



REPUBLIKA E KOSOVËS
REPUBLIKA KOSOVA – REPUBLIC OF KOSOVO
GJYKATA SUPREME E KOSOVES
VRHOVNI SUD KOSOVA- SUPREM CORT KOSOVO

ANNUAL REPORT

Advisory Sentencing Commission

Prishtinë, February 2022

Table of contents

Introduction.....	3
I. Short background of the Advisory Sentencing Commission.....	4
II. Activity of the Advisory Sentencing Commission.....	5
III. Topics and concepts addressed in the Specific Guidelines "Official corruption and criminal offenses against official duty".	8
IV. Launching of the Specific Guidelines on "Official Corruption and Criminal Offenses against Official Duty"	10
V. The results of the Survey with judges from the Serious Crimes Department on the process of developing the Specific Guidelines.....	12
VI. The contribution of the Academy of Justice in training of legal professionals on Sentencing Guidelines.....	13
VII. Cooperation with Civil Society.....	15
VIII. Engagement with the University of Prishtina and the expansion of the sentencing reform to university studies	16
IX. Engagement for an increased role of the prosecutors in sentencing.....	19
X. Revision of the General Guidelines	20
XI. Analysis of decision-making in judgments from Chapter XXXIII.....	22
A. Mitigating circumstances	23
B. Aggravating circumstances	23
XII. Analysis of decision-making in judgments of different natures.....	24
A. Mitigating circumstances	26
B. Aggravating circumstances	29
XIII. Determination of a criminal fine	31
XIV. Reasoning of judgments in the function of sentencing.....	31
XV. Conclusion	32

Introduction

During 2021 the Advisory Sentencing Commission has conducted continuous activities, all focused on the sentencing reform in the country. The present report provides for an overview of the work and activities of this Commission. Although the report focuses in 2021, it is worth noting that despite the pandemic limitations during this and the previous year 2020, due to COVID-19, the Commission continued with numerous activities and engagements both through the online platforms and face to face meetings.

During this year, the Commission continued to work closely with its strategic partners, the US Embassy in Kosovo and the UNDP, as a supporting pillar for sentencing reform in the country. This close cooperation culminated in the finalization of the Specific Sentencing Guidelines on Official Corruption and Criminal Offenses against Official Duty in June 2021.

The present report contains an overview of the Commission's activity during this year, the inputs received from judges and prosecutors, but also a summary analysis of a sample of cases and the manner of implementation of the Supreme Court Sentencing Guidelines.

I. Short background of the Advisory Sentencing Commission

Considering the importance and role that the sentencing reform in the country can have in increasing the professionalism, transparency and public confidence in the judiciary, there was a need to establish a special body which would deal with further development of such reform but also monitor its implementation. Thus, the Advisory Sentencing Commission was established in August 2018, as a support body for the Supreme Court with a special mission of development and monitoring of Sentencing Policies in the country. The Commission was also tasked with suggesting areas for improvement on the issue of Sentencing. The aim is to have information from all stakeholders to ensure that existing but also other guidelines that will be developed in the meantime, address issues of concern and problems in sentencing practice in Kosovo. The materials prepared by this Commission, as a rule, are submitted for review and approval to the General Convention of the Supreme Court. During the year the Commission operated in the following composition:

1. **Enver Peci**, Chief Judge of the Supreme Court - Chairperson of the Commission
2. **Agron Qalaj**, Prosecutor at the Chief State Prosecutor's Office delegated by the Chief Prosecutor Aleksandër Lumezi - Member¹
3. **Agim Maliqi**, Judge at the Supreme Court - member
4. **Burim Ademaj**, Appellate Court,
5. **Albina Shabani Rama**, President of the Basic Court Prishtina.²
6. **Enver Fejzullahu**, Director of the Justice Academy - member
7. **Behar Ejupi**, President of the Bar Association - member.

The Commission will continue to engage in an ongoing sentencing reform.

¹During 2020-21 the Chief State Prosecutor delegated the Prosecutor Agron Qalaj from the Chief State Prosecutor's Office to this Commission. Although Prosecutor Qalaj is an active part of this Commission, he has not been confirmed as an official member, but exercises his duty as a delegate of the CSP.

²On 14 January 2021 Judge Shabani-Rama has replaced Judge Aferdita Bytyqi who was appointed a judge in the Special Department of the Basic Court in Prishtina.

II. Activity of the Advisory Sentencing Commission

As pointed out in the introduction of the present report, the Commission had a quite intensive activity in 2021. During the process of drafting Specific Guidelines, activities focused on closer and more frequent interaction with representatives of the judiciary³ in order to understand the concerns, shortcomings but also dilemmas of judges in dealing with criminal offenses belonging to this category. Thus during this process the Commission held a total of 7 meetings as outlined in the following table:

Meeting date:	Court/Department	Number of judges that participated
3 March 2021	Basic Court Prishtina/Special Department and Serious Crimes Dept.	14 judges
5 March 2021	Court of Appeals/ Serious Crimes Dept. and Juvenile Dept.	14 judges
11 March 2021	Basic Court Gjilan / Serious Crimes Dept. and Juvenile Dept.	8 judges
12 March 2021	Basic Court Ferizaj / Serious Crimes Dept. and Juvenile Dept.	5 judges
16 March 2021	Basic Court Peja and Gjakova / Serious Crimes Department	10 judges
18 March 2021	Basic Court Prizren/ Serious Crimes Department	5 judges
23 March 2021	Basic Court Mitrovica/ Serious Crimes Dept. and Juvenile Dept.	4 judges

Such methodology and consultation with judges has been welcomed by all judges who attended these meetings. This method is considered much more productive and comprehensive. As a result of numerous discussions, in the follow-up of its work, the Commission has managed, to address some of the dilemmas raised by judges, thus enriching the content of this Guidelines even further.

³ For more see the link: <https://supreme.gjyqesori-rks.org/2021/03/03/kryetari-nis-takimet-me-gjyqtaret-e-departamenteve-per-krime-te-renda-neper-gjykata/>

In addition to meetings with various stakeholders, the Commission continued its regular meetings, thus finalizing the draft Guidelines in its meeting held on June 2, 2021⁴ and presenting it to the Supreme Court judges for review and approval.



Picture: Advisory Sentencing Commission in a meeting with judges from the Special Department and the Serious Crimes Department of the Basic Court Prishtina.

The Specific Guidelines "Official corruption and criminal offenses against official duty" was unanimously approved by the General Session of the Supreme Court judges on June 10, 2021.⁵ The adoption of this Guidelines was welcomed by the US Embassy in Kosovo, considering this as a major step towards fighting corruption and encouraging everyone to implement it in practice.

⁴For more info see the link: <https://supreme.gjyqesori-rks.org/2021/06/02/komisioni-per-politike-ndeshkimore-finalizon-draft-udhezuesin-e-vecante-korrupsioni-zyrtar-dhe-veprat-penale-kunder-detyres-zyrtare/>

⁵ <https://supreme.gjyqesori-rks.org/2021/06/10/miratohet-udhezuesi-korrupsioni-zyrtar-dhe-veprat-penale-kunder-detyres-zyrtare/>

In addition to its continuous commitment in drafting these Guidelines, OPDAT has yet



again ensured the translation of these guidelines into Serbian and English and has distributed 2000 hard copies to judges, prosecutors, defense lawyers, Academy of Justice and University of Prishtina.

The work of the Commission has not finished with the approval of the Guidelines. During the summer, the Commission, in cooperation with the

US Embassy, started preparations for the official launch of the Guidelines. On September 14, 2021⁶ The commission had its last meeting on this issue to finalize preparations for its launch, including drafting guest invitations, determining the agenda and other logistical issues. In the same meeting, the Commission decided to initiate the work for the revision of the General Sentencing Guidelines approved in 2018 as well as the necessary preparations for drafting of the Annual Activity Report of the Commission.

⁶ <https://supreme.gjyqesori-rks.org/2021/09/14/komisioni-per-politike-ndeshkimore-nis-punen-per-revidimin-e-udhezuesit-te-pergjithshem/>

III. Topics and concepts addressed in the Specific Guidelines "Official corruption and criminal offenses against official duty".

The Specific Guidelines are mainly based on criminal offenses under Chapter XXXIII, Official Corruption and Criminal Offenses against Official Duty of the Criminal Code of the Republic of Kosovo (hereinafter CC).⁷ However, the concepts and principles contained in this document also apply to other provisions of the Code, which refer to the abuse of official duty, as per previous criminal codes, which are applicable to criminal offenses committed at the time these codes were in force. The Guidelines also apply to other important criminal legislation on sentencing issues for various forms of abuse of official duty.

Unlike the 2018 General Guidelines⁸, the specific Guidelines have expanded in more detail on issues of interest and specifics of offenses of this nature. Always based on the provisions of the CC, the Guideline breaks down the aspects of sentencing in detail by focusing on two main points: the level of liability and the degree of damage caused. The Guidelines also break down the relevant mitigating and aggravating circumstances provided by the Criminal Code in detail, giving explanations on the different forms of how these circumstances can be found in this category of offenses and what their weight may be. This content is largely based on similar Guidelines developed in the UK.

Unlike the General Sentencing Guidelines, these Guideline have expanded to another aspect - breakdown of elements of definitions related to the offenses of this category. All this has emerged as a need to address the dilemmas raised by judges, prosecutors and other stakeholders. Thus, the Guidelines provide for e detailed breakdown of the definition of "Official Person" defined in the CC by analyzing it in terms of relations that this definition has with other applicable legislation referring to this category. The

⁷Criminal Code No.06/L-074 of the Republic of Kosovo, Official Gazette of the Republic of Kosovo/No.2/14 January 2019, Prishtina.

⁸Sentencing Guidelines, February 2018, Approved by the General Assembly of the Supreme Court.

Guidelines also focus to a considerable extent on some of the main elements of the offenses of this category but with special emphasis on finding the intent in these offenses. Examples from international practice are given in clarification of Article 22 of the CC on finding of intent through factual circumstances. Excerpts from this elaborate were also taken from the workshop on the same topic "Finding intent" sponsored by the US Department of Justice (OPDAT) held on April 15-16, 2021, attended by prosecutors and judges from USA.



Picture: Advisory Sentencing Commission in its meeting of 14 September 2021

IV. Launching of the Specific Guidelines on “Official Corruption and Criminal Offenses against Official Duty”

On September 23, 2021 - The President of the Supreme Court who is at the same time a Chairperson of the Commission, Mr. Enver Peci, in the presence of honored guests from various local and international institutions did the official launching of the Specific Guidelines “Official Corruption and Criminal Offenses against Official Duty”.⁹ In a keynote address to the audience, Chief Judge Peci described these Guidelines as "a golden key for professionals in the justice system, as its implementation facilitates the fair resolution of cases."

This launch was made possible thanks to the support, this time again by the US Embassy, respectively the US Department of Justice, OPDAT office in Kosovo. Due to restrictions in place for prevention and protection from COVID_19, the launch was accompanied by limited face to face participation and a Livestream was enabled for this purpose allowing a wider audience to follow the event.



⁹ <https://supreme.gjyqesori-rks.org/2021/09/23/gjykata-supreme-lanson-udhezuesin-korrupsioni-zyrtar-dhe-veprat-penale-kunder-detyres-zyrtare/>

In this ceremony, keynote speeches were also presented by the Charge d'Affaires of the US Ambassador to Kosovo, Mr. Nicolas Giacobbe, the Minister of Justice, Ms. Albulena Haxhiu, and the Deputy Chairperson of the KJC, Mr. Qerim Ademaj. , stipulated, among other things, that “ *Only through the implementation of the Sentencing Guidelines, it is possible for corrupt government officials and corrupt people - no matter how influential - to face severe punishments on an ongoing basis. "Sentencing Guidelines for corruption cases will help you do that."* Giacobbe, called on every judge to use the Guidelines.

The Minister of Justice, Albulena Haxhiu, also presented a keynote address to participants, who praised the work in drafting the Guidelines, stating, among other things, that “as Minister of Justice I am strongly committed, within my powers, to strengthen the justice institutions in their fight against organized crime and corruption, through draft laws, different instructions or secondary legislation, but also through the budget”.

On the same day¹⁰, The President of the Supreme Court and Chairperson of the Commission Mr. Enver Peci, awarded certificates of appreciation to legal experts of the American Embassy, Constantine Soupios and Benina Kusarifor for their contribution in drafting of the Supreme Court Sentencing Guidelines.



Picture: President Enver Peci handing over certificates of appreciation to Mr. Konstantine Soupios and Ms. Benina Kusari

¹⁰<https://supreme.gjyqesori-rks.org/2021/09/24/kryetari-i-gjykates-supreme-nderon-me-mirenjohje-ekspertet-e-ambasades-amerikane-per-kontributin-ne-politiken-ndeshkimore/>

V. The results of the Survey with judges from the Serious Crimes Department on the process of developing the Specific Guidelines

Immediately after the approval of the specific Guidelines, in June, the Commission conducted a survey with judges in order to get their impressions on the methodology of drafting the Guidelines through consultations, its format but also how satisfied are they with the topics covered by it. Participants in this survey were 33 judges of the Serious Crimes Department.

According to the answers provided in this survey, judges answered as follows:

- **When asked what the respondents thought about the process of drafting the Guidelines**, the answers were as follows:
 - 90% of respondents answered that this was a proper process as it enables them to raise issues and dilemmas which can be clarified by the Supreme Court.
 - 9% of participants in this survey considered that the Supreme Court has the responsibility to draft and approve these Guidelines and that prior consultations are unnecessary.

- **When asked what the respondents thought about the contents of the Guidelines**, the answers were as follows:
 - 75% of respondents answered that it is very good and solves many raised dilemmas.
 - 12% of respondents considered that the Guidelines are too generic and do not address dilemmas in practice, meanwhile
 - 18% of respondents did not have an opinion as they considered that they needed to study it in more detail.

- **When asked about respondents' views on the extent to which they will be able to apply principles of the Guidelines in practice**, the answers were as follows:
 - 48% of respondents answered that they will implement them constantly.

- 48% of respondents answered that they will try to implement them in practice.
 - 1% of respondents considered that its practical implementation will be difficult.
- **When asked if respondents consider that adequate implementation of the Guideline can have an impact in increasing public confidence in the justice system, the answers were as follows:**
- 75% of respondents answered that in general it will have an impact.
 - 21% of respondents answered that it can have an impact to some extent, meanwhile
 - 1% of respondents considered that its implementation will not have any impact on increasing the confidence.

VI. [The contribution of the Academy of Justice in training of legal professionals on Sentencing Guidelines](#)

The Academy of Justice has a very important role in the widest possible implementation of the Sentencing Reform. During this year the Academy had the following activities in this field:

- *Continuous Program*

On November 24, 2021, with the support of the OSCE, a half-day training on "Sentencing Guidelines" was held. Beneficiaries of this training were judges from regions of Mitrovica, Pristina and Gjilan.

On December 20-22, 2021, with the support of the OSCE, a workshop was held in Peja on the topic: "Unification of case law in criminal cases". Participants in this workshop were judges from different regions.

- *Initial Program with newly appointed judges from VIII-th Generation*

On November 19, 22 and 23, 2021, four training sessions were held at the Academy of Justice under the module "Sentencing Guidelines" where beneficiaries were 24 judges from the VIII generation.

In the follow-up of innovations in this field, in addition to trainings and roundtables with judges, on the occasion of the approval of the Instruction of the Chief State Prosecutor on the role of the prosecutor at sentencing, the Academy in cooperation with the US Embassy and the Chief State Prosecutor's Office, held three roundtables with prosecutors of all levels, in order to familiarize them with their obligations under these Guidelines. Due to the situation with the Covid-19 Pandemic, the roundtables were conducted online as follows:

-On April 30, 2021- with the attendance of 19 prosecutors from the basic Prosecution Offices of Gjilan and Ferizaj.

-On May 7, 2021 - with the attendance of 12 prosecutors from SPRK and the Appellate Prosecution Office.

-On May 21, 2021- with the attendance of 35 prosecutors from the basic Prosecution Offices of Prishtina, Mitrovica and Gjakova.

In 2022, the Academy has foreseen holding and continuation of roundtables with the same topic "Sentencing policies and implementation of the Sentencing Guidelines". A challenge during 2020 as well as 2021 continued to be the spread of COVID-19 cases which did not allow holding of practical workshops in this field which would make these trainings more efficient.

VII. Cooperation with Civil Society

During 2021, the Commission continued its engagement and cooperation with civil society focused on monitoring the justice system. Highlighting the contribution and value that monitoring of civil society brings, during the work on drafting the specific Guidelines the Commission met with representatives of civil society, more specifically KLI and GLSP in order to receive input from them on the draft Guidelines, areas that need to be further addressed or expanded and generally their impression on the topics elaborated in the Guidelines. Following this meeting, the KLI and GLSP submitted their written comments and suggestions. They have been carefully reviewed and handled by the Commission and appropriately included in the final document.

Seeing the growing interest of civil society in monitoring the implementation of sentencing guidelines in the country, on December 16, 2021, the President of the Supreme Court, in cooperation with the US Embassy, OPDAT office in Kosovo, organized a roundtable whereby they invited representatives of all non-governmental organizations that deal with monitoring of the justice system.¹¹ In addition to members of the Sentencing Commission this meeting was also attended by representatives of: BIRN, GLSP, ROLAG, CLARD and ATRC. Representatives of civil society were given some recommendations on how to more effectively monitor sentencing in the country and requests were made to cooperate more closely with the Commission in order to increase the level of implementation of this reform.

¹¹ <https://supreme.gjyqesori-rks.org/2021/12/16/komisioni-konsultativ-per-politike-ndeshkimore-diskutoi-me-shoqerine-civile-per-reformen-ne-kete-politike/>

Civil society representatives in this meeting stressed the need to strengthen mechanisms that compel judges to implement the Guidelines of the Supreme Court by linking them with their performance assessment and application of legal measures, stating that guidelines should become mandatory in the future. Their remark was on the unreasoned suspended sentences, failure to provide reasoning for the aggravating and mitigating circumstances. Their representatives that were present considered this quite useful for their future work as well.



Picture from the meeting of the Commission with representatives of civil society, December 16, 2021

VIII. Engagement with the University of Prishtina and the expansion of the sentencing reform to university studies

In order for students to be exposed to sentencing reform as soon as possible, it is considered necessary to familiarize them, but also academic staff with the Supreme Court's engagements on the sentencing reform. Thus, during 2021, the Commission, respectively President Peci held a series of activities in the spirit of increasing cooperation with the University "Hasan Prishtina", respectively the Faculty of Law at this University.

Initially on March 4, the President of the Supreme Court, Enver Peci, held an online lecture for students of the Faculty of Law at the University of Prishtina, on "The role and responsibilities of the Supreme Court" which was attended by about 100 students of this faculty. Sentencing was one of the many topics presented during this lecture.

On October 13, 2021, the President of the Supreme Court, Enver Peci, in his capacity as Chairperson of the Advisory Sentencing Commission, together with a representatives of the US Embassy, held a meeting with the Dean of the Faculty of Law, University of Prishtina, Avni Puka, to discuss ways of cooperation between the two institutions, with a focus on sentencing.¹² After this initial meeting, and as agreed with Dean Puka, on 30 November 2021, a meeting was held with professors of the Criminal Department of Faculty of Law, University of Prishtina.¹³ The aim of this engagement is to include the sentencing reform as part of the curriculum. It is deemed that it is of the interest to work in that direction so that the academic staff at the law faculties have an increased commitment to follow the reform in this field. It is unfair for lawyers to face this reform for the first time only after they have become judges, prosecutors or defense lawyers. Since sentencing is a topic that affects many subjects which are already lectured within law faculties, it was suggested that professors incorporate this topic within their syllabuses. Such a proposal was welcomed by professors of the Criminal Department of the Faculty of Law, who expressed readiness for such an engagement. The President Peci and the US Embassy also offered their assistance and contribution in this regard. Being a new topic many students of this faculty may show an interest to research this field. Many faculties in countries where sentencing guidelines are implemented have this as an elective course.

¹² <https://supreme.gjyqesori-rks.org/2021/10/13/politika-ndeshkimore-ne-fokus-te-takimit-mes-kryetarit-te-gjykates-supreme-dhe-dekanit-te-fakultetit-juridik/>

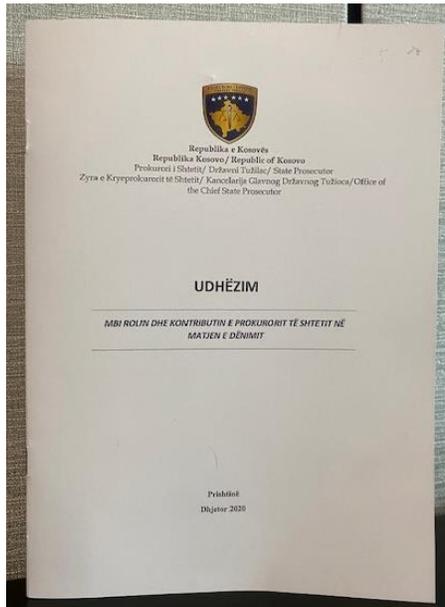
¹³ <https://supreme.gjyqesori-rks.org/2021/11/30/profesoret-e-fakultetit-juridik-te-gatshem-te-japin-kontributin-e-tyre-per-politiken-ndeshkimore-ne-kosove/>

Another topic of discussion was the involvement of professors in future reform. In developed countries, academics are always part of such reforms and Kosovo is no exception. The role of professors would be in developing research and concrete ideas on areas where improvements need to be made. This would be a great help to the Commission and the Supreme Court in future reforms.



Picture from the meeting of President Peci and representatives of the American Embassy with the professors of the criminal department of the Faculty of Law, November 30, 2021

IX. Engagement for an increased role of the prosecutors in sentencing



In the prosecution system, the state prosecutor plays an extremely important role in improving sentencing policies in the country. During the continuous work of the Advisory Sentencing Commission the necessity for a more active engagement of prosecutors in criminal proceedings was ascertained, especially in contribution to the fair calculation of the sentence.

As the state prosecutor is already represented in the Commission through the Chief State Prosecutor, the initiative has been taken to prepare instructions for prosecutors in this field. Thus, with the assistance of the US Embassy, OPDAT Office in Kosovo, an "Instruction on the role and contribution of the state prosecutor at sentencing" has been drafted. The approval of this Instruction was announced at the Annual Conference of State Prosecutor held in January 2021. This Instruction is based in Article 11 par.5 of the Law on State Prosecutor.

The instruction has two purposes:

To instruct prosecutors that they are obliged to follow the sentencing reform in the country pursuant to the Guidelines approved by the Supreme Court since 2018.

To instruct prosecutors on their obligations throughout different stages of criminal proceedings. The instruction expands by providing details and concrete examples on the obligations and the role of the prosecutor in this regard based on provisions of the Criminal Procedure Code.

This Instruction aims to enable the prosecutor as a party to the procedure to actively engage in providing sufficient data to the court which will then assist the court in making an adequate decision on the sentence.

X. Revision of the General Guidelines

In the spirit of the 2019 amendments to the CC and pending changes in the Criminal Procedure Code, the Commission has decided to initiate the process of revising the 2018 General Sentencing Guidelines.

In addition to the Commission's own discussions on areas that require amendment, the Commission also conducted surveys with judges, prosecutors and lawyers in order to obtain input from them.

A total of 20 judges from the Serious Crimes Department participated in the survey of judges, while another joint survey of prosecutors and defense lawyers was attended by 8 prosecutors and 28 defense lawyers.

Below is an overview of answers to some of the questions posed in these surveys:

- **To the question to what extent did you have the opportunity to apply the General Guidelines in practice, the answers were as follows:**
 - o 75% of judges and 33% of defense lawyers/prosecutors stated that they apply it consistently.
 - o 25% of judges and 39% of defense lawyers/prosecutors stated that they apply it rarely;
 - o 28% of defense lawyers/prosecutors answered that they have never applied it.
- **To the question whether they encountered difficulties in its application and what are those difficulties they** gave different answers. Although a significant number of participants in the survey stated that they did not encounter difficulties in implementation, there were nevertheless some participants who expressed their opinion on this question. These are very important as they enable the Commission to have a clearer picture of areas in which it should focus during the review. Below we have provided some of the most dominant answers in the survey:
 - o Application of the Guidelines will be more difficult when adjudicating in a panel of judges than when adjudicating as an individual judge.

- In some parts, the Guidelines are too generic and not concrete.
 - Guidelines interpretations are often dubious and in some parts contain inadequate terminology.
 - The difficulties are evident, it takes a longer practice as it is a new practice.
 - In mitigating circumstances.
 - Yes, I have encountered difficulties, especially when we consider the current practices of sentencing for some criminal offenses, which have mainly received a punishment of fine or a suspended sentence.
- **When asked if they consider that the drafting methodology or the format of the General Guidelines should be changed, 90% of judges and 71% of prosecutors/defense lawyers answered No.**

The revision of the General Guidelines was deemed necessary not only on the basis of the assessment of respondents but also based on the assessment of the Commission itself. Based on the analysis of the Commission, taking into account the amendments to the legislation but also the expected changes, the Commission has concluded that in addition to some of the issues raised by respondents, the revision will focus on the following areas:

- Adding new sentences provided by the new CC to the annexed table, which did not exist in the previous code.
- Adding the aggravating circumstance of "Family relationship" based on the 2019 amendments of the CC, respectively in Article 70 par. 2.14 and accompanying explanations about this circumstance.
- Accessory punishments pursuant to Articles 62 and 63 of the CC.
- Cases from domestic and international caselaw focused specifically on aspects of sentence calculation and finding the element of intent based on the factual circumstances in various offenses.
- Additional breakdown on the issue of reasoning of decisions.

- Clarification as needed of the parts already dissected in these Guidelines or even parts that need to be clarified based on the dilemmas that have been raised and can be raised in the meantime.
- Finally, part of this revision will be dedicated to the "Sentencing hearing" pending the amendment of the Criminal Procedure Code and depending on the form in which this article will be finally adopted by the Parliament of Kosovo. This part is considered to be very important as a guideline for the justice system in general and other parties in this process, given that it is presented as a new process.

XI. Analysis of decision-making in judgments from Chapter XXXIII

In compiling this report and in order to have impartial analysis, the Commission decided to include some key parts of the report on the monitoring of sentencing by civil society, more precisely by the ROLAG Organization.¹⁴ The following analysis is compiled from the review of 140 published judgments and focuses on consideration of both aggravating and mitigating circumstances applied in these judgments. The analysis further consists in reviewing the sentence vis-a-vis the sentencing guidelines for criminal offenses provided in the chapter on official corruption and criminal offenses against official duty in an attempt to highlight the degree of application of the Guidelines and to consider them when the Advisory Sentencing Commission decides to review sentencing parameters. Out of a total of 140 judgments, 100 were convictions while 40 acquittals. For the purpose of monitoring the Guidelines, the analysis focused only on convictions and only on prison sentences. According to this analysis it turns out that the use of mitigating circumstances is much more extensive vis-a-vis the aggravating ones, however in both cases they were rarely or never elaborated.

¹⁴ROLAG is supported by the UNDP office in Kosovo. This organization monitors judgments of court cases adjudicated by the basic courts for criminal offenses under Chapter XXXIII of the Criminal Code on Official Corruption and Criminal Offenses Against Official Duty.

A. Mitigating circumstances

The Criminal Code provides for several mitigating circumstances for the purpose of sentencing. Considering that the Criminal Code, although not exhaustively, defines some mitigating circumstances, the study shows that in most cases the mentioned circumstances cannot all be related to the factors mentioned in the CC. For example, while the circumstances of "no prior conviction", "supporter of the family" and "difficult economic conditions" may be related to the mitigating factor of "personal circumstances and character of the convicted person", it was difficult to group or relate other circumstances to any specific factor foreseen in the CC. Moreover, circumstances such as "remorse", "difficult economic conditions" or "Pledge not to repeat the offense" in some cases turn out to be quite similar to the specifics and circumstances in which the offense was committed.

During analysis, ROLAG has found that the most common circumstances used by courts are as follows:

Mitigating circumstances	Frequency of use of this circumstance
No prior convictions	53
Good behavior during the trial	52
Guilty plea	52
Family supporter	36
Remorse	34
Difficult economic conditions	30
Pledge not to repeat the offense	20

B. Aggravating circumstances

In terms of aggravating circumstances, the following table shows which of them have been used the most. The finding that circumstances are only mentioned, but not accompanied by any detailed elaboration as to why such a circumstance exists and how that circumstance affects the calculation of the sentence, is also valid for this part.

Aggravating circumstance	Frequency of use of this circumstance
Criminal/social danger of the offense	25
Degree of criminal liability	21
Prior criminal record	8
Violation of official duty	7

It is worth mentioning here that while in the mitigating circumstances there is more or less a clarity as to what constitutes mitigating circumstances, here it seems that we have a double counting of mitigating circumstances and elements of the criminal offense, such as the case with "breach of official duty".

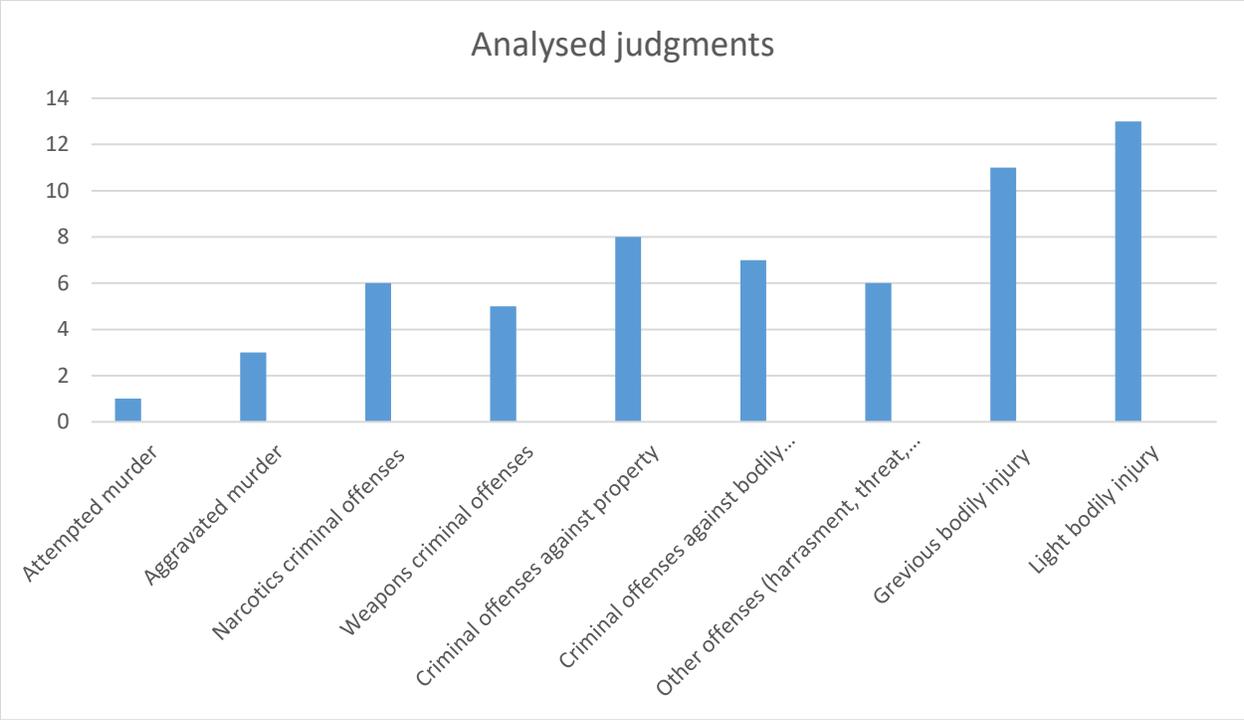
XII. Analysis of decision-making in judgments of different natures

To make a more general analysis of the way courts decide, with an emphasis on sentencing and the use of mitigating and aggravating circumstances, the Commission with the support of the US Embassy, OPDAT Office in Kosovo has analyzed a number of judgments of courts throughout Kosovo to find out if there is uniformity in the application of these circumstances or if they differ from one category to another.

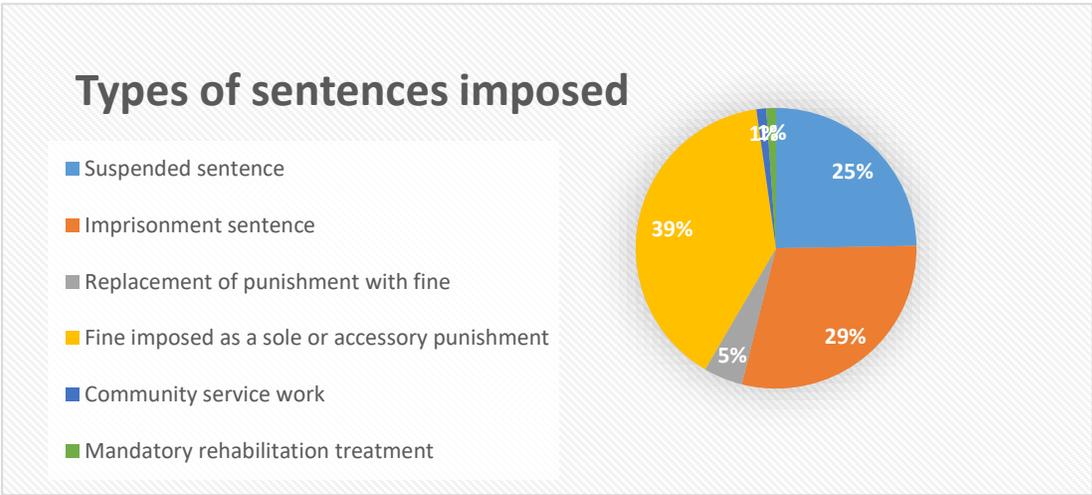
The following analysis is based on the review of 60 conviction judgments for criminal offenses from the following chapters:

- Criminal offenses against life and body;
- Criminal offenses against sexual integrity.
- Narcotics offenses;
- Criminal offenses against property;

Criminal offenses in the analyzed judgments were qualified according to the Provisional Criminal Code of Kosovo and the Criminal Codes of 2012 and 2019.



The criminal samples of light and serious bodily injury were taken as the largest sample for analysis, for which the analysis of mitigating and aggravating circumstances will be separate, unlike for judgments for other offenses within the same category as above which were fewer in number.



The diagram above shows, in percentage, the types of sentences imposed for the analyzed judgments.

- Regarding the fines imposed, their amount ranges from 150-2000 €.
- In terms of effective imprisonment sentences, the range of sentences is from 30 days to life imprisonment for the criminal offense of aggravated murder.
- In none of the analyzed judgments did the court determine restitution for the injured party, thus referring the injured party to a civil litigation. Only in one case of theft did the perpetrator retribute the party in advance and the court assessed this as a mitigating circumstance at sentencing.
- Regarding confiscation, in all analyzed judgments we have encountered only confiscation of weapons and narcotics.

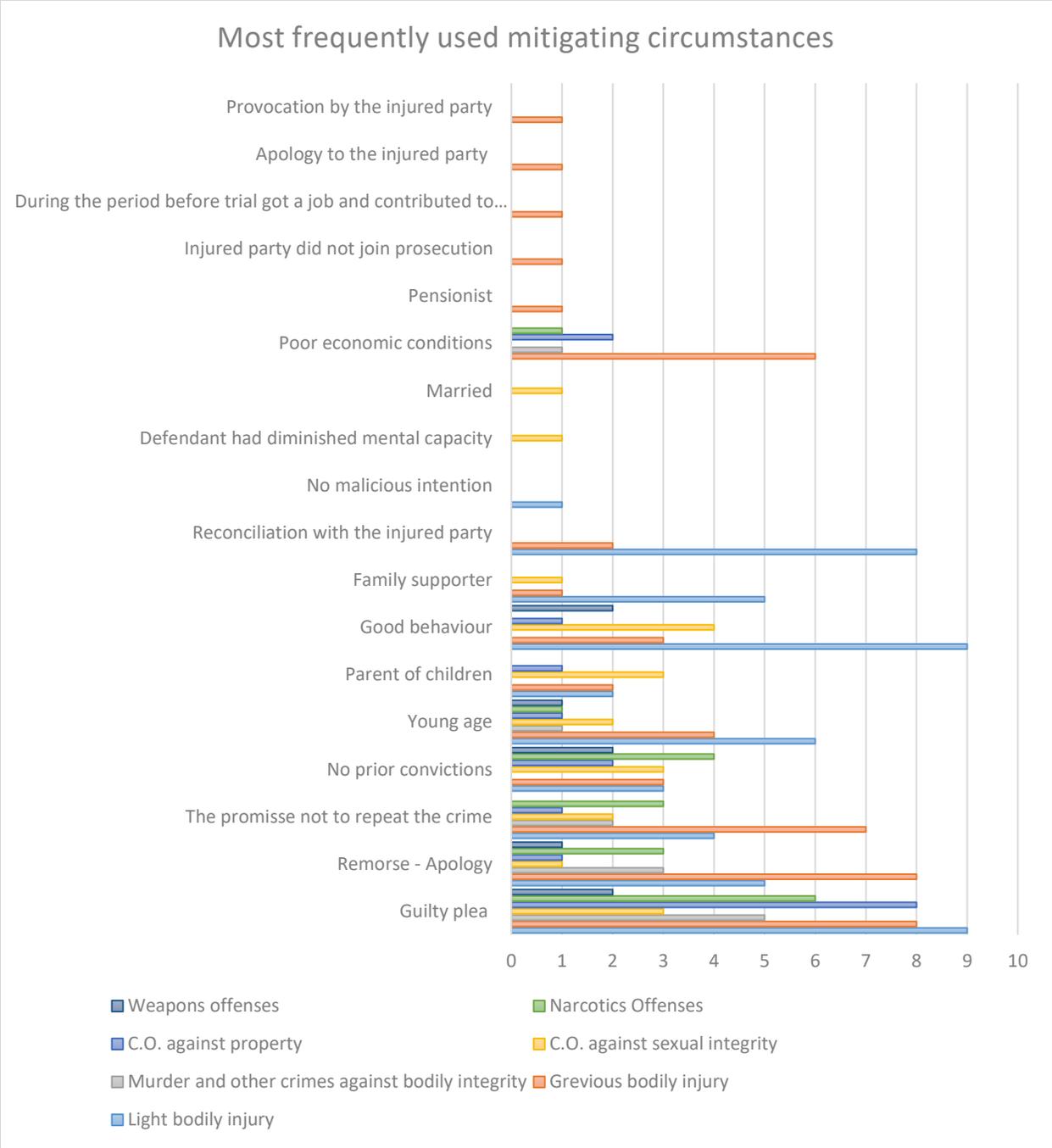
A. Mitigating circumstances

The table and diagram below show in detail the factors, type and number of mitigating circumstances taken into account by the courts at sentencing. It seems that in 41 cases, the court emphasized the guilty plea of the perpetrator when calculating the sentence. It is worth noting that in 11 of these cases the court imposed an effective imprisonment sentence of 30 days to life imprisonment despite the existence of a number of mitigating circumstances. Such offenses for which there was a guilty plea and in which the court nonetheless sentenced a person to imprisonment include grievous bodily injury (4 cases), theft, aggravated theft, drug offenses, intimidation and aggravated murder. This is an important detail because as it has been noticed in many cases in the past, the guilty plea automatically led to the imposition of less severe sentences, mainly suspended and fine sentences

Regarding the circumstances that were taken into account, this time too, there was higher percentage of use of personal circumstances of the perpetrator, (young or old, married, parent), financial aspect (poor economic condition and family supporter) or even the

behavior of the perpetrator. However, at least in the analyzed judgments, the number of cases where mitigating circumstances such as: married or a parent, is significantly smaller in all judgments.

Mitigating circumstances used in the cases analyzed	Light bodily injury	Grievous bodily injury	Murder and other C.O against bodily integrity	C.O against sexual integrity	C.O against property	Narcotics Offenses	Weapons Offenses	Total
Guilty Plea	9	8	5	3	8	6	2	41
Remorse - making of an apology	5	8	3	1	1	3	1	22
Pledge not to repeat the offense	4	7	2	2	1	3		19
No prior convictions	3	3		3	2	4	2	17
Young age	6	4	1	2	1	1	1	16
Parent of children	2	2		3	1			8
Good behavior	9	3		4	1		2	19
Family supporter	5	1		1				7
Reconciliation with the injured party	8	2						10
No malicious intent	1							1
The defendant had diminished mental capacity				1				1
Married				1				1
Poor economic situation		6	1		2	1		10
Retired		1						1
Injured party did not join the prosecution		1						1
During the trial defendant got a job and contributed to the society		1						1
Apology to the injured party		1						1
Provocation by the injured party		1						1
	52	49	12	21	17	18	8	177



It is worth mentioning that regarding the use of mitigating circumstances, it was noticed that when using circumstances related to the injured party, respectively the victim, although in minimal numbers, it seems that the court has assessed them in a wrong manner. Here we are referring mainly to three of the circumstances in the table above:

- **Apology to the injured party** - Circumstance used in a case of light bodily injury.

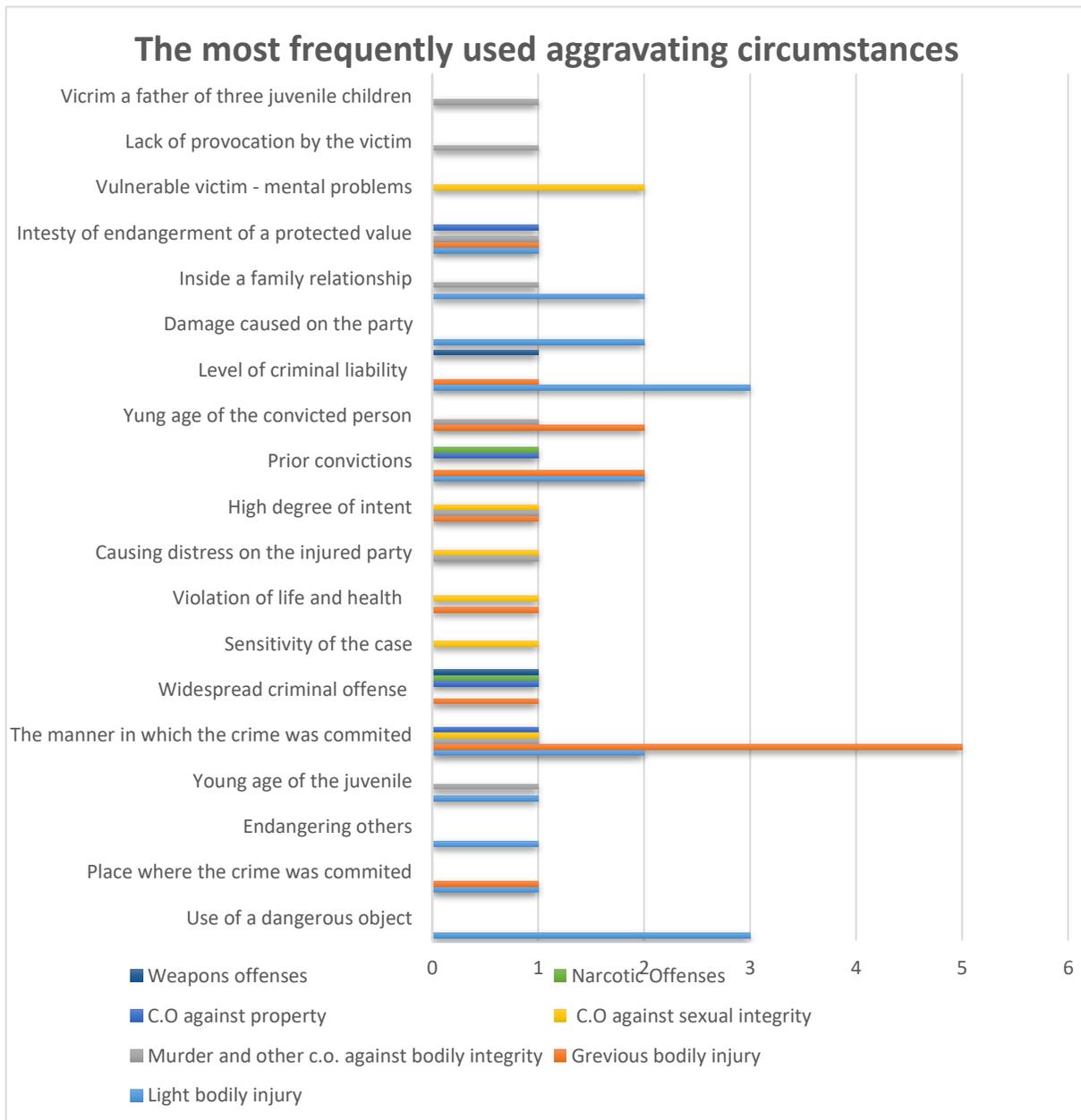
- **Provocation by the injured party** - Circumstance used in a case of grievous bodily injury (domestic violence).
- **Injured party did not join the prosecution-** Circumstance used in a case of grievous bodily injury.

B. Aggravating circumstances

This part of the report focuses on the aggravating circumstances used in the analyzed judgments. Although the number of circumstances is a smaller compared to mitigating ones, this is reasonable given that the CC is built in such a way that many of the circumstances are already included as elements of the criminal offense.

Aggravating circumstances used in the cases analyzed	Light bodily injury	Grievous bodily injury	Murder and other C.O against bodily integrity	C.O against sexual integrity	C.O against property	Narcotics Offenses	Weapons Offenses	Total
Use of a dangerous object	3							3
Place where the criminal offense was committed	1	1						2
Endangerment of others	1							1
Young age of the juvenile	1		1					2
The manner in which the criminal offense was committed	2	5	1	1	1			10
Widespread criminal offense		1			1	1	1	4
Sensitivity of the issue				1				1
Violation of life and health		1		1				2
Distress caused on the injured party			1	1				2
High degree of intent		1	1	1				3
Prior convictions	2	2			1	1		6
Young age of the injured party		2	1					3
Degree of criminal liability	3	1					1	5
Damage caused to the party	2							2
It occurred within family relationships	2		1					3
The intensity of endangerment of a protected value	1	1	1		1			4
Sensitive victim - mental problems				2				2
No provocation by the victim			1					1
Victim is father of three minor children			1					1
	18	15	9	7	4	2	2	56

The Diagram below shows that in some cases the court has paid attention to the circumstances related to the injured party/victim, such as the vulnerable victim, the offense committed within the family relationship, the distress caused on the victim, the age of the victim, etc. The courts have also, rightly so, taken into account the perpetrator's criminal record and it is also noted that in 4 of the 6 cases in which this circumstance was taken into account, effective imprisonment sentences were imposed. Although in small numbers, it has been observed that in some cases there has been a double counting of element of the criminal offense as aggravating circumstances.



XIII. Determination of a criminal fine

In February 2020, the Supreme Court approved the Guidelines for calculating the criminal fine and in order to facilitate the calculation of the fine as adequately as possible, the Criminal Fine Calculator has been developed. It has been integrated into the website of each court for easier use by judges.

Yet despite having such a sophisticated tool on their disposal (which many countries would aspire to have), courts, at least as far as we were able to understand from the judgments analyzed, have not utilized that application. Considering that in over 50% of cases the courts imposed a fine either as the only sentence or as accessory to other sentences, to ensure that the sentence is as effective as possible, it should be first and foremost adapted to the financial situation of the perpetrator.

XIV. Reasoning of judgments in the function of sentencing

In the analyzed judgments there is a somewhat satisfactory reasoning, based on the fact that in some of the cases it was noticed that courts have done more than just emphasizing the applied circumstances. However, the reasoning of the sentences imposed still requires a lot of improvement. This is necessary especially in cases where the court has imposed a sentence that is below the legal minimum (17 of the analyzed judgments). In these judgments it was not noticed that the court has delved too much into which of the circumstances is considered as particularly mitigating despite the fact that it has imposed sentences below the minimum.

The reasoning is limited to breaking down the reasons as to why a circumstance had an impact on the level of the sentence or why such a circumstance, although present, did not play a major role in influencing the sentence. This could at least have been applied in the cases clarified above where the court, even when there was a guilty plea, imposed a prison sentence.

XV. Conclusion

This report has been prepared not only to reflect the work of the Commission during 2021, but also to assist judges in identifying shortcomings in their work and areas in which there is a need for improvement. Starting in 2018, the Guidelines approved by the Supreme Court, provided a very useful tool for, but not limited to, judges, in order for them to do their job as efficiently as possible. On the other hand, it is completely clear to the Commission that the work of courts depends to a large extent on the involvement of the parties in the procedure through the provision of data which would help the court make a decision that is as fair as possible. Therefore, this report and the analysis included as part of this report are valuable and should be studied by other stakeholders beyond judiciary.

- Using the circumstances, sometimes inappropriately, means that courts need to do more capacity building work regarding the elaboration of the part related to sentencing. A mere listing of circumstances, without accurate and detailed elaboration based on facts that show how that conclusion was reached, is not enough to have a clear picture of how the relevant sentence was reached. While courts enjoy discretion in setting the sentence, they are also obliged to provide adequate reasoning through which the parties as well as the public can clearly understand whether such a decision was fair. Therefore, this would increase accountability and public trust in the work of courts.
- Given that the CC allows the inclusion of mitigating and aggravating circumstances which are not explicitly included in the Code, this does not mean that the court should apply them without any criteria and without adequate reasoning. At the same time, the mere fact that a circumstance exists under the CC does not mean that it should be automatically applied. The court must in any case ensure only inclusion of circumstances that are relevant to the particular case.

- Some circumstances such as the pledge not to commit the offense in the future, remorse and good behavior in court, according to the analysis are more descriptive than substantive in nature. The same have been used extensively in all judgments analyzed above for all criminal offenses without exception. These circumstances are very subjective and courts must be careful about the extent to which they apply them. In particular, in offenses against official duty, the use of mitigating circumstances in numbers greater than aggravating circumstances gives the impression that there is a tendency to impose more lenient sentences and consequently harms the image of the system;
- The court must also engage so that the circumstances but also the elements related to the commission of the criminal offense, the consequences and the damage caused are the dominant factors in determining the sentence, but always taking into account not to double count the elements of the criminal offense as aggravating circumstances.
- Courts should eliminate blaming language towards victims, with a focus on vulnerable victims, especially in criminal offenses against bodily or sexual integrity.
- The imposition of criminal fines continues to be done in a 'copy paste' form without implementing the Guidelines (and calculator) for imposing criminal fines. Courts are encouraged to implement as much as possible the Guidelines for measuring the criminal fine and the calculator to ensure that the sentence is commensurate to the financial situation of the convicted person. This requires as actively as possible engagement, in particular of prosecutors, to provide data on the financial standing of the perpetrator, data that the prosecutor will be able to collect during the investigation stage.
- A wider application of the specific Corruption Guidelines is also recommended, as it is a very valuable tool for dealing with criminal offenses based on this Chapter.
- It is recommended to work more on the reasoning of judgments. During the analysis of judgments included in the present report, a limited elaboration is noticed regarding the part of the sentence calculation and the circumstances taken into account. While the Commission has noted some positive examples in terms of structure in some

judgments where the part of circumstances is very well structured, these positive examples should be replicated by other courts as well.

- It is encouraged to take into consideration the data from criminal records. This is because the criminal record of the perpetrator is a key element in determining the sentence of the perpetrator as it is an important indicator not only of his/her dangerousness (in violent criminal offenses), but also of the possibility of his/her rehabilitation in the future.

