearly an aggravating circumstance that should always be considered. However, because of the potential seriousness of this consideration, it should be approached with caution and only upon sufficient findings by the court.

One consideration will be whether there was an independent charge for each victim of the crime. If victims are all independently reflected in individual charges then this factor will normally not be a consideration. The only time the court should take this into consideration would be aggravation for a unified sentence under Article 76 in which there are similar acts against multiple victims. Although the court imposes a sentence for each individual act, paragraph 2.2 precludes simply aggregating the individual punishments and requires a sentence lower than the sum total. If the court is inclined to give a final sentence substantially lower than the aggregate of the individual sentences, it should provide justification as to why, and explain why the existence of multiple victims does not justify aggregation close to the sum total of the sentences.

Additionally, the court cannot consider this aggravating factor if the prosecution has failed to prove a crime against a particular victim or their status as a victim. Essentially this means that the court cannot use a victim who was the subject of a not guilty verdict/adjudication as a victim for purposes of aggravating some other offense. Likewise, if the court has doubts sufficient doubts over the facts describing a victim, it should not consider them as a victim in aggravation.

Relevant questions include?

- Were there witnesses or others present at the time?
- Is there a domestic/family relationship involved?
- Were there non-physical injuries that were inflicted on others such as psychological, emotional etc.?
- Does the offense sufficiently account for the number of actual victims?
- Can the offense be adjusted based on the number of victims?
- Is the activity of a nature that the greater the number of victims the greater the level of punishment should be?

2.4.3. Whether the victim of the criminal offense was particularly defenseless or vulnerable.[53]

Vulnerability or defenselessness of a victim is another factor that must always be considered by the court and taken into consideration for final sentencing. The notion that those who are at a disadvantage due to personal attributes or based on a set of circumstances are deserving of greater protection is a generally held belief as well as the concept that a defendant taking advantage of that situation or condition is deserving of greater punishment. The prominence of the concept of vulnerable/defenseless throughout the CCRK lends further argument to its significance in sentencing. Not only is it considered an aggravating factor in sentencing, but it serves to enhance the sentencing range for crimes more frequently than any other factor. Clearly,

[53]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 2.6 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

the legislator intends for this factor to be a prominent one. This circumstance, like the previous one, is also foreseen by Article 46 of the Istanbul Convention, which includes the case when "*the criminal offense was committed against a vulnerable person due to special circumstances*" as an aggravating circumstance.[54]

Perhaps the greatest consideration for the court will be the level of defenselessness/vulnerability and the ability of the defendant to perceive that status. In other words, does the ability of the defendant to perceive the status of the victim impact the application of this factor and its significance? Generally, the victim is taken as the defendant finds them and their ability to recognize the condition is irrelevant. This is supported by the language of the factor that simply requires a finding of defenselessness or vulnerability and mentions nothing about the defendant's knowledge of the condition. A finding of this factor will not be dependent on the ability of the defendant to perceive the vulnerability. But the court should still consider this in assessing to what degree it will aggregate the sentence. If the condition is obvious and easily capable of perception, the court can increase the sentence to a greater degree on the basis that the defendant clearly and consciously disregarded the condition of the victim when the act was committed. This would need to be assessed from the viewpoint of the average person for all considerations under this factor.

The definition of Vulnerable Victim has undergone radical changes with the Criminal Code of 2019. According to Article 113 paragraph 39 *"Vulnerable victim "is a victim of a crime who is a child, a physically or mentally handicapped person, a person suffering from diminished capacity, a pregnant woman, the elderly or a person whose relationship to and dependence on the offender make them particularly vulnerable to repeat victimization, intimidation or retaliation."*.

Such a definition includes what is meant by vulnerability and the concept of a vulnerable person, in a more explanatory way. It can be loosely said that there are two definitions within a single definition intended to complement each other. This has been achieved in such a way that the definition includes two elements:

Personal characteristics of a person including age or physical condition; or

The vulnerability and dependence of the person towards the defendant are due to various reasons that may exist in certain cases.

The definition includes the conjunction, "or" which implies that both complement each other but can also exist separately. The revision of this definition is quite significant because the previous definition focused only on the first part of the definition. The difference between the current definition and the previous definition is that while in the old CCRK qualified vulnerability was mainly based on the family relationship between the victim and the defendant and the physical condition, the new one changes the approach by adding several characteristics (which are not necessarily valid only for victims in family relationships), due to which the victim has a predisposition to be much more sensitive or vulnerable.

It is important to note that the CCRK has placed the modifier "particularly" before vulnerable, indicating that a simple finding of vulnerability will not trigger this aggravating factor. Although it is impossible to quantify exactly what is meant by this enhancement, it should be viewed as something more than the traditional concept that comes to mind in the victim context, such as without a weapon or means to defend oneself from an attack. This is a level of defenselessness slightly beyond average or derived from some other temporary or permanent vulnerability.

[54] Council of Europe Convention on preventing and combating violence against women and domestic violence, Article 46, under c., Istanbul, May 11, 2011.

The only assessment that remains to be done is the level of aggravation that exists in a particular situation. This can occur due to enhanced levels of defenselessness or some other aspect of vulnerability. Like defendants in general, those who commit crimes in a domestic relationship prey on vulnerable and defenseless individuals. Additionally, perpetrators know that those people who are defenseless are less likely to be able to defend themselves. For example, age (very old, very young), *disability* (psychological, mental, physical), pregnancy or recent child birth, *immigration or residence status* (undocumented, no papers), association with *a minority ethnic or religious community* (Roma) *or sexual orientation* (gay or lesbian) are all factors that may increase the victim's risk of dependency on the perpetrator. These factors may make it difficult or impossible for victims to seek help, report the violence, or leave the abusive relationship.[55]

In cases where a defendant has exploited a victim's vulnerability (for instance, when the circumstances have been used by the defendant to prevent the victim from seeking and obtaining help), this circumstance will usually aggravate the sentence. Similarly, domestic relationships that involve a prolonged period of mental and physical abuse will increase the defenselessness of the victim and the likelihood of a finding of significant aggravation.

Double counting and Caution

This factor is easily subject to overlap as well as the possibility of double counting. The court should ensure that the offense itself was not already enhanced based on the vulnerability of the victim. These are particularly present in sexual offenses. Likewise, there is a substantial opportunity for overlap as many of the categories may contribute to the level of vulnerability or defenselessness. For example, factor 2.7, the age of the victim has a direct impact on vulnerability.

Relevant questions include:

- Did the victim qualify for any of the conditions contained in the definition of vulnerable under Article 113 Paragraph 39?
- Is there a relationship between the victim and the defendant? What is the nature and power structure of the relationship?
- Does the relationship exhibit properties of dependence or control?
- Are the conditions of vulnerability obvious or easily recognizable?

2.4.4. The age of the victim, whether young or old[56].

While this factor may initially appear easy to apply, there are no clear definitions or ranges to answer the natural questions that arise of where "young" ends and "elderly" begins. While this allows maximum flexibility for the court to determine the circumstances, it can contribute to deviations in sentencing practices because of multiple interpretations. Although this will not be present where age clearly falls into this category (for example a child of 5 years of age) it becomes increasingly difficult as age becomes less universally considered within the category. The fact that "child" is defined by the code under Article 113 Paragraph 22 as being under the age of 18 can be

[55] DCAF, Handbook for Judges, Considerations for Assessing Domestic Violence in Bosnia and Herzegovina, Sarajevo (2014), p. 20.

[56]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 2.7 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

somewhat definitive in qualifying the victim as "young," especially considering that "adult" is defined under Paragraph 24 as reaching the age of 18. However, it should not be considered authoritative. As is discussed in detail later under the mitigating factor of the age of the defendant, international practice in war crimes has sometimes considered an individual "young" who was well into adulthood by accepted standards. Generally, the court should consider victims under the age of 18 as young, while considering those beyond it with increasing skepticism.

Unfortunately, there is no similar situation for evaluating the status of "elderly." The court is left entirely within its discretion to determine the application of this factor. As a starting point, mandatory retirement ages for public servants can be consulted as well as general access to retirement benefits or pensions. As this factor becomes increasingly difficult to assess, it should begin to impact the level of aggregation that is applied based on the factor, ultimately being eliminated completely at some point.

Double counting and Caution

Sexual offenses or offenses against children are primarily where an offense level is enhanced due to the age of the victim. As in all cases, aggravation should not occur under this factor if the offense level charged has already considered age.

As discussed under factor 2.6 the concept of age will frequently have some bearing on the level of vulnerability of the victim. However, the court should bear in mind that this factor can be applied as an aggravating factor solely based on the age of the victim - without reference to vulnerability or a finding of vulnerability. Simply membership within the category is sufficient to trigger an enhanced level of punishment.

Relevant questions include:

- Is the victim under the age of 18?
- Is the victim over the age of 65?
- Was there a finding of vulnerability of the victim? If so, to what extent did the age of the victim contribute to such a finding?
- Can the age of the victim be completely separated from additional findings of factors related to the victim?

2.4.5. The degree of damage caused by the convicted person, including death, permanent injury, transmission of disease to the victim, or any other damage caused to the victim or his/her family;[57]

Although the extent of the harm caused to the victim will almost always be considered in determining the ultimate level of the offense, there is still significant room for enhancement within the foreseen range. This factor makes it clear that the court is to consider fully all injuries, whether they fall within the more traditional sphere of physical injuries or into expanded areas of consideration.

Aggravation will include severe immediate physical and/or psychological harm that presents a serious risk to the life of the victim. It will also include aggravation for longer-term suffering caused by permanent injury or the consequences of the transmission of a disease. It

[57] Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 2.8 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

should also include long-term psychological impact such as post-traumatic stress disorder. The court will need to solicit from the victim and/or medical expert the impact on the victim's life in the near term as well as the long term.

It is very important to mention that the breakdown and evaluation of the circumstance from par. 2.8 should also be viewed from the perspective of which category of the offense we are talking about, due to the fact that this circumstance is not only related to the aspect of physical or health injury of the damage caused to the victim, since the first part of the sentence "The degree of damage caused..." also includes the element of material, emotional damage or any other impact of any kind. Thus in the special Guidelines for criminal offenses of corruption[58] in the explanation of this circumstance (where it is grouped with the circumstances from par. 2.3. and 2.5. due to the similarity between the circumstances) a very interesting approach was taken by making the connection between corruption and the degree of damage where this circumstance is linked and clarified in a context that is not necessarily monetary, but rather with a view of the impact on the environment, public health, vulnerable categories of society or funds. Therefore, for crimes from Chapter XXXIII but also other crimes of a similar nature, reference to those Guidelines is recommended, as it provides more specific clarifications.

The degree of damage caused as a circumstance from par. 2.8 is closely related to the circumstance of the intensity of danger or damage to the protected value under Article 69, par. 3.3. of CCRK, due to the fact that the same refers to the damage caused or threatened, which is the same as the one emphasized in circumstances from Article 70 par. 2.8. Thus, the Guidelines on corruption, contain a multitude of circumstances, which are classified according to categories, including not only the value of the monetary damage as broken down in paragraphs 31-34 of Article 113 of the CCRK, but also other types of damage as explained above.[59]

Another issue worth addressing is the issue of determining the amount of financial damage. This usually has to do, especially with the offenses from the field of economy, procurement and the like when it is required to determine the amount of damage or financial benefit. In these cases, the calculation of the actual damage and not the total value of the contract must be assessed.

Double counting and Caution

Perhaps no other aggravating circumstance has more potential to coincide with other circumstances and to be double counted due to the fact that this circumstance often constitutes an element of the criminal offense as well. As such, it is necessary to avoid double counting by referring to it as an aggravating circumstance as well. However, the calculus does not stop there and international practice has increasingly sought to expand the areas considered in the calculus. The same was done with the special Guidelines for criminal offenses of corruption. In many respects, this a factor that requires the court to look at all facets of the impact on the victim and consider them in arriving at a final sentence – fine-tuning the sentence to accurately reflect the entire amount of impact.

Relevant questions include:

- What are the short-term direct physical injuries? Are there long-term conditions/disabilities/impacts associated with them?

[58] Specific Guidelines: Official corruption and criminal offenses against official duty, Supreme Court,, pg.34-38, 10 June 2021, Pristina.
Ibid.pg.47.

- Was the degree of injury more than the minimum amount required to meet the element of the offense?
- Was there transmission of a disease? Are there long-term impacts from the disease?
- Were family members present at the time of the crime? Did they observe the crime? Is there psychological injury in the short-term and/or long-term?
- Was there a loss of services to family members as a result of the crime? What was there duration?
- Did the victim die as a result? What was the proximity? What was the impact on the family members in financial terms and psychological terms?
- Is there harm other than physical or psychological injury to the victim as a result of victimization?
- Are there other means of financial recourse? Is the defendant able to make restitution? Does this offset some forms of injury and if so to what degree?
- Has the damage had an impact on a wider range of people? What is the extent of this damage?
- Other considerations as explained in the Special Guidelines for criminal offenses of corruption, where the degree of damage to the environment, public health, sensitive funds, etc. are important.

2.5. Any abuse of power or official capacity by the convicted person in the perpetration of the criminal offense; and evidence of a breach of trust by the convicted person[60]

Factors 2.9 and 2.10, though considered separately under the code, have a number of important commonalities. The same approach of combining these two circumstances is also used in the separate Guidelines for criminal offenses of corruption. Both of these circumstances fundamentally involve a relationship between the victim and the defendant in which the defendant has power over the victim or the ability to exercise some control over the victim's person or property. This power may have been delegated by the victim or it may exist as the result of a social norm, relationship or more formal power structure. Regardless of how the imbalance is created, the crime results in full or some part from improper exercise of that power or taking advantage of the disparity.

The second shared concept is that the relationships embodied by both are important to the functioning of society. When breaches or abuses occur, they involve damage to more than just the victim; they involve damage to society's collective belief in entering into or trusting those relationships in the future. This is especially true when the relationship was the primary basis for the commission of the crime. For example, when law enforcement uses their position to commit a crime, it has an impact on both the victim and society. Citizens who hear about the crimes may be less likely to cooperate with law enforcement investigations in the future or legitimate legal requests. This degrades the overall stability of society. As such, some quantum of punishment enhancement is to promote and/or restore trust in these structures and deter future abuses.

The court must keep in mind that there is no minimum level the abuse or breach that must contribute to the successful commission of the crime. The mere fact that the relationship existed

[60] Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 2.10 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

and was violated is sufficient to trigger this finding. The level of contribution is more applicable to the weight this factor will have in aggravation within the range than whether the factor exists.

2.5.1. Abuse of Power or Official Capacity

Factor 2.9 specifies an abuse of power or official capacity within the range of the base-level offense. Abuse of power (or authority) is traditionally considered exercising relevant state, political, or administrative functions within a formalized legitimate structure. This can be an improper exercise of state-granted power within the context of the individual's position, or it can mean using the power in an indirect manner that may be unrelated to the inherent authority within the position, but based on the victim's perception of the power vested in the defendant.

It is also worth emphasizing the approach of the Guidelines for criminal offenses of corruption on how it breaks down this circumstance in the context of criminal offenses against official duties and corruption, given that the official capacity is an element of most of the offenses under this category. The guidelines connect not only the fact that a person is an official but also the fact that the higher the position, the higher the responsibility should be. Based on this concept, the Guidelines provide for the degree of responsibility separately for each offense.[61] For more about the definition of who is considered an "Official Person" see the Guidelines for criminal offenses of corruption.[62]

2.5.2. Abuse of Trust

Abuse of trust, according to factor 2.9, should be considered a less formalized power structure. These will fall under the more traditional concepts of abuse of trust in which there is a fiduciary or quasi-fiduciary relationship between the victim and the defendant. This may be a relationship in which the victim willingly gave discretion to the defendant. Although traditionally abuse of trust was only considered in cases of family relationships, this is a much broader concept. A concrete example can be the financial relationship and the trust that can exist either between business partners or even the abuse of trust on the part of the accountant or financial officer entrusted with the finances of a business. In these cases, it is important to differentiate between the degree of abuse of trust from case to case, since this is the best way to achieve individualization of punishment.

Double counting and Caution

As is the case with other factors, the primary concern will be double counting this factor as both an element of the offense and a factor to aggravate the sentence within the range. The court should pay particular attention to the wording of the law regarding the distinction between them, although generally as described above, they will not always be as formally distinguished. As to the abuse of official position, we consider that the special Guidelines for the criminal offenses of corruption provide sufficient examples regarding the care of avoiding double counting. Meanwhile, when speaking in the context of Article 330, abuse of trust represents only one of those examples in which the court must be careful not to engage in double counting by also including it as an aggravating circumstance. This Article refers to damage to property interests and

[61] Specific Guidelines: Official Corruption and Criminal Offenses against Official Duty, Supreme Court, pg. 38, 46, 59-73; 10 June 2021, Prishtinë/Pristina
[62]Ibid, pages 3-9.

includes, among other things, abuse of trust by the legal guardian, lawyer or any other person with a legal obligation to the owner of the property.

Relevant questions include:

- Is there a relationship or inequity in power between the defendant and the victim?
- Is there a formal fiduciary or quasi-fiduciary relationship between the defendant and the victim?
- Did the defendant owe some financial or personal duty to the victim?
- Is the victim dependent on the defendant for caretaking or financial support?
- Is there a high degree of emotional dependence by the victim?
- Did the crime depend on the existence of the relationship or abuse? If not, was it a factor in the overall success of the crime?
- Was the relationship or reliance reasonable in light of the situation?
- Did the violation contribute to the level of harm to the victim?

2.6. Whether the criminal offense was committed as part of the activities of an organized criminal group[63]

Aggravating factor 2.11 considers the functioning of an organized criminal group as an aggravating factor in considering the final sentence. As criminal activity becomes more structured and elaborate, it poses an increasing threat to the effective functioning of society. It erodes societal trust in law enforcement, impacts economic development, and contributes to the overall level of crime as organized structures are more capable of significant achievements. Because of the threat, a finding of this factor by the court should have a significant impact on the ultimate punishment. In situations where more than one person was involved in the commission of a crime against a single victim, it is significant that the victim is likely to be in greater fear and feel a greater sense of helplessness.

In determining this circumstance it is essential to have "an organized criminal group" which is specifically defined in Article 113 par 13 of the Criminal Code as "*a structured association, established over a period of time, of three or more persons for the commission of a certain criminal offense that acts in concert with the aim of committing one or more serious criminal offenses in order to obtain, directly or indirectly, a financial or another material benefit*." This is further refined under the definition of a "structured association" contained in Paragraph 14, which is defined as "*an association that is not randomly formed for the immediate commission of an offense, but it does not need to have formally defined roles for its members, continuity of its membership, or a developed structure*." Whether that crime is the crime at issue before the court is not required by the definition. The defendant may, for example, formed the group previously with the aim of committing a serious crime, but only actually been found guilty of the present offense. The final requirement is that the group needs to have been established over time. The additional aspects that need highlighting are the requirement of a minimum of three persons to form the group, that it has as its aim to commit one or more serious offenses, and that it be established over a period of time. The numerical requirement is relatively straightforward.

[63]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 2.11 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

The criminal code contains many references and definitions regarding organized or structured groups, therefore, there may be confusion as to which of them is applicable in the absence of the correct reference. While par. 14 of Article 113 defines "structured association", par. 5 of Article 128 defines the "structured group" and essentially both are almost completely the same in essence. In addition to the above-mentioned definitions, Article 277 sanctions participation or organization into an organized criminal group in a separate article for criminal offenses punishable by at least 4 years, while Articles 127 and 136 sanction organization in a criminal group for the commission of specific criminal offenses, in the first case association for purposes of anti-constitutional activity, while the second organization and participation in a terrorist group.

There are several elements to this aggravating factor that need to be carefully considered by the court. The first is that there must be a structured association that is not “randomly established” but without the need for ongoing association or a more formalized hierarchical structure. A good example of random formation for the immediate commission of an offense would be bystanders observing an assault who decided to take part in the crime. In this situation, although organized to the extent that all individuals are participating in the crime (and sufficient to meet the definition requirements), they have organized for the purpose of committing the crime, but defendants have come together in a random formation to commit the offense, therefore in this case we are also dealing with other types of cooperation, foreseen under the Code, rather than with an organized group. They are therefore not a structured association.

Double counting and Caution

Although participation in an organized criminal group is a circumstance of considerable weight in sentencing, the court must always be careful as to when it can include it as an aggravating circumstance. This is due to the fact that, as emphasized above, association in a criminal group is provided either by separate articles or as a qualified offense, Therefore double counting it with an aggravating circumstance should be avoided. More specifically, its use should be avoided in relation to articles 34, 127, 136, and 277, but also all other offenses where such participation constitutes a qualified offense, knowing that such cases are numerous in different articles of the CCRK.

Alternatively, the lack of an organized crime charge or a finding of not guilty on the offense will not automatically exclude the application of this aggravating factor. The primary consideration will be whether the intent and purpose of the participation in the crime was simply the commission of the crime or further facilitation of the existence and prosperity of the organized criminal group.

Relevant questions include:

- Did the group exist to any extent prior to the commission of the crime?
- Did the actions of each individual contribute to the commission of the crime?
- Was the general aim of the group to commit a crime for the purpose of financial gain or a material benefit (directly or indirectly)?
- Was a charge of organized crime disproven? If so what was the basis for the finding?
- Did the existence of the group contribute to the damage or play some role in the successful completion of the crime?
- Was there a structured or quasi-structured hierarchy in place?

2.7. If the crime is an act of hate...[64]

With the amendments of the CCRK, this circumstance has been expanded to include several other categories. The court must distinguish between the motive and *mens rea* (intent). The former being what causes a person to act, and the latter being the mental element or criminal intent required for a given offense. In this situation, the court will specifically find that the defendant committed the act with the motive being the victim's membership in the specifically protected group. It is important to note that there is no explicit requirement that the court determine that the person or group of persons is in fact a member of the protected group. This should not be an inquiry for the court. It is enough that the defendant had a reasonable belief of the victim's membership in the protected category.

This factor also includes motivations for the affinity of an individual for a protected group. Again, there is no specific requirement that the person actually has an affinity for the group, merely that the defendant believed it existed and it contributed to the motive for the crime. Affinity is a broad category that goes well beyond more formal relationships such as marriage or familial bonds. It can include friendships, acquaintances, and general goodwill.

Determining the motivation of the defendant will be a matter of looking at all surrounding circumstances. While the vocalization of motives by a defendant during the commission of the crime or during subsequent interviews is sufficient to find this factor, it is not necessary. The court may use any past actions, behavior, and/or attitudes towards the group to establish the existence of this factor.

Double counting and Caution

The main concern related to this circumstance concerns the possibility of double count in specific criminal offenses or even cases where it is presented as a qualified form of a criminal offense. Example: In the criminal offense of aggravated murder from Article 173 par.1.10. This mainly happens in crimes against humanity, more precisely violation of the equal status of citizens and residents of the Republic of Kosovo from Article 190 or Incitement of discord and intolerance from Article 141. Although these crimes primarily focus on racial, religious, and ethnic targeting, their place as specific crimes within the code does not diminish the importance of the additional protected groups. Thus, aggravation for an offense motivated by the victim's sexual orientation deserves the same degree of aggravation as a crime motivated by the victim's ethnicity. Likewise, there is no distinction or discount for victimization based on membership in the group as opposed to affinity for members of the group – the level of aggravation is the same.

There may be some overlap in the calculation of the degree of seriousness as well as the number of victims. Particularly in situations where the crime is a widely viewed one and the motive is more clearly connected to the crime. A crime that is in an openly public place and is purposely overtly connected to the category can be linked to more victims and/or an overall increase in the level of harm caused.

Relevant questions include:

- Is there evidence the crime was motivated by membership or affinity for members of one of the protected categories?
- Did the defendant make statements before, during or after the crime indicating a motive?

[64]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 2.12 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

- Are there multiple protected categories involved?
- Is there prior behavior or statements by the defendant indicating targeting of the protected category?
- Was the crime designed purposely to impact a larger number of persons than the particular victim?
- Does the defendant have a prior history of negative interaction with the category or predispositions?

2.8. Any previous criminal conviction of the convicted person[65]

This factor recognizes the generally held belief that individuals who have committed crimes in the past should be punished more severely than those who have not. It also recognizes that previous sentences or punishment schema have failed to rehabilitate or reform the defendant. In essence, the purpose of the sentence begins to shift away from the prospects of rehabilitation and moves more towards the concept of preventing further crime by the defendant.

Here the court will need to examine the prior conduct and consider a variety of factors including:

- the number of prior convictions;
- the seriousness of the prior offenses;
- the nature of the offenses and their similarity to the current offense (similar offenses in nature will be indicative of a continuing pattern of behavior as well as a failure of the prior sentence to deter the defendant);
- the separation in time between the convictions (a long gap between a prior conviction and the current will generally be less relevant than a more recent prior conviction); and
- the sentences received for the prior offenses (offenses resulting in a minimal prison sentence or alternative sentence will be less relevant than those resulting in a significant prison sentence).

It is important to note that this is a separate consideration from the aggravation of sentence under Article 75 for multiple recidivism. Unlike Article 75, which provides very clear qualification regarding the consideration of previous convictions, this aggravating circumstance does not provide for such provisions.

This aggravating factor must be considered when the defendant has previously been convicted of prior offenses, particularly those of a similar nature. Due to the nature of domestic violence, which thrives on repetition, this factor is particularly important in assessing the overall nature of the relationship and the need for an enhanced penalty. In order to prevent the continuation of the cycle of violence, the presence of prior convictions bearing a reasonable relationship to the maintenance or exertion of control over the victim should result in considerable aggravation of the sentence.

In cases of recidivism (repeated offence) it is clear that the victim of domestic violence, as a rule, has taken an active role in seeking the assistance of the criminal justice system and allied institutions. Thus recidivism is indicative of consecutive failures by the institutions legally

[65]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 2.13 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

obligated to offer protection (and justice) to the victim. In cases of recidivism, prevention as one of the intended purposes of the sanction was obviously not achieved. Moreover, recidivism may denote a pattern of domestic violence or battering, particularly in combination with other forms of abusive behavior (extreme domination, obsessive jealousy, etc.)[66]. Generally, a finding of this aggravating factor should result in a more serious penalty for the offender.

Article 69 par.4 of the Criminal Code states that when determining the punishment for a recidivist, the court shall especially consider whether the defendant has previously committed a criminal offense of a similar nature as the new criminal offense, whether the two acts were committed for the same motives and the period of time that has elapsed since the previous conviction was pronounced or since the punishment was served or waived. This portion of the Code allows the Court to adjust the statutory maximum penalty of the offense by up to one half. Although any prior criminal offenses can be considered in adjusting the range upward, if the Court encounters offenses commonly associated with domestic violence situations, it is strongly suggested to apply this provision in order to enhance the overall offense level.

Double counting and Caution

The primary concern with this factor will be the potential conflict between it and Article 69 on recidivism. However, it is possible for the defendant to be subject to both the recidivism enhancement as well as aggravation within the elevated range. Such a situation will need to independently meet the criterion of both situations without applying any of the offenses to both criteria.

Relevant questions include:

- Does the prior conviction fulfill the criteria of Article 69 and warrant the application of a recidivism enhancement?
- Are the prior convictions similar in nature without being against the same victim?
- Does the prior conviction indicate ongoing reliance on criminal behavior?
- Have there been prior sentences similar in nature and duration as that proposed?
- How long was the intervening period between the prior conviction and the present offense? What has been the defendant's behavior during this time?
- Is the prior conviction relevant to the determination that aggravation should take place?

2.9. If the offense is committed within a domestic relationship[67]

Family relationship is the newest circumstance added to the 2019 CCRK. Article 113 paragraph 25 of the CCRK provides details as to which relationships fall under the concept of a family relationship.

The inclusion of this circumstance highlights even more the additional protection that the legislator tries to give to the preservation of the family as the main cell of society. The inclusion

[66] Case No. IT-95-9/1-S, Sentencing Judgment, Prosecutor v. Stevan Todorovic, International Criminal Tribunal for the Former Yugoslavia, (July 31, 2011), Par. 61, also cited the Appeal Judgment in the Aleksovski case, par. 183; Appeal judgment in the Celebici case, par.745

[67] Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 2.14 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

of this circumstance is also intended to convey the message to those who continue to operate with the old worldviews that the family must be preserved at all costs regardless of how damaged the relationships within that family are. This circumstance also conveys the message which is based on many contemporary researches that an unhealthy family relationship greatly affects the development and psychology of children growing up in that environment, therefore those who break this balance deserve harsher punishment. Therefore, in all cases where a crime foreseen under the KPRK is committed within a family relationship courts must always take this circumstance into account as long as it does not represent an element of the criminal offense. As to the weight that this circumstance should have in relation to other aggravating circumstances, that is not something that can be precisely determined. This is due to the fact that it always depends on the type of crime at hand, namely the weight and dangerousness of the defendant's actions, but also on the type of family relationship we are talking about. So for example, if we go back to the definition of family relationship according to Article 113 par.25, we see that there are actually two main categories of relationships:

- the relationships that arise from close couple relationships: spouses/ex-spouses, cohabitants, or those who have cohabited before and children born from these relationships; and
- those relationships that are mainly related to blood or consanguinity: parents, grandparents, nephews, nieces, aunts, uncles, uncles, and cousins.

While the CCRK sanctions and punishes all the above-mentioned relationships, when it comes to the weight of family relationships, the court should almost always assign much more weight when the offense is committed within the first category of relationships. However, even this is not always very precise, since the above-mentioned relations must always be analyzed in terms of the connection and dependence that the defendant may have with the victim. For example, while the perpetrator may be the grandfather or grandmother and the victim may be a grandson or granddaughter, if the victim e.g. was a minor, a person with a disability, or a person who was entrusted to care, then the circumstances have much greater weight, as e.g. in the given example, the victim also falls under the definition of a "vulnerable victim" sanctioned by Article 113 paragraph 39 of the CCRK. The same applies to the opposite relations when the defendant is a nephew or niece and the victim is an elderly person (grandfather, grandmother, aunt, uncle, etc.) who is dependent on the defendant's care. Even in this case, the elderly victim can be included in the definition of a vulnerable victim since "*... dependence on the perpetrator makes him particularly vulnerable to repeated victimization, repeated intimidation or repeated retaliation*."[68] Therefore, the circumstance of a family relationship combined with the designation as a sensitive victim doubles the weight of this circumstance.

Double counting and Caution

Undoubtedly, the circumstance of family relationship is one of the most significant circumstances related to victims and victimization. At the same time, this circumstance also has the greatest potential for double counts among the offenses outlined in the CCRK, where it is

[68] Definition of Vulnerable Victim according to Article 113 paragraph 39, Criminal Code of the Republic of Kosovo, Code no. 06/L-074, Official Gazette of the Republic of Kosovo/No.2, 14 January 2019 Prishtinë/Pristina.

presented as an element of the criminal offense.[69] Unfortunately, in our judicial practice, such cases of double counting of this circumstance are quite frequent. Courts should make efforts to eliminate this double counting as it represents a procedural violation.

Relevant questions include:

- Is the family relationship an element of the criminal offense either in the basic offense or as a qualified offense?
- Are there other aggravating circumstances related to the victims and to what extent are they expressed?
- How big is the risk of repeating the crime either because of the defendant's prior record or because of the easy access the defendant can have to the victim?

3. Mitigating circumstances from Article 70 of CCRK

General issues

Unlike aggravating factors, which tend to focus on the victim and the seriousness of the crime, mitigation tends to diminish the penalty based on the redeeming qualities of the defendant such as acceptance of responsibility or cooperation, circumstances beyond the defendant's control, and facts that reduce culpability. They conform to the concept of proportionality as well as the goals of rehabilitation. As with aggravation, the court should demand factual support before concluding a factor exists, particularly when expert opinion is required, and avoid duplicate consideration and application.

Unlike aggravating circumstances, in which some of the circumstances qualify as offense elements, there are only a few cases where mitigating circumstances are included as specific or qualified criminal offenses. As many of the mitigating circumstances are attributable to the person or their interaction with law enforcement, they are broadly construed to apply to any situation. There is little concern with elemental double counting and the court can primarily focus its concern on the overlap between the particular circumstances.

Of primary concern for the court will be entering into areas of mitigation that are controversial. This can be within a particular factor that is specified in the code or by finding a factor that is not specifically defined in the Code. Regardless, unlike aggravating circumstances, which are relatively narrowly defined and broadly accepted within the international community, mitigation is a more fluid concept that is constantly evolving. Broad categories make the evaluation more difficult. For example, personal circumstances can encompass virtually anything connected to the perpetrator's life. While this is important to ensure that the court does not settle on punishment that is more than necessary, it significantly increases the potential for the personal preferences or beliefs of the court to impact the sentence. This, in turn, increases the opportunity for inconsistent sentencing for similar offenses as two courts may disagree on whether a scenario is mitigating or not. Ultimately the court must carefully evaluate whether the factor is truly mitigating and consistent with appropriate standards, or whether it is a personally held belief of

[69] Criminal Code of the Republic of Kosovo, No. 06/L-074, Articles 163 (par.3), 173 (par 1.3) 182 (par 2), 227 (par.4.9), 229 (par 3.9) and 230 (par 3.9) Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

the court that has larger implications for sentencing practices in general. In the assessment of facts and decisions, a judge finds a measure between empathy, compassion, kindness, discipline, and severity so that his application of the law is perceived as legitimate and fair.[70]

3.4. circumstances falling short of grounds for exclusion of criminal responsibility, for example, diminished mental capacity[71]

This mitigating factor is premised on circumstances reducing criminal responsibility, such as some mental condition that falls short of complete exclusion of criminal liability. Although the category is not limited, and other factors are discussed in brief below, the specific reference to diminished mental capacity reflects an intent to focus on mental health as the primary means by which this factor will exist. Perpetrators argue that although they broke the law, they should not be fully criminally liable for doing so as their mental functions were diminished or impaired. However, in practice, we also encounter cases where this circumstance is misinterpreted to the extent that it leads to the release of the defendant from responsibility when in fact this is not the intention of the legislator. The precise interpretation is that because of the mental state, the defendant should be punished more leniently as he/she finds it much more difficult to conceptualize his/her actions.

It is defined more fully by Article 18, paragraph 2 of the CCRK:

A person who commits a criminal offense is considered to have diminished mental capacity if, at the time of the commission of a criminal offense, his or her ability to understand the nature and importance or consequences of his or her actions or omissions was substantially diminished because of the conditions in paragraph 1 of this Article. **Such a person is *considered criminally liable but the court shall take these conditions into consideration when deciding the duration and the type of sanction or measure of mandatory treatment it imposes*.**

The reference to paragraph 1 requires that the diminished capacity originates from some "permanent or temporary mental illness, mental disorder or disturbance in mental development that affected his or her mental functioning".[72]

Read in conjunction, the court is required to determine two facts before concluding that a reduction is warranted. First, that the defendant's ability to understand the nature of the actions is substantially diminished. And second, that the diminished ability is directly related to a mental condition of some form.

Ultimately, the required consideration by the court under Article 18 is fulfilled by this mitigating factor and there should be no more reduction for a mental condition under another factor or theory of reduced responsibility. As such, a finding of this circumstance can result in a substantial reduction. However, due to the technical nature of such a finding, the court must rely on medical testimony or expert opinion in concluding that the condition both exists and is substantial.

Additional theories under this mitigating factor include the possibility of a reduction of punishment based on reduced liability under Chapter II depending on the circumstances.

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[70] European Network of Councils for the Judiciary (ECNJ), Judicial Ethics Report 2009-2010, pg.9. 12

[71] Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 3.1, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

[72] Ibid, par. 2.

Double counting and Caution

There is little likelihood of overlap with this category and other mitigating factors, although, if mental health becomes a substantial issue in the case, it may overlap with the personal circumstances of the defendant. Although mental health will contribute substantially to the measures of treatment or ancillary orders attached to the final sentence, there are no offenses in which the category or offense level is reduced with mental capacity as an element.

Relevant questions include:

- Was there a medical evaluation to make this determination?
- What is the seriousness of the medical condition?
- Is there a diagnosed history of the condition or did the diagnosis occur only after the commission of the offense?
- Is the ability of the perpetrator to understand the consequences or nature of their actions substantially diminished or only partially? Is such a determination possible?
- Is the perpetrator completely unable to understand the consequences of their actions?
- Is the conclusion consistent with standards generally accepted within the medical community?
- Will the perpetrator's mental condition improve or is it permanent in nature?
- Was the condition a temporary one created by the perpetrator?
- Did the perpetrator commit the offense due to extreme necessity but the harm created exceeded the harm threatened?
- Was the excess created by the negligence of the defendant?
- Was the offense committed under the threat of bearable violence that was immediately reported to the competent authority? What was the level of threat of violence?
- Was the offense committed in proportion to the threat?
- Was the perception/reality of the threat reasonable in light of the attendant circumstances?
- Was the offense committed under coercion, but the defendant could be expected to accept the danger?
- Was the offense committed under coercion, but the defendant created or caused the danger or was under a legal obligation to face the danger?

3.5. Evidence of provocation by the victim[73]

The issue of provocation is one that perhaps arouses the most controversy of any of the mitigating factors present in the law. It is a circumstance which in some of the articles is presented as an element of the criminal offense, while in other cases it can be used as a mitigating circumstance, but only under certain preconditions. Provocation is a deeply emotional issue that often involves human relationships and the impact of jealousy, anger, and fear. As many of the situations in which it is claimed as a mitigating factor involve the dynamics of gender and sexual relations it will inevitably involve social, cultural, and moral values. It may very well be that the social and moral attitudes of an individual judge may strongly influence whether the court considers the particular actions of a victim to be "provocation" and, to some extent, justifying the

[73] Ibid. par.3.2.

actions of the defendant. As such, the court must tread lightly in this area to ensure that its own personal beliefs do not cloud the appropriate use of this factor.

Provocation by the victim is traditionally described as a loss of self-control by the defendant. However, modern theories have called this approach into question as it focuses on the emotional reaction of the defendant. Newer approaches assess both the conduct of the victim and the reasons behind the perpetrator's response. This approach focuses on whether the actions of the victim were sufficient to give a defendant a justified sense of being severely wronged. And that the defendant's reaction was reasonable. In order to make this determination, the court must focus on the following:

- The nature, degree, and context of the provocation.
- The duration and degree of the acts in response to the provocation.
- Whether the reaction was disproportional to the provocation.

In extreme situations, such as homicide, courts must find similarly extreme levels of provocation. For example, courts have been willing to consider provocation when the victim admitted to molesting the defendant's children or the victim had been intentionally injuring the defendant's children over a prolonged period of time.

Heat of passion

In some circumstances, courts have concluded that a single incident is sufficient to trigger a reaction by the perpetrator. Here there must be an immediately identifiable triggering event that resulted in the actions of the perpetrator. Moreover, the triggering event will need to be extreme and vary appropriately to offset the offense committed by the perpetrator. Consequently, the greater the reaction level by the defendant the more extreme the provoking event will need to be.

Provocation in domestic abuse context

Abusers often assert provocation as a mitigating factor. The Court must scrutinize the assertion of provocation in the context of the domestic violence relationship, taking into account that abusers often consider any threat to their ability to control the victim as provocation. However, even though inhuman or rude behavior is not foreseen in other acts in the Code, this does not mean that it cannot be taken as a mitigating circumstance if there is a basis.

Relevant questions include:

- What was the nature of the relationship between the victim and the defendant?
- Are they strangers or family?
- Is there an intimate relationship between them?
- Is there a third party involved?
- Was the provocation criminal in nature – whether formally charged or not? How serious was the crime?
- Did the provocation occur repetitively or only a single time?
- Did the provocation occur over a significant period of time
- Was there a significant period of time between the act of provocation and the reaction?
- Was there violence involved or the threat of violence?
- Were the provocative acts or threats real or perceived?

- Were the provocative acts seeking equality rights in a relationship such as beginning or ending a relationship, seeking an education, seeking employment, etc.?
- What was the balance of power between the defendant and the provocateur?
- Was the criminal act proportional to the provocation?
- Was it similar in nature?
- If there were multiple smaller events, do they aggregate to a sufficient level?
- Does the reaction in light of the provocation shock the conscience?
- Would a reasonable person similarly situated consider the acts a provocation?

3.6. Personal circumstances and character of the convicted person[74]

Personal circumstances and good character of the convicted are common mitigating factors in sentencing structures throughout the world. In fact, many sentencing studies conclude that personal circumstances are one of the most commonly cited mitigating circumstances and that their impact on the final sentence can be quite significant. They are frequently considered the best way to arrive at a truly individualized sentence that takes into account all facets of the defendant's life and situation.

The fact whether a particular personal circumstance is worthy of consideration in mitigation is often a subjective decision and can depend largely on the personal opinion of the judge. What is considered by one judge as mitigating, may not be considered as such by another, and may even be considered by a third as an aggravating factor. The code's general reference to "personal circumstances" further supports the notion that a list of universally accepted personal circumstances in mitigation is non-existent. The discussions that follow are a general attempt to reasonably describe some factors that frequently appear.

Character

The 'character' of the accused may be considered relevant in mitigation of the penalty because it shows that the criminal conduct is not part of the regular behavior of the accused. This factor may relate to other circumstances such as admission of guilt, cooperation with the authorities, voluntary surrender, remorse, assistance to victims, etc. These circumstances have an impact on the weight of the 'Good Character' circumstance. Caution needs to be made related to this factor and the weight given to it in sentencing whether the good character was shown after the crime or if such a character was only shown before the judge.

In some decisions of the Court of Appeal in Great Britain, evidence of good character was taken into account in the court decision. Thus, in the Reid case, the Court of Appeals reduced the sentence for burglary based on the defendant's conduct pending trial, in attempting to rescue three children from a burning house. This behavior, according to the Court, can justify the conclusion that "the appellant has been a much better and more worthy member of the society than is reflected by his criminal activity. There are other similar decisions related to actions such as saving a child from drowning, saving a person's life on a railway, and preventing the escape of prisoners.[75]

[74]Criminal Code, Article 74 par 3.2

[75] Andrew Ashworth and Rory Kelly, Sentencing and Criminal Justice, 5.4.2 Valued societal contributions, p.162, 7th Edition, Bloomsbury Publishing, 2021.

Drug or alcohol addiction

Where acquisitive crime is committed in order to fund a drug habit, this might be treated as a mitigating or aggravating, depending on whether the judge views this as a manifestation of diminished or increased culpability.

Employment or education

In some cases, a defendant's steady job, or involvement in studies or vocational training, can be a mitigating factor. A good work record may have more influence in less serious offenses due to the destruction of a defendant's long-term economic prospects if sent to prison for a short period of time. Generally, employment by a defendant demonstrates some responsibility, that they are an organized person unlike most who appear in court and possibly less likely to offend again.

On the contrary, some courts may consider this circumstance unimportant since the same should be considered in relation to the obligations the person has. A court may argue, particularly when there is sufficient culpability that a defendant was fully aware of the potential punishment that might result from the commission of the crime, including the loss of employment, and still chose to disregard the consequences. An additional argument may be that consideration of employment in serious cases is in fact penalizing those who are unemployed – possibly through no fault of their own in difficult economic times.

Ultimately, courts should give less weight to this factor as the seriousness of the offense increases. This is especially applicable to crimes of violence.

Personal and family situation

In general, courts have regularly given some consideration to the "family situation" of the accused and the impact incarceration would have on others. In particular, having young or many children is frequently considered in mitigation as is being an only parent where incarceration would render a child a ward of another relative. Specific considerations may include the following situations:

- Number and age of the children.
- Whether the perpetrator is the sole provider for the family.
- Whether the defendant provides care for others.
- Whether the defendant is a single parent.
- Health of persons under the defendant's care.
- All other living circumstances of the defendant that might have an impact on the sentence.

If the court decides to consider familial circumstances in mitigation the focus must be on the specific impact separation will have on the family. In practice, its use should be limited to those situations in which the impact on the family is significant because of particular circumstances. For example, if the children have limited support from others if the perpetrator is incarcerated. Mitigation is discouraged simply based on the existence of a family.

Another reason why the courts could, in principle, consider 'family concerns' as mitigating would be based on the principle of restorative justice that the personal and family situation of the accused can lead judges to believe in the chances of rehabilitation of the defendant. In principle, the defendant's care for his family demonstrates certain positive personal qualities and possibly militated against further offending. Someone who looks after vulnerable dependents could be said

to be doing work for the community and this should be taken into account in sentencing such a person, since 'we're all indebted to those who look after others.

It is extremely important for the court to consider the role of all family members in the crime. If a family member is the victim of the defendant's crime, there should be NO mitigation for family circumstances that relate to the victim or put other family members in jeopardy. For example, if a defendant committed an offense against the sexual integrity of a child, they should not receive mitigation because they need to take care of that child, nor should they receive mitigation because they need to take care of other children in the home.

Ultimately, any mitigation based on the family must come with a careful assessment of all circumstances of the defendant and careful consideration of whether mitigation is a benefit or a risk. The court must not just consider, for example, that there are young children, but whether the defendant has been providing for their welfare and contributing to their upbringing. If there are other sickly relatives in the home, is the defendant actually providing care for them in a meaningful and productive way? If the perpetrator committed a violent crime, is there a potential for injury to family members in subsequent crime?

Double counting and Caution

There may be overlap in consideration of the health of the defendant if there are mental issues contributing to diminished mental capacity.

Relevant questions include:

- How serious is the crime and what are the injuries if any?
- Is the perpetrator employed? What is the nature and extent of the employment?
- Are there dependent family members? If so, what are the ages?
- What is the extent of the dependence of family members on the perpetrator?
- Is there a family member involved as the victim?

3.7. Evidence that the convicted person played a relatively minor role ...[76]

Both mitigating factors 3.4 and 3.5 of Article 74 focus on the role of the defendant and essentially their culpability in the crime itself. In many respects, this factor is the converse of aggravating factor 2.1. Factor 3.4 is similar in nature to 3.5, but the focus of 3.4 is more on actual participation in the offense, as opposed to more ancillary assisting of the offense. One example of 3.4 would be acting as a lookout during the commission of a robbery. While the penalty available and the charge are the same, the factor establishes that the lookout is less culpable and therefore deserving of a lesser punishment.

Factor 3.5 is addressed as well under Article 33 which describes assistance in criminal offenses. The Article specifically provides for more lenient punishment when the individual, for example, makes available the means to commit the offenses, creates conditions or removes impediments to the commission of the offense or makes preparation in advance to conceal evidence of the commission of the offense, the perpetrator or identity of the defendant, the means used for

[76] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 70 par 3.4 and 3.5, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtin/Pristina.

commission of the offense or the profits or gains which result from the commission of the offense. Article 33's requirement of more lenient punishment for those who provide assistance is fulfilled by applying factor 3.5 and arriving at a punishment more lenient than those who participate more formally. There is no requirement by Article 33 that there be a larger reduction in offense level through mitigation of punishment unless it is appropriate.

It is important for the court to keep in mind that a finding of aggravation under 2.1, that a defendant ad a high degree of participation, does not require that the remainder of the defendants are therefore minor participants under 3.4. or an assistant under 3.5. Nor does the finding that one defendant was an average-level offender mean that one or more of the others will therefore be minor participants.

As for a minor role, any conclusion that the participant played a minor role will mean a finding by the court that the defendant minimally contributed to the commission of the crime first, in terms of meeting the elements of the crime, and second in comparison to the other defendants. If the defendant's contribution could be removed with minimal impact on the completion of the crime, the court can safely conclude that factor 3.4 was present.

Factor 3.5 requires the court to evaluate not only the level of participation between the defendant and other participants, but it will require some assessment of the proximity of the defendant and how direct the contribution is in the commission of the offense. It is more likely that the court can find 3.5 exists when the defendant is not present at the scene of the crime. Another indicator will be temporal timing of the defendant's contribution. If the contribution of the defendant was close in time to the completion of the crime then the defendant is less likely to be considered an ancillary participant.

Double counting and Caution

There should be little concern for overlap other than between factors 3.4 and 3.5 themselves. The court should not find both factors present at the same time. As mentioned earlier, factor 3.4 should be limited to only those situations where the defendant is physically present and taking part in the actual commission of the crime but in a minor role. As opposed to 3.5 where the contribution took place before or after and occurred in a supporting or planning role. Pressure or reluctance on the part of the defendant to commit the crime should not be assessed under 3.4 or 3.5 as it is more appropriately considered under factor 3.1.

Relevant questions include:

- Did the defendant possess some skill or specialty needed for planning or carrying out of the crime?
- Did the defendant plan or contribute information or materials needed for the commission of the crime?
- Was the defendant's contribution temporally distant from the commission of the crime itself (before or after)?
- Was there a defendant that principally contributed or dominated the commission of the crime?
- Was the defendant physically present at the scene of the crime?
- Could the crime have taken place without the contribution of the defendant? Was the contribution materially important to the success of the crime?

- Can the actions of the defendant be isolated and quantified in comparison to those of the other participants?

3.8. The age of the convicted person, whether young or elderly[77]

Age is amongst the classic 'personal circumstances' to be considered in the determination of punishment for a defendant. In general, there are two main circumstances that should be considered as mitigating circumstances: the **young age of** the defendant and the **old age** of the defendant. While both are age-related, they differ in terms of the logic for mitigation. For young perpetrators, mitigation is typically premised on the immaturity of the defendant. Here the defendant, to some extent, was too young or inadequately developed to truly understand the nature of their conduct. Therefore the penalty should be reduced. In terms of the elderly, the concept is that the health of the defendant may be compromised or the length of the sentence may be such that there is little likelihood for the defendant to return to society.

Both situations share a similar logic in terms of the ability of the defendant to bear the punishment. An additional justification frequently put forth for considering age in mitigation is the concept that for the young or old, the sentence might have an exceptional impact on the particular defendant. Here a sentence within the "normal" range may be especially hard to bear. In these situations, the concern is that sentences should have roughly the same impact on all defendants and when the defendant falls into this category it violates this principle.

The difficulty with both factors is that there is no clear definition as to what constitutes youth or elderly as a mitigating factor. Thus, the court must approach the application of this factor with a great deal of caution and focus on uniform application. In both situations, the extreme end of the range is less difficult to deal with and it is less controversial to simply look at the age and determine that mitigation should apply. As the age becomes more controversial, the court will need to increasingly rely on an evaluation of the reasoning for mitigation in the first place. For instance, to properly assess the factor of a 'young age' apply elements such as an inexperienced, fragile, immature, or naïve personality should be taken into account; similarly, the factor of an 'advanced age' should be assessed in conjunction with health, infirmities, diseases, and so on. As the age increases, the court will need to provide greater and greater justification of the defendant's inability to understand the nature of their actions, which increasingly may justify diminished mental capacity.

When considering the application of the 'elderly' factor, there should be no consideration of the defendant's ability to understand their actions or comprehend their nature, i.e. senility or disability. If there are concerns with understanding, it is more appropriately addressed under the diminished capacity factor. For this factor to apply, the court should evaluate the overall health conditions of the defendant and the ability to adequately serve the sentence. The traditional theory under this reduction is that because of the advanced age of the defendant, the sentence will have a disproportionately harsh effect in comparison to a younger defendant given the same sentence. The court can certainly discount this factor if there is evidence the condition was used for the benefit of the defendant in committing the crime.

[77]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 3.6 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

Overlap and Caution

As discussed earlier, this factor may have considerable overlap with diminished capacity, particularly when applying this factor in the context of an inability to comprehend acts or consequences.

Relevant questions include:

- Was the defendant under the age of 18 or over the age of 65?
- Was the defendant of sufficient age that they should understand the nature of their actions?
- Are there facts or evidence that indicates the defendant did in fact understand their actions despite their age?
- Is there evidence the defendant assessed or consciously disregarded the potential negative outcomes of their actions?
- Is the defendant suffering from an acute health condition? Will the defendant survive the contemplated sentence?
- Is there a mental condition contributing to an inability to contemplate the defendant's actions?
- Did the defendant consciously take advantage of this factor in the commission of the crime?
- Are the applicable conditions to meet this mitigation medically diagnosed?
- Is this a condition that pre-dated the commission of the crime?

3.9. Factors indicating remorse and cooperation by the perpetrator[78]

Factors 3.7 through 3.12 of Article 74 are grouped to warn the court of a strong potential for overlap between the factors. If not approached with careful consideration and caution, there is a strong likelihood that the defendant will receive a greater degree of mitigation than entitled.

All six of these factors feed into the concept of rehabilitative justice. Namely that the defendant has to some extent accepted they have committed some wrong, accepted responsibility, and are willing to make amends. By indicating as much, the focus of the court should be on the re-integration of the defendant into society as opposed to removing them in order to protect society. As each of these factors can play an important role in determining the overall sentence, being considered powerful indicators of rehabilitative prospects, the court must not allow facts applied to one factor also support one of the others.

No other area for confusion and potential overlap can be found than the concept of remorse. Every single factor in this cluster can arguably support a finding of remorse and boost the rehabilitative prospects of the defendant.

- Restitution to the victim can be considered an indicator of remorse.
- Cooperation with the court could be considered acceptance of responsibility and remorse.
- Entry of a guilty plea can be considered acceptance of responsibility and remorse.

[78]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 pars 3.7-3.12 Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

In sentencing schemes and historically perhaps no other factor is as significant to mitigation as the concept of remorse. It emotionally impacts judges, prosecutors, and even victims to lessen their judgment and their demands for incarceration. Because of the potential for such a significant impact, to ultimately ensure that sentencing is consistent across defendants, and to ensure mitigation is not inappropriately inflated, it is absolutely imperative that the court strictly construe the meaning of factors 3.7-3.12 and not allow cross-application. Thus, in one of the assessments of the courts in Kosovo, the court noted that: "*The court considered as aggravating circumstance, the defendant's dishonesty in expressing regret for his actions and the fact that he only apologized for his actions for purpose of mitigation, since the court observed during the proceedings that the apology he extended to the defendant was not honest, especially considering the fact that the judge noticed the defendant smiling while the injured party was testifying about the case...*"

Such an assessment made by the court regarding the defendant's expressed honesty represents one of the examples of how the court should be vigilant about the remorse expressed by the defendant precisely because it is a circumstance that is very subjective and difficult to measure. Therefore, in each case, there should be the most realistic possible assessment of the defendant's honesty and whether such a circumstance should be taken into account in reducing the sentence.

3.10. Evidence that the convicted person made restitution or compensation to the victim[79]

The concept with this factor is that it is beneficial for the victim to have been restored, at least financially, to some sort of pre-crime state. Additionally, there is some consideration that the actions should be considered meritorious in terms of contributing to the goals of the criminal justice system as it will offset state-supported legislation to provide victim compensation. This is particularly appropriate if the restitution occurs without prompting by the court.

However, if the court applies victim compensation to this factor, it cannot apply it to evidence of remorse as well. Not only is there the concern that it will double count mitigation, but there is some concern that the defendant is attempting to gain the benefit of the discount without really truly engaging in the act because it is the "right" thing to do.

Another area of concern is whether this factor focuses on the ability to pay and, therefore, whether it is appropriate to award mitigation simply because the particular party has the ability to pay. This concern is more obvious when there are co-defendants, both with the desire to pay, but only one with the ability. In that situation, the court must consider whether it is, in effect, penalizing the defendant who has no money and rewarding the one who does. This is not to say that the concept has no merit, especially depending on the ability of the state to provide compensation if the defendant cannot. The fact that in a particular case, the victim is able to pay for medical bills or lost wages is a definite benefit. It simply means that the court must assess the totality of the circumstances in determining whether to mitigate and to what level. The court should particularly consider the ability of the defendant to pay in proportion to the amount paid.

Relevant questions include:

- Was restitution made prior to arrest or formal intervention by law enforcement?

[79]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 3.7 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

- Was the defendant aware of the strength of the case against them at the time restitution was made?
- Was restitution made as the result of some agreement with the victim in relation to pursuing/supporting the prosecution of the case?
- What was the ability of the defendant to pay in proportion to the amount paid? Were there co-defendants with varying ability to pay?
- Was the victim made whole as a result of the restitution?
- Was restitution considered in concluding the defendant was remorseful for their actions? Was restitution considered in support of any other mitigating factor?
- Was compensation/restitution made in some form other than monetary?

3.11. General cooperation by the convicted person with the court, including voluntary surrender[80]

Factor 3.8 focuses on the behavior of the defendant after the commission of the crime; specifically on the interaction between the defendant and the court. This will inevitably focus on the conduct of the defendant during the conduct of the trial and will ultimately be based on the perception of the court. This is not and should not be considered a portion of cooperation with the prosecution which is specifically reserved for circumstance from par. 3.9.

Voluntary surrender of a defendant can have implications for the sentencing process and the ability of the court to conclude the proceedings and has thus been considered a factor in the mitigation of the penalty. Courts also assume that voluntary surrender and submission to the process have larger implications and may inspire other defendants to act accordingly, improving the overall effectiveness of the work of the courts. Voluntary surrender diminishes **substantially** when the proceedings are purely domestic in nature.

Regardless of whether the proceeding relies on domestic or international tribunals, the ultimate question for the court should be whether it is appropriate to consider this factor at all. Awarding mitigation for cooperation with the court is in essence rewarding behavior that should otherwise be expected from a defendant. A more appropriate approach would be to reserve cooperation mitigation for activity that is in excess of that otherwise expected or generally appropriate behavior. Instead, many tribunals have rejected the awarding of mitigation for behavior, opting instead to punish poor behavior with aggravation of the sentence. Examples include behavior that is disruptive and verges on lack of awareness of the gravity of the offense, threatening or intimidation of witnesses, and a general lack of respect for the solemnity of the judicial process.

Relevant questions include:

- Was the surrender to the tribunal or the prosecution?
- Was the surrender due to impending law enforcement intervention?
- Did the defendant surrender from an international location or domestic?
- Is the behavior generally expected by the court from a defendant? Was it simply a lack of bad behavior by the defendant?

[80]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 3.8 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

- Was surrender or cooperation fundamentally important to the resolution of the case by the court? Did it contribute to closing the matter?

3.12. The voluntary cooperation of the convicted person in a criminal investigation or prosecution[81]

Cooperation can assume many forms from merely facilitating the presentation of the prosecutor's case, testifying and providing evidence in other cases, disclosing new information or corroborating known information, and also contributing to the identification of other perpetrators of crimes. This can be cooperation with the police during the investigation stage as well.

It is very important that the court keeps this factor separate and distinct from a plea or a formal cooperation agreement. When there is a formal structure in place it clearly outlines the terms of mitigation, its limitations, and the expectations of the prosecution. The court should presume unless suggested otherwise by the prosecutor, that full cooperation at the level in the matter before the Court was calculated into the agreement. The court should not use this factor to further reduce an agreed-upon sentence or reduction as this will undermine future agreements and amount to double-counting of cooperation.

The evaluation of the cooperation of the defendant depends both on the quantity and quality of the information they provide. It also depends on the spontaneity and selflessness of the cooperation. The court must assess whether the information was shared without the expectation of something in return and willingly, or only reluctantly based on the impending action of law enforcement or prosecutorial success. The court should use its authority to elicit from the prosecutor or law enforcement the level or importance of benefit provided by the cooperation of the defendant.

If the court determines that the cooperation was substantial this factor is generally considered as significant in mitigation as it also facilitates an expeditious trial. On the other hand, when judges ascertain that cooperation was forthcoming reluctantly, was sporadic or connected to some extraneous factor, mitigation will be reduced.

Relevant questions include:

- Is there a formal plea or cooperation agreement in place? If so, are the terms of reduction clearly outlined?
- If there is an agreement in place, did the defendant provide information above or beyond that envisioned within the agreement?
- Was the information provided in expectation of a reduction in sentence?
- Did the defendant provide cooperation substantially important to resolution of the matter? Resolution of the matter?
- Did the perpetrator confess to the crime?
- Did the defendant provide incriminating testimony against another defendant during the investigation and/or the trial?
- Was evidence in support of conviction recovered as a result of cooperation of the defendant?

[81] Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 3.9 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

3.13. Plea of guilty[82]

The guilty plea was discussed above in the context of the general circumstances for sentencing according to Article 69. Guilty pleas have long been a source of mitigation in sentencing for a variety of reasons. Some argue they indicate acceptance by the defendant of their actions, readiness to be rehabilitated and reintegrated, a willingness to be punished for their crimes, and a sign of remorse to the victim and society. However, haphazard application of this factor leads to double counting factors in mitigation and overvaluation of the ultimate mitigation. Current practice in Kosovo strongly supports that when present, this factor is disproportionately important in comparison to other factors – indicating double counting and overlapping application. Furthermore, there is little evidence to suggest that a broad application of a guilty plea into other factors is actually warranted. Considering that each circumstance that may support a guilty plea can be evaluated independently, the guilty plea should be given its own careful assessment. ***The most important thing to note is that a guilty plea does not automatically reduce the sentence below the legal minimum.*** The court must focus its assessment only on the fact that the defendant has pleaded guilty. It should not consider the plea as support for remorse, cooperation, or indeed any other factor.

There are several benefits that inherently derive from a plea of guilty that form the basis for mitigation. The primary reason relates to all of the societal benefits that derive from avoiding a trial. A guilty plea prevents the expenditures associated with having witnesses testify, police to produce defendants, security for the proceedings, perhaps translation costs, and the focus of several judges on one case at the expense of many others. There are also psychological savings as victims and witnesses forego the heavy mental stress of being present and testifying at trial. And the system itself can ultimately focus its time and attention on cases that are perhaps more worthy of society's limited financial resources. Finally, to a limited extent, mitigating punishment for those who voluntarily plead indicates to others that they will be dealt with fairly. It encourages others to come forward, whether already indicted or as unknown perpetrators.

The act of a guilty plea should, in principle, give rise to some reduction in the sentence that the defendant would otherwise receive. However, the extent of the mitigating value of guilty pleas depends largely on the moment at which the plea is entered. An early plea is accorded more weight than a late one, as the benefits to the system and the economy of trial are at their peak. It is also generally believed to be more genuine and spontaneous, as opposed, for example, to a last-minute effort to minimize punishment for a trial that is going poorly for the defendant. As the proceedings progress, the mitigation afforded should decrease proportionally. However, once the trial begins there should be a significant drop in the mitigation awarded as the benefits of avoiding a trial have largely been lost – especially if victims have been called to testify. If the plea occurs in the midst of a trial the court should seriously consider awarding a minimal or no reduction.

It is important to keep in mind that this significant reduction in mitigation after the trial starts is not a penalty for exercising the right to trial. It is simply an acknowledgment that the primary reward for a guilty plea is derived from avoiding societal costs. Ultimately, a defendant who exercises their right to trial has one opportunity that is unavailable to the defendant who pleads guilty, and that is to be found not guilty and forego punishment entirely.

Finally, this factor should not be confused with a plea agreement. Those are completely separate considerations. The plea agreement involves all parties agreeing to the final sentence for

[82]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 3.10 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

the defendant – no additional reduction based on this circumstance as that would represent double counting. The plea agreement itself should adequately represent the societal savings as well as all additional mitigating factors that are appropriate. This factor is reserved solely for those situations in which the defendant pleads guilty without an agreement in place with the prosecutor.

If the court is faced with a situation in which plea negotiations took place but failed, but the defendant ultimately pled guilty to the court without an agreement in place, it should consider the sentence offered by the prosecutor that was rejected. If the court finds that circumstances surrounding negotiation of the plea agreement indicate that the defendant forewent the plea offer in hopes of receiving a lower sentence from the court, it should strongly consider the potential impact if the court does indeed decide on a lower sentence. Sentencing below the plea offered without justification can discourage future plea negotiations from taking place.

Relevant questions include:

- Is the defendant pleading at the earliest possible opportunity?
- Has the defendant had an opportunity to evaluate all of the proposed evidence and proposed testimony prior to pleading guilty?
- Has the trial formally started? Has testimony occurred?
- Has the victim testified?

3.14. *Any remorse shown by the convicted person*[83]

Among the other circumstances related to the person of the accused, 'remorse' has traditionally been a significant consideration in the mitigation of a sentence in almost every system. Ideally, it represents an acknowledgment of the victims' suffering, recognition that the act was wrong, assumption of responsibility, and a willingness to accept the consequences. When the remorse is coupled with more than an expression of sorrow, but some actual act that demonstrates repentance, there is an argument for mitigation. In those situations, the defendant has exhibited all of the traits for successful rehabilitation and reintegration under the rehabilitative model of sentencing.

In order to accept remorse as a mitigating circumstance in sentencing, the judge must be satisfied that the remorse expressed is sincere. This assessment is clearly difficult, considering this factor is of a subjective nature, the truthfulness of which resides solely within the defendant. It requires the court to consider not only the words of the defendant but the circumstantial evidence and inferences that can be drawn from actions and behavior. These have traditionally included such things as:

- Statements made by the defendant indicating remorse and repentance.
- Positive direct actions Specific towards the victim such as an apology.
- If there is injury to the victim, immediately seeking or providing medical assistance.
- Emotions of the defendant observed by the victim, prosecutor and/or court.
- If the defendant's actions were caused or exacerbated by some extraneous condition, such as alcohol or narcotic use, seeking medical treatment.

[83]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 3.11 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

- Subsequent behavior of the defendant such as in the courtroom, surrender to police, and cooperation with prosecution.
- Plea of guilty at the earliest possible moment.

Unfortunately, we encounter cases in our judicial practice in which, despite the existence of many aggravating circumstances related to the way the crime was committed, and the very serious actions of the defendant, the court still takes "remorse" and "defendant's promise" as especially mitigating circumstances. Thus, in one of the many cases from practice, which ended in fatality in less than a year, the Court had taken this as a special mitigating circumstance, and had reduced the sentence below the legal minimum by replacing the prison sentence with a fine, despite to the fact that the judgment itself contained indications of high degree of danger posed by the defendant "... *This person initially requested from his son to convey to him the situation at home about who was entering and leaving the house and when he disagreed, he ordered the boy to return to the family..., meanwhile he started stalking the victim by finding a residence near the house of her parents to check when she was going out and back...*"[84] In such cases, but also in any other case, the guilty plea must always be weighed in relation to the circumstances of the commission of the offense and the responsibility of the defendant rather than as an isolated matter.

Double counting and Caution

As was discussed at the outset of factors 3.7-3.12, many exhibit a strong potential to overlap with one another. As can be seen from the list above, many of those factors are traditionally cited as circumstantial evidence to support a finding of remorse of the defendant, thereby resulting in significant mitigation. However, time and experience have shown that the utility of using those factors as indicators is diminishing. With the increased use of plea bargaining and pleas of guilty, modern sentencing has recognized that actions traditionally attributed to remorse on the part of the defendant are perhaps more appropriately considered calculated choices to reduce sentence exposure. The Criminal Code acknowledges this consideration by giving many of them their own specific factor. This means that the court must limit its consideration to only those facts and circumstances that are not directly attributable to another factor.

While remorse can be a significant and compelling factor in mitigation, the lack of remorse should not be considered an aggravating factor. This applies to situations in which there is a plea or plea agreement as well.

Generally, statements or apologies from the defendant should be viewed with skepticism as false remorse can be an integral part of the cycle of violence present in domestic violence relationships.

Relevant questions include:

- If injury to a victim is involved did the defendant provide medical treatment? At what point in time?
- Has the defendant expressed direct remorse to the victim or witnesses?
- Has the defendant taken steps to indicate remorse or acceptance of responsibility?
- Did the defendant express emotion supporting remorse?

[84] Quoted from a Judgment from the court practice in the Republic of Kosovo.

- Did the defendant seek medical/psychological help after the crime? At what point in time? Did the defendant do so when the capture was imminent or after proceedings began?
- Did the activity or action exhibit genuine remorse or was it done to reduce liability and punishment?
- Did the defendant exhibit remorse in an attempt to persuade the victim to lobby for a reduced or no sentence? Is this a domestic violence situation?
- Did the defendant mitigate damages or the potential to spread to other victims if possible?

3.15. *Post-conflict conduct of the convicted person*[85]

This factor is in many respects a catch-all provision, hence its failure to provide examples or additional detail. If the court finds that the defendant's conduct warranted some degree of mitigation, but is incapable of application under any of the other factors, the court may consider it here. This can include attitude, behavior, actions, admissions, or any other conduct as appropriate.

In some respects, the focus on post-conflict behavior can provide more support for aggravation rather than mitigation. This can include:

Destroying any traces or evidence of the crime (unless that is a separate criminal offense);

Taking certain actions in order to pressure witnesses and expert witnesses into false testimonies or promising any rewards to that end (unless that is a separate criminal offense);

Relevant questions include:

- Does such conduct deserve mitigation?
- Does the conduct support the application of any other mitigating circumstances?
- Does the conduct appear related to or as a reaction to imminent law enforcement or official action?

3.16. *In cases where the person is convicted for the criminal offense of taking hostages, kidnapping or illegal deprivation of liberty or as defined in articles 169, 191 or 193 of this Code,...* [86]

Factor 3.13 will only be applicable to the court in limited circumstances. Specifically, when dealing with the abduction-related crimes of Hostage Taking (169), Kidnapping (191), and Unlawful Deprivation of Liberty (193). In these limited circumstances, the court will need to evaluate all of the surrounding circumstances to determine whether this factor will indeed apply. In some respects, the factor is indicative of some remorse on the part of the defendant or at the very least an affirmative act in relation to the victim in an effort to ensure a safe return. It also provides mitigation in circumstances when the defendant provides information towards identifying

[85]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 3.12 Official Gazette of the Republic of Kosovo/No.2, January 14, 2019, Prishtinë/Pristina.

[86] The Criminal Code of the Republic of Kosovo No. 06/L-074, Article 70, paragraph 3.13: In cases where the person is convicted for the criminal offense of taking hostages, kidnapping or illegal deprivation of liberty or as defined in articles 169, 191 or 193 of this Code..., contribution to the effective release or to bringing the abducted taken or stopped person alive, or the voluntary provision of information that contributes to identification of others responsible for a criminal offense. Official Gazette of the Republic of Kosovo No.2 14 January 2019, Prishtinë/Pristina

others, in effect cooperating with law enforcement. The goal is to provide some mitigation when there is some abandonment of a crime that is likely headed towards more serious consequences.

In addition to falling under one of the enumerated offenses, there are several additional requirements before the court can consider mitigation. For mitigation in relation to the victim, the code is clear that the victim must, in fact, survive. The defendant must also provide some effective contribution to the safe return of the victim. This must be more than surrendering the person in the face of law enforcement, a failed crime or an accidental occurrence. There must be some evidence that the actions were designed or formulated to return the victim and that in evaluating the totality of circumstances, they helped bring about that result.

For mitigation in the second situation, it will require the voluntary provision of information about co-defendants. The amount of mitigation will depend on the court's evaluation as to the voluntariness of the defendant's contribution. If the defendant voluntarily abandons the crime and provides information about co-defendants prior to law enforcement involvement, it will be entitled to more mitigation than if it was provided at the end of a long interrogation in the face of a lengthy period of incarceration.

Overlap and Caution

As mentioned briefly above, there is the potential for overlap with this factor and other mitigating factors. An affirmative act on the part of the defendant that contributes to the safe release of the victim supports the theory that the defendant partially abandoned their original intent and is seeking to mitigate the end result. A court can conclude that this exhibits some level of remorse and hence there is an opportunity for overlap. Likewise, the voluntary provision of information related to co-defendants overlaps with the concept of cooperation with law enforcement. As the circumstances are so narrow for the application of this factor, any evidence supporting a finding should be focused on this factor.

Relevant questions include:

- Did the victim live?
- Are the defendant's actions responsible for the safe return of the victim? If not completely, to what extent? Was the contribution negligible?
- Would the victim have returned safely without the defendant's contribution?
- Was the safe return of the victim the purpose of the actions?
- Was the goal of the actions the safe return of the victim?
- Were the actions motivated by law enforcement intervention?
- Was the failure of the crime imminent at the point of contribution?
- Was law enforcement aware of the crime?
- Was the contribution based on some degree of voluntary abandonment by the defendant?
- Was the perpetrator in custody when providing the information or contribution?
- Did the identification result in the apprehension of other defendants?
- Was their contribution greater than just the identification of other perpetrators?

3.17. Regarding the criminal offenses of terrorism defined under this Code...,[87]

The new circumstance included in the amendments of the CCRK is related to criminal offenses of terrorism. This circumstance has largely to do with the defendant's contribution to helping the justice authorities. The sanctioning of terrorism and related acts is shared into three basic laws:

- Criminal Code of the Republic of Kosovo[88]
- Law on Prevention of Money Laundering and Combating the Financing of Terrorism.[89]
- The law on the prohibition of joining armed conflicts outside the territory of the country.[90]

From what can be seen above, it can be said that the legislator tried to include criminalization of all types of these crimes, precisely because of the high level of local and global risk they pose. Therefore, due to the nature of these acts and the consequences they can carry, it is impossible to break down the elements related to acts of this nature and the circumstances relevant to them. However, a separate guideline would provide a more precise analysis combining all applicable mitigating and aggravating circumstances.

While it was mentioned above that the legislator has given special importance to these crimes, it is clear that the inclusion of this mitigating circumstance, precisely for these types of crimes represents an indication of how important the early detection or even prevention of these acts is to avoid the massive consequences that these acts can cause. More details about this circumstance will be discussed in a separate Chapter addressing acts of terrorism.

4. Other mitigating circumstances taken into consideration during practice

As with aggravating factors, there is no limitation on the court to only those factors enumerated in the Code. However, the list is generic and expansive enough that many factual scenarios evidencing traditional mitigating factors will fit within one of the factors. Before venturing beyond these limits, the court should carefully assess whether the factor contemplated is one that is in conformity with sentencing practices and not simply based on personal opinion. Mitigation is far more subject to social values, norms, and customs than aggravation and can easily disrupt the goal of decreasing sentencing disparities.

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[87] The Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 70 par 3.14 with regard to terrorism offenses laid down in this Code, the fact that the offender renounces terrorist activity before any grave consequences have resulted therefrom and provides the police, prosecutors, or judicial authorities with information which they would not otherwise have been able to obtain; assists in the prevention or mitigation of the effects of the offense; identifies with sufficient detail to allow the arrest or the prosecution of another terrorist or terrorist group, finds evidence or prevents further terrorist offenses, Official Gazette of the Republic of Kosovo/No.2, 14 January 2019, Prishtine/Pristina.

[88]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

[89] Law No.05/L-096 on Prevention of Money Laundering and Combating the Financing of Terrorism, Official Gazette of the Republic of Kosovo / No. 18 / 15 June 2016, Prishtinë/Pristina

[90] Law No. 05/L -002 on the prohibition of joining armed conflicts outside of the territory of the country, Official Gazette of the Republic of Kosovo / No. 7 / 02 April 2015, Prishtinë/Pristina.

- *Elapse of Time*

An additional mitigating factor the court may consider in rare and very specific cases that may have some bearing in mitigation is the elapse of a significant period of time between the commission of the offense and when the matter is finally brought before the court. The theory behind this potential factor is somewhat multifaceted. Perhaps the court finds before it an individual who after committing the offense has lived a model life, prospered, and shown indications of abandoning any semblance of a life of crime, obviating the need for personal deterrence. Perhaps the court believes the matter has sufficiently faded from the minds of the public that there is no longer an immediate call for justice or a perceived need for general deterrence. Or maybe the case is very old as a result of neglect or the prior political situation.

Any of the foregoing may seem like possible reasons for awarding mitigation for the defendant, however, the court should approach this factor with some skepticism. Although the court is not bound only to the mitigating factors enumerated in the code, it nevertheless should proceed with caution, as venturing beyond means the factor may be controversial or at the very least less widely acknowledged. Regardless, the court should keep several considerations in mind.

First, the mere passage of time itself is not sufficient to award mitigation. The legislature has provided the courts with quite specific procedural deadlines on hearings as well as statute of limitations for various offenses. Those procedural controls are in place for the purpose of determining when justice is no longer capable in light of continuing delays. Moreover, alternative methods to detention likewise serve the purpose of minimizing or preventing impact on the defendant during any delays. To offer some form, even graduated, of mitigation simply due to delays creates the perverse incentive to delay the proceedings further in hopes of deriving an additional benefit.

Any consideration of some mitigation benefit to the defendant should not be awarded without a thorough evaluation of the actions of the defendant, particularly whether the perpetrator's own actions contributed to any of the delays or passage of time that the court is seeking to provide mitigation for (in whatever capacity). If the defendant has actively participated in the creation of delays, or avoiding detection or identification, there should be no consideration, to any extent, of mitigation based on this theory. The court should evaluate the defendant's potential contribution liberally as the behavior of passively continuing on as if nothing happened, over an extended period of time, does indicate a lack of acknowledgment that the behavior was criminal. In fact, there is some logic to the argument that if a significant period of time has passed and the defendant has failed to do such things as make amends to the victim, turn themselves in, or cooperate with the court, it actually represents behavior of a lack of rehabilitation or remorse.

Similarly, the court should look to the prosecution and law enforcement and evaluate whether there was significant mishandling causing unjust delays. Whether this will warrant mitigation is a controversial and difficult issue to assess. Regardless, there should be clear evidence of mismanagement beyond the mere passage of time.

- *High level*

Concerning the possibility of a traditional claim of superior order for the accused who had to follow that order (i.e., a form of 'duress'), Article 16 specifically prohibits complete exclusion except under very narrow circumstances. As to its application as a mitigating factor, such an assessment will be highly fact-dependent and only possible in extreme situations, certainly not when there is evidence that the defendant was a willing participant in the crime. In the rare situation

when the circumstances may lead to the application of mitigation, the court must consider whether it is more appropriately categorized under mitigating factor 3.1

- *Honor crimes*

Judges *should not* consider any reduction of penalty for a crime committed by a family member based on the defendant's claim to have acted out of respect for culture, tradition, religion, or custom, or to restore their so-called "honor". Courts must ensure that the prohibition on these justifications is never considered as a restriction of the defendant's cultural or religious rights and freedoms. This is fundamentally important in societies where distinct ethnic and religious communities live together and in which the prevailing attitudes towards the acceptability of domestic violence differ depending on the cultural or religious background. In fact, Article 46 of the Istanbul Convention[91] actually demands harsher punishment if the crime is committed by a family member or by two or more people acting together.

- *Victim's prior sexual behavior*

In many countries, the victim's prior sexual history continues to be used to inappropriately deflect attention away from the defendant onto the victim. The victim's past sexual history *is not* relevant to her credibility. Nor should it be a reason to reduce a defendant's sentence.[92] Ultimately, evidence of the complainant/survivor's sexual history should not be considered in the mitigation of a defendant's punishment.

- *Support from the victim*

The wishes of the victim or the victim's family for lenient treatment of the defendant are sometimes considered in the mitigation of a sentence. If the court is considering such a reduction, it should be mindful of several issues. First, the wishes of the victim (and restoration), although very important, are only one component of the overall sentence. Even if the court nullifies victim considerations based on the victim's wishes, it must still provide a sentence that meets the needs of society in terms of justice, deterrence, etc. It should not be the ultimate factor determining a final sentence. When victimization is based on property or financial loss, the wishes of the victim may be more prominently considered in the final sentence. However, a sentence imposed for an offense of violence should be determined by the seriousness of the offense, not by the expressed wishes of the victim.

Second, the court must be extremely wary if there are indications of domestic violence in the offense. In order to award mitigation the court must ensure that the victim will not be exposed to a high risk of further violence. This is a very hard task in most of the domestic violence cases. Reconciliation is a fundamental part of the cycle of violence in domestic violence cases and in many situations, there are periods in which the victim will decide against pursuing claims or forgiving the defendant. For any such request, the prior history of the relationship must be thoroughly evaluated, especially whether there have been similar situations where the victim has

[91] Council of Europe Convention on preventing and combating violence against women and domestic violence, open for signature on May 11, 2011, Istanbul Turkey. The Convention came into force on August 1, 2014.
[92] Handbook for judges and prosecutors on domestic violence, Victim's background, par. 10.7.3 Prishtine/Pristina (2016), p. 78.

aborted prosecution. There are several additional reasons why it may be particularly important that this principle is observed in a case of domestic violence:[93]

It is undesirable for a victim to feel responsible for the sentence imposed. There is a risk that a plea for mercy made by a victim was induced by threats made by, or by a fear of, the defendant. Granting requests will increase the likelihood of a repeat offense in the future and indicate to the defendant and other abusers that they can control the outcome by controlling the victim.

[93] *ibid*. The wishes of the victim and their effect on punishment, pg. 79.

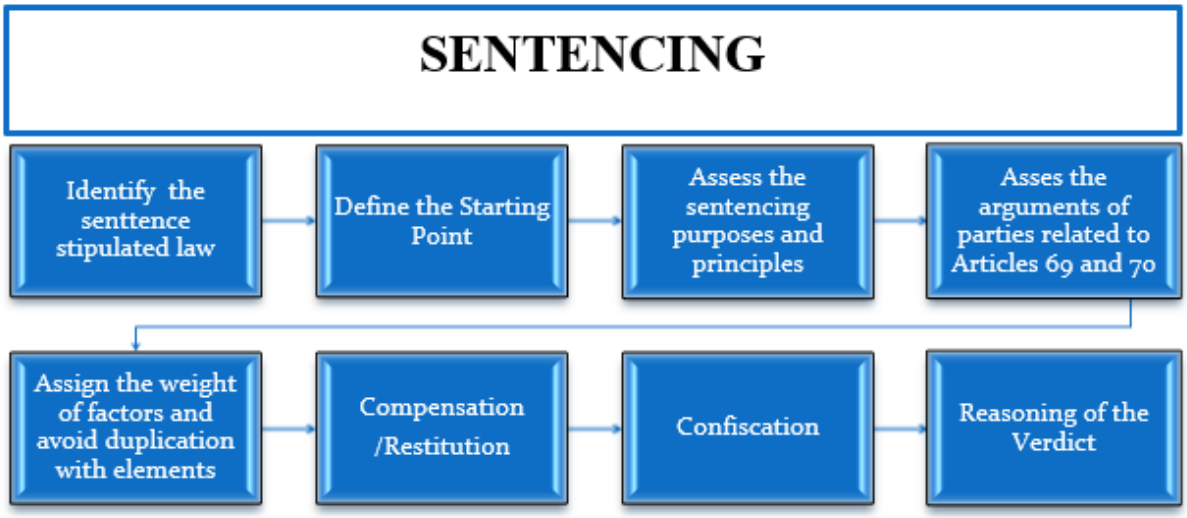
VI. Sentencing Stages

1. General issues

Each of the following headings is dedicated to different stages of sentencing. In general, this framework follows, as far as possible, the provisions of Article 69.1 of the CCRK which states: *"When determining the punishment of a criminal offense, the court must look to the minimum and maximum penalty applicable to the criminal offense. The court must then consider the purposes of punishment, the principles set out in this chapter, and the mitigating or aggravating factors relating to the specific offense or punishment."*

The assessment and calculation of punishment is carried out according to the following steps:

- Establish the sentence provided by law for that offense.
- Determine the starting point.
- Assess the goal and principles of sentence.
- Assess parties' arguments regarding aggravating and mitigating circumstances.
- Determine the weight of the circumstances and ensure that they do not represent an element of the criminal offense.
- Determine whether alternative and/or accessory punishments for that offense are possible, proportionate and adequate.
- Determine restitution/compensation.
- Confiscation of the instrumentality or proceeds of crime.
- Step-by-step reasoning of considerations for sentencing.



2. Starting Point

The Council of Europe's Recommendation concerning consistency in sentencing says: *"Wherever it is appropriate to the constitution and the traditions of the legal system, some further techniques for enhancing consistency in sentencing may be considered. Two such techniques which have been used in practice are "sentencing orientations" and "starting points". Sentencing orientations indicate ranges of sentences for different variations of an offense, according to the presence or absence of various aggravating or mitigating factors, but leave courts with the discretion to depart from the orientations.* ***Starting points indicate a basic sentence for different variations of an offense, from which the court may move upwards or downwards to reflect aggravating and mitigating factors.*** *In particular, for frequently committed or less serious offenses or offenses which are otherwise suitable, consideration may be given to the introduction of some form of orientations or starting points for sentencing as an important step towards consistency in sentencing".*[94]

Starting points define the position within a category scale from which to start calculating the sentence. Once the starting point is established, the court should consider further aggravating and mitigating factors and previous convictions so as to adjust the sentence within the range. Starting points and ranges apply to all defendants, whether they have pleaded guilty or been convicted after trial. Credit for a guilty plea is taken into consideration only after the appropriate sentence has been identified.

Unlike the 2018 Sentencing Guidelines, where the average between the legal minimum and maximum was determined as the starting point for all punishments provided for by the Criminal Code, a different approach has been taken in the present revised Sentencing Guidelines. Thus, as you will notice from the separate part for each chapter of the CCRK, different scales of starting points have been determined such as 1/3, 1/2 or 2/3 between the foreseen legal minimum and maximum. Although the legislator has foreseen a legal minimum and maximum, the general opinion of the judges was that the revised Guidelines should be amended precisely in terms of determination of the starting point. Different starting points are determined even within the same chapter of the CCRK, depending on how dangerous those offenses are to the society, or whether the offenses of a certain category are more prevalent during a certain period of time, and it is in the country's interest that to have stricter policy both in legislation and in implementation. Through such scaling, the Supreme Court aims to make the Guidelines as applicable to the judiciary as possible.

In general, the CCRK provides for wider ranges for more serious criminal offenses and narrower ranges for less serious criminal offenses. At the same time, in addition to decision-making within the legal range of the sanction, the CCRK in certain cases, depending on the circumstances, gives discretion to the court to impose a sentence below the legal minimum or above the legal maximum.

Determining the starting point touches on a number of issues identified earlier:

[94] Recommendation No. No. R(92)17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing, (adopted by the Council of Ministers on 19 of October 1992).

- **First, it establishes a baseline sentencing level that is easily ascertainable by the public and increases the legality of the sentencing process.** There is little argument that the public is unaware of what the sentence will be, at least from the outset. This supports the argument that a primary component of any effective level of general deterrence is awareness of the type and length of penalties attached to each crime.

- Second, it puts the system and the defendant in a better position to negotiate plea deals, plead guilty, or determine other alternative solutions. **The defendant, who knows that the court, in the absence of mitigating or aggravating circumstances, will impose a sentence according to the starting point, will better assess whether it is in his/her interest to consider the above-mentioned solutions instead of subjecting himself/herself to a long and troublesome trial. This will increase the overall efficiency of the system.**

- **Finally, it decreases the chances of heaving divergent sentencing practices.** While the impact of divergence is relatively minimal when the range provided to the Court is small, thus the larger the available range between the minimum and maximum, the bigger the impact of the non-uniform starting point. By determining the starting point, all courts start the sentencing process the same way and consequently, it results in similar treatment of perpetrators for similar crimes.

At the end of this step, the Court has identified the baseline information with which to engage in individualization of the sentence to the particular defendant by assessing the aggravating and mitigating factors present. It has a minimum and maximum range within which to work, the starting point, and whether a fine is available as a mandatory addition or a complete substitution. This information should be considered by the Court as the presumptive sentencing information. Meaning that the Court, under most or "normal" circumstances, will decide on a sentence within the confines of this information. The Court may only deviate from this baseline when it is able to conclude that there are circumstances sufficiently outside the norm of "average" defendants to justify a departure. This is in conformity with paragraph 1 of Article 70 on the general rules of mitigation and aggravation which states that "[t]he punishment imposed on a perpetrator is the punishment prescribed for the criminal offense, while a more lenient or severe punishment may be imposed only in accordance with the conditions provided for by this Code".

3. Assigning weight to the circumstances

Once the court has thoroughly evaluated all of the possible aggravating and mitigating circumstances, their factual support, and whether they are relevant or not, it must then engage in a quantitative evaluation. Step 4 involves the evaluation and assignment of weight for each factor present, comparing and balancing aggravating and mitigating, and evaluating whether additional adjustments are available.

Assigning weight to the circumstances requires the court to engage in a two-step process. First, evaluate whether each factor has internal significance. Second, the court must determine the overall seriousness of the offense. While in countries like the USA and Great Britain, there is an almost mathematical formula in determining the weight of circumstances, in the Republic of Kosovo such calculation is limited. Being a new democracy that is trying to embrace practices of

other countries, such sentencing calculation seems quite complex, so we embraced the opinion that the calculation of the weight of a circumstance should be left to the discretion of the Court by comparing that circumstance to how much mitigating and aggravating circumstances are present in the case.

Internal significance of the factor

In many situations, the evaluation of the circumstances will simply be an evaluation of whether they exist. For those situations when a factor is non-existent, the Court can simply move on to the next factor and eliminate it from consideration. However, when a factor does exist, the evaluation does not stop there. The Court must then assess the weight that will be given to the circumstance. Determining the weight of a circumstance requires the Court to establish a hierarchical structure within the particular circumstance and then assess where the particular case falls within the hierarchy. This will then create a relative weight for the circumstance.

A classic example involves a defendant who pleads guilty during the judicial proceedings. Just because the defendant pleads guilty, he is not automatically entitled to the maximum amount of mitigation for doing so. Within this circumstance, there are a series of levels that impact the significance of the individual factor. A defendant who pleads guilty at the first opportunity should be given the maximum mitigation available for this mitigating circumstance. In comparison, a defendant who pleads guilty on the eve of trial may be given credit in mitigation, but it will be substantially less. A defendant who pleads guilty during the trial would be given almost no credit for the plea. If we consider that the overall benefit to the system in terms of expenditure of resources is the purpose of allowing mitigation for a plea of guilty, the greater resources saved, the more mitigation will be offered.

For each factor, the court must undergo a thorough analysis of whether the defendant is entitled to the full benefit of the factor based on the facts present. Each factor presented in the foregoing sections on mitigation and aggravation provides some possible divisions for the Court's consideration, but the list is not exhaustive.

4. Seriousness of the Offense

Once the Court has completed consideration of all factors, determined their presence, and evaluated their internal value, the next step is to determine the overall seriousness of the offense listed explicitly in CCRK and other laws. Seriousness is a major component of determining the final sentence and is the combination of two critical considerations, the culpability of the defendant in the commission of the offense and the harm caused by the offense. Generally, the higher the culpability of the defendant and the harm caused, the greater the sentence must be. Seriousness will not include all factors listed in the code, only those that are traditionally considered appropriate. Once seriousness is evaluated, the remaining factors can be considered.

As the court evaluates these two factors it must be stressed yet again that there must be NO double counting of factors if the factors are an element of the offense. As was discussed earlier, the Criminal Code contains many derivative offenses that ALREADY take into consideration the statutory factors listed below. If the offense charged already takes into consideration any of the factors listed below, they cannot be used again for consideration of the seriousness of the offense.

Additionally, as explained earlier, the factors listed below have the potential to overlap with one another. The Court must be cautious not to consider any of the facts of a particular case for more than one factor.

5. Factors indicating the degree of responsibility of the defendant

The following factors are relevant in determining the level of responsibility of the defendant. These factors will indicate that the defendant was a willing participant and was a significant contributor or architect of the crime or, in the alternative, participation was minimal or there were circumstances impacting the assessed level of participation. Generally, the level of responsibility will be other than the level of an average offender.

(i.) Higher degree of responsibility

a. *Factors mentioned in the law*

2.1 A high degree of participation of the convicted person in the criminal offense

A high degree of intent on the part of the convicted person.

2.11. whether the criminal offense was committed as part of the activities of an organized criminal group

2.9. any abuse of power or official capacity by the convicted person in the perpetration of the criminal offense;

2.10. evidence of a breach of trust by the convicted person;

b *Factors not mentioned in the law*

- Whether the defendant deliberately caused harm greater than necessary for the commission of the crime
- Whether the defendant targeted victims because of vulnerability, age or ulterior motives

(ii.) Lower degree of responsibility

3.1. circumstances falling short of grounds for exclusion of criminal responsibility, for example, diminished mental capacity;

3.4. evidence that the convicted person played a relatively minor role in the criminal offense;

3.5. the fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another;

3.2. Evidence of provocation by the victim;

3.6. the age of the convicted person, whether young or elderly;

6. Factors influencing the level of damage

The following factors are relevant factors in determining the level of damage caused by the crime. Generally, these factors will indicate that the crime had a greater or lesser level of damage than was embodied by the specific provisions of the criminal offense in the Code. This may include the number of victims or the degree of injury to the victims.

(i.) Higher degree of damage

a. *Factors mentioned in the law*

2.3. the presence of actual or threatened violence in the commission of the criminal offense;

2.4. Whether the criminal offense was committed with particular cruelty;

2.5. Whether the criminal offense involved multiple victims;

2.6. Whether the victim of the criminal offense was particularly defenseless or vulnerable;

2.7. The age of the victim, whether young or elderly;

2.8. The extent of the damage caused by the convicted person, including death, permanent injury, the transmission of disease to the victim, and any other harm caused to the victim and his or her family;

b Factors not mentioned in the law

- Whether the degree of harm was greater than that needed to commit the crime and the level of injury is not included in the factor listed above.
- The level of non-physical damage caused, or financial loss was significantly higher than needed or was in addition to physical harm.

(ii.) Lower degree of damage

3.7. evidence that the convicted person made restitution or compensation to the victim;

7. Relative Importance and Purpose of Sentencing

In addition to the general rules of application for determining the weight of each factor described above, the Court should also consider the following points to further fine-tune the sentence.

The first is relative importance. As has been discussed throughout the Guidelines, not all factors should/will be considered equal to one another in the overall calculus. The Council of Europe Recommendation concerning Consistency in sentencing states: *"Wherever possible, the law or practice should also attempt to define those factors which should not be considered relevant in respect of certain offenses."*[95] In general, the following principles should be applied:

Significant Aggravation:

- Trauma/injury suffered by the victim(s)
- Vulnerability of the victim(s)
- The cruelty caused
- Abuse of authority or trust
- Express participation

Significant mitigation:

- Remorse/efforts to minimize impact
- Plea of guilty
- Indirect participation/ pressured participation
- Cooperation with authorities
- Limited knowledge of actions
- Low consideration
- Criminal record (unless recidivist)
- Age
- Good character
- Family status

The second element that must be considered when assessing the relevant aggravating and mitigating circumstances for sentencing is that they must be coherent with the intended aims of sentencing. For example, if one of the main aims is rehabilitation or re-socialization, then factors such as remorse and cooperation of the defendant will assume a central role and importance in sentencing; whereas if a retributive approach prevails in sentencing, circumstances linked to the role of the accused in the commission of crimes and to the harm inflicted on victims should prevail. This would encourage, for example, harsher sentences for crimes in which a position of trust or authority was abused, and for crimes perpetrated with cruelty, sadism, or motivated by prejudice, discrimination or hate towards particularly vulnerable victims; and impose less severe sentences in connection with sincere remorse, and cooperation of the accused with the prosecutor and the judicial authorities. As with the significance factor consideration, for simplicity, it is suggested that there simply be a reduction of up to 25% for those factors that are not directly related to the overall purposes of sentencing that the court has identified. If the court has taken the approach that all purposes of sentencing are equally important, it will not need to engage in this adjustment.

What appears evident is that factors taken into account in the determination of sentences are of a various nature but essentially are connected to: the purposes assigned to punishment, the

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influence exercised by general principles, the specific circumstances of the case, and its procedural aspects.

8. Prohibition on Double Counting Circumstances

Of significant importance for appropriately evaluating aggravating and mitigating circumstances is the court's awareness of the concept of double-counting circumstances. This problem occurs in several scenarios that are discussed in greater detail below.

Firstly, there is the potential for violating the principle of double jeopardy in sentencing by punishing the same defendant twice for the same conduct: first for their individual responsibility and second by using the same facts to enhance the ultimate penalty by applying them as an aggravating circumstance. The court must not consider those circumstances which are an element of the criminal offense for aggravating a sentence, since they were already considered when the legislature determined the base level range for the offense.

For example, for the criminal offense of robbery from Article 317, the court cannot consider as an aggravating factor that the offense was committed with the threat or use of violence as the use/threat of violence is an element of the offense.

In the absence of violence or threats to use violence, the offense is classified as ordinary theft and carries a sentence of up to 3 years.

Similarly, although less common, if a lesser sentence (often under the legal minimum) was based on a statutory factor, those same facts cannot also be used to lower the sentence through their use as a mitigating factor. For example, Article 159 of the CCRK describes the crime of Endangering Civil Aviation Safety and provides that someone operating an aircraft in an irregular manner is subject to punishment from 1-10 years of imprisonment. Paragraph 6 of the provisions specifically provides that if the offense is committed negligently the sentence is reduced to up to 5 years imprisonment. As a reduced level of culpability was applied when formulating the sentencing range for the negligent commission of the offense, the court cannot further use these facts to further reduce the sentence claiming such as mitigation under 3.1 as a circumstance falling short of grounds for exclusion of criminal responsibility. Although these situations are not as widespread as the situations under aggravating factors, nevertheless the court should be wary of these cases.

More specifically, as an illustration, we will take some cases from judicial practice where such a double count has been observed:

In a case related to the criminal offense of domestic violence from Article 248 paragraph 1 of the CCRK, the court, at sentencing, among others, took the fact that the criminal offense was committed within the family relationship, respectively against the ex-wife as an aggravating circumstance.[96] In this case, the court mistakenly double-counted the same circumstance, due to the fact that the main element of the domestic violence (according to Article 248) is its commission

[96] Quoted from a Judgment from the case-law of the Republic of Kosovo

within the family relationship. This issue was addressed very well by the Supreme Court's Guidelines for handling cases of domestic violence[97]

In another case, the court adjudication on a criminal offense of negligent murder from Article 175, as the first qualified circumstance mentioned the fact that "*the degree of damage caused by the convicted person is very serious as it involves the death of the victim*".[98] In this case, we have a double count since the death of the victim is an essential element of this crime.

Another area where the court should be concerned about double-counting is the concept of overlapping circumstances, which can occur in the areas of both mitigation and aggravation. This happens because the Code provides a very broad categorical set of aggravating and mitigating circumstances to choose from. Inevitably, the court will be faced with a circumstance that may logically apply to more than one category. While the initial reaction may be to consider it under both categories and consider it as having met two aggravating or mitigating factors, this is also double counting and must be avoided by the court.

For example, the CCRK considers the entry of a guilty plea to be a mitigating circumstance under factor 3.10. The Code also foresees the remorse shown by the defendant as a mitigating circumstance in paragraph 3.11. One can argue that the entry of a guilty plea provides the court with some evidence of remorse and therefore it can be considered in assessing whether remorse exists under 3.11. The logic here is that the defendant, by pleading guilty, is showing that he is taking responsibility for his actions and is remorseful. While this may not be particularly persuasive by itself, it could become important when combined with additional evidence, and assessing the totality of the circumstances. Similarly, one could argue that a defendant who pays restitution under 3.7 is likewise exhibiting some level of remorse. A defendant who attempts to make the victim whole through restitution arguably has taken responsibility for his actions and is expressing some degree of remorse. In both examples, the court must only ascribe the facts to one of the mitigating factors. By ascribing it to more than one, the court double counts the fact in its consideration and improperly provides more mitigation than the defendant is entitled to.

The same situation applies to aggravating circumstances as well. One might argue that a victim who is young, an aggravating circumstance under par 2.7 (the age of the victim) could likewise contribute to the fact that the victim was particularly vulnerable under par 2.6. Or if the Court concludes the victim was particularly vulnerable, that finding could contribute to a finding that the crime was committed with “particular cruelty” under par 2.4. Here, the logic is that with a vulnerable victim, the level of injury is augmented and it may catapult it into the category of “particular cruelty.” Again, the court should constrain itself to keep the circumstances distinct and not apply them to more than one circumstance. If it is a discrete factor enumerated in Article 70, it should remain a separate consideration by the court.

The final area of potential conflict comes when multiple charges are involved with the existence of facts that are both an element of an offense and may also be used in aggravation/mitigation of another offense sentence under Article 70. The key question is what

[97] Supreme Court of the Republic of Kosovo, Instruction regarding the legal qualification and treatment of cases of domestic violence according to the Criminal Code of the Republic of Kosovo, No. 113/2020, Prisshtine/Pristina, 12/06/2020.
[98] Quoted from a Judgment from the case-law of the Republic of Kosovo

happens when the defendant is found not guilty of the offense that contains the factor as an element of the crime? For example, the defendant is charged with two offenses, one in which the use of actual violence is an element of the offense, and elevates the range of possible punishment, and one in which the use of actual violence could be used as a factor in aggravation under Article 70. If the defendant is found not guilty of the first offense and guilty of the second, the court will need to make a specific evaluation of whether the element of the actual use of violence was a factual component of the not guilty verdict. In other words, has the court found that there was no actual use of violence? If so, then the court is affirmatively finding that this factor does not exist, and it cannot then be used as aggravation for the final penalty for the second offense. If not, the court is free to use it as an Article 70 aggravating factor.

In contrast, if the above scenario results in a finding of guilt for both crimes, the situation will be different. In that case, the crime in which the actual use of violence is an element of the crime will be elevated to a qualified form of offense. However, the court may not apply the Article 74 factor to the second offense.

Finally, in multiple offense convictions, using Article 70 factors should be in terms of the overall punishment as opposed to on an individual basis……

9. Sentence mitigation

It stands to reason that the qualitative and quantitative level of mitigating outweighing aggravating will naturally place the defendant in a situation well outside the norm of normal or typical cases. Thus, the court should be well convinced that this is not the typical situation. When the situation is especially uncommon the code provides several special circumstances in which the lower end of the sentencing range can be adjusted downward. Articles 71[99] and 72[100] provide the court with the restrictions under which additional mitigation and range lowering can take place. As this type of mitigation can have a very significant impact on the final sentence, particularly as the amounts are not adjusted in proportion to the range of the original sentence, the court must be very cautious in the application and only reserve them for the most appropriate situations.

Article 71 provides adjusting the lower end of the range for sentences under 3 specific circumstances as follows:

> 1. The court may impose a punishment below the limits provided for by law or impose a lesser type of punishment:
>
> 1.1. when the law provides that the punishment of the perpetrator may be mitigated or reduced;

[99]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 71 Mitigation of punishments, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.
[100] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 72 Limits on mitigation of punishments, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

1.2. when the court finds that there are particularly mitigating circumstances that indicate that the purpose of punishment can be achieved by imposing a lesser punishment; or,

1.3. in cases when the defendant pleads guilty or enters into a plea agreement.

If the court finds that one of the above circumstances exists, it is allowed to lower the bottom end of the sentencing range down to the amount specified in Article 72 of the code. Thus, for example, all sentences that have 10 years or more established as a minimum final sentence can be mitigated to a new minimum sentence of 5 years. Under paragraph 1.2 sentences of a minimum of five years, and less than 10, can be adjusted down to a minimum sentence of 3 years. This structure progresses down to a possible fine substitution for any sentence which under the law does not possess a minimum incarceration period.

First, there is NO requirement that if Article 71 applies, the court must apply the reduction under Article 72. Moreover, there is also NO requirement that the maximum amount be awarded in any given situation. It is perfectly permissible for the court to determine that based on the totality of the circumstances and in consideration of the specific case, mitigation is not warranted and therefore no adjustment is made. It is also permissible for the court to determine that the maximum reduction is not appropriate – only a portion. For example, the defendant is guilty of committing an offense carrying a range of 3-5 years (Category V sentence b). If the defendant eventually pleads guilty then the court may consider mitigation as applied under Article 71 paragraph 1.3. According to Article 72, the court can reduce the sentence to one year. As explained above, the court is NOT OBLIGED to apply Article 71 mitigation – it is merely an option. Also, the court is not obliged to sentence the defendant to 1 year according to Article 72. If, for example, the defendant pleads guilty at the last possible moment, the court might determine that even though mitigation is available, it is not warranted, or warranted in less than the maximum amount..

The court must "specially" consider the maximum and minimum sentence provided for by the code. This provision is to temper the approach of the court in light of the voluminous number of sentences that are used within the code especially since their maximums can be extremely varied. If mitigation is simply applied pro forma to every sentence that falls within Article 71 it can have wildly disproportionate impacts. Take for example a 3–5-year sentence. If mitigated, the new possible minimum is one year, that same reduction is available to a sentence of at least 4 years. In the first instance, the maximum benefit possible from reduction to one year is 4 years (from the 5 year maximum). In the case of at least 4 years, which has no maximum (25 years under the code), the possible available reduction is 24 years.

Determining the applicability of mitigation principles

As described above, there are three situations in which the Court can apply mitigation provided for in Article 71. However, in order to systematize and apply them proportionally, there are some limitations that the court must keep in mind.

Situation 1: Article 71 paragraph 1.1 provides that the Court may consider mitigation when the law specifically provides that the sentence may be mitigated or reduced. Although this does not appear in many specific offenses within the criminal code, there is no application in Chapter

II to criminal liability for offenses that are almost exclusively exceptions. Here the court may grant mitigation under the appropriate provisions in Article 13 Extreme Necessity, Article 14 Violence or Threat, Article 15 Acts committed under coercion, Article 18 Mental incompetence and diminished mental capacity, Article 26 Mistake of Law, Article 33 Assistance, and Article 34 criminal association. The court must find that the specific requirements listed in the provision have been met and then determine whether mitigation should be granted.

Situation 2: Article 71, paragraph 1.2 is an affirmative finding that there are "*particularly*" mitigating circumstances that indicate that the purpose of punishment can be achieved by imposing a lesser punishment. While this is not clearly defined, it indicates a situation that is quite outside the norm or level of the average defendant. Here the court must be quite clear about what the goals of the punishment are in relation to the defendant and what the particularities of the defendant, or their situation are that indicate that those goals will be achieved by a lower punishment. The defendant, for example, may have shown significant acts of remorse and efforts to make amends to the victim that are outside the norm of what might be considered normal. In these situations, the Court is allowed to apply mitigation and adjust the ranges accordingly. The court must then consider the circumstances surrounding the new ranges. In general, the court must reject the application of mitigation under this article if the aggravating circumstances outweigh the mitigating ones.

Situation 3: According to Article 71, paragraph 1.3, the third option has two components:

The first component is that the court can adjust the ranges whenever the defendant pleads guilty in court without a plea agreement.

The second is when there is a plea agreement.

In the first situation, the Court's decision must be aligned with the time of the guilty plea. Mitigation is not available to the defendant simply because somewhere along the process he decided to plead guilty. The substantial benefit conferred by a guilty plea is based on the cost savings to society in terms of time, money, and emotional costs associated with testifying and victimization. These benefits are significantly reduced once the trial starts. Therefore, mitigation under Article 71 should no longer be available when the trial begins. If the defendant pleads guilty in time and the Court finds that mitigation is appropriate, as with the first two categories, the court must still go through the assessment process to determine what the final ranges should be and whether further mitigation is available. Although the code provides that a guilty plea may be sufficient to mitigate the sentence, further language in the code requiring the input of all interested parties strongly leans against the application of section 72 mitigation where there are objections. This makes sense when considering that a plea (not a plea agreement) is simply one of 13 stated mitigating possibilities under the code. Considering that the primary reason for mitigation based on a plea is the conservation of resources, opposition by the parties premised on some reasonable justification indicates that there are other considerations that offset such a significant benefit to the defendant. Hence, objection by any of the parties, based on reasonable grounds, or a finding of any aggravating factor, should eliminate the automatic award of Article 76 mitigation by simple virtue of a plea and require a finding of particular mitigation in line with the guidelines. Whether the arguments of the parties in opposition amount to reasonable grounds for denial is obviously left to the careful consideration of the court.

In the second situation under Article 71 Paragraph 1.3, mitigation is available for the defendant who has entered into a plea agreement with the prosecutor. Although plea agreements and sentencing are discussed in greater detail later, this provision essentially allows the prosecutor to enter into plea negotiations with the full mitigated range at his/her disposal. Thus in the appropriate situation, the prosecutor is able to offer the full range of mitigated sentences that are available by law for the court. This is separate and apart from the court's final approval of such a sentence. This provision is not binding for the court to accept the plea agreement.

10. Waiver of Punishment

Article 73[101] and 74[102] allow the court to completely waive the defendant's punishment in two situations. Under Article 73, the court is permitted to waive punishment when the code specifically allows for waiver regardless of the limitation on mitigation provided for under Article 72. This form of waiver occurs in two situations. The first is a waiver in a particular criminal offense when specific appropriate conditions are met. The court will need to evaluate the specific criminal offense under the code to determine the application of Article 73. Second, any offense committed with certain forms of modified criminal liability or collaboration will also potentially qualify for acquittal from responsibility. These include Article 12 Necessary Defense, Article 13, Extreme Necessity, Article 29 Inappropriate Attempt, Article 30 Voluntary Abandonment of attempt, and Article 34 Criminal Association.

Article 73 waiver is specific to offenses committed negligently and on fulfilling of two criteria. First, the defendant must be affected so severely by the consequences that additional punishment is unnecessary to achieve its purpose. Second, the defendant must immediately make an effort to eliminate or reduce the consequence and completely or substantially compensate for the damage. The first criteria will require a thorough evaluation of the impact on the defendant. This is not an objective evaluation but subjective and directly connected to the particular defendant. The second criteria require immediate action to mitigate. This will naturally be a crucial element of determining whether the first criteria is met, as attempts to mitigate will evidence impact on the defendant. However, there is no requirement that those efforts do indeed succeed. What is required is an objectively reasonable attempt to do so. Finally, there must be some form of compensation. As the ability to pay may be a factor in determining waiver, the court should not premise this finding on immediate payment. If the defendant is able and willing to do so over time the court should waive punishment after monitoring successful payment.

[101]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 73 Waiver of Punishment, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.
[102] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 74 Special grounds to waive punishments for criminal offenses committed negligently, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Priishtine/Pristina.

11. Aggravation for multiple recidivism[103]

Article 75 offers the only opportunity in the Code to add or adjust upward the maximum sentence provided by law for a particular offense with the exception of life imprisonment. The court is allowed to add ½ of the maximum penalty for the offense as an accessory punishment. However, the perpetrator's prior offenses must meet several qualifications:

- Two or more previous offenses that:
  - Resulted in one year of imprisonment or more and
  - Less than 5 years have elapsed from the termination of the prior punishment

Once the court determines that the defendant meets these factors, it is required to consider in particular the entry of a guilty plea, the motives, circumstances and similarity of the prior offenses, and the need to impose a punishment to fulfill the purposes of punishment. These considerations are relevant but are not absolute in terms of requirements. Therefore, while it is certainly relevant that the criminal offenses were similar in nature, etc., it is not required that they be similar before the court aggravates the ranges of the sentence. The more similar in nature, the more the court should consider the maximum aggravation possible as it will also imply that prior penalties for the same offense have failed to rehabilitate or prevent the defendant from offending again and the purposes of punishment will adjust more towards the protection of society from the perpetrator.

12. Punishment of concurrent criminal offences

As the complexity of the sentencing process increases substantially when there are multiple offenses involved or aggravation based on recidivism, it is exceedingly difficult to represent the process in a chart format. However, once the court has comprehensively evaluated aggravation and mitigation, it is simply a matter of applying the process described above to each offense and aggregating the sentence. The available final range, to comply with the provisions of Article 80, is a matter of aggregating the arrived-at sentence as a maximum and determining a minimum.

For example, the defendant commits three offenses, two carry a range of 3-5 years and one a range of 1-4 years. If the court sentences the defendant to two 4-year and one 3-year sentence, Article 80 requires that the final sentence be higher than each individual (i.e. more than 4 years) but less than the aggregate of the total (i.e. 11 years). Unfortunately, the code provides little guidance beyond this in determining where the final sentence should be and in the above example.

One important point to note is the assumption that aggravating/mitigating value was the same for all offenses. While in many situations this may be true, it does not preclude the court from finding different values or factors that apply for different offenses. The court may find that a defendant, for example, was very remorseful for committing one offense, but not another. One

[103] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 75 Aggravation for multiple recidivism, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtina/Pristina

victim may be vulnerable while another is not. The example simply illustrates the process. The court must evaluate each offense individually.

Additional considerations the court may use in adjusting the final concurrent sentence above or below the presumptive sentence may include:

- Where each sentence individually falls within the spectrum of the available range. If there is substantial mitigation of each individual sentence, the final sentence should enjoy substantial mitigation as well and vice versa.
- The prevalence of criminal behavior in the community and the need to deter future perpetrators.
- Whether each offense involved a victim other than the state.
- The seriousness of the criminal offenses in relation to one another (minor offenses may have less of a need to be reflected in cumulative sentences than serious ones).
- The similarity of the offenses to one another based on their elements.
- The likelihood of rehabilitation and reintegration vs. the need to protect society from the perpetrator.
- Is there a sufficient reflection of each offense in the final sentence such that there are no "free" crimes or "free" victims.

13. Trial Panel sentencing decisions

Another important consideration for the court is how to determine a final sentence when a panel is involved. The recommended method is to determine an average sentence value from all of the final decisions for those judges finding the defendant guilty of the offense. Any finding of not guilty should be eliminated from the final calculation. It is suggested that each judge independently evaluate the circumstances before the court and determine a final value for aggravation and mitigation.

In situations where one judge has a significantly different sentencing outcome than the others, there should be an additional step in which the judges consult with one another over what factors were considered found/not found in mitigation/aggravation. This should happen in any situation where one member of the panel arrives at a sentence that is substantially different from the others. This is to ensure that the court has not accidentally omitted or failed to consider a factor. It is emphasized that though this additional consultation may ultimately have the impact of changing the opinion of the judge; it should not be considered the primary purpose of the consultation. It is merely to further protect the verdict on appeal. If the decision remains the same, it will again be the average of each sentence.

VII. Application of alternative, accessory, and other punishments

Imposing adequate alternative or accessory punishments or even other types of obligations provided for by the CCRK can often have a much greater impact on the defendant than the main punishment itself. Article 46 of the CCRK describes the possibilities for imposing alternative punishments.

1. Suspended sentence

A suspended sentence is perhaps the most common form of alternative punishments used in court practice. A suspended sentence can be extremely useful and preserve human rights when used in the proper situation, but it can also easily become controversial because it can readily appear as the complete release of the defendant from all liability without consequence. First and foremost, the court must provide justification for the substitution of the imprisonment with a suspended sentence – particularly that the substitution will equally meet the purposes of punishment. The requirements of Article 47 clearly emphasize that a suspended sentence is reserved for lighter offenses when the threat of imprisonment is considered sufficient for further prevention. The background, mental make-up, and attitudes of the defendant are of paramount importance in the evaluation process.

Article 50 of CCRK establishes the framework and eligibility for a sentence to be suspended. There are two guidelines that control suspension. Firstly, any criminal offense that carries a maximum of 5 years or less is eligible for suspension. Secondly, any criminal offense that carries a maximum of 10 years or less is eligible for suspension but only if the provisions of mitigation are applied. Implicit from these two guidelines is that any criminal offense that carries a maximum penalty over 10 years is not eligible for suspension.

The court must keep in mind that just because a sentence is initially eligible for a suspended sentence, it does not mean that it the court is automatically entitled to use this alternative. It must engage in the evaluation and ultimately arrive at a sentence in the permissible range.

A. Suspension of sentence in cases with a 5-year maximum

If the court is faced with one or more offenses of a maximum of five years it must evaluate each offense on its own merits as outlined in these guidelines and arrive at a sentence within the provided ranges.

If the ranges is guilty of a single offense, and the sentence arrived at is two years or less, it may suspend the sentence per paragraph 3 of Article 50. However, the court must also conclude that based on the factors listed in Article 49 paragraph 4, which focus on the particular past behavior of the defendant as well as personal circumstances, the defendant is suited for a suspended sentence, and the purposes of punishment are met. If the sentence is greater than two years, the court cannot suspend the sentence.

B. Suspension in cases with 10-year maximum

Unlike suspended sentences for offenses of 5 years or less, offenses carrying possible sentences of 10 years or less require an additional step. Before they can be considered for suspension, they must first go through the mitigation process. This means that they must meet one of the qualifications from Article 71. This Article states that the court MAY impose a punishment below the ranges provided for by law or impose a lesser type of punishment:

- when the law provides that the punishment of the perpetrator may be mitigated or reduced;
- when the court finds that there are particularly mitigating circumstances that indicate that the purpose of punishment can be achieved by imposing a lesser punishment; or,
- in cases when the perpetrator pleads guilty or enters into a plea agreement.

This is only an initial step of qualification, and it does not immediately entitle the court to impose a suspended sentence. The court must go through the process of evaluating the aggravating and mitigating circumstances and independently arrive at the sentence ranges that allow a sentence of 2 years or less as required by Article 50. The court must also conclude that based on the circumstances listed in Article 49 paragraph 4, which focuses on the particular past behavior of the defendant as well as personal circumstances, the defendant is suitable for the imposition of a suspended sentence and that the purposes of the punishment have been met.

C. Obligations and conditions of suspended sentences

Because the primary purpose of a suspended sentence is to avoid effective imprisonment when the threat of punishment is sufficient, the Court must ensure that the defendant is given the appropriate means to avoid repeating criminal offenses and to be re-integrated into the community. As suspended sentences generally apply to situations where the behavior is not normal, there will usually be something that contributed to the motivation for those actions.

Suspended sentences with no conditions other than a general prohibition to commit offenses in the future should be imposed as rarely as possible and be reserved only for the smallest situations where there are strong indications of remorse, restitution to any victim, and cooperation with the court and law enforcement. There is essentially no apparent purpose or means available to the court. Courts are strongly advised that suspended sentences are carefully scrutinized, and the lack of conditions must be explained in detail. Ultimately, considering mitigating and verifiable circumstances, the suspended sentence that has no conditions SHOULD be revoked when violated.

The court must carefully assess the situation and set obligations and conditions for punishments that address the behavior. The Code in Article 56 provides for 15 possible conditions [104] with the possibility of supervision by the probation service. In addition to these provisions,

[104] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 56 Types of obligations set forth in a suspended sentence, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

accessory punishments from Article 59 are available and must always be considered in addition to the terms of the suspended sentence. These are covered in more detail below.

1.1. medical or rehabilitation care in a health care institution.

1.2 undergo a medical or rehabilitation treatment program.

1.3. visit a psychologist and/or another consultant and act in accordance with their recommendations.

Conditions 1.1-1.3 should always be assigned to situations where there are mental health problems or medical conditions as motivation for committing the criminal offense. 1.3 should be used with discretion by the court if there are indications that mental health may be a contributing factor but there is no medical diagnosis at the time of sentencing.

1.4. vocational training in a certain profession;

1.5. performing work activities;

1.6. the use of salary and income or other assets to satisfy family obligations;

Any offense involving the failure to provide any form of financial support must have provisions for compliance with payments. This may include selling property to satisfy the obligation as long as the defendant's life is not destroyed. If there are indications that the offense was motivated by a lack of financial resources or even boredom, the Court must set conditions that require the defendant to acquire the skills to become a productive member of society.

1.***7. prohibition to change the residence without informing the probation service;***

If supervision by the probation service is used, this should be a mandatory provision. In addition, this provision should always be used if there are indications that the defendant has the means/ability to relocate. The intention to relocate without justification is a possible indicator of the relocation in order to continue the bad behavior and can be prevented by requiring him/her to give notice of this.

1.8. abstain from the use of alcohol or drugs;

Any indication of drug/alcohol abuse, whether directly present at the time of the offense or not, should be accompanied by restriction of use in addition to any other form of consideration from point 1.3. If drug or alcohol addiction was the main motive for committing the criminal offense, mandatory rehabilitation treatment is required under Article 54.

1.9 to refrain from frequenting certain places or locales.

1.10. refrain from socializing or contacting certain people;

If the criminal offense did not happen randomly but was more concentrated in a particular person or place, the Court should always include the restriction of frequenting of a particular place

or person. These should be used in particular in family situations where the criminal offense is directly related to the contact with the particular person. Bearing in mind that the very nature of the domestic violence relationship is to perpetuate the situation through repetition, there is little **likelihood** for a simple suspension to be effective without restrictions. The court must be very specific in naming/describing persons and places the defendant must avoid, including any extended family members. Violation of these provisions should serve as immediate grounds for revocation of probation. Monitoring by the probation service should also be imposed.

1.11. giving up the possession of any kind of weapons;

Any offense related to the possession of a weapon or its use to injure or intimidate someone should be suspended with restrictions on the carrying or possession of weapons. The restriction must be general in nature and not simply limited to a particular weapon that was used. This provision should also include possession in addition to carrying a weapon.

If there are indications that there is a domestic violence component to the offense, restrictions on access/possession of the weapon should be included, regardless of whether the possession is directly related to the offense itself or not. Possession itself can be coercive and intimidating to the victim. Scientific research has shown that the presence of a firearm in the possession of a defendant of domestic violence significantly increases the risk of serious bodily injury or death to the victim, children, and others. As a result, it becomes very important for the court to inquire and order the forfeiture of any firearms accessible to the defendant. This is permissible even when the abuser has legal possession of the weapon.[105] The presence of a weapon in the home is often a critical component in creating fear in the victim through a constant state of jeopardy. The weapon may have been used in a previous incident of either actual violence or a threat, and its continued presence implies the ongoing possibility that the behavior will reproduce itself. It also serves to prevent the victim from leaving the aggressor or reporting previous incidents to the authorities. Research shows that the use of weapons or dangerous tools or threats to use these in the context of domestic violence represents a clear indicator of escalation and a decisive indicator in fatal outcomes.[106]

1.12. compensate or restitute the victim of the criminal offense;

Any suspended sentence involving a victim where the defendant has the ability or means to make restitution must be accompanied by this condition. This will prevent the need for filing a civil suit, relieve the state of any liability it may have, and provide the victim with the direct relief to which they are entitled.

1.13. to return the proceeds of crime;

[105] Handbook for judges and prosecutors on domestic violence, Confiscation of instrument used or that can be used to commit violence, par. 6.9 Prishtina (2016), p. 44, which is also a quote from Law No. 05/l-22 on weapons, (2015) Article 10, Article 36 and Article 38.
[106] Ibid. p.66

In any situation in which there are proceeds gained as a result of the offense, it must include recovery of such proceeds. If the defendant has converted the proceeds into another form, the Court must order the sale or recovery of the converted form if the defendant is still the sole owner of it.

1.14. not possess or use a computer or access the Internet as required by the court;

Acts that are committed through a computer or other electronic means with Internet access must be accompanied by these restrictions. This should not be limited to offenses with computers alone. Any criminal offense where the court finds that the use of the computer was reasonably related to the commission of the criminal offense or facilitated the commission of the offense must have a limitation provision. If the defendant has a business connection or legitimate use outside of the commission of the offense, the Court must draft the restrictions narrowly as necessary.

1.15. to provide financial reports as directed by the court.

If there is a financial component in the commission of the criminal offense and/or if it is motivated by a financial benefit, this circumstance must be used. Periodic reports are an excellent tool for the court to monitor whether the defendant's income is legitimate or related to criminal activity.

In many situations, it would be quite effective if the obligations from Article 56 of the CCRK were not limited to the imposition of a suspended sentence alone but be imposed alongside other penalties as the impact of these obligations can be very big. However, such a limitation exists in the current law, and it is clear that the same can only be applied to the suspended sentence.

In addition to the provisions of Article 56, the code constantly refers to Article 48 paragraph 3 which provides for possible provisions for suspended sentences. However, one of the mentioned circumstances clearly differs from the conditions of Article 56. This means that the court can request that the defendant make restitution for the damage caused by the offense.

All conditions are designed to monitor the defendant's actions and can be adapted to almost any crime or situation. The suggestions provided for each condition are specific to the crimes/motives they are designed to monitor. However, the code does not limit the application of these conditions, and the court is encouraged to combine them as it sees fit to develop effective means of monitoring the defendant's progress and ensure that the suspended sentence is successfully served. Regardless of the number of conditions, the Court must include deadlines for each condition with appropriate monitoring provisions that will enable the conditions to be adjusted.

When imposing these conditions, the Court must be attentive to the conditions and circumstances in the defendant's life. Some of these considerations are highlighted in Article 48, paragraph 3, and require a general awareness that the Court should not set conditions that are impossible or very difficult to fulfill, due to valid/relevant circumstances. This does not mean that the Court should rely only on the defendant's word about the existence of such conditions. The court must ask for evidence of such circumstances and if it acknowledges them, it should ask for other alternatives.

D. Verification period

The Code provides for a period of verification or fulfillment of the suspended sentence, with duration from 1-5 years. Although the Court is free to determine the appropriate duration, it is strongly suggested that the Court increases the period in proportion to the seriousness of the offense. Below are the suggested verification periods:

E. Monitoring by the Probation Service

Article 55 allows the court to impose monitoring by the probation service for the suspended sentence. This may be for active monitoring of the defendant for compliance with certain conditions or simply a request for periodic reporting that obliges the defendant to meet with the probation officer. While some of the conditions provided for in the code do not need active monitoring, practice shows that active and regular monitoring of progress in fulfilling the conditions is the most effective way to ensure compliance with conditions, reintegration, and overall success of the suspended sentence. At the very least, the defendant will be aware of the court's presence and continuous interest in results and regularly reminded that failures will be quickly identified and punished. Unconditional suspended sentences are more likely to fail than those with conditions that are actively monitored. However, the Code only allows a monitoring period of 6 months to 3 years. Considering that currently, the court cannot monitor the entire verification period of the possible suspended sentence of 5 years, the Courts must actively use the allowed period. It is strongly suggested that any probation period of 3 or more years involving obligations to the defendant be accompanied by 3 years of monitoring by the probation service.

F. Revocation of the suspended sentence

Revocations are relatively straightforward in the code and are generally covered by Articles 50-52 which set out the conditions for revocation following the commission of new offenses, thereby failing to comply with conditions, and being sentenced for the previously committed offense.

Article 50 requires mandatory revocation of the suspended sentence whenever a new criminal offense that results in a sentence of 2 or more years of imprisonment is committed. However, if the sentence is less than two years or a fine, revocation is not mandatory. Nonetheless, the Court is encouraged to assess the violation based on the circumstances, motive, and type of criminal offense, which may suggest to the court that the new offense committed, despite the existence of the suspended sentence, is a strong indication that the suspended sentence has **failed to** achieve its objective. The revocation must be assumed unless there is convincing evidence from the defendant to justify such actions. If the criminal offense is identical/similar in nature, with the same motive and victim, the revocation must be immediate.

Committing a new criminal offense can be convincing evidence for the revocation of the suspended sentence; however, a breach of conditions requires more careful analysis and consideration. Article 52 allows the court to revoke the suspended sentence and impose the previously determined sentence for failure to comply with certain conditions based on Article 48 paragraph 3, or Article 56 as a whole. The Code is quite flexible in allowing the Court to assess the circumstances surrounding the compliance of conditions and to consider whether revocation is

appropriate or whether it is reasonable to continue the condition. If the non-compliance with conditions is justified, the Court is required to remove the condition or replace it with a more appropriate condition. However, any extension of the period for complying with conditions or compliance with new conditions must be until the end of the compliance period.

If the Court decides to revoke the suspended sentence for failure to comply with the condition, according to Article 53 this must be done within 1 year of the established deadline (and before the expiry of the verification period). For example, the Court requires the defendant to complete a drug rehabilitation program within 1 year and provides for a 5-year probationary period. If the Court does not learn about the failure by the 4th year, It can revoke the sentence for failure to comply with the condition. This must happen before the end of the 2nd year.

These are relevant considerations for the revocation/extension of the condition:

- The court should not simply postpone the compliance period continuously until the verification period expires. The reason for non-compliance must be given.
- The defendant bears the burden of justifying the non-compliance with the conditions of the suspended sentence or showing that the condition should be replaced.
- Substitution or removal of conditions must be due to non-compliance based on circumstances beyond the defendant's control (For example – the defendant is unable to complete vocational training because the vocational school is closed).
- Non-compliances that show a lack of seriousness or disrespect for the court's authority should result in the revocation of the suspended sentence. The continuation of these conditions is unlikely to lead to compliance and erodes respect for the judicial system as a whole.
- Continuations based on arguable grounds may be made, but never more than once on the same arguable grounds.
- If monitoring by the probation service is not imposed, the Court must actively check the files or hold hearings in the deadline period set for the conditions, to determine compliance.
- The court must hold at least one hearing sometime towards the end of the verification period to determine if all conditions have been met and/or make a final decision on revocation.

Suspended sentences are an effective tool available to the court to minimize the effective prison sentence and to maximize the rehabilitation of the perpetrators. However, they are not very effective without clear conditions, compliance monitoring, and willingness of the court to revoke them when the conditions are not met. They should not be used as a means of finishing cases that are considered less serious as they will not serve any useful purpose and rehabilitation will fail. The court must be willing to take the time to create effective suspended sentences so that society can reap the benefits of them.

2. Order for community service / Semi-liberty

Both semi-liberty and community service are alternative means of serving a court-ordered sentence of up to one year in prison. Both carry the possibility of additional conditions as part of

the sentence. These should be used by the Court to address contributing issues and design a program for proper reintegration.

Since community service potentially replaces and reduces a year's imprisonment to a maximum of 30 working days or 240 hours, it should be used less frequently than semi-liberty, which requires periods of effective imprisonment. Since the period of performance is not greater than one year, the court should foresee an initial period of a substantially shorter duration in order to assess compliance and maximize the Court's options.

3. Accessory punishments

Accessory punishments from Article 59 can be imposed together with ANY main or alternative punishment. Although they differ in their mandatory application, the court must assess their applicability before imposing the final sentence. This is especially true for a suspended sentence as it increases the possibility of tailoring the sentence to the particular needs of the defendant and maximizes the prospect of reintegration.

3.1. Accessory punishments based on amendments of CCRK 2023

In addition to the accessory punishments foreseen by the CCRK of 2019, in 2023[107] some changes have also been made to the accessory punishments with impact on the criminal offenses of rape and domestic violence mainly. Each of these added accessory punishments adds an obligation on the court to impose these accessory measures, not focusing only on the main punishment. Given that these new foreseen punishments are specific only to certain categories of offenses, this Guidelines will only mention each of them shortly, meanwhile, more details for each are included in the breakdown of the relevant chapters[108] of CCRK, .

- Article 3, paragraphs 2.9 and 4 - Prohibition of the right to run for public office from three (3) to ten (10) years, for the person who is found guilty of the criminal offense of rape and domestic violence.
- Article 3 paragraph 2.10 and 5 (62A)- Prohibition of employment in the public sector at all levels from one (1) to five (5) years, for the person who is found guilty of the criminal offense of rape.
- Article 5 (62B)- Prohibition of the right to drive a vehicle in any type of category from one (1) to five (5) years, against a person who was found guilty of the criminal offense of rape at the time when practicing a profession of the driver.
- Article 2 paragraph 2.a.1 - Prohibition of purchasing at auctions for the sale of public property, public assets, or licenses granted by a public authority in any service from three (3) to ten (10) years.

[107] Law No. 08/L-188 amending the Criminal Code No. 06/L-074 of the Republic of Kosovo, Official Gazette of the Republic of Kosovo/No. 23/ November 23, 2023, Prishtina.
[108] Chapter XX Criminal offenses against sexual integrity and Chapter XXI Gender Based Criminal Offenses, against marriage and family.

- Article 2 paragraph 2.a.2 - Prohibition from applying as a strategic investor and any other form of benefiting from the privileges granted by the legislation in force, from three (3) to ten (10) years.

3.2. Deprivation of the right to be elected[109]

Deprivation of the right to be elected is a mandatory accessory punishment. This punishment includes offenses from Chapter 18 (Criminal offenses against voting rights) and other criminal offenses for which the penalty of at least two years of imprisonment is provided if the offense was committed with the intention of being elected. The disqualification period is 1-4 years.

The court should use this provision wisely as these acts show a fundamental disrespect for democratic values. In general, if the court has imposed a prison sentence, the right not to be elected must be imposed for at least 3 years. However, in cases where the alternative sentence of a suspended sentence has been imposed, the period of disqualification must be at least as long as the suspended sentence.

3.3. Order for compensation of loss or damage[110]

This is a mandatory provision that must be included in any case where there is any loss or damage to the victim's property. Unlike compensation for medical injury or physical injury, this measure focuses only on pecuniary loss. In addition to the value of the property itself, the court must also order compensation for the loss of income that the victim experiences as a result of the crime. There is no limitation on compensation based on the defendant's ability to pay or the victim's ability to obtain compensation by other means.

3.4. Prohibition on exercising public administration or public service functions[111]

This article has undergone significant changes under the CCRK of 2019, expanding especially the category of offenses for which this type of prohibition applies either in an alternative form or as a mandatory ban. Thus, the prohibition from paragraphs 1,3 and 4 is presented as an imperative norm and as follows:

Par. 1- requires the prohibition of the exercise of the function from 1-5 years for the official persons who have misused the function and have been sentenced to imprisonment.

Par. 3 – is introduced as a stricter measure, given that a ban of 1-10 years is imposed each time on an official who has been sentenced to imprisonment for any of the offenses included in Chapter XXXIII of the CCRK.

Par. 4 - also represents an innovation and deviation from the practice of the nature of this prohibition by highlighting the importance to acts of domestic violence and obliging the court to

[109] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 60 Deprivation of right to be elected, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[110]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 61, Order for compensation of loss or damage Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.
Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 62 Prohibition on exercising public administration or public service functions, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina

impose a ban of 1-5 years for the official person who has been convicted for this act. sanctioned under Article 248 of the CCRK.

Meanwhile, paragraph 2 of this Article, makes the difference with offenses of a less serious nature by instructing (but not compelling) the court to observe the possibility of imposing this prohibition for 1-3 years whenever a fine or suspended sentence is imposed.

When invoking these three paragraphs of this Article, it is important for the court to establish the misuse of functions during the exercise of functions in public administration or public service. In general, the period of prohibition allowed by law should be proportional to the gravity of the offense.

The separate Guidelines for criminal offenses of corruption also contain a breakdown of this and the subsequent prohibitions.

3.5. Prohibition on exercising a profession, activity, or duty[112]

This prohibition is addressed to individuals who abuse their authority as part of the offense or directly commit the offense, allowing for restriction of their right to exercise that position or other duties provided for in Article 63. This is not limited only to positions in public bodies and does not limit the court only to offenses where abuse of position is a formal element. It is enough for the court to find or determine that the position was misused in the commission of the crime. The suspension period is 1-5 years and the time spent in prison or in a health-care institution is not calculated in its duration. The prohibition period varies from 1 to 10 years in case of conviction for any of the offenses from Chapter XXXIII of the Criminal Code, as was the case with paragraph 3 of Article 62 above.

The provision in paragraph 3 stipulates that non-compliance with the prohibition is a basis for revoking the suspended sentence.

Paragraph 5 of this article represents a very significant innovation as well, giving great importance to the prohibition of contact with children if the perpetrator has committed the criminal offense of Human Trafficking from Article 165 of the CCRK or any of the criminal offenses from Chapter XX that deal with the violation of sexual integrity in cases where children are victims. What is noticeable is the severity of the prohibition, which can be lifelong with evaluation by the court every 10 years. This prohibition actually represents a very important preventive measure since the court may also limit access if there is reason to believe it may be misused in the future. For example, the court can prohibit the defendant from being employed as a teacher if such a position has been misused to sexually molest a child. The court may also deny the defendant custody of the children in whatever professional capacity if there is reason to believe that the authority in this position may increase the likelihood of serial abuse of such authority.

[112] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 63 Prohibition on exercising a profession, activity or duty, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina

3.6.Driving prohibition[113]

This prohibition focuses on those offenses which involve driving in situations that endanger public safety. However, this is not limited to offenses where the offense is committed using a vehicle. It is sufficient to relate it to the commission of the offense in such a way as to include driving that endangered public safety. As with most provisions, this prohibition must be in direct proportion to the danger caused, the gravity of the offense, and the responsibility of the defendant. For example, the duration of this prohibition should be much longer if the defendant has endangered a larger number of people, for example, a bus driver when transporting a large number of passengers, or a case of a driver of an oil or gas tanker who caused the criminal offense by extreme recklessness, whereby he/she endangered a large number of residents, etc. Such examples show the importance of imposing this prohibition measure to avoid future risks from the same individual. According to Article 59 paragraph 3 of the CCRK, this accessory punishment can be imposed together with a suspended sentence, a judicial warning or a waiver of punishment.

3.7. Confiscation of driver's licenses[114]

Confiscation of driver's licenses from Article 65 is similar in nature to the prohibition from Article 64, however, it enables confiscation of a license or the right to obtain a driving license if the driver does not have one, for any vehicle (not specifically any vehicle type/model). The risk is the same as in the previous prohibition in the sense that there is a risk to public traffic. However, the court is limited to offenses involving death or serious bodily injury or if the court finds that the defendant's continued participation in public traffic is dangerous due to the driver's inability to drive safely. The confiscation must be proportional to the gravity of the offense. If the offense causes death or serious bodily injury and is directly related to driving a motor vehicle, the period of confiscation of the license must be 5 years.

3.8. Order to publish judgments[115]

Article 66 of the CCRK allows the publication of judgments when it is in the general interest that the judgment be published in a more open and accessible manner in comparison to the traditional access to public records. The use of this provision should be limited especially when the privacy of persons is endangered or when the publication may identify persons who are not related to the commission of the offense or endangers official secrecy. This provision can be particularly useful when public figures are involved or when there are larger implications for overall stability.

3.9. Expulsion of foreigners from the territory of the Republic of Kosovo[116]

[113] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 64 Prohibition on driving motor vehicles par 1, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[114] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 65 Confiscation of driver's licenses, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[115] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 66 Order to publish judgments, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[116] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 67 Expulsion of foreigners from the territory of the Republic of Kosovo, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

Article 67 of the KPRK is self-explanatory and allows the deportation of foreigners for a period of 1-10 years. The court must take into account the seriousness of the offense, the motives for committing the offense, and the relationship of the defendant when determining the duration of this sentence.

4. Mandatory treatment measures

Chapter V[117] of KPRK provides for mandatory treatment measures. These provisions apply only to defendants who are not criminally responsible due to mental incapacity, have essentially diminished mental capacity, or are addicted to drugs or alcohol. As such these measures are beyond the scope of the Sentencing Guidelines. Most of the findings in these cases are factual findings that prove that the defendant is not criminally liable or has suffered from an essentially diminished mental capacity and the treatment of such a condition is of primary importance. Finally, in cases where the criminal punishment can be applied according to the Guidelines, the court can replace the punishment with a certain period of mandatory treatment, provided that the offense was committed under the influence or mainly as a result of the use of drugs or alcohol.

5. Judicial admonition

Articles 81 and 82 allow the court to impose judicial admonition. A judicial admonition is essentially replacing a prison sentence with a formal reprimand from the court that if the behavior is repeated, there will be a more severe punishment. As stated in the CCRK, the admonition is available for all offenses punishable by up to one year in prison or a fine, or the offenses punishable by up to 3 years that specifically foresee the admonition. According to the KPRK, there are only two offenses where the possibility of issuing a judicial admonition is explicitly foreseen in both cases where the perpetrator was provoked by the inhumane or rude behavior of the victim:

- Assault from Article 184,

- Light bodily injury from Article 185,

The use of judicial admonition for offenses that carry a possible sentence of up to one year in prison is further restricted to only those cases where there are sufficient mitigating circumstances to make the offense particularly minor. Therefore, the court must go through the process of evaluating the aggravating and mitigating circumstances. If the court determines that the aggravating circumstances are equal or greater than the mitigating ones, it cannot replace the sentence with a judicial admonition. Moreover, if there are not enough mitigating circumstances to make the offense of relatively minor importance, the court cannot use judicial admonition. One method of assessment is to consider how close the defendant's actions were to not meeting the requirement for being a criminal offense. Injuries that barely meet this criminal offense threshold

[117] Criminal Code of the Republic of Kosovo, No. 06/L-074, Chapter V Measures of Mandatory Treatment, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

are more likely to qualify the offense for judicial reprimand. As stated in Article 82 paragraph 5, the important considerations for completing the threshold of a less serious offense are the actions of the defendant during and after the commission of the criminal offense. The court's focus is not only on whether the defendant's actions qualify as deviant behavior, but whether the defendant has understood the behavior and taken corrective measures.

Finally, emphasis must be placed on Article 93 of the CCRK regarding the legal consequence of the sentence, which categorically states that the judicial admonition does not produce legal consequences for the defendant.

6. Punitive order

Chapter 30[118] of CPCRK provides for the issuing of a punitive order. This allows the prosecutor, to request the court in the indictment to issue a punitive order for criminal offenses for which the maximum sentence of up to 3 years of imprisonment is provided. A punitive order cannot be issued in cases of domestic violence. The punishments that can be imposed are a fine, accessory punishments provided for in Article 59 of the Criminal Code, or a judicial admonition, as well as the confiscation of property if the same is specified. The important thing the court in this regard is that the consent of the defendant is not necessary for the issuance of a punitive order, but the defendant is given the opportunity to object. The court may reject the request if, similar to the plea agreement, the court is not convinced that the proposed measures are adequate and/or that based on the factual data in the indictment it can be expected that another sentence will be imposed.

[118] Criminal Procedure Code No.08/L-032, Official Gazette of the Republic of Kosovo, No.24, 17 August 2022, Prishtinë/Pristina.

VIII. Reasoning of the judgment.

At the end, we must make one more significant observation. If we focus on Article 369 par. 8 of the CPCRK, we can see that the legislator has emphasized the need for more precise reasoning when dealing with more serious cases "*...The court, in particular, explains by which grounds it was guided if it found that it was an especially serious case or that it is necessary to impose a sentence which is more severe than what has been prescribed,...*". However, we must bear in mind that even according to this article, the court has emphasized cases of aggravation above the legal maximum and not aggravation within the maximum range. Therefore, logically, in these cases, the need for reasoning and for a different standard for severity beyond the maximum is naturally necessary. The same paragraph requires the same standard of sentencing justification if the Court *"..., found that it was necessary to reduce the sentence or to waive the sentence, or to impose an alternative punishment or to impose a measure of mandatory rehabilitation treatment or confiscation of the material benefit acquired by the commission of a criminal offense.*" Given that in practice we find many cases where punishments below the minimum or even alternative punishments are imposed, even for crimes where the imposition of such punishments does not seem reasonable enough, the Court in these cases must make sure that it gives a detailed reasoning why it considered that a punishment of a lighter nature is justified.

Providing adequate reasoning for the final sentence is of primary importance. Clear reasoning and analysis are essential requirements of judicial decisions and an important aspect of the right to a fair trial provided for in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The quality of judicial decisions mainly depends on the quality of their reasoning. Adequate reasoning is a necessity that should not be neglected in the interest of expediency.[119]

Clear reasoning also gives the defendant adequate notice of the reasons for the decision and allows victims and prosecutors to know that their concerns and arguments have been addressed. Furthermore, proper reasoning gives the necessary safeguards to the higher courts that all provisions of the law have been adequately considered and this will inevitably reduce the number of successful appeals based on the lack of reasoning or the inability of the higher court to assess the grounds for sentencing. The judge should make sure that the judgments are comprehensible He/she gives his/her reasons for the decision so that all parties involved understand the logic used by the judge as the basis for his decision.[120] Emphasizing the reasons not only makes the decision easier for the parties to understand and accept, but above all it is a safeguard against arbitrariness. First, this obliges the judge to respond to the submissions of the parties and state the reasons that justify the decision and make it lawful; secondly, it enables society to understand the functioning of the judicial system.[121]

Following the principles and approach laid out in the guidance will eliminate the vast majority of appeals. However, sentencing based solely on calculations in the Guidelines is no substitute for reasoning and proper consideration of a specific case and circumstances. Nowhere

[119] Consultative Council of European Judges (CCEJ), Opinion No. 11 of CCEJ for the attention of the Council of Ministers of the Council of Europe on the quality of judicial decisions, Strasbourg (2008) No. 3.
[120] European Networks of Councils for the Judiciary (ENCJ), Judicial Ethics Report 2009-2010, pg.9. 14.
[121] Consultative Council of European Judges (CCEJ), Opinion No. 11 of CCEJ for the attention of the Council of Ministers of the Council of Europe on the quality of judicial decisions, Strasbourg (2008) No. 35.

is this more debatable and problematic than in the consideration of aggravating/mitigating circumstances.

Identifying the ultimate sentencing range is simply a matter of determining the overall aggravating circumstances as opposed to mitigating circumstances, and considering whether any other factors, such as mitigation, affected the sentence. Having finalized this, the court determines the appropriate ranges and sets the final sentence within those ranges. The court then makes final corrections such as conditioning the sentence or determining alternative sentences. Finally, the court determines whether any additional punishment and/or conditional sentence conditions apply. In addition, it determines the final sentence based on aggravating/mitigating circumstances and other applicable provisions. When drafting the final written decision, the court should apply the following suggestions:

- Every circumstance that the court verifies and is relevant must be clearly stated in the judgment both aggravating and mitigating.
- The court must present a relatively detailed summary of the facts which the court believes support and justify the finding of circumstance.
- The court must assess the overall gravity it gives to each circumstance after stating the facts in support of the circumstance.
- The court must refer to all the circumstances that do not exist and emphasize that there are no facts that support those circumstances.
- If there is evidence presented in support of a certain mitigating/aggravating circumstance that the court does not find reliable, it should specifically state this by giving a brief justification.
- The court must clearly state whether circumstances are equal, or non-existent, one outweighs or significantly outweighs the other.
- Suspended sentences must include specific reasoning as to why the court believes the threat of punishment is sufficient to deter the defendant from committing another offense.
- If the mitigation from Article 71 has been applied, it should specifically include clarification on which provisions of the Code the court relied on to mitigate the sentence.

To be of high quality, the court decision must be perceived by the parties and society in general to have been made as a result of adequate application of legal rules, fair procedure, and adequate factual assessment, as well as effectively enforceable. Only then will the parties be convinced that their case has been properly examined and society will perceive the decision as a factor in restoring social harmony. To achieve these goals, a number of criteria must be met.[122]

Considering that the Constitution of the Republic of Kosovo in Article 53 foresees the obligation that *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*" this reasonably gives the possibility to the justice system to use European Court of Human Rights practice as basis for issuing its acts, and in this case in particular for reasoning of the judgment. Moreover, the inclusion of quotes from decisions of this court would increase the credibility of the court's decision-making process.

[122] Consultative Council of European Judges (CCEJ), Opinion No. 11 of CCEJ for of attention of the Council of Ministers of the Council of Europe with regard to the quality of judicial decisions, Strasbourg (2008) Nr.35

IX. Second instance review

1. Discretion of the Court of Appeals on sentencing

As discussed, one of the most important goals of these Guidelines is to reduce disparity or difference in sentencing without taking away judges' discretion to adapt to particular situations. If the guidelines are followed properly, the need for Appellate review will be significantly reduced as will the grounds on which this court must review decisions of the lower instance courts.

A full sentencing explanation creates a permanent record of what the judge considers relevant to the case and why. This information can be valuable in a number of aspects... In general, good explanations become a channel through which the special knowledge and experiences of judges can be transferred to policymakers. Thus, the position of the first instance trial judge can provide important insights into issues such as the relative severity of different types of offenses, the effects of incarceration on defendants and defendants' families, the importance of apologies, the structure of criminal organizations and the exercise of discretion by the police and prosecutors – all of which have an impact on choosing a fair sentence.[123]

It is very important to emphasize that the standards of sentencing, weighing the circumstances and reasoning that are all included in the CCRK, CPCRK, and the present Guideline ARE applicable to the same degree for the Court of Appeals as a second instance. In fact, the Court of Appeals should serve as a model for the lower courts in applying these principles. Only in this way can the harmonization of practice in sentencing be achieved.

2. Elimination of differences or inequalities

A common criticism of sentencing that is not subject to appellate review is the disparity that results from sentencing in cases that do not appear to be very different from one another. In the publics' mind, unequal sentences imposed on defendants convicted of the same offense, without any concrete justification, constitute an unreasonable excess of the court's discretion and may lead to a loss of respect for the judicial system. Unjustified differences in sentencing also tend to hinder the rehabilitation of prisoners. Such unintended effects of sentencing disparities thwart the deterrent and rehabilitative goals of sentencing.[124] Therefore, at its core, the Court of Appeals has the important task of eliminating potential differences between sentences, ensuring adequate reasoning and reducing arbitrariness. This assessment should be based on the principles established by the CCRK, the CPCRK as well as the present and other Guidelines of the Supreme Court, as mandated by the Law on Courts for the harmonization of court practices.

In countries with a significantly consolidated and advanced judicial system, such as the USA, the decisions of the courts serve as precedents for the resolution of similar cases by courts. On the other hand, in continental legal systems, the decisions do not have this effect, but despite

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[123] Michael M. O'Hear, Appellate Review of Sentencing Reasoning: Learning from the federal and Wisconsin experiences [Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences], 93 Marq. L. Rev. 751(2009). Available at: http://scholarship.law.marquette.edu/mulr/vol93/iss2/15

[124] ***Dupree Julian Glenn,*** Louisiana Law Review, Volume 33/No.4, ABA Minimum Standards for Criminal Justice-A, Appellate Review of Sentence, p. 561.

this, they can provide valuable guidance to other judges dealing with similar cases or issues, in cases that raise any broad social issue or any important legal issue. Therefore, the stipulation of reasons, which derive from a detailed study of the legal issues addressed, must be done with special care in such cases in order to fulfill the expectations of parties and society.[125] As mentioned above, in the Republic of Kosovo, cases handled by the European Court of Human Rights can have quite an impact on the handling of cases in our system, precisely because of Article 53 of the Constitution of the Republic of Kosovo.

Differences undermine the certainty and clarity of application of the social and legal control and undermine the social order. Where uniform penalties are prescribed, any deviation from the prescribed penalty would be clear obvious, and remediable within the legal process. In contemporary legal systems, procedural solutions are used to address such differences, and restoration of harmonization of sentences is a function reserved for the Court of Appeals. Therefore, when two identical cases come before the Court of Appeals and different sentences have been imposed by the lower instance courts, the Court of Appeals can resolve these differences by deciding which lower court was right or by imposing new identical punishments on the perpetrators. However, completely identical cases with identical personal and impersonal characteristics are very rare. When the differences in punishments are a result of different factual situations of cases, it can be justified in social terms since different cases require different social treatment. But when the differences in punishments come as a result of different judicial experiences or different views of the courts, then this is understood as an injustice that requires correction.[126]

A judicial decision must meet a number of requirements based on which general principles can be identified, regardless of the specific characteristics of each judicial system and court practices in different countries. The point is that the purpose of the court decision is not only to resolve the dispute so as to give legal certainty to the parties but often also to create a judicial practice that can prevent the emergence of other disputes and ensure social harmony. Judges must generally apply the law consistently. However, when the court decides to depart from previous judicial practice, this must be clearly stated in its decision. In exceptional circumstances, it may be appropriate for the court to specify that the new interpretation applies only from the date of the decision in question or from the date specified in such decision.[127]

3. The ``manifest error'' standard

According to the ICTY Appeals Chamber, "*the appeal against the sentence is an appeal stricto sensu; it is remedial in nature and not a de novo (new) trial. Trial panels are empowered with broad discretion in determining the appropriate sentence, due to their obligation to individualize sentences to fit the circumstances of the accused and the gravity of the offense. As a rule, the Appeals Chamber will not substitute its sentence for that imposed by the trial panel unless the appellant proves that the trial panel made a "manifest error" in the exercise of its discretion*

[125] Consultative Council of European Judges (CCEJ), Opinion No. 11 of CCEJ for the attention of the Council of Ministers of the Council of Europe on the quality of judicial decisions, Strasbourg (2008).
[126] Hallevy, Gabriel. The right to be punished: modern doctrinal sentencing. Springer Science & Business Media, 2012.
[127] Consultative Council of European Judges (CCEJ), Opinion No. 11 of CCEJ for the attention of the Council of Ministers of the Council of Europe on the quality of judicial decisions, Strasbourg (2008).

or failed to apply the applicable law. It remains for the party challenging the sentence, to prove how the trial panel exceeded its discretionary framework in imposing the sentence... *In this regard, the appellant must prove that the trial panel: (i) gave weight to irrelevant or non-material considerations; (ii) failed to give sufficient weight to relevant considerations; (iii) made a clear error regarding the facts on which it exercised its discretion; or (iv) has made a decision which is so unreasonable or simply unfair that the Appeals Chamber is able to conclude that the trial panel failed to properly exercise its discretion.*[128]

The same principle was used in the case of Aleksovski and Tadic*: "In continental legal systems such as Germany and Italy, the respective Criminal Codes determine which circumstances the judge must take into account when imposing a sentence.* ***Courts of Appeals may interfere with the discretion of lower courts if their considerations have gone beyond those circumstances or if they have violated the prescribed ranges for the sentence.*** *The Appeals Chamber has followed this general practice. Therefore, in the case Prosecutor v. Tadić, the Appeals Chamber held the position that* ***it should not interfere with the exercise of the Trial Chamber's sentencing discretion unless there is some "manifest error"...*** *This error consisted in giving insufficient weight to the extent of the Complainant's conduct and failing to treat his position as a commander as an aggravating circumstance in relation to his liability under Article 7(1) of the Statute".*[129]

As such, the court should make efforts to limit its consideration of the "adequacy" of the sentence to situations in which it needs to definitively resolve an issue and/or where there is a misapplication of the provisions of the law.

The same recommendation for the courts of first instance also applies to the Court of Appeals, that in the case of the decision based on the appeal, it should primarily take into account the gravity of the offense and the circumstances under which that offense was committed in order not to allow that a circumstance of minor importance affects the reduction of the sentence. Unfortunately, in our practice, we still find such cases where circumstances are not properly weighed. Thus, in one case, the Basic Court found the defendant guilty and sentenced him to 1 year, because he had punched the victim in the face after a family dispute, causing her injuries, and the forensic expertise established that the injured party suffered light bodily injury sanctioned under Article 185 par.3 subpar.3.1 in conjunction with par.1 of the CCRK. In the reasoning of this decision, the court shows how the injured party changed her statement in the main hearing, saying that the accused had not used violence against her. The court of first instance, based on circumstantial evidence, found that the victim gave this statement under the influence of violence or threats that the accused and her husband exerted on her. The court of the second instance had modified the first instance judgment regarding the sentence, thereby sentencing the defendant with a suspended sentence of 1 year, a sentence which will not be executed if the accused does not commit another criminal offense within the period of 2 years. In addition to the circumstances described by the court of first instance, this Court considered the appeal of the defense counsel and

[128] Case no. IT-08-91-A, Judgment of the Appeals Chamber in the case Prosecutor v. Mico Stanisic & Stojan Zupljanin, International Criminal Tribunal for the former Yugoslavia, (June 30, 2016), Par.1100

[129] Case No. IT-95-14/1-A, Judgment, Prosecutor v. Zlatko Aleksovski, International Criminal Tribunal for the former Yugoslavia, (March 24, 2000), Par. 186-187, cited Prosecutor v. Tadic, Case No.: IT-94-1-A and IT-94-1-Abis, Judgment on appeal against sentence.

found the fact that the injured party waived the criminal prosecution as a specially mitigating circumstance.

From the analysis of the two decisions, it can be observed that the Court of Appeals has mitigated the sentence against the defendant by invoking the waiver of criminal prosecution by the victim as a specially mitigating circumstance, even though the court of first instance found that the victim had changed her statement as a result of violence or threats exerted by the accused and her husband.

II. Specific part

I. Chapter XIV Criminal offenses against the constitutional order and security of the Republic of Kosovo

I. General Overview

The crimes covered by this chapter can be divided into three groups based on the degree of danger that they represent:

1. Maximum penalty with very high legal minimums of 5, 10, 12, 15 years and maximum of 20 years or even life imprisonment.
2. Average imprisonment penalty with maximum sentences of up to 10 years of imprisonment; and
3. Low imprisonment penalty with maximum sentences from 6 months, and 1, 3 and 5 years.

The fact that the crimes referring to security and constitutional order affect aspects that violate state sovereignty and stability, speaks of the reason why the penalties are so high.

It should also be emphasized that the legislator also included the criminal offenses of terrorism in this chapter. This category of crimes represents a phenomenon on its own and involves crimes that are not only of a local character, but that involve a global dimension with the potential for mass threats. These offenses are sanctioned in three different laws in the Republic of Kosovo[130] therefore, this Chapter is also divided into two different parts in the analysis, one of which is dedicated to the criminal offenses of terrorism and the other part is dedicated to other offenses against the constitutional order and security which do not qualify as terrorist acts.

[130] Criminal Code of the Republic of Kosovo, Code no. 06/L-074, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina; Law No. 05/L -096 on the prevention of money laundering and the fight against the financing of terrorism, Official Gazette of the Republic of Kosovo / No. 18 / 15 june 2016, Prishtinë; Law No. 05/L -002 on the prohibition of joining armed conflicts outside of the territory of the country, Official Gazette of the Republic of Kosovo / No. 7 / 02 aprill 2015, Prishtinë.

1. Constitutional Order and Security

A. Starting Point

Hereunder are some recommendations for categories of criminal offenses for activities against the constitution and security of the Republic of Kosovo, excluding the terrorism offenses:

- Offenses committed as part of a criminal group have no suggested starting point since they are sanctioned with Article 127[131] of the Criminal Code of the Republic of Kosovo.
- Furthermore, it should be noted that the starting point IS NOT APPLIED for offenses punishable by imprisonment for life if the court imposes such sentence. Judges are advised to see Part I of these Guidelines, respectively Point III – Principal Punishments as per the Criminal Code of the Republic of Kosovo.

A. Relevant aggravating circumstances

- *Abuse of power or official position from Article 70 par*. 2.9, must be taken into account in all cases where we are dealing with these criminal offenses, always excluding the cases involving those articles, respectively paragraphs where such a position is presented as an element of the criminal offense.
- *High degree of participation by the convicted person*. - In cases where the official position is an element of the criminal offense, this does not prevent the court from taking into account the circumstances from Article 70 par. 2.1 always weighing the extent and the way in which the person was involved in the commission of these crimes. Conversely, the circumstance from paragraph 3.5 of this same Article may also affect the mitigation of the punishment. Offenses covered with this Chapter, in cases of joining an organized criminal group, paragraphs of Article 127 are applied, therefore since this is presented as an element of the criminal offense, it cannot be considered as an aggravating circumstance to avoid double count.

[131] Criminal Code of the Republic of Kosovo, Article 127, Alliance for Anti-Constitutional Actions, Code No. 06/L-074, Official Gazette of the Republic of Kosovo, No. 2, 14 January 2019, Prishtina.

- *High degree of intent* – addresses the persistence in the commission of the criminal offense when the perpetrator, through the degree of commitment, in a way helps in determining the degree of intent in committing the criminal offense. Persistence is a very important factor in the perpetrator's determination in committing the offense.
- Other aggravating circumstances provided for in Article 70 of the Criminal Code may also be applicable in the offenses under this chapter, by always being careful to avoid overlapping them with the elements of the criminal offense. For elaboration purposes, we will be taking *the degree of damage caused* as an aggravating circumstance provided for in par. 2.8[132] by ensuring to avoid overlapping with the elements of the criminal offense. This is due to the fact that Article 126[133] in paragraphs 1.1-1.4 refer to the degree of damage caused by the acts from Articles 113-127 of this Chapter. This means that the connection of any offense from aforementioned articles with Article 126 makes it impossible to include the circumstance from Article 2.8 as an aggravating circumstance.
- *Circumstances related to victims* - All circumstances from par. 2.4-2-7 may be relevant depending on the type of crime committed. Some of the offenses in this chapter refer to offenses committed against high state representatives. However, some of the crimes are related to the danger that can be caused to the civilian population through the destruction of infrastructure, objects or equipment, etc. which have the potential to cause a greater number of victims. Many of these circumstances referring to the victims and higher degree of danger to which they are exposed, are already included as elements of the offense in Article 126[134] of CC, so one must be careful to avoid double count of aggravating circumstances. Courts should be careful and avoid double count.

B. Relevant mitigating circumstances

- *The guilty plea or the guilty plea agreement* in the crimes with maximum and average penalty according to this Chapter, should not be automatically considered for mitigation below the legal minimum in cases which are not accompanied by other extraordinary mitigating circumstances.
- Considering that the commission of these crimes disturbs the balance of not only the narrow circle but also of the entire state infrastructure, courts must be very careful in the weight they give to the mitigating circumstances. This especially refers to the very subjective and personal circumstances of the perpetrator which should have minimal weight in relation to other aggravating circumstances or even the criminal liability and the degree of harm caused.

D. Applicability of other punishments

- *Imposing a suspended sentence* - may be appropriate only for crimes with low or medium penalty, but always taking into account the degree of liability of the perpetrator and the degree of harm caused. This punishment is not justified in cases where the perpetrator acts as part of an organized criminal group, unless there are particularly mitigating circumstances.

[132] The degree of damage caused by the convicted person, including death, permanent injury, transmission of disease to the victim or any other damage caused to the victim or his/her family.
[133] Criminal offenses against the constitutional order and security of the Republic of Kosovo.
[134] Criminal offenses against the constitutional order and security of the Republic of Kosovo

- *Imposing the order for community service work* - may be appropriate only for crimes with low penalty and if there are no aggravating circumstances that would justify a prison sentence.
- *Imposing a fine* - Article 140[135] paragraphs 1 and 2 refer to the category of less severe crimes within this chapter, therefore it provides for a possibility to impose a fine as the main punishment. The same applies to the offense from Article 141 paragraph 1.[136] In order for the fine to have the desired effect, it must be ensured that the fine is commensurate to the financial situation of the perpetrator in line with Article 69 par. 5 of the Criminal Code and the Supreme Court's Guidelines on Imposing Criminal Fines.[137]
- *Imposing accessory punishments from Article 62[138] or 63[139]* - recommended in all cases where the official person is involved in commission of criminal offenses from this chapter. In many cases, imposing an accessory punishment will have a greater effect and achieve the purpose of the punishment compared to other forms of punishment.
- *Use of other accessory punishments* may be reasonable given the nature of the offenses of this chapter. For example, Expulsion of foreigners from the territory of the Republic of Kosovo from Article 67 of the Criminal Code.
- *Judicial admonition* - It can be imposed in accordance with the principles of Article 82 paragraph 2 and 5, for less severe offenses from this Chapter and cannot be applied when the perpetrator has a criminal record.
- *Waiver of punishment* is foreseen as a possibility only in Article 127 par. 3 if the member of the group or union reports the group before committing the criminal offense, which is also in line with the mitigation provisions from Article 277 par. 4 [140] of CC.

[135] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 140 Unauthorized border or boundary crossings, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina
[136] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 141 Inciting discord and intolerance, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[137]Specific guidelines: Imposing a fine as a sanction for criminal offenses according to the Criminal Code of the Republic of Kosovo. Approved on February 27, 2020, by the General Meeting of the Supreme Court, Pristina.
[138] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 62 Prohibition on exercising public administration or public service functions, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina
[139] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 63 Prohibition on exercising a profession, activity or duty, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina
[140] Participation in or organization of an organized criminal group.

2. Criminal offenses of terrorism and terrorism-related offenses

General Overview

Terrorism in Kosovo is addressed under three different laws: The Criminal Code of Republic of Kosovo[141], the Law on Prevention of Money Laundering and Combating Terrorism Financing[142], and the Law on Prohibition of Joining Armed Conflicts Outside State Territory[143]. While terrorism offenses are covered by these laws, the fact that three different laws apply in terrorism cases may lead to ambiguity as to which law/offense is applicable. This is why sentencing for these offenses is discussed separately from other offenses of Chapter XIV. The purpose of this terrorism specific guidance is to provide a tool for the justice system when handling terrorism related cases. The material will also include reference to European Court of Human Rights terrorism related case-law.

UN Security Council Resolution 1566 (2004) clearly reaffirms that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security. The Resolution states that states "must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."[144] This Resolution and other international instruments make it clear that terrorism is a threat that knows no boundaries and therefore any measures taken in response to terrorism actions and perpetrators should be considered with the global threat posed and not in isolation to a specific country. Because Kosovo has the obligation to join this global effort in fighting terrorism, the justice system must understand that punitive and/or preventive measures should be viewed from the perspective of the general threat.

Terrorism offenders do not fit a set profile. They may be first radicalized as teenagers and have little or no history of criminal behavior or actual violence. Dissecting the underlying motivations and understanding the level of radicalization of offenders are factors criminal justice professionals must consider when determining an appropriate sentence.[145]

A. Terrorism and the human rights defenses

Terrorism is a criminal act that is never justified. As the Council of Europe Convention states: "terrorist offenses and the offenses set forth in this Convention, by whoever perpetrated, are under no circumstances justifiable by considerations of a political, philosophical, ideological,

[141] Criminal Code of Republic of Kosovo No, 06/L-074, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.
[142] Law No. 05/L -096 Law on the Prevention of Money Laundering and Combating Terrorist Financing, Official Gazette of Republic of Kosovo / no. 18 / 15 June 2016, Pristina.
[143] Law No. 05/L -002 on Prohibition of Joining the Armed Conflicts Outside State Territory, Official Gazette of Republic of Kosovo / no 7 / 02 April 2015, Pristina.
[144] Resolution 1566 (2004), [on international cooperation in the fight against terrorism], Adopted by the Security Council at its 5053rd meeting, on 8 October 2004.
[145] Kevin D.Lowry: Responding to the Challenges of Violent Extremism/Terrorism Cases for United States Probation and Pretrial Services, Journal for Deradicalization, Winter 2018/19, Nr.17, ISSN:2363-9849, U.S. District Court of Minnesota.

racial, ethnic, religious or other similar nature, and recalling the obligation of all Parties to prevent such offenses and, if not prevented, to prosecute and ensure that they are punishable by penalties which take into account their grave nature."[146] The corpus of international counter-terrorism instruments rests on an unequivocal condemnation of this type of crime, with no concession to any possibility of ideological justification.[147]

The permissible legitimate purposes for limiting the exercise of certain rights may include national security, public safety, public order, health, morals and the human rights and freedoms of others. In cases involving terrorist threats, public safety and/or national security are the purposes most likely to be invoked to justify measures limiting certain rights.[148] As long as such measures are foreseen by the criminal legislation, the courts should make use of them. This same principle is incorporated in Article 5 of the CCRK which says, "*In the execution of a criminal sanction or a measure of mandatory treatment, certain rights of the perpetrator may be restricted only to the extent that is commensurate with the nature or the content of the sanction or measure and only in a manner that provides for the respect of his or her human dignity, and is in compliance with constitution and applicable legislation*."[149]

B. Defining terrorism offenses

Article 128 par.1 of the CCRK defines terrorism for the purposes of criminal offenses included in Chapter XIV as follows:

Terrorism, terrorist act or terrorist offense means the commission of one or more of the following criminal offenses with **an intent to**:

a. seriously intimidate a population,
b. to unduly compel a public entity, government or international organization to do or abstain from doing any act, or
c. to seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of the Republic of Kosovo, another State or an international organization.

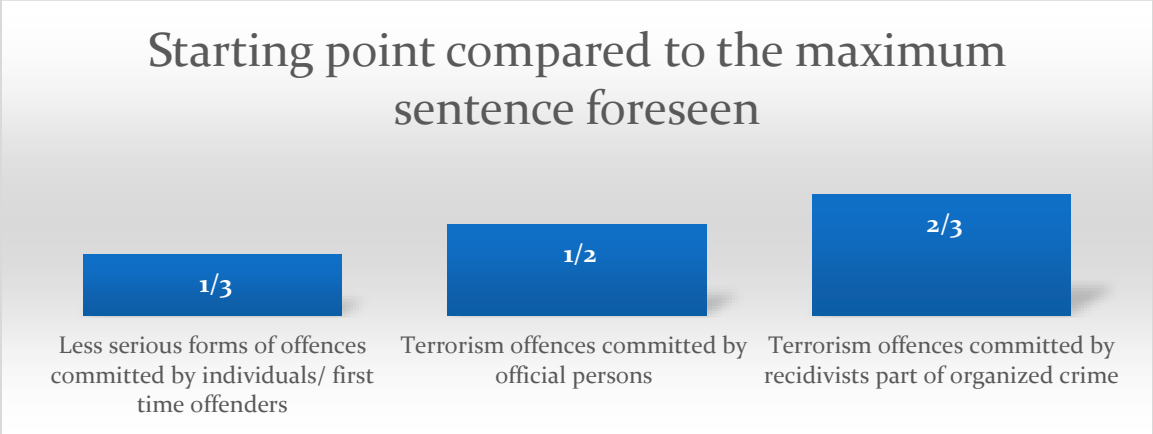
The above article further lists a number of offenses under the CCRK, which are committed for the purposes of terrorism, including offenses against life and body, sex crimes, and offenses from Chapter XV[150]. Based on the above definition, it is clear that for an offense to fall under the CCRK definition of terrorism one of the specific intents listed under a. - c. must be met.

[146] Council of Europe Convention on Prevention of Terrorism, CoE Treaty Series No.196, Warshaw, 16.V.2005.
[147] United Nations Office on Drugs and Crime, Handbook on Criminal Justice Responses to Terrorism, Criminal Justice Handbook Series, pg.40, 2009.
[148] United Nations Office on Drugs and Crime, Handbook on Criminal Justice Responses to Terrorism, Criminal Justice Handbook Series, pg.20, 2009.
[149] Criminal Code of Republic of Kosovo No, 06/L-074, Article 5, Limitations on the execution of criminal sanctions and measures of mandatory treatment, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.
[150] Criminal Code of Republic of Kosovo No, 06/L-074, Chapter XV, Criminal Offenses Against Humanity and Values Protected by International Law, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.

It is worth noting that, although terrorism is a specific intent crime, there is often no obvious proof of the defendant's intent. Instead, in line with Article 22[151] of the CCRK, intent may need to be proved through circumstantial evidence (e.g. a defendant's internet search history, their close contacts, etc.)

C. Starting point

It is important to emphasize that ineffective handling of terrorism offenders may result in dire, catastrophic consequences that range from freeing dangerous offenders to commit acts of terrorism in the community, to unnecessarily incarcerating very young offenders, possibly creating long-term breeding grounds for terrorists in prison.



The above chart shows the different starting points for different types of offenders:

- First time offenders usually represent a lower risk of reoffending compared to other offenders with a violent past or those operating in groups. For these reasons the starting point is lower for first offenders. Nevertheless, this does not mean they cannot be dangerous, therefore assessing the level of harm and culpability is crucial to determine the appropriate sentence.
- Starting points for public officials involved in terrorism related offenses is higher than for other individuals. This is due to two reasons: first, because they are persons who are entrusted with public authorizations and instead of exercising their duty they have breached the public trust; second, because as official persons the fact that official persons have often more access to public resources (depending on their function). The court must first consider the starting point (½ for public officials) and after that consider aggravating factors under par.2.9 of Article 70.
- Offenders operating as part of organized crime and offenders with previous convictions pose a higher risk, thus the starting point is highest for these categories. It should be noted that this category is sanctioned under Article 136 and the starting point ½ is also applicable to this Article. Furthermore, related to offenses punishable by imprisonment for life, the starting point

[151] Article 22 of the CCRK stipulates "*Knowledge, intention, negligence or purpose required as an element of a criminal offense may be inferred from factual circumstances*."

is NOT APPLICABLE if the court imposes such a punishment. Judges are advised to review Part I of these Guidelines, respectively Point III – Principal Punishment under CCRK.

D. Relevant aggravating factors for terrorism related offenses

Article 70 of the CCRK provides a non-exhaustive list of aggravating factors for consideration at sentencing. It is important to understand and properly apply the most relevant factors in a terrorism-related context. Below is an analysis of statutory factors foreseen by the CCRK, but also a list of indicators[152] which (since the CCRK provides for a non-exhaustive list) may serve as standalone factors used to explain circumstances already foreseen by CC. Most of the factors listed below are taken from the U.K. terrorism guidelines.[153] The below analysis is also based on the ECtHR case-law, various publications, and handbooks on this matter.

As emphasized several times in the Guidelines, the court cannot use an aggravating factor which at the same time comprises an element of the crime. Therefore, the factors described below are only applicable in absence of such factor as element of the crime or in cases where with the purpose of clarifying the weight of a certain element, the factor is described as reference.

It is crucial for the courts to assess factors not in an isolated manner, but always comparing it to other aggravating and mitigating factors as that gives the factor its true value. The case Z.B.*v.* France is an example of how French courts, and the ECtHR considered all relevant aggravating factors and did not evaluate factors in isolation. In 2012, eleven years after the 9/11 attacks, the defendant gave his nephew a T-shirt with the words "I am a bomb!" on the front and "Jihad, born on 11 September" on the back. A French court found the defendant guilty of condoning crime for two reasons. First, although more than eleven years separated the attacks of 9/11 from the events of the case, the court noted that the slogans at issue were displayed only a few months after other fundamentalist terrorist attacks in France that resulted in the death of three children in a school. The court reasoned that the passage of time did not diminish the significance of the message depicted on the t-shirt. Second, the court reasoned that the fact that the applicant had no links with any terrorist group and did not espouse a terrorist ideology could not detract from the significance of that message either.[154] On appeal, the ECtHR found no violation of Article 10 in light of the context in which the conduct took place, including the Toulouse terrorist attacks in which three children had been killed outside their school, and also the specific context, that is to say the instrumentalization of a three-year-old child.[155]The above case is a true example of the court's

[152] The word indicators used in the text refers to three different situations: (1) the case when that indicator can be used as an aggravating/mitigating circumstance, since the KP contains a non-exhaustive list in Article 70; (2) some indicators help the court to ascertain the existence or not of a mitigating or aggravating circumstance; or (3) some indicators help the court to better determine the weight of a mitigating/aggravating circumstance in the context of measuring the punishment for a certain offense.
Unlike the mitigating and aggravating circumstances from Article 70 of the CC, which are generalized for all crimes within the CC, the indicators focus on situations surrounding the specific crime in question.
[153] U.K. Sentencing Council, Terrorism Offenses, Definitive Guideline, 27 April 2018.
[154] European Court of Human Right, 60Z.B. v. France, App. No. 46883/15, (Sept. 2, 2021), https://hudoc.echr.coe.int/fre?i=002-13388
[155] European Court of Human Rights, Guide on case-law of the Convention-Terrorism, Updated 31.08.2022.

proper determination of the weight of each of the factors listed and the link between the various factors.

As laid out throughout the text of the Guidelines, factors related to culpability and harm are the most important factors in determining the appropriate sentence. Furthermore, it is important to recognize the different levels of harm and culpability determined by certain indicators.

i. A high degree of participation of the convicted person in the criminal offense[156] *and a high degree of intent on the part of the convicted person.*[157]

Since intent is an integral part of the definition of terrorism under Article 128 of the CC, it is considered that intent is already an element of the terrorism offences. What par.2.2 of Article 70 requires is defining the level of that intent. This is often established by considering the multitude of actions by the perpetrator and through circumstantial evidence.

The level of participation may be used either as an indicator of the level of intent by the perpetrator, or in determining the extent of the role and the contribution of the perpetrator, which is why the two are discussed together. The level of the perpetrator engagement/participation is relevant when the offender acts as part of the organized group or in co-perpetration. The weight of this factor depends on the type of offense committed and/or the prevalence of other aggravating factors. The following indicators are important because they are indicative of the factors above (participation and intent) as well as other aggravating factors listed below.[158]

a. Traveling outside Kosovo for terrorism-related activities. The fact that a defendant travelled and/or participated in terrorist activities outside Kosovo should not be looked at as a sign of lesser harm resulting in lower sentence. On the contrary, the effort taken by the perpetrator to travel to another country to participate in a terrorist activity or join terrorist groups should be considered as a factor in aggravation as a clear indicator of high level of participation and the commitment and intent of the defendant to engage in a criminal act.
b. Over-identification with a group or cause.
c. Direct and reasonable knowledge that joining a terrorist organization would result in military training and/or that the person or their members would be expected to be engaged in armed conflict.
d. Direct and reasonable knowledge that participation in a terrorist organization would have an impact on family members, or would create expectations that family members would participate in or provide support for the terrorist organization, or even they would expose children to armed conflict.
e. Browsing extremist materials (even passive viewing) especially if those materials glorify violent acts or encourage support for violent perpetrators or activities.
f. Ideological motivation for engaging in terrorism including public statements expressing high levels of anti-sentiment against Kosovo and/or other western countries.

[156] Criminal Code of Republic of Kosovo No, 06/L-074, Article 70 par.2.1, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.
[157] Criminal Code of Republic of Kosovo No, 06/L-074, Article 70 par.2.2, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.
[158] Determining the factors listed may very well be considered as a sort of risk assessment on the level of risk the perpetrator presents to the society by analyzing each action/segment of actions of the perpetrator in determining the appropriate sentence

g. Multiple and highly calculated attempts to carry out the offense and/or continued efforts to carry out terrorism related activities even after intervention attempts by family or law enforcement.
h. Communication with other extremists (*including individuals involved in a foreign terrorist organization*). The fact that the offender had terrorist connections is important and would increase the weight of this factor. This could either be an indicator of an increased commitment to and ability to engage in violent action, or could indicate an ability to reengage post-release, or even both.
i. Use of sophisticated methods of communication with other criminals to avoid detection.
j. Use or provision of false or fraudulent identification or a name change to a "Combat name" in addition to violent extremist propaganda, tattoos, or possession of other violent extremist symbols or objects.
k. Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offense and/or avoid or impede detection.
l. Failure to comply with current court orders.
m. Failure to accept responsibility for actions or to show remorse for the consequence caused even after the determination of guilt.
n. Changes in behavior and limiting friendships to only persons with similar extremist ideology beliefs or supporters of such ideology. This may be an indicator of lack of perpetrator's remorse or indicator on whether there is a potential for future rehabilitation.
o. Recent, a large volume of, and/or repeated possession or accessing of violent extremist material or material disseminated by [designated] terrorist organizations. It is particularly important whether the possession of article(s) indicates that offender's preparations for terrorist activity are complete or almost complete, or whether the offender's engagement was limited in preparation toward terrorist activity. It is also important whether the violent extremist material is intended for use in a specific terrorist act. Simply viewing such material, alone, may not be indicative of a crime but should be a consideration.
p. Offenses committed whilst in prison, suspended sentence, probation or supervision.
q. Activities like selling property, fundraising, or obtaining a passport close in time to the terrorist activity can all be indicators of the level of involvement in mobilization to violent extremism/terrorism activities.
r. Significant contributions made to furthering terrorism. Financing terrorism is a separate criminal offense under Article 131 of the CC, Article 3 of the Law on Prohibition of Joining the Armed Conflicts Outside State Territory, and Article 57 of the Law on Prevention of Money Laundering and Combating Terrorist Financing. Therefore, it may constitute an element of the offense, but if it is not an element, then it adds weight to the gravity of the defendant's offenses. It is necessary to keep in mind that a contribution may also include non-financial contributions which can as well have an impact in advancing terrorist actions. Thus, the evaluation of such contributions from different angles is necessary.
s. Withholding information on terrorist activities from law enforcement. Article 135[159] of the CCRK addresses failure to report terrorists, terrorist groups or terrorist activities. While this comprises an element of a crime if an offender is charged with it, it is significant for the court to distinguish the value of the information withheld, including, but not limited to, information which could have prevented an act of terrorism.

[159] Criminal Code of Republic of Kosovo No, 06/L-074, Article 135 Concealment or failure to report terrorists or terrorist groups, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.

t. *Indicators related to inciting terrorist violence.* Some of the below indicators may be important in determining the type and extent of terrorist engagement for cases related to inciting terrorist actions:
   a. Significant volume of terrorist publications published or disseminated.
   b. Statement or publication provides instruction for specific terrorist activity aimed at inciting endangerment to life.
   c. Sophistication of the online presentation, including tags that would allow it to be found by searchers.
   d. Use of and demonstration using real weapons and real ammunition, not toy guns.
   e. Public statements expressing high levels of anti-sentiment against Kosovo and other western countries.
   f. Use of multiple social media platforms to reach a wider audience. This and the previous indicator may serve to determine the extent of the perpetrator's contribution depending on the status of the perpetrator. E.g. if an influential person or media with many followers has made such statements then the level of the harm aimed or caused could be much higher.

Because terrorist propaganda incites discrimination, hostility, and violence by advocating hatred on national, racial, or religious grounds, penalizing such incitement is a direct means of implementing the International Covenant on Civil and Political Rights, even when the harm being incited does not occur.

CCRK Article 134 prohibits incitement to commit terrorist offense. Article 3, paragraph 4 of the Law on Prohibition of Joining the Armed Conflicts Outside State Territory also sanctions incitement through articles, audio-visual recordings, social media posts, and any other form of communication that calls upon or incites others to commit terrorist acts. Nevertheless, the below listed factors may be useful at sentencing to explain the extent of engagement/participation by the offender as a very important factor to the level of culpability and engagement.

The European Court of Human Rights has long accepted that certain modes of identification with a terrorist organization, especially the glorification of such an organization, can be considered as manifesting support for terrorism and as an incitement to violence and hatred. Similarly, the Court accepts that the dissemination of messages praising the perpetrator of a terrorist attack, denigration of the victims of such attacks, appeals to finance terrorist organizations and other similar actions can amount to inciting terrorist violence.[160]

ii. The presence of actual or threats of violence in the commission of the criminal offense.[161]

Whether or not the offense was committed or just attempted is not important. The difference between the threat to violence and the actual violence is significant, although both depend on the type of the offense and the level of threat posed/caused. At times, the threat to violence is so high that it causes such trauma on the individual/s threatened that could even exceed the actual violence. Another factor to consider is the background or the characteristics of the perpetrator. For example:

[160] European Court of Human Rights, Guide on case-law of the Convention-Terrorism, pg.30, Updated 31.08.2022
[161] Criminal Code of Republic of Kosovo No, 06/L-074, Article 70 par.2.3, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.

- A threat posed by a person with military or law enforcement background. Extremists with law enforcement or military training, knowledge of explosives and firearms, prison experience, and access to extremist networks and resources bring higher levels of risks, as they have greater capability to carry out acts of violence.
- The Criminal background of the offender (criminal violent history, a well-known radicalized individual, etc.) impacts the degree of seriousness of a terrorist threat. Not all radicalized individuals commit crime, however, radicalization is often precursor to involvement in terrorism-related offenses. Determining the level of radicalization or how violent the individual is a precursor to determine the danger to the community, but also the type of offense most appropriate, the necessary conditions of supervision or the opportunity for rehabilitation.

iii. Whether the criminal offense was committed as part of the activities of an organized criminal group.[162]

Article 136 of the CCRK sanctions terrorist activities committed in an organized structure/group. Other articles in the code prohibit other forms of cooperation such as co-perpetration (Article 31), Criminal Association (Article 34) and Agreement to commit criminal offense (Article 36).

The below listed indicators may be used to explain the extent of engagement/participation by the offender in an organized criminal group, which are important to determine the offender's level of culpability:

a. Whether the offender is a prominent or significant member of a criminal terrorist organization.
b. Persistent efforts to gain widespread or significant support for the organization.
c. Expressing high levels of commitment and devotion to a terrorist group, ideology or cause.
d. Involvement in sophisticated and lengthy ongoing conspiracy/significant planning.
e. Encouraging or recruiting others to join the terrorist group.
f. Misrepresenting the nature of terrorist organization.
g. Ongoing deception throughout the process to protect the group members and cause.

iv. Abuse of power or official capacity[163] *or evidence of a breach of trust*[164] *by the convicted person*

Both of these factors indicate the offender's culpability and the extent of risk that the defendant may reoffend. Both factors could apply to the same offender: for example, an offender who was a police officer and committed a terrorist act in a school compound abused his power as a public official and breached the trust of the school authorities who had all the reason to believe he/she will ensure their safety.

As stated earlier even if the starting point for official person is higher it does not constitute duplication for the purpose of using factor from par.2.9 as the latter will be assessed on the type of function. For example, an official person with access to confidential or classified information,

[162] Ibid.par.2.11
[163] Criminal Code of Republic of Kosovo No, 06/L-074, Article 70 par.2.9, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.
[164] Criminal Code of Republic of Kosovo No, 06/L-074, Article 70 par.2.10, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.

or with access to information technology infrastructure, has a higher culpability compared to an official with minor role and minimal to no access to such resources. The above present some of the examples where such factors may apply.

v. Prior criminal convictions of the convicted person[165]

As stated above, the starting point for recidivists is higher. Under this factor the court should assess the type of crimes the offender was previously convicted of, for example, whether has he/she was previously convicted of terrorism related offenses, other violent crimes, or non-violent crimes. In general, the more serious the previous offenses, the higher the risk which should result in a higher sentence, including aggravation under Article 75 of the CCRK. When assessing whether a previous conviction is "recent," the court should consider the time gap since the previous conviction. Where there are previous convictions, but they are either old or non-violent in nature, this indicates a lower likelihood of reoffending and also more opportunities for offender's rehabilitation. Conversely, if the time between a previous conviction and current offense is the result of a lengthy prison sentence, the courts should not recognize the time as a mitigating factor. Conversely, it may be appropriate to consider it an aggravating factor (for example, if the crime was committed in proximity to release).

The issue of prior convictions for the defendants who do not fulfil the concept of multiple recidivism under Article 75 of CCRK has been best explained in the first part of the Guidelines, specifically Point V – Aggravation and Mitigation of punishment under Article 70 of the CCRK.

vi. Victim-related factors

Victim-related factors must always be considered and addressed when sentencing terrorism offenders. Below is a list of factors foreseen by Article 70 of the CCRK:

- ✓ Par.2.4. whether the criminal offense was committed with particular cruelty.
- ✓ Par.2.5. whether the criminal offense involved multiple victims.
- ✓ Par.2.6. whether the victim of the criminal offense was particularly defenseless or vulnerable.
- ✓ Par.2.7. the age of the victim, whether young or elderly.
- ✓ Par.2.8. the extent of the damage caused by the convicted person, including death, permanent injury, the transmission of a disease to the victim, financial harm or costs borne by the victim to obtain treatment, psychological harm, and any other harm caused to the victim and his or her family.
- ✓ Par.2.12 if the criminal offense is a hate act, which is any crime committed against a person, group of persons, or property, motivated upon the race, color, gender, gender identity, language, religion, national or social origin, relation to any community, property, economic condition, sexual orientation, birth, disability or other personal status, or because of their affinity with persons who have the aforementioned characteristics.

Consideration of these factors is particularly important considering the high potential of serious harm and/or threat to wider community and public health. Threats and actual violence against

[165] Criminal Code of Republic of Kosovo No, 06/L-074, Article 70 par.2.13, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.

larger number of victims is very common in terrorism cases and should not be overlooked when determining the sentence.

The Supreme Court's Corruption Guidelines provides for an extended explanation on how corruption may have a serious impact on the public health or environment. The same logic applies in aggravation when evaluating factor from 2.8 for terrorism cases in cases where terrorist actions are targeting public infrastructure or resources.

The aggravating factor from par.2.12 will likely be present in terrorism cases. Extremists frequently target victims due to their perceived sexual orientation, nationality, or religion. This is why courts should consider and include this factor and prosecutors should include it in their argument. It is also a circumstance (motive) required under Article 69[166] subparagraph 3.2. of the CCRK. Courts should also consider whether the offender has verbally or in writing discussed or incited attacks against certain communities within Kosovo, facilities used by other countries, or planned attacks in such countries.

E. Mitigating factors for terrorism-related offenses

Article 70 of the CCRK paragraph 3 provides a non-exhaustive list of mitigating factors.. Excessive use of mitigating factors, which are often irrelevant to the specific offense, has largely contributed to such mitigation. The below analysis focuses on mitigating factors that are appropriate to consider when sentencing terrorism offenders.

i. circumstances falling short of grounds for exclusion of criminal responsibility, for example, diminished mental capacity.

Even where a defendant has the mental capacity to be held criminally liable for a terrorism offense, the court may properly consider whether the defendant suffers from a diminished mental capacity. Such a determination must be supported by evidence from an expert, and only after the court has considered the harm to the victim and the risk of the defendant reoffending.

Paragraph 2 of Article 18 of the CCRK clearly stipulates that "… *Such person is criminally liable but the court shall take these conditions into consideration when deciding the duration and the type of sanction or measure of mandatory treatment it imposes*."[167] Thus, based on this provision it is clear that diminished mental capacity can only be considered in mitigation leading to a reduced sentence and not a sentence below the statutory minimum.

ii. *The personal circumstances and character of the convicted person*[168]

Evidence that an offender has demonstrated positive good character could be a factor in mitigation at sentencing, for example where a defendant undertakes charitable works in his/her community. However, this factor is less likely to be relevant where the offense is very serious and

[166] Criminal Code of Republic of Kosovo No, 06/L-074, Article 69, General rules on calculating punishments, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.
[167] Criminal Code of Republic of Kosovo No, 06/L-074, Article 18, Mental incompetence and diminished mental capacity, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.
[168] Criminal Code of Republic of Kosovo No, 06/L-074, Article 70, par.3.3, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.

where an offender has used their 'good character' or status to facilitate or conceal the offense then it should be treated as an aggravating factor.

Courts should rarely consider the fact that an offender is married or has children as mitigating factors. Offenders who espouse extremist ideologies also risk radicalizing family members. Many returning foreign terrorist fighters put their families in great danger by taking them to conflict zones. The fact that a defendant has children should therefore ordinarily be considered in aggravation rather than mitigation. Incarceration of the defendant should not be avoided under the justification that "*the defendant's presence near his children is crucial for their wellbeing and growth*"[169]. The fact that the defendant traveled to conflict area and brought them to harm's way, as well as the fact that he may be a radicalizing element at home, should be taken in consideration as aggravating circumstance due to the defendant's negative behavior.

iii. *The role and contribution of the person in commission of the crime*[170]

This category includes the below circumstances:

- Evidence that the convicted person played a relatively minor role in the criminal offense.

- The fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another.

Both of the above factors have been discussed at length when analyzing the perpetrator's role in the aggravation context. These are very important mitigating factors in cases of co-perpetration and organized crime. It helps with determination of the specific sentence based on the role each played. The lesser the role, the higher weight it has in mitigating the sentence. Nevertheless, courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation, or exploitation. This factor may indicate that the offender is vulnerable and would find it more difficult to cope with custody or to complete a community order.

iv. *The age of the convicted person, whether young or elderly*[171]

Age and/or lack of maturity can affect the offender's responsibility for the offense and the effect of the sentence on the offender. These considerations may justify a reduction in the sentence having in mind always the gravity of the offense.

[169] The text is taken from one of the decisions of Kosovo courts, where for the purpose of sentencing the court stated among others "the court considered as extraordinary mitigating circumstance, personal circumstances and the character of the defendant, respectively the fact that he is married, father of two juveniles, who live in poor conditions, considering the fact that they lived for several years in Syria, and that his work, respectively any eventual employment is the only source for their existence and that the defendant's presence near his children after their return to Kosovo to help them adapt, is crucial for their wellbeing and growth…"

[170] Criminal Code of Republic of Kosovo No, 06/L-074, Article 70, par.3.4 and 3.5, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.

[171] Criminal Code of Republic of Kosovo No, 06/L-074, Article 70, par.3.6, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.

Young adults are still developing neurologically and consequently may be less able to evaluate the consequences of their actions. They are more likely to take risks or behave impulsively particularly in the presence of others. Adverse childhood experiences including deprivation and/or abuse may affect development. An immature offender may find it particularly difficult to cope with the requirements of a community order without appropriate support. There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behavior and change their conduct.

The argument based on the immaturity should not apply to the adults nor elderly. They should be fully aware of their actions. The only reason why it could apply in mitigation is if the old age is also associated with some sort of serious health condition, which would make it unreasonable to hold the person in detention. Otherwise, in cases of a serious terrorism offense and where the perpetrator poses a serious risk, imprisonment (even lengthy periods of imprisonment) is justified.

v. Factors related to offender remorse and cooperation[172]

All of the below factors are grouped for the purpose of showing that these offenders could have less chances of reoffending and higher chances on rehabilitation. Nevertheless, it does not imply an automatic reduction in sentence as they must be analyzed and compared with other circumstances of the case:

- ✓ Evidence that the convicted person made restitution or compensation to the victim.
- ✓ General cooperation by the convicted person with the court, including voluntary surrender.
- ✓ The voluntary cooperation of the convicted person in a criminal investigation or prosecution.
- ✓ Any remorse shown by the convicted person.
- ✓ Post conflict conduct of the convicted person.
- ✓ In the case of a person convicted of the criminal offense of Hostage Taking, Kidnapping or Unlawful Deprivation of Liberty or as provided for in Article 169, 191 or 193 of this Code, effectively contributing to releasing or bringing the kidnapped, abducted, taken or detained person forward alive or voluntarily providing information that contributes to identifying others responsible for the criminal offense.

Expressing relief about leaving one's commitment to the extremist cause or ideology can also be an indicator of a cognitive shift. Court testimony as a witness can be one of the most significant tests, demonstrating legitimacy of change for an offender.

Cooperation and testifying on behalf of the prosecution are acts that can represent a change in mindset and result in limiting the individual's ability to return to the group at any level. Evaluating the significance of cooperation involves reviewing several aspects. The first is to determine if the offender provided forthright, detailed admissions and had a remorse for breaking the law that went beyond scripted responses. The second is evidence of contemplation about one's actions, which includes reflection on harm to others, such as one's family, communities, and oneself. Although the perpetrator agreed to cooperate, delays in conveying messages is a sign of remaining loyalty to the group and level of radicalization even after what appears to have been a

[172] Criminal Code of Republic of Kosovo No, 06/L-074, Article 70, par.3.7-3.9 and 3.11-3.13, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.

change of heart and mindset. Other situations include where the offender publicly denounces the extremist group, cause, or ideology in a manner that would lessen the ability to return to involvement with other extremists. It also shows commitment to leaving extremism behind. However, offenders sometimes have been scripted in denouncing their cause as a legal strategy to mitigate their potential sentence. Consistency in narratives and honesty must be more closely monitored in extremism/terrorism cases. Courts should be cautious about considering a defendant's silence in court as indicating true remorse, as this does not necessarily show remorse but rather his/her intention in keeping low profile. Thus, silence of the defendant, particularly in cases where the defendant has not admitted his/her guilt should not be taken in mitigation.[173]

Other indicators in assessing the mitigation under the above factors may include:

- Lacking actual actions or attempts to carry out activities.
- Early disengagement from the group.
- Accepting responsibility for one's actions.
- Pursuing programming and rehabilitative efforts after arrest.
- Clear evidence of a change of mind set prior to arrest.
- If the offender is returning from overseas travel and became disillusioned due to a bad experience or express remorse and denounces the group or cause, this can be a positive step if it is verifiable.

vi. A new mitigating factor for terrorist offenses in CC

Offenses expressed in Par.7 of Article 3 of the Law foresees more lenient sentences when *all* of the following circumstances are met:

a) The fact that the perpetrator of the criminal offense renounces the terrorist activity before it has serious consequences, and
b) provides the police, prosecutors or judicial authorities with information that they would not be able to obtain.
c) helps prevent or mitigate the effects of the criminal offense.
d) identifies with sufficient detail to allow the arrest or prosecution of any terrorist or terrorist group.
e) finds evidence or prevents other terrorist acts.

It seems that the elements of the above circumstance coincide with the situations from Article 30 of the CCRK.[174] These elements may be met either in the form of an agreement on the admission of guilt or as part of the defendant's cooperation with law enforcement authorities.

[173] Unfortunately, as observed from Kosovo practice, silence was considered in mitigation. In one of the judgments the court concluded "*during the main hearing, despite that he did not accept the guilt, his conduct and posture was correct, manifesting a kind of remorse, despite his actions, but without expressively admitting the guilt for any of the criminal offenses he is being charged*." This justification along with the justification as from Supra note 26 were taken as extraordinary mitigating circumstances leading to a sentence below the statutory minimum.

[174] Article 30 - Voluntary renunciation of the attempt states: "The court may release a person from punishment for a punishable attempt of a criminal offense if such person voluntarily renounces the commission of the criminal offense

It is possible that these mitigating factors could duplicate those set out in the elements of the offense from Article 3 paragraph 7 of the Law on the Prohibition of Joining in Armed Conflicts Outside the Country's Territory, and the mitigating factors below in CCRK Art. 70. The possibility of doubling the circumstance with other mitigating factors is much greater and this with the following:

- ✓ General cooperation of the convicted person with the court, including voluntary surrender (Article 70 par.3.8);
- ✓ Voluntary cooperation of the convicted person in the criminal investigation or prosecution (Article 70 par.3.9);
- ✓ The behavior of the convicted person after the conflict (Article 70 par.3.12);
- ✓ Voluntary renunciation of the attempt from Article 30 of the Criminal Code.
- ✓ Mitigation of the sentence due to reaching an agreement on the admission of guilt.

These factors are always case-specific and must be weighed against the defendant's risk of reoffending and degree of harm caused or intended.

3.3.8 The entering of a plea of guilty.[175]

The entering of a guilty plea is an important indicator that a defendant is successfully disengaging from past criminal activity. However, courts should proceed with caution before treating an admission of guilt as a mitigating factor at sentencing. Courts should conduct careful inquiries with defendants, beyond their scripted statements, to assess whether the offender is truly remorseful, appreciates the wrongfulness of his/her conduct, and is not at risk to reoffend.

Most offenders plead guilty at the initial hearing, meaning courts would not have sufficient information on the relevant aggravating factors. Therefore, courts should make efforts to schedule ex-officio sentencing hearings (unless parties already requested a hearing) as per the provisions of the CPC and request additional information from the parties. An automatic reduction under the statutory minimums should be avoided without such consideration of other factors.

F. Criminal liability of legal persons in terrorism related cases

When sentencing defendants for terrorism-related propaganda, the courts, in cases where the defendant acted as a responsible person[176] of a legal entity, must take into consideration not only the individual responsibility of the perpetrator, but also of the legal entities that enabled the crime[177].. It is also foreseen by international instruments including the Council of Europe

which he has begun, although he is aware that in accordance with all the circumstances, he could continue the offense or if, after committing such an act, it prevents the consequences from occurring."

[175] Criminal Code of Republic of Kosovo No, 06/L-074, Article 70, par.3.10, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.

[176] As per the definition in the Law, the Responsible person – is a natural person within the legal person, who is entrusted to perform the certain tasks, or is authorized to act on behalf of the legal person and there exists high validity that he/she is authorized to act on behalf of the legal person.

[177] This is clearly stipulated in Article 37 of the CC, the Law on Liability of Legal Persons for Criminal Offenses

Convention on the Prevention of Terrorism.[178] Article 11 par.3 of this Convention states the necessity of "…*effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions*." for legal entities.

Chapter III of the Law foresees imposing sanctions on legal persons to include fines, suspended sentences, and other security measures. One example would include actions for inciting hatred in commission of the terrorism. These offenses are sanctioned by Article 134 of the CCRK and paragraph 4 of Article 3 of the Law on Prohibition of Joining the Armed Conflicts Outside State Territory.

There are multiple instances of sanctions against broadcasting and/or publishing companies being sanctioned when determined they have been used to promote terrorism and terrorist activity or incite hatred. In many of those cases the ECtHR found no violation of Article 10 of ECHR for shutting down those businesses. Nevertheless, the courts must be very cautious to ensure such measures do not infringe disproportionally the freedom of expression.

G. Applicability of other types of sentences

Other than imprisonment, it is important to tackle other sentencing related aspects, which are very important for achieving the goal of individual deterrence.

Accessory sentences. - Unfortunately, the CCRK in Article 59 has only provided for a very limited and exhaustive list of accessory sentences. The most relevant ones include:

a. order to pay restitution or compensation.[179]

b. prohibition on exercising public administration or public service functions.[180]

c. prohibition on exercising a profession, activity or duty.[181]

d. order to publish a judgment- this is a very effective measure.[182]

e. expulsion of a foreigner from the territory of the Republic of Kosovo.[183]

As discussed above, when referring to the starting points and the respective aggravating factors related to a *defendant who commits the crime in his capacity as official person*, sentences for such persons should include the accessory sentences either from Article 62 or 63 of the CCRK. Unfortunately, these accessory sentences are rarely imposed in Kosovo practice.

Compensation or restitution of victims should be considered in sentencing defendants (including is cases where the court imposes a suspended sentence) particularly considering the

[178] Council of Europe Convention on Prevention of Terrorism, Article 10- Liability of legal entities, CoE Treaty Series No.196, Warshaw, 16.V.2005.
[179] Criminal Code of Republic of Kosovo No, 06/L-074, Official Gazette of Republic of Kosovo/No.2, Article 61, 14 January 2019, Pristina.
[180] Ibid. supra note Article 62
[181] Ibid. supra note Article 63.
[182] Ibid. supra note Article 66.
[183] Ibid. supra note Article 67.

large possibility for harm caused to the victims of terrorism. The same applies to legal entities as well.

In the case of expulsion of a foreigner, the court may order such sentence but need to ensure the reasons for his/her expulsion are clearly explained as it may raise concerns on violation of Article 1 Protocol 7 of the ECHR. Thus, ordering such expulsion is allowed under Kosovo legislation but should be proportional and reasonable in compliance with international standards. In principle, the States must be allowed, in the context of the fight against terrorism, to deport non-nationals whom they consider to be threats to national security. It is not the Court's function to review whether an individual is in fact such a threat; its only task is to consider whether that individual's deportation would be compatible with his or her rights under the Convention (see, among other cases, X v. Sweden, § 46, and W. v. France, § 65).[184]

Suspended sentence - Before issuing a suspended sentence, courts must give serious consideration to the type of offense committed, the culpability of the defendant, and the harm threatened or caused. Imposing a suspended sentence on defendants with criminal backgrounds or other high-risk offenders would only be appropriate as an exception when there are extraordinary circumstances that would justify this as a sentence.

As observed in various reports such sentences are rarely associated with any obligations for the offender other than the general obligation of refraining from commission of crimes. Article 56 of the CCRK stipulates a number of obligations attached to a suspended sentence which could very effectively be used in terrorism related offenses. Inclusion of one or more of the below obligations is highly recommended:

- to receive medical or rehabilitation care in a health care institution.
- to undergo a medical or rehabilitation treatment program.
- to visit a psychologist and/or another consultant and act in accordance with their recommendations.
- to refrain from changing residence without informing the probation service.
- to abstain from the use of alcohol or drugs.
- to refrain from frequenting certain places or locales.
- to refrain from meeting or contacting certain people.
- to refrain from carrying any kind of weapon.
- to compensate or restitute the victim of the offense.
- to return the material benefit acquired from the commission of the criminal offense.
- not to possess or use a computer or to access the internet as directed by the court.
- to provide financial reports as directed by the court.

The above factors referring to *refraining from frequenting certain places and/or refraining from meeting/contacting certain people* could be very effective in ensuring disengagement of the defendant from terrorist activities. The courts need to keep in mind that disengaging offenders often require more than just one sentence. Imposition of above obligations on first time offenders

[184] European Court of Human Rights, Guide on case-law of the Convention-Terrorism, pg.36, Updated 31.08.2022.

could lead to long-term results. Imposing a s*uspended sentence with order for supervision by the probation service*[185]is also very important consideration particularly for the young offenders.

Order for community service work - foreseen by Article 57 of the CC, would be appropriate only for the most lenient forms of terrorism related offenses. As per par.1 of this Article "*An order for community service work may be imposed on a convicted person, if the court imposed a punishment of a fine of up to two thousand five hundred (2,500) EUR or a punishment of imprisonment of up to one (1) year. Community service work may only be ordered upon the consent of the convicted person."* This type of punishment may be more appropriate for young offenders where the court assesses the defendant poses a low risk of re-offending, there was no harm associated with the offense, and in addition there are other factors that lead to determination that this order would be sufficient to achieve the purpose of sentencing.

Confiscation of assets - Any confiscation of property must be provided for by law and pursue a public-interest aim. Courts should properly order that assets be confiscated from legal entities that support terrorism offenses. As regards proportionality, the Court has emphasized that the confiscation of assets in criminal cases has become more widespread both in the legal systems of several Contracting States and at the international level, and that it is currently being used not only in evidence but also as a separate penalty for an offense (***Aboufadda v. France (dec.), § 27***).[186]

Criminal fine - Criminal fines are regulated by the Law on Liability of Legal Persons for Criminal Offenses, Criminal Code, and Law on the Prevention of Money Laundering and Combating Terrorist Financing. Fines are foreseen for offenses related to terrorist facilitation and financing and legal entities involved in terrorism related activities. At all times when determining the fine the courts must apply the legal requirements in measuring the fine and in accordance with the Supreme Court Guidelines on Criminal Fines. This would ensure a fine achieves its preventive effect. Imposition of a criminal fine in lieu of the jail sentence is discouraged and not recommended for offenders posing high risk.

[185] Criminal Code of Republic of Kosovo No, 06/L-074, Official Gazette of Republic of Kosovo/No.2, Article 55, 14 January 2019, Pristina.
[186] European Court of Human Rights, Guide on case-law of the Convention-Terrorism, pg.30, Updated 31.08.2022.

II. Chapter XV Criminal offenses against humanity and values protected by international law

This chapter contains offenses of dimension and importance not only at the local but also international level. This is because many of the offenses mentioned in this chapter are sanctioned by various Conventions of an international character. Therefore, most of the articles provided for in this chapter foresee high legal minimums and maximums up to life imprisonment.

Thus, offenses related to matters sanctioned under the Geneva Convention carry high legal minimums and maximums (9 articles of this Chapter). Therefore, it is very important that the calculation of punishment for the offenses of this chapter starts from the middle point between the legal minimum and maximum, by always taking into account other measures that can adequately lead to a reduction of such phenomena.

Regarding the offenses from this chapter, the Smuggling of Migrants from Article 164 and Trafficking in Persons from Article 165 are the most prevalent in our practice. When it comes to trafficking in persons in particular, the way the Republic of Kosovo handles the investigation, prosecution and trial of the perpetrators of these crimes is always under the microscope of some of the most important international reports:

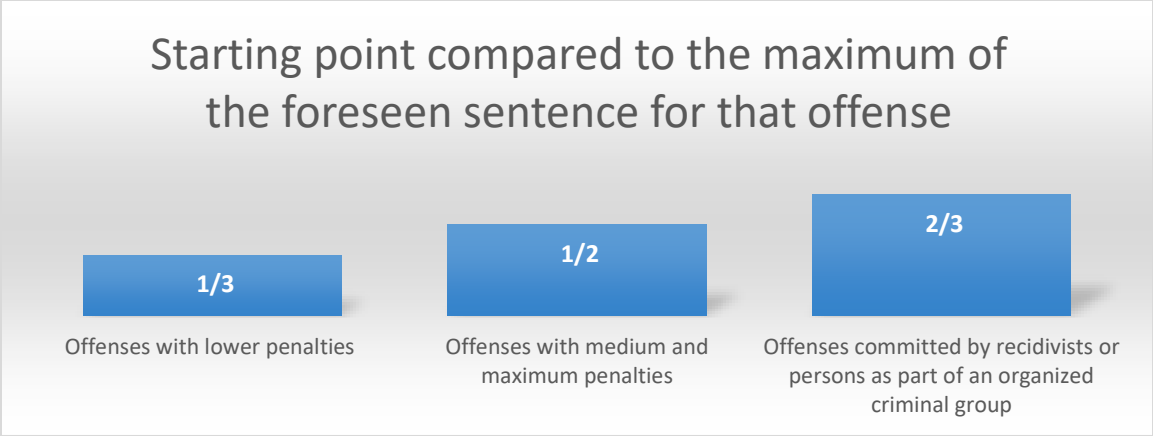
- US Department of State Trafficking in Persons Report.
- Council of Europe Report, Greta Report.

For years, these two reports have pointed out the low sentencing rate of perpetrators, often below the legal minimum, and the lack of confiscation of assets.

According to the State Department Report, the Republic of Kosovo has not met the minimum standards for combating human trafficking but has made significant efforts in this direction. The courts must bear in mind that sentences imposed on the perpetrators of these crimes are important not only for the individual cases before them, but they also cumulatively represent the basis for the general assessment of the Republic of Kosovo and its ranking on the map of countries that are in compliance with the principles of international Conventions and have an impact in allocation of funds dedicated to the Republic of Kosovo. Therefore, in principle, the imposition of alternative punishments as well as mitigation below the legal minimum are not appropriate for the offenses from this chapter, except in cases where the court finds extraordinary mitigating circumstances and only for offenses of less severe nature within this chapter. A mere guilty plea or the plea agreement should not automatically lead to a reduction of sentence below the legal minimum, as this is not an automatic right of the defendant. Courts must assess and weigh circumstances under which the offense was committed, the degree of culpability and the degree of criminal liability much more so as to assess whether the latter outweigh the guilty plea or the plea agreement.

A. Starting Point

Same as in the previous chapter, within the scope of this chapter we also find offenses with three types of penalty (minimum, medium, and maximum). In general, offenses with medium and maximum penalties are dominant.



The table above provides this chapter's suggested starting point for criminal offenses, distinguishing between those with low, medium, and maximum penalties and offenses committed by recidivists and organized criminal groups.

- Recidivists and perpetrators operating as part of an organized criminal group present a higher risk, so the starting point is higher for these categories. It should be clarified that the last category is sanctioned by Article 154 and the starting point of 2/3 is also valid for this Article. It should also be noted that the starting point does not apply to crimes for which life imprisonment is provided as a possible punishment if the court imposes such punishment. Regarding this matter, judges are instructed to examine Part I of the present Guidelines, more precisely Point III-Main punishments according to the CCRK.

While in peacetime many of the crimes related to armed conflicts are rare, the judiciary in Kosovo should focus on those that are more frequent and that damage the reputation of the Republic of Kosovo in the international arena. Given that human trafficking and smuggling remain quite widespread offenses in practice, courts are required to pay special attention when dealing with these cases. Some of the recommendations focus on the following points:

- When calculating the punishment, courts assess the relevant mitigating and aggravating circumstances, making sure that the circumstances related to the victims carry more weight in the calculation of the punishment as opposed to the personal circumstances of the defendant.
- In cases where courts consider that they do not have enough data regarding the mitigating and aggravating circumstances, they should schedule a sentencing hearing in the sense of Article 356 of the Criminal Procedure Code (even if parties have not requested such a hearing) thereby seeking more data and facts from the parties and/or the Probation Service to help in the adequate calculation of the punishment.

B. Relevant aggravating circumstances

i. Circumstances related to crimes in armed conflicts analyzed by international case law

As a rule, crimes during various armed conflicts have much different dynamics than crimes committed in peacetime. The International Criminal Tribunal for the former Yugoslavia is seen as an adequate tribunal for analysis of aggravating or mitigating circumstances for crimes of this nature. Below we are citing just a few of those references.

A high degree of participation of the convicted person in the criminal offense

Although there is no direct parallel in international practice to this factor, it can be considered in the context of a leadership position in a hierarchical structure. This conforms to the belief that leaders, particularly in organized hierarchical structures, should be punished to a greater extent than subordinates. As noted by the ICTY in the Stakic Trial :

'...as with white collar crimes, the defendant behind the direct defendant – the defendant in white gloves – might deserve a higher penalty than the one who physically participated depending on the particular circumstances of the case."[187]

Not surprisingly, the factor is most frequently cited by international tribunals in war crimes cases or genocide. In those cases, the existence of a leader, particularly in a formal hierarchical structure, was considered fundamentally important to the completion of the crime. Without the existence of the formal military structure and all the attendant circumstances that came with it, the crimes may never have occurred. Hence courts considered there needed to be aggravation of the offense. Although there are some international cases where aggravation does not take place, it predominantly occurs in situations where the leadership position was an element of the crime.

It is very interesting to see the nuances of the reasoning of ICTY in Plavsic, and how they have considered her role in the Presidency as an aggravating factor. The Trial Chamber in its judgment stated: *"The Trial Chamber accepts that the superior position of the accused is an aggravating factor in the case. The accused was not in the very first rank of the leadership: others occupied that position. She did not conceive the plan that led to this crime and had a lesser role in its execution than others. Nonetheless, Mrs. Plavsic was in the Presidency, the highest civilian body, during the campaign and encouraged and supported it by her participation in the Presidency and her pronouncements".*[188]

Indirect participation of the accused in the commission of crimes on the other hand should be linked to a better formulated theory of modes of liability, rather than being a mitigating circumstance. For example, in the opinion of the ICTY Appeals Chamber, "proof of inactive participation by a superior in the criminal acts of subordinates adds to the gravity of the superior's failure to prevent or punish those acts and may therefore aggravate the sentence…Failure to prevent or punish subordinate crimes is the relevant culpable conduct and lack of active participation in the crimes does not reduce that culpability".[189]

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[187] Case No. IT-97-24-T, Verdict, Prosecutor v. Milomir Stakic, International Criminal Tribunal for the former Yugoslavia, (July 31, 2003), Par.918.

[188] Case No. IT-00-39&40/1-S, Sentencing Judgment, Prosecutor v. Biljana Plavsic, International Criminal Tribunal for the Former Yugoslavia, (February 27, 2003) para. 57:

[189] Case No.IT-96-21-A, Judgment, Prosecutor v Zejnil Delalic, Adravko Mucic, Hazim Delic and Esad Landžo, International Criminal Tribunal for the Former Yugoslavia, (20 February 2001), Par.756-757 -737 also cited the Appeal Judgment in the Aleksovski case, par. 183.

As such, an act of assistance to a crime is a form of participation in a crime often considered less serious than personal participation or commission as a principal and may, depending on the circumstances, warrant a lighter sentence than that imposed for direct commission.

The same applies also to the unwillingness in the commission of crimes. Unwillingness should not generally play any role in the mitigation or aggravation of the offense. The factor 'willingness/eagerness' in the commission regards elements more properly related to the necessary men's rea for the crime(s) committed. The degree of involvement of the accused is already assessed (and accordingly weighed) in relation to the mental element, with no need to consider it in aggravation or mitigation a second time.

Concerning the possibility that the existence of a superior order be regarded as a mitigating circumstance for the accused who had to follow that order (i.e., a form of 'duress'), it should be specified that such a circumstance does not necessarily constitute a mitigating factor, and clearly does not grant a complete defense to soldiers. Certainly, for the case in which the defendant was a subordinate but also a willing participant in the criminal conduct, there will be no mitigation to his/her sentence. The existence of a superior order qualifies as a mitigating circumstance only when the subordinate commits a crime(s) not of his own will but under absolute coercion, as a result of the compulsory nature of the order received from his superior, disobedience to which could have endangered the accused own life.

A high degree of intent on the part of the convicted person;

One of the circumstances that, among others, leads to the conclusion of the level of intent for the commission of these acts is also the commission with premeditation.

As stated in the judgment of the ICTY Trial Panel in the Krstic case: *"Premeditated or enthusiastic participation in a criminal act necessarily reveals a higher level of criminality on the part of the participant. In determining the appropriate sentence, a distinction is to be made between individuals who allowed themselves to be drawn into a maelstrom of violence, even reluctantly, and those who initiated or aggravated it and thereby more substantially contributed to the overall harm".*[190]

Whether the criminal offense was committed with particular cruelty.

To some extent, this factor has been addressed by many International Tribunal cases concerning the gravity of crimes during conflicts. For example, in Blaskic case the Trial Chamber concluded: "*The fact that the crime was so horrific is a qualitative criterion which can be derived from its particularly cruel or degrading nature*". "*The cruelty of the attack is clearly an important consideration in determining the appropriate sentence. In this case, the heinousness of the crimes is established by the sheer scale and planning of the crimes committed which resulted in suffering being intentionally inflicted upon the victims regardless of age, sex or status".*[191]

The inclusion of the family members as victims in homicide cases has been recognized by the ICTY Trial Chamber, which stated: *"Along with the physical or emotional scars borne by the*

[190] Case No. IT-98-33-T, Judgment, Prosecutor v. Radislav Krstic, International Criminal Tribunal for the former Yugoslavia, (August 2, 2001), Par.711.
[191] Case No. IT-95-14-T, Judgment, Prosecutor v. Tihomir Baskic, International Criminal Tribunal for the former Yugoslavia, (March 3, 2000), Par.783.

victims, their suffering at the loss of loved ones and the fact that most of them are still unable to return to their homes to this day must also be mentioned".[192]

Whether the criminal offense involved multiple victims.

Given the great potential for these offenses to result in large-scale victimization, this is presented as a circumstance that should nevertheless be taken into account in aggravation. While observing the offenses of this chapter, we notice that in many of these articles (159-161), the sentence is higher based on the intent of the defendant and the degree of injuries or the death of the victims, however, it does not make a difference based on the number of victims. So, the legal maximums are the same regardless of the number of victims. Therefore, the court will look into this consideration when examining the circumstances in Article 70 Paragraph 2.5 of the CCRK.

Any abuse of power or official capacity by the convicted person in the perpetration of the criminal offense; and Evidence of a breach of trust by the convicted person

The reference in this circumstance is numerous in international practice, especially by international tribunals. A simpler example which although refers to war crimes, is very current and can be easily applied in daily local practice due to the defendant's profession as the case of doctor Ntakirutimana, where the Trial Panel in determining the sentence had considered the status of the accused as a doctor as relevant and the fact that he had misused his position by destroying lives instead of saving them and had violated the ethical obligation he owed to the community.[193]

The reasoning was similar when the Todorovic Trial Chamber observed that "[i]nstead, in his position as chief of an institution that is responsible for upholding the law, Stevan Todorovic actively and directly took part in offenses which he should have been working to prevent or punish. … his abuse of position of authority and people's trust in the institution clearly constitute an aggravating factor".[194]

Personal circumstances and character of the convicted person as a mitigating circumstance cited by international practice

Personal circumstances and good character of the convicted are common mitigating factors in sentencing structures throughout the world. The circumstance of good character has been addressed in many cases of the Hague Tribunal for the former Yugoslavia either to justify or not to justify its application as a circumstance. Thus, In Blaskic case, ICTY pointed out that *"the character traits are not so much examined in order to understand the reasons for the crime but more to assess the possibility of rehabilitating the accused."*. Nevertheless, just like in Furundjia case when the court was assessing whether to include the young age as mitigating, in both cases the Trial Chamber stated that "… in a case as serious as this and also insofar as many accused

[192] Supra note 62, par.115.
[193] Case No.ICTR-96-17-T, Judgment and Sentence, Prosecutor v. Elizaphan and Gorard Ntakirutimana, International Criminal Tribunal for Rwanda (TNPR), (21 February 2003).
[194] Case No.IT-95-9/1-S, Sentencing Judgment, Prosecutor v. Stevan Todorovic, International Criminal Tribunal for the Former Yugoslavia, (July 31, 2001), Par.61, also cited Aleksovski Appeal Judgment, par. 183; Appeal judgment in the Celebici case, par.745.

share these personal factors, the Trial Chamber must find that their weight is limited or even non-existent when determining the sentence."[195]

The 'good character' evidence, is related to the evaluation of aspects such as reputation, credibility, personality, and social conduct of the accused, is usually intended to show that the crime committed is out of character and, on the whole, aims at providing judges with more complete information concerning the life of the accused, his background and characteristics. In Sikirica case, the ICTY Trial Chamber concluded that evidence of good character should be rewarded: *"The Chamber has heard ample evidence of Dragan Kolundzija's efforts to ease the harsh conditions in the Keraterm camp for many of the detainees.... On the basis of the testimony as to his benevolent attitude towards the detainees, Dragan Kolundzija should receive a significant reduction in his sentence".*[196]

Age and health condition of the defendant

The difficulty with both factors is that there is no clear definition as to what constitutes youth or elderly as a mitigating factor. Some of the difficulties in the application of this factor can be seen in the practice of ICTY towards assessing 'young'. Generally, the Trial Chambers have, on average, considered 'young' to be between 19 and 23 years at the time when the crime occurred. While one might consider this average to be the outer limits of what might be considered young, it is not difficult to sympathize with its use. But there have been instances when the court went so far as to apply mitigation to someone well beyond that age. Thus, the determination of 'young' age depends on the type of crime committed and how much would be expected from a 'young' perpetrator to understand the gravity of his actions or ability to withstand extreme pressure from superiors.

In the Plavsic case advanced age of the accused was considered for two reasons: First, physical deterioration associated with advanced years makes serving the same sentence harder for an older than a younger accused. Second, an offender of advanced years may have little worthwhile life left upon release."[197]

Contrary to the Plavsic case, the ICTY had a very interesting approach in Simic case, while deciding whether the medical condition impacts the sentence has given a very broad reasoning on why such a condition not necessarily is considered as mitigating factor. In this case, the defense had presented a medical report stating that Mr.Simic's condition would require full-time medical attention for the remainder of his life; that he would also require daily assistance for personal hygiene, food preparation, moving his wheelchair, and transferring him from the bed to his wheelchair". Despite the medical report presented, considering the gravity of the crime committed by the defendant, the Trial Chamber observed that "…there is no indication in the medical report (Exhibit A) regarding the extent to which Milan Simić's life expectancy would be affected by virtue of being incarcerated. A medical condition that may at some future date affect life expectancy does not, in the opinion of this Trial Chamber, automatically give rise to a reduction

[195] Case No. IT-95-14-T, Judgment, Prosecutor v. Tihomir Baskic, International Criminal Tribunal for the former Yugoslavia, (March 3, 2000), Par. 782, cited IT-95-17/1-T, Prosecutor v. Anto Furundjia, Judgment, (December 10, 1998) para. 284.

[196] Case No. IT-95-8-S, Sentencing Judgment, Prosecutor v. Dusko Sikirica, Damir Dosen, Dragan Kolundzija, International Criminal Tribunal for the Former Yugoslavia, (November 13, 2001), para. 229.

[197]Case nr. IT-00-39&40/1-S, Trial Judgment, Prosecutor v. Biljana Plavsic, International Tribunal for the Former Yugoslavia, (27 February 2003) para. 95.106.

in sentence." It was the Chamber's opinion that only in exceptional circumstances or "rare" cases ill health should be considered in mitigation.

Additionally, although the Trial Chamber was aware that the detention facility could not meet the needs of Mr. Simic, it did not impact their decision for incarceration. The Chamber issued the decision and considered:

"It necessary to state that the prison facility to which Milan Simić will eventually be assigned should, as far as possible, be in a position to accommodate his medical needs…. Although sympathetic to the medical complications that Milan Simić has suffered and his current medical condition, the Trial Chamber is not satisfied that the medical problems are present to such a degree as would justify a reduction of the sentence. Milan Simic's medical condition is not to be taken into account as a mitigating factor in the determination of sentence."

General cooperation by the convicted person with the court, including voluntary surrender

However, this factor has had primary significance in sentencing in international tribunals due to the inherent nature of the proceedings. As their success relies heavily on inter-state cooperation, which can be problematic in the best of scenarios, courts have awarded mitigation to perpetrators who have willingly submitted themselves to the jurisdiction of the court. In the Erdemović case, the cooperation of the accused, his voluntary surrender, and the admission of guilt were considered mitigating circumstances: *"The Prosecution stated that they found no inconsistencies with the information which he gave them; their investigations have confirmed much of what he told them, indicating that the defendant is of an honest disposition. This is supported by his confession and consistent admission of guilt, in particular by the fact that he came forward voluntarily and told of his part in the massacres before his involvement was known to any investigating authorities"*[198]

Regarding crimes of this nature, one should single out the circumstance of the *release of hostages* from Article 70 paragraph 3.13[199] of the CCRK which appears as a very adequate circumstance to be considered as a special mitigating circumstance fulfilling the condition from Article 71 paragraph 1.2 for mitigation of the punishment below the minimum punishment or imposition of a lesser type of punishment.

Guilty Plea

Taking into account in particular the very serious nature of the offenses from this chapter, the guilty plea should be excluded from the automatic calculation of the penalty under the legal minimum. The court must assess the benefits of this admission. In the Sikirica case, the Chamber gave this assessment regarding the timing of the guilty plea: "While an accused who pleads guilty to the charges against him prior to the commencement of his trial will usually receive full credit for that plea, one who enters a plea of guilt any time thereafter will still stand to receive some

[198]Case nr. IT-96-22-Tbis, Verdict, Prosecutor v. Drazen Erdemovic, International Criminal Tribunal for the Former Yugoslavia, (March 5, 1998), para. 16.i.

[199]In cases where the person is convicted for the criminal offense of taking hostages, kidnapping or illegal deprivation of liberty or as defined in articles 169, 191 or 193 of this Code, the contribution to the effective release or to bringing the abducted taken or stopped person alive, or the voluntary provision of information that contributes to identification of others responsible for a criminal offense.

credit, though not as much as he would have, had the plea been made prior to the commencement of the trial."[200]

ii. Circumstances mainly for offenses from articles 163-166

Circumstances referring to acts of gender-based violence with a focus on Human Trafficking.

When talking about the aggravating circumstances in cases, especially of human trafficking, the judiciary must take into account that these offenses mainly fall within the regulatory framework of the Istanbul Convention, as they are also considered acts of gender-based violence, as they affect women disproportionately more. Istanbul Convention[201] (which has already been integrated into the Constitution of the Republic of Kosovo) Article 46 lists several circumstances that can be taken into consideration when calculating the sentence for the offenses covered under this Convention. The following table provides a combination/adaptation of circumstances from the CCRK and the Istanbul Convention clarifying how one circumstance corresponds to the other. As it can be observed in the following table and in the circumstances from the CCRK, the circumstances from the Convention can also serve as an indicator or factor which can be applied alongside the aggravating circumstances of the CCRK, therefore you can find them repeated in the table:

From Article 70 par. 2 of the Criminal Code	From Article 46 of the Istanbul Convention
A high degree of participation in crime by the convicted person. A high degree of intent on the part of the convicted person.	Criminal offenses or similar criminal offenses have been committed repeatedly.
The presence of actual or threatened violence in the commission of the criminal offense.	The criminal offense was committed with extreme levels of violence. The offense was committed with the use or threat of a weapon. Criminal offenses or similar criminal offenses have been committed repeatedly.
Whether the criminal offense was committed with particular cruelty. Whether the criminal offense involved multiple victims. Whether the victim of the criminal offense was particularly defenseless or vulnerable. The age of the victim, whether young or elderly.	The criminal offense was committed against a vulnerable person due to special circumstances. The offense was committed against or in the presence of a child.
The extent of the damage caused by the convicted person...	Criminal offenses or similar criminal offenses have been committed repeatedly.

[200]Case nr. Case No. IT-95-8-S, Sentencing Judgment, Prosecutor v. Dusko Sikirica, Damir Dosen, Dragan Kolundzija, International Criminal Tribunal for the Former Yugoslavia, (November 13, 2001), para. 150

[201] Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210)], 01/08/2014.

	The criminal offense has caused serious physical or psychological damage to the victim.
Whether the criminal offense was committed as part of the activities of an organized criminal group;	The criminal offense is committed by two or more people acting together.
Any relevant prior criminal convictions of the convicted person.	Criminal offenses or similar criminal offenses have been committed repeatedly. The perpetrator was previously convicted for criminal offenses of a similar nature.
If the offense is committed within a domestic relationship.	The criminal offense was committed against a former spouse or partner or a current spouse or partner recognized under the domestic law, by a family member, a person who lives with the victim or a person who abused his or her authority;

Courts should take into account that the aggravating circumstances recommended in the Istanbul Convention should become part of our judicial practice precisely because the same has become part of our legislation by its incorporation into the Constitution of the Republic of Kosovo.

What stands out as innovation compared to the circumstances foreseen under the CCRK are the requirements to be taken into consideration:

- When criminal offenses have been committed repeatedly.
- When criminal offenses have been committed in the presence of a child.

Consideration of the existence of the organized group in these activities is of particular importance when determining the sentence, as it not only indicates a higher degree of individual responsibility, but also a higher degree of damage and violence exercised or threatened. The response of the justice system should always be tougher towards this category of perpetrators as well as recidivists.

The degree and form of violence and coercion are some of the most important factors in the aggravation of punishment, therefore they deserve special attention. In order to identify forms of violence but also other elements of the criminal offense of trafficking, courts are instructed to consider the list of indicators[202] approved by the Government of Kosovo which are based on international standards, and which enable the justice system to better understand the forms in which these elements can be expressed.

C. Mitigating circumstances for offenses from Articles 163-166

Although all circumstances from paragraph 3 of Article 70 can be applied to the crimes of this chapter, the courts must be extra careful in calculating their weight. It is impossible to make a template of the circumstances that have more weight than others since their application and weight depends a lot on the type of offense, the degree of victimization and/or damage caused as well as person's level of responsibility. This is because the last three must always have the main role in determining the type and height of the punishment.

[202] The Government of the Republic of Kosovo, Administrative Instruction No. 01/2014 for early identification of victims of human trafficking by consular services, border police and labor inspectorate, 04/03/2014.

It should be emphasized that the good character of the defendant or even his/her prior behavior should not be taken into consideration in the trafficking offenses, but even if considered, their weight should be minimal in relation to the other circumstances of these offenses or aggravating factors. Moreover, the character of the defendant should not in any case be taken as a special mitigating circumstance for mitigating the sentence below the legal minimum.

In cases of guilty pleas, the court must be careful so as not to automatically apply mitigation below the legal minimum as the serious nature of the offenses in this chapter generally does not justify automatic reduction without considering other circumstances.

D. Applicability of punishments and other measures

- *Accessory punishment* - In case of the involvement of an official person in the acts of trafficking, in addition to the main punishment the courts are instructed to impose an accessory punishment from Article 62, respectively Article 63 of the Criminal Code, with a special focus on the confiscation of assets, proceeds of crime and/or instrumentalities.
- *Punishment of fine* - Given that both Articles 164 and 165 of the Criminal Code foresee the imposition of a fine, the court must always take into account that fines imposed must be commensurate to the defendant's financial situation, as required by Article 69 par. 5 of the Criminal Code and elaborated in the special Guidelines for the imposition of criminal fines.
- *Victim Compensation* - Compensation of victims should always be at the center of the court's decision-making and should be ordered especially in cases where we are dealing with alternative case resolution. In cases where the determination of non-material damage is not possible in criminal proceedings, the court must make an effort to order restitution for reasonable material damages. The victim restitution has precedence over the imposition of a fine on defendants. Courts should instruct victims about the possibility of submitting compensation applications to the Victim Compensation Program.
- *Confiscation of assets* - the offenses within this Chapter that are related to trafficking, smuggling of migrants or slavery and forced labor are offenses that are carried out for the purpose of profit, therefore the court must ensure that, in addition to the decision on punishment, it also addresses the financial aspect and profit of the defendant/s.
- *Waiver of punishment* - Even though these crimes are of serious nature, CCRK in Article 154[203] par.3 provides for the possibility of waiving the punishment if a member of the criminal group reports the criminal group that got organized for the purpose of committing any of the crimes from Articles 142-150, before committing the crime.

[203] Organization of groups to commit genocide, crimes against humanity and war crimes.

III. Chapter XVI Criminal offenses against life and body

General overview

Criminal offenses under this chapter are criminal offenses that have been given special importance in all periods, and are also given special importance by the legislator, thereby assigning high importance to the protection of protected items. In addition, it should be noted that the right to life is also guaranteed by international instruments, which are also embedded into the Constitution of Kosovo, and as such are in direct application. The right to life is an absolute and unlimited right. The Convention on Human Rights and Freedoms of 1950, and Article 1 of Protocol No. 6 of 1983 suggest that the death penalty be abolished, which was already decided in 1999 in the Republic of Kosovo, when the death penalty as corporal punishment was replaced first with long-term imprisonment, and later with the life sentence. The criminal offense of murder is a very serious criminal offense, because it affects the greatest value of all – the human life. Criminal law, however, recognizes three types of murder, namely:

- Ordinary murders, or a basic definition of murder,
- qualified murders, and
- privileged murders,

and therefore, in terms of the punishments for these crimes, there should be differences.

The offenses covered by this chapter may be divided into three groups, on the basis of the gravity such offenses represent:

- Maximum punishment, starting at rather high thresholds of 5, 10, 15 years of imprisonment, and maximum of 20 years or even life sentence.
- Moderate punishment, with sentences ranging up to 10 and 15 years; AND
- Low punishment, with sentences ranging up to 6 months, 1, 3 and 5 years.

A. The starting point

- To explain the above distinction, it is necessary to emphasize that the starting point is NOT APPLIED for offenses punishable with imprisonment for life if the court imposes this

sentence. Judges are advised to see Part I of these Guidelines, respectively Point III – Principal Punishments as per the CCRK.

B. Relevant aggravating circumstances

When weighing aggravating and mitigating circumstances, it should always be taken into account that any aggravating and mitigating circumstance will have been weighed correctly only when assessed in conjunction with each other, and in relation to other circumstances that are relevant in the case of weighing the gravity of the sentence to be imposed. An isolated assessment of either aggravating or mitigating circumstances cannot generate a comprehensive overview of the gravity of the criminal offense and the perpetrator, which is an essential requirement for a fair assessment of the sentence.

In deciding on the type and level of the sentence, the relevant circumstances provided for in Article 70, para 2 of the CCRK must always be taken into consideration, however, care must be taken not to consider the elements of the criminal offense as aggravating circumstances, especially when handling the offense of aggravated murder, as per Article 173 of the CCRK:

- *deprives a child of his or her life; Article 173, para, sub-para 1.1 of the Criminal Procedure Code cannot be taken as an aggravating circumstance, in line with Article 70, para 2, sub-para 2.7, which would imply the age of the victim. This is because too often, the courts of first instance erroneously consider an element of the criminal offense as such to be an aggravating circumstance.*

- *High participation rate of the convicted person.* - In cases involving especially the criminal offense of murder, as per Article 173 of the CCRK, serious murder in Article 174 of the CCRK, light bodily injury, as per Article 185 of the CCRK, and grievous bodily injury as per Article 186 of the CCRK, the court must address the circumstances as per paragraph 2.1 of Article 70, in due consideration also of the extent of involvement of the person in the commission of the criminal offense, or in cases of co-perpetration or criminal enterprise, the extent and or manner of involvement of such person in the commission of such offenses. Conversely, the circumstance in paragraph 3.5 of this same Article may contribute to the mitigation of the sentence.

- *the high extent of intent on the part of the convicted person or, in fact, the degree of criminal liability*, may also be taken as an aggravating circumstance, but also as a mitigating circumstance. One must bear in mind that the degree of criminal liability is proven by the very fact of finding culpability. Since criminal liability consists of responsiveness and culpability, therefore the person who is not responsive cannot be liable. However, Article 17 of the CCRK provides that "a perpetrator of a criminal offense is criminally liable if he or she is mentally competent and has committed the criminal offense intentionally or negligently". Hence, based on the above, such circumstances may be considered as both aggravating and mitigating circumstances. Thus, the fact that a person committed a crime in a state of substantially diminished mental capacity does not mean that there shall be no criminal liability, but that such a fact would only be taken as an obligatory mitigating circumstance. Whereas, if such a person is found to be dangerous for the environment, then the court may impose, additionally to the sentence, a measure of mandatory psychiatric treatment under detention in a health care institution (Article 85 of the CCRK) or mandatory psychiatric treatment at liberty (Article 86 of the CCRK). This would depend on the degree of dangerousness of the perpetrator of the criminal offense. On the other hand, the law

differentiates between intent (direct intent and eventual intent) and negligence, both in terms of definition but also in terms of the degree of criminal liability, and the sentences for such types of liability. Therefore, the court must make a distinction and always take into account the intent and the type of such intent, but also negligence, as a lighter form of culpability, which is punishable only when expressly foreseen by law.

- Even other aggravating circumstances as provided by Article 70 of the CCRK may apply in the offenses under this chapter, always in due effort to avoid compounding with the elements of the criminal offense itself. For elaboration purposes, let us take the *extent of damage caused* as an aggravating circumstance, as provided by para 2.8 of Article 70 of the CCRK, thereby making sure not to compound with the elements of the criminal offense. This is due to the fact that the offenses under this chapter always harm life and body, which means that this fact itself renders impossible the inclusion of an item under Article 2.8 as an aggravating circumstance.

- *Circumstances related to the victims*- All the circumstances from paras 2.4-2.7 may be relevant, depending on the type of offense committed. Many of such circumstances referring to the victims, and the higher degree of hazard they are exposed to, are already included as elements of the offense itself in Article 173 of the CCRK, and therefore, care must be taken not to compound them with aggravating circumstances. Courts should be cautious to avoid such compounding.

A circumstance used by the international tribunals, and recently also used by the Kosovo courts is the impact of the murder on the victims' family:

"The impact of the criminal offense on the victims (the injured party, the deceased's family) was considered as an aggravating circumstance since in this specific case, the victim left behind his wife and two daughters, whose lives will be more difficult after the death of the deceased, especially since one of the daughters is a minor, therefore in the specific case the criminal offense has created consequences and has also affected third parties, the deceased's family members, especially his minor daughter."[204] This element should not be addressed only in terms of determining compensation for family members, but also in the context of the damage and the gravity of the perpetrator's crime. The impact on family members is also recognized by the EU Directive of 25 October 2012, which emphasizes that "It is possible that family members of victims may also be harmed as a result of the criminal offense. In particular, family members of a person whose death was directly caused by a criminal offence may suffer harm as a result of the offence. Such family members, who are indirect victims of the offence, should also benefit from the guarantees provided for in this Directive."[205]- *the circumstances under paras 2.8-2.12 and 2.14* are also elements of the criminal offense, and as such, cannot be taken as aggravating circumstances, especially in the cases of the criminal offense of aggravated murder under Article 173 of the CCRK.

It is of particular importance the circumstance foreseen in paragraph 2.12, whether expressed as a constituent element of the criminal offense or as an aggravating circumstance. This paragraph provides for a number of grounds that aggravate the severity of this offense when it is committed

[204] Taken from judicial practice in the Republic of Kosovo
[205] Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

as an act of hatred against persons, groups of persons or property motivated by the following reasons:

a. race, color, language, religion, national or social origin,

b. gender, gender identity,

c. relation with a community, property,

d. economic status,

e. sexual orientation, birth,

f. disability or

g. any other personal status,

h. or due to proximity to persons with the above-mentioned characteristics.

For example, let's examine in principle the murder motivated by gender. In recent years, the term "Gender-based violence" or even "Femicide" has been used massively. The term 'Femicide' was first defined by the United Nations (UN) as "the killing of women by men motivated by hatred, contempt, pleasure or a sense of ownership of women," and later as "the killing of women by men because they are women." Femicide encompasses a wide range of violent acts, such as murder in the context of IPV, sexual murder, killing of prostitutes, honor killings, infanticide of female babies and dowry-related deaths, although some of them do not apply directly to the European context.[206] Another definition used by the UN High Commissioner for Human Rights considers femicide: "The killing of women because they are women, whether committed within the family, a family or other interpersonal relationship or by anyone in the community, or whether it is committed and tolerated by the State or its agents."[207] Such definitions are countless and many countries around the world, but also in the region, have begun to incorporate this definition within their domestic legislation. Therefore, given the importance of these categories of murders and for the purpose of general prevention, courts should pay due attention to decision-making in such gender-motivated cases. The same principle applies to other types of offenses within this chapter.

- Courts must take special care when imposing life imprisonment, as the most severe sentence provided, as this must have a well-reasoned justification. Thus, even though this sentence is provided by the CCRK, the sentence may be imposed only in the most serious criminal offenses, committed under particularly aggravating circumstances, or in criminal offenses causing severe harm or consequences (Article 41 of the CCRK). It does not suffice only to underline that the criminal offense was committed under particularly aggravating circumstances, but they must also be reasoned, and indicated in terms of what the circumstances are, or their severe consequences. Although there is very little case law in this regard, because first, such sentences have only been imposed rarely, it has been observed that their reasoning is insufficient, and often do not coincide with the particularly aggravating circumstances as required by the provision of Article 41 of the CCRK.

[206] European Institute for Gender Equality, EIGE, Glossary of definitions of rape, femicide and intimate partner violence, 2.2.3 Proposed definition of femicide, p. 28, 2017
[207] Ibid, p. 18.

C. Relevant mitigating circumstances

A guilty plea, or a guilty plea agreement, in crimes punishable by maximum and moderate sentences under this Chapter, should not be conceived automatically to be mitigating under the legal minimum in cases in which such a plea is not accompanied by other exceptionally mitigating circumstances. An example of a mitigating circumstance that can be taken as an exceptionally mitigating circumstance is circumstances under paras 3.2, 3.8, 3.9 of Article 70 of the CCRK.

Bearing in mind that the commission of some of these criminal offenses causes a disturbance in the balance of vulnerable persons, such as unlawful termination of pregnancy (Article 178), forced sterilization (Article 179), female genital mutilation (Article 180), harassment (Article 182) and sexual harassment (Article 183), the courts must be very careful in the weight they give to the mitigating circumstances. This especially refers to the very subjective and personal circumstances of the perpetrator, which should have minimal weight in relation to other aggravating circumstances, or even the liability itself and the extent of damage caused.

Even the other mitigating circumstances listed in Article 70, paragraph 3 of the Criminal Code, must be reasoned and not just described as a circumstance, without proper analysis. Care must be taken especially when weighing the sentence when dealing with the criminal offenses of murder under Articles 172 and 173, in which, it is often observed from the judgments that the courts do take into account personal circumstances (such as the fact that the defendant is married, a father of x children, and the poor economic situation) even though there may be a case in which the victim is the very spouse of the defendant.

D. Application of other punishments

- *Imposing a suspended sentence* - may be suitable only for crimes with low or moderate punishment, but always taking into account the degree of liability of the perpetrator, and the degree of harm caused. This punishment is justified in cases in which where there are particularly mitigating circumstances, respectively in cases under Articles 181, 182, 184 and 185 of the Criminal Code, or when the involvement of the defendant in committing the offense is minimal compared to others.

- *Imposing an order for community service* - may be appropriate only for crimes with low punishment, and if there are no aggravating circumstances that justify a prison sentence.

- *Imposing a fine* - Article 181, paragraphs 1 and 2, present a category of the lightest offenses under this chapter, therefore, a fine is provided as a possibility of imposing as a main sentence. The same applies in the offenses under Article 182, paragraph 1, Article 183, paragraph 1, Article 184, paragraph 1 of the CCRK. In order for the fine to have the proper effect, it must be ensured that the relevant fine is imposed in due account of the financial status of the perpetrator, pursuant to para 5 of Article 69 of the CCRK, and the Supreme Court's Guidelines on criminal fines.

- *Imposing accessory punishments, as per Articles 62 or 63* - is recommended in cases in which an official person is involved in committing the offenses under this chapter. In many cases, the imposition of this accessory punishment shall have a greater effect and may meet the aim of the punishment itself, compared to other forms of punishment. Also, two amendments to the CCRK

(2019 and 2023) expand the range of reasons for which a person may be prohibited from exercising his/her function. Thus, Article 62, paragraph 4, provides that a person may be prohibited from exercising his/her function for 1-5 years if he/she has been convicted of domestic violence. The 2023 amendments to the CCRK have also brought several innovations in this regard. However, these changes will be discussed more extensively in the analysis of the relevant chapters.[208] Given that many of the criminal offenses of this chapter also fall within the definition of domestic violence under Article 248, a brief reference has been made.

- Imposing other accessory punishments might not be rational, considering the nature of the offenses under this chapter. For example: The expulsion of foreigners from the territory of the Republic of Kosovo, under Article 67 of the CCRK.

- *Judicial admonition* - In accordance with the principles of paragraphs 2 and 5 of Article 82, it may be imposed in lighter offenses under this Chapter and may not be applied when the perpetrator has a criminal record. For example: Article 184, paragraph 4, and Article 185, paragraph 4, provide that this punishment may be imposed when a perpetrator was provoked by the inhumane and cruel behavior of the victim.

- Waiver of punishment may be applied to the offenses of this chapter, if the legal conditions according to the general part of the CCRK are met.

Furthermore, Article 187, Paragraph 3, is very specific, stating: "A person is not criminally liable under paragraph 1 of this article if he or she participated in a fight through no fault of his or her own or merely to defend himself or herself or to separate other participants in the brawl."[209]

[208] See Chapters XX and XXI.
[209] Criminal Code of Republic of Kosovo No. 06/L-074, Article 187, Participation in a brawl, Official Gazette of Republic of Kosovo/No.2, 14 January 2019, Pristina.

IV. Chapter XVIII Criminal offenses against human rights and freedoms

General observations

The Republic of Kosovo in Article 7 of the Constitution has defined the values on which the constitutional order is based, such as the principles of freedom, peace, democracy, equality, respect for human rights and freedoms, and the rule of law, non-discrimination, the right of property, environmental protection, social justice, pluralism, separation of state power and market economy. Whereas in Article 21 (General Principles) it is determined that basic human rights and freedoms are indivisible, inalienable, and inviolable and are the basis of the legal order of the Republic of Kosovo.

According to Article 22 of the Constitution, human rights and freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and have precedence, in case of conflict, over the provisions of laws and other acts of public institutions: (1) Universal Declaration of Human Rights; (2) the European Convention for the Protection of Fundamental Human Rights and Freedoms and its Protocols; (3) International Convention on Civil and Political Rights and its Protocols; (4) Framework Convention of the Council of Europe for the Protection of National Minorities; (5) Convention on the Elimination of All Forms of Racial Discrimination; (6) Convention on the Elimination of All Forms of Discrimination against Women; (7) Convention on the Rights of the Child; (8) Convention against Torture and Other Cruel, Inhuman and Degrading Treatment.

Chapter XVII of the Criminal Code protects fundamental human rights and freedoms. Freedom means the individual's ability to behave in one or another way, while rights are conceived as authorizations that are recognized to people and citizens by the constitution, law, or any other national or international legal act. The content of the protected rights defines criminal offenses against freedoms, including violence, unlawful deprivation of liberty, and kidnapping. The group of crimes against human rights includes the violation of equality of citizens, the violation of the right to exercise legal remedies. This chapter defines 17 criminal offenses, most of which can be committed by any person. Some of these crimes can only be committed by official persons, such as the unlawful deprivation of liberty committed by an official person (193 par. 3), Coercion to obtain statements (Article 193 par. 3), (Torture, Article 196), etc..

In relation to culpability, criminal offenses against freedoms and human rights can only be committed with intent, and the possibility of negligence is not foreseen. To consider that they have been committed, in addition to intent, some of these criminal offenses also require a specific purpose. Perpetrators that violate the values protected in this chapter must be subject to the appropriate punishments because the nature of these acts violates highly regarded freedoms and fundamental rights such as equality, liberty, free will to give statements, the right not to be subjected to torture under any circumstances as an absolute right, the right to enjoy the inviolability of the home, the protection of privacy, the right to public assembly, and the right to exercise legal remedies. As such, the category of these rights and freedoms are guaranteed by the Constitution and key international instruments of human rights and freedoms.

The levels of punishments for criminal offenses by chapter vary from a fine for the lightest forms, to a prison sentence of 1, 3, 5, 10, 12, or 15 years, as well as a life sentence, provided for the criminal offense of kidnapping from article 191 par.3 of the CCRK.

Criminal offenses against human rights and freedoms from Chapter XVII are - Article 190 Violating equal status of citizens and residents of the Republic of Kosovo, Article 191 Kidnapping, Article 192 Coercion, Article 193 Unlawful deprivation of liberty, Article 194 Coercion to take statements, Article 195 Mistreatment during exercise of official duty or public authorization, Article 196 Torture, Article 197 Infringing inviolability of residences and premises, Article 198 Unlawful search, Article 199 Infringing privacy in correspondence and computer databases, Article 200 Unauthorized disclosure of confidential information, Article 201 Unauthorized interception, Article 202 Unauthorized photographing and other recording, Article 203 Violating orders for covert or technical measures of surveillance or investigation, Article 204 Preventing or hindering a public meeting, Article 205 Preventing exercise of the right to use legal remedies, Article 206 Preventing printing or distribution of printed materials and broadcasting of programs.

According to the level of punishment, the aforementioned criminal offenses can be divided into three groups:

- High imprisonment penalties with a minimum of 5 and 15 years of imprisonment and a maximum of 15, 25 (general maximum), or life imprisonment;
- Average imprisonment penalty with sentences of up to 10 years of imprisonment; and
- Low imprisonment penalty starting with fines, 3 months, 6 months, 1, 3 and 5 years.

As noted from the penalty levels for criminal offenses under the chapter, there is a big difference between the minimum penalty of a fine and a minimum of 3 months of imprisonment and the penalty for offenses with a minimum of 5 years of imprisonment.[210] (up to 25 years as a general maximum), maximum 15 years imprisonment[211] up to life imprisonment[212].

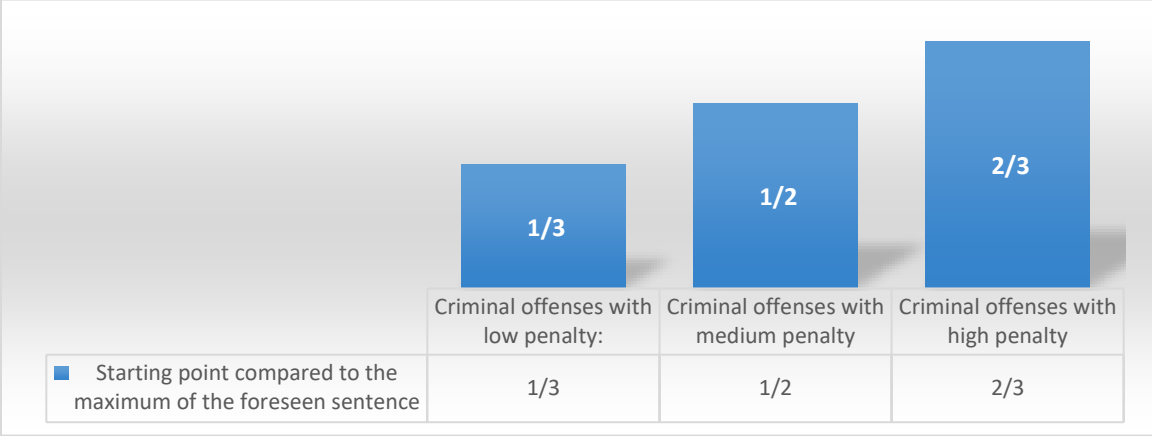
Considering the weight and seriousness of each criminal offense, when determining the sentence, the court must take into consideration in particular the degree of culpability of the perpetrator in the commission of the offense and the damage caused. The degree of culpability will be assessed taking into account the circumstances and characteristics deriving from each case both in relation to the perpetrator and in the context of the objective circumstances of the offense. The degree of damage will be determined depending on the case, based on the extent the injured party has been harmed, what are the concrete consequences and what is their intensity and duration, are the consequences repairable, etc.

A. Starting Point

Hereunder you will find some recommendations for categories of criminal offenses against human rights and freedoms:

[210] Code No. 06/L-074, Criminal Code of the Republic of Kosovo, Article 193 Unlawful deprivation of liberty, paragraph 3, Official Gazette of the Republic of Kosovo / No. 2/14 January 2019, Prishtinë.
[211] Code No. 06/L-074, Criminal Code of the Republic of Kosovo, Article 196 Torture, Official Gazette of the Republic of Kosovo / No. 2/14 January 2019, Prishtinë.
[212] Code No. 06/L-074, Criminal Code of the Republic of Kosovo, Article 191 Kidnapping, paragraph 3, Official Gazette of the Republic of Kosovo / No. 2/14 January 2019, Prishtinë.

- The following table provides the suggested starting point for criminal offenses from this chapter, distinguishing between those with low, medium and maximum penalties and offenses which carry the sentence of life imprisonment.
- The level of penalty for criminal offenses is a legal mater, this categorization is simple, it is based exclusively on the degree of punishment, making a division which helps determine the starting point which judges can use as orientation point to determine and impose an adequate punishment.



As can be seen from the table, for criminal offenses with low penalties, the starting point for sentencing is 1/3 of the prescribed punishment, depending on the aggravating or mitigating circumstances, it moves up or down from this position. For a number of criminal offenses, low penalties have been foreseen for both the basic form as well as the privileged form.

For criminal offenses with an average penalty, that include criminal offenses of 5-10 years of imprisonment, the starting point of 1/2 of the punishment has been determined, taking into account the weight of the criminal offense, depending on the circumstances applicable in the concrete situation, the court will move up in the direction of the maximum or down in the direction of the minimum sentence.

For criminal offenses with a maximum penalty, the starting point of 2/3 applies. Regarding crimes for which life imprisonment is provided as possible punishment, the starting point DOES NOT APPLY if the court imposes such punishment. Regarding this matter, the judges are instructed to examine Part I of the present Guidelines, more precisely Point III-Main punishments according to the CCRK.

Moving from the starting point does not mean a mechanical quantitative count of aggravating or mitigating circumstances, but the nature and quality of circumstances have a decisive and influential impact on the sentence, each of the circumstances is weighed alone, and then in connection with the totality of circumstances, in this context its concrete impact and impact on the punishment is assessed. In general, when taking steps in the sentencing process, judges are required to build a unique approach to determining the sentence, so the first step is to identify the criminal offense with its given legal qualification to determine the category of criminal offenses in which it is classified, namely in the category with low, medium or high penalty. Then they will be faced with a multitude of circumstances provided by the context of the criminal offense and the factors related to the perpetrator of the criminal offense. Their identification, and subsequent

combination of these factors, should result in the tailoring of a punishment which may be more or less severe from the initial determination.

The unified approach does not present the same outcome of punishments, as this will be determined by the circumstances of each specific case, however, it will ensure consistency in the punishments imposed, thereby avoiding unjustified differences for analogue cases, leaving sufficient space for differentiation in sentencing to reasonably reflect the particularities and characteristics of each case.

B. Aggravating circumstances

For adequate sentencing, special importance needs to be given to the circumstances in which the criminal offense was committed, both the subjective ones referring to the perpetrator and the objective ones.

The degree of criminal responsibility of the accused, is one of the most important factors in this regard if he is responsible, or if there are circumstances that affect the degree of criminal responsibility and the form of culpability - direct intent. Are there factors that show that the accused acted with premeditation, determination, and persistence in committing the criminal offense, or the decision to commit the criminal offense was taken on the spot, and it is not a case of premeditated intent, the motives for which the criminal offense was committed, etc., will have their role and effect in punishment.

The extent of the damage, is another relevant component in sentencing, what is the damage and to what extent was it caused by the criminal offense, what are the consequences for the victim and the community, is the damage repairable, did the accused try to minimize or hide the damage. Consequently, the court will pay special attention to the nature of the damage, which will depend on the personal characteristics and circumstances of the victim, in this context the impact of a certain crime that has had on the victim in an all-encompassing way is appreciated.

Criminal offenses against human rights and freedoms violate the fundamental values on which a society is built, as explained above, it is important to assess the extent to which these values have been specifically violated and damaged in this context.

To determine the most accurate level of culpability, we use factors such as: *motive, planning, and spontaneity*. Circumstances must be assessed in situations where the accused *intentionally* causes more harm than necessary to commit such a crime, or *when targeting a vulnerable victim* (because of their old or young age, disability, or because of the work they do).

In practice, there may be situations where extremely serious damage that is beyond the intent of the perpetrator is caused, in such cases, culpability will be significantly affected by the degree to which the damage could have been foreseen. If the criminal offense has caused much more, or much less damage than the accused intended or anticipated, depending on these circumstances they may be given more or less weight in light of the circumstances of the concrete case.

Aggravating circumstances separately

-*Abuse of power or official position* from Article 70 par. 2.9, must be taken into account in all cases where we are dealing with these criminal offenses. However, for many of the offenses of

this chapter, the case when the offense is committed by an official person is considered as a qualified form of offense, so the double count of the element with the aggravating circumstance should be avoided.

- *In particular, by their nature, criminal offenses of this category, committed by officials* are quite disturbing due to the fact that we are dealing with persons who based on the position they hold are expected to contribute to the strengthening of the rule of law and justice in society. In terms of the concrete circumstances related to the type of authorizations of the official position, hierarchy, the high-ranking perpetrators with important and specific authorizations, should receive more serious punishments, based on the assessment of concrete consequences that may have affected both the victim and the community.

-*Previous convictions of the accused* - It is especially necessary to analyze the type and nature of criminal offenses for which he was previously convicted, such as:

a) the nature of the criminal offense, its connection, and relevance to the current offense;
b) the time that has passed since the previous conviction.

In terms of prior convictions, it may be reasonable to take into account previous criminal precedents, and the sentence should be kept in proportion to the seriousness of the actual offence(s). The effect of previous convictions depends on the special characteristics of the accused's previous criminal case. Consequently, any effect of prior criminality should be reduced or nullified when there has been a substantial period without criminality prior to the actual offense being tried, or when the actual offense is of a minor nature.[213]

- *High degree of participation by the convicted person* - To what extent was the person engaged in the commission of the criminal offense, or in cases of co-conspiracy or criminal association, to what degree and manner was the person involved in the commission of these offenses? Conversely, the circumstance from paragraph 3.5 of this same Article may also affect the mitigation of the punishment.

- *whether the criminal offense was committed as part of the activities of an organized criminal group*, circumstances from paragraph 2.12 of article 70 of the CCRK. The fact that the criminal offense was committed within the framework of the activity of an organized criminal group indicates a high degree of dangerousness, a serious violation of values, this is a clear indicator that the punishment should be moved up from the starting point in terms of aggravation. The existence of this circumstance in principle has undoubtedly a dominant character over the mitigating circumstances that may exist. However, as was the case with the official person, the organized criminal group is presented as an element of the criminal offense in some cases, so double counts should be avoided.

- *The criminal offense committed by two or more persons in cooperation or in a group* - is considered an aggravating circumstance. The accused who acted in cooperation or in a group affects the increase of his degree of criminal responsibility. When the victim is confronted by two

[213] Recommendation No. No. R(92)17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing, (adopted by the Council of Ministers on 19 of October 1992). D. Previous convictions, 3.

or more people, it is a significant factor that will likely make him more afraid and feel powerless to defend himself.[214]

-*Committing the act with brutality and cruelty*, causing the high intensity of suffering and hardship on the victim.

-*Long-term planning and premeditation for the commission of the criminal offense* - speaks about the offense committed in cold blood, with persistence and well thought out.

-*Family members present, especially the presence of children/serious concerns* - the criminal offense was committed in the presence of family members, especially children. A circumstance will be taken as aggravating in cases of the presence of family members, especially children as they may suffer serious discomfort, and this stressful event may be accompanied by traumatic consequences for them.

-*Committing a criminal offense driven by ulterior motives* - as such motives which drive the perpetrator to commit the criminal offense, selfishness, jealousy, careerism, revenge, blood feud, envy, pride.

-*Substantial impact on infringement of a right or freedom* - the circumstance will be assessed as having had a serious impact, which means that it has influenced to the extent that the right and freedom of a person has been significantly affected, by also assessing its outcome, such as the deprivation of the exercise of legal remedies, which as a result, caused irreparable or substantial damages on the victim.

-*If the offense was committed through coercion, intimidation or exploitation* - These can be used provided that they are not elements of criminal offenses.

Other aggravating circumstances provided for by Article 70 of the CCRK may also be applicable in the offenses under this chapter, always by being careful to avoid overlapping them with the elements of the criminal offense, for example, the degree of the damage caused can be considered as aggravating circumstance

Circumstances related to victims - All circumstances from pars. 2.4-2-7 may be relevant depending on the type of crime committed. Circumstances related to the victims can be taken as aggravating, however, caution is advised so as to avoid a double count.

C. Mitigating circumstances

The circumstances defined under Article 70 par.3 of the CCRK can be considered as mitigating circumstances. Considering the nature and diversity of these crimes, courts should be careful depending on the concrete crime and give due weight to mitigating circumstances. In particular, the degree of criminal responsibility and concrete damage caused**.**

-*The guilty plea or the guilty plea agreement* in the crimes with maximum and average penalty according to this Chapter, should not be automatically considered for mitigation below the legal minimum in cases that are not accompanied by other extraordinary mitigating circumstances.

[214] Andrew Ashworth, Sentencing and Criminal Justice Edition (Law in Context). Edition 5, 164-165, Publisher, Cambridge University Press (2010).

- *Evidence that the convicted person played a relatively minor role* in the commission of criminal offense; The fact that the person played a minor or subordinate role if he acted with others/performed a limited role under direction.

- *The fact that the convicted person participated in the criminal offense not as the principal perpetrator* but through aiding, abetting, or otherwise assisting another; In the forms of cooperation in the commission of the criminal offense we are presented with aiders, abettors and persons who help the perpetrator after the commission of the offense. The fact that they are not key persons in the commission of the criminal offense can be considered as a mitigating factor, but to what extent, it will depend on the specific circumstances of each case.

-*Overall cooperation by the convicted person with the court*, including voluntary surrender. Cooperation with the court, including surrender, should be treated as a mitigating circumstance, since this helps the court in serving justice, saves time and resources for institutions, and helps in serving justice. Therefore, consideration of these circumstances should have the right impact, making it clear that cooperation with the court and surrender will be considered mitigating for the sentence.

Voluntary cooperation of the convicted person in a criminal investigation or prosecution; The effective detection, investigation, and prosecution of perpetrators of criminal offenses is vital, therefore cooperation in the early stages is not only important but can also be decisive, in apprehending perpetrators and ensuring evidence to punish persons who commit and are involved in such activities. In each concrete case, cooperation and concrete contribution made by the accused to the interests of justice should be assessed, and depending on the extent of such contribution, it is reasonable to reflect it on the degree of punishment.

-*The act was carried out in an unplanned manner and limited in scope and duration* - contact with the victim was limited in terms of time and substance, indicating an ad hoc and unplanned action.

-*Efforts to minimize the consequences of the offense and support the victim.* Good and humane behavior in relation to the victim, such as offering food, reducing the feeling of fear and insecurity in those circumstances, and offering the possibility of communication with family members and relatives, as it can be in the case of illegal deprivation of liberty, kidnapping.

-*Limited impact on the violation of rights and freedoms* - the impact was small, without consequences or with minor consequences.

-*The offense was committed under the influence of mental shock* caused by provocation or wrongful actions of the victim or any other person.

-*The offense was committed under the influence of unjust orders and instructions of the superior*.

- *The offense committed during the period of conditional release*, or a period of an alternative suspended sentence - the criminal offense including the violation of certain obligations of the suspended sentence was committed during this period.

-*Age and/or lack of maturity* - Old age has an impact on the determination of punishment if we are dealing with people of old age who have passed almost a century of life, in conjunction with other circumstances such as previous clean record, therefore this circumstance needs to have a certain impact in sentencing.

-*Young age and lack of maturity* may have a certain impact in determining the sentence.

-*Remorse for the criminal offense committed* - To ascertain whether we are dealing with real and sincere remorse.

-*Good character and/or exemplary behavior* - the person's past and other circumstances show that the accused had good character and was known for exemplary behavior in society. For certain crimes, the perpetrator's sincere efforts to normalize relations with the victim can be taken into consideration as a mitigating circumstance in the context of reflecting the perpetrator's behavior after the crime.

-*Physical disability or serious medical conditions* that require urgent, intensive or long-term treatment is considered as a mitigating circumstance based on the principle of humanity that should follow the procedure and criminal justice.

Considering the nature and diversity of these crimes, courts should be careful depending on the concrete crime and assign adequate weight to mitigating circumstances.

D. Applicability of other punishments

- *Imposing a suspended sentence* - may be appropriate only for crimes with a low or medium penalty, but always taking into account the degree of liability of the perpetrator and the degree of harm caused. It is not suitable as a punishment for recidivists.
- *Imposing the order for community service work* - may be appropriate only for crimes with low penalties and if there are no aggravating circumstances that would justify a prison sentence. It may be more suitable especially for young offenders with the potential of resocialization, of course for crimes with low penalties.
- *A punishment of fine* - For less severe crimes, this chapter, provides for a possibility to impose a fine as the main punishment. For the fine to have the desired effect, it must be ensured that the fine is commensurate to the financial situation of the perpetrator in line with Article 69 par. 5 of the CCRK and the Supreme Court's Guidelines on Imposing Criminal Fines.[215]
- *Imposing accessory punishments from Article 62*[216] *or 63*[217] - recommended in all cases where the official person is involved in the commission of criminal offenses from this chapter. In many cases, the imposition of accessory punishments will have a greater effect and achieve the purpose of the punishment compared to other forms of punishment.
- *Use of other accessory punishments* may be reasonable given the nature of the offenses of this chapter. For example, the Expulsion of foreigners from the territory of the Republic of Kosovo from Article 67 of the CCRK.
- Judicial admonition - It can be imposed in accordance with the principles of Article 82 paragraphs 2 and 5, for less severe offenses from this Chapter. Judicial admonition can be pronounced for criminal offenses for which a prison sentence of up to one (1) year or a fine is

[215]Specific guidelines: Imposing a fine as a sanction for criminal offenses according to the Criminal Code of the Republic of Kosovo. Approved on February 27, 2020, by the General Meeting of the Supreme Court, Pristina.
[216]Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 62 Prohibition on exercising public administration or public service functions, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina
[217] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 63 Prohibition on exercising a profession, activity or duty, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina

foreseen, in cases where such offenses were committed with mitigating circumstances that make the criminal offenses particularly light. Judicial admonition can also be issued for certain criminal offenses for which punishment of up to three (3) years is foreseen, according to the conditions established by law. When deciding to impose a judicial admonition, the court especially takes into account the purpose of the judicial admonition, the behavior of the perpetrator in the past, his behavior after committing the criminal offense, the degree of criminal responsibility, and other circumstances in which the criminal offense was committed. However, the imposition of the judicial admonition was foreseen by the legislator against perpetrators of lighter criminal offenses, with a low degree of criminal responsibility and with little danger, therefore it is necessary to make a proper analysis to determine if imposing this sanction is sufficient and appropriate in the light of all circumstances, including the nature of the criminal offense.

- *Waiver of punishment* - cannot be applied to this type of criminal offence.

V. Chapter XVIII Criminal offenses against voting rights

General Overview

This chapter contains a total of 11 articles, emphasizing the importance of protecting an individual's right to vote and run for office. Democratic elections are a reflection of the rule of law and serve as a basis for evaluating democracies. According to the 2023 V-Dem Report[218], Kosovo is ranked among the countries with electoral democracy, showing a significant increase in its index by 30-40% over the last 10 years. Kosovo is now among the 15 countries that have demonstrated the most improvement in this index. The report, along with other evaluations, indicates that Kosovo's elections have been assessed as free and democratic. This success is largely attributed to the proactive engagement of the justice system in protecting the right to vote. Since the 2013 elections, the prosecutorial and judicial systems have played a crucial role in ensuring a democratic electoral process by taking measures against perpetrators of crimes outlined in this chapter.

Although penalties provided for in this chapter are low compared to many in other chapters (maximum 5 years of imprisonment), it is important to note the legislator's intention to always increase the legal minimum (2- and 3-year minimum sentence) in any case when an official is involved in the abuse of official office. This is a very important indication for courts, which should bear in mind that even for crimes of this chapter, the punishment (both type and amount of punishment) should always be different compared for officials compared to those for ordinary citizens. However, there are exceptions to this rule, particularly in cases of organized forms of fraud during voting/elections, which should carry a heavier penalty because of this element.

The approach that the courts take in dealing with these offenses is very significant for a new state such as Kosovo, when the various defense mechanisms are still under development. Elections enable the changes in the democracies of the countries, therefore the justice system must always keep in mind that the commission of the offenses under this chapter extend beyond individual harm caused by an individual, but these offenses have a profound potential to impact the general perception of democracy in a country. Preventing the trend of voting fraud from becoming a common occurrence is extremely important also because such a trend could demotivate voters from actively participating in the voting process. Therefore, courts must always consider the very important principle of proportionality when determining punishments.

A. Starting point

To harmonize the approach in calculation of punishment for these crimes, the following figure provides for a recommendation for the starting point in calculation of punishment for three different situations:

[218] Evie Papada, David Altman, Fabio Angiolillo, Lisa Gastaldi, Tamara Köhler, Martin Lundstedt, Natalia Natsika, Marina Nord, Yuko Sato, Felix Wiebrecht, and Staffan I. Lindberg. Defiance in the Face of Autocratization. Democracy Report 2023. University of Gothenburg: Varieties of Democracy Institute (V-Dem Institute), Mars 2023.

The figure above clearly shows the difference between the different forms of sentence calculation for these offenses based on key specifics. The legal minimums and maximums foreseen by the legislator are provided to differentiate between various perpetrators, with different circumstances and different levels of damage they can cause.

Courts should consider that if a perpetrator falls into two or even three of the above categories, then the highest starting point for this category of offenses will be used as a starting point. Meanwhile, other circumstances will be considered as aggravating circumstances. For example, if an official person is also part of an organized criminal group, the starting point is calculated as 2/3 of the maximum sentence, with the official status taken as an aggravating circumstance (if it is not already an element of the criminal offense). Additionally, if the person has any previous conviction, that will be considered an aggravating circumstance under Article 70 par. 2.13 of the CCRK. If there are other significant aggravating circumstances, the court may impose the maximum sentence.

In cases of recidivism in the sense of Article 75[219] of the CCRK, 2/3 of the maximum sentence is used as a starting point. If this crime is accompanied by other particularly aggravating circumstances, always with a special focus on the perpetrator's involvement in crimes of the same nature, involvement in an organized criminal group, or even the high degree of the damage caused, then an aggravation of the punishment is recommended pursuant to provisions of Article 75.

B. Relevant Aggravating Circumstances

The following part breaks down some of the aggravating circumstances provided for by Article 70 par.2 of the CCRK and how they can be weighed and broken down further.

a. A high degree of participation of the convicted person in the criminal offense[220].

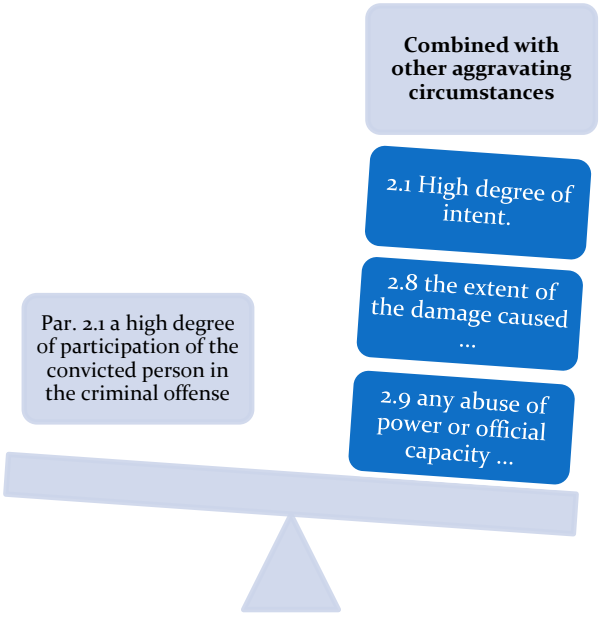
This circumstance in particularly relevant in the offenses covered by this Chapter in two aspects:

- *In cases where we are dealing with an individual*; and

[219] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 75 Aggravation of punishments for multiple recidivism, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina
[220] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 70 General rules on mitigation or aggravation of punishment, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

- *In cases where we are dealing with an organized criminal group*.

The weight of this, as well as any other circumstance, depends on whether it is combined with other aggravating circumstances under the CC.



The above figure provides an example of how this circumstance, when combined with others, can weigh more not only in aggravating the punishment towards the maximum, but also how the same can be combined with them. Of course, recidivism is not included here due to the general concept that the starting point for recidivists is higher than for defendants without a criminal record. Additionally, involvement as part of an organized criminal group is not included as the reason for this is broken down in more detail below. The above figure refers to cases where the offenses are carried out by individuals. In these cases, it is important to assess the degree of effort undertaken by the defendant in committing the crime. This is presented as relevant not only in terms of the position or function held by the defendant, but also in terms of the form of engagement in achieving the goal of committing the criminal offense. Thus, the responsibility will be much higher if the defendant holds a position such as a CEC official, Manager of the Registration Center, or Tabulation Center, or any other supervisory and leadership authority that gives him/her the opportunity for widespread misuse, for example, compared to an election commissioner. However, this assessment does not mean that it applies only to the officials involved in an election function, but it is applicable to any official who may play a role in the proper running of the campaign and the election process in general. As reflected in the figure above, this assessment must always be compared to the degree of harm that the person can cause in relation to the circumstance from par. 2.8. This is because even a commissioner can do quite a lot of damage in a polling station if the number of voters is very large, as the damage caused or the potential damage has a much greater impact on the election result.

The examples given above are all adequate for consideration in offenses related to the voting process itself. However, this circumstance can also apply to other crimes within this chapter, especially if the assessment is made in terms of the concrete role that the defendant played in the

commission of the crime. For instance, the evaluation should consider whether the official contributed by omission, offered help, or was a key person in the commission of the offense on his/her own or by motivating others.

On the other hand, if we are dealing with an individual, who is not an official person, but an individual who does not have any official role in the electoral or related process, the weight of this circumstance may be lower, but always taking into account the degree of damage caused or intended through participation.

Regarding the assessment of the degree of participation when it comes to criminal groups, this is addressed within the context of paragraph 2.11 below.

b. Abuse of power or official position[221]

It must be considered in all cases where we are dealing with these criminal offenses, always excluding the cases involving those articles, respectively paragraphs where such a position is presented as an element of the criminal offense. In those cases, it is enough for calculation of punishment to start from the starting point recommended above and then proceed with assessment and consideration of other applicable circumstances. At the same time, as reflected in the circumstance under par. 2.1, it is important to distinguish between the function that the defendant carries and the degree of harm that he/she can cause.

In cases where the official position is an element of the criminal offense, this does not prevent the court from taking into account the circumstances from Article 70 par. 2.1 always weighing the extent to which the person was engaged in the commission of the criminal offense, or in cases of co-perpetration or conspiracy to commit the criminal offense.

c. Evidence of breach of trust by the convicted person[222]

This circumstance can also be taken as merged with the circumstance from par. 2.9. Thus, for example, an election official, police officer, etc. who have been entrusted with election materials, when the same abuses this duty, he/she also breaches the trust. Therefore, in these offenses, this circumstance can be used to elaborate why it is important to include the abuse of power when it comes to a certain task entrusted to a person because of the function that person holds.

All that was said above about the aggravating circumstances regarding the right to vote and free determination, also apply to cases of threats and other offenses from this chapter committed against the running candidates and have the same importance and weight as explained above.

d. Whether the criminal offense was committed as part of the activities of an organized criminal group[223]

The principles highlighted for the circumstance from par. 2.1 are applicable to this circumstance as well. The difference lies in the fact that the role of the leader is assessed in relation to the other members of the organized criminal group, the hierarchy, the role and contribution of each one in the commission of the criminal offense. Offenses within this chapter committed in the

[221] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 70 General rules on mitigation or aggravation of punishment, par 2.9, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[222] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 70 General rules on mitigation or aggravation of punishment, par 2.10, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[223] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 70 General rules on mitigation or aggravation of punishment, par 2.11, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

form of organized crime should understandably result in a higher degree of harm. Therefore, these crimes as such must necessarily entail the highest punishment as well. More about this circumstance is elaborated above in Chapter V of these Guidelines.

e. If the criminal offense is an act of hatred and committed against persons due to certain affiliation[224]

This circumstance can be very relevant for offenses from this Chapter if they are directed at people by targeting them specifically because of their national origin, affiliation with a community, etc. The existence of this circumstance must be taken into account by courts, especially if it is accompanied by the presence of violence. However, it should be borne in mind that the use of violence, force, or threat is presented as an element of the criminal offense and therefore it should not be considered as an additional aggravating circumstance. Instead, the existence of violence, threat, or force adds to the weight of the circumstance from par. 2.12 when calculating the punishment.

C. Relevant Mitigating Circumstances

The mitigating circumstances provided for in Article 70 par.3 may all be relevant for application, but it always depends on which offense we are talking about.

a. circumstances falling short of grounds for exclusion of criminal responsibility, for example, diminished mental capacity[225]

When talking about the offenses of this Chapter, this circumstance can rarely be applicable since these offenses are mainly those that have a very specific intent - violation of the election process, and therefore would not usually be caused by persons with diminished mental capacity. unless such persons would be misused in exceptional circumstances for commission of these offenses. An example would be threatening a running candidate. Therefore, as a circumstance it is unlikely to find much application in these offenses.

b. Personal circumstances and character of the convicted person[226]

It has become a regular practice in our courts that the personal circumstances and character of the convicted person are considered in mitigating the sentence. While these circumstances may be applicable in this chapter one should be careful as usual in the weight ascribed to them. For example, when it comes to officials who are responsible for administration of elections, these circumstances may have a very low weight in calculation of the punishment. On the other hand, it can be taken as a circumstance with greater weight for perpetrators who, for example, pushed by the economic situation, were forced to participate in the commission of this crime. However, even in such a case, it is important that the weight of this circumstance be determined based on the existence of significant aggravating circumstances (e.g., the degree of the damage caused), as well

[224] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 70 General rules on mitigation or aggravation of punishment, par 2.12, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[225] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 70 General rules on mitigation or aggravation of punishment, par 3.1, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[226] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 70 General rules on mitigation or aggravation of punishment, par 3.3, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

as how this circumstance is combined with any other mitigating circumstance in terms of weight in order for this circumstance to affect further mitigation of the sentence.

- *Even the age of the convict*[227] can be a relevant circumstance for application in these crimes, provided that it is reasonably compared to other circumstances, but also provided that it is justified why age plays a role in the context of the committed crime.

For more analysis about the use of these circumstances in the calculation of punishment, please refer to the general part of these Guidelines.

c. Circumstances that indicate a lesser role of the perpetrator in the commission of the crime[228]

Circumstances from paragraphs 3.4 and 3.5 of Article 70 of the Criminal Code have been deliberately grouped in one paragraph to clarify that they have many similarities as they speak of a lower engagement of the perpetrator in committing the criminal offense. The necessity of differentiating the contribution of the individual leader was mentioned earlier in the text when we elaborated on the aggravating circumstances of this nature.

d. Other mitigating circumstances for this category of offenses

As was the case with the above circumstances, here, too, the grouping of circumstances from par. 3.7-3.12 was not done by chance.[229] since they have the potential for doubling/tripling among themselves during the calculation of the punishment, when in fact all of them, in a way indicate a show of remorse by the defendant. The same methodology of grouping them in one group is also applied in the general part of the Guidelines, which addresses mitigating circumstances.

D. Applicability of other punishments

None of the following punishments are considered appropriate to be imposed in the cases of persons with a criminal record and especially in cases of recidivism.

Imposing a suspended sentence - may be appropriate for crimes from this chapter, but always taking into account the degree of responsibility of the perpetrator and the degree of harm caused.

Imposing the order for community service work - may be appropriate for crimes within this chapter with legal maximum of 1 year and if there are no aggravating circumstances that would justify a prison sentence.

[227] Article 70 par. 3.6 (The age of the convicted person, whether young or elderly).
[228] Article 70 par. 3.4. (evidence that the convicted person played a relatively minor role in the criminal offense;) and par. 3.5 (the fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another).
[229] Article 70 par. 3.7. (evidence that the convicted person made restitution or compensation to the victim); par. 3.8. (general cooperation by the convicted person with the court, including voluntary surrender); par. 3.9. (the voluntary cooperation of the convicted person in a criminal investigation or prosecution); par. 3.10. (the entering of a guilty plea); par. 3.11. (any remorse shown by the convicted person); par. 3.12. (Post conflict conduct of the convicted person).

Imposing a punishment of fine - Articles 207 and 208 provide for the possibility of imposing a fine as the main punishment[230] while Article 211[231] provides for the imposing a fine in addition to imprisonment. Nevertheless, in order for the fine to have the desired effect, it must be ensured that the fine is commensurate to the financial situation of the perpetrator in line with Article 69 par. 5 of the Criminal Code and the Supreme Court's Guidelines on Imposing Criminal Fines.[232]

Imposing of accessory punishment from Article 60[233] - the court shall impose an accessory punishment of deprivation of the right to be elected to persons who, ***in order to be elected, commit any of the criminal offenses provided for in this chapter***. This norm clearly imposes an obligation on the court to impose the accessory punishment on current candidates, in addition to the main punishment. Imposing this punishment is not reasonable for other officials who commit the offense on behalf of another person, rather than with the intention of being elected themselves. It should be noted that recent amendments to the Criminal Code of Kosovo have added a new paragraph 2 to this article., which provides for the prohibition of candidacy for any public position for a period of three (3) to ten (10) years for a person found guilty of the criminal offenses of rape and domestic violence.[234]

Imposition of accessory punishment from Article 62[235] *or 63*[236] - is recommended to be imposed in all cases where an official person is involved in the commission of offenses under this chapter, provided that it does not constitute an element of a criminal offense. Article 211 of the Criminal Code qualifies the abuse of official position during elections as a separate offense. Additionally, specific paragraphs in Articles 213-217 consider the involvement of an official as a qualified offense. The imposition of this punishment is particularly important when the imposition of the accessory punishment under Article 60 is not appropriate.. In many cases, the imposition of accessory punishments will have a greater effect and may better achieve the purpose of the punishment compared to other forms of punishment.

Judicial admonition - It can be imposed in accordance with the principles of Article 82 paragraph 2 and 5, for less severe offenses from this Chapter and cannot be applied when the perpetrator has a criminal record.

[230]Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 207 Violation of the right to be a candidate par 1, and Article 208 Threat to the candidate, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

[231] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 211 Abuse of official duty during elections par 1, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

[232]Specific guidelines: Imposing a fine as a sanction for criminal offenses according to the Criminal Code of the Republic of Kosovo. Approved on February 27, 2020, by the General Meeting of the Supreme Court, Pristina.

[233] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 60 Deprivation of right to be elected, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

[234] Law No. 08/L-188 on Amending and Supplementing the Criminal Code No. 06/L-074 of the Republic of Kosovo, Article 4, Official Gazette of the Republic of Kosovo/No. 23, November 23, 2023, Pristina.

[235] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 62 Prohibition on exercising public administration or public service functions, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina

[236] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 63 Prohibition on exercising a profession, activity or duty, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina

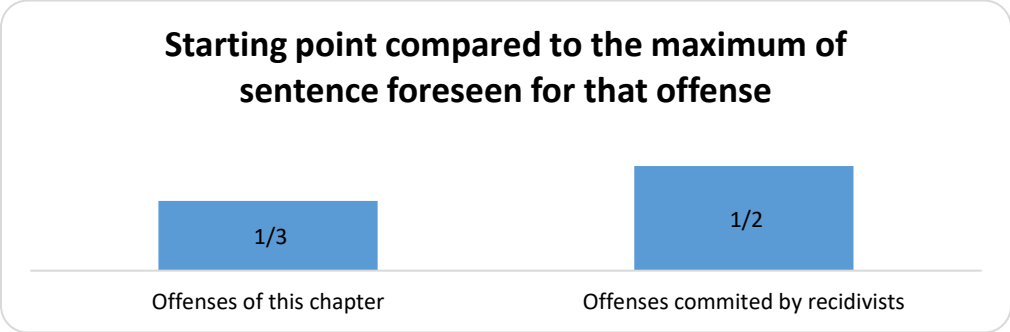
VI. Chapter XIX Criminal offenses against rights in labor relationship

General observations

The offenses covered by this chapter are criminal offenses with a low penalty ranging from 6 months, 1, 3, and 5 years and give the possibility of imposing a punishment of fine. Although the punishments for these criminal offenses are low, these criminal offenses are of special importance because they represent criminal offenses directed against individual rights that derive from the labor relationship between the employer and the employee.

These criminal offenses can easily be confused with the criminal offenses of abusing official position or authority from Article 414 of the CCKK because when the perpetrator is an official, the purpose of committing the criminal offense must be distinguished. At the same time, acts such as violation of the right to strike from article 221 of the CCRK, also represent a violation of a constitutional right of the person[237], therefore it should be treated with due seriousness depending on the form of unlawful action and the weight of circumstances.

A. Starting Point



The table above gives the suggested starting point for offenses from this chapter, providing a starting point of 1/3 for all offenses under this chapter, with the exception of offenses committed by recidivists for whom the starting point is calculated as 1/2.

B. Aggravating circumstances

- *Abuse of power or official position from Article 70 par*. 2.9, must be taken into account in all cases where we are dealing with these criminal offenses, always excluding the cases involving those articles, respectively paragraphs where such a position is presented as an element of the criminal offense.
- *High degree of participation by the convicted person*. - This circumstance can be applied in cases where the offense is committed by several perpetrators, weighing based on the extent to which the person was engaged in the commission of the criminal offense and in what way the person was involved in the commission of these offenses. Conversely, the circumstance from paragraph 3.5 of this same Article may also affect the mitigation of the punishment.
- Other aggravating circumstances provided for by Article 70 of the CCRK may also be applicable in the offenses under this chapter, by always being careful to avoid overlapping them with the elements of the criminal offense. For elaboration purposes, we will be taking *the*

[237] Constitution of the Republic of Kosovo, Article 43, Freedom of assembly, K-09042008, April 9, 2008.

degree of damage caused as an aggravating circumstance provided for in par. 2.8[238] by ensuring to avoid overlapping with the elements of the criminal offense. This is due to the fact that the criminal offense from Article 222 par.2 of the CCRK refers to the degree of damage caused.

- *Circumstances related to victims* - All circumstances from para. 2.4 to 2-7 may be relevant depending on the type of crime committed.

C. Mitigating circumstances

The guilty plea according to this Chapter, should not be automatically considered for mitigation below the legal minimum in cases that are not accompanied by other extraordinary mitigating circumstances.

D. Applicability of other punishments

- *Suspended sentence* - may be suitable for offenses under this chapter, as long as we are not dealing with recidivism or violent actions such as those described, for example, in Article 221. Accompanying this punishment with additional obligations [239], can be quite effective for lighter forms of the offense.
- *Imposing the order for community service work* - may be appropriate if there are no aggravating circumstances that would justify a prison sentence.
- *Imposing a punishment of fine*- For all offenses from this chapter except for article 220 par.2 and 3 is foreseen as a possibility of serving as the main punishment. In order for the fine to have the desired effect, it must be ensured that the fine is commensurate to the financial situation of the perpetrator in line with Article 69 par. 5 of the CCRK and the Supreme Court's Guidelines on Imposing Criminal Fines.[240]
- *Imposing accessory punishments from Article 62[241] or 63[242]* - recommended in all cases where the official person is involved in commission of criminal offenses from this chapter. In many cases, the imposition of accessory punishments will have a greater effect and achieve the purpose of the punishment compared to other forms of punishment.
- *Judicial admonition* - It can be imposed in accordance with the principles of Article 82 paragraph 2 and 5, for less severe offenses from this Chapter and cannot be applied when the perpetrator has a criminal record.
- *Waiver of punishment* - cannot be applied to this type of criminal offences.

[238]The degree of damage caused by the convicted person, including death, permanent injury, transmission of disease to the victim or any other damage caused to the victim or his/her family.
[239]For example "compensate or restitute the victim of the criminal offense" from Criminal Code of the Republic of, Code No. 06/L-074, Article 56 , par 1.12, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.
[240]Specific guidelines: Imposing a fine as a sanction for criminal offenses according to the Criminal Code of the Republic of Kosovo. Approved on February 27, 2020 by the General Meeting of the Supreme Court, Pristina.
[241]Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 62 Prohibition on exercising public administration or public service functions, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina
[242] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 63 Prohibition on exercising a profession, activity or duty, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina

VII. Chapter XX Criminal offenses against sexual integrity.

General Overview

The 2019 amendments to the CCRK have brought about many changes to the articles of this Chapter. This relates to both the order of the articles and the severity of punishments under this category. In 2020, the Assembly of the Republic of Kosovo voted to adopt amendments to the Constitution, thereby enabling the direct implementation in Kosovo of the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, globally known as the Istanbul Convention. This international treaty has now become part of the legal order of Kosovo, and as such, the justice system must ensure that the protection of the victims and the sanctioning of the perpetrators are in line with international standards. Article 45[243] of the Istanbul Convention requires that the offenses be punished with effective, proportionate, and convincing sentences, taking into account their gravity. Article 46 of the Convention also provides a list of aggravating circumstances that must be taken into account when weighing the sentence, while such circumstances are also included in the general guidelines of the Supreme Court.

This Chapter enumerates ten criminal offenses, while the offense of sexual harassment remained under Chapter XVI, which provides on criminal offenses against life and body. This chapter was also affected by the most recent amendments to the CCRK, in such a way that Article 232 Abuse of Children in pornography was moved to the new Chapter XXIV/A, titled Cybercrime as a new Article 277/I.[244] Another novelty is the introduction of Article 236/A, which provides for the requirement of persons to undergo a virginity test.

It has been stated above that this chapter contains very harsh punishments, and some of them even include capital punishments, including life imprisonment sentences.

Such are the following offenses, for which minimum terms of 10, 15, and 20 years up to life imprisonment are provided:

- Article 227 Rape, paras 5 and 9
- Article 228 Sexual services of a victim of trafficking, paras 5 and 8
- Article 229 Sexual assault, paras 4 and 8
- Article 230 Degradation of sexual integrity, para 7

In all the above cases, the severity of the punishment is related to the two most serious consequences of a crime: the death of the victim and the minor age of the victim (14 or 16 years).

What is characteristic of the offenses under this chapter is that most of the paragraphs and sub-paragraphs include, as elements of the criminal offenses, the aggravating circumstances under Article 70 of the CCRK, thus making it impossible to consider such circumstances under the aggravating circumstances.

[243] Council of Europe Convention on preventing and combating violence against women and domestic violence [Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210)], 01/08/2014.

[244] Law no. 08/L-188 amending the Code no. 06/L-074, Article 277/I Materials containing sexual exploitation and abuse of children, Official Gazette of the Republic of Kosovo/No. 23, November 23, 2023, Pristina

On the other hand, the minimum penalties under this chapter go up to an average of 3 years, which may be substituted with fines:

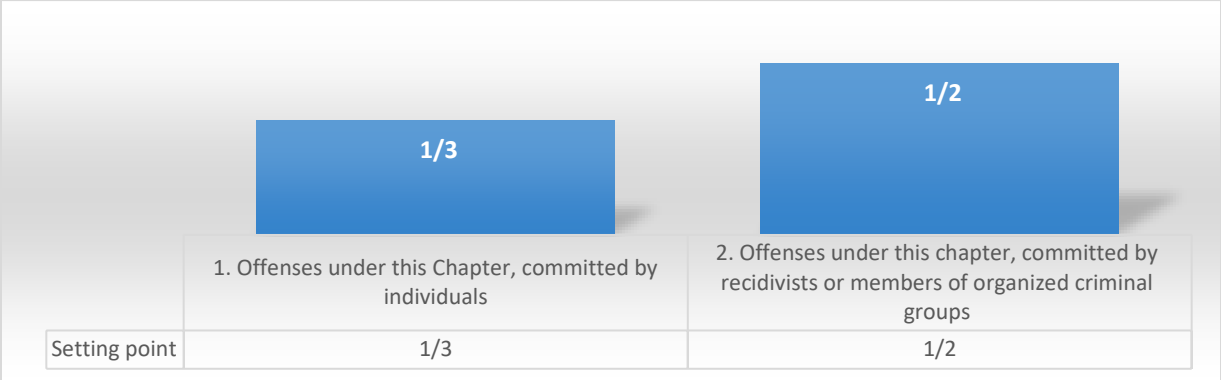
- Article 229 Sexual assault, para 1
- Article 230 Degradation of sexual integrity, para 1
- Article 231 Offering pornographic material to persons under the age of 16, para 1
- Article 233 Inducing sexual acts by false promise of marriage, para 1
- Article 236 Sexual relations within the family, para 1

Meanwhile, Article 235 Provision of premises for prostitution, para 1, is punishable with up to 4 years, and a fine.

The increase in minimum and maximum thresholds in crimes of this nature has often been criticized by the justice system, thereby invoking a deviation from the principle of proportionality, relative to the crime committed. Due to the nature of such offenses, and unlike many other crimes, there are great difficulties in proving the commission of such crimes and establishing proper evidence to prove the actions. However, the matter of proving the offense is a procedural aspect, in which additional effort is required from the justice bodies, especially a more diligent focus on circumstantial evidence. This is because offenses against sexual integrity are also violations of Articles 3 and 8 of the European Convention on Human Rights. Therefore, the response of the justice system overall to such offenses must be adequate and powerful. Thus, in the case *MGC v Romania*[245], the court analyzing the matter of the response of the authorities in the assessment of the circumstances in cases of rape of minors, did not analyze this only on the basis of the said case of the rape of the 11-year-old, but to answer whether the state had violated its positive obligation, it had also consulted the practice of local courts in some of these cases, on the presence or not of consent from the minor victim. The court had found that the investigation of the applicant's case, and in particular, the approach of the local courts, in the context of the lack of consistent practice in this area, had not met the criteria required under the positive obligation of states for an efficient system of criminal justice to punish all forms of sexual abuse of children, thus leading to a violation of Articles 3 and 8 of the Convention. The court also found that the local courts had failed to demonstrate a child-sensitive approach in analyzing the facts of the case, misinterpreting as consent the fact that the child had not told their parents about the abuse, or that the child had not screamed for help, and not considering the possibility that this could be a child's potential reaction to a traumatic event. The court had also emphasized the failure of the authorities to sufficiently investigate the circumstantial evidence, precisely because they had given very little or no weight to the greater vulnerability of minors, and the special psychological factors present in the case of abuse of minors.

[245] Case of M.G.C. v. Romania, Application no.61495/11, 15.06.2016, par.69-75, https://hudoc.echr.coe.int/#{"fulltext":["sex crime"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-161380"]}

- ***Starting point***



Since it is clear that the legislator's intention was the social punishment for crimes of this nature, expressed in extremely harsh sentences, and since most aggravating circumstances are already embedded as elements of the criminal offense in many of the paragraphs, only two differences were allowed in terms of the starting point for the offenses under this Chapter:

- Starting point of 1/3 for all offenses committed by non-recidivist individuals.
- The starting point of ½ for cases in which the offense is committed by recidivists, as well as by members of an organized criminal group.

Of course, this is presented only as a starting point, as the Court must always ponder other circumstances beyond those already included as elements of the criminal offense. The sections on mitigating and aggravating circumstances provide more details about the circumstances that may affect the final sentence. It should be noted that for offenses where life imprisonment is a possible punishment, the starting point DOES NOT APPLY if the court imposes this sentence. Regarding this issue, judges are instructed to review Part I of this Guide, specifically Section III - Principal Sentences under the Criminal Code.

B. Aggravating circumstances

For purposes of illustration, the data from the EULEX Report on the Assessment of the Handling of Rape Cases are presented,[246] where in the analysis of 20 guilty verdicts, the drafters had given some examples of the circumstances the courts had found to be aggravating in these cases:

- Weight of the criminal offense, the manner of commission of the criminal offense.
- Minor age of the victim.
- Previous criminal record.
- Commission with intention, despite knowing the age of the victim.
- Awareness of the consequences and dangerousness of the crime.
- Lack of guilty plea by the defendant.

[246] EULEX, Assessment of the Handling of Rape Cases by the Justice System in Kosovo, Monitoring report, 4.2.3.2 Lenient sentences, Page 27, July 2022.

Many of the above already appear as elements of the criminal offenses. Therefore, their inclusion as a circumstance would mean duplication, which is why this should be avoided.

As mentioned above, a number of aggravating circumstances under Article 70 of the Criminal Code are included as elements of the criminal offense. The table below illustrates the circumstances which are generally included as elements of offenses.

Aggravating circumstances under the Article 70, expressed as elements of the criminal offenses		**Mentioned in Articles**
2.2	The high degree of intent on the part of the convicted person.	227, 229, 230
2.3	The presence of violence or the threat of violence in the commission of the criminal offense.	227, 229, 230
2.4	Whether the criminal offense was committed in a particularly cruel manner.	227, 229, 230
2.5	If the offense involves several victims.	228
2.6	Whether the victim of the criminal offense was particularly unprotected or vulnerable.	227-230
2.7	Age of the victim, whether young or old.	227-236
2.8	The degree of harm caused by the convicted person, including death, permanent injury, transmission of disease to the victim or any other harm caused to the victim or their family.	227-230
2.9	Any misuse of power or official position by the convicted person in the commission of the criminal offense.	228
2.10	Evidence of breach of trust by the convicted person.	227, 229, 230
2.14	Whether the criminal offense is committed within the family relationship.	227, 229, 230

Since all these above-mentioned elements/circumstances have a large weight in the commission of the criminal offense, the legislator has considered increasing the legal minimums and maximums. Thus paragraphs 2.4 and 2.8 address the severity of harm caused. This may be reflected differently in the various offenses under the chapter, namely the level of psychological harm, degree of trauma, transmitted diseases, etc. However, what is not explicitly included in these circumstances (but should be considered as part of them) is the pregnancy resulting from the rape of the victim, which involves a very serious and long-term consequence, not only for the victim but also for the conceived fetus, and consequently, the child. Therefore, this consequence should always be taken into account when weighing the punishment. The court must bear in mind that even within one single circumstance, there are different variations, since in most cases, the above-mentioned factors are found combined in two, three or more circumstances and rarely in isolation. Therefore, in such cases, differentiation must be made from one case to another.

The rest of the circumstances in the table above, together with the circumstances mentioned below, are part of the circumstances that paint the degree of liability of the perpetrator:

If the criminal offense was committed as part of the activity of an organized criminal group since this item is considered in establishing the starting point, its weighing as an additional circumstance would be compounding. However, in this case, the Court should analyze this circumstance further in the context of the duration of membership in this organization, the position in the hierarchy, the type of criminal activity, etc.

The high degree of participation of the convicted person in the criminal offense[247] - this circumstance is elaborated in almost every chapter, and the same arguments regarding the perpetrator in such case would apply to this case as well. Therefore, the punishment of an individual as part of a criminal group should be based on the form of involvement in the commission of such crime, and the greater involvement/role should be reflected in a punishment proportionate and adequate to such involvement.

If the criminal offense is an act of hatred, which means any criminal offense committed against a person, group of persons, or property, motivated on the basis of...[248] if the crimes against sexual integrity are committed for reasons as indicated in this paragraph, these are very relevant factors and should be weighed in the final sentence. As a circumstance, it falls within the remit of circumstances indicating a heightened liability of the perpetrator.

Any previous criminal conviction of the convicted person[249] Previous records represent one of the most important elements in sentencing. Recidivism is already accounted for in setting a higher starting point for offenders with a criminal record. However, However, for previous convictions that do not meet the concept of multiple recidivism under Article 75 of the CCRK, this is best explained in the first part of the Guidelines, specifically in Point V - Aggravation and Mitigation under Article 70 of the CCRK.

In addition to the above-mentioned circumstances, there are also a number of other factors and circumstances not explicitly included in the CC, but which indicate the degree of liability and should be taken into consideration when weighing the punishment. Some of them would include:

- Previous violence against the same victim.
- Forced entry into the house/apartment or the place of the victim.
- Significant premeditation in the commission of the criminal offense.
- If the offense was committed in complicity
- Use of alcohol or narcotics in committing the crime.
- Exploitation for commercial purposes.
- Desecration and shaming of the victim, such as through the exposure of photos or videos of the act of rape, or their distribution on social networks.
- Prolonged isolation.
- Abduction, etc.

All of these, even if they are not accounted for in separate offenses, must be taken into consideration when weighing the punishment.

[247] Para 2.1
[248] Para 2.12
[249] Para 2.13

E. Mitigating factors

According to the EULEX report on the Assessment of the Handling of Rape cases,[250] in the analysis of the 20 guilty verdicts, the drafters had given some examples of the circumstances the courts had found to be mitigating in these cases:

- Defendant giving a promise that he will never violate the law again;
- Defendant apologizing to the victim;
- Defendant's poor economic state; status as the sole family provider or unemployed;
- Defendant's young age;
- Defendant's correct behavior in the court;
- Defendant's guilty plea;
- Defendant had no previous criminal record in Kosovo;
- Small age gap between the victim and defendant;
- Defendant having a family and kids;
- Defendant's low education level;
- Defendant's bad health condition;
- Lack of physical injuries to the victim as a result of the rape;
- Prolonged length of proceedings and period of time elapsed from the occurrence of the crime (i.e. 10 years).

Although the sample of cases may not be sufficient to conduct an accurate assessment of the court practice in handling such cases, the use of the above-mentioned circumstances does provide a general reflection on how the courts conceive of these circumstances. There are some matters that should be emphasized, only on the basis of the above circumstances:

- While the use of some of these circumstances may be reasonable, giving too much weight is never justified in cases in which the offense is serious and brings serious harm to the victim.
- There are circumstances that are completely irrelevant. Example: "*low education level of the defendant*" is not justified at all as a mitigating circumstance, even less so for crimes of this nature. It would be reasonable for the Court to attempt justifying the consideration of such circumstance only in the context of weighing the perpetrator's ability to comprehend the gravity of his/her actions, just as it would be the case of considering young age[251], but not only the perpetrator having a lower education level. Therefore, a proper reasoning of the ruling is more than necessary to comprehend the logic behind the court's decision-making.
- There are also circumstances like "*absence of physical injuries to the victim as a result of the rape*", the consideration of which as a mitigating circumstance is not only wrong, but

[250] EULEX, Assessment of the Handling of Rape Cases by the Justice System in Kosovo, Monitoring report, 4.2.3.2 Lenient sentences, Page 27, July 2022.

[251] For example, young people aged 18-25 are still developing neurologically, so they may be less able to:
- Assess the consequences of their actions.
- Control their impulsiveness.
- Refrain themselves from taking risks.

These are some of the circumstances taken into consideration within the UK Guidelines when reasoning about age as a mitigating circumstance. For more, see: https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/

also quite worrying, when as it is clearly seen, such a circumstance was used in the criminal offense of rape.

Crimes such as murder and some crimes against sexual integrity cause harm that is qualitatively different from damages arising from fraud or crimes against property. Harm constitutes substantial disturbances with the physical and sexual integrity of the victim, which are far more humiliating than any crime. The irreparable nature of the harm to the victim may extend more widely to the family and society.[252] It is not thought that most rape cases are planned, in the way one would, for example, plan for armed robberies, but the weight of liability would usually be large, since the perpetrator is fully aware of his actions. Therefore, the use of such a mitigating circumstance must be strictly prohibited. On the other hand, the existence of additional physical injuries, beyond those arising from rape, is presented as an element of the criminal offense, when such injuries are of a serious nature.

- Just as it was emphasized above, even the *apology*, or generally the *expression of the defendant's remorse* in crimes against sexual integrity should be viewed with a large dose of caution, precisely because of the harm resulting from such offenses.[253]

Regarding the psychological impact, the court should be aware of any indication that the defendant humiliated, shamed, or degraded the victim by taking photographs, video or audio recordings, posting comments on social networks (on the Internet), or threatening to reveal private or personal information about the victim. These actions may be considered aggravating circumstances since they are intended to further humiliate the victim. The court is encouraged to pay special attention if the specific case of humiliation involves a minor victim, which would further increase the gravity of the offense and its consequences. This is particularly important considering that at a young age, the victim's personality is not fully developed, and they are dependent on others.[254]

F. Applicability of other sentences.

As emphasized in other chapters, in its weighing of the punishment, the Court must take into account the appropriateness and proportionality of the punishment against the crime committed.

-Imposing a suspended sentence - may be suitable only for crimes with low or medium criminality, but always in due consideration of the degree of liability of the perpetrator, and the degree of harm caused. This sentence is not justified in cases in which the perpetrator has a criminal record, or acts as part of an organized criminal group, unless there are particularly mitigating circumstances.

- *Imposing an order for work in community service* - may be suitable only in offenses of low criminality, and if there are no aggravating circumstances that would justify a prison sentence.
- *Imposing a criminal fine-* There are only 4 cases where a fine is legally provided as a main penalty instead of a prison sentence, and that applies to offenses for which the maximum punishment is up to 3 years. In all the cases where the court may substitute a prison sentence

[252] Maslen, Hannah. Remorse, Penal Theory and Sentencing, Relevance of offense type, Pg.141, United Kingdom: Bloomsbury Publishing, 2015.
[253] Ashworth, Andrew; Kelly, Rory. Sentencing and Criminal Justice. Proportionality and Seriousness, Pg.128 United Kingdom: Bloomsbury Publishing, 2021.
[254] DCAF, Judicial Benchbook, Considerations for Domestic Violence Case. Evaluation in Bosnia and Herzegovina, Sarajevo (2014), p. 21.

with a fine, it should ensure that such a fine has the appropriate effect, it must also ensure that the specific fine is imposed in due account of the financial status of the perpetrator, pursuant to para 5 of Article 69 of the CCRK, and the Supreme Court's Guidelines on criminal fines.[255]

- *Imposing accessory punishments*
  - *Accessory punishments under Articles 62 and 63-* Imposing an accessory punishment under Articles 62 or 63 is presented as quite important in terms of sanctioning the perpetrators of the offenses under this chapter. While the punishment under Article 62 refers only to employees of the public sector, Article 63 is more general, as it includes any function or activity. Thus, paragraph 1 of Article 63 clearly means the imposition of accessory punishment to a person who has misused his/her position, activity or duty with the purpose of committing a criminal offense, or there is a possibility that he or she will do so in the future. In order to impose such a punishment, it is not necessary to fulfill only the condition that the person has committed the offense by abusing the office. On the contrary, paragraph 1 of this Article clearly provides that such punishment must also be imposed on other perpetrators if there is reason to expect that the exercise of such a profession, activity or duty by him or her may be misused to commit a criminal offense in the future. The duration of the sentence may be from 1-5 years. However, paragraph 5 of the same Article provides for a much longer incarceration if the victim is a minor. According to this paragraph, if the perpetrator has committed a criminal offense under Article 165, or from the chapter of offenses against the sexual integrity of a child, this perpetrator would be imposed the measure of prohibition of the exercise of a profession, activity, or duty, that would include regular contact with children. This sentence may also be imposed for life, subject to a periodic review of 10 years from the starting date of serving the sentence. For example, if a person is convicted of the criminal offense of rape of a minor, the Court, by imposing such accessory punishment, would ensure that such person is limited in his/her access to children (not only in the duty he/she currently exercises but also in any function or task which may include or involve working with children), thus eliminating the likelihood of misusing duty in the future. This punishment would undoubtedly have a greater deterrent effect; therefore, it is presented as appropriate.

In addition to the accessory punishments as provided by the 2019 CCRK, in 2023, some changes were made to the accessory punishments, mainly affecting the criminal offenses of rape and domestic violence. Each of such introduced accessory punishments would only contribute to the court's obligation to impose such additional measures, not focusing only on the main punishment. Each of the relevant accessory punishments shall be discussed in more detail below:

  - *Prohibition of the right to run for public office* [256]- This accessory punishment was introduced with an amendment to Article 59 of the 2019 CCRK, but a broader elaboration was also introduced within the framework of Article 60, Deprivation of the right to be elected, listed as a new paragraph 2:

[255] Specific Guidelines: Imposition of fines as a sanction in criminal offenses from the Criminal Code of the Republic of Kosovo. Adopted on February 27, 2020 by the General Session of the Supreme Court, Pristina.
[256] Law no. 08/L-188 amending the Code no. 06/L-074, Articles 3 and 4, Official Gazette of the Republic of Kosovo/No. 23, November 23, 2023, Prishtina.

"*The court shall deprive the right to run for any public position from three (3) to ten (10) years, to a person who is found guilty of having committed the criminal offense of rape and domestic violence*."

This means that in any case in which a perpetrator is found guilty of any of the two above-mentioned offenses, the court must also impose this accessory punishment. Thus, while Article 60 had its key focus on criminal offenses against voting rights, this Article has not only been expanded further for these two categories of offenses, but it has simultaneously provided a longer-term compared to other offenses, also depriving the person of the possibility of running for public office.

Prohibition of employment in the public sector - In the same spirit as the sentence above, the prohibition of employment in the public sector represents an accessory measure under Article 62 of the Criminal Code, sanctioning not only public officials who currently exercise public functions. This new Article only confirms what is already stated in paragraph 1 of Article 63, specifically mentioning the prohibition that a person convicted of violence or domestic violence cannot be employed in the public sector in the future (at any level), and that for the period of 1-5 years.

Prohibition on driving motor vehicles of any type of category[257], from one (1) to five (5) years, to a person who is found guilty of the criminal offense of rape at a time of exercising the vocation of driver. It seems clear that this accessory punishment introduced with the amendments expands the application of the already existing measure in the CC, specifically Article 64 "Prohibition of driving motor vehicles". While Article 64 refers to offenses related to risking public traffic, the new Article 62B introduced is much harsher, as it not only expands the range of application, but simultaneously applies to all categories of vehicles, and not only to categories/vehicles of the specified type, as noted in Article 64. The new punishment introduced specifically targets the people who are entrusted with the transportation of goods or persons, and who in the exercise of this profession, commit the criminal offense of rape.

Amendments to the Criminal Code include two accessory punishments[258] below, for the perpetrators who are found guilty of the criminal offense of rape or domestic violence:

- *Prohibition of purchasing at auctions public property, public assets, or licenses granted by a public authority* in any service for a period of three (3) to ten (10) years.

- *Prohibition of applying as a strategic investor and any other form of benefiting from privileges* granted by the applicable legislation for a period of three (3) to ten (10) years.

Although, in fact, these sanctions are not directly related to the nature of these offenses, the legislator's intention seems to have been to prevent perpetrators of such offenses from benefiting from the state budget in various ways. Therefore, in its ruling on the perpetrators of the aforementioned offenses, the court should also ensure the imposition of the accessory punishment.

[257] Law no. 08/L-188 amending the Code no. 06/L-074, Article 62B, Official Gazette of the Republic of Kosovo/No. 23, November 23, 2023, Prishtina.
[258] Law no. 08/L-188 amending the Code no. 06/L-074, Article 2, Official Gazette of the Republic of Kosovo/No.23, November 23, 2023, Prishtina.

- *Judicial admonition* - In accordance with the principles of paragraphs 2 and 5 of Article 82, it may be imposed for offenses with minimum sentences (as listed above) under this Chapter and may not be applied when the perpetrator has a criminal record.

- Waiver of punishment – is not provided for any of the offenses of this Chapter.

It is worth noting Article 226, which states: "The perpetrator is not criminally liable because of a fact under Article 25 of this Code if he or she, for justifiable reasons, did not know and could not have known that the victim was under the age of sixteen (16) years."[259]

[259] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 226, Mistake of fact as to age of victim, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

VIII. Chapter XXI Gender Based Criminal Offenses Against Marriage and Family

General observations

Criminal offenses from this chapter in particular in the last decade have received global attention increasing the pressure on relevant institutions to change outdated practices and adapt them to developments in the international arena. This pressure has continued to increase especially due to two elements:

- European Court of Human Rights (ECtHR) Judgments,
- Protection offered by the Istanbul Convention[260].

Even the Republic of Kosovo, despite the fact that it is neither a signatory to the Istanbul Convention nor a member of the Council of Europe, has amended many of its relevant policies and laws to adapt to these developments. This is due to the fact that according to the Constitution of the Republic of Kosovo, international instruments that regulate this field, including the European Convention on Human Rights (ECHR) have direct applicability in the Republic of Kosovo. In 2020, the Istanbul Convention was added to the list of these international documents. On the other hand, Article 53 of the Constitution obliges the institutions of the Republic of Kosovo to interpret the provisions related to human rights and fundamental freedoms in accordance with the judicial decisions of the ECtHR.

The acts sanctioned under this chapter are closely related to the core of society - the family and everything related to it. However, with the completion of amendments to the CCRK in 2023, the title of this chapter itself has been amended thereby expanding it to cover gender-based criminal offenses in addition to offenses against family. In this context, a special article has been added that addresses ***Violence against women in public life***.[261] It seems that through this intervention the legislator aimed to fulfill the requirements of the Istanbul Convention, even though we as the Supreme Court consider that this offense has already had sufficient coverage in the provisions of the existing articles or even because it does not coincide much with the nature of other offenses covered in this chapter.

Of all the offenses mentioned in this chapter, there are two categories of offenses sanctioned most severely:

- Forced marriage, par. 5 and 6, which entails a minimum of 15 years of imprisonment.
- Extramarital cohabitation with a person under the age of sixteen also contains high minimum and maximum ranges.

In its first assessment report on Kosovo since the incorporation of the Istanbul Convention in the Constitution of the Republic of Kosovo, GREVIO on the issue of forced marriages, emphasized in some of the assessment reports the difference between arranged and forced marriages, noting that while the first category does not fall within the scope of Article 37 of the Convention due to the existence of an "implied" consent, the second falls within this scope.

[260] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Istanbul, 11 May 2011.
[261] Law No. 08/L-188 amending Code No. 06/L-074, Article 284/A Violence against women in public life, Official Gazette of the Republic of Kosovo/No. 23 November 23, 2023, Prishtina.

Regarding child marriages, GREVIO has brought to mind that the global human rights standards set out in the United Nations Convention on the Elimination of All Forms of Discrimination against Women and the United Nations Convention on the Rights of the Child prohibit betrothal and marriage of children, ensure the right to freely choose a spouse and to enter into marriage with free and full consent, and consider early and forced marriage as a harmful practice that must be ended.[262]

A rather pronounced problem in Kosovo, which is often raised as a concern even by the justice system itself, is the extramarital union with persons under the age of 16. In most cases, these marriages are expressed in the Roma, Egyptian, and Ashkali communities. Many of the factors are related to the culture of these communities and lack of education is a contributing factor. Based on the principle of supremacy of legal norms over social norms and with the aim of combating such norms, the legislator has foreseen very harsh punishments.

Another crime of extremely great importance in this chapter is domestic violence sanctioned by Article 248 of the CCRK. This offense was included in the CCRK for the first time in 2019, and since its entry into force, many dilemmas regarding the implementation of this article have arisen. For this reason, in 2020 the Supreme Court issued an Instruction regarding the legal definition and treatment of domestic violence cases[263]. Since the issuance of the Directive, the Assembly of Kosovo has adopted the Law on prevention and protection from domestic violence, violence against women, and gender-based violence[264]. With the adoption of this Law, several issues were defined that were regulated by the Directive and that are mainly related to the definition of four forms of violence (physical, economic, psychological, and sexual).

However, the adoption of this Law itself still leaves questions about some issues that have to do with the elements of this criminal offense and the implementation of other provisions related to Article 248. This is due to the fact that if we make a comparison between other underlying offenses and the offense from Article 248, it turns out that for some offenses, the sanction is lower if the offense is committed within a family relationship than if it were committed by a foreigner. For example, Serious bodily injury from Article 186 par.1 foresees a maximum sentence of 5 years, while for domestic violence according to Article 248, the maximum sentence for physical violence is 3 years. Understanding that the goal of the legislator was not to foresee lower punishment, but actually the most severe punishment for these cases, we therefore come to the conclusion that the goal of Article 248 from the very start was:

- To introduce domestic violence as a stand-alone offense in the CCRK.
- Ensure that the mildest forms of domestic violence that are not covered by the other basic offenses in the KPRK are covered by this article. These acts, if committed outside the context of a family relationship, would constitute minor offenses.

[262] Secretariat of the monitoring mechanism of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence - Council of Europe Gender Equality Division, Capacity Building and Cooperation Projects Unit, Assessment of approximation of laws, policies and other measures of Kosovo* with the standards of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), 5. Forced marriages, pg. 66

[263] Supreme Court, Instruction regarding the legal qualification and treatment of domestic violence cases according to the Criminal Code of the Republic of Kosovo, No. Gj.A.113/2020, 12/06/2020.

[264] Law No. 08/L-185, on prevention and protection from domestic violence, violence against women and gender-based violence, Official Gazette of the Republic of Kosovo, No. 22, October 12, 2023, Prishtina.

Another problem related to the regulation of domestic violence in this Article is the way in which the provision was drafted in paragraphs 1 and 3, as there is a duplication of paragraphs but with a substantial difference regarding the forms of domestic violence and the intention for committing this criminal offense. Thus, according to paragraph 1, the violence is reflected in its three forms physical, psychological, and economic violence or abuse, whereas the fourth form of violence, namely sexual violence was added in paragraph 3 of the same Article. Another confusion between paragraphs 1 and 3 is related to the fact that while paragraph 1 stipulates that the violence is carried out "with intent" ... *to violate the dignity of another person within a domestic relationship* ... ..." paragraph 3 does not mention the intent for committing this act. By its appearance, paragraph 1 seems to contain elements of a more serious offense than that of paragraph 3, precisely because it introduces an indication that such actions may have been carried out continuously against the victim by the perpetrator in order to achieve the goal of violating the victim's dignity, while paragraph 3 may also imply a momentary action without a characteristic of continuous violence or pressure which would meet the element of violation of dignity. However, if we analyze it in terms of sanction, it can be observed that despite the aggravating element in par.1, the sanction remains the same in both.[265]

At the time of drafting the present Guidelines, another revision of some Articles of the CCRK is underway and Article 248 is one of those articles. It would be much easier for law enforcement bodies and the justice system if all crimes committed against persons in family relationships were handled within the framework of Article 248 to avoid dilemmas about the qualification of the criminal offense, similar to the regulation that the legislator has made in Article 128[266] paragraph 1 of the CCRK. This way of regulation would enable domestic violence to be reflected in all its forms, so that if elements of the underlying offenses are met, the qualification would be made based on that Article, but by also referring to its connection with Article 248 with the purpose of including it within the definition of Domestic violence but maintaining the sanction according to the relevant Article. Of course, the same Article 248 should also preserve the definition for the lighter forms of offenses within the family relationship to deter further escalation of these crimes. However, we as a justice system are waiting to see how this matter will be finally settled and then find the best way to implement it in practice.

A. Starting Point

Due to the wide range of issues that this chapter regulates with the additions of the latest amendments to the CCRK, and the sentences provided for them, but also due to the sensitivity of the regulated issues, it is quite difficult to draw an exact parallel between the starting point for the offenses from this chapter and determining the starting point uniformly. ***However, the starting point of ½ represents an adequate compromise for all offenses of this nature, which will then require addressing the very specific circumstances for certain categories of these offenses***. The acts within this chapter (with the exception of the new Article 248/A) are highly sensitive considering that they affect the cell of a society - the Family.

[265] Taken from the Supreme Court Instruction regarding the legal qualification and treatment of domestic violence cases according to the Criminal Code of the Republic of Kosovo, No. Gj.A.113/2020, 12/06/2020.
[266]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 128 Definition for the provisions of terrorism in Articles 114-139, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

B. Aggravating circumstances

When it comes to the aggravating circumstances related to the offenses covered in this chapter, most of the circumstances that have already been addressed in the Chapter on offenses against sexual integrity above are applicable, including those added by the recent amendments of the CCRK.

A characteristic of criminal offenses from this chapter is that, in general, most of these criminal offenses are committed by family members, respectively by persons with whom the perpetrator is in a family relationship (as a broader concept than 'Family member') therefore in the case of reference in aggravating circumstances, especially circumstance from Article 70 par. 2.14 of the CCRK, the court must take into account whether the family relationship between the perpetrator and the victim is presented as an element of the criminal offense since the same cannot be double counted the same aggravating circumstance. The situation is different when the article would refer to the vulnerable victim defined in Article 113 par.39 of the CCRK since this definition extends beyond just the family relationship.

The extent of the damage caused and the psychological impact. -Adequate assessment of this circumstance should not simply be limited to physical injuries but must include injuries of a psychological nature as well. This can include both short-term and long-term psychological implications and the ability of the particular victim to recover after the crime. Psychological violence against a victim in a domestic relationship can sometimes constitute the most significant injury to the victim. However, the court must take into account that within the framework of Article 248[267] psychological violence is also included as one of the four forms of violence against family members. Therefore, in cases where we are dealing with offenses qualified under Article 248, psychological violence cannot be double counted both as an aggravating circumstance and as an element. In other cases, when the crime committed against a family member is qualified according to one of the underlying offenses, e.g. Light bodily injury from Article 185, continuous psychological violence against the victim can be considered for aggravation, due to the fact that the level of the defendant's intent is expressed through psychological violence as a factual circumstance[268] .

Modern medicine and developed legal systems recognize that psychological damage over time can have permanent and long-lasting impacts on a victim. Long after the signs of physical violence disappear, the psychological component of the injury remains. It may take many forms and be diagnosed as a wide variety of conditions many of which are permanent and debilitating. Though infrequent, there may be minimal or even no physical violence component in the history of the relationship. This does not mean that the relationship history should be discounted. The impact of psychological and emotional damage needs to be evaluated over the long term and considered carefully by the Court. In the end, the Court must consider the psychological implications of not only the instant crime but the long-term relationship and the psychological implications.

[267]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 248 Domestic violence, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

[268] Criminal Code, Article 22 stipulates that *"Knowledge, intention, negligence or purpose required as an element of a criminal offense may be inferred from factual circumstances."*

Any previous criminal conviction of the convicted person Previous conviction is one of the elements weighing the most in sentencing. Recidivism is already included when setting a higher starting point for offenders with a criminal record. Regarding the defendant's previous convictions that do not meet the concept of multiple recidivism under Article 75 of the CCRK, this is best explained in the first part of the Guidelines, more precisely under Point V-Aggravation and Mitigation based on Article 70 of the CCRK.

Violation of Court Orders

The commission of an offense that includes a violation of orders or protective measures issued by the court, both in criminal and civil proceedings, can significantly aggravate the punishment. The orders not to harass, not to contact, or not to repeat the violence already show that in advance there was a confirmed behavior on the part of the defendant, for which the court has imposed such an order. Breaching an order imposed can cause significant harm and/or anxiety on the victim. It also represents disrespect for the authority of the Court and jeopardizes compliance with more than just the order in question. Failure to aggravate sentences for violating court orders will dampen overall compliance with the orders and actually encourage such behavior in the future on the part of the defendant.

In addition to the above-mentioned circumstances, there are also a number of other factors and circumstances that are not explicitly included in the CCRK, but which have the same indication of the degree of responsibility and which should be taken into consideration in sentencing. To name a few:

- Previous violence against the same victim.
- Forced entry into the house/apartment or place where the victim is located.
- Significant planning in the commission of the criminal offense.
- If the offense was committed in complicity
- Use of alcohol or narcotics to commit the crime.
- Exploitation for commercial purposes.
- Desecrating and shaming the victim, such as through the exposure of photos or videos of the act of rape or their distribution on social networks.
- Holding the victim in prolonged isolation.
- Kidnapping etc.

If these cannot be included as a separate offense or if they do not represent elements of a criminal offense, should by all means be taken into account at sentencing.

Repetition of violence and threats to use violence

The proven record of violence or threats by the defendant in the context of family or gender-based violence is a key factor in assessing the seriousness of the offense. Evidence of constant repetition of the same or similar violent behavior or threat of violence is an indicator of both the defendant's character and an increased level of dangerousness. Prior assaults are admissible to show motive or intent in domestic violence cases or other gender-based violence even when they are quite remote in time. Thus, a violent past is often crucial in determining the appropriate sentence. This refers to any of the offenses which are committed by the same defendant more than once during a period of time. If a person has engaged in repeated violence against an intimate partner over time, the victim may have a reasonable belief that danger is imminent on the basis of relatively small behavioral clues that from the perspective of court and the public may seem totally irrelevant. For example, if the defendant shows remorse at the hearing and promises

not to repeat the crime, and on the other hand, the criminal record shows that the defendant has continuously engaged in violent behavior, this is sufficient for the court as a factual circumstance to understand the degree of his remorse and if the same should be taken as a basis for sentencing.

So, for example in one of the cases of domestic violence handled by the courts in Kosovo, the fact that the defendant had previously committed violence against his wife was taken into account when deciding:

"*In this particular case, this court emphasizes the fact that weapons were found during the search of the house of the accused after the report of the domestic violence incident and it should also be reiterated that it was not the first time that the defendant used a weapon in relation to his wife, since in an earlier case he cut off her finger through the use of a weapon. Therefore, this court finds that without an adequate criminal sanction, there are indications that the situation could escalate to a fatal outcome.*"

This is a very important factor as it emphasizes the particularly devastating effect on a victim who is repeatedly subjected to the same type of criminal act, especially in cases where the defendant and the victim live in the same house.

Use or threat of using weapons or other dangerous objects

The presence of a weapon in the home is often a critical component in creating fear in the victim through a constant state of jeopardy. The weapon may have been used in a previous incident of either actual violence or a threat, and its continued presence implies the ongoing possibility that the behavior will be repeated. It also serves to deter the victim from leaving the aggressor or reporting previous incidents to the authorities. Research shows that the use of weapons or dangerous tools or threats to use these in the context of domestic violence represents a clear indicator of escalation and a decisive indicator in fatal outcomes. Therefore, the presence of a weapon and/or the threat of it should be considered in aggravation, regardless of whether the defendant possesses a permit for it. At the same time, the court must take into account that the nature of the criminal offense or the degree and nature of the injury is not a relevant factor. This considering that the Istanbul Convention[269], which has become part of the Constitution of the Republic of Kosovo as of 2020[270], in Article 46 recommends the inclusion of the circumstance when the offense was committed with the use or threat of a weapon, as an aggravating circumstance in criminal offenses of gender-based violence or domestic violence.

Repetitive acts against the same victim

It is important to emphasize the particularly devastating effect on a victim who is repeatedly subjected to the same type of criminal act or activity over a period of time. Repetition will always have a significant impact on aggravating a final sentence, especially when considering whether the circumstances arise to the level of particular cruelty. Repetition frequently occurs in situations of domestic violence, where the overall injury and harm are created over a long period, which can include significant gaps in time between particular acts. While the length of time between acts is relevant, it should not be used to discreetly separate or exclude the harm caused by one episode from that of another. The court must consider the type of crime, the object of the crime

[269] Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, Article 46, under g, May 11, 2011.
[270] Amendment of the Constitution of the Republic of Kosovo No. 07-v-058, Amendment no. 26, 25 September 2020

and the intentions of the defendant in determining whether a particular action should be considered in conjunction with the instant offense. Additionally, if an act is not technically available to aggravate a sentence as a recidivist, it should not be ignored. It may still be relevant in upgrading the particular offense as a qualified form.

Whether the criminal offense involved multiple victims.

This factor is significant in domestic violence situations where courts frequently focus solely on the custody arrangement and ignore the impact of violence on a child who is present in the home. If the child is present at home during the offense, the court must consider the past of the relationship and its impact on the child. Even if the crime charged does not include an offense for actions directly against the child, the presence of the child can be considered an aggravating factor under 2.5 as the child will be an additional victim. Once presence is established, the Court will need to determine the extent of the injury and consider the degree of appropriate aggravation (similar to considerations against the primary victim). Such a thing is foreseen by the Istanbul Convention Article 46 which among other aggravating circumstances, includes a case when "the crime was committed against or in the presence of a child".

It is encouraging to see that our courts have started to build such a practice as well where the presence of the child is considered in the assessment of the gravity of the offense and the impact that the offense has had on the children.

"*In the specific case, the criminal offense was committed in the presence of two small children. Moreover, as a result of the conflict the defendant escaped and the injured party ran away from home, thereby leaving the two children who needed necessary parental care alone at home in an environment in which there were weapons. This speaks best about the degree to which the violence exerted by the defendant has reached. In this case, the police officer who testified in the trial explained that it was a terrible situation and his colleagues managed to calm the children down*."

In the aforementioned case, the court not only assessed the fact that the children were present during the violence but also that the children were left without care precisely because of this violence, thus affecting the psychological aspect of children.

Even if a child is not subjected to physical abuse, they often suffer emotional and psychological trauma from living in a home where their fathers abuse their mothers. Those who grow up observing their mothers being abused, especially by their fathers, grow up with a role model of intimate relationships in which one person uses intimidation and violence over the other person to get their way. Experts believe that children who are raised in abusive homes learn that violence is an effective way to resolve conflicts and problems. There is a strong likelihood they will replicate the violence they witnessed as children in their teen and adult relationships and ultimately their parenting experiences. Children from violent homes who are subjected to violence or witness it also have higher risks of alcohol/drug abuse, post-traumatic stress disorder, juvenile delinquency, and ultimately adult criminal activity.

The court should strongly consider this aggravating factor in cases when:

- A child (or other) witness was physically present when the violence was taking place.
- A child (or other) witnesses were not physically present, but able to hear the violence/abuse.

- A child (or other) witnesses were not physically present and cannot hear the violence/abuse, but can see its consequences afterward.

The court will also need to consider the impact on the victim's family. This can be fairly wide-ranging as well. It should not only include injuries to family members that might witness the crime (such as in the domestic violence context), but also include the impact on the family members in dealing with the aftermath. This can include psychological injury, emotional damage and/or loss of caregiver abilities. This factor can also apply to children present in the home who witness the crime as more fully described under factor 2.5. Additionally, long-term abuse present in the relationship can cause permanent psychological injury, even in the absence of actual physical injury. Again, the Court will need to assess the history in its entirety to arrive at an appropriate level of aggravation.

Abuse of trust in a family or similar context

With the inclusion of the new aggravating circumstance of "family relationship" under the new Criminal Code, the interpretation of trust as a circumstance that can be considered in a family context has faded away to a large extent due to the possibility of double count consideration between these two circumstances. However, abuse of trust can include relationships that do not fall within the definition of family relations but are so interconnected precisely because of the expectation and trust that is given to the caregiver, for example, in cases where the defendant can be the child's guardian, nanny, coach, etc. The common element of these cases is the position of trust has a high degree of connection to specific emotional harm that may emerge from the misuse of this trust.

Trust implies a mutual expectation of conduct that shows consideration, honesty, care, and responsibility. An abuse of trust relates to a violation of this understanding that can occur through direct violence or emotional abuse. An additional consideration includes evaluating the abuse of power in a relationship by restricting another individual's autonomy. This is frequently a component of domestic violence situations and can include maintenance of control through psychological, physical, sexual, financial, or emotional means.

Provocation in domestic abuse context

Abusers often assert provocation as a mitigating factor. The Court must scrutinize the assertion of provocation in the context of the domestic violence relationship, taking into account that abusers often consider any threat to their ability to control the victim as provocation. On the other hand, an at-risk partner who has retaliated against her abuser may appropriately raise the issue of provocation based on a history of violence by the abuser. The first consideration is whether the party claiming provocation is the abuser or an at-risk partner who retaliated. Such assertions need to be treated with great care, both in determining whether they have a factual basis and also considering whether the alleged conduct amounts to provocation sufficient to mitigate the seriousness of the offense. This requires the court to consider the totality of the information regarding the nature of the domestic violence relationship.

An at-risk partner's "provocation" of the perpetrator through a refusal to follow the perpetrator's rules, such as becoming romantically involved with another person, or taunting the respondent, do not qualify as provocation. Likewise, threats to leave a relationship, disobedience by the victim, or any real or perceived violations of the abuser's "honor" do not amount to provocation.

For provocation to be a mitigating factor for an at-risk partner who retaliates, it will usually involve actual or anticipated violence - including psychological abuse. Provocation is a stronger mitigating factor in this context if it has taken place over a significant period. Finally, the court will need to establish the level of provocation experienced by the at-risk retaliating partner. As an example, paragraph 4 of Article 185 of the Criminal Code has recognized the impact of extreme provocation in cases of bodily injury: "The court may impose a judicial admonition on the perpetrator for the offense provided for in paragraph 1 or 2 of this Article if the perpetrator was provoked by the inhumane or brutal conduct of the injured party." The example from Article 185 is presented as an illustration of the importance of the provocation foreseen by the legislator. However, care should be taken not to have duplication by including it both as an element and as a mitigating circumstance.

C. Mitigating circumstances

Adequate weighing of the mitigating circumstances in relation to the aggravating circumstances and the type and weight of the criminal offense is very important in offenses of this nature. Some circumstances are used in practice for offenses of this chapter, but they are completely irrelevant.

Apology or generally the expression of remorse of the defendant, similarly to crimes against sexual integrity, should be viewed with a great deal of caution, precisely because of the damage that results from them.

Personal circumstances, character, and cooperation with justice authorities. -The good character of the defendant is presented as a very frequent circumstance in favor of mitigation for the defendant in cases of domestic violence. The Court should be particularly skeptical of any claim of mitigation for good character. One of the dynamics of these relationships that may allow domestic violence to continue unnoticed for lengthy periods is the ability of the defendant to have two personae. The persona displayed to the community is often completely different than the persona the abuser displays in the context of the relationship. The Court should only consider the character of the defendant as it pertains to the relationship. If there are ongoing incidents of domestic violence, this circumstance is not relevant at all and should not be taken into account. Often abusive partners present well, as they are manipulative and skilled at maintaining control.[271]

In practice, there are cases where the "*low educational level of the defendant*" is considered for mitigation. It is reasonable for the Court to try and justify consideration of this circumstance, only in the context of assessing the perpetrator's ability to understand the gravity of his/her actions, the same as it would be in the case of taking age into consideration, but not merely because the defendant has lower education. Therefore, the proper reasoning of the decision is more than necessary to understand the logic behind such a decision by the court.

[271] Handbook of domestic violence for judges and prosecutors, Personal circumstances and character of the convicted person, par. 10.6.4. Prishtinë (2016), P. 76.

D. Applicability of other punishments

As emphasized in other chapters, during sentencing, the Court must take into account the appropriateness and proportionality of the punishment with the crime committed.

- *Imposing a suspended Sentence* - may be suitable only for some of the lighter forms of offenses from this Article. Issues related to the degree of dangerousness should always be considered when it comes to cases of domestic violence. A suspended sentence must not be considered when there has been a breach of a protective order, particularly when the act that constituted the breach is of a violent nature. The perpetrator in these cases has already shown disobedience to court orders by failing to respect the Protection Order. Violation of a suspended sentence/obligations provided for in this sentence must be taken into account at the time of sentencing. When imposing the sentence from Article 244, the court must also take into account paragraph 4, which provides that in addition to the imposition of a suspended sentence, the court can also order the perpetrator to pay regularly and meet the obligations of care, education, and means of living.[272] The same principle also applies to Article 245 of the CCRK, except that in the latter it also adds the obligation to pay unpaid dues.[273]
- *Imposing the order for community service work*– can also be applicable if there are especially mitigating circumstances and if there are no aggravating circumstances that would justify a prison sentence.
- *Imposing a punishment of fine-* Imposing such a punishment of this sentence in most cases is not reasonable in crimes where the perpetrator is a family member if this has an impact on the member (victim) who is financially dependent on the perpetrator.
- *Imposing accessory punishments –* as far as the imposition of accessory punishments is concerned, almost the same principles as elaborated in the Chapter on criminal offenses against sexual integrity apply. Regarding the criminal acts of domestic violence, Article 62 of the CCRK also provides for the prohibition of exercising the function in public administration or public services for 1-5 years in any case when these officials are convicted of domestic violence. This sentence is imposed regardless of whether the official is sentenced to effective imprisonment or probation.[274]
    - *Confiscation of the weapon*- According to the Law on weapons, a person cannot obtain consent for the purchase of a weapon[275] and licensed equipment[276] if, among other things, the person poses a risk to himself, public safety, and security.[277] The same Law clarifies the definition of public order and safety, according to which the final punishment for domestic violence is also included in this definition, therefore in these cases, the person's valid license can be confiscated precisely because of the danger that this person may pose.[278]

[272] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 244 Violating family obligations, par. 4, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[273] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 245 Avoiding maintenance support par. 4, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[274]Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 62 Prohibition on exercising public administration or public service functions, par. 4 Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina
[275] Law No. 05/L-022 on weapons, Article 7 Application of the natural person for purchasing a firearm; Official Gazette of the Republic of Kosovo/No. 25, August 19, 2015, Prishtina.
[276] Ibid, Article 18, Firearm Carrying Permit.
[277] Ibid, Article 10 Danger to Public Order and Safety.
[278] Ibid, Article 38 Confiscation of a license, permit and weapon.

IX. Chapter XXII Criminal offenses against public health

General observations

The Criminal Code of Kosovo in Chapter XXII has defined criminal offenses against public health, where the object of protection of these criminal offenses is the health of people in general but also individual persons. The Criminal Code of the Republic of Kosovo - Code No. 06/L-074 has defined the basic forms of legal incrimination, while the integral part of criminal offenses has been defined through blanket norms which are based on several laws, among them: Law on Health - Law No. 04/L-125, Law on Veterinary Medicine - Law No. 2004 / 21, Law on Food, no. 08/L-120, Law on Medicinal Products and Medical Devices - Law Nr. 04/L -190, as well as a host of laws from this field. Otherwise, the legal provisions of these criminal offenses include criminal offenses that protect the health of a group of people, but also of the general population. Also, some legal provisions in this chapter protect the life and health of animals and sanction irresponsible activity in the case of their treatment.

This Chapter includes eighteen criminal offenses: Transmitting contagious diseases (Article 249), Failure to comply with health provisions during an epidemic (Article 250), Transmitting venereal diseases (Article 251), Spreading the HIV virus (Article 252), Employing persons infected by contagious diseases (Article 253) , Irresponsible medical treatment (Article 254), Failure to provide medical assistance (Article 255), Unlawful exercise of medical or pharmaceutical activity (Article 256), Unlawful medical experiments testing of drugs (Article 257), Irresponsible preparation and dispensing of drugs (Article 258), Unlawful transplantation and trafficking of human organs and tissues (Article 259), Production and distribution of tainted medical products (Article 260), Production and circulation of harmful food items (Article 261), Irresponsible inspection of animal products destined for consumption (Article 262), Giving or using false certificates of physicians or veterinarians (Article 263), Pollution of drinking water (Article 264), Pollution of food products used by people or animals (Article 265), Serving alcoholic beverages to persons under the age of sixteen years (Article 266).

The basic characteristic of these criminal offenses is the fact that the vast majority of these criminal offenses are related to the protection of the health of the general population but also of persons of any specific or unspecified category, while some criminal offenses are intended to preserve animal life or health. A special feature of these criminal offenses is the fact that they can be committed by any person, but also by persons who have certain capacities, such as doctors, medical personnel, veterinarians, and pharmacists. Many of the acts in this chapter have the potential to cause harm on a large scale, therefore their adequate treatment is very important. Also, crimes such as the pollution of drinking water from Article 264 of the CCRK can also be treated in terms of terrorist crimes from Chapter XIV, so it must be treated with the seriousness of the alleged or caused damage. Many of these offenses can be committed as a result of corrupt actions, hence the Guidelines for Criminal Offenses of Corruption[279] addressed the same issues in the assessment of the scale of damage. There are also offenses from this article such as Article 260

[279] Specific Guidelines: Official corruption and criminal offenses against official duty, Supreme Court, pp. 34-38, June 10, 2021, Prishtina, also addressed in the General Sentencing Guidelines p. 86 (to confirm the page after finalizing the text

Production and circulation of harmful medical products which, because they are related to medical products, can be considered as offenses very similar to narcotic offenses under Chapter XXIII, because there is a high potential for misuse of medicinal substances as a substitute for narcotic substances or to manipulate the effect of the latter. Therefore, as such, they should be treated with due seriousness, depending on the level of danger these offenses pose.

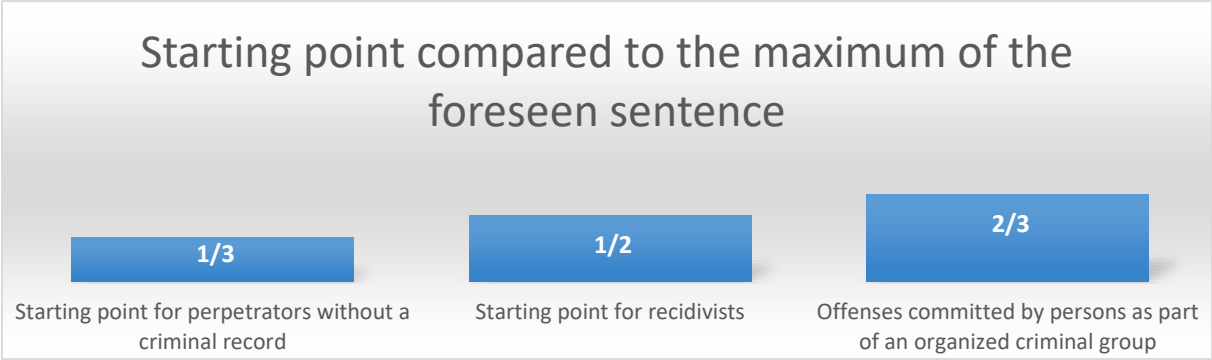
Considering that this chapter foresees several criminal offenses of different types and characteristics, the determination of the punishments is quite different, both in terms of imprisonment and in terms of fines. A characteristic of fine punishments is that none of the criminal offenses contain neither the minimum nor maximum range, therefore in these cases, the ranges determined by law should be applied.

Regarding prison sentences, there is also a wide range between the minimum and the maximum and it is also mainly presented in two forms, namely the form where the legal minimum is not defined at all but only its maximum, and some other offenses where a range is defined between the minimum and the maximum which is quite large range, which means that there is a high margin of punishment for these two criminal offenses starting from three (3) months and extending to twelve (12) years.

Analyzing this high diversity between the prescribed punishments, both for fines and imprisonment, it appears that courts are highly likely to impose inconsistent punishments, undoubtedly making the application of the guidelines a necessity.

A. Starting Point

To harmonize the approach to sentencing for these criminal offenses, the recommendation is to use starting points of sentencing for three different situations, taking into account the degree of punishment, specifics, and the capacities of perpetrators:



-starting point from 1/3 for cases where perpetrators of criminal offenses do not have a criminal record, respectively, they have not been previously convicted. Therefore, in these situations, we consider that a starting point of 1/3 of the maximum penalty would be appropriate.

-starting point of 1/2 for cases where perpetrators of criminal offenses have a criminal record, respectively, have previously been convicted for offenses of this nature and in cases where this criminal offense is committed for financial gain. The same principle also applies to cases where

legal entities are involved as perpetrators. [280] In such cases, criteria defined in Article 10, paragraph 2 of the Law on the responsibility of legal persons for criminal offenses should be taken into account.[281] This legal provision provides that *"During the sentencing, the court will take into account, in particular, whether the legal entity has been convicted of a criminal offense, whether the previously committed criminal offense is the same as the new criminal offense and how much time has passed since the previous conviction"*.

- *while the starting point from 2/3 should be used for cases where the perpetrators of criminal offenses act as part of an organized criminal group.* However, it should be assessed if the above-mentioned characteristics have already been incorporated into the specific criminal offenses.

The above figure clearly shows the difference between the different forms of sentencing for these crimes based on the punishments provided for these crimes and depending on the nature and consequences resulting from these actions.

B. Aggravating circumstances

Some of the aggravating circumstances provided for in article 70 par.2 of the CCRK should be used in these criminal offenses, because as stated above, some of these criminal acts are committed intentionally, but when assessing the aggravating circumstances, one must take into account the fact that the elements of criminal offenses are not considered as aggravating circumstances in their qualifying forms. When assessing the aggravating circumstances, it should be borne in mind, as determined by the provisions of the CCRK and in the present Guidelines, that the aggravating circumstances are not exhaustive or exclusive, therefore, the court has the discretion to present other circumstances depending on the perpetrator and criminal offenses. Aggravating circumstances for criminal offenses under this chapter can be of different natures and each case can have its specifics.

Taking into account the provisions of Article 70 par.2 of the CCRK, we can conclude that some of the aggravating circumstances defined in the list can also be applied to this chapter of criminal offenses as follows:

- *High degree of participation of the convicted person in the criminal offense -* this circumstance is broken down in almost every chapter and the same arguments regarding the perpetrator in the case in question apply to this one as well. Therefore, the penalty for an individual as part of the criminal group should be based on the form of engagement in the commission of that crime, and greater engagement/role should be reflected in proportionate and adequate sentence commensurate to that engagement.
- *High degree of intention –* Although intent is presented as an element of criminal offense in some of the offenses from this chapter, the court often delves into the degree of intent to determine the perpetrator's level of responsibility.
- *Presence of actual or threatened violence in the commission of the criminal offense -* This circumstance represents a basis for being assessed as an aggravating circumstance in cases where violence and intimidation are used to carry out these criminal offenses and by the fact

[280] Article 112 of the KPRK provides that *"The criminal offenses for which the legal person may be criminally responsible, the criminal liability of the legal person, the criminal sanctions that may be applied to the legal person and the special provisions that regulate the criminal procedure applicable to the legal person are provided by a separate law"*.

[281] Law No. 04/L-030 on the responsibility of legal entities for criminal offenses dated 31.08.2011.

that the means used are dangerous by their nature and destination. However, this circumstance should not be applied in cases where these circumstances represent the qualifying element of other criminal offenses, as the aggravating circumstance would be double counted.

- *Whether the criminal offense was committed with a particular cruelty manner -* This manner of committing a criminal offense is observed in certain criminal offenses and the act of carrying them out must be of a cruel nature, i.e. exceeds the usual circumstances through which serious bodily injury or death is caused on a person. This circumstance can be surfaced based on the manner of perpetration and is determined through the use of medical methods with the purpose of causing suffering which is of a higher degree than ordinary suffering.
- *Whether the criminal offense involved multiple victims -* This circumstance represents a basis for being assessed as an aggravating circumstance in cases where a specific activity of the criminal offenses under this chapter, involves a large number of victims, of course, provided that is not an element of the offense. However, there is a big difference between the cases where the damage massively affects the population and the cases where it affects a limited number of people. Other aggravating circumstances can be considered if the offense was committed continuously against the same victim, the degree of suffering and humiliation caused, and the helplessness of the victim.
- *Whether the victim of the criminal offense was particularly defenseless or vulnerable -* This circumstance represents a basis to be considered as an aggravating circumstance in cases where these criminal offenses are related to vulnerable and sensitive persons as a result of an activity determined in the criminal offenses under this chapter. This can include persons of certain capacities, namely minor children, pregnant women, elderly persons, and any category of people who have predispositions to be defenseless or vulnerable.
- *Age of the victim, whether young or old-* The age of the victim, namely young or old presents circumstances that can be applied to this chapter of criminal offenses, especially considering the fact that these categories can often be damaged or endangered through these criminal offenses. It can be applied as an aggravating circumstance when the health or life of infants or elderly persons under care is threatened.
- *The extent of the damage caused by the convicted person, including death,*

  permanent injury, transmission of a disease to the victim, and any other harm caused to the victim and his or her family - This circumstance can be applied only in cases where these circumstances do not present qualifying elements of this criminal offense, since most of these circumstances are an integral part of criminal offenses.
- *Any prior criminal conviction of the convicted person – Recidivism is included in the starting point calculation as stated above.* Nevertheless, regarding the defendant's previous convictions that do not meet the concept of multiple recidivism under Article 75 of the CCRK, this is best explained in the first part of the Guidelines, more precisely under Point V-Aggravation and Mitigation based on Article 70 of the CCRK.
- *If the offense is an act of hatred, which means any offense committed against a person, group of persons, or property, motivated by race, color, sex, gender identity, language, religion, national or social origin, affiliation with any community, property, economic status, sexual orientation, birth, disability or any other personal status, or due to closeness to persons with the above characteristics unless any of these characteristics constitute an element of the offense;* These circumstances are very specific and can be applied in this chapter in cases where criminal offenses have been committed with a certain motive or contain any of the

characteristics listed under this circumstance. As a circumstance, it falls within the scope of circumstances that indicate increased responsibility of the perpetrator.

C. Relevant mitigating circumstances

Some of the mitigating circumstances provided for in Article 70 par.3 of the CCRK are relevant for application in this category of criminal offenses and these circumstances must be assessed depending on the personality of the perpetrator and the type of circumstances that can specifically be applied to this chapter of the criminal offenses:

- *personal circumstances and character of the convicted person-* This circumstance can be considered as a mitigating circumstance in cases where there are good personal circumstances, and it is especially expressed in cases of remorse for the criminal offense committed accompanied by a promise not to repeat acts of this nature or other criminal acts. The good character is assessed based on aspects such as reputation, credibility, personality, and social conduct of the accused, usually intended to show that the crime committed is out of character and this is related to information about the life of the accused, his/her past and other characteristics.
- *evidence that the convicted person played a relatively minor role in the criminal offense -* The determination of this circumstance must be linked to the high degree of participation on the part of another person, and when assessing the actions of these persons, the lowest role can also be determined, which can also be manifested through his/her behavior by expressing a dose of remorse.
- *the fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another; -* This circumstance is also applied in cases where his/her participation is not as the main perpetrator, but his/her contribution is smaller in the commission of the criminal offense in different ways. However, this circumstance does not apply in cases where the perpetrator of these criminal offenses is a person with the same capacity, such as another authorized person, another health worker, etc.
- *age of the convicted person, young or old -* The age of the person should be considered as a mitigating circumstance in cases where the person is young since this usually represents his/her immaturity to understand the nature of these criminal offenses, this circumstance can also be considered in elderly persons by connecting the assessment and with the health condition.
- *general cooperation by the convicted person with the court, including voluntary surrender; the voluntary cooperation of the convicted person in a criminal investigation or prosecution -* Cooperation can be considered as a mitigating circumstance, but the contribution must be concrete and result in acceptance of responsibility and remorse. If the court determines that the cooperation was substantial this factor is generally considered as significant in mitigation as it also facilitates an expeditious trial. On the other hand, when judges ascertain that cooperation was forthcoming reluctantly, was sporadic or connected to some extraneous factor, mitigation will be reduced.
- *Guilty plea -* The admission is usually considered as a mitigating circumstance because this way the trial ends faster, and it is not necessary to administer the evidence, which reduces the time and material cost of a trial. However, the stages of entering a guilty plea must be distinguished and of course, the guilty plea made in the initial stages represents a basis for greater mitigation, while a guilty plea in the later stages also represents the basis for mitigation but which should be valued in a smaller amount of mitigation. It should also be assessed

whether such a guilty plea is accompanied by complete and sincere remorse of the perpetrator, this circumstance must also be related to several other factors, such as the behavior of the perpetrator in relation to the victim, repentance, or even compensation for the damage caused. According to judicial practice, this circumstance is often overestimated and is disproportionate compared to other circumstances, which also indicates double counting and overlapping of this circumstance. It should be reiterated that a guilty plea does not automatically mitigate the punishment if other accompanying circumstances are missing.

- *The remorse shown by the convicted person-* This circumstance can be considered as a mitigating circumstance and must be manifested not only through verbal declaration but argued through the behavior of the perpetrator. This assessment is clearly difficult, considering this factor is of a subjective nature, the truthfulness of which resides solely within the perpetrator. It requires the court to consider not only the words of the perpetrator but also the circumstantial evidence and inferences that can be drawn from actions and behavior.
- *Post-conflict conduct of the convicted person* - The behavior of the perpetrator after the commission of the criminal offense can be considered as a mitigating circumstance when the perpetrator manifests good behavior either towards the victim or the community in general by expressing remorse for the perpetrated action and as a result of the remorse continues with good behavior by helping or supporting a certain category of persons or a relevant institution dealing with the rehabilitation of persons.

D. Applicability of other punishments

None of the following punishments are considered appropriate in cases of persons who have previously committed criminal offenses of the same nature or have seriously harmed the health of a large number of the population, or these criminal offenses have left permanent consequences in the victims.

Imposing a suspended sentence - A suspended sentence can be imposed for most of the criminal offenses under this chapter (except for criminal offenses for which the maximum penalty is imprisonment of up to 12 years), therefore by applying provisions for mitigation of the penalty there is a possibility of imposing a suspended sentence (Article 49 par.2 of the CCRK). However for other criminal offenses for which a prison sentence of up to five (5) years is provided, the suspended sentence can be imposed without the application of mitigation provisions (Article 49 par.1 of the CCRK). Nevertheless, in these cases, it is imposed by taking into account the circumstances of the specific case, the degree of responsibility of the perpetrator, and the consequences caused by this criminal offense. In case of the application of the suspended sentence, the obligation defined by the provisions of Article 56 par.1 subpar.1.12 of the Criminal Code to compensate or restitute the victim of the criminal offense and 1.13 to return the material benefit acquired by the commission of the criminal offense can also be applied.

Imposing the order for community service work - may be appropriate for crimes within this chapter with a legal maximum of 1 year and for those offenses that foresee a punishment of a fine.

Imposing a punishment of fine- Some criminal offenses defined under this chapter, provide for the possibility of imposing a fine as the main punishment and as an alternative to imprisonment. Nevertheless, for the fine to have the desired effect, it must be ensured that the fine is

commensurate to the financial situation of the perpetrator in line with Article 69 par. 5 of the CCRK and the Supreme Court's Guidelines on Imposing Criminal Fines.[282]

Imposing an accessory punishment[283]- with the exception of the accessory punishments defined by Articles 64 and 65 of the KPRK, the court can impose all punishments defined by Article 59 of the CCRK on perpetrators of criminal offenses and all the accessory punishments are suitable to be imposed based on the specified durations that apply to relevant provisions for each defined punishment. It is particularly important to impose accessory punishments from articles 62 and 63 when the perpetrator commits offenses from this chapter in abuse of official duty.

Judicial admonition - can be imposed in this chapter in cases where a sentence of up to one (1) year of imprisonment is foreseen and it should take into account that the criminal offense is committed under particularly mitigating circumstances.

Waiver of punishment- this chapter of criminal offenses does not foresee this option, however, considering that some of the criminal offenses are also committed negligently, the provisions of Article 74 of the Criminal Code may be applied.

Confiscation- some criminal offenses of this chapter, foresee for the mandatory confiscation of items, namely herbs, medical products or harmful items.

[282]Specific Guidelines: Imposing a fine as a sanction for criminal offenses under the Criminal Code of the Republic of Kosovo. Approved on February 27, 2020 by the General Assembly of the Supreme Court, Pristina.
[283]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 64 and 65, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

X. Chapter XXIII Narcotics offenses

Traffic in narcotic substances, particularly unlisted dangerous substances or precursors, has increased in recent years. The beginning of the war in Ukraine in 2022, has also led to among others also the change of the narcotic route. Balkan countries have also been impacted extensively from such movements. Therefore, the response of the justice system to obstruct these networks and these phenomena is very important.

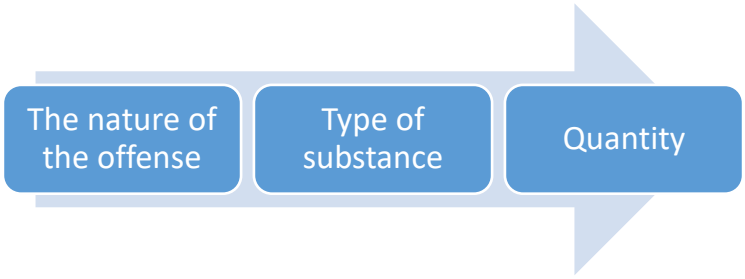
The increase in the consumption, market, trafficking, and cultivation of narcotic substances over the years also determines the increase in the commitment and adequate response of the justice system against these phenomena. For comparison, find some figures hereunder on the number of criminal reports received at the prosecution office during the last decade:

2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
374	511	438	725	1061	1556	1328	906	1105	1172

The above statistics include all offenses from chapter XXIII.

Determining some principal issues and frameworks for criminal offenses related to narcotics is a necessity, especially at this time when more and more narcotics of different natures appear on the market. Therefore, the aim of this part will be to draw some lines:

- The difference between the types of offenses.
- Differentiation between drugs of different types based on the level of dangerousness and proliferation.
- The quantity of narcotics.
- Other accompanying issues that categorize these offenses and which are important for the calculation of the punishment.



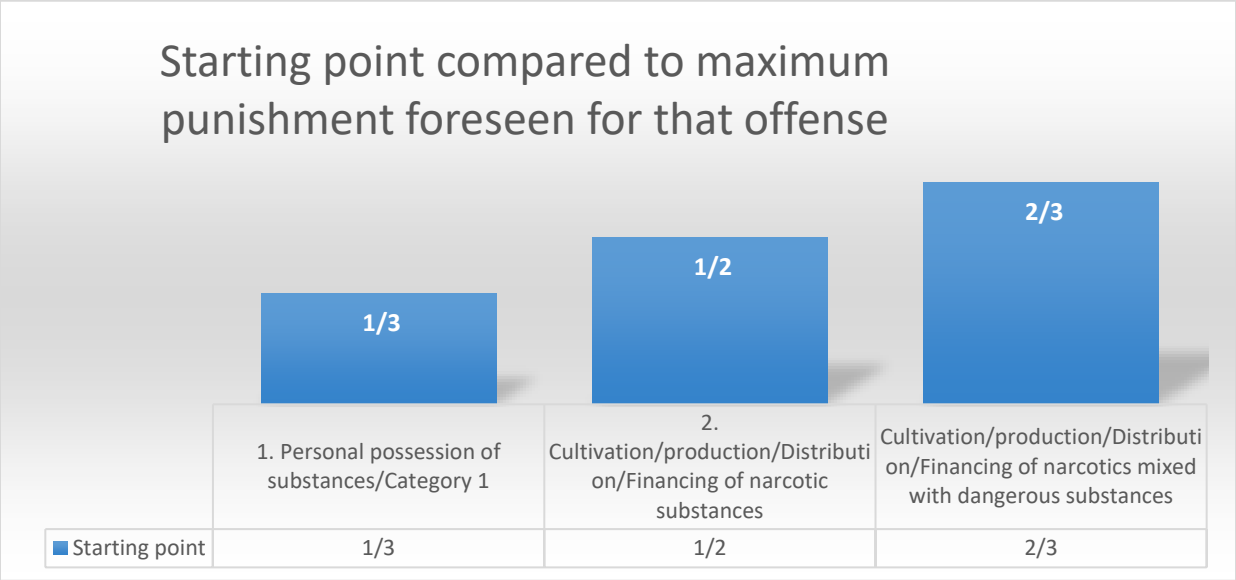
To clarify the aforementioned issues, the Supreme Court will be based on the practice of the most developed countries which have already built a framework which may be adequate for the Republic of Kosovo.

A. Starting Point

The nature of the offense is a very important factor in determining the starting point and final sentence. It is very important to distinguish whether the offense was committed for:

- Personal possession.
- Cultivation, production, distribution or financing of narcotic substances, or
- Cultivation, production, distribution or financing of narcotic substances with dangerous mixes.

Even within each of the above circumstances, there are certain elements that make the offense more serious than in other cases. Therefore, the above three divisions only address the important factors in general in determining the starting point.



- A lower starting point (of 1/3) compared to other categories has been specified for personal consumption.
- Cultivation/production/distribution/financing of substances has a starting point in the middle ½ of the sentence range.
- The third starting point is defined as 2/3 since it refers to high risk substances or mix of such substances. We will discuss more information below on breaking down these elements and examples of how the presence of these substances or mixtures can impact the sentence.

1. Types of narcotics

The type of narcotics should serve to determine the sentence. This part incorporates in itself some very important matters to be addressed in more details.

a. *Differentiating between high-risk drugs*

In developed countries, the punishment for narcotic substances depends, among other things, on the type of substance and the dangerousness it carries. Unfortunately, the criminal

legislation in Kosovo does not make such a differentiation of criminality depending on the type of substance. Only Article 272[284] of the CCRK reflects the three types of substances: the hashish plant, the cocaine bush, or the cannabis plant, foreseeing the punishments for their cultivation. Nevertheless, the CCRK does not reflect all types of narcotic substances encountered in Kosovo. Law on narcotic drugs, psychotropic substances, and precursors[285] has integrated in an annex the classification of drugs and narcotic substances in accordance with the United Nations Single Convention on Narcotic Substances[286] of 1961, United Nations Convention on Psychotropic substances of 1971[287] and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988[288]. The Law and the Conventions have divided substances into 4 categories:

- Table I- Substances that have a high risk and that have no use in medicine and veterinary medicine and whose activity is prohibited in Kosovo.
- Table II- Substances that have a high risk and that have use in medicine and veterinary medicine and whose activity is prohibited in Kosovo.
- Table III- Narcotic drugs and dangerous psychotropic substances[289] and precursors[290] of narcotic drugs, which are used in medicine and veterinary medicine.
- Table IV- Substances used in the production of narcotic drugs and psychotropic substances - precursors.

b. Unlisted substances and the changes in the trafficking in narcotic market

The abovementioned tables include general groups of narcotic substances which are most often found in the narcotic substance local market or in cases where Kosovo is used as transit country for such substances. The appearance of new synthetic drugs/opioids, unlisted in the conventions, in the last few years represents, a global problem. The same problem is present in Kosovo too, considering that the above-mentioned Law has not been updated since 2008, when originally approved. There is a need to point out that because the list of substances is part of the Law which requires an extensive amendment procedure, the Republic of Kosovo is way behind in inclusion of new substances currently in the market which represent health hazard. In Europe, annually at an average 60 new substances are listed and all remain unregistered in Republic of Kosovo, limiting as such efficient fight against such substances for law enforcement and the justice system.

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[284]Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 272 Cultivation of opium poppy, coca bush or cannabis plants, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[285]Law No. 02/L-128, on narcotic drugs, psychotropic substances and precursors, UNMIK/Reg/2008/10, 19.02.2008.
[286] United Nations Single Convention on Narcotic Drugs, 1961 as amended by the 1972 Protocol.
[287] UN Convention on Psychotropic Substances,1971.
[288] UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,1988.
[289] Law No. 02/L-128, on narcotic drugs, psychotropic substances and precursors, Article 2: "Psycho-trope substance means any substance, natural or synthetic, presented in Table 3 as Annex to this Law, based on Lists I, II, III and IV of the Convention on Psychotropic Substances of year 1971;
[290] Law No. 02/L-128, on narcotic drugs, psychotropic substances and precursors, Article 2: "*Precursor mean any substance, natural or synthetic which can be used to obtain the narcotic medicament or psychotrope substance, presented in Table IV, based on Lists I and II of Convention of the United Nations of year 1988, Against Illegal Trafficking of Narcotic Medicaments and Psychotrope Substances and in the Regulation of (EC) No. 273/2004 of European Council and Parliament on 11.02.244 regarding Precursors. Any other substance presented in Table IV of this Law will be interpreted as precursors*;"

The illicit drug markets are changing rapidly, with synthetic drugs replacing plant-based drugs in terms of production, trafficking, marketing and consumption. In this context, illicit drug manufacturers have significantly expanded their ability to secure the sources of the chemicals they use. The system established under Article 12 of the 1988 Convention was designed to monitor international trade and, as such, is a system that is responsive to the rapidly changing pace of illicit drug production today, as custom-made precursors or precursors are increasingly being used to circumvent controls. In addition to seeking opportunities to substitute controlled precursors for uncontrolled precursors, the illicit drug industry is also exploiting gaps in licit markets to recover precursors from uncontrolled products that fall outside the scope of the 1988 Convention.[291] The increasing sophistication, diversification and scale of illicit drug manufacturing operations has exceeded expectations and predictions at the time of the 1988 Convention. As a result, there is now almost no limit to the range of chemicals and production methods that can be used in the illicit manufacture of drugs, including those previously considered unsuitable for use on the illicit market. In general, the chemicals used are obtained from two sources of supply, each with its own implications for the controls that can be applied:

- Chemicals that can be found on the market and that are regularly traded for legitimate purposes, such as benzaldehydes, methylamines and phenylacetic acid esters; or,

- "Designer" precursors intentionally produced as chemical relatives of controlled precursors and that can be easily converted into controlled precursors.[292]

-According to the UN, a number of countries have decided to expand the list of substances specifically mentioned in the law dealing with narcotics to include the concept of "chemical" and/or "pharmacological" similarity to a controlled drug, which is structurally similar and/or has a similar or greater effect on the central nervous system as the controlled substance, thus treating it as an analogous substance and therefore subject to the same control.[293] Even the Commentary to the 1988 Convention itself, when referring to Article 13, provides the following explanation: "Under Article 13, Parties are obliged to take such measures as are necessary to prevent the trade in and diversion of materials and equipment for the production of illicit drugs... Neither the word "material" nor the word "equipment" are defined in the Convention, but they can be interpreted broadly to include a wide range of goods[294], non-scheduled chemicals and new precursors.[295] The CCRK also includes a definition of where " "analogue" means any substance which is not otherwise authorized and whose chemical structure is substantially similar to that of substances or

[291] United Nations, International Narcotics Control Board; Precursors and chemicals frequently used in the illicit manufacture of narcotic drugs and psychotropic substances, Report of the International Narcotics Control Board for 2023 on the implementation of article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, Address by President Jallal Toufiq, p.iii, January 2024, United Nations Office at Vienna.
[292] INCB, IV. Options to address the proliferation of nonscheduled "designer" precursors at the international level. The issue #218, 2018.
[293] UN Toolkit on Synthetic Drugs, https://syntheticdrugs.unodc.org/syntheticdrugs/en/legal/national/analogueleg.html last accessed on March 21, 2024.
[294] UN, Commentary to the UN Convention against illicit trafficking of narcotic drugs and psychotropic Substances 1988, Article 13, par.13.1, pg.289, New York, 1998.
[295] Report of the International Narcotic Control Board (INCB), IV. Options to address proliferation of the nonscheduled designer precursors, Instructions provided with the Convention of 1988, pg.40, 2018

preparations which have been declared to be narcotic drugs or psychotropic substances and whose effects it reproduces."[296]

In response to rapid trends, the EU has also tried in various ways to address the issue of drugs that are not specifically listed in the approved schedules. According to the EU Regulation ... "non-scheduled substance" means any substance which, although not listed in the Annex, has been identified as being used for the illicit manufacture of narcotic drugs or psychotropic substances.[297] Of course, one should also bear in mind that analogue control may have unintended negative consequences for legitimate manufacturers and suppliers of substances for medical and/or research purposes, because they cannot verify with certainty whether a substance they produce or sell is considered to be an analogue substance, which puts them at risk in determining whether certain substances fall into the category of dangerous substances.[298]

c. Examples of various mixes of substances

It is critical that the court is also aware of the degree of dangerousness that certain mixtures of substances, seemingly of minimal danger in individual amounts, may carry. Lately, there increasing concern worldwide about "laced drugs."[299] Laced drugs represent the mixture of two or more substances, with one substance generally being a cheaper substance. The substances being "laced" into the more expensive substances are referred generally as "cutting agents" or "adulterants." These cutting agents generally encompass powerful chemicals that can, in fact, product similarly psychoactive effects as the drug. The cutting agents can range from household items (i.e., rat poison, laundry detergent, boric acid, baking soda, and talcum powder) to other drugs (i.e., caffeine, Phencyclidine[300] (PCP or "Angel Dust"), and fentanyl).

Drug manufacturers mix in the cutting agents with the more expensive substance (i.e. "masking" the more expensive substance) to "bulk up" the original product, and thus sell less product for more profit. In other cases, drug traffickers lace drugs to increase the psychoactive effect of the substance, thus leading to a lethal combination. For example, in Kosovo, drug manufacturers will lace marijuana, a cheaper substance and a common drug in the country, with other substances, such as:

- *Marijuana – Fentanyl. Marijuana* laced with small quantities of fentanyl has become a frequent occurrence. Only one pinch of fentanyl (2 to 3 mg) is sufficient to cause an overdose or even fatality. Often, the consumer is not aware that the substance is laced.

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[296] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 267 Unauthorized purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues, paragraph 4, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

[297] Council Regulation (EC) No.111/2005 dated 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors, Chapter I, Subject Matter and Definitions, Article 2 par.(2), Official journal of the European Union, L 22/1, 26.01.2005.

[298] UN Toolkit on Synthetic Drugs, https://syntheticdrugs.unodc.org/syntheticdrugs/en/legal/national/analogueleg.html last accessed on March 21, 2024.

[299] For more on Laced drugs see What are Laced Drugs? | Turnbridge.

[300]Sold as a white powder or in liquid form, PCP is addictive, Phencyclidein (PCP), commonly known by its street name, "Angel Dust," is a member of the hallucinogen family of drugs, which can cause mind-altering effects to users, such as confusing, mood changes, and seeing things or hearing noises that are not there. More serious health effects, such as seizures, coma, and possible death, can result from high doses. See PCP: PCP: What to Know (webmd.com)

- *Marijuana – Formaldehyde.* Usually the lacing of marijuana with formaldehyde is done for the purpose of increasing the potency of marijuana. This mix is known to result in harmful cognitive effects, loss of memory due to neurological damage, and at times, fatality.
- *Marijuana – Heroin*. Marijuana laced with heroin may result in serious damage to health, such as reduced breathing and heart rate, confusion, etc. Additionally, individuals may become lethargic and those people who do not use the drug on a regular basis, may have a significantly lower tolerance. Thus, for some individuals, consumption of this mix, due to the potency of heroin, may easily lead to overdose and severe health damage.
- *Marijuana – Cocaine*. Marijuana laced with cocaine is less common in the market yet the effects of marijuana (as a substance with a sedative effect) laced with cocaine (as ;a substance with a stimulant effect) may lead to serious health issues. Often times, users experience hallucinations, paranoia, cardiovascular issues, seizures, etc.
- *Marijuana – LSD.* LSD is a very powerful hallucinogenic drug, and is highly potent, even in small doses. Usually, LSD's potency weakens if smoked with marijuana. However, if marijuana laced with LSD is chewed, then the effect is much stronger. In this case, individuals may become disoriented with resulting poor judgment (due to the hallucinogenic effects).
- *Marijuana – Methamphetamine.* When methamphetamine is aced with marijuana, the combined substance may produce extremely powerful effects, such as confusion, hallucinations, delusion and potential seizures.

In addition to the above examples, there are many cases when marijuana, and other cutting agents, such as heroin, cocaine, are laced with components, resulting in a final mixture that substantially increases the risk of harmful consequences for consumers. For example, marijuana laced with laundry detergent, fungus, glass or lead, can result in health complications such as vomiting, coughing, sharp pain in the chest or throat, difficulty breathing, diarrhea, dizziness, etc. There are other instances where narcotic substances are mixed with other nonharmful components (exs. flour, milk powder, sugar, etc.) only for the purpose of adding bulk to increase the profit of the final drug sale. Of course, the purity of the product warrants consideration for a court's weighing of the final punishment, as the purity does not simply relate to the profit of the drug sale, but also relates to the effects on the user that the drug produces, and even the resulting level of a user's addiction. However, there are no clear-cut lines here; this is because while some substances of higher purity can be more addictive, but mixed products with less harmful cutting agents can still lead to more severe health issues due to the risk of the supplemental ingredient.

d. Fentanyl and risks from this substance

An unprecedented scourge of addiction and death, propelled by the illicit trafficking, sale, distribution, and abuse of fentanyl and other synthetic opioids, grips communities across parts of the world today. For example, the United States of America is currently locked in its "fourth wave" of the fentanyl crisis—one that began in the early 1990s.[301] This wave of the crisis features staggering statistics: Over 300 Americans are estimated to be dying daily from fentanyl

[301] Claire Klobucista, The U.S. Fentanyl Crisis: What to Know | Council on Foreign Relations (cfr.org); Department of Justice, *Strategic Goal 2: Keep Our Country Safe*, 2023, Department of Justice | Objective 2.5: Combat Drug Trafficking and Prevent Overdose Deaths | United States Department of Justice (2023).

poisoning.[302] These numbers proceed a record-breaking 12-month period, from April 2022 to April 2023, where 111,355 people died from a drug overdose, with fentanyl and other synthetic opioids involved in nearly 70 percent of those deaths.[303] Since the end of 2015, the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) has been conducting a series of joint investigations with Europol into new fentanyls that have raised serious concerns at European level. Fentanyl and its derivatives (fentanyls) are a highly potent group of synthetic opioids. In some cases, these substances are used in human and veterinary medicine, in anesthesia and for pain management. However, fentanyls are also illegally synthesized for easier transportation, as very small quantities can produce thousands of very potent doses that are sold on the street. This makes them very attractive to organized crime and poses a challenge for drug control agencies. New opioids, which are not controlled by the UN Convention, can be produced and marketed freely and openly by chemical and pharmaceutical companies, often based in China, but not only.[304]

e. Lethality of fentanyl

Complicating matters substantially, fentanyl is incomparable to the drugs propelling previous epidemics, as its unique chemical composition and capacity addict users in ways not seen previously. That is because fentanyl, a synthetic opioid analgesic (or a lab-made opioid), is faster and cheaper to produce than other drugs, and approximately 50 times more potent than heroin and 100 times more potent than morphine.[305] In fact, the reason that fentanyl has historically been ubiquitous in post-outpatient surgery care is because its chemical composition breaks down so rapidly in the body.[306] In other words, as Dr. Caleb Banta-Green, a researcher with the Addictions, Drug and Alcohol Institute at the University of Washington School of Medicine in the United States explains, fentanyl "makes you feel really good" very quickly.[307] But just as quickly, the buzz goes away, meaning users "have to use ëfentanyl] again and again and again" to get the same buzz.[308] The addictive nature and potency of the drug, in turn, explains why users are more susceptible to overdoses, which, as Dr. Banta-Green elaborates, "can happen in seconds to minutes."[309] By comparison, overdoses from less potent prescription opioids, such as oxycodone, or drugs like heroin, will "typically take many minutes to hours."[310] What this translates to is simple: There is *a significantly reduced* timeframe to intervene and save a user experiencing a fentanyl overdose as opposed to a user experiencing a heroin overdose.[311]

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[302] The White House, Dr. Rahul Gupta Releases Statement on CDC's New Overdose Death Data Showing a Full Year of Flattening Overdose Deaths | ONDCP | The White House (July 12, 2023).
[303] Deidre McPhillips, Overdose deaths continue to rise in the US, reaching another record level, provisional data shows | CNN (Sept. 13, 2023).
[304] European Monitoring Centre for Drugs and Drug Addiction, Attention to fentanyl… and other new opioids (last updated on 04.10.2023), https://www.emcdda.europa.eu/spotlights/fentanils-and-other-new-opioids_en, last accessed on 25th March 2024.

[305] Melinda Wenner Moyer, What to Know About Fentanyl and Why It's So Dangerous - The New York Times (nytimes.com) (May 19, 2022).
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *Id.*

f. Varied motivations of users and market access

Another factor that makes the fentanyl crisis so intractable is that users' motivations to take the drug vary substantially. For example, while some seek out fentanyl because it invokes such a powerful high; others who take fentanyl (including those who overdose) may have never intended to consume the drug. It is this latter class of users, who may be unintentionally poisoned after having purchased unregulated prescription drugs sold online or by unlicensed dealers on social media apps (Snapchat, TikTok, etc.) or on the street.[312] Gone are the methods of the 1980s and 1990s, where drug dealers used pagers and burner phones to conduct drug deals secretly.[313] Social media transactions, instead, have filled the void, with today's traffickers embracing privacy features like encrypted or disappearing messages, available on social media and messaging apps, to communicate with their buyers.[314] According to Tim Mackey, a professor at the University of California San Diego in the United States, who runs a federally funded start-up that develops artificial intelligence software to detect illicit online drug sales: "There are drug sellers on every major social media platform—that includes Instagram, Facebook, Twitter, Snapchat, Pinterest, TikTok and emerging platforms like Discord and Telegram."[315]

Laboratory testing from the DEA reveals that 7 out of every 10 pills seized by authorities contains a lethal dose of fentanyl.[316] Dr. Nora Volkow, Director of the National Institute on Drug Abuse in the United States, explained: "When you are putting fentanyl in pills that are sold as benzodiazepines or for pain, you are reaching a new group of customers that you wouldn't have if you were just selling fentanyl powder."[317] The result has been a new demographic of addicts having quick access to their drugs of choice online.

The problem is that the prevalence of drugs laced with, or composed entirely of fentanyl, goes unbeknownst to many, given that these counterfeit pills appear "legitimate"—usually coming in a proper prescription bottle, with each pill resembling the color and size of an authentic prescription pill.[318]

2. Defining the quantity of narcotic substances

As emphasized infra, one of the most important issues at sentencing is defining the quantity of the narcotic substances compared to the type of substance, the degree of risk and/or dependence. Courts should take into account that the same quantity of different substances does not have the same level of dangerousness; therefore, the punishment should not be the same. There is only one reference in the CCRK regarding a sentence based on the quantity of the narcotic substances. Specifically, Article 269[319] paragraph 2 of the CCRK provides that for possession of up to three (3) grams of narcotic, psychotropic or analogue substances, the person shall be punished with a fine or imprisonment of up to one (1) year. The issue with the article as written now is that it does

[312] Jan Hoffman, Fentanyl Tainted Pills Cause Drug Fatalities Among Youth to Soar - The New York Times (nytimes.com) (May 19, 2022).
[313] *See id.*
[314] *See id.*
[315] *See id.*
[316] Drug Enforcement Administration (DEA), One Pill Can Kill | DEA.gov (2024).
[317] *Id.*
[318] *Id.*
[319] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 269 Unauthorized possession of narcotic drugs, psychotropic substances or analogues, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

not differentiate between the various narcotics. The article's application of a uniform maximum quantity amount of 3 grams to the same punishment is problematic, because as stated infra, some narcotics are deadly in much lesser quantities than that amount. Another gap in the legislation is that Article 275 has not defined the meaning of a "***large quantity***" of narcotics nor has it provided any gradation of defining that term in context to the potency of a particular substance. For example100 grams of cocaine or heroin is not the same as 100 grams of marijuana/hashish. Accordingly, the differentiation between narcotic substances included in the table above is not only applicable because of the degree of dangerousness, but also because the price/benefit varies greatly from one substance to another.

Currently, different types of narcotic substances have been distributed in the world and synthetic ones are becoming more and more worrisome precisely because of the high potential of dangerousness and extraordinary addiction of individuals affecting entire communities. In Kosovo, but also for the Balkans, marijuana/cannabis trafficking remains one of the most widespread phenomena, and as a source of financing for many other illegal activities but does not leave behind other types of substances.

Below you will find an example of how the penalty for ***the cultivation, export, import or trafficking of these substances*** changes in the USA depending on which type of substances we are talking about. Of course, besides the type and quantity, there are a number of other circumstances (such as the purity and mixture of the substance) that are taken into consideration for the final sentence and that significantly impact the amount of the sentence reflected in the table, but the following are presented for illustration purposes only.

Table A: Scaled table of US sentences by specific narcotic substances

Quantity	**Type of substance**						
	Cocaine	**Ecstasy**	**Heroine**	***LSD.***	**Methampheta mine.**	**Fentanyl**	**Marijuana Cannabis**
100gr:	21-27m	27-33m	51-63m	151-188m	97-121m	97-121m	0-6m
1kg	51-63m	63-78m	97-121m	235-293m	151-188m	151-188m	0-6m
100kg	151-188m	188-235m	235-293m	235-293m	235-293m	235-293m	51-63m

In addition to the U.S system, shown in the table above (Table A) on the calculation of the type and quantity of substances, similar approach is applied in Great Britain, but in a more specific way. There, the combination of the specific type and quantity of the narcotic substance is divided into different categories (with category 1 being the significant harm and category 4 as the lower harm) which are presented as indicators of the degree of harm and therefore affect the categorization of punishments. An example is given below for cases of importation of these substances, from which each category is then compared to the degree of responsibility of the defendant to determine the starting point and also the framework of punishment.[320]

Table B: Scaled table of UK sentences by specific narcotic substances

Category 1	**Category 2**	**Category 3**	**Category 4**
Heroin, cocaine - 5kg	Heroin, cocaine - 1kg	Heroin, cocaine - 150gr	Heroin, cocaine - 5gr

[320] Sentencing Commission, Drug Offenses Definitive Guideline, Import, p.4. Great Britain

Ecstasy,10,000 tablets	Ecstasy, 2,000 tablets	Ecstasy – 300 tablets	Ecstasy – 20 tablets
LSD 250,000 square	LSD 25,000 square	LSD 2,500 square	LSD 170 square
Amphetamine - 20kg	Amphetamine - 4kg	Amphetamine-750gr	Amphetamine-20gr
Cannabis-200kg	Cannabis-40kg	Cannabis-6kg	Cannabis- 100gr
Ketamine- 5kg	Ketamine- -1kg	Ketamine- 150gr	Ketamine- 5gr.

In the absence of a table with reference quantities as a guideline for measuring punishment, the Supreme Court has researched for such a basis in the world. The most suitable guideline table has turned out to be the table from Australia. For clarification, compared to the tables taken as examples from the USA and Great Britain, the following table is only related to the definition of the meaning of different levels of quantities of narcotic substances for comparative purposes. However, for the justice system, this table can serve as a good resource for distinguishing from one substance to another. Such a division of different quantities is made precisely based on the degree of danger that the substances with different compositions represent. It should be made clear that the table from the state of Australia in fact contains a much wider range of narcotic substances by classifying them in several columns with different quantities. However, for the purposes of the most precise and practical guidance, the Supreme Court has only taken the data from the table for some of the substances to make it easier for the courts to understand how much of a substance could be qualified as a small quantity or a large quantity for orientation and comparison purposes. The columns have also been simplified from the table (including fewer divisions to avoid confusion in their reading. The latter may assist the courts in decision-making, especially when it comes to the quantities of substances within the meaning of Article 275. Another reason is the fact that the substances included in that table are not all included within the list of substances according to the Law on Narcotic Drugs, Psychotropic Substances and Precursors, therefore the following table contains only some of the most commonly used substances.

Table C: Most commonly used narcotics

Type of substance	Small quantity	Considerable quantity	Large quantity
Amphetamine	3.0g	250.0gr	1.0kg
Canabis leaf /Marijuana	300.0g	25.000gr	100.0kg
Canabis oil	5.0g	500.0gr	2.0kg
Cannabis plant cultivated by enhanced indoor means	5bimë	50	200bimë
Canabis plant- other	5bimë	250	1 000bimë
Cannabis resin/ Hashish	30.0g	2.500gr	10.0kg
Coca leaf	30.0g	2.500gr	10.0kg
Cocaine	3.0g	250.0gr	1.0kg
Fentanyls	0.0075g	1.25gr	0.005kg

Heroin	3.0g	250gr	1.0kg
LSD or Lysergic Acid and its derivatives even if such derivatives contain hallucinogens	15 DDU apo 0.003g	0.5gr	0.002kg
3,4-Methylenedioxyamphetamine (MDMA) Ecstasy[321]	0.75g	125gr	0.5kg
Concentrate of poppy straw	30.0g	2.500gr	10.0kg

B. Relevant Aggravating Circumstances

As mentioned above, there are several circumstances related to narcotics offenses that courts must consider when determining the final sentence. Referring to the U.S sentence calculation table (Table A), the following table is provided for comparison purposes on how a sentence can change when several other factors are considered.

Table D: Increase of sentence for narcotic substances by adding other factors

Quantity						
1kg	**Cocaine**	**Ecstasy**	**Heroine**	**Metham-phetamine**	**Fentanyl**	**Marijuana Cannabis**
No additional circumstances	51-63m	63-78m	97-121m	151-188m	151-188m	0-6m
Use of a weapon or violence	63-78m	78-97m	121-151m	188-235m	188-235m	6-12m
Substantial risk to the environment	70-87m	87-108m	135-168m	210-262m	210-262m	70-87m
All above circumstances	108-135m	135-168m	210-262m	324-405m	324-405m	70-87m

Many of the aggravating circumstances provided for in Article 70 of the CCRK are included as an element of the criminal offence which immediately leads to a more severe punishment, qualifying under Article 275 of the CCRK. Therefore, below, we will first discuss the circumstances that are applicable to the offences under this Chapter and then those under Article 275. There are some of the aggravating circumstances from Article 70 that are not mentioned in an exhaustive manner in Article 275, as a qualifying element, but that are closely related to those circumstances, therefore the following section aims to highlight such interrelations. Also, many of the above-mentioned explanations provide clarification of the following circumstances, but they are presented above for the purpose of a more adequate reflection of the dangerousness of these offences.

- *High degree of participation of the convicted person*. Participation in an organized group is already sanctioned by Article 275. It is important to emphasize that it is applied as an

[321] Dozimi standard për Ekstazi është 140mg për tabletë, që nënkupton që 1kg=7143 tableta. Megjithatë duhet pasur parasysh se madhësia e tabletave mund të variojë në madhësi dhe peshë varësisht nga procesi i prodhimit, lloji i tabletës që presohet dhe përbërësve tjerë (njohur si adulterants) që mund t'iu jenë shtuar si p.sh. metamfetaminë, ketamine anestetike, kafeina, efedrina, heroina, kokaina, phencyclidine (PCP) apo dextromethorphan (sirup për kollitje) etj.

aggravating circumstance in all articles, including Article 275. Thus, in all other offenses, such a circumstance is used to individualize the punishment based on the degree of involvement of each perpetrator separately. The same principle is used in Article 275, except that in the context of that article it is used to differentiate the actions of each member of the organized criminal group.

- *High level of intent*. Based on the above-mentioned description of the different types of substances, various mixtures that are appearing on the market with a very high risk, it is very important to highlight the great effort of the perpetrators of this category, whether to mix substances, avoid common substances just to escape the listed substances, but also to find forms of online communication, encrypted messages and even payments through cryptocurrencies to escape detection. All of these represent a high level of intent of the perpetrator and the intention to commit the crimes and as a circumstance it has a very large weight in the amount of the sentence. As a circumstance it is also applicable in Article 275 of the CCRK.
- *The criminal offense was committed in a particularly cruel manner.* Considering the trend of synthetic substance mixtures, this circumstance can in fact be conceived as fulfilling the element of Article 275, paragraph 1.6, since many of these new mixtures and substances have a destructive and, one might even say, "cruel" effect on human health. To understand this, it is best to follow the global trends and epidemics of synthetic drugs, some of which have even turned users into a vegetative state. But in the context of this circumstance, it can also be understood when perpetrators take advantage of a certain state of the victims by injecting them with substances against their will. For example, this can usually happen to victims of human trafficking (or even migrant smuggling) who are often injected with narcotic substances with the aim of transporting them without hindrance across borders and in vehicles or containers dedicated to goods. Therefore, such a situation represents the extremes of cruelty and should be taken into account in the height of the sentence. Depending on the victim's status, e.g. if he is a child or a person dependent on the perpetrator, then the qualification may also fall within the scope of the vulnerable victim qualified by Article 275 paragraph 1.4.
- *The extent of the damage caused*. This circumstance is closely related to the above-mentioned explanations regarding the types of substances and their quantity, therefore, when assessing the level of punishment, all of the above must be taken into account. In fact, when it comes to mixtures of dangerous substances, especially synthetic ones, in those cases the offense should automatically be treated according to Article 275 par. 1.6. In cases where we are not dealing with mixtures but with traditional narcotic substances, for the purposes of other articles in this chapter, the assessment can be made in the context of the clientele reached compared to the quantity of narcotics.
- *Any previous conviction*. As a circumstance, it is self-explanatory and ultimately a factor with a lot of influence on the length of the sentence. When it comes to the offenses of this chapter, the sentence should be higher than for first-time offenders. The situation is different for people addicted to narcotic substances who are found with minimal amounts for personal consumption, although they should be treated by the justice system, however, their treatment is different from recidivists who engage in this illegal activity and the focus on this category should be more on rehabilitation programs.

C. Circumstances as per Article 275

As mentioned above, Article 275 provides significantly higher penalties for offenses from Articles 267, 268, 269, 270 or 272 of the CCRK in case where further circumstances are present. So, through this article, the legislator has added additional elements of criminal offenses from the mentioned articles. The existence of even one circumstance makes this offense more serious and therefore qualifies it as an offense under Article 275. Naturally, the existence of two or more, or even all of the circumstances listed below increases the weight and thus the height of the punishment. Many of these circumstances are foreseen by the legislation of different countries as circumstances that affect the height of the punishment. For example, Switzerland provides for harsher penalties for suppliers of narcotic substances if: the perpetrator knows that the substances pose a greater danger to a large group of people, is a member of an organized criminal group, has a substantial profit from the trade of substances, or if he/she distributes in the vicinity of educational institutions. Countries such as Spain, Norway, Portugal, etc. have a similar approach.

- *Paragraph 1.1 the perpetrator acts as a member of the group* - According to the European Monitoring Centre for Drugs and Drug Addiction organized criminal networks from the Western Balkans appear to be "poly criminal", namely they are primarily engaged in drug trafficking, but also participate in other illegal activities, including arms smuggling, human trafficking, and money laundering. Some of these networks appear to have expanded their operational presence in the European Union (EU) drug market. This is linked to a greater involvement in the cocaine supply chain, which already includes activities in Latin America, but also appears to be linked to an involvement in the production of cannabis in some EU countries.[322] According to the same report, these networks use online markets and cryptocurrencies, which offers them benefits in the production and trafficking of drugs and money laundering. Due to the dangerous nature associated with these criminal groups, the punishments against members of these groups should be differentiated from those against individual perpetrators. The high degree of participation from Article 70 par. 2.1 of the CCRK is an important circumstance to differentiate punishments depending on the role of the person in the organized criminal group.
- *Paragraph 1.2. The perpetrator is an official misusing his/her position or authorizations.* A great deal of public trust is placed on official persons in the exercise of public authorizations. This trust, coupled with the breakdown of this circumstance throughout the Guidelines, is a distinction that must be made between the function of the official person and the degree of responsibility that a person bears. The more sensitive the position, the more severe the punishment should be. It should be clear that, according to this circumstance, the very function of an official person without any official authorization, who is engaging in illegal activities involving narcotic substances does not qualify for application of Article 275. An example of this scenario is if the defendant is an employee in one of the state institutions for matters such as agriculture, civil registration, culture, whose activity is therefore not related to the exercise of authorization linked to any narcotic-related activities (for any category of substances in the table provided by the law). Thus, the fact that the defendant is an official can be used as an aggravating circumstance within the framework of Article 70 (for misuse of the trust that was given to him/her in the exercise of a public function) and result in imposition of the accessory

[322]European Monitoring Center for Drugs and Drug Addiction, Regional report on drug-related health and safety in the Western Balkans 2022, Regional report, 2023

punishment from Article 62. This imposition is based only on the application of the basic Article, however, rather than on the basis of qualification in Article 275.

- *Paragraph 1.3. the perpetrator uses or threatens to use violence or a weapon.* This circumstance is identical to the circumstance from par. 2.3 of Article 70 of the CCRK. It can also be accompanied by other aggravating circumstances such as those from Article 70, par 2.4 and 2.5 of the CCRK. The use of threats and violence is a typical circumstance for perpetrators who become part of narcotics-related activities. In most cases, violence accompanies cases involving the distribution of or trafficking of narcotic substances. The use of a weapon is not unusual and often can result in fatality. Therefore, courts should always consider perpetrators' use of violence, which in turn, should weighing the final calculation of punishment.
- *Paragraph 1.4. The offense is committed by harming or exploiting a vulnerable victim.* Any circumstance involving a perpetrator harming or exploiting a vulnerable victim in the process of completing the crime should have a bearing in raising the punishment. This circumstance appears similar to the circumstance presented in Article 70 paragraph 2.6 of the CCRK, as well as to 2.7 of the same Article. Nonetheless, the specifics of this circumstance's occurrence vary. For example, a victim may face violence by traffickers. Alternatively, traffickers could violently push or threat victims against their wills to engage in illegal drug distribution activities.

  Traffickers too can exploit children for the purpose of spreading their drug network or pushing children to use drugs. Therefore, this circumstance bears similarities to the another circumstance from par 1.7 of article 70 paragraph (the offense is committed within a three hundred fifty (350) meter radius of a school or any other locality which is used by children or within a three hundred fifty (350) meter radius of any educational institution). According to the Labyrinth Organization in Kosovo[323], while there are no accurate figures to capture this situation the total number of users in Kosovo is estimated to exceed 30,000, and 16 years of age is average age of first-time use of narcotics. Due to the relatively young population in Kosovo, traffickers are aware that the biggest market is found amongst younger generations. This is based on traffickers' assessments that young people are at incomplete stages of mental development as compared to adult populations. Lastly, the court should give serious consideration to cases where elderly people may potentially be involved, being used as experimental subjects to test new substances. Although the likelihood of such a scenario may be low in Kosovo, it nevertheless represents a circumstance that should not be overlooked if it is encountered.
- *Even the circumstance from Article 70 paragraph 2.14 of the CCRK, involving a crime being committed within a familial setting*, has a connection with this circumstance. This is because family members often are swept into narcotics-related crimes based on their blood relation to the main perpetrator or other dependent relationship to the perpetrator.

For these reasons, both aforementioned circumstances must have significant weight in courts' calculations of punishment.

- *Paragraph 1.5. shipment, consignment, container, or vehicle intended for a humanitarian operation is used for the unlawful transport of narcotic drugs or psychotropic substances.* This circumstance is also relevant considering the listed substances for medical use from tables II,

[323] See https://www.evropaelire.org/a/rritet-perdorimi-i-drogave-ne-kosove/31869646.html

III and IV of the Law on narcotic substances described above. These listed substances are also found in the Guidelines for criminal offenses of corruption[324]. According to those Guidelines, even in corruption offenses, the misuse of social assistance funds or other funds intended for vulnerable categories should be taken into account for aggravation. The courts should apply the same logic when the substances or drugs are destined for certain categories and are misused by perpetrators. Very often this circumstance is also associated with the involvement of official persons due to the access they have to these supplies. Therefore, when combined, these circumstances can add a great weight in the calculation of punishment.

- *Paragraph 1.6. the perpetrator mixes the narcotic drug, psychotropic substance or analogue with other substances that aggravate the danger to health.* This circumstance is increasingly gaining importance. Today, we are unfortunately witnessing the emergence of narcotic substances with mixtures of various synthetic substances that greatly increase the danger. When calculating the punishment, the court must assess whether the substance used has a destructive effect on the user or poses a health risk often. In many developed countries, the problem of perpetrators mixing narcotic substances is leading to devastating consequences for entire communities.

- *Paragraph 1.8. the offense is committed in a correctional institution.* This circumstance appears to be quite important to us because of the problems it brings not only in terms of aggressiveness, disease and addiction, but also the problems it can bring inside a correction institution. Compounding this, an offense being committed in a correctional institution can encourage further trafficking inside the institution. Similar to the previous circumstances listed here, it is common for this circumstance to include the involvement of official persons who tolerate such actions.

- *Paragraph 1.9 criminal offence includes large quantities of narcotics, psychotropic or analogue substances.* As discussed above, this paragraph emphasizes that large quantities of narcotics represent a basis for qualification under Article 275 and, consequently, higher sentence. The same applies for Article 273[325] of the CCRK which in its paragraph 2 has stipulated a sentence similar to Article 275 when referring to large quantities but even in this one it does not specify the large quantity. In absence of a specific table defining the quantity, the courts mainly sentence on the basis of established practice, allowing different interpretations and difference in approach.

D. Mitigating circumstances

The mitigating circumstances provided for in Article 70 paragraph 3 of the CCRK may all be relevant for application of the final sentence, but it will always depend on the particular offense at issue.

[324]Supreme Court, Special Guidelines for Official Corruption and Offenses Against Official Duty, p. 37, Impact on vulnerable categories of society and funds related to these categories, Prishtina, 2021.
[325] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 273 Organizing, managing or financing trafficking in narcotic drugs or psychotropic substances, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

- *Circumstances falling short of grounds for exclusion of criminal responsibility, for example, diminished mental capacity*. Offenses in this Chapter may involve circumstances that are applicable to people who have developed addiction to narcotic substances. However, extra care is definitely needed for the highest risk offenses within this Chapter.

- *Personal circumstances and character of the convicted person*- It has become a regular practice in our courts that the personal circumstances and character of the convicted person are considered in mitigating one's sentence. While these circumstances may be applicable for offenses in this Chapter, courts should be careful in the weight ascribed to personal circumstances and character when evaluating offenses of serious nature. However, even in such a case, it is important that the weight of this circumstance be determined based on the existence of significant aggravating circumstances (e.g., the degree of the damage caused) as well as how this circumstance is combined with any other mitigating circumstance in terms of weight for this circumstance to affect further mitigation of the sentence.

- *The age of the convicted person-* can also be a relevant circumstance for application in these crimes, especially when it comes to possession of small quantities of substances intended for individual consumption. The relevance of this circumstance should be reasonably compared to the existence of other circumstances associated with the offense.

- *Circumstances that indicate a lesser role of the perpetrator in the commission of the crime.* The circumstances from Article 70 paragraphs 3.4 and 3.5 of the CCRK are presented as the opposite of the aggravating circumstance from paragraph 2.1. This circumstance can be very important for the cases of organized criminal groups to differentiate between the main perpetrators and others with a lower degree of engagement.

- *Other mitigating circumstances for this category of offenses.* As was the case with the above circumstances, here, too, the grouping of circumstances from paragraphs 3.7 through 3.12 was not done accidentally. This is because the same circumstances always have the potential for doubling/tripling among themselves during the calculation of the punishment when, in fact, all of them indicate a show of remorse by the defendant. The same methodology of gathering the circumstances in one group is also done in the general part of the Guidelines, which speaks about mitigating circumstances. Voluntary cooperation from paragraph 3.9 should be one of the most important circumstances when it comes to discovering the network of such criminal activity. Therefore, in these types of cases, this circumstance should have greater weight in the court's calculation of a perpetrator's sentence, depending on the extent to which such help results in discovering persons included in these networks.

E. Applicability of other punishments

- *Imposition of a suspended sentence* – It may be appropriate for a court to impose a suspended sentence for crimes from this chapter. But the court should always take into account the degree of responsibility of the perpetrator and the degree of harm that perpetrator caused. A suspended sentence for first-time offenders and for less severe forms of criminal activity, such as possession or distribution in small quantities, when not accompanied by other particularly

aggravating circumstances, may be appropriate. On the latter it is necessary to pay attention particularly to the defendants criminal background as the same may have had many instances where caught distributing in small quantities, but this should not lead to automatic leniency. Instead, the court should consider in its assessment his entire actions. Since the court has the discretion to impose a sentence, especially between the legal minimum and maximum, the assessment of the amount of the sentence must be made based on the degree of dangerousness and responsibility that the person bears.

In cases where the perpetrator is a substance user, the court is instructed to use Article 54 of the [326] CCRK or even impose additional obligations from Article 56 of the CCRK. For example, the following obligations could be more adequate for a particular offender, who is either a first-time offender or has committed a less severe crime:

- to participate in medical or rehabilitation care in a health care institution (Paragraph 1.1).
- to undergo a medical or rehabilitation treatment program (Paragraph 1.2).
- to visit a psychologist and/or another consultant and act in accordance with the expert's recommendations (Paragraph 1.3).
- to abstain from the use of alcohol or drugs (Paragraph 1.8).
- to refrain from frequenting certain places or locales (Paragraph 1.9).
- to refrain from meeting or contacting certain people (Paragraph 1.10).
- to refrain from carrying any kind of weapon; (Paragraph 1.1) - if this obligation is relevant to the perpetrator's offense.

-Imposition of accessory punishment from Article 62 or 63 - The court is recommended to pronounce it in all cases where an official person is involved in the commission of the offenses under this chapter.

-Imposition of the order for community service work - – It may be appropriate to simply impose community service work for perpetrators who have committed less serious forms of criminal offenses within this Chapter. For example, community service might be most appropriate for a perpetrator who has merely been charged with possession of substances in small quantities and if there are no aggravating circumstances that would justify a prison sentence.

-Imposition of a punishment of fine - Articles 269, Paragraph 2 provides for the possibility of imposing a fine as the main punishment, while most of the other articles within this Chapter provide for the imposition of a fine in addition to imprisonment. For the fine to have the desired effect, it must be ensured that the fine is commensurate to the financial situation of the perpetrator in line with Article 69, Paragraph 5 of the CCRK and the Supreme Court's Guidelines on Imposing Criminal Fines. It is not recommended to replace prison sentences with a fine in the most serious crimes within this Chapter, particular those found in Article 275 of the CCRK.

-*Judicial admonition* - Judicial admonition can be imposed in accordance with the principles of Article 82, Paragraphs 2 and 5, for less severe offenses from this Chapter, but cannot be applied when the perpetrator has a criminal record.

[326] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 54 Suspended sentence with order for mandatory rehabilitation treatment, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

XI. Chapter XXIV Organized crime

General observations

It is interesting to see how the legislator has addressed organized crime by including it in a separate chapter under a single article within the CCRK, more precisely Article 277.

Organized crime cases require special considerations in sentencing due to the often persistent and serious nature of crimes and the fact that many perpetrators are repeat offenders or career criminals. A careful examination of the seriousness of the crime, the activity of the criminal group and the responsibility of the perpetrator within the organized group is essential for determining the appropriate punishment. Organized crime and ordinary criminals differ in that organized crime is the product of career criminals with often longer-term criminal relationships who commit crimes that involve prior planning and organization. Therefore, considering the level of danger that these people present, an adequate response is required.

Appropriate sentencing in cases of organized crime is very important for several reasons:

- ✓ **Prevention:** Effective punishment affects those who might consider getting involved in organized crime. If punishments are severe and consistently applied, potential criminals will be less inclined to participate in or support such illegal activities due to fear of significant consequences.
- ✓ **Justice for victims:** Organized crime often has far-reaching and severe effects on its victims, communities, and businesses. Appropriate sentencing helps ensure that those responsible for these damages are held accountable, providing a sense of justice for victims and their families.
- ✓ **Destruction of criminal networks:** Punishment can be used strategically to dismantle organized crime networks. By imposing appropriate punishments on the members of these criminal groups, especially the main figures, the ability of the group to carry out illegal activities is weakened, consequently reducing its overall influence.
- ✓ **Public trust:** Effective sentencing in organized crime cases fosters public confidence in the criminal justice system. When people see that serious crimes are met with appropriate consequences, they are more inclined to trust and support the justice system as the mainstay of maintaining social order. This fulfills the principle that all individuals, regardless of their status or connections, are subject to the same legal standards and consequences for their actions.

A. Starting Point

In line with the starting points provided in each of the separate chapters, the starting point for participation or organization of the organized criminal group starts at 2/3 range of the minimum and maximum punishment provided in Article 277.

B. Relevant aggravating circumstances

During sentencing for members of criminal groups, the court must take into consideration a number of circumstances that affect the severity of the punishment.

A distinction must be made between sentencing and assessment of factors important to determine the punishment for participation in an organized criminal group in cases where the underlying offense itself provides for a more severe punishment if that offense was committed by persons as part of an organized criminal group.

While the aggravating and mitigating circumstances related to the basic offenses are discussed in the relevant chapters, the following elaboration is mainly related but is not limited to, circumstances related to the offense from Article 277:

- *Level of Participation*: Obviously, organized criminal groups operate based on a structure and hierarchy. Therefore, when handling these cases, it is important that courts also consider the role of the individual in the organized criminal group and whether the defendant is a leader, a key member, or a peripheral participant. In the case of the person who organizes, establishes, supervises, manages, or directs the activity of the criminal group, the court should bear in mind that it is no longer a question of an aggravating circumstance since this constitutes an additional element of the criminal offense and is treated according to Article 277 paragraph 2 and no longer as an aggravating circumstance from Article 70 of the CCRK in order to avoid double count.
- *The level of criminal engagement* is also important. If, for example, an individual as a member of the group has taken an active and significant part in the commission of some offenses, this in a way also shows his/her desire and willingness to commit criminal activity. An exception is made if it is established that the same person has carried out such activities under pressure and threats for various reasons, in which case his culpability would be proportionally reduced.
- *Assessment of the nature of criminal activity.* - The seriousness of criminal activities in which the criminal organization and its members are involved must be assessed. The same applies to the purpose for which they were established. For example, if the organization is established and therefore involved in violent crimes, human trafficking, drug trafficking, terrorism, or large-scale financial fraud, this can lead to a more severe punishment precisely due to the degree of damage (financial or other), and the category of victims affected by such activity.
- *The purpose of establishment or operation of the criminal group.* - besides the nature of the acts committed or attempted by the criminal group, the purpose of establishment of such a group is equally important. This is due to the fact that there is a difference between the nature of criminal offenses in which a criminal organization can be focused compared to the other since the offenses can be of a very serious nature and have a massive impact. Therefore, this circumstance must be considered in combination with other listed circumstances.
- *Concealment of an organization's criminal activities.*- is also an important indicator to be assessed by the court. There are organizations that are registered as legal entities with regular activities, but in fact the purpose of their organization is mainly to deal with criminal activities. Such organizations mainly deal with money laundering from illegal activities. On the other hand, there are organizations that are clearly criminal and established for criminal activity only, and as such are equally or even more dangerous. However, the court's assessment in both circumstances must be based exclusively on taking into consideration all other circumstances.
- *Participation or association with other criminal groups*.- Participation in or association with other organized criminal groups indicates a determination of the defendant in committing crimes and a high degree of intent, therefore, due to the extent of the damage that these organizations can cause, the punishment should also be higher.

- *Criminal history of the defendant* - is a very important circumstance as an indicator of a continuous pattern of criminal behavior that consequently requires higher punishment, especially for crimes of a similar and violent nature.

Of course, other circumstances provided for in the CCRK which may be specific to certain offenses related to a criminal group are also applicable in the context of these offenses and combined with the circumstances for this chapter.

C. Relevant mitigating circumstances

Article 277 in paragraph 4 specifically provided that *"The court may reduce the punishment of a member of an organized criminal group who, before the organized criminal group has committed a criminal offense, if he/she reports to the police or prosecutor the existence, formation, and information of the organized criminal group in sufficient detail to allow the arrest or the prosecution of such group."* This clearly presents a circumstance that allows a reduction of sentence even below the legal minimum if the contribution of the defendant in this aspect is significant. As a circumstance, it is presented along the same lines as the circumstance from Article 70 subparagraph 3.14[327] which is even more detailed for acts of terrorism. Thus, if the case is related to committing or attempting to commit acts of terrorism by the group, then Article 70 subparagraph 3.14 would apply, and to assess it as a particularly mitigating circumstance paragraph 4 would be applied in the sense of allowing the mitigation of punishment even below the legal minimum based on the assessment.

Other important circumstances in terms of a person's participation in an organized criminal group may be, but are not limited to, the following:

- *The defendant has no criminal record*. - This may be an important mitigating factor, indicating that the crime may be an isolated event.
- *Remorse and acceptance of responsibility*: Showing sincere remorse for the crime and taking responsibility for one's actions can be seen as a sign of remorse and can lead to a lower sentence although it must be weighed against other circumstances as it is otherwise a very subjective element.
- *Violence or Threat.* - If the accused was forced, threatened or coerced to commit the crime, this can be an important mitigating circumstance as long as the conditions required by Article 14.[328] and 15[329] of CCRK are met.
- *Diminished mental capacity*. - If the mental or cognitive capacity of the accused was essentially impaired leading to a reduced ability to understand or control his/her actions, this may be a mitigating circumstance always within the assessment of this incapacity under Article 18 paragraph 2 of CCRK.

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[327] *with regard to terrorism offenses laid down in this Code, the fact that the offender renounces terrorist activity before any grave consequences have resulted therefrom and provides the police, prosecutors, or judicial authorities with information that they would not otherwise have been able to obtain; assists in the prevention or mitigation of the effects of the offense; identifies with sufficient detail to allow the arrest or the prosecution of another terrorist or terrorist group, finds evidence or prevents further terrorist offenses."*

[328] Criminal Code of the Republic of Kosovo, Article 14 Violence and intimidation, Code No. 06/L-074, Official Gazette of the Republic of Kosovo/No.2, 14 January 2019 Prishtinë/Pristina.

[329] Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 15, Acts committed under coercion, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

- *Substance abuse*.- When a defendant is a person addicted to drugs or alcohol, it can be a limited indicator in the assessment of the sentence in terms of his/her participation in a criminal group. This is because the defendant, in episodes when he is not under such influence, can judge his/her actions and decisions for joining such a group. On the other hand, if we are to assess his/her condition at the time of committing the act, then we can assess how impaired his judgment was at the time, always taking into consideration other circumstances related to his/her role, intent and other circumstances discussed above, rather than make an isolated assessment.
- *Age of the defendant*. - If the accused is a minor, young adult, or elderly person, then it can be taken as a mitigating circumstance, always reflecting his potential for rehabilitation or reduced capacity to understand his/her actions of participation in a criminal group and activities of that group.
- *Rehabilitation Efforts*. - If the defendant has made efforts at rehabilitation, such as by participating in counseling, substance abuse treatment, or educational programs, this may be viewed positively.
- *Positive personal circumstances of the defendant*. - Evidence of the defendant's positive qualities, such as a stable job, strong family ties, community service, or contributions to society, may influence a less severe sentence within legal ranges, but only if mitigating circumstances prevail.

D. Applicability of other punishments

A suspended sentence is not a recommended punishment for members of criminal groups except in exceptional cases and when the legal conditions are met, by considering circumstances in each case.

Punishment of fine. - Article 277 provides maximum fines of €250,000 for members and €500,000 for leaders of criminal groups. Naturally, this logic was used bearing in mind the provisions of the general part of the CCRK, more precisely Article 43 paragraph 2 of the CCRK. Based on this principle, the calculation of fines should be done in accordance with the Supreme Court's Guidelines for determination of criminal fines.

Accessory punishments may find application depending on the case and the nature of the participation and commission of acts. For criminal organizations operating under the umbrella of a legal entity, sanctions prescribed in the Law on the liability of legal entities apply.

Confiscation- is extremely important since it takes away the resources and financial benefit for which they established or associated with the criminal organization.

Mitigation of sentences has already been discussed under mitigating circumstances and is allowed if the conditions under Article 277 paragraph 3 are met.

XII. CHAPTER XXIV/A Cybercrimes

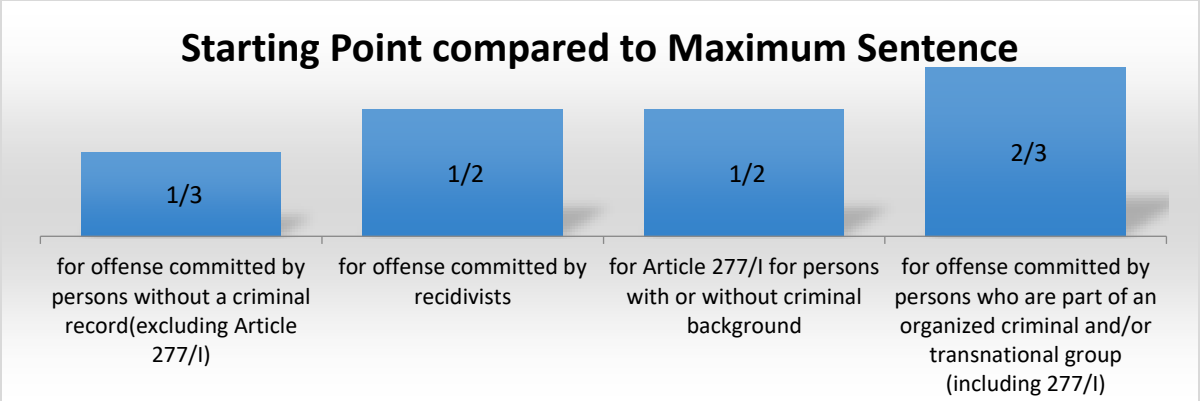
General Overview

The whole world, including our country, has made significant progress towards transitioning to an information society. The Internet and information and communication technology now permeate nearly every aspect of people's lives. Society relies on, and therefore depends on, information and communication technologies, making it a target for cybercrime. These are crimes committed against or through data and computer systems. Cybercrime involves criminal activity carried out on computer networks, and also using computers either as a target or as a tool. In addition to specific criminal offenses under the field of cybercrime, it can also include fraud, various types of forgery, extortion, financial crime, espionage, terrorism, organized crime, cyber-espionage, and computer terrorism. In addition to a large number of criminal offenses against or through information and communication technology, an increasing number of court cases involve electronic evidence stored on computer systems or other electronic devices. Cybercrime offenses are often international in nature, as they are committed online, making them highly transnational.

Cybercrime in Kosovo was governed by Law No. 03/L-166 on the Preventing and Countering Cybercrime. This law was amended after the entry into force of Law No. 08/L-173 on Cyber Security, which removed certain provisions of Law No. 03/L-166. Previously, the Criminal Code of the Republic of Kosovo did not have a separate Chapter for these criminal offenses. In November 2023, several amendments to the Criminal Code were adopted with Law No. 08/L-188 on Supplementing and Amending the Criminal Code No. 06/L-074 of the Republic of Kosovo. These amendments introduced Chapter XXIV/A of the CCRK, designated "Cyber Crimes," as a sub-chapter of Organized Crime, providing for cybercrime offenses. This law deleted/removed existing criminal offenses from the Criminal Code of the Republic of Kosovo No. 06/L-074, specifically, Article 232 Abuse of children in pornography, Article 327 Intrusion into computer systems, and Article 336 Identity and access device theft. It should be noted that cybercrime is regulated by the Council of Europe Convention called the Budapest Convention on Cybercrime. However, the Republic of Kosovo has not yet signed this convention as it is not yet a member of the Council of Europe.

A. Starting Point

Seeking to establish a uniform approach to sentencing for these criminal offenses, the CCRK offers a recommendation for the starting point for measuring punishment in three different situations:



-starting point of 1/3 when the perpetrators of criminal offenses do not have a criminal record, specifically, this applies to individuals with no prior convictions or those who lacked solid knowledge in the use of technology, such as social media or various digital applications. First-time offenders typically present a lower risk of re-offending compared to other offenders with a violent past or those who operate in groups. For these reasons, the starting point is low for first-time offenders. However, this does not mean they cannot be dangerous. Therefore, assessing the level of harm and culpability is crucial to determining the appropriate sentence.

Important Note: The starting point of 1/3 does **NOT** apply to the measurement of the sentence for the offense under Article 277/I[330] due to the sensitivity of these cases. The starting point for these cases is 1/2, regardless of the criminal history of the perpetrator.

-starting point of 1/2 when the perpetrators of criminal offenses have a criminal record, specifically, this applies to individuals who have previously been convicted of similar crimes and in cases where this criminal offense is committed for the purpose of financial gain. It also includes those with solid knowledge in the use of technology, such as social networks or various digital applications.

The starting point for offenses under Article 277/I is 1/2, regardless of the criminal history of the perpetrator. These offenses are of a more serious nature, so even their mildest form has a higher starting point compared to other offenses under this chapter. The subsequent starting point of 2/3, as described below, also applies to this offense if it is expressed in the following forms.

-while the starting point of 2/3 is for offenses committed by persons who are part of an organized criminal and/or transnational group. Usually, these perpetrators are experts in technology and this criminal offense is committed for financial gain of large sums or operations across several states or within one state but in several different places and with the purpose of committing high-threat criminal offenses. Due to these characteristics, the starting point for this category would be

[330] Law No.08/L-188 on Amending and Supplementing the Criminal Code No.06/L-074 of the Republic of Kosovo, Article 277/I Materials containing sexual exploitation and abuse of children, Official Gazette of the Republic of Kosovo /No.23/23 November 2023, Pristina.

appropriate at 2/3 of the maximum sentence. However, it should be considered that the mentioned characteristics are not incorporated into the specific criminal offenses.

The above chart clearly shows the difference between different forms of sentencing considerations for these offenses, based on the nature and specifics of these criminal offenses and depending on the nature and consequences resulting from the actions taken through these activities.

Considering that this chapter covers some specific criminal offenses of different nature, the conduct of commission can be described as different. Therefore, the determination of punishments is quite different, both in terms of imprisonment and fines. For punishments consisting of fines for some of these criminal offenses, neither the minimum nor the maximum have been set. Therefore, to ensure the fines have a proper effect, they must be calculated in accordance with the Fine Imposition Guidelines.

Regarding prison sentences for some serious criminal offenses, only the minimum prison sentence is provided, with the statutory maximum prison sentence applying. For some other crimes, the range between the statutory minimum and maximum is defined. In general, for these criminal offenses, the range between the statutory minimum and maximum of the prison sentence is not very high, except for some specific offenses where the higher end of the range is significant. For two criminal offenses, there is a broad range of punishment starting from three (3) years and up to ten (10) years, as well as from five (5) years to fifteen (15) years.

B. Relevant aggravating and mitigating circumstances

When determining the sentence for criminal offenses in general, the court must consider, among other things, the relevant aggravating and mitigating circumstances. Due to the specific nature of the criminal offenses that are part of this Chapter, it is difficult to determine which of the circumstances may carry more weight than others. As in the other chapters of the special part of the CCRK, the relevant aggravating and mitigating circumstances in this Chapter on criminal offenses can be numerous and varied, depending on the nature of the criminal offense, the personal qualities of the perpetrator of the criminal offense and the victim, as well as the circumstances under which the criminal offense was committed, but not only these. It is important that the courts take into consideration other aggravating and mitigating circumstances, in addition to those provided for in Article 69, paragraph 3 and Article 70, paragraphs 2 and 3 of the CCRK. The courts should take into account the specifics on each case, since the lists of relevant aggravating and mitigating circumstances in these legal provisions are non-exhaustive.

C. Aggravating circumstances

Cybercrime offenses can have different aggravating circumstances, especially considering the specific nature of these crimes. This depends on a case-by-case basis.

We will break down the potential aggravating circumstances in the context of Article 70 of the CCRK as follows:

- *a high degree of participation of the convicted person in the criminal offense,* undertaking numerous actions to commit certain criminal offenses;

- *a high degree of intention on the part of the convicted person,* acting with direct intent and pronounced premeditation to commit the criminal offense and realize its consequences;

- *whether the criminal offenses were committed in continuity,* since in these criminal offenses the actions committed in most cases persist over a long period of time. This is crucial in showing the level of intent of the perpetrator, persistence, and seriousness of the crime. Therefore, this circumstance should have significant weight in sentencing considerations.

- *the goals and motives for committing certain criminal offenses,* since in many cases these criminal offenses under this Chapter are ultimately committed with the goal and motives of unlawful financial gain;

- *the extent of the damage caused by the convicted person, namely the intensity of danger or injury to the protected value* is a circumstance that must be considered as the harm or consequences caused by these criminal offenses can be catastrophic not only for the individual, but also for the state. This circumstance is also included in the above list of indicators. Combined with the circumstances in paragraphs 2.5-2.7 of Article 70, they should have significant weight in sentencing considerations, given that crimes of this nature can affect victims of different ages and sensitivities. Certainly, for offenses under Article 277/I, the fact that the victim is a child automatically includes as an element of the crime both the age and vulnerability of the victim. However, since the article in question does not specify the child's age, using circumstances from paragraphs 2.6 and 2.7 is justified in terms of elaborating the circumstances for the context in which the offense was committed. Further, elderly people also fall into the category of vulnerable victims and are likely to fall prey to various types of cybercrime with an emphasis on identity or credential theft, with devastating consequences for their life and future. Lastly, the transnational scope context has already been considered in the starting point above, so it cannot be counted again as an aggravating circumstance. If the criminal conduct involves activity meeting the definition of a cyber incident as defined by the Law on Cyber Security,[331] a judge should consider, among other things, the following potential aggravating circumstances:

    - the number of users or victims affected by the cyber incident, in particular users relying on the service for the provision of their services.
    - duration of the cyber incident.
    - geographical spread of the area affected by the cyber incident.
    - the extent of service interruption.
    - the extent of the impact on economic and social activities.

- whether the criminal offense was committed as part of the activities of an organized criminal group and any relevant prior criminal convictions of the convicted person. These circumstances were considered in the context of the starting point and therefore should not be counted again as an aggravating circumstance;

[331] Law No. 08/L-173 on Cyber Security, Article 8 Obligation of the digital service providers to report a cyber incident, paragraph 2, Official Gazette of the Republic of Kosovo, No. 4, February 27, 2023, Pristina.

- any previous criminal conviction of the convicted person - recidivism is taken into account in determining the starting point above. However, as regards to the defendant's previous convictions that do not meet the concept of multiple recidivism under Article 75 of the CCRK, this is best explained in the first part of the Guidelines, specifically in Point V - Aggravation and Mitigation under Article 70 of the CCRK.

- the particular circumstances in which the criminal offense was committed – This circumstance is somewhat embedded within the extent of damage and the indicators listed above, but there may be additional circumstances that makes it applicable.

- the personal circumstances of the perpetrator and his or her behavior after committing a criminal offense, as well as any other significant circumstance recognized by the court.

- As a circumstance that is not provided by the CCRK but that can also be applied to this category of offenses, *could be the commission of cybercrime on behalf of another nation state* for various purposes, including economic gain. In these cases, it can be established as an aggravating circumstance with considerable weight unless the charges include a specific offense, such as under Chapter XIV.

D. Mitigating circumstances

The specific nature of cybercrime offenses makes it challenging to determine particular mitigating circumstances, making it difficult to determine which mitigating circumstances may outweigh others.

However, based on our case law, as with other criminal offenses, pleading the case is considered a mitigating circumstance in sentencing considerations for the commission of criminal offenses under this Chapter. But as noted in other chapters, pleading the case should not automatically reduce the punishment below the statutory minimum. In cases where the plea is accompanied by other mitigating circumstances (e.g., previous conduct of the perpetrator, remorse shown by the perpetrator, compensation for any damage or expression of readiness for compensation, financial situation, serious health condition of the perpetrator or any close family member, etc.), then a more lenient sentence may be justified, it is understood, considering the totality of circumstances in the specific case.

Additionally, the personal circumstances and character of the perpetrator of the criminal offense, evidence that the perpetrator played a relatively minor role in the criminal offense, the fact that the perpetrator participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another, then the age of the perpetrator (young or old); the cooperation of the perpetrator of the criminal offense with the court and the prosecution, as well as his conduct after committing the criminal offense can be considered as mitigating circumstances, typically on a case-by-case basis.

These crimes are of such a nature that they are mostly carried out persistently and with special skills and experience on the part of the perpetrator, and they seldom occur in one instance, which suggests that mitigating circumstances should never prevail.

E. Applicability of other punishments

Even where cybercrime offenses are concerned, considering the range of punishment provided for these criminal offenses, the imposition of other punishments should also be considered in certain situations.

Suspended sentence - is appropriate in certain cases, applying Articles 47, 48, and 49 of the CCRK. Under certain circumstances, it is particularly important for the courts to issue a suspended sentence and order that the punishment be executed if, within a determined time, the convicted person fails to return the material gain acquired from the commission of the criminal offense, fails to provide compensation for the damage caused by the criminal offense, or fails to perform another obligation, especially the obligation under *Article 56 para. 1 sub-paragraph 14 of CCRK (not to possess or use a computer or access the internet as directed by the court).*

Prohibition on exercising a profession, activity, or duty - more precisely, paragraph 5 of this Article provides that the court would place a prohibition on the perpetrator of a criminal offense under Article 165 or Chapter XX of this Code committed against a child, a prohibition on exercising a profession, activity, or duty that involves regular contact with children. Further, the court may impose this punishment for life, subject to periodic judicial review by the court after the expiration of ten (10) years from the start of the execution of the measure imposed. With the amendments to the CCRK in 2023, Article 232[332] of the previous Code, has been deleted. The similar content of this article was transferred to the new chapter XXIV/A as the new Article 277/I, now designated "Materials containing sexual exploitation and abuse of children". *Consequently, it follows that the court should be able to impose such a sanction also on the perpetrators of the offenses provided for in Article 277/I.*

Punishment with a fine – For some criminal offenses under this chapter, a cumulative fine and prison sentence are provided. Therefore, a fine should be imposed considering the law requirements. In this regard, it should be noted that when determining the punishment of a fine, the court should consider the financial situation of the perpetrator, including his or her personal income, other income, assets, and liabilities. Therefore, it is critical that, when imposing a fine, the courts consider the Specific Fine Imposition Guidelines of the Kosovo Supreme Court on fines as a criminal sanction according to the Criminal Code of the Republic of Kosovo. While, in the case of imposing a fine on legal persons for criminal offenses under this Chapter, the courts must consider the circumstances provided by the Law on Legal Persons' Criminal Liability.

Confiscation – For cybercrime offenses, confiscation is mandatory, according to Article 277/L of Law No. 08/L-188 on Supplementing and Amending Criminal Code No. 06/L-074 of the Republic of Kosovo. This article provides for the confiscation of electronic devices and stipulates that the electronic devices and software used to commit the criminal offenses under this Chapter are subject to confiscation according to the Criminal Procedure Code.

Waiver of punishment cannot be applied to offenses under this Chapter.

[332] Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Chapter XX, Article 232 Abuse of children in pornography, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.

Chapter XXV Criminal offenses against the economy

General observations

A country's economy and economic system are vitally important segments of social life. Considering the importance of the economy for social well-being, the state is committed to creating economic policies that suit social needs and interests. Legal-criminal norms are issued in parallel with economic policies, foreseeing punitive measures for certain actions that endanger the existing relations in the economy of a country.

Economic criminality can be defined as various forms of criminal behavior (actions or omissions) of physical and legal persons in the field of financial and business circulation, directed against the economic system, which risks attacking and damaging the economic system and economic relations of a country.

CCRK in Chapter XXV has defined thirty-five (35) criminal offenses against the economy. These criminal offenses are directed against the economic interests of a country. In terms of the motive for committing them, these criminal acts are mostly motivated by financial gain for oneself or others. The Criminal Code of the Republic of Kosovo - Code No. 06/L-074 has defined the basic forms of legal incrimination. These criminal offenses also include the criminal offense of Money Laundering and Terrorism Financing which is punished under Law No. 05/l on Prevention of Money Laundering and Combating the Financing of Terrorism.

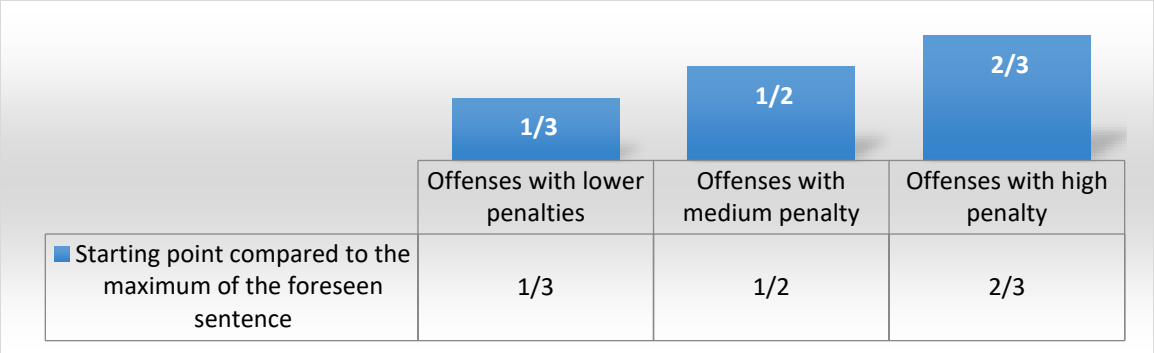
The main characteristic of criminal offenses in the field of economy is material gain or other benefits. Physical and legal persons, persons with certain responsibilities or any other person can be a perpetrator of these criminal offenses. Therefore, the following elaboration will include a discussion of natural persons separately from that of legal entities.

1. Sentencing for natural persons

A. Starting Point

When it comes to the starting point for natural persons, a distinction is made between criminal offenses with lower, average, and maximum penalties.

The level of penalty for criminal offenses is a legal matter, this categorization is simple, it is based exclusively on the degree of punishment, making a division that helps determine the starting point which judges can use as an orientation point to determine and impose an adequate punishment.



As can be seen from the table, for criminal offenses with low penalties, the starting point for sentencing is 1/3 of the prescribed punishment, depending on the aggravating or mitigating circumstances, it moves up or down from this position and includes punishment of up to 5 years of imprisonment.

For criminal offenses with an average penalty that include criminal offenses of 5-10 years of imprisonment, the starting point of 1/2 of the punishment has been determined, taking into account the weight of the criminal offense, depending on the mitigating and aggravating circumstances, the court will move up in the direction of the maximum or down in the direction of minimum sentence.

The only offenses with higher penalties (over 10 years) are the offenses from Article 294[333], 306[334], and Article 302[335] which refer to punishments according to the Law on the Prevention of Money Laundering and the Financing of Terrorism which foresee a punishment from 5 to 15 years of imprisonment.

B. Aggravating circumstances

For adequate sentencing, special importance needs to be given to the agravating circumstances in which the criminal offense was committed, defined in Article 70 par. 2 of the CCRK.

- ***Misuse of power or authorizations*** are considered as aggravating circumstances for perpetrators, be that an official person or responsible person, although in many of the criminal offenses according to this chapter, the official person or the responsible person is presented as an element of the criminal offense, so in these cases, double count should be avoided as well.
- ***The degree of economic damage***- a characteristic of many of the crimes from this chapter is the inclusion of different degrees of damage to move up or down the sentence scale, therefore the degree of damage (mainly in terms of quantifiable financial damage) is considered. However, even within the same category, there is the possibility of differentiation between the degree of damage, taking into account other damages, beyond

[333]Criminal Code of the Republic of Kosovo, Article 294 Organizing pyramid schemes and unlawful gambling Code No. 06/L-074, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.
[334]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 306, Government securities collusion and fraud, par 3, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.
[335]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 302, Monely Laundering, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

financial, that may be related. Let's take as an example the criminal offense of entering into a harmful contract from Article 285 of the CCRK. Paragraph 2 thereof mentions causing damage exceeding €100,000, which according to Article 113 of the Criminal Code is considered to be large-scale damage. However, in the case of the decision, given that this paragraph provides only the lower threshold, it seems that the damage caused can reach much higher figures, therefore based of this the court can decide whether to set a punishment towards the minimum or the maximum range foreseen. Of course, in addition to considering the amount of financial damage, the court must also take into account other damages such as The impact on public health, the environment, certain categories, etc. to adequately determine the damage or destruction that occurred as a result of this act.

- ***Period of illegal activities*** - if the illegal activities have lasted for a long period of time, this shows not only the persistence and intent of the perpetrator but also appears as an indicator that should necessarily lead to higher punishment.
- ***High degree of participation by the convicted person*** - to what extent was the person engaged in the commission of the criminal offense, or in cases of co-conspiracy or criminal association, to what degree and manner was the person involved in the commission of these offenses.
- ***Number of victims*** - if the criminal offense has affected, a large number of individuals or economic entities, as stated above, it represents an aggravating circumstance.
- ***Impact on the economic market***- if the criminal offense caused destabilization or had a negative impact on the economic market, it means that citizens are the ultimate victims of such destabilization since it affects their household economies.
- ***Personal benefit*** - the sum or the amount benefited by the perpetrator of the criminal offense is an aggravating circumstance in cases where the amount of the damage is not a qualifying element of the criminal offense.
- ***Previous convictions or recidivism*** - for persons who are recidivists, especially of criminal offenses of the same nature, it should be taken as an aggravating circumstance. Whereas, regarding the defendant's previous convictions that do not meet the concept of multiple recidivism under Article 75 of the CCRK, this is best explained in the first part of the Guidelines, more precisely under Point V-Aggravation and Mitigation based on Article 70 of the CCRK.

C. **Mitigating circumstances**

The circumstances defined under Article 70 par.3 of the CCRK can be considered as mitigating circumstances. Considering the nature and diversity of these crimes, courts should be careful depending on the concrete crime and give due weight to mitigating circumstances. In particular, the degree of criminal responsibility and concrete damage caused.

- ***The guilty plea or the guilty plea agreement*** in the crimes with maximum and average penalty according to this Chapter, should not be automatically considered for mitigation below the legal minimum in cases that are not accompanied by other extraordinary mitigating circumstances.
- ***Rehabilitation or restitution of damage*** - if the perpetrator has returned the appropriated amounts or repaired the economic damage caused, it can be taken as a mitigating circumstance.

- ***Evidence that the convicted person played a relatively minor role*** in the commission of the criminal offense - The fact that the person played a minor or subordinate role, if he acted with others/performed a limited role under direction. The fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another;
- ***Personal circumstances*** - difficult personal or family situation of the perpetrator.

The circumstances defined under Article 70 par.3 of the CCRK can be considered as mitigating circumstances.

Considering thee nature and diversity of these crimes, courts should be careful depending on the concrete crime and give due weight to mitigating circumstances. In particular, the degree of criminal responsibility and concrete damage caused.

D. Applicability of other punishments

- *Imposing a suspended Sentence* - apply this punishment by the court may be appropriate for offenses from this chapter. However, courts must always take into account the degree of responsibility of the perpetrator and the degree of harm caused by the perpetrator. Imposing a suspended sentence may be reasonable for first-time offenders and for lighter forms of criminal offenses when they are not accompanied by other particularly aggravating circumstances.

- *Imposing a punishment of fine-* Some criminal offenses defined under this chapter, provide for the possibility of imposing a fine as the main punishment and as an alternative to imprisonment. Nevertheless, in order for the fine to have the desired effect, it must be ensured that the amount of fine imposed is commensurate to the financial situation of the perpetrator in line with Article 69 par. 5 of of the CCRK and the Supreme Court's Guidelines on Imposing Criminal Fines. It is not recommended to replace the prison sentence with a fine for the most serious crimes within this chapter. The court should also take into account the imposing restitution, given that the offenses from this chapter have the potential to cause large property damages.

- *Imposing accessory punishments*- for perpetrators of criminal offenses from this chapter, it is particularly important to impose accessory punishments from articles 62 and 63 when the perpetrator commits the offenses from this chapter by abusing official duties or authorizations as a responsible person in the legal entity.

- *Judicial admonition -* can be imposed in this chapter in cases where a sentence of up to one (1) year of imprisonment is foreseen and it should take into account that the criminal offense is committed under particularly mitigating circumstances.

- *Waiver of punishment -* this chapter of criminal offenses does not provide the possibility to waive the punishment on the perpetrator, therefore the provision of Article 74 of the CCRK cannot be applied.

- *Confiscation-* some criminal offenses in this chapter, foresee the mandatory confiscation of items, or goods.

2. Sentencing for legal entities

Given that crimes of this nature are mainly related to legal entities, it is of vital importance to also determine the sanction for legal entities. According to the Law on Liability of Legal Persons for Criminal Offenses[336], the following sanctions may be imposed on the legal entity for criminal offenses committed:

- Sentences:
- Suspended sentence and
- Security Measures

Types of sentences that can be imposed for criminal offenses of a legal entity are: fine and cessation of work of the legal entity.

A. Fine sentence

Fines for legal entities can range from 1,000 Euros to 100,000 Euros. Regarding fines, Article 9 of the Law provides the minimum and maximum fines, depending on the amount of damage caused. As always, it should be remembered that the determination of restitution should always have priority compared to the punishment of a fine.

Circumstances influencing the sentencing of fines for legal entities

Setting the appropriate fine for legal entities is key to removing the motive for which these entities engage in illegal activities. As in the case of imprisonment for natural persons, the Law in question in Article 10 has also defined the circumstances that may affect the amount of fine, therefore the court is also obliged to take into account the following:

- the gravity of the criminal offense committed.
- the consequences that have occurred or could have occurred.
- the circumstances under which the criminal offense was committed.
- the economic power and the size of the legal person.
- the function and the number of responsible persons in a legal person, who have committed a criminal offence.
- the conduct of a legal person after the committal of the criminal offense.
- the measures that were taken by the legal person with the purpose of omitting and reporting the criminal offense.
- rapport with the victim of the criminal offense.
- the conduct of the legal person for the criminal offense, including the

  acceptance of responsibility for the committed criminal offense.

According to paragraph 2 of the same Article, the Court will especially consider:

- whether the legal person has any previous record for a criminal offense,
- the type of the criminal offense committed previously, is it the same as the new criminal offense and

[336] Law No. 04/L-030 on the responsibility of legal entities for criminal offences, Official Gazette of the Republic of Kosovo No. 16/14 September 2011, Pristina.

- how much time has passed since the first punishment.

The law also allows the mitigation of the punishment if this is provided for by this law or the law in which the criminal offense is foreseen, or if there are particularly mitigating circumstances.

Finally, the law also foresees aggravation for recidivism not only for the legal person but also for the responsible person by using the same principles as those mentioned in CCRK, i.e. up to twice the amount of the highest measure of punishment, if the perpetrator is multiple recidivist. The Law also deals with cases where multiple recidivism is considered.

Penalty calculation for legal entities in the USA

In order to illustrate the practices and regulations of other countries, this title is dedicated to the way in which the calculation of fines for legal entities is foreseen in the USA. In addition to the Sentencing Guidelines, the US Sentencing Commission (hereafter the Commission) has also provided a method of measuring fines. Thus according to a Publication called "Fines for Organizations"[337]The main consideration for the court is to differentiate whether:

- **Organization that acts mainly for criminal purposes or mainly with criminal means,** on which the court imposes a fine in an amount up to the statutory maximum, sufficient to strip the organization of all its net assets. This document also defines the term "Net Assets" as assets remaining after payment of all legitimate claims of bona fide creditors. Meanwhile, in cases where the total value of the organization's assets is not known, the court sets the maximum fine allowed by law, in the absence of good faith creditors.
- **Other organizations that do not operate primarily for criminal purposes or through criminal means**, in these cases the determination of the fine depends on the damage that is quantifiable.

In terms of circumstances affecting the level of fine, according to the Commission, the level of fine depends on the level of responsibility/guilt of the organization. Circumstances that reflect this factor are:

- Personnel level - if we are talking about high-level personnel in the Organization or organizational unit (such as Heads of the organization or organizational unit or if we are dealing with a middle level) who participate, tolerate, or willfully ignore criminal activity.
- The past of the organization.
- If the organization has violated a preliminary court order.
- Obstruction of justice.

On the other hand, the mitigating circumstances that are taken into consideration to reduce the level of responsibility are the following:

- if the offense has been reported in advance.
- if the organization has an effective Ethics program.

[337] *Premier, Fines for Organizations, Office of the General Counsel, United States Sentencing Commission*, Washington DC, May 2023, last visited July 10, 2024 https://www.ussc.gov/guidelines/primers/fines-organizations

B. Cessation of work of the legal person

According to the applicable Law, for the legal person that was established for the purpose of committing criminal offenses or used its activity mainly for the commission of criminal offenses, the court imposes a punishment of cessation of work of the legal person. Exceptions to this are local self-government units or political parties.

C. Suspended sentence for the legal entity

The court may impose a suspended sentence of up to 50,000 Euros for a period of not less than two years to a legal person. This punishment is foreseen by Article 12 of the Law. In terms of conditions for the imposition of punishments, its effect, and revocation of the punishment, the provisions of the CCRK shall be applied accordingly. In the suspended sentence, the court can determine that the sentence will be applied when the legal person is sentenced within the specified term:

- fails to return the proceeds of crime;
- does not compensate for the damage caused by the criminal offense or
- fails to meet other obligations provided for in the criminal law provisions.

D. Security Measures

In Article 13 the law also foresees several security measures that can be imposed on a legal entity, by providing further details for each of them:

- Prohibition of exercising certain activities and works,
- Seizure of an item, confiscation of proceeds and
- Public announcement of the Judgment.

XIII. Chapter XXVI Criminal Offenses Against Property

General observations

Criminal offenses against property are considered one of the most important chapters of the special part of the CCRK. These criminal offenses are part of the so-called "classical criminality" because most of them were recognized even in the oldest criminal laws. This Chapter on criminal offenses, with some minor changes, is recognized by all the criminal laws of contemporary countries.[338]

In general, the primary protection subject of this Chapter on criminal offenses is property. By the term "property" we mean immovable, movable property, as well as property rights and interests that belong to subjects (natural and legal persons). However, it should be noted that property is also protected by other chapters of the CCRK, e.g. Chapter on criminal offenses against the economy; The chapter on official corruption and criminal offenses against official duty; the Chapter on criminal offenses against the general security of people and property, etc. Unlike other Chapters of the CCRK, in which property is also guaranteed and protected indirectly, this Chapter of criminal offenses against property, guarantees the primary and direct protection of property.[339]

In addition to the legal provisions of the CCRK, property is also protected by other pieces of legislation. In this regard, it is worth noting that property is protected and guaranteed by the Constitution of the Republic of Kosovo (Article 46), by the Law on Property and Other Real Rights,[340] as well as other civil laws.

It should be noted that the state, in principle, implements the protection of property through provisions of civil and economic laws, while the provisions of criminal laws are used only when the property is endangered, damaged, or taken using violence, threats, fraud, and other dangerous acts.

Most of the criminal offenses in this Chapter can be committed by any person *(delicta communia)*. However, some of these criminal offenses can only be committed by persons possessing certain qualities, such as the criminal offense "Misappropriation of another's property", from article 318, paragraph 2 of the CCRK, and the criminal offense "Breach of trust", from article 330, paragraph 2 of the CCRK can only be committed by the guardian, lawyer or any other person that has a legal obligation to the owner of the property *(delicta propria)*.

Criminal offenses against property can be committed only with the most serious form of culpability, namely only with intent. None of the criminal offense included in this Chapter, foresees explicitly that it can also be committed through negligence.[341]

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[338] SHALA, AFRIM, *The special part of criminal law with cases from judicial practice, Gjilan, 2010, p*. 225;
[339] *ibid*.
[340] Law No. 03/L-154 On Property and Other Real Rights, dated 25.06.2009
[341] SHALA, AFRIM, *The special part of criminal law with cases from judicial practice, p*. 226. However, in the science of criminal law, there is a prevailing position that the criminal offense "Purchase, receipt or concealment of goods obtained through the commission of a criminal offense" from Article 333, paragraph 2 of the Criminal Code can be committed with the so-called "mixed form of culpability", which includes certain aspects of negligence and eventual (constructive) intent.

The basic characteristic of most criminal offenses against property is that the vast majority of them are committed with the "purpose of illegal financial gain for oneself or other persons" (e.g. criminal offenses: "theft",[342] "Aggravated theft",[343]etc.). However, some criminal offenses of this Chapter are also committed for other purposes, e.g. criminal offense "Taking possession of movable property",[344] is carried out with the "purpose of keeping the property in possession", but this is not the case with appropriation, or the criminal offense "Damaging property rights of another person",[345] which is carried out "with the purpose of preventing the realization of property claims, respectively with the purpose of preventing payment of debt", etc. In some other criminal offenses of this Chapter, "the purpose of the perpetrator is only to damage the property of the other person", e.g. criminal offense "Destruction or damage to property".[346]

Criminal prosecution for most of these criminal offenses is undertaken *ex officio*. However, for some criminal offenses, prosecution is undertaken based on a motion of the injured party, e.g. criminal offense "Misappropriation of another's property" from article 318, paragraph 7 of the KPRK, etc. However, Article 335 of the CCRK, provides that When the offense provided for in Articles 313, 314, 315 paragraph 1. sub-paragraph 1.1, 320, 321 paragraph 1, 330 paragraph 1, and 332 of the present Code is committed against a person with whom the perpetrator is a family member, criminal proceedings shall be initiated following

a motion when the amount involved is less than two hundred and fifty (250) EUR.

Another feature of the Chapter on criminal offenses against property is that it foresees fines for most criminal offenses. The Punishment of the fine is foreseen cumulatively with the prison sentence,[347] however, for some criminal offenses, it is also foreseen as an alternative to imprisonment. However, it should be noted that for punishment of a fine was not foreseen for any of the criminal offenses of this Chapter as a sole punishment, but each time, the fine is foreseen either cumulatively with the prison sentence or alternatively with the prison sentence.

Even though a fine is prescribed for most criminal offenses against property, it is important to note that no specific minimum and maximum fines have been determined for these criminal offenses. In these situations, the Court applies legal provision from article 43, paragraph 1 of the CCRK, which provides that the punishment cannot be less than one hundred (100) euros *(general minimum)* nor exceed twenty-five thousand (25,000) EUR, while for criminal offenses related to

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Article 313 of the CCRK
Article 315 of the CCRK
Article 319 of the CCRK
Article 332 of the CCRK
Article 321 of the CCRK

[347] If a certain criminal offense provides that its perpetrator will be punished with a fine and a prison sentence, in such we are talking about the possibility of imposing two types of punishments cumulatively. According to the CCRK, the possibility of imposing two types of punishments cumulatively is usually foreseen for cases of criminal offenses committed with the aim of obtaining benefit. The conjunction "and" that is used between the fine and the prison sentence is a determining criterion in this regard, in other words, if the conjunction "and" is used between the fine and the prison sentence, we can conclude that both a fine and a prison sentence are foreseen cumulatively for the relevant criminal offenses. Whereas, in other cases, when the conjunction "or" is used between the fine and the prison sentence, then we can conclude that punishments for the relevant criminal offenses are foreseen in an alternative way. In these cases, punishments foreseen in an alternative way are equal and the court is authorized to impose one or the other type of punishment, while in the cases where punishments are foreseen cumulatively, the court must impose both of these punishments at the same time. SHALA, AFRIM, *The special part of criminal law with cases from judicial practice, p*. 34.

terrorism, human trafficking, organized crime or criminal offenses committed for the purpose of obtaining material benefit, it cannot exceed five hundred thousand (500,000) EUR *(general maximum)*. This way, based on the above, it results that the general minimum fine punishment of one hundred (100) EUR, provided for in the aforementioned legal provision, is also the special minimum fine for criminal offenses against property, while the general maximums of penalty provided for in the aforementioned legal provision are also special maximums for these criminal offenses. Thus, for criminal offenses against property committed for the purpose of obtaining material benefit, the special maximum fine is five hundred thousand (500,000) EUR, while for other criminal offenses against property, the special maximum fine is twenty-five thousand (25,000) EUR.

In the context of the level of dangerousness of criminal offenses, this Chapter of criminal offenses provides for criminal offenses with a low level of dangerousness, criminal offenses with a medium level of dangerousness, and criminal offenses with a high level of dangerousness. Precisely, based on this criterion, criminal offenses against property can be systematized into three (3) groups:

1. *Criminal offense with a low level of dangerousness*, for which fines and/or imprisonment are foreseen, where the maximum imprisonment provided is up to six (6) months; one (1) year; two (2) years; three (3) years; four (4) years and five (5) years;
2. *Criminal offense with a medium level of dangerousness*, for which fines and/or imprisonment are provided, where the maximum imprisonment provided is up to seven (7) years; eight (8) years, and ten (10) years, and
3. *Criminal offense with a high level of dangerousness*, for which fines and/or imprisonment are provided, where the maximum imprisonment provided is up to twelve (12) years; fifteen (15) years, and up to twenty-five (25) years[348] or life imprisonment. Life imprisonment is provided for the following criminal offenses: "Theft in the nature of robbery";[349] "Robbery"[350] and "Arson".[351]

A. Sentencing Process

As noted above, in the chapter on criminal offenses against property, various imprisonment sentences and/or fines are provided, starting from the mildest punishments to the most severe ones.

Similarly to other chapters of the Criminal Code, even in the case of sentencing for criminal offenses against property, the courts must take into account the range of punishment provided for the relevant criminal offences, the purpose of the punishment, the principles defined by the legal provisions of the CCRK, as well as the relevant mitigating and aggravating circumstances.[352]

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[348] For qualified forms of criminal offences: "Theft in the nature of robbery", from article 316, paragraph 4 of the CCRK and "Robbery" from article 317, paragraph 5 of the CCRK, are punishable by a fine and imprisonment of at least ten (10) years or life imprisonment. Considering that the qualified forms of these two (2) criminal offenses do not provide for the special maximum prison sentence, the Court should apply the legal provision of Article 42, paragraph 1 of the CCRK *(general maximum prison sentence)*, from which it results that the special maximum prison sentence for these qualified forms is twenty-five (25) years.

[349] Article 316 paragraph 4 of CCRK:

[350] Article 317 paragraph 5 of CCRK:

[351] Article 322 paragraph 4 of CCRK: Considering that these criminal offenses are punishable by life imprisonment, based on article 42, paragraph 3 of the CCRK, the court can impose a prison sentence of up to thirty-five (35) years.

[352] Article 69 paragraph 1 of CCRK:

It is important to emphasize that with regard to criminal offenses against property, when deciding about sentencing, courts must take into account one of the main principles of criminal law that *"the punishment should be in proportion to the gravity of the criminal offense from this Chapter, as well as the behavior and circumstances of the perpetrator"*.[353]

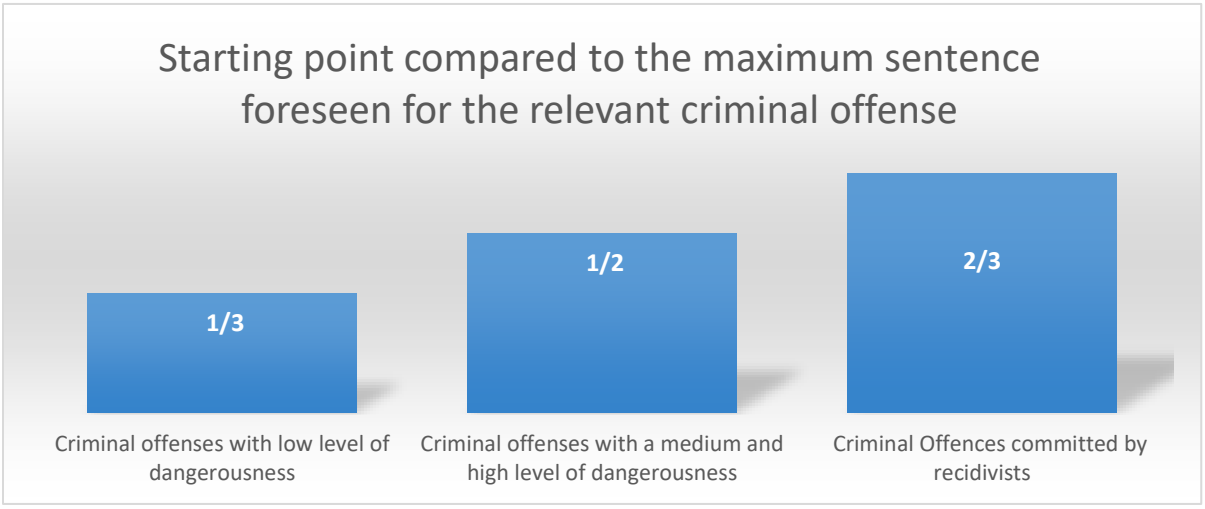
In this respect, the punishment must be proportional to the gravity of the criminal offense and the degree of criminal responsibility of the perpetrator. In addition to these, calculation and fairness of the punishment is expressed by taking into account not only the seriousness of the criminal offense and the criminal liability, but also other objective and subjective circumstances, such as: e.g. previous life of the perpetrator, behavior after committing the criminal offense, general and special purposes of punishment, etc.[354]

Considering that a fine is provided for most of the criminal offenses against property, when imposing a fine, courts must also consider the financial situation of the defendant and especially the amount of personal income, other types of income, assets and liabilities. Moreover, courts should not set the fine at a level that is beyond the defendant's means.[355]

When it comes to the imposition of fines for criminal offenses against property, courts should also consider several important aspects as elaborated in detail in the Specific Guidelines of the Supreme Court of Kosovo - Determination of a fine as sanction for criminal offenses according to the Criminal Code of the Republic of Kosovo.[356]

B. Starting Point

In order to harmonize the approach in sentencing for criminal offenses against property, the following figure provides a recommendation for the starting point of sentencing for three (3) different situations that take into account specifics of these criminal offenses, the capacities of perpetrators, and cases from judicial practice:



[353]Article 69 paragraph 2 of CCRK:
[354] SHALA, AFRIM, *Introduction to criminal law, Fourth edition, Pristina, 2023, p*. 202.
[355]Article 69 paragraph 5 of CCRK:
[356] Specific Guidelines of the Supreme Court of Kosovo, Determination of the fine as a sanction for criminal offenses according to the Criminal Code of the Republic of Kosovo, Pristina, February 2020. https://www.gjyqesori-rks.org/wp-content/uploads/2020/06/Udhezues-per-shqiptimin-e-gjobes-penale.pdf

The figure clearly shows the difference between the different forms of sentencing for these criminal offenses based on the key specifics presented above. This way, referring to the above-mentioned figure, it results that in this Chapter we have three (3) different starting points for sentencing as follows:

- One-third (1/3) of the maximum punishment provided for the corresponding criminal offense can be applied in cases of criminal offenses with a low level of dangerousness, if defendants do have no criminal record, i.e. they have not been previously convicted of criminal offenses. As stated above, criminal offenses with a low level of dangerousness, within the Chapter of criminal offenses against property, could be considered those criminal offenses for which fine and/or imprisonment is provided, where the maximum imprisonment provided is up to six (6) months; one (1) year; two (2) years; three (3) years; four (4) years and five (5) years; In such situations, one-third (1/3) of the maximum punishment provided for the relevant criminal offense may be taken as a starting point.

- If we are talking about criminal offenses with a medium and high level of dangerousness, committed by defendants who have no criminal record, i.e. who have not been convicted before, then, it is possible to take *one-half (1/2) of the maximum penalty provided for the relevant criminal offense as a starting point.* As stated above, criminal offenses with a medium level of dangerousness, are considered those for which fine and/or imprisonment is provided, where the maximum imprisonment foreseen is up to seven (7) years; eight (8) years, and ten (10) years. Whereas, Criminal offenses with a high level of dangerousness, are those for which fines and/or imprisonment are provided, where the maximum imprisonment provided is up to twelve (12) years; fifteen (15) years, and up to twenty-five (25) years or life imprisonment.

- Meanwhile, in cases where defendants who have been previously convicted of criminal offenses (recidivists) appear as perpetrators, then it is possible to take *two-thirds (2/3) of the maximum penalty provided for the corresponding criminal offense* as a starting point. Of course, in such cases, when it comes to natural persons as perpetrators of criminal offenses, then the criteria defined in Article 69, paragraph 4 of the KPRK should also be taken into account. This legal provision provides that *"when determining the punishment for a recidivist, the court shall especially consider whether the perpetrator has previously committed a criminal offense of a similar nature as the new criminal offense, whether the two acts were committed for the same motives, and the period of time that has elapsed since the previous conviction or since the punishment was served or waived.* In such cases, where legal entities are involved as perpetrators,[357] the criteria defined in Article 10, paragraph 2 of the Law on the responsibility of legal persons for criminal offenses should be taken into account.[358] This legal provision provides that *"During the sentencing, the court will take into account, in particular, whether the legal entity has been convicted of a criminal offense, whether the previously committed criminal offense is the same as the new criminal offense and how much time has passed since the previous conviction"*.

[357] Article 112 of the KPRK provides that *"The criminal offenses for which the legal person may be criminally responsible, the criminal liability of the legal person, the criminal sanctions that may be applied to the legal person and the special provisions that regulate the criminal procedure applicable to the legal person are provided by a separate law"*.

[358] Law No. 04/L-030 on the responsibility of legal entities for criminal offences, Official Gazette of the Republic of Kosovo No. 16/14 September 2011, Pristina.

It is important to clarify that such a starting point can only be applied in situations where the so-called *"multiple recidivism"* institute cannot be applied.

The conditions that must be met for implementation of the so-called *"multiple recidivism"* are provided for in Article 75, paragraph 1 of the CCRK, and Article 10, paragraphs 4 and 5 of the Law on the responsibility of legal persons for criminal offenses.

C. Relevant aggravating and mitigating circumstances

As mentioned before, during sentencing for criminal offenses in general, the court must take into account *inter alia* the relevant aggravating and mitigating circumstances.[359]

Also, as indicated in other chapters of the special part of the CCRK, in this Chapter, the relevant aggravating and mitigating circumstances can be numerous and of different natures, depending on the nature of the criminal offense, personal qualities of the perpetrator and the victim, as well as the circumstances under which the criminal offense was committed.

Among other things, it is important that the courts take into consideration other aggravating and mitigating circumstances, in addition to those provided for in Article 69, paragraph 3 and Article 70, paragraphs 2 and 3 of the CCRK, taking into account the specifics of each case separately, since in these legal provisions provide for non-exhaustive lists of relevant aggravating and mitigating circumstances. Within these circumstances, there are objective circumstances that refer to the criminal offense and subjective circumstances that refer to the perpetrator of the criminal offense.[360]

D. Relevant aggravating circumstances

Aggravating circumstances in criminal offenses from this Chapter can be of different natures, depending on the specifics of each case separately.

Based also on the specifics of criminal offenses from this Chapter and referring to cases from our judicial practice, courts should take into account but not be limited only to the following aggravating circumstances:

- *high degree of participation of the convicted person in the criminal offense,* by undertaking numerous actions with the aim of committing certain criminal offenses;
- *high degree of intention the part of the convicted person,* acting with specific intent and with significant premeditation in order to commit the criminal offense and cause its consequences;
- *the presence of actual or threatened violence in the commission of the criminal offense,* normally if such an aspect does not constitute an element of the criminal offense, since in some criminal offenses within the Chapter of criminal offenses against property "violence" or "threat to use violence" are considered elements of the criminal offense;

[359] Article 69 paragraph 1 of CCRK:
[360] SHALA, AFRIM, *Introduction to criminal law, p*. 259-260.

- *if the criminal offenses were committed continuously* since it has been seen from judicial practice that some criminal offenses from this Chapter are committed continuously over a long period of time;
- *the extent of damage caused by the convicted person, namely the intensity of endangerment or damage to the protected value*; such a circumstance must be taken into account as an aggravating circumstance, only if it does not constitute an element of the relevant criminal offense;
- Whether the criminal offense was committed *as part of the activities of an organized criminal group;*
- *any prior criminal conviction of the convicted person*; Recidivism is included in the starting point calculation. Nevertheless, regarding the defendant's prior convictions that do not meet the concept of multiple recidivism under Article 75 of the CCRK, this is best explained in the first part of the Guidelines, more precisely under Point V-Aggravation and Mitigation based on Article 70 of the CCRK.
- the circumstances under which the relevant criminal offense was committed
- the personal circumstances of the perpetrator and his/her behavior after committing the criminal offense, as well as any other aggravating circumstance, which is assessed as such by the court.

E. Relevant mitigating circumstances

Due to the different natures of the criminal offenses that are part of this Chapter, it is difficult to determine which of the mitigating circumstances may have greater weight than other circumstances of this nature.

However, based on our judicial practice, the guilty plea is one of the circumstances that is considered as a mitigating circumstance when sentencing for criminal offenses from this Chapter. If the guilty plea is accompanied by other mitigating circumstances (e.g. previous conduct of the perpetrator, remorse shown, compensation for damage or expression of readiness for compensation, return of stolen items, serious health condition of the perpetrator or of a close family member, etc.), then a milder punishment may be justified, of course taking into account other circumstances of the specific case as well.

Also, the personal circumstances and character of the perpetrator; evidence that the perpetrator played a relatively minor role in the commission of the criminal offense; the fact that the perpetrator participated in the criminal offense not as the main perpetrator, but through assistance, aiding and abetting the other person in any other way, the age of the perpetrator (young or old); the cooperation of the perpetrator with the court and the prosecution authorities, as well as his/her conduct after committing the criminal offense can be considered as mitigating circumstances, normally taking into account specifics of each case separately.

F. Applicability of sanctions and other measures

In criminal offenses against property, in certain situations, imposition of some other punishments and measures should be taken into consideration.

In this regard, considering the nature of criminal offenses against property, such as first and foremost, *confiscation* - is an important tool that must be applied in cases where criminal offenses from this Chapter are committed.[361]

Punishment with a fine - is important and suitable to be imposed in certain cases, taking into consideration the criteria provided by law and the fact that criminal offenses against property are committed in most cases with the goal and motive of obtaining material benefit.

Suspended sentence - is also suitable and can be applied in certain cases, stating that the sentence will be executed, if within the specified period the perpetrator fails to return the property benefit gained through criminal offense, fails to compensate the damage caused by a criminal offense or fails to fulfill other obligations provided for in Article 56 of the CCRK.[362]

Furthermore, *alternative punishment - community service order* may be suitable for certain criminal offenses, by ordering the perpetrator to perform one or more obligations provided for in Article 48 paragraph 3 or Article 56 of the CCRK.[363]

In addition to these, in certain cases, it will also be possible to impose a *suspended sentence with an order for mandatory rehabilitative treatment*[364] OR *suspended sentence with an order for supervision by the probation service.*[365]

Considering the nature of criminal offenses against property, for certain cases, imposing of the following accessory punishment should also be considered - *"Order for compensation of loss or damage"*, which is provided for in Article 61 of the CCRK. This legal provision provides that in cases where the court convicts the person who has been found guilty of any criminal offense involving theft, loss, damage, or destruction of property, the court will order the perpetrator to restitute the victim of the criminal offense. Restitution includes the value of expenses that are equal to the value of any property stolen, lost, damaged, or destroyed. Based on this legal provision also, compensation will be ordered for any loss of income that the victim suffered as a result of the criminal offense and investigative and judicial procedures related to that offense.

Whereas, the *judicial admonition* may be imposed for lighter criminal offenses,[366] taking into account all circumstances related to the criminal offense and the perpetrator, as well as other conditions provided by law, if it is estimated that such a sanction is sufficient to achieve the purpose of punishment.

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[361] Article 92 of the CCRK provides that *"Property or means that has been acquired by a criminal offence shall be confiscated, according to the provisions of the Criminal Procedure Code of the Republic of Kosovo. When confiscation is not possible in accordance with paragraph 1. of this Article, the Court shall order the perpetrator to pay an equivalent amount, or the Court shall confiscate any property of the defendant of equivalent value as set forth in the Criminal Procedure Code of the Republic of Kosovo;*

[362] Article 48 paragraph 3 of CCRK:

[363] Article 57 paragraph 4 of CCRK:

Article 54 of the CCRK

Article 55 of the CCRK

[366] Article 81 and 82 of CCRK;

Alternative punishments can very easily achieve the right effect, especially for example in cases of theft of services from Article 314, of course always for as long as the value of the benefit or damage is not significant. If such cases have not found a solution in the mediation procedure, the imposition of an alternative sentence will also be effective. The same logic applies to the punishment of fine if it is imposed in accordance with the perpetrator's financial situation, as provided for in the Fines Guidelines.

XIV. Chapter XXVII Criminal offenses against the environment, animals, plants, and cultural objects

General observations

In an era where environmental pollution has become a global challenge, environmental protection has gained tremendous importance in the contemporary world. Studies and research on this challenge show that efforts to preserve and promote the environment are necessary to guarantee our future and that of future generations.[367]

In an effort to achieve this important goal, many contemporary states have criminalized a multitude of actions related to environmental pollution, foreseeing them as illegal offenses, whether in the form of criminal offenses (misdemeanors), minor offenses, administrative violations, or other violations. The aim of these measures is to take care of the citizen's right to a clean and healthy environment.

In addition to legal-penal measures, other measures have been undertaken, including those of an educational, political, economic, and social nature, etc. that aim to influence the behavior and attitude of individuals and society in general towards the environment.

Also, various national and international organizations, political parties, agencies, special ministries, and other institutions have been created, with the aim of protecting the environment.[368]

This commitment is an expression of global concern for the health of people, animals, plants, and cultural objects, and due to its great importance, the issue of environmental protection is also guaranteed by the constitutional provisions of various countries and by many agreements and legal instruments in the international level.[369]

According to these agreements and international legal instruments, states are obliged to include a multitude of actions that are taken against the environment, that damage or endanger the health of people, animals, plants, and cultural objects, into their criminal legislations as criminal offenses.

In addition to the provisions of other laws and acts, the environment is generally protected by the criminal provisions, namely the criminal law.[370]

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[367] SHALA, AFRIM, *Environmental protection through criminal law, Tirana, 2023, p.* 4. http://jus.igjk.rks-gov.net/844/

[368] SHALA, AFRIM, *The special part of criminal law with cases from judicial practice, p*. 253.

[369] On the international level, environmental protection, in general, is guaranteed and protected by various conventions and instruments, both at the level of the United Nations and within various continental and regional organizations. In this respect, the number of United Nations Conventions on the environment is high, but among the most important conventions are: the Vienna Convention for the Protection of the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; Aarhus Convention; Montreal Protocol; Kyoto Protocol, United Nations Convention on Climate Change, etc. In the framework of the Council of Europe, it is important to mention two (2) conventions: the Convention on the Protection of the Environment through Criminal Law and the Convention on Civil Liability for Damage Resulting from Activities Hazardous to the Environment. However, within the European Union, it is worth mentioning the Directive of the European Parliament and the Council "On the Protection of the Environment through Criminal Law".

[370] SHALA, AFRIM, *Environmental protection through criminal law, p.* 11.

It is known that criminal law implements its protective function by providing which actions or behaviors are considered criminal, the conditions for criminal responsibility, and by foreseeing criminal sanctions, as well as other measures against perpetrators.[371]

Therefore, the function of environmental protection is carried out by criminal law by predicting which acts or behaviors against the environment are considered criminal acts, what are the conditions for criminal liability and by providing criminal sanctions, as well as other measures against perpetrators of such criminal acts.

These legal provisions which foresee criminal offenses against the environment, conditions for criminal liability, as well as criminal sanctions and other measures that can be imposed on perpetrators of such criminal offenses, constitute "environmental criminal law".[372]

Such criminal offenses are provided for in Chapter XXVII of the CCRK and this Chapter is named "Criminal offenses against the environment, animals, plants and cultural objects".[373]

In recent years this Chapter of criminal offenses has undergone several changes and additions, both in terms of introducing new criminal offenses, harmonizing them with the most important international documents and instruments, as well as in terms of changing some elements of other existing criminal offenses.

In addition, this Chapter of criminal offenses has also undergone changes in recent years, in the following aspects:

- in some criminal offenses, the structure of actions that constitute the offense was changed;
- some paragraphs have been added to certain criminal offenses which provide some forms of corresponding criminal offenses;
- for some criminal offenses the Code provides that the court can compel the perpetrator to undertake certain measures for the protection, preservation and improvement of the living environment;
- in some other criminal offenses, in addition to the prison sentence, the possibility of imposing a fine sentence is provided alternatively;
- for some criminal offenses, punishment with a fine and imprisonment is provided in a cumulative manner;
- in some criminal offenses, the level of punishment has been changed;

This Chapter of criminal offenses protects the environment, animals, plants, and cultural objects.[374]

The expression *"environment"* has a broad and general meaning, it implies the natural environment: air, soil, water, climate, flora, fauna, and cultural heritage, as part of the environment created by man.

The consequence of most of the criminal offenses that are provided for in this Chapter is the concrete and abstract endangerment of the environment. However, in order for some forms of

[371] SHALA, AFRIM, *Introduction to criminal law, p*. 20.
[372] SHALA, AFRIM, *Environmental protection through criminal law, p.* 11.
[373] In the Criminal Code of the Republic of Albania (Law no. 7895, dated 27.01.1995), these criminal offenses are foreseen in Chapter IV and are named *"Criminal offenses against the environment"*.
[374] SHALA, AFRIM, *The special part of criminal law with cases from judicial practice, p*. 253.

these criminal offenses to exist, there must be damage to the legal asset that is protected by these criminal offenses.

Most of the criminal offenses in this chapter have a blanket nature, as their defining elements require the application of additional laws governing specific aspects of relevant environmental fields..[375]

In most cases, any natural person or legal entity can be a perpetrator of the criminal offenses from this Chapter. Thus, most crimes against the environment are so-called *"delicta communia"*[376] - criminal offenses which can be committed by any person.

The criminal offenses of this Chapter can be committed intentionally, while the light forms of some criminal offenses can also be committed negligently.

Also, in addition to this Chapter of the CCRK, the environment in general is directly or indirectly protected through other chapters of the CCRK. However, in the other chapters of the CCRK, it is a question of criminal offenses that protect other values and rights, which in a way protect many environmental aspects as well.

In this regard, the following criminal offenses are worth mentioning:[377]

- *"Committing a terrorist offense"*, from Article 129 in conjunction with Article 128, paragraph 1, subparagraph 1.6. of CCRK;
- *"Training for terrorism",* from article 133, paragraph 2 of the CCRK;
- *"War crimes in serious violation of laws and customs applicable in international armed conflict", from Article 145, par 2, sub-par 2.4, of the CCRK;*
- *"War crimes in serious violation of laws and customs applicable in that are not international armed conflict",* Article 147, par 2, sub-par 2.15 of the CCRK;
- "Unauthorized appropriation, reception, use, production, possession, transfer, alteration, disposal, dispersion or damage of nuclear or radioactive material", from Article 170 of the CCRK;
- "*Threats to use or commit theft or robbery of nuclear or radioactive material* from Article 171 of the CCRK;
- *"Destruction, damage or removal of public installations"*, from Article 357 of the CCRK;
- *"Illegal construction",* from Article 359 of the CCRK, etc.

[375] Environmental protection is also regulated and foreseen by special laws, depending on the specific areas related to this issue. In this regard, the most important laws that refer to the protection of environment in general and which should be taken into account by judges when deciding on cases related to criminal offenses against the environment, animals, plants and cultural objects are: Law No. 03/L-025 on Environmental Protection, dated 23.06.2022; Law No. 03/L-043 On Integrated Prevention and Control of Pollution, dated 26.03.2009; Law No. 08/L-025 On Protection of Air from Pollution, dated 25.02.2010; Law No. 03/L-233 on Nature Protection, dated 30.09.2010; Law No. 04/L-147 on Kosovo Waters, dated 19.03.2013; Law No. 03/L-163 on Mines and Minerals, dated 22.07.2010; Law No. 04/L-060 on Waste, dated 24.05.2012; Law No. 2004/21 on Veterinary Medicine, dated 16.06.2004; Law No. 08/L-137 on Forests, dated 09.03.2023; Law No. 02/L-53 on Hunting, dated 16.12.2005; Law No. 02/L-85 on Fisheries and Aquaculture, dated 10.10.2006; Law No. 02/L-88 on Cultural Heritage, dated 09.10.2006; Law No. 04/L-110 on Construction, dated 31.05.2012; Law No. 04/L-197 on Chemicals, dated 27.02.2014; Law No. 06/L-029 on Radiation Protection and Nuclear Safety, dated 30.03.2018, etc.

[376] SHALA, AFRIM, *Introduction to criminal law, p*. 54.

[377] SHALA, AFRIM, *Environmental protection through criminal law, p.* 12.

In addition to these, the protection of the environment in the criminal legal sense is also provided for by Article 80 of the Law on Mines and Minerals,[378] and in our judicial practice, we have had several such cases, where physical and legal persons have been accused and declared guilty/responsible based on this legal provision.

A. Sentencing Process

The Chapter of criminal offenses against the environment, animals, plants, and cultural objects, provides for low punishments in general, except in cases where the consequences of criminal offenses result in death, serious bodily injury of any person, substantial material damage to property, animals or plants or in substantial material deterioration of air, water or soil quality.

Similarly to other chapters of the CCRK, in the case of sentencing for criminal offenses against the environment, animals, plants, and cultural objects, Courts must take into account the range of punishment provided for the relevant criminal offenses, the purpose of the punishment, the principles defined by the legal provisions of the CCRK, as well as the relevant mitigating and aggravating circumstances.[379]

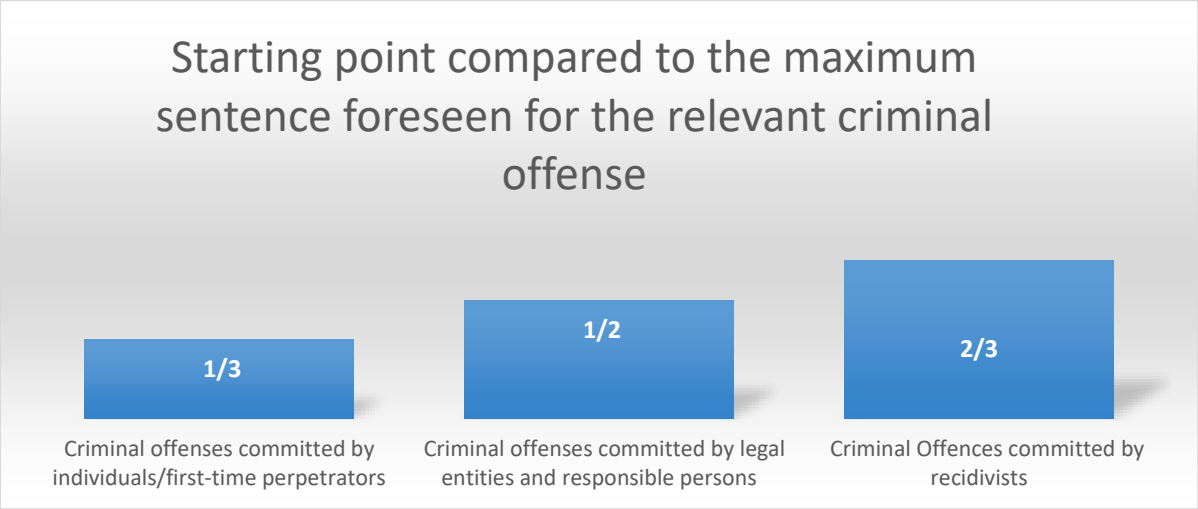
It is important to emphasize that with regard to criminal offenses against the environment, animals, plants, and cultural objects when deciding about sentencing, courts must take into account one of the main principles of criminal law that *"the punishment should be in proportion to the gravity of the criminal offense from this Chapter, as well as the behavior and circumstances of the perpetrator"*.[380]

In this respect, the punishment must be proportional to the gravity of the criminal offense and the degree of criminal responsibility of the perpetrator. In addition to these, calculation and fairness of the punishment are expressed by taking into account not only the seriousness of the criminal offense and the criminal liability but also other objective and subjective circumstances, such as: e.g. previous life of the perpetrator, behavior after committing the criminal offense, general and special purposes of punishment, etc.[381]

B. Starting Point

[378] Law No. 03/L-163 On Mines and Minerals, dated 22.07.2010, amended by several subsequent laws.
[379]Article 69 paragraph 1 of CCRK:
[380]Article 69 paragraph 2 of CCRK:
[381] SHALA, AFRIM, *Introduction to criminal law, p*. 202.

In order to harmonize the approach in sentencing for criminal offenses against the environment, animals, plants, and cultural objects, the following figure provides a recommendation for the starting point of sentencing for three (3) different situations that take into account specifics of these criminal offenses, the capacities of perpetrators and cases from judicial practice:



The figure clearly shows the difference between the different forms of sentencing for these criminal offenses based on the key specifics presented above.

Based on our judicial practice, in a considerable number of cases, especially in criminal offenses like *"Polluting, degrading or destroying the environment"*, from Article 338 of the CCRK and criminal offenses from Article 80 of the Law on Mines and Minerals, the perpetrators of criminal offenses are legal entities and the responsible persons, while on the other hand, in a significant number of these cases, but also in other criminal offenses (*"Devastation of forests",* from article 348; *"Forest theft",* from Article 349, etc.), the accused/convicted persons have a criminal record, i.e. they were previously convicted of criminal offenses.

This way, referring to the above-mentioned figure, it results that in this Chapter of criminal offenses we have three (3) different starting points for sentencing as follows:

- ***One-third (1/3) of the maximum sentence for criminal offenses committed by individuals/leaders without any criminal past;***
- ***One-half (1/2) of the maximum sentence for offenses committed by legal persons and responsible persons; and***
- ***Two-thirds (2/3) of the maximum sentence for crimes committed by recidivists.***

a. *One-third (1/3) of the maximum punishment provided for the corresponding criminal offense* can be applied in cases of criminal offenses where natural persons are presented as perpetrators, and the same have no criminal record, i.e. they have not been previously convicted of criminal offenses. In such situations, 1/3 (one-third) of the maximum penalty provided for the corresponding criminal offense should be taken as a starting point.
b. If legal entities and responsible persons are presented as perpetrators of criminal offenses against the environment, animals, plants, and cultural objects, then the starting point should be

1/2 (one-half) of the maximum punishment provided for the corresponding criminal offense. There are at least two (2) reasons that were taken as a basis when a different starting point was determined for legal entities and responsible persons, in relation to natural persons, as follows:

- *Firstly,* based on cases from judicial practice, the criminal offenses of this Chapter committed by legal entities and responsible persons cause great damage to the environment in general and
- *Secondly,* by committing the criminal offenses from this Chapter, legal entities and responsible persons are generating huge material benefits.

c. Meanwhile, in cases where natural persons, legal entities, and responsible persons who have been previously convicted of criminal offenses (recidivists) appear as perpetrators, then it is possible to take 2/3 *two-thirds of the maximum penalty provided for the corresponding criminal offense* as a starting point. Of course, in such cases, when it comes to natural persons as perpetrators of criminal offenses, then the criteria defined in Article 69, paragraph 4 of the KPRK should also be taken into account. This legal provision provides that *"when determining the punishment for a recidivist, the court shall especially consider whether the perpetrator has previously committed a criminal offense of a similar nature as the new criminal offense, whether the two acts were committed for the same motives, and the time that has elapsed since the previous conviction or since the punishment was served or waived.* In such cases, where legal entities are involved as perpetrators,[382] the criteria defined in Article 10, paragraph 2 of the Law on the responsibility of legal persons for criminal offenses should be taken into account.[383] This legal provision provides that *"During the sentencing, the court will take into account, in particular, whether the legal entity has been convicted of a criminal offense, whether the previously committed criminal offense is the same as the new criminal offense and how much time has passed since the previous conviction"*.

It is important to clarify that such a starting point can only be applied in situations where the so-called *"multiple recidivism"* institute cannot be applied.

The conditions that must be met for implementation of the so-called *"multiple recidivism"* are provided for in Article 75, paragraph 1 of the CCRK, and Article 10, paragraphs 4 and 5 of the Law on the responsibility of legal persons for criminal offenses.

C. Relevant aggravating and mitigating circumstances

As mentioned before, during sentencing for criminal offenses in general, the court must take into account *inter alia* the relevant aggravating and mitigating circumstances.[384]

However, in this regard, it is important to clarify in advance two (2) aspects related to the aggravating and mitigating circumstances, which judges should take into account when deciding to impose the punishment for criminal offenses from this Chapter as follows:

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[382] Article 112 of the KPRK provides that *"The criminal offenses for which the legal person may be criminally responsible, the criminal liability of the legal person, the criminal sanctions that may be applied to the legal person and the special provisions that regulate the criminal procedure applicable to the legal person are provided by a separate law"*.

[383] Law No. 04/L-030 on the responsibility of legal entities for criminal offences, Official Gazette of the Republic of Kosovo No. 16/14 September 2011, Pristina.

[384] Article 69 paragraph 1 of CCRK:

1) *Firstly,* the relevant aggravating and mitigating circumstances are circumstances that influence the punishment to be more severe or more lenient within the ranges provided by law (minimum and special maximum punishment) for the specific criminal offense.[385] So, in other words, the relevant aggravating and mitigating circumstances have an impact on the punishment being harsher or more lenient only within the special minimum and maximum range provided for specific criminal offenses. This is due to the fact that from judicial practice it has been observed that in some cases a sentence was imposed below the special minimum sentence, only based on mitigating circumstances. In relation to this issue, it is important to note that Article 70, paragraph 1 of the CCRK provides *The punishment imposed on a perpetrator is the punishment prescribed for the criminal offense, while a more lenient or severe punishment may be imposed only in accordance with the conditions provided for by this Code".* The legal provisions of the CCRK, recognize two (2) criminal law institutes, on the basis of which the sentence can be set below the special minimum as follows:
    a) "**Mitigation of punishment**" (Articles 71 and 72 of the CCRK)[386] and
    b) "**Waiver of punishment** ", applying Article 73, paragraph 2 of the CCRK.

Whereas the court can determine a sentence above the special maximum only if the legal provisions of **"Aggravation of punishments for multiple recidivism"**, from article 75 of the KPRK, are applied.[387]

2) *Secondly,* the relevant subjective and objective elements of criminal offenses[388] from this Chapter cannot be treated as relevant aggravating or mitigating circumstances. In other words, the relevant aggravating and mitigating circumstances can be taken into account when sentencing, only if they are not provided as subjective and objective elements of criminal offenses from this Chapter. This is due to the fact judicial practice has shown that in some cases when addressing aggravating or mitigating circumstances, courts are considering the subjective and objective elements of the criminal offenses for which the punishment has been determined.[389]

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[385] SHALA, AFRIM, *Introduction to criminal law, p*. 260.

[386]Article 10, paragraph 3 of the Law on the Liability of Legal Persons for Criminal Offenses, provides that *"The court may impose a punishment under the provided measures for the criminal offence (a more lenient punishment) when this is provided for by law or provisions under which the criminal offense is established or if there are especially mitigating circumstances. The punishment may be mitigated up the lightest measure, provided for by Article 12, paragraph 1. of this law..*

[387] The legal institute of *"Aggravation of punishments for multiple recidivism"* is also provided for in the Law on the responsibility of legal entities for criminal offenses. Article 10, paragraph 4 of this Law, provides that *"The court may impose a more severe punishment to the legal person or responsible person, as provided for the criminal offense that was committed, up to the double amount of measure for the highest punishment, if the perpetrator is a multiple recidivist".*

[388] Regarding the figure of criminal offenses in general, see more broadly: *Basic training modules for professional associates* (Criminal-substantive and procedural), Prishtina, 2021, p. 23/24 and No. 119-124. http://jus.igjk.rks-gov.net/801/

[389]The Supreme Court of Kosovo in the judgment Pml.nr.579/2023, dated 06.12.2023, but also in several other cases from its judicial practice, has emphasized that the subjective and objective elements of the figure of criminal offenses cannot be treated as aggravating or mitigating circumstance, on the grounds that the same circumstance cannot be counted twice (2), first by the legislator, and then by the court.

Also, as indicated in other chapters of the special part of the CCRK, in this Chapter, the relevant aggravating and mitigating circumstances can be numerous and of different natures, depending on the nature of the criminal offense, personal qualities of the perpetrator and the victim, as well as the circumstances under which the criminal offense was committed.

Among other things, it is important that courts take into consideration other aggravating and mitigating circumstances, in addition to those provided for in Article 69, paragraph 3 and Article 70, paragraphs 2 and 3 of the CCRK, taking into account the specifics of each case separately, since in these legal provisions provide for non-exhaustive lists of relevant aggravating and mitigating circumstances. Thus, Article 69, paragraph 3 of the CCRK provides that *"When determining the punishment, the court shall consider but not be limited by following factors: ..."* , while Article 70, paragraph 2 of the CCRK provides that *"When determining the punishment the court shall consider, but not be limited by, the following aggravating circumstances:..."*, and paragraph 3 of this Article provides that *"When determining the punishment the court shall consider, but not be limited by, the following mitigating circumstances:..."* . According to these legal provisions, in addition to circumstances that have been mentioned explicitly, the court has the authority to take into account other circumstances in each specific case, which may have an influence in imposing a more severe or more lenient punishment. Within these circumstances, there are objective circumstances that refer to the criminal offense and subjective circumstances that refer to the perpetrator of the criminal offense.[390]

D. Relevant aggravating circumstances

Aggravating circumstances in criminal offenses from this Chapter can be of different natures, depending on of each case separately.

Based also on the specifics of criminal offenses from this Chapter and referring to cases from our judicial practice, courts should take into account but not be limited only to the following aggravating circumstances:

- *high degree of participation of the convicted person in the criminal offense,* by undertaking numerous actions with the aim of committing certain criminal offenses;
- *high degree of intention on the part of the convicted person,* acting with specific intent and with significant premeditation in order to commit the criminal offense and cause its consequences;
- *if the criminal offenses were committed continuously* since it has been seen from judicial practice that some criminal offenses from this Chapter such as; *"Polluting\, degrading or destroying environment",* from Article 338 of the CCRK, are carried out continuously for a long period of time;[391]
- *the purpose and motive for the commission of certain criminal offenses,* since in many cases even from judicial practice it has been observed that some of the criminal offenses from this Chapter were committed with the purposes and motives of illegal financial gain;
- *the extent of damage caused by the convicted person, namely the intensity of endangerment or damage to the protected value*; such a circumstance must be taken into account as an

[390] SHALA, AFRIM, *Introduction to criminal law, p*. 259-260.

[391] Referring to cases from judicial practice, it has been observed that the criminal offense under Article 80 of the Law on Mines and Minerals is often committed continuously.

aggravating circumstance, only if it does not constitute an element of the relevant criminal offense; For example, if as a result of committing the criminal offense *"Devastation of forests"* , according to article 348 of the CCRK, the forest has been destroyed in a large area, which will require a long time to repair.

- Whether the criminal offense was committed as part of a group[392], or activities of an organized criminal group[393]
- any prior criminal conviction of the convicted person .;[394] Recidivism is included in the starting point calculation of 2/3. Nevertheless, regarding the defendant's prior convictions that do not meet the concept of multiple recidivism under Article 75 of the CCRK, this is best explained in the first part of the Guidelines, more precisely under Point V-Aggravation and Mitigation based on Article 70 of the CCRK.
- the circumstances under which the relevant criminal offense was committed
- the personal circumstances of the perpetrator and his/her behavior after committing the criminal offense, as well as any other aggravating circumstance, which is assessed as such by the court.

E. Relevant mitigating circumstances

Due to the different natures of the criminal offenses that are part of this Chapter, it is difficult to determine which of the mitigating circumstances may have greater weight than other circumstances of this nature.

However, based on our judicial practice, the guilty plea[395] is one of the circumstances that is considered as a mitigating circumstance when sentencing for criminal offenses from this Chapter. If the guilty plea is accompanied by other mitigating circumstances (e.g. previous conduct of the perpetrator, remorse shown, compensation for damage or expression of readiness for compensation, serious health condition of the perpetrator or of a close family member, etc.), then a milder punishment may be justified, of course taking into account other circumstances of the specific case as well.

Also, the personal circumstances and character of the perpetrator; evidence that the perpetrator played a relatively minor role in the commission of the criminal offense; the fact that the perpetrator participated in the criminal offense not as the main perpetrator, but through

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[392] In Article 113, paragraph 12, the CCRK, provides that "Group of people means three (3) or more people".

[393] Article 113, par 3 of the CCRK provides that *"a structured association, established over a period of time, of three or more persons for the commission of a certain criminal offense that acts in concert with the aim of committing one or more serious criminal offenses in order to obtain, directly or indirectly, a financial or other material benefit."*

[394]The Supreme Court of Kosovo in the judgment Pml.nr.395/2023, dated 29.08.2023, among other things, assessed that the court of first instance should not have considered the fact that there were ongoing criminal proceedings against the convict for other criminal offenses as an aggravating circumstance since that would be contrary to the principle of presumption of innocence, which is guaranteed by Article 31, paragraph 5 of the Constitution of the Republic of Kosovo. Not only in this criminal case, but also in other cases, the Supreme Court of Kosovo has emphasized that only sentences imposed by final judgments, under certain circumstances and assuming they meet certain requirements, can be considered as aggravating circumstances at sentencing, but in the aforementioned case it was found that "the fact that the convicted person was suspected of some criminal offenses should not be taken into consideration, since this does not mean that the he is also guilty of these criminal acts".

[395] Article 70, paragraph 3, subparagraph 3.10. of KPRK

assistance, aiding and abetting the other person in any other way, the age of the perpetrator (young or old); the cooperation of the perpetrator with the court and the prosecution authorities, as well as his/her conduct after committing the criminal offense can be considered as mitigating circumstances, normally taking into account specifics of each case separately.

F. Applicability of other punishments

Same as with other chapters, in the case of criminal offenses that are part of the Chapter against the environment, animals, plants, and cultural objects, in certain situations the imposition of some other penalties should also be considered.

In this regard, *the obligation of the perpetrator (physical and legal person) to undertake certain measures for the protection, preservation, and improvement of the living environment should also be mentioned.* This is explicitly provided for in Article 340, paragraph 5 and Article 341, paragraph 7 of the CCRK. These legal provisions provide that *"When imposing a sentence for the criminal offense provided for in this Article, the court may require the perpetrator to undertake certain measures for protection, safeguarding and improving the environment."* . Otherwise, Article 7 of the Convention for the Protection of the Environment through Criminal Law provides for *"restoration of the environment"* as a criminal sanction.[396]

Confiscation - is an important tool that must be applied when criminal offenses from this Chapter are committed.[397] In Article 13, Paragraphs 3 - 6 of the Law on the Liability of Legal Entities for Criminal Offenses, the issue of confiscation of items and financial gain in cases of criminal offenses for which legal entities are responsible is regulated, while these legal provisions can also be applied in cases where legal entities commit criminal offenses against the environment, animals, plants and cultural objects.

Suspended sentence - is suitable to be applied in certain cases, applying Article 48, paragraphs 2 and 3 of the CCRK. Under certain circumstances, it is especially important for court to impose a suspended sentence, deciding that the sentence will be executed, if within the specified period of time the perpetrator fails to return the property benefit gained through criminal offense, fails to compensate the damage caused by a criminal offense or fails to fulfill other obligations provided for in Article 56 of the CCRK.[398]

Punishment of fine - is important to be imposed in certain cases, taking into consideration all the requirements provided by law. In this aspect, it should be noted that when imposing a fine, the court must also take into account the financial situation of the perpetrator and especially take into account the amount of personal income, other income, property, and his obligations. Courts should not impose a fine at a level that is beyond the defendant's means.[399] Likewise, when imposing a fine, it is important for courts take into consideration the specific Guidelines of the Supreme Court

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[396]The Convention on the Protection of the Environment through Criminal Law is a document of the Council of Europe that was signed in Strasbourg on 04.11.1998. https://rm.coe.int/168007f3f4

[397] Article 92 of the CCRK provides that *"Property or means that has been acquired by a criminal offence shall be confiscated, according to the provisions of the Criminal Procedure Code of the Republic of Kosovo. When confiscation is not possible in accordance with paragraph 1. of this Article, the Court shall order the perpetrator to pay an equivalent amount, or the Court shall confiscate any property of the defendant of equivalent value as set forth in the Criminal Procedure Code of the Republic of Kosovo;*

[398]Article 48 paragraph 3 of CCRK:

[399]Article 69 paragraph 5 of CCRK:

of Kosovo for imposing fines as a sanction for criminal offenses under the Criminal Code of the Republic of Kosovo.[400] Whereas, when imposing fines on legal persons for criminal offenses from this Chapter, courts must take into account circumstances provided for in Article 10, paragraph 1 of the Law on the Liability of Legal Persons for Criminal Offences.

For criminal offenses from this Chapter for which legal entities are responsible, the courts must also take into account the imposition of punishment - *cessation of work of the legal entity*[401] or imposing a security measure - *prohibition of work and certain functions*[402].

For certain criminal offenses (e.g. criminal offense *"Providing irresponsible veterinarian assistance"*, from article 343, paragraph 2 of the CCRK, etc.), committed due to carelessness and based on the circumstances specific to the case, the courts can also issue *a judicial admonition* if taking into account all the circumstances related to the offense and the perpetrator, it is estimated that the judicial admonition is sufficient to achieve the goal of punishment.[403]

Furthermore, the *alternative punishment - community service order* may be suitable for certain criminal offenses, by ordering the perpetrator to perform one or more obligations provided for in Article 48 paragraph 3 or Article 56 of the CCRK.[404]

- *Waiver of punishment* - can be applied to this type of criminal offense only if the conditions from Article 74 subpar. 1.2 of the CCRK are met.

[400] https://supreme.gjyqesori-rks.org/ëp-content/uploads/legalOpinions/83258_Udhezues%20per%20llogaritjen%20e%20gjobes_final.pdf
[401]Article 11 of the Law on the responsibility of legal persons for criminal offenses.
[402]Article 13, pars 1 and 2 of the Law on the responsibility of legal persons for criminal offenses.
[403] Article 81 of the CCRK
[404]Article 57 paragraph 4 of CCRK:

XV. Chapter XXVIII - Criminal offenses against the general security of people and property

General observations

In everyday life, the performance of certain jobs and the use of certain tools present opportunities or carry risks for people's lives, bodily integrity, and property. Protection of life, bodily integrity, and property from these dangerous actions is done by taking adequate preventive measures, but also through the determination of certain legal and criminal norms, which are expressed in cases of causing a general risk to people and property, because undertaking of general dangerous actions and the use of dangerous means can be a way to commit many criminal offenses against life, bodily integrity and property.

The chapter contains seven criminal offenses: Causing general danger (Article **356**); Destruction, damage, or removal of public installations (**357**); destroying, damaging, or removing protective equipment and endangering workplace safety (Article **358**); illegal construction (Article **359**); unlawful construction work (Article **360**); Unlawful delivery or transportation of explosives or flammable materials (Article **361**); Failure to avoid danger (**362**); and misusing the distress or danger signal (**363**).

The characteristics of criminal offenses from this chapter are:

- the commission of these criminal offenses causes a general danger to people's lives and to property to a large extent;
- the general risk as a result of the dangerous action lies in endangering the life or body of an undefined circle of people or an undefined object;
- the general risk as a consequence of the criminal offense against the general security can be both concrete and abstract.

Intent is the basic form of culpability for these criminal acts, but some of these criminal acts also exist when they are committed through negligence.

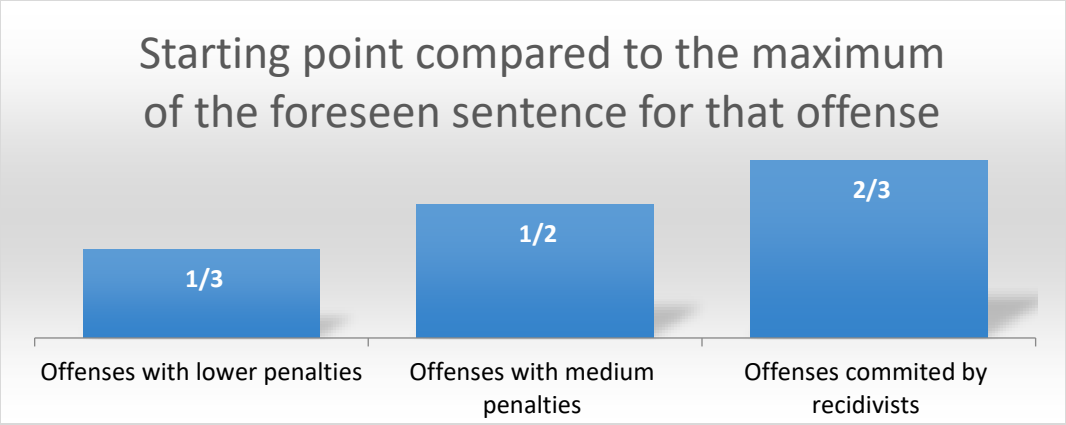
Depending on the form of culpability, intent or carelessness and consequences caused to property, people, and place where they are committed, punishments for these criminal offenses are as follows:

- Low sentences with maximums of up to 1.3 years
- Medium sentences with maximums of up to 5, 8, and 12 years.

Usually when these criminal offenses are committed in a place where a large number of people are present, or when these offenses result in serious bodily injury, substantial property damage or death, the sentences range from 8 to 12 years.

A. Starting Point

To harmonize the approach in the calculation of punishment for these crimes, the following image provides a recommendation for the starting point in the calculation of punishment:



- 1/3 for offenses with lower penalties
- 1/2 for crimes with medium and maximum penalties
- 2/3 for criminal offenses committed by recidivists

The image above clearly shows the difference between the different forms of sentencing based on punishments foreseen for these criminal offenses.

B. Relevant aggravating circumstances

Some of the aggravating circumstances provided for in Article 70 par. 2 of the CCRK come in question in these criminal acts.

a) if the criminal offense involves several victims. In fact, the consequences of these criminal offenses that result in the death of one or more persons are a qualifying element, but this circumstance provided for in Article 70 par. 5 of the Criminal Code, must be taken into account in all cases where more than three people die as a result of these criminal offenses

b) the extent of the damage caused by the convicted person, Although the degree of damage and death of one or more persons are elements of these criminal offenses, the degree of damage as an aggravating circumstance must be assessed based on the damage caused to families of victims (deceased persons), especially when we are dealing with several victims, the damage caused due to consequences of injuries, in cases where we are dealing with permanent injuries, the number of persons at risk, etc.

c) *any prior criminal conviction of the convicted person.* Recidivism is included in the determination of the starting point of 2/3. Nevertheless, regarding the defendant's prior convictions that do not meet the concept of multiple recidivism under Article 75 of the CCRK, this is best explained in the first part of the Guidelines, more precisely under Point V-Aggravation and Mitigation based on Article 70 of the CCRK.

C. **Mitigating circumstances**

Some of the mitigating circumstances provided for in Article 70 par.3 of CCRK are relevant for application, depending on which offense we are talking about.

a. *Personal circumstances and character of the convicted person*
b. *entering of a guilty plea.*
c. *remorse expressed by the convicted person.*
d. *the conduct of a convicted person after the commission of the criminal offense.*

e. *evidence that the convicted person made restitution or compensation to the victim.*

D. Other punishments that may be imposed

The following punishments are not considered appropriate to be imposed in cases of persons who have previously committed criminal offenses of the same nature.

Suspended sentence - can be considered for offenses from this chapter (with the exception of criminal offenses for which a prison sentence of up to 12 years is provided), always taking into account the circumstances of the specific case, the degree of responsibility of the perpetrator, and the consequences caused. The suspended sentence may also include an order to fulfill one or more obligations according to the provision of Article 56 of the Criminal Code. In this regard, the court can order the perpetrator to compensate or restitute the victim of the criminal offense, and receive vocational training in a certain profession (subpar. 1.4 and 1.13 of Article 56). Whereas, in terms of the criminal offense of Destroying, damaging, or removing safety equipment and endangering work-place

safety (Article 358), the provision explicitly provides that the court may impose the condition to install the safety equipment within the specified time limit on the offender (par. 8 of the aforementioned Article).

Imposing the order for community service work - may be appropriate for crimes within this chapter with a legal maximum of 1 year and for those offenses that foresee a punishment of fine, whereby the court can impose a fine of 2500€.

Imposing a fine - Article 356 par. 6, Article 359 par. 1, Article 361 par. 1, 2, and 4, Article 362 par. 1, and 363 par. 1 foresee the possibility of imposing a fine as the main punishment. Nevertheless, in order for the fine to have the desired effect, it must be ensured that the fine is commensurate to the financial situation of the perpetrator in line with Article 69 par. 5 of the CCCK and the Supreme Court's Guidelines on Imposing Criminal Fines.[405]

Imposing an accessory punishment Article 61[406] - In these criminal offenses the court may impose accessory punishment of compensation of loss or damage on the perpetrator.

Judicial admonition - can be imposed for these criminal offenses in cases where a sentence of up to 1 year of imprisonment is foreseen and the criminal offense is committed under particularly mitigating circumstances.

Waiver of punishment - in these criminal offenses it is not explicitly provided that the punishment can be waived on the perpetrator, however, since these criminal offenses can also be committed by negligence, waiving of punishment can be imposed based on Article 74 paragraph 1 subpar. 1. 2 of the CCRK, in cases where the perpetrator, immediately after the commission of the criminal offense, made an effort to avoid or reduce the consequences of that offense and it completely or in a large part has compensated the damage caused by that act.

[405]Specific Guidelines: Imposing a fine as a sanction for criminal offenses under the Criminal Code of the Republic of Kosovo. Approved on February 27, 2020 by the General Meeting of the Supreme Court, Pristina.
[406]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 64 and 65, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

XVI. Chapter XXIX Criminal offenses of weapons

General observations

The Criminal Code has traditionally defined a special chapter of criminal offenses of weapons, and this is due to the fact that weapons are usually dangerous, and citizens are not allowed to possess them freely, but their possession is conditional upon obtaining permission. in advance by competent authorities. CCRK - Code No. 06/L-074 has defined the basic forms of legal incrimination, while in order to clarify what is considered a weapon, the provisions of Article 113 par.1 subpar.40 of the CCRK have defined, determined and categorized weapons and types, while the integral parts of criminal offenses were defined through blanket provisions which are based on the Law on Weapons - Law No. 05/L-022, as well as in the Administrative Instructions issued by the Ministry of Internal Affairs. Otherwise, the legal provisions include several important aspects of activities that involve weapons, starting from Import, export, possession, use, and production, which are systematized through the relevant legal provisions.

This Chapter includes six criminal offenses: Unauthorized import, export, supply, transportation, production, exchange, brokering, or sale of weapons or explosive materials (Article 364), Unlawful obliteration, removal or altering of markings on firearms or ammunition (Article 365), Unauthorized ownership, control or possession of weapons (Article 366), Use of a weapon or dangerous instrument (Article 367), False weapons permits, consents and licenses and provision of false information (Article 368) and Manufacturing and procuring weapons and instruments designed to commit criminal offenses (Article 369).

The fundamental characteristic of these criminal offenses is the fact that the vast majority of these criminal offenses are related to ownership, control, or unauthorized possession of weapons and their use, while the other offenses defined in this chapter are rarely presented in judicial practice. A special feature of these criminal offenses is the fact that they can also be committed by persons who possess a permit for the weapon, but do not comply with relevant permits issued or expiration dates of permits for the specified period.

Criminal offenses from this chapter are committed only with intent, while the manner of commission of these criminal offenses is by action. Considering that weapons offenses are criminal offenses that are also connected with financial gain and the fact that weapons often represent an instrumentality for committing other criminal offenses, the vast majority of these crimes foresee two punishments, namely the punishment with a fine and prison sentence. While fines and prison sentences for some criminal offenses are foreseen to be imposed in a cumulative form, they can also be imposed alternatively in others, depending on the nature and dangerousness of these criminal offenses.

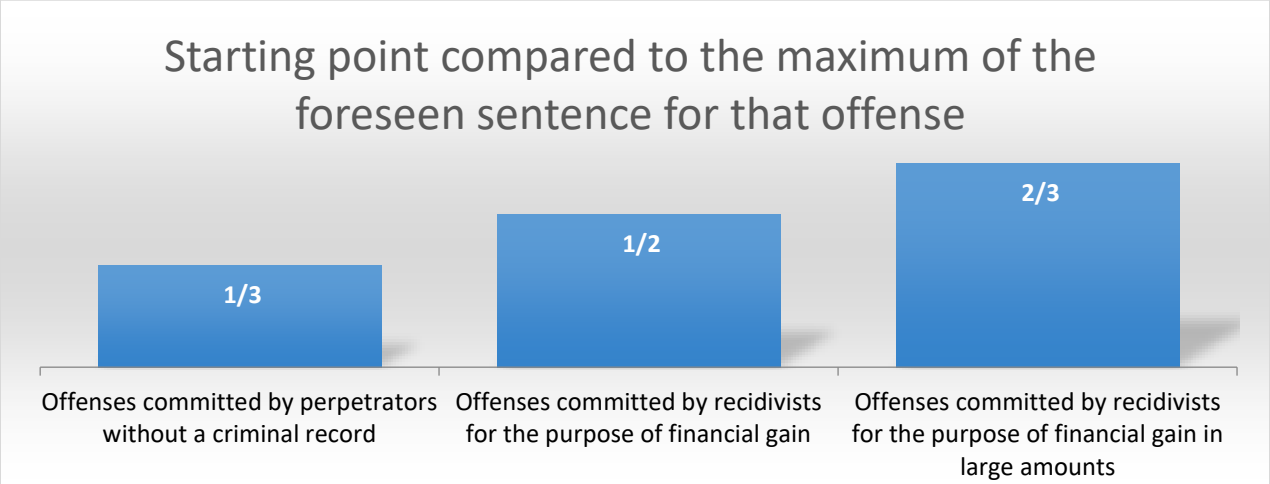
Considering that this chapter foresees several criminal offenses of different types and characteristics, the determination of the punishments is quite different, both in terms of imprisonment and in terms of fines. A characteristic of fine punishments is that some criminal offenses contain neither the minimum nor maximum range for them, thus in these cases the determined legal minimum and maximum should be applied. In some criminal offenses, only the legal maximum has been determined, starting from two thousand five hundred (2,500) Euros to (ten thousand) 10,000 Euros.

Regarding prison sentences, there is also a wide range between the minimum and the maximum and it is also mainly presented in two forms, namely the form where the legal minimum is not defined at all but only its maximum, and some other offenses where a range is defined between the minimum and the maximum which is quite large range, which means that there is a high margin of punishment for these two criminal offenses starting from one (1) year and extending to ten (10) years.

Analyzing this high diversity between the prescribed punishments, both for fines and imprisonment, it appears that courts are highly likely to impose inconsistent punishments, undoubtedly making the application of the guidelines a necessity. However, it is important to emphasize the fact that the CCRK has defined a qualifying form when a weapon is used or carried in no less than thirty (30) criminal offenses, which indicates the fact criminal offenses from this chapter should be considered as criminal offenses with a high level of dangerousness.

A. Starting Point

To harmonize the approach to sentencing for these criminal offenses, the recommendation is to use starting points of sentencing for three different situations, taking into account the degree of punishment, specifics, and the capacities of perpetrators:



- *the starting point of 1/3 for offenses when the perpetrators do not have a criminal record*, i.e. they have not been previously convicted, or they were provided with a permit in advance but did not renew the relevant permit within the timelines. The starting point according to this category would be appropriate even in cases where the perpetrator fails to comply with the gun permit requirements or acts outside of this permit. Therefore, in these situations, we consider that a starting point of 1/3 of the maximum penalty would be appropriate.

-*starting point of 1/2 for offenses where perpetrators of criminal offenses have a criminal record*, respectively, have previously been convicted for offenses of this nature, and in *cases where this criminal offense is committed for financial gain.*

- *while the starting point of 2/3 for offenses where perpetrators have a criminal record, i.e. they have previously been convicted several times for offenses of this nature and this criminal offense is committed for financial gain of large sums* or perpetrators are acting in several states or within a state but in several different locations and with the purpose of committing high-risk criminal

offenses. Due to these characteristics, the starting point of 2/3-rd of the maximum punishment according to this category would be appropriate, however, we should observe whether the above-mentioned characteristics are already incorporated into specific criminal offenses.

The above figure clearly shows the difference between the different forms of sentencing for these crimes based on the punishments provided for these crimes and depending on the nature and consequences resulting from these actions.

B. Relevant aggravating circumstances

These criminal offenses contain some of the aggravating circumstances provided for in article 70 par.2 of the Criminal Code, because stated above, these criminal offenses are committed intentionally, but when assessing the aggravating circumstances, one must take into account that the use of a weapon or its possession has been incriminated as a qualifying form in thirty (30) different criminal offenses, therefore in these cases the fact that the perpetrator used or had a weapon with him cannot be used as an aggravating circumstance as this represents a qualifying element of the concrete criminal offense and at the same time represents double count of aggravating circumstances. When assessing the aggravating circumstances, it should be borne in mind, as determined by the provisions of the CCRK and in the present Guidelines, that the aggravating circumstances are not exhaustive or exclusive, therefore, the court has the discretion to present other circumstances depending on the perpetrator and criminal offenses. Aggravating circumstances for criminal offenses under this chapter can be of different natures and each case can have its specifics.

Taking into account the provisions of Article 70 par.2 of the CCRK, we can conclude that some of the aggravating circumstances defined in the list can also be applied to this chapter of criminal offenses as follows:

A high degree of participation of the accused person in the criminal offense. High degree of participation can be defined in cases where the perpetrators of criminal offenses act by dividing their roles and in this case, one of the perpetrators dominates the criminal offense compared to the other participants. Such dominance can be expressed by being the key person in the organization of arms trafficking, in the creation of a network of weapons traffickers, and the organization should be active for a longer time period, involving one or more countries. Some other circumstances that can be considered are the degree of planning and especially the time of involvement in preparation of the offense until its commission.

High level of intent - concealment, crossing several countries, etc. All these and other indicators are important in determining the level of intent and persistence of the perpetrator in committing the criminal offense and consequently in determining the level of punishment.

The presence of actual or threatened violence in the commission of the criminal offense. This circumstance represents the basis for being assessed as an aggravating circumstance in cases where violence and threats represent means to carry out these criminal acts and the fact that weapons are considered dangerous, this a priori represents aggravating circumstance. However, this circumstance should not be applied in cases where the weapon represents the qualifying element of other criminal offenses and where the use or possession of a weapon is defined as a qualified form of criminal offense, as the aggravating circumstance represents a double count.

Whether the criminal offense involved multiple victims. This circumstance represents a basis for being assessed as an aggravating circumstance in cases where a specific activity of the criminal offenses under this chapter, involves a large number of victims. Other aggravating circumstances can be considered if the offense was committed continuously against the same victim, the degree of suffering and humiliation caused, and the helplessness of the victim.

Whether the victim of the criminal offense was particularly defenseless or vulnerable. This circumstance represents a basis for being assessed as an aggravating circumstance in cases where these criminal offenses are related to defenseless and vulnerable persons, as a result of the activity determined in the criminal offenses of this chapter, and this can be observed in the case of the sale of weapons to a category of people who have predispositions to attack these categories of victims.

If the criminal offense was committed as part of the activity of an organized criminal group. This circumstance represents a basis for being assessed as an aggravating circumstance in cases where it is not foreseen as separate incrimination.

Any prior criminal conviction of the convicted person. This circumstance can be assessed as an aggravating circumstance in cases where the perpetrator commits criminal offenses from this chapter, but also other criminal acts which indicate that the same person tends to commit criminal acts that are part of his/her personality. Recidivism was included in the calculus of the starting point, nevertheless, regarding the defendant's prior convictions that do not meet the concept of multiple recidivism under Article 75 of the CCRK, this is best explained in the first part of the Guidelines, more precisely under Point V-Aggravation and Mitigation based on Article 70 of the CCRK.

If the offense is committed within a domestic relationship. This circumstance can be assessed as an aggravating circumstance in cases where the perpetrator commits criminal offenses within the family setting and is related to the fact that, in general, criminal offenses committed within the family present higher risk as they disrupt these relationships and this can often be committed against children or in their presence, against another member of the family who is vulnerable and the impact of these criminal offenses on the victims has a consequence related to their psychological aspect.

C. Relevant mitigating circumstances

Some of the mitigating circumstances provided for in Article 70 par.3 of the CCRK are relevant for application in this category of criminal offenses and these circumstances must be assessed depending on the personality of the perpetrator and the type of circumstances that can specifically be applied to this chapter of the criminal offenses:

Personal circumstances and character of the convicted person This circumstance can be considered as a mitigating circumstance in cases where there are good personal circumstances and it is especially observed in cases of remorse for the criminal offense committed, accompanied by a promise not to repeat acts of this nature or other criminal acts. The good character is assessed based on aspects such as reputation, credibility, personality and social conduct of the accused, usually intended to show that the crime committed is out of character and this is related to information about the life of the accused, his/her past, and other characteristics.

Evidence that the convicted person played a relatively minor role in the criminal offense; The determination of this circumstance must be linked to the high degree of participation on the part of another person, and when assessing the actions of these persons, the lowest role can also be determined, which can also be manifested through his/her behavior by expressing a dose of remorse.

The fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another; This circumstance also finds application in cases where his/her participation is not as the main perpetrator, but in different ways his contribution in the commission of the criminal offense is smaller.

The age of the convicted person, young or old; The age of the person should be considered as a mitigating circumstance in cases where the person is young since this usually represents his/her immaturity to understand the nature of these criminal offenses, this circumstance can also be considered in elderly persons and there is no time-related assessment as to what is considered as old age.

General cooperation of the convicted person with the court, including voluntary surrender; the voluntary cooperation of the convicted person in the criminal investigation or prosecution. Cooperation can be considered as a mitigating circumstance, but the contribution must be concrete and result in acceptance of responsibility and remorse. If the court determines that the cooperation was substantial this factor is generally considered as significant in mitigation as it also facilitates an expeditious trial. On the other hand, when judges ascertain that cooperation was forthcoming reluctantly, was sporadic or connected to some extraneous factor, mitigation will be reduced.

The entering of a plea of guilty. The guilty plea is usually considered as a mitigating circumstance due to the fact that this way the trial ends faster, and it is not necessary to administer the evidence, which reduces the time and material cost of a trial. However, the stages of entering a guilty plea must be distinguished and of course, the guilty plea made in the initial stages represents a basis for greater mitigation, while the guilty plea in the later stages also represents the basis for mitigation but which should be valued in a smaller amount of mitigation. It should also be assessed whether such a guilty plea is accompanied by complete and sincere remorse of the perpetrator, this circumstance must also be related to several other factors, such as the behavior of the perpetrator in relation to the victim, repentance, or even compensation for the damage caused. According to judicial practice, this circumstance is often overestimated and is disproportionate compared to other circumstances, which also indicates double counting and overlapping of this circumstance.

Remorse expressed by the convicted person. This circumstance can be considered as a mitigating circumstance and must be manifested not only through verbal declaration but argued through the behavior of the perpetrator. This assessment is clearly difficult, considering this factor is of a subjective nature, the truthfulness of which resides solely within the perpetrator. It requires the court to consider not only the words of the perpetrator but also the circumstantial evidence and inferences that can be drawn from actions and behavior.

The conduct of the convicted person after the conflict; The conduct of the perpetrator after the commission of the criminal offense can be considered as a mitigating circumstance when the perpetrator manifests good behavior either towards the victim or the community in general by expressing remorse for the perpetrated action and as a result of the remorse continues with good

behavior by helping or supporting a certain category of persons or a relevant institution dealing with the rehabilitation of persons.

D. Other punishments that may be imposed

The following punishments are not considered appropriate to be imposed in cases of persons who have previously committed criminal offenses of the same nature.

Imposing a suspended sentence - suspended sentence can be imposed for all criminal offenses under this chapter (since the maximum penalty for these offenses is imprisonment of up to 10 years), therefore by applying provisions for mitigation of the penalty there is a possibility of imposing a suspended sentence (Article 49 par.2 of the CCRK). However, for other criminal offenses for which a prison sentence of up to five (5) years is provided, the suspended sentence can be imposed without the application of mitigation provisions (Article 49 par.1 of the CCRK). Nevertheless, in these cases, it is imposed by taking into account the circumstances of the specific case, the degree of responsibility of the perpetrator, and the consequences caused by this criminal offense. When imposing a suspended sentence, the Court must also take into account the possibility of imposing additional orders under Article 56. One of the very specific obligations in this article that is suitable for application in this chapter is one according to paragraph 1.11 - giving up the possession of any type of weapon. Of course, depending on the circumstances of the specific case, other obligations under this Article may also apply.

Imposing the order for community service work - may be appropriate for crimes within this chapter with a legal maximum of (1) year and for those offenses that foresee a punishment of fine, whereby the court can impose a fine of 2500€.

Imposition of a fine - Almost all the criminal offenses defined in this chapter (with the exception of the criminal offenses from Article 366 par. 2 of the CCRK, and the criminal offense from Article 369 par. 1 and 2 of the CCRK), provide for the possibility of imposing a fine as the main punishment and in two forms both as a cumulative and alternative punishment. Nevertheless, in order for the fine to have the desired effect, it must be ensured that the fine is commensurate to the financial situation of the perpetrator in line with Article 69 par. 5 of of the CCRK and the Supreme Court's Guidelines on Imposing Criminal Fines.[407]

Imposing an accessory punishment[408]- with the exception of the accessory punishments defined by Articles 64 and 65 of the KPRK, the court can impose all punishments defined by Article 59 of the CCRK on perpetrators of criminal offenses and all the accessory punishments are suitable to be imposed based on the specified durations that apply to relevant provisions for each defined punishment.

Judicial admonition - can be imposed in this chapter in cases where a sentence of up to one (1) year of imprisonment is foreseen and it should take into account that the criminal offense is committed under particularly mitigating circumstances.

[407]Specific Guidelines: Imposing a fine as a sanction for criminal offenses under the Criminal Code of the Republic of Kosovo. Approved on February 27, 2020 by the General Assembly of the Supreme Court, Pristina.
[408]Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Article 64 and 65, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

Waiver of punishment- this chapter of criminal offenses does not provide the possibility to waive the punishment for the perpetrator, since these types of crimes are committed with intent, therefore the provision of Article 74 of the CCRK cannot be applied.

Confiscation - except for the criminal offense of Manufacturing and procuring weapons and instruments designed to commit criminal offenses (Article 369), mandatory confiscation of weapons is also defined in all other criminal offenses of this chapter. Moreover, in some criminal offenses, confiscation also includes the equipment for manufacturing weapons and the means of transportation of weapons, which represents a special obligation of courts to confiscate them automatically.

XVII. Chapter XXX Criminal offenses against the security of public traffic

General observations

Public traffic is an important economic activity, but where there is always the possibility of endangering life, bodily integrity, and property. Protection of life, bodily integrity, and property in public traffic is done through criminal offenses, respectively by defining the incriminating actions of those who violate the rules of public traffic, and their purpose is to ensure the safety of public traffic in accordance with the provisions of public traffic.

This chapter includes six criminal offenses: Endangering public traffic (Article 370), Driving while impaired or intoxicated (Article 371), Endangering public traffic with dangerous acts or means (Article 372), Irresponsible supervision of public traffic (Article 373), Refraining from providing help to persons injured in traffic accidents (Article 374) and Misusing international communication signals (Article 375).

A characteristic of these criminal offenses is that they are committed through illegal behavior of traffic participants, namely with violation of the relevant provisions of public traffic, endangering the life, bodily integrity, or property of people. Therefore, the application of these provisions must be accompanied by provisions related to (the law) public traffic safety.

With the exception of the criminal offense (Refraining from providing help to persons injured in traffic accidents - Article 374), all criminal offenses can be committed both intentionally and negligently, and depending on the form of culpability, intent, or negligence and the consequences caused to property and people these criminal offenses are punishable with:

- Low sentences with maximums of up to 1.3 years
- Medium sentences with maximums of up to 5, 8, and 12 years.

Usually, when these criminal acts are committed intentionally and cause death or property damage of €20,000, the maximum penalties are up to 12 years.

A. Starting Point

To harmonize the approach in the calculation of punishment for these crimes, the following image provides a recommendation for the starting point in the calculation of punishment:

The above figure clearly shows the difference between the different forms of sentencing for these crimes based on the punishments provided for these crimes and depending on whether these acts have been committed intentionally or negligently and the consequences resulting from such actions.

B. Aggravating circumstances

Some of the aggravating circumstances provided for in Article 70 par. 2 of the Criminal Code can be used in some of these offenses because, as stated above, most of these criminal offenses are committed with (eventual) intent or negligence, therefore, they are not criminal offenses carried out with premeditation or directed at a specific person or specific property.

The high degree of participation of the accused person in the criminal offense. Perpetrators of the largest number of these criminal offenses are traffic participants, and since these criminal offenses are committed in violation of the relevant provisions of public traffic, it is not uncommon for the criminal offense to be committed with the contribution of both participants in public traffic, or the contribution one participant is primary and the that of the other is secondary. Therefore, this aggravating circumstance is present in all cases where the accident comes due to exclusive omissions of the accused person or one of the participants in a traffic accident.

Whether the offense involves multiple victims. In fact, the consequence of these criminal offenses resulting in the death of one or more persons is a qualifying element, however this circumstance provided for in Article 70 par.5 of the Criminal Code must be taken into account in all cases where as a result of the public traffic rules violation, several people lose their lives, since it is not uncommon for more than three people to die or be seriously injured as a result of these criminal acts.

Any prior criminal conviction of the convicted person. This circumstance is presented separately in cases where the accused has been previously convicted for criminal offenses of this nature. Regarding the defendant's previous convictions that do not meet the concept of multiple recidivism under Article 75 of the CCRK, this is best explained in the first part of the Guidelines, more precisely under Point V-Aggravation and Mitigation based on Article 70 of the CCRK.

C. Relevant mitigating circumstances

Some of the mitigating circumstances provided for in Article 70 par.3 of CCRK are relevant for application, depending on which offense we are talking about.

- Personal circumstances and character of the convicted person. The weight of the personal circumstances and the character of the convicted person will determine the punishment that will be imposed with a fine or imprisonment.
- *entering a guilty plea*
- *remorse expressed by the convicted person*
- the conduct of the convicted person after committing the criminal offense - compensation of expenses, offering assistance immediately after the commission of the offense, etc.

D. Applicability of other punishments

The following punishments are not considered appropriate to be imposed in cases of persons who have previously committed criminal offenses of the same nature.

Suspended sentence - can be considered for offenses from this chapter (with the exception of criminal offenses for which a prison sentence of up to 12 years is provided), always taking into account the circumstances of the specific case, the degree of responsibility of the perpetrator, and the consequences caused. In addition to the suspended sentence, the court should consider imposing a conditional sentence in accordance with Article 46 par. 2.2.[409] and types of obligations in accordance with Article 56[410] , adequate for this category.

Imposing the order for community service work - may be appropriate for crimes within this chapter with a legal maximum of 1 year and for those offenses that foresee a punishment of fine, whereby the court can impose a fine of 2500€.

Imposing a fine - Article 370 par. 1 and 7, Article 371 par. 1 and 2, Article 372 par. 2 and 6, Article 373 par. 1, 2, and 3, foresee the possibility of imposing a fine as the main punishment. Nevertheless, for the fine to have the desired effect, it must be ensured that the fine is commensurate to the financial situation of the perpetrator in line with Article 69 par. 5 of the CCRK and the Supreme Court's Guidelines on Imposing Criminal Fines.[411]

Imposing accessory punishment - Article 64 and 65[412] - the court can impose accessory punishments such as Prohibition on driving motor vehicles (Article 64) and Confiscation of driver's licenses
(Article 65) for these criminal offenses. According to Article 64 of the Criminal Code - the perpetrator of the criminal offense, who endangers public traffic, the court can prohibit him from driving a vehicle of a certain type or category. However, according to Article 65 of the CCRK - The court may confiscate a driver's license for a specific type and category of motor vehicle from a perpetrator who jeopardizes the safety of public traffic confiscate the driver's license for certain type or category of vehicles and prohibit the perpetrator from obtaining a new driver's license for a period of one (1) to five (5) years. If the perpetrator does not have a driver's license, the court shall prohibit the perpetrator from obtaining a driver's license for a period of one (1) to five (5) years. However, the accessory punishment - confiscation of driving license, can be imposed by the court only if the perpetrator committed a criminal offense causing serious bodily injury or death of a person or if the court finds that further participation of the perpetrator in public traffic is dangerous for the safety of public traffic due to his/her inability to drive safely.

[409] Criminal Code of the Republic of Kosovo, Code No. 06/ L-074, Article 46, par. 2.2. Order for supervision by the Probation Service, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[410] Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 56 Types of obligations outlined in a suspended sentence, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Pristina.
[411] Specific Guidelines: Imposing a fine as a sanction for criminal offenses under the Criminal Code of the Republic of Kosovo. Approved on February 27, 2020, by the General Meeting of the Supreme Court, Pristina.
[412] Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Articles 64 and 65, Official Gazette of the Republic of Kosovo/No. 2, January 14, 2019, Prishtinë/Pristina.

Judicial admonition - can be imposed for these criminal offenses in cases where a sentence of up to 1 year of imprisonment is foreseen and the criminal offense is committed under particularly mitigating circumstances.

Waiver of punishment - according to the criminal code, the court can waive the punishment of a perpetrator only when this is provided for by law. In these criminal offenses, it is not explicitly provided that the perpetrator's punishment can be waived, however, considering that these criminal offenses can also be committed by negligence, the special optional basis of waiver of punishment for criminal offenses committed by negligence is also possible - Article 74 par.1 subpar.1.1 and 1.2 of KPRK. In the criminal offense of endangering public traffic due to negligence, it is not infrequently that the consequences of these criminal offenses hit the perpetrator so hard that the punishment and its purpose are unnecessary, or in cases where the perpetrator immediately after committing the criminal offense has made an effort to avoid or reduce consequences of that act and whether he has partially or in large part compensated for the damage caused by that act.

XVIII. Chapter XXXI Criminal offenses against the administration of justice and public administration

General observations

Criminal offenses that violate the administration of justice strike at the core of the justice system function. It is very important to have credibility in our justice system. TO this end, it must be protected from such violations, attacks, and interventions of a criminal nature.

Perpetrators who interfere in the course of justice must be subject to serious punishments, criminal offenses related to administration of justice do not only affect individuals, but the community at large. Society has an interest in ensuring that justice is being served properly. Such behavior of wrongdoers results in perpetrators avoiding prosecution, or innocent people being wrongfully investigated, accused, or even convicted. These offenses include, *inter alia*, pressuring witnesses to withdraw their testimony or to remain in court, using violence or threats, which may have such a huge effect so as to change the entire outcome of a case in judicial proceedings and lead to a failure of justice. Consequently, the criminal offenses in this chapter protect the activities of justice authorities and public administration, whose function is vital for a society ruled by the law.

The largest number of criminal offenses that are included in this group are directed against justice authorities, which deal with the prosecution and trial of perpetrators of these crimes, ie. against the functions exercised by the courts and the prosecution authorities. To name a few: failure to report the preparation of criminal offenses, failure to report criminal offenses or perpetrators, Providing assistance to perpetrators after the commission of criminal offenses, false report, etc. while the offenses of Obstruction of evidence or official proceedings, falsifying documents, special cases of falsification documents, violating secrecy of proceedings, legalization of false content, generally provide protection for the good functioning of administration and legal order in general. In criminal offenses related to the courts, we have contempt of court and non-execution of court decisions.

Finally, criminal offenses against the administration of justice and public administration from Chapter XXXI can be summarized in four groups:

1. Criminal offenses of failure to inform and false reporting:
    a) failure to report preparation of the criminal offense (Article 377 of the CCRK)
    b) failure to report criminal offenses or perpetrators (Article 378 of the CCRK)
    c) failure to inform of a person indicted by the international criminal tribunal (Article 379 of the CCRK)
2. Criminal offenses related to criminal proceedings:
    a) false statement under oath (Article 383 CCRK)
    b) false statements (Article 384 CCRK)
    c) false statements of cooperative witnesses (Article 385 of the CCRK)
    d) obstruction of evidence or official proceedings (Article 386 of CCRK);
    e) intimidation during criminal proceedings (Article 387 CCRK);
    ë) retaliation (Article 388);
    f) Tampering with evidence (Article 389);
    d) violating the secrecy of proceedings (Article 392)

3. Criminal offenses of persons deprived of liberty:
   a) uprising of persons deprived of liberty (Article 396 CCRK)
   b) Facilitating the escape of persons deprived of liberty (Article 397 CCRK)
   c) Facilitating the escape of persons deprived of liberty(Article 398 CCRK)
   d) Unlawful release of persons deprived of liberty (Article 399 CCRK)
4. Other criminal offences:
   a) providing assistance to perpetrators after the commission of criminal offenses (Article 380 CCRK)
   c) Accessory to a person indicted by the international criminal tribunal (Article 381 of the CCRK)
   c) Unlawful facilitation of the exercise of a profession, activity or duty (Article 400 CCRK)
   ç) Contempt of court (Article 393 CCRK)
   ç) Failure to execute court decisions (Article 394 CCRK)
   d) legalization of false content (Article 395 CCRK)
   dh) falsification documents (Article 390)
   f) special cases of falsifying documents (Article 391)
   e) Unlawful facilitation of the exercise of a profession, activity or duty (Article 400 CCRK)

According to the level of punishment, the aforementioned criminal offenses can be divided into three groups:

1. High penalties with a minimum of 10 and 15 years imprisonment or life imprisonment;
2. Average imprisonment penalty with sentences of up to 10 years of imprisonment; and
3. Low penalties starting with fines, 3 months, 6 months, 1, 3 and 5 years.

As we can see, there is a high degree of punishment for criminal offenses that refer to obstruction of justice and administration, from the minimum punishment of a fine to imprisonment of 15-25 years (general maximum) or life imprisonment.

Consequently, this chapter covers more serious crimes related to the killing of officials, such as revenge from Article 388 par. 3 of the CCRK, which incriminates the situations when an official is killed with the intention of revenge for any act committed during the exercise of his/her official duty, as well as the criminal offense of violating confidentiality of proceedings Article 392 par. 3 of the CCRK, in cases of disclosure of information, data on the identity or personal data of the protected person in criminal proceedings or in a special protection program, that results in the death of the protected person, the perpetrators of these offenses shall be punished with imprisonment of at least 15 fifteen and ten (10) years or life imprisonment.

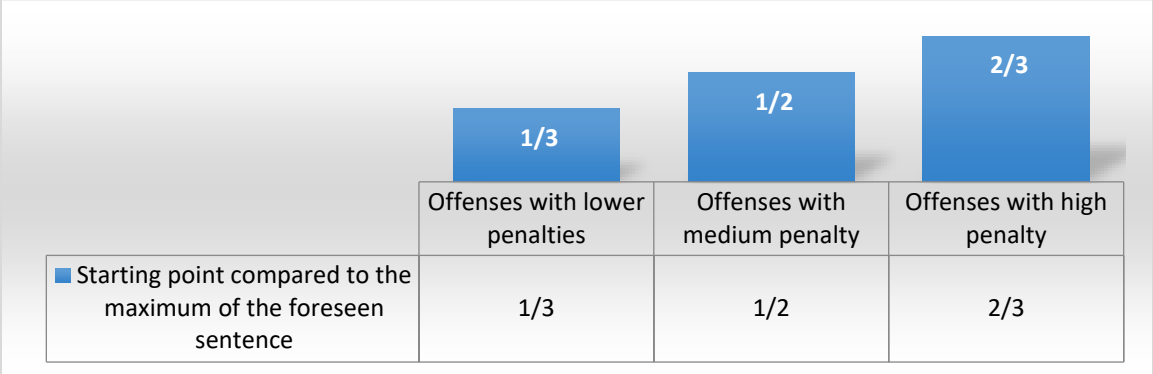
Considering the seriousness of each criminal offense, the court must take into consideration the degree of culpability of the perpetrator in the commission of the offense, or damage caused. The nature of the damage will depend on the personal characteristics and circumstances of the victim. In some cases, where no real damage may have resulted, the court will deal with the assessment of the dangerousness of the perpetrator's conduct, as well as examine the degree of damage that could have occurred.

The structure defined in the Guidelines will be followed for this chapter as well, namely the starting point, aggravating, mitigating factors, and the possibility of applying accessory and other punishments.

A. Starting Point

The following table provides the suggested starting point for criminal offenses from this chapter, distinguishing between those with low, medium, and maximum penalties and the most serious offenses which carry the sentence of life imprisonment.

The level of penalty for criminal offenses is a legal matter, this categorization is simple, it is based exclusively on the degree of punishment, making a division that helps determine the starting point which judges can use as an orientation point to determine and impose an adequate punishment.



	Offenses with lower penalties	Offenses with medium penalty	Offenses with high penalty
Starting point compared to the maximum of the foreseen sentence	1/3	1/2	2/3

As can be seen from the table, for criminal offenses with low penalties, the starting point for sentencing is 1/3 of the prescribed punishment, depending on the aggravating or mitigating circumstances, it moves up or down from this position.

Most of the criminal offenses from this chapter, provide for low punishments, and the possibility of exemption from criminal liability for the following criminal offenses, Failure to report preparation of criminal offenses (Article 377), Failure to report criminal offenses or perpetrators (Article 378), Failure to inform of a person indicted by the international criminal tribunal (Article 379), Assisting perpetrators after the commission of the criminal offenses (Article 380) Accessory to a person indicted by the international criminal tribunal (Article 381), if the person is related to the perpetrator of the criminal offense as a parent, child, spouse, sibling, adoptive parent or adopted child or a person with whom the perpetrator lives in an extramarital union, except for criminal offenses involving child abuse or domestic violence.

For criminal offenses with an average penalty that includes criminal offenses of 5-10 years of imprisonment, the starting point of 1/2 of the punishment has been determined, taking into account the weight of the criminal offense, depending on the circumstances applicable in the concrete situation, the court will move up in the direction of the maximum or down in the direction of the minimum sentence.

It is important to note that moving from the starting point does not only mean a mechanical quantitative count of aggravating or mitigating circumstances, but the nature and quality of circumstances have an essential and influential impact on the sentence, meaning that each of the circumstances is weighed alone, and then in connection with the totality of circumstances, whereby its concrete impact and impact on the punishment is assessed in this context.

Offenses with high penalties include criminal offenses starting from 10 and 15 years of imprisonment or life imprisonment and this chapter contains two such offenses: revenge from

article 388 par. 3 of the CCRK punishable by 15 years of imprisonment or life imprisonment and Violation of the secrecy of proceedings from Article 392 paragraph 4, punishable by 10 years imprisonment or life imprisonment. It should also be noted that regarding crimes for which life imprisonment is provided as possible punishment, the starting point DOES NOT APPLY if the court imposes this punishment. Regarding this matter, the judges are referred to examine the General Guidelines, more precisely Point III (Main punishments according to the CCRK).

In general, when taking steps in the sentencing process, judges are required to build a unique approach in determining the sentence, so the first step is to identify the criminal offense with its given legal qualification to determine the category of criminal offenses in which it is classified, namely in the category with low, medium or high penalty.

Then they will be faced with a multitude of circumstances provided by the context of the criminal offense and the factors related to the perpetrator of the criminal offense. Their identification, and subsequent combination of these factors, should result in the tailoring of a punishment which may be more or less severe from the initial determination.

The unified approach does not necessarily mean the same outcome of punishments, as this will be determined by the circumstances of each specific case, however, it will ensure consistency in the punishments imposed, thereby avoiding unjustified differences for similar cases, leaving sufficient space for differentiation in sentencing to reasonably reflect the particularities and characteristics of each case.

B. Aggravating circumstances

For adequate sentencing, special importance needs to be given to the circumstances in which the criminal offense was committed, both the subjective ones referring to the perpetrator and the objective ones. The degree of criminal responsibility of the accused, is one of the most important factors in this regard, if he/she is responsible, or there are circumstances that affect the degree of criminal responsibility and the form of culpability - direct or eventual intent, or negligence in cases where negligence is sanctioned. Are there factors that show that the accused acted with premeditation, determination and persistence in committing the criminal offense, or the decision to commit the criminal offense was taken on the spot, and it is not a case of a premeditated intent, the motives for which the criminal offense was committed, etc., will have their role and effect in punishment.

The extent of damage, is another relevant component in sentencing, what is the damage and to what extent was it caused by the criminal offense, what are the consequences for the victim and for the community, is the damage repairable, did the accused try to minimize or hide the damage.

The court will pay particular attention to the nature of the damage, which will depend on the personal characteristics and circumstances of the victim. The assessment of the damage by the court will be a way to take into account the impact of a certain crime on the victim.

Criminal acts against the administration of justice cause damage to the community every time. Thus it is important to assess the extent to which the administration of justice as a general value, including all its components, has been violated and damaged starting from the function to carry out its constitutional and legal mission, to the issue of its integrity and reliability.

In assessing the seriousness of any concrete criminal offense, it is necessary to consider not only any real damage caused by the offense but also any damage that was intended to be caused or could be foreseen by the perpetrator as a result of the criminal offense.

Such an assessment is a difficult task, especially when there is an imbalance between culpability and harm, sometimes the resulting harm is higher than the harm intended by the perpetrator, in other circumstances, the perpetrator's culpability may be at a higher level than the damage resulting from the criminal offense. In this respect, damage must always be judged in the light of culpability. To determine the most accurate level of culpability, we use factors such as: motive, planning, and spontaneity. Circumstances must be assessed in situations where the accused *intentionally* causes more harm than necessary to commit such a crime, or when targeting a vulnerable victim (because of their old or young age, disability, or because of the work they do).

In practice, there may be situations where extremely serious damage that is beyond the intent and control of the perpetrator is caused, in such cases, culpability will be significantly affected by the degree to which the damage could have been foreseen. If the criminal offense has caused much more, or much less damage than the accused intended or anticipated, depending on these circumstances they may be given more or less weight in light of the circumstances of the concrete case.

Relevant aggravating circumstances

-*Abuse of power or official position from Article 70 par*. 2.9, must be taken into account in all cases where we are dealing with these criminal offenses, always excluding cases involving those articles, respectively paragraphs where such a position is presented as an element of the criminal offense. In the jurisprudence of the ICTY, the abuse of the position of influence and authority in society can be taken into account as an aggravating factor in the sentence. In particular, by their nature, criminal offenses of this category, committed by officials are quite disturbing because we are dealing with persons who based on the position they hold are expected to contribute to the strengthening of the rule of law and justice in society, rather than becoming its violators as that would lead to loss of citizens' trust in the system. In terms of the concrete circumstances related to the type of authorizations of the official position, and hierarchy, the high-ranking perpetrators with important and specific authorizations, should receive more serious punishments, based on the assessment of concrete consequences that may have affected both the victim and the community.

-*Prior convictions* - It is especially necessary to analyze the type and nature of criminal offenses for which he was previously convicted, such as:

a) the nature of the criminal offense, its connection, and relevance to the current offense;
b) the time that has passed since the previous conviction.

Prior convictions should not, at any stage of the criminal justice system, be automatically used as a factor against the accused. Although it might be reasonable to take into account previous criminal precedents, the sentence should be kept in proportion to the seriousness of the actual offense(s). The effect of previous convictions depends on the special characteristics of the accused's previous criminal case. Consequently, any effect of prior criminality should be reduced or nullified when there has been a substantial period without criminality before the actual offense being tried, or when the actual offense is of a minor nature. Regarding the defendant's previous convictions that do not meet the concept of multiple recidivism under Article 75 of the CCRK, this

is best explained in the first part of the Guidelines, more precisely under Point V-Aggravation and Mitigation based on Article 70 of the CCRK.

-*High degree of participation by the convicted person* - to what extent was the person engaged in the commission of the criminal offense, or in cases of co-conspiracy or criminal association, to what degree and manner was the person involved in the commission of these offenses. Conversely, the circumstance from paragraph 3.5 of this same Article may also affect the mitigation of the punishment. The practice of the International Tribunal, in the Kupreškic Judgment, states that "the sentences to be imposed must reflect the inherent weight of the criminal behavior of the accused. To determine the seriousness of the crime, it is required to take into account the special circumstances of the case, as well as the manner and degree of participation of the accused in the crime".

-*Whether the criminal offense was committed as part of the activities of an organized criminal group* a circumstance from Article 70 par 2.12 of the CCRK. The fact that the criminal offense was committed within the framework of the activity of an organized criminal group indicates a high degree of dangerousness, a serious violation of values, and a serious violation of the administration of justice, this is a clear indicator that the punishment should be moved up from the starting point in terms of the aggravation. The existence of this circumstance in principle has undoubtedly a dominant character over the mitigating circumstances that may exist.

The criminal offense was committed by two or more persons in cooperation or in a group - is considered an aggravating circumstance. The accused who acted in cooperation or in a group affects the increase of his degree of criminal responsibility. When the victim is confronted by two or more people, it is a significant factor that will likely make him more afraid and feel powerless to defend himself.

-*Presence of children/serious concerns* - the criminal offense was committed in the presence of children. A circumstance will be taken as aggravating in cases of the presence of children as they may suffer serious discomfort and this stressful event may be accompanied by traumatic consequences.

- *Contact made at or near the victim's home or place of work* - contact with the victim made at home or at the place where he/she lives, or at his/her place of work, putting the victim in a difficult position and unsafe in these places.

- *Serious impact or an impact on the administration of justice* - the circumstance will be assessed as having a serious impact, which influenced the administration of justice in a significant way, including but not limited to its outcome, also the impact which may not have been substantial but nevertheless existed can be treated as an aggravating circumstance.

-*If the offense was committed through coercion, intimidation, or exploitation* - can be used provided that they are not elements of criminal offenses.

- *If a weapon was used in the commission of the crime* - it can be used as an aggravating circumstance provided that it is not a feature of the criminal offense.

- *The offense committed during the period of conditional release*, or a period of an alternative suspended sentence - the criminal offense including the violation of certain obligations of the suspended sentence was committed during this period.

Other aggravating circumstances provided for by Article 70 of the CCRK may also be applicable in the offenses under this chapter always by being careful to avoid overlapping them with the elements of the criminal offense, for example, the degree of the damage caused can be considered as aggravating circumstance

Circumstances related to victims - All circumstances from pars. 2.4-2-7 may be relevant depending on the type of crime committed. Circumstances related to the victims can be taken as aggravating, however, caution is advised to avoid a double count.

C. Mitigating circumstances

The circumstances defined under Article 70 par.3 of the CCRK can be considered as mitigating circumstances. Considering the nature and diversity of these crimes, courts should be careful depending on the concrete crime and give due weight to mitigating circumstances. In particular, the degree of criminal responsibility and concrete damage caused.

-*The guilty plea or the guilty plea agreement* in the crimes with maximum and average penalty according to this Chapter, should not be automatically considered for mitigation below the legal minimum in cases that are not accompanied by other extraordinary mitigating circumstances.

-*Evidence that the convicted person played a relatively minor role* in the commission of the criminal offense - The fact that the person played a minor or subordinate role if he acted with others/performed a limited role under direction. The fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another; In the forms of cooperation in the commission of the criminal offense we are presented with aiders, abettors and persons who help the perpetrator after the commission of the offense. The fact that they are not key persons in the commission of the criminal offense can be considered as a mitigating factor, but to what extent, it will depend on the specific circumstances of each case.

- *Overall cooperation of the convicted person with the court,* including surrender, Cooperation with the court including surrender should be considered as a mitigating circumstance since this helps the court in serving justice, saves time and resources for institutions, and helps in serving justice. Therefore, consideration of these circumstances should have the right impact, making it clear that cooperation with the court and surrender will be considered mitigating for the sentence.

- *Voluntary cooperation of the convicted person in a criminal investigation or prosecution is vital;* The effective detection, investigation, and prosecution of perpetrators, as a result of cooperation in the early stages is not only important but can also be decisive, in apprehending perpetrators and ensuring evidence to punish persons who commit and are involved in such activities. In each concrete case, cooperation and concrete contribution made by the accused to the interests of justice should be assessed, and depending on the extent of such contribution, it is reasonable to reflect it on the degree of punishment.

- *Contact with the witness is unplanned and limited in scope and duration* - the contact with the witness was unplanned, random, and limited in time, indicating an *ad hoc* and unprepared act.

- *The perpetrator's responsibility is significantly reduced by mental disorder* or mental incapacity - if it is established that the perpetrator has a mental disorder and lacks mental capacity, it will have the appropriate effect as a mitigating circumstance.

- *Limited or insignificant influence on the administration of justice* - the impact has been small or negligible in the administration of justice.

-*Limited distress/impact caused on the victim* - the disturbance or impact was found to be limited and insignificant.

-*Age and/or lack of maturity* - Old age has an impact on the determination of punishment if we are dealing with people of old age who have passed almost a century of life, in conjunction with other circumstances such as previous clean record, therefore this circumstance needs to have a certain impact in sentencing. Likewise, young age and lack of maturity may have a certain impact in determining the sentence.

-*Remorse for the criminal offense committed* - To ascertain whether we are dealing with real and sincere remorse.

-*Good character and/or exemplary behavior* - the person's past and other circumstances show that the accused had good character and was known for exemplary Example: in society.

-*Physical disability or serious medical conditions* that require urgent, intensive or long-term treatment is considered as a mitigating circumstance based on the principle of humanity that should follow the procedure and criminal justice.

The circumstances defined under Article 70 par.3 of the CCRK can be considered as mitigating circumstances.

Considering the nature and diversity of these crimes, courts should be careful depending on the concrete crime and give due weight to mitigating circumstances. In particular, the degree of criminal responsibility and concrete damage caused.

D. Applicability of other punishments

- *Imposing* a suspended sentence - may be appropriate only for crimes with a low or medium penalty, but always taking into account the degree of liability of the perpetrator and the degree of harm caused. In addition to the suspended sentence, certain obligations may also be imposed in accordance with Article 56 of the CCRK, par. 1.9-1.11.

Imposing the order for community service work - may be appropriate only for crimes with low penalties and if there are no aggravating circumstances that would justify a prison sentence.

- A punishment of fine - For less severe crimes, this chapter provides for a possibility to impose a fine as the main punishment. A characteristic for two of the offenses in this chapter[413] is that they foresee specific amounts of fines, in contrast to most articles of the CCRK, which generally only foresee fines as a punishment. In order for the fine to have the desired effect, it must be ensured that the fine is commensurate to the financial situation of the perpetrator in line with Article 69 par. 5 of the CCRK and the Supreme Court's Guidelines on Imposing Criminal Fines, especially when imposing fines of 125.000 € as foreseen in Article 387 of the CCRK.

Imposing accessory punishments from Article 62 or 63 - is recommended in all cases where the official person is involved in the commission of criminal offenses from this chapter. In many cases,

[413] Article 385, paragraph 2, False statements of co-operating witnesses provides for a fine of €500 for a false statement or testimony, while Article 387 Intimidation during criminal proceedings provides for a fine of €125,000.

the imposition of accessory punishments will have a greater effect and achieve the purpose of the punishment compared to other forms of punishment.

- Imposing other accessory punishments may be reasonable given the nature of the offenses of this chapter. For example Expulsion of foreigners from the territory of the Republic of Kosovo from Article 67 of the CCRK.

Judicial admonition - It can be imposed in accordance with the principles of Article 82 paragraph 2 and 5, for less severe offenses from this Chapter. Judicial admonition can be pronounced for criminal offenses for which a prison sentence of up to one (1) year or a fine is foreseen, in cases where such offenses were committed with mitigating circumstances that make the criminal offenses particularly light. Judicial admonition can also be issued for certain criminal offenses for which punishment of up to three (3) years is foreseen, according to the conditions established by law. When deciding to impose a judicial admonition, the court especially takes into account the purpose of the judicial admonition, the behavior of the perpetrator in the past, his behavior after committing the criminal offense, the degree of criminal responsibility, and other circumstances in which the criminal offense was committed. However, the imposition of the judicial admonition was foreseen by the legislator against perpetrators of lighter criminal offenses, with a low degree of criminal responsibility and with little danger, therefore it is necessary to make a proper analysis to determine if imposing this sanction is sufficient and appropriate in the light of all circumstances, including the nature of the criminal offense.

Waiver of punishment - is foreseen as a possibility for some criminal offenses, as a result of the nature of these offenses for which the legislator has foreseen the possibility of waiver, such as for the criminal offenses Uprising of the persons deprived of liberty - Article 396 par. 4 (If the perpetrator of criminal offense from paragraph 1. or 2. of this Article voluntarily renounces uprising before exercising force or serious threats, the court may waive his/her the punishment), Article 385 False statements of cooperating witnesses par 2 , the court can waive his/her sentence when there are mitigating circumstances. Waiver of punishment is also provided in provisions of Article 127 par. 3 of the CCKK which provides that, if the member of the group or association reports the group to authorities before committing the criminal offense, he/she can be released from punishment.

XIX. Chapter XXXII Criminal offenses against public order

General observations

Criminal offenses against public peace and order are those offenses that affect the sphere of public order and security, strengthening and protection of which is of great importance because it is related to freedom and fundamental human rights sanctioned in international law instruments such as the European Convention of Human Rights, the Charter for Political and Civil Rights, but also in the basic legislation of our country such as the Constitution of the Republic of Kosovo, which foresees a normal functioning of the judicial system, and other bodies foreseen in the law, which help the enforcement of criminal justice and execution of court decisions, and which occupy a special place in the provisions of the Criminal Code.

The commonality of all criminal offenses listed in a given group should be the unique protected collective good. This represents a cohesive connection between different criminal offenses within the same group. Meanwhile, when it comes to criminal offenses against public order, their only "common characteristic" is the absence of this common protected good. Criminal offenses with very different protected goods are listed in this group (e.g., obstructing an official person in the exercise of his official duties, falsifying a document, calling for resistance, obstructing religious ceremonies, damaging graves or corpses, etc.), so it is not possible to make any minimum unification for all these criminal offenses in relation to the protected group good.

The consequence of the heterogeneity of criminal offenses in this group is that the meaning and content of some of them cannot be determined from the viewpoint of their systematization in the criminal law, something that for other offenses is not only possible but often very important. In addition, even internal systematization of these offenses is also difficult. The reasons for such a structure of these criminal offenses are, first of all, of a technical-legal nature. It is not uncommon in comparative criminal law to divide various criminal offenses, which, according to the accepted criteria of classification, cannot be classified in a certain group, into special large, but heterogeneous groups, as was the case with our Criminal Code. This solution has its positive side, because this way we can avoid the creation of many groups of numerically smaller criminal offenses. However, this does not exclude the possibility or the need for this group of criminal offenses to be divided into two or more groups, as was the case in the Republic of Slovenia, which has divided these offenses into two groups in its Criminal Law: criminal offenses against legal circulation and criminal offenses against public peace and order.

The protected good of this group of criminal offenses is public peace and order. The very expression of public peace and order is difficult to define precisely. Usually, this expression means the existing state of legal circulation and legal certainty, namely the impression of citizens that legal certainty and personal security exist. Public order consists of the mutual relations of citizens, which are in harmony with the rules of good behavior (with the normal way of life) and social discipline. From this, it follows that every criminal offense, in a certain way, affects the sensitivity of legal certainty and personal security of citizens. However, unlike other criminal offenses, which, in principle, endanger the personal safety of a certain person, and indirectly public peace and order, in general, the criminal offenses of this group, endanger first of all, public peace and order of everyone. Strengthening and protection of public order and security are of great importance,

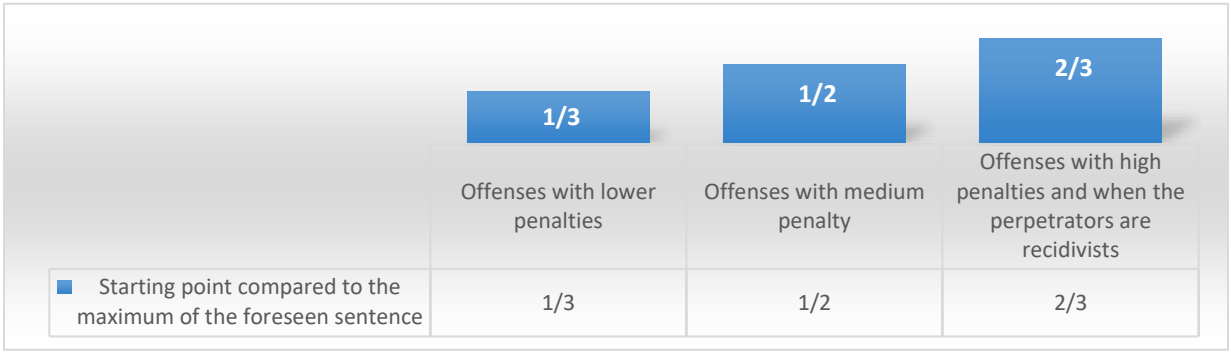
because the enjoyment of fundamental human rights and freedoms, sanctioned by the Constitution, is directly related to them.

According to the level of punishment, the aforementioned criminal offenses can be divided into three groups:

- Low penalty with sentences from 3 months, and 1, 3 and 5 years.
- Average penalty with sentences of 5 to 8 years; and
- Maximum penalty with legal minimums of 8, 10 and 12 years

A. Starting Point

The following table provides this chapter's suggested starting point for criminal offenses, distinguishing between those with low, medium, and maximum penalties. The level of penalty for criminal offenses is a legal matter, this categorization is simple, it is based exclusively on the degree of punishment, making a division that helps determine the starting point which judges can use as an orientation point to determine and impose an adequate punishment.



As can be seen from the table, for criminal offenses with low penalties, the starting point for sentencing is 1/3 of the prescribed punishment, depending on the aggravating or mitigating circumstances, it moves up or down from this position.

For criminal offenses with an average penalty that include criminal offenses of 5-8 years of imprisonment, the starting point of 1/2 of the punishment has been determined, taking into account the weight of the criminal offense, depending on the circumstances applicable in the concrete situation, the court will move up in the direction of the maximum or down in the direction of minimum sentence.

It is important to note that moving from the starting point does not only mean a mechanical quantitative count of aggravating or mitigating circumstances, but the nature and quality of circumstances have a very important and influential impact on the sentence, meaning that each of the circumstances is weighed alone, and then in connection with the totality of circumstances, whereby its concrete impact and impact on the punishment is assessed in this context.

In general, when taking steps in the sentencing process, judges are required to build a unique approach to determining the sentence, so the first step is to identify the criminal offense with its given legal qualification to determine the category of criminal offenses in which it is classified, namely in the category with low, medium or high penalty. Then they will be faced with

a multitude of circumstances provided by the context of the criminal offense and the factors related to the perpetrator of the criminal offense. Their identification, and subsequent combination of these factors, should result in the tailoring a punishment which may be more or less severe from the initial determination. The unified approach does not necessarily mean the same outcome of punishments, as this will be determined by the circumstances of each specific case, however, it will ensure consistency in the punishments imposed, thereby avoiding unjustified differences in analog cases, leaving sufficient space for differentiation in sentencing to reasonably reflect the particularities and characteristics of each case.

B. Aggravating circumstances

For adequate sentencing, special importance needs to be given to the circumstances in which the criminal offense was committed, both the subjective ones referring to the perpetrator and the objective ones.

The degree of criminal responsibility of the accused, is one of the most important factors in this regard, if he/she is responsible, or there are circumstances that affect the degree of criminal responsibility and the form of culpability - direct or eventual intent, or negligence in cases where negligence is sanctioned.

Factors that show that the accused acted with premeditation, determination, and persistence in committing the criminal offense, or the decision to commit the criminal offense was taken on the spot, and it is not a case of a premeditated intent, the motives for which the criminal offense was committed, etc., will have their role and significant impact on the punishment.

The court will also pay *particular attention to the nature* of the damage, which will depend on the personal characteristics and circumstances of the victim. The assessment of the damage by the court will be a way to take into account the impact of a certain crime on the victim.

In assessing the seriousness of any concrete criminal offense, it is necessary to consider not only any real damage caused by the offense, but also any damage that was intended to be caused or could be foreseen by the perpetrator as a result of the criminal offense.

Relevant aggravating circumstances

Article 70 of the CCRK provides a non-exhaustive list of aggravating circumstances to be considered in determining the sentence. It is important to understand and properly apply the most relevant circumstances in a context related to criminal offenses against public order. Below is an analysis of the circumstances foreseen by the CCRK but also some indicators that (precisely because the CCRK provides a non-exhaustive list) can serve to clarify the circumstances foreseen by the CCRK.

If the criminal offense was committed as part of an organized criminal group activity - considering that this part was taken into account when determining the starting point, inclusion as an additional circumstance would represent a double count. However, in this case, the Court should analyze this circumstance further in the context of the duration of membership in the organization, the position in the hierarchy, the type of criminal activity, etc.

High degree of participation of the convicted person in the criminal offense - this circumstance is broken down in almost every chapter and the same arguments regarding the perpetrator in the case in question apply to this one as well. Therefore, the penalty for an individual

as part of the criminal group should be based on the form of engagement in the commission of that crime, and greater engagement/role should be reflected in proportionate and adequate sentence commensurate to that engagement.

If the criminal offense is a hate act, which is any crime committed against a person, group of persons, or property - crimes against public order were committed for any motives mentioned in this paragraph are very relevant factors and should be weighted in the final sentence. As a circumstance it falls within the scope of circumstances that show increased responsibility of the perpetrator, therefore where this is taken as circumstance, it must have significant weight in sentencing.

Any prior criminal conviction of the convicted person Prior conviction is one of the elements weighing the most in sentencing. Recidivism is already included when setting a higher starting point for offenders with a criminal record. Nevertheless, regarding the defendant's prior convictions that do not meet the concept of multiple recidivism under Article 75 of the CCRK, this is best explained in the first part of the Guidelines, more precisely under Point V-Aggravation and Mitigation based on Article 70 of the CCRK.

C. Mitigating circumstances

Although all circumstances from paragraph 3 of Article 70 can be applied to the crimes of this chapter, the courts must be extra careful in calculating their weight. It is impossible to make a template of the circumstances that have more weight than others since their application and weight depends a lot on the type of offense, the degree of victimization and/or damage caused as well as the person's level of responsibility. This is because the last three must always have the main role in determining the type and height of the punishment.

The mitigating circumstances that can be taken into account but without being limited to are:

- The defendant's remorse and promise not to violate the law;
- The defendant apologized to the victim.
- Young age of the injured party
- Defendant's guilty plea.
- The defendant has no prior criminal record in Kosovo.
- Low level of education of the defendant.
- Absence of physical injuries on the victim as a result of the attack

The guilty plea in the crimes with maximum and average penalty according to this Chapter, should not be automatically considered for mitigation below the legal minimum in cases that are not accompanied by other extraordinary mitigating circumstances. A guilty plea is an important indicator that the defendant is successfully dissociating himself from past criminal activity. However, courts should exercise caution before treating a guilty plea as a mitigating factor in sentencing. Courts must ask defendants careful questions, beyond their prepared verbatim statements, to assess whether the perpetrator is truly remorseful, recognizes the mistake of his/her behavior, and is not at risk of recidivism. Most perpetrators plead guilty at the initial hearing, which means that courts will not have enough information about relevant aggravating factors. Therefore, courts should make an effort to schedule sentencing hearings ex officio (unless the

parties have already requested a hearing) based on the provisions of the CPCRK and request additional information from the parties. Automatic mitigation below legal minimums without regard to other factors should be avoided.

Furthermore, in the forms of *cooperation in the commission of the criminal offense we encounter aiders, abettors,* and persons who help the perpetrator during the commission of the offense. The fact that they are not key persons in the commission of the criminal offense can be considered as a mitigating factor, but to what extent, it will depend on the specific circumstances of each case, and provided that it does not constitute a separate offense or element of an offense.

Also, the *overall cooperation of the convicted person with the court,* including surrender, Cooperation with the court including surrender should be considered as a circumstance as mitigating circumstance, since this helps the court in serving justice, saves time and resources of institutions, and helps in serving justice. Therefore, consideration of these circumstances should have the right impact, making it clear that cooperation with the court and surrender will be considered mitigating for the sentence.

Age can also be used as a factor in sentencing - since old age has an impact on the sentencing, if we are dealing with people of old age who have passed almost a century of life, in conjunction with other circumstances such as previous clean record, therefore this circumstance needs to have a certain impact in sentencing. Likewise, Young age and lack of maturity may have a certain impact in determining the sentence.

Then, remorse for the crime committed - establish whether we are dealing with real and sincere remorse, good character, and/or exemplary behavior, if the person's past and other circumstances show that the accused had good character and was known for exemplary behavior in society.

Considering the nature and diversity of these crimes, courts should be careful depending on the concrete crime and assign adequate weight to mitigating circumstances. In particular, the degree of criminal responsibility and concrete damage caused.

D. Applicability of other punishments

Imposing a suspended sentence - may be appropriate only for crimes with a low or medium penalty, but always taking into account the degree of liability of the perpetrator and the degree of harm caused.

-Imposing an order for community service work - may be appropriate only for crimes with low penalties and if there are no aggravating circumstances that would justify a prison sentence. For example, the criminal offense from Article 405 - Failure to participate in averting a public danger, Article 409 - Impersonating an official, or Article 410 - Self-justice.

-A punishment of fine - For less severe crimes, this chapter, provides for a possibility to impose a fine as the main punishment. In order for the fine to have the desired effect, it must be ensured that the fine is commensurate to the financial situation of the perpetrator in line with Article 69 par. 5 of the Criminal Code and the Supreme Court's Guidelines on Imposing Criminal Fines. For example, the criminal offense from Article 405 - Failure to participate in averting a public danger, Article 409 - Impersonating an official, Article 410 - Self-justice, 412 - Disrupting religious ceremonies, or 413 - Damaging graves or corpses.

Special emphasis should be placed on Article 404 - Participating in a crowd committing a criminal offense and hooliganism. Paragraph 4 of the same Article, foresees a fine of €200-10,000 for hooliganism with minor consequences. This offense is the only one in the CCRK that foresees a fine as the sole sanction for a natural person.

Imposing accessory punishments from Article 62 or 63 - is recommended in all cases where the official person is involved in the commission of criminal offenses from this chapter. In many cases, the imposition of accessory punishments will have a greater effect and achieve the purpose of the punishment compared to other forms of punishment. For example, in the criminal offense from Article 407 - Taking or destroying official stamps or official documents. The expulsion of the foreigner from the territory of the Republic of Kosovo is another accessory punishment that is appropriate to be imposed for the offenses under this chapter.

- Judicial admonition - it can be imposed in accordance with the principles of Article 82 paragraphs 2 and 5, for less severe offenses from this Chapter. Judicial admonition can be pronounced for criminal offenses for which a prison sentence of up to one (1) year or a fine is foreseen, in cases where such offenses were committed with mitigating circumstances that make the criminal offenses particularly light. For example, in the criminal offense from Article Article 405 - Failure to participate in averting a public danger or in par.1 of Article 410 of the CCRK. Judicial admonition can also be issued for certain criminal offenses for which punishment of up to three (3) years is foreseen, according to the conditions established by law.

When deciding to impose a judicial admonition, the court especially takes into account the purpose of the judicial admonition, the behavior of the perpetrator in the past, his behavior after committing the criminal offense, the degree of criminal responsibility, and other circumstances in which the criminal offense was committed.

However, the imposition of the judicial admonition was foreseen by the legislator against perpetrators of lighter criminal offenses, with a low degree of criminal responsibility and with little danger, therefore it is necessary to make a proper analysis to determine if imposing this sanction is sufficient and appropriate in the light of all circumstances, including the nature of the criminal offense.