

**Department of Human Rights and Communities**

**Legal System Monitoring Section**

**Inadequate Assessment of  
Mitigating and Aggravating Circumstances by the Courts**

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## **Inadequate assessment of mitigating and aggravating circumstances by the courts**

The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) is concerned that inadequate sentencing practices may violate international human rights law and the legal framework in Kosovo. The OSCE has monitored cases where courts fail to assess circumstances that are relevant to the mitigation or aggravation of the crime when sentencing defendants. Inadequate assessments of these relevant mitigating and aggravating circumstances were particularly prevalent when courts sentenced defendants below pre-determined legal minimums.

The courts in Kosovo must consider all relevant mitigating and aggravating circumstances when determining the punishment for a criminal offence. This includes “the degree of criminal liability, the motives for committing the act, the intensity of danger or injury to the protected value, the circumstances in which the act was committed, the past conduct of the perpetrator, the entering of a guilty plea, the personal circumstances of the perpetrator and his or her behaviour after committing a criminal offence.”<sup>1</sup> Although the law specifies a number of circumstances that should be considered relevant, this list is not exhaustive and courts are under an obligation to consider other circumstances that are deemed important for the determination of punishment.<sup>2</sup>

Sentencing decisions should include well-reasoned explanations as to the relevant mitigating and aggravating circumstances that influenced the judges in a case.<sup>3</sup> The right of the accused to a reasoned decision is one of the requirements of a fair trial, because it allows for the right to exercise an appeal. This enables a court of second instance to review thoroughly the findings of the court of first instance.<sup>4</sup>

In its Recommendation of the Committee of Ministers to Member States Concerning Consistency in Sentencing, the Council of Europe recommends that “courts should in general, state concrete reasons for imposing sentences. In particular, specific reasons should be given when a custodial sentence is imposed. What counts as a ‘reason’ is a motivation which relates the particular sentence to the normal range of sentences for the type of crime and to the declared rationales for sentencing.”<sup>5</sup>

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<sup>1</sup> Article 64(1), Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003, with subsequent amendments. On 6 November 2008, Kosovo promulgated Law No. 03/L-002 on Supplementation and Amendment of the Kosovo Provisional Criminal Code of Kosovo No. 2003/25, which left the code substantially the same as the 2003 law, with only a section on guilty plea agreements added and the name of the code changed to Criminal Code of Kosovo, hereinafter referred to as CCK.

<sup>2</sup> Ibid.

<sup>3</sup> Articles 396(8), 402(1)(3) and 403(1)(12), Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003, with subsequent amendments. On 22 December 2008, Kosovo promulgated the Law No. 03/L-003 on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure No. 2003/26, which left the code substantially the same as the 2003 law, though a section on guilty plea agreements was added, an article on the length of police-ordered detention was amended, and the name of the code was changed to Kosovo Code of Criminal Procedure, hereinafter referred to as KCCP.

<sup>4</sup> European Court of Human Rights, *Hadjianastassiou v. Greece*, Judgment, 16 December 1992, paragraph 33.

<sup>5</sup> Council of Europe, Recommendation No. R(92)17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing, 19 October 1992.

The Criminal Code of Kosovo (CCK) provides the minimum and maximum penalties for each crime. When there are particularly mitigating circumstances to indicate that the purpose of the punishment would be achieved through a lesser punishment, the court may reduce the punishment below the otherwise pre-established minimum sentence that is provided for in the law.<sup>6</sup> A court must justify its decision, however, and explain its authority whenever it imposes a sentence below the pre-established minimums outlined in the criminal code.<sup>7</sup> Insufficiently explained court reasoning can be grounds for an appeal.<sup>8</sup>

### **Failure to assess adequately mitigating circumstances**

The OSCE monitored cases that did not demonstrate mitigating circumstances. Nevertheless, the courts imposed sentences below the pre-established minimum without justifying the decision in their reasoning.<sup>9</sup> In some cases, the decision simply referenced the existence of mitigating circumstances without assessing the relevant circumstances that were perceived as mitigating to justify a punishment below the minimum established by law.

On 14 October 2009, a trial commenced before the district court in Gjilan/Gnjilane for two adult and two juvenile defendants accused of kidnapping a child.<sup>10</sup> According to the CCK, the criminal offence of kidnapping a child carries a prison sentence from one to ten years. All four defendants were found guilty. One adult defendant was sentenced to three months and the other to six months of prison. The educational measure of intensive supervision by a guardianship authority<sup>11</sup> was imposed against the two juvenile defendants. The punishment imposed by the court, particularly for the two adults, was below the standard minimum sentences, but the judgment did not adequately assess the circumstances that could authorize a lenient prison sentence. The judgment mentioned as mitigating circumstances the good behaviour of the defendants during the trial, their levels of education, and lack of prior convictions. These circumstances do not appear to be “particularly mitigating” to justify a punishment below the limits provided for by law. However, the prosecutor did not appeal the decision.

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<sup>6</sup> Article 66 of the CCK provides, “[t]he court may impose a punishment below the limits provided for by law or impose a lesser type of punishment: (1) When the law provides that the punishment of the perpetrator may be mitigated; or (2) When the court finds that there are particularly mitigating circumstances which indicate that the purpose of punishment can be achieved by imposing a lesser punishment.”

<sup>7</sup> Article 66(2), CCK.

<sup>8</sup> Articles 396(8), 402 and 403, KCCP.

<sup>9</sup> Article 396(8), KCCP provides that “[i]f the accused has been sentenced to a punishment, the statement of grounds shall indicate the circumstances the court considered in determining the punishment. The court shall, in particular, explain by which grounds it was guided if it found that it was...necessary to reduce or to waive the sentence.”

<sup>10</sup> Articles 159(2) and 23, CCK.

<sup>11</sup> Article 22, Juvenile Justice Code, promulgated through UNMIK Regulation 2004/8 on the Juvenile Justice Code of Kosovo, 20 April 2004. An educational measure does not include a prison term, but rather a parental (or guardian) obligation to monitor a child’s activities more closely.

On 13 October 2009, a trial commenced before the district court in Gjilan/Gnjilane for a defendant accused of the criminal offence of sexual abuse of persons under the age of 16 years.<sup>12</sup> The victim was 15 years old. The offence carries a prison sentence from one to ten years. However, the defendant was sentenced to three months of imprisonment. The court considered as mitigating circumstances the defendant's fair behavior during the main trial, his guilty plea, the remorse he expressed during the hearing, his poor economic living conditions, that he is married and the father of five children. The court decision noted that by imposing this sentence "the purpose of punishment [...] will be achieved".

In these cases, the court failed to assess, or even to identify, the particular mitigating circumstances that would indicate that the purpose of punishment could be achieved by a lesser sentence.

There were no assurances, as required by Article 66 of the CCK that conditions were present that allowed the mitigation of punishment, or that the mitigation of punishment was within the limits authorized in Article 67 of the CCK.

### **Failure to adequately assess aggravating circumstances**

The courts not only find it difficult to assess mitigating circumstances, but also have similar difficulty with aggravating circumstances.

On 21 August 2009, the police station in Pejë/Peć filed a report against a 34-year-old defendant for the rape<sup>13</sup> of an 11-year-old girl. The rape of a victim under 16 years carries a prison sentence from five to twenty years. Although it was established that there was sexual intercourse between the defendant and the child, the indictment rendered on 28 September 2009 re-qualified the offense as sexual abuse of persons under the age of 16 years.<sup>14</sup> The prison sentence for the re-qualified offence is from one to ten years. However, in the re-qualified offence, when a perpetrator causes "serious bodily harm or serious disturbance to the mental or physical health of the person" the prison sentence is longer, from three to fifteen years.<sup>15</sup> The medical expert testified that, in response to what happened, the child suffered from post-traumatic stress disorder. There was evidence that the victim suffered a serious disturbance to her mental health. On 23 November 2009, the district court in Pejë/Peć sentenced the defendant to prison for one year and six months. The court did not find any aggravating circumstance. The reasoning did not discuss the post-traumatic emotional and behavioral mental health symptoms that the child displayed.

The court failed to assess adequately the aggravating circumstances prior to imposing a sentence. Reasoning that does not address the causal link between the crime and the consequence, in this case the victim's post-traumatic stress syndrome, fails to meet

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<sup>12</sup> Article 198(1), CCK.

<sup>13</sup> Article 193(4), CCK.

<sup>14</sup> Article 198(1), CCK.

<sup>15</sup> Article 198(5)(2), CCK.

the minimum standards of an adequate assessment of the relevant circumstances that is necessary prior to sentencing a defendant.

On 14 October 2009, the OSCE monitored a case in the district court in Prishtinë/Priština where the defendant was convicted, under Article 198(1) of the CCK, for sexual abuse of persons under the age of 16 years. A mental health expert testified that the victim had a mental impairment since birth. The court's written reasoning did not assess whether the age of the victim in this sexual assault case, ten years old, or her mental impairment were aggravating circumstances, nor whether these factors were considered at all when sentencing the defendant. The court did, however, consider the defendant's lack of a prior record as a mitigating circumstance.

The OSCE has noted that in many cases judges lack a proper understanding of how different circumstances may or 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 offence 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.<sup>16</sup> One such mitigating factor, which the courts often refer to, is the economic status of the offender. It is difficult to see how the offender's economic situation could have any influence, mitigating or aggravating, on the courts' decision on punishment of sexual offences as exemplified in the cases cited above.

Judges have a tendency, including with cases involving the most vulnerable members of society, to apply mitigating rather than aggravating circumstances. In the two referenced cases above the victims were under-aged girls. Applying mitigating and not aggravating circumstances to perpetrators of sexual abuse against under-aged and mentally disabled girls raises the serious policy issue of whether the absence of aggravating circumstances decreases the deterrent effect that could minimize future cases of sexual abuse, particularly in cases involving minors.

Similarly, most written verdicts simply enumerate the mitigating and aggravating factors without further evaluation, and then make a standard reference to the purpose of the punishment, stating that it will be fulfilled through the decision. The majority of cases do not include any assessment of the mentioned circumstances or their influence on the court's decision, or any reference to the severity of the chosen punishment in relation to the legal limits established for the specific crime.<sup>17</sup>

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<sup>16</sup> While there is no extant commentary to the CCK that elaborates on the nature of aggravating circumstances that should serve to influence sentencing, commentary to the previously applicable Federal Republic of Yugoslavia Criminal Code may serve as a guide. Ljubisa Lazarevic *Commentary of the Article 8 of the Federal Republic of Yugoslavia Criminal Code*, 5th Edition, Belgrade, 1995.

<sup>17</sup> See the OSCE Review on the Criminal Justice System: "*Crime, Detention and Punishment*" (April 2003 – October 2004), page 62. Retrieved 16 July 2010 from [http://www.osce.org/documents/mik/2004/12/3984\\_en.pdf](http://www.osce.org/documents/mik/2004/12/3984_en.pdf).

The lack of proper justification in court judgements involving cases where a mitigated punishment was applied not only breaches the law, but also fails to serve the purposes of deterrence.<sup>18</sup> This lack of justification may also influence the general public's perception of how the judicial system responds to specific crimes.

The OSCE observed the lack of sentencing guidance<sup>19</sup> to assist courts in assessing mitigating and aggravating circumstances in sentencing decisions. The Supreme Court of Kosovo has not actively assumed its role by providing additional reasoning in its decisions on punishment.<sup>20</sup> This could be remedied with well-reasoned decisions when responding to appeals from the lower courts.

Lower courts do not have easy access to district and Supreme Court of Kosovo judgements.<sup>21</sup> Such knowledge transfer between courts would contribute to a consistent approach to assess mitigating and aggravating circumstances when deciding sentences. Consistent sentencing is a fundamental principle of justice. Disparity in the sentencing of similar cases would lead to a perception of injustice and further decrease the public's confidence in the justice system.

## **Conclusion and recommendations**

The lack of established jurisprudence or other resources to assist court assessments of mitigating and aggravating circumstances leaves the courts in Kosovo with little guidance. Moreover, it results in an increased risk that similar cases yield widely different outcomes, because judges have limited opportunity to learn the sentencing practices of others.

The OSCE has monitored a number of instances where court judgements do not assess relevant mitigating and aggravating circumstances in relation to the crime and the defendant. There is often little justification for a punishment below the standard sentence authorized by the CCK. Opinions generally reveal a lack of understanding on how to assess mitigating and aggravating circumstances. These shortcomings were observed at all levels of the judicial system.

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<sup>18</sup> Article 34 of the CCK reads: "PURPOSE OF PUNISHMENTS. The purposes of punishment are: 1) To prevent the perpetrator from committing criminal offences in the future and to rehabilitate the perpetrator; and 2) To deter other persons from committing criminal offences."

<sup>19</sup> See the OSCE Review on the Criminal Justice System: "*Crime, Detention and Punishment*" (April 2003 – October 2004), pages 46 and 62. Retrieved 16 July 2010 from [http://www.osce.org/documents/mik/2004/12/3984\\_en.pdf](http://www.osce.org/documents/mik/2004/12/3984_en.pdf).

<sup>20</sup> Article 31(7), Law on Regular Courts (Official Gazette of the Socialist Autonomous Province of Kosovo, No. 21, 28 April 1978) states that the Supreme Court of Kosovo "determines principled attitudes and legal opinions on the issues which are relevant for the unique application by the courts in the territory of the Province."

<sup>21</sup> In 2002 and 2003, the Kosovo Law Centre (KLC) in co-operation with the Kosovo Foundation for an Open Society, published the first two volumes of the Kosovo Supreme Court decisions. See the OSCE Review on the Criminal Justice System 1999-2005 "*Reforms and Residual Concerns*", March 2006, pages 23-24. Retrieved on 16 July 2010 from [http://www.osce.org/documents/mik/2006/03/18579\\_en.pdf](http://www.osce.org/documents/mik/2006/03/18579_en.pdf); Supreme Court of Kosovo decisions have not been published by KLC since the "*Bulletin of Judicial Practice, Supreme Court of Kosovo, January – March 2006*" was published in 2007.

In light of the above, the OSCE recommends the following to improve the court system in Kosovo:

- Judges should reference the phrase “particularly mitigating circumstances” and identify specific case facts when they, as authorized by Article 66 of the CCK, impose sentences below the standard legal limit;
- The Supreme Court of Kosovo and district courts should provide well-reasoned legal opinions and guidance regarding sentencing to encourage the transfer of knowledge between courts and the uniform application of the legal norms regarding punishments;
- Lower courts should be given easier access to district and Supreme Court of Kosovo judgments;
- Lawyers and public prosecutors should assist the court by proposing which circumstances are mitigating and which are aggravating; and,
- The Kosovo Judicial Institute should continue to offer training for judges and prosecutors at all levels of the judicial system on legal reasoning and writing and how to assess mitigating and aggravating circumstances in sentencing, including training involving sexual abuse against minors.