

A Comparative Prospective on the Individualization of Criminal Sentencing*

Abstract

The purpose of this paper is intended to make a theoretical and practical analysis of mitigating and aggravating circumstances in criminal law, their importance in relation to the principle of individualization of punishment as well as their importance in relation to determining the right criminal sentencing. This analysis is based on a mixed methodology, including descriptive, analytical and comparative methods by using doctrines, legislation and practice of Albanian and foreign courts as a source of data. The paper also aims to highlight the real problems related to the understanding of the theoretical importance of mitigating and aggravating circumstances and also their implementation by the Albanian courts. The main focus is on proposing a practical and unified solution to the applicability of these circumstances, taking the lead from foreign jurisdictions, primarily based on common law systems. Specifically, this paper proposes the creation of a unified methodology for the practical implementation of mitigating and aggravating circumstances in the Albanian legislation as a guide for the Albanian courts.

KEYWORDS: crime, mitigating and aggravating circumstances, punishment, sentencing guidelines, unified approach, Albania

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1 | Introduction

Mitigating and aggravating circumstances are a core part for the individualization of criminal punishment. As a substantial part of imposing the right sentencing, the Court in civil law jurisdictions lean on them a primary role in imposing the right sentence. A judge must impose a sentence that is sufficient, but no greater than necessary to reflect the seriousness of the offense, to promote respect for the law, to provide a just punishment for the offense, to adequately deter criminal conduct, to protect the public from further crimes by the defendant, and to provide the defendant with needed educational or vocational training, or medical care.

The Albanian Criminal Code provides in its Article 1/c the principle of justice in determining punishment. This principle is fully articulated in Article 47 of the Albanian Criminal Code, which provides for the individualization of punishment.^[1] The individualization of punishment means that appointment by the court against the author of the criminal offense of a type and measure of punishment in accordance with the character and social danger of the offense and of the author, as well as with the mitigating and aggravating circumstances of that case.^[2] The individualization of punishment is a discretion of the court, which thus fulfills its function of delivering justice. Respecting the principle of individualization of punishment by the court is of fundamental importance for the decision to be not only legal, but also fair in the sense of Article 17 of the Albanian Constitution.^[3]

One of the most important elements of the principle of individualization of punishment is mitigating and aggravating circumstances. These circumstances consist of objective and subjective factors, which do not affect the existence of the criminal offense, but have a direct impact on the type and extent of the criminal penalty against the perpetrator of the criminal offense.^[4] Their correct assessment is therefore essential if a decision is to be not only legal but also fair.

¹ Ismet Elezi, Skënder Kaçupi, Maksim Haxhia, *Criminal Law Commentary, The General Part* (Tiranë: Kumi Publication, 2015).

² Albanian Criminal Code, 1995. <https://qbz.gov.al/preview/a2b117e6-69b2-4355-aa49-78967c31bf4d>.

³ Albanian Constitution, 2017. <https://klp.al/wp-content/uploads/2020/02/Kushtetuta-2017.pdf>.

⁴ Shefqet Muçi, *Criminal law, The general part* (Tirana: Dudaj Publications, 2012).

Every criminal offense is committed under certain circumstances. However, not every circumstance of committing a criminal offense is considered a mitigating or aggravating circumstance. Only those circumstances that have a direct impact on the social dangerousness of the criminal offense and its author are considered as such, thus influencing the adequate sentencing measure.^[5] In this respect, criminal laws often exhaustively identify special aggravating circumstances, which, if proven to exist, should influence the imposition of harsher penalties. While the mitigating circumstances are not exhaustively identified in criminal law, it is the court's duty to identify other mitigating factors on a case-by-case basis, which, if proven to exist, should influence the awarding of milder sentences.

It is important for the court to correctly assess every mitigating and aggravating circumstance, as this way the risk of giving the same decisions is avoided. Each case is carried out in different circumstances and therefore the sentences cannot be the same. In this context, the fair assessment of mitigating and aggravating circumstances constitutes a guarantee for the respect of the fundamental rights and freedoms of a person; it also constitutes a guarantee for the existence of a legal and fair decision in the sense of Article 17 of the Albanian Constitution. Further more the fair evaluation of mitigating and aggravating circumstances constitutes a guarantee not only for the existence of a fair decision, but also for its perception as such by the author of the criminal offense; which fundamentally serves the achievement of the goals of criminal sentencing.

2 | Mitigating and aggravating circumstances

The Albanian Criminal Code, sanctions the mitigating and aggravating circumstances in Articles 48, 49 and 50. In the case of the aggravating circumstances the doctrine and the principles of law oblige the court to stick strictly to the exhaustive lists provided in Article 50 of the Albanian Criminal Code, while in the case of mitigating circumstances this is not the case. The above is related to the implementation of the principle of legality,^[6]

⁵ Ismet Salihu, *Criminal law, The general part* (Prishtinë, 2014).

⁶ Dorina Hoxha, Skënder Kaçupi, Maksim Haxhia, *Criminal law, The general part* (Durrës: Jozef Publications, 2018).

nullum crimine, nulla poena sine lege, as well as to the manifestation of the human aspect of criminal law. So, everything that is in favor of *reo* is allowed, and it is precisely in this aspect, the list provided in Article 48 of the Albanian Criminal Code, regarding extenuating circumstances, is not exhaustive. This fact is clearly stated in Article 49 of the Code, which provides that “the court, regardless of the circumstances mentioned in Article 48 of this Code, may also take into account other circumstances as long as it considers them to be such as to justify the mitigation of the punishment”.

The mitigating circumstances that ease the punishment, provided in Article 48 of the Albanian Criminal Code are:

- a. when the offense was committed motivated by motives with positive moral and social values;
- b. when the offense was committed under the influence of mental shock caused by provocation or unfair actions of the victim or any other person;
- c. when the offense was committed under the influence of the actions or unfair instructions of the superior;
- d. when the person who committed the offense shows deep remorse;
- e. when the person has replaced the damage caused by the criminal offense or has actively helped to eliminate or reduce the consequences of the criminal offense;
- f. when the person appears before the competent authorities after committing the criminal offense;
- g. when the relationship between the person who committed the criminal offense and the victims have been normalized.

The mitigating circumstance provided for in letter “a” of the first paragraph of this Article, does not mitigate the punishment when the criminal offense was committed in the circumstances provided for in letter “j” of Article 50 of this Code.

The mitigating circumstance, provided for in the letter “e” of the first paragraph of this Article, does not facilitate the punishment of a person who has committed a criminal offense against children or a criminal offense of domestic violence.

In the other hand the aggravating circumstances listed in Article 50 of the Code are:

- a. committing the offense motivated by weak motives;
- b. committing the offense in order to expose the responsibility or to hide the criminal responsibility of another or to avoid punishment for another criminal offense or to carry out , or to ensure for oneself or for third parties financial gains, or any other type of material benefit;
- c. committing a criminal offense with cruelty and m izori;
- ç. committing a crime after being sentenced for a previously committed crime;
- ç/1. committing a criminal offense after placing the person under electronic surveillance;
- d. committing actions that aggravate or increase the consequences of the criminal offense;
- dh. committing the criminal offense by abusing the public function or religious service;
- e. when the offense is committed against children, pregnant women or persons who, for various reasons, cannot to protect themselves;
- e/1. committing a criminal offense during or after the issuance of court orders for protection from domestic violence;
- f. when the offense is directed against representatives of other states;
- f/1. When the offense is directed at elected persons and public officials, due to duty;
- g. when the offense is committed by taking advantage of family, cohabitation, friendship, hospitality relationships;
- gj. committing the criminal offense in collaboration;
- h. committing the offense criminal more than once;
- i. when the offense was committed using weapons, combat ammunition, explosive, incendiary, poisonous and radioactive substances,
- j. when the offense was committed motivated by motives related to gender, race, color, ethnicity , language, gender identity, sexual orientation, political, religious or philosophical beliefs, health condition, genetic predisposition or disability.

In light of the above description, after a general sense of which are the aggravating and mitigating circumstances listed in the Albanian Criminal Code, we will further analyse their role in a more practical overview.

2.1. Prosecutor's request as a condition for assessing aggravating circumstances

Aggravating circumstances are objective and subjective factors which are exhaustively defined in Article 50 of the Criminal Code and which directly affect the type and extent of criminal punishment.

Their impact on the final decision against the defendant is of a great importance and weight, as it results in an increase in the amount of punishment towards the maximum limit of the sanction. For this reason, referring to the principle of legality (which also includes the principles of taxability and determination), these aggravating circumstances must be provided in a clear, unambiguous and complete manner in the law.

In this context, Article 150 of the Albanian Criminal Procedure Code, has defined these circumstances as evidence.^[7]

Therefore, the prosecutor has the obligation to prove them with concrete proof of evidence. For this reason, these circumstances must be part of the indictment and the request to send the case to trial, thus giving the defendant the opportunity to defend himself.

If these aggravating circumstances are identified during the investigation phase, after notification of the charge, the prosecutor has the obligation, based on Article 34, Paragraph 1 of the Code, to supplement the charge by adding to its content the new aggravating circumstance not previously announced in the indictment.^[8] It should be emphasized that this new aggravating circumstance does not change the nature or cause of the accusation, but only complements it.

The prosecutor has the same obligation even at the end of the investigation, referring to Article 327, Paragraph 3 and 4 of the Criminal Procedure Code, where the defendant has the right to be familiar with the criminal fact and to submit a statement related on it. In this way, before the trial, the announcement of the end of the investigation (part of which are the aggravating circumstance) guarantees a mini-contradiction of the defendant with the prosecutor not only about the criminal fact, but also on the aggravating circumstance.^[9]

⁷ Decision of Supreme Court Of Albania, 14 February 2018.

⁸ Klodian Kurushi, *New accuses in the criminal process*, July 2017. <https://pdfslide.net/documents/akuzat-e-reja-n-procesin-penal-dhe-llojin-veprs-penale-dhe-konstruktin-e-saj.html?page=1>.

⁹ Dhimitër Lara, *Comment on criminal procedure* (Morava, 2019).

As for the trial phase, Article 373 of the Albanian Criminal Procedure Code stipulates in a taxing manner the obligation of the prosecutor to communicate to the defendant the new aggravating circumstance that emerges during the trial.

In the analysis of the above, we estimate that the aggravating circumstances constitute facts that are the subject of evidence, given that they directly affect the type and extent of the punishment. If the prosecutor refers to these circumstances in his research regarding the measure of punishment, he has the obligation to first make those parts of the indictment.

Since the aggravating circumstances must be part of the indictment and aim to aggravate the punishment against the defendant, they must be notified to the latter in any case in order to guarantee an effective defense, in accordance with the principle of due process of law. The obligation to notify both the defendant and the court falls only on the prosecutor. This means that the court, during the trial phase, cannot take into consideration and evaluate mainly these circumstances for the individualization of the punishment, without them being part of the indictment. This clearly results from the content of Article 373 of the Albanian Criminal Procedure Code, which determines that when aggravating circumstances that arise during the judicial review, obligates to notify the defendant and therefore make them part of the judicial review and belongs only to the prosecutor.^[10]

The strict application of this apparently procedural rule (but which in fact has direct material consequences) is important because it has a direct impact on the nature and extent of the criminal penalty. In this sense, the precise implementation of this rule constitutes a guarantee for the implementation of the principle of not worsening the defendant's position. The opposite applies to mitigating circumstances, which, because they do not worsen the position of the defendant, can be considered mainly by the court even without being requested or notified by the prosecutor.

In relation to the above, it results that in practice in the prosecution and the Albanian courts, the rule above is not uniformly applied, since in some cases the aggravating circumstances are presented by the prosecutor in the indictment and evaluated by the court within the framework of the prosecutor's request for the exercise of criminal prosecution, while in some other cases these circumstances are not presented in the indictment, but are mainly evaluated by the court.

¹⁰ Albanian Criminal Procedure Code, updated, 1995. https://www.pp.gov.al/rc/doc/kodi_i_procedures_penale_date_30_gusht_2017_1201.pdf.

2.2. What factors do judges take into account when considering punishments?

If the judge is not limited by a mandatory minimum sentence or some other law that limits his or her discretion in sentencing, the defense is normally allowed to bring a plethora of factors to the judge's attention. Here are some examples of factors that judges often take into consideration when determining punishment:

- The criminal history of the defendant (or lack of history, if the defendant is a first time offender).
- Whether the defendant was the principal actor in the crime (i.e. the person that held the gun during the robbery) or only an accessory to the crime (the person that told the principal about an unlocked cash register).
- The mental state of the defendant at the time of the crime (emotional distress, drug addiction, etc.)
- The degree to which anyone was hurt during the commission of the crime.
- The likelihood that a defendant will be able to be rehabilitated through various programs.

Of course, all of these factors could be seen as either “mitigating” factors (ones that lessen a criminal punishment) or “aggravating” factors (ones that increase a criminal punishment) depending on the factual details and the viewpoint of the judge.^[11]

For example, if a criminal defendant has a history of committing the same types of crimes over and over; it may appear to a judge that the previous criminal punishments had been inadequate and weigh in favor of a harsher punishment. Another judge might see this defendant as “a product of the system” and suggest a new approach, such as intense substance abuse treatment followed by probation, in an attempt to make a lasting change in the defendant's life.

First-time offenders can almost always escape jail time for minor offenses, and in some cases, they can make agreements with the prosecution that

¹¹ Francesco Antolisei, *Manual of Criminal Law, general part*, 12th ed. (Milano: Giuffrè Editor, 1991).

allow them to avoid a criminal conviction altogether. Sometimes these offenders will have to complete a court-ordered course or pay restitution to the victims of their crimes to be eligible.

The United Colleges of the Albanian Supreme Court with decision No. 6 of 30 October 2011, has assessed the aggravating circumstances within the prosecutor's request for the punishment of the defendants A.H and F.H for the criminal offense of felony murder, committed in collaboration (aggravating circumstances), theft with violence committed in collaboration (aggravating circumstances) and illegal possession of firearms weapons, provided for by Articles 141-25, 139-25 and 278/4 of the Albanian Criminal Code.^[12]

The court reasons that: "Measures of punishment of the convicted have been determined by the court in full accordance with the requirements of Article 47 of the Criminal Code, taking into account the circumstances provided by Articles 48, 49 and 50 of the Criminal Code, because it should be emphasized that the defendants have aggravating circumstances provided for by the letters "gj" and Article 50 of the Criminal Code, therefore the claim of the defendant "F" to have differences in the sentencing versus the other defendant in "absentia" is not based on the law, since he as well as his accomplice had the same role in committing the criminal offense as the executor, which shows that he is a person with significant social risk".

Also, in the decision of the Albanian Supreme Court No. 162, dated 14 October 2015,^[13] results that the court has evaluated the aggravating circumstances within the prosecutor's request for the punishment of the defendant A.D for committing the criminal offense of "Murder in other qualifying circumstances", provided by Article 79 letter "ë", in aggravating circumstances "driven by weak motives" provided for by Article 50/a, and mitigating circumstances provided for by Article 48/ç and 48/dh of the Criminal Code; for committing the criminal offense of "Intimidation", provided for by Article 84, under aggravating circumstances "prompted by weak motives" provided for by Article 50/a, and mitigating circumstances provided for by Article 48/ç and 48/dh of the Albanian Criminal Code; for committing the criminal offense of "Disturbance of public peace," provided for by Article 274 and mitigating circumstances provided for by Article 48/ç

¹² Unifying decision of the Albanian Supreme Court, The concurrence of the criminal offense of 'Theft with fatal consequences' with "Robbery with violence" and "Armed robbery", 30 September 2011.

¹³ Albanian Supreme Court, Prosecutor's Office at the District Court of Lushnje v. A.D, 14 October 2015.

of the Criminal Code; for committing the criminal offense of “Carrying weapons without a permit,” provided for by Article 278/2, and mitigating circumstances provided for by Article 48/ç and 48/dh of the Albanian Criminal Code; for committing the criminal offense of “Unauthorized Possession of Combat Weapon Cartridges,” provided for by Article 278/3 and mitigating circumstances provided for by Article 48/ç and 48/dh of the Albanian Criminal Code.

In contrast to the practice as above, in other cases the courts have mainly evaluated the aggravating circumstances as a factor that justifies the awarding of harsher punishments. Thus, in the decision No. 2909, dated 7 October 2015 of the Tirana Judicial District Court, it results that the prosecution body requested the punishment of the defendants I.H and K.V for the criminal offense of theft committed in collaboration with each-other, provided for by Article 134/2 of the Criminal Code.

The Court of the Judicial District of Tirana decided to declare the defendant I.H guilty of the criminal offense of theft committed in collaboration with each-other, provided for by Article 134/2 of the Albanian Criminal Code and his sentence of two years and six months of imprisonment; the conviction of the defendant K.V for the criminal offense of theft in collaboration, provided for by Article 134/2 of the Criminal Code and his sentence of one year and eight months of imprisonment. In determining the type and measure of punishment, the court reasons that:

In the present case, there is an aggravating circumstance in the commission of the criminal offense by the defendants I.H and K.V, point «g» of Article 50 of the Criminal Code. When the offense was committed by taking advantage of family relations, of coexistence, of friendship, of hospitality.

In the decision No. 86, dated 28 January 2015 of the Tirana Court of Appeal, it appears that the prosecution body requested the punishment of the defendant E.B for the criminal offenses “Murder with intent” and “Possessing cold weapons without permission,” provided for by Articles 76 of 279/2 of the Albanian Criminal Code.

The Tirana Court of Appeal has decided to uphold the decision No. 648, dated 01 April 2014 of the Court of the Judicial District of Tirana, which found the defendant E.B guilty of the criminal offenses for which he was accused and sentenced him to 20 years of imprisonment. In its decision, the Tirana Court of Appeal reasons that: “The defendant committed the

criminal offense under aggravating circumstances provided for by Article 50, letter «c» of the Albanian Criminal Code”.

Also, in the decision No. 630/60-2014-2196, dated 14 October 2014 of the Vlora Court of Appeal, it appears that the prosecution body requested the punishment of the defendant G.ZH for the commission of the criminal offense of “Theft” provided for in the Article 134 of the Albanian Criminal Code.

The Vlora Court of Appeal has decided: “Enforcement of the decision No. 333, dated 17 July 2013 of the Court of the Judicial District of Vlora with this amendment on the manner of serving the sentence by removing probation”. The court reasons that:

The danger of the author is not minor and the offense was committed under aggravating circumstances, according to Article 50/d of the Criminal Code, as the defendant has continuously benefited from the good faith reports of the employer his; that the consequences of doing it have increased as a result of the replacement of the fuel that happened in the warehouse, several cars were damaged and the commercial image of the gas station where the defendant worked was damaged [...] The defendant denied the commission of the criminal offense and did not cooperate with the prosecuting body. Since there are no mitigating circumstances in favor of the defendant, which would reduce his social dangerousness and the crime committed, the application of Article 59 of the Albanian Criminal Code should be removed [...].

So, in some cases the aggravating circumstances have been assessed *proprio motu* by the courts, without being the ones presented in the indictment and without their review being requested by the prosecution.

Regarding the above, we reason that the aggravating circumstances can be verified by the court only if they are part of the indictment and the request for sending the case to trial, notified to the defendant in accordance with the criminal procedural rules. This is because these circumstances aggravate the punishment of the defendant and therefore their identification, verification and evaluation *proprio motu* by the court would contradict the principle of not worsening the position of the defendant.

In contrast to the aggravating circumstances, the mitigating circumstances ease the punishment of the defendant and therefore the court can mainly verify them.^[14]

¹⁴ Luca Chiesa, *Substantive Criminal Law: Cases, Comments and Comparative Materials* (Durham: Carolina Academic Press, 2014).

Precisely for this reason, Article 49 of the Albanian Criminal Code has provided for the possibility for court to identify and apply *proprio motu* other mitigating circumstances besides those provided for in Article 48 of the Albanian Criminal Code, which, although not expressly provided for in the law, justify according to the court judgment the mitigation of the sentence.

2.3. Creation of a unified methodology for the practical implementation of mitigating and aggravating circumstances

As previously analysed, we conclude that there are significant problems in the implementation of mitigating and aggravating circumstances in Albania today, and we believe in other jurisdictions as well. The courts have often verified the aggravating circumstances without them being part of the indictment and without being notified to the defendant; factors that do not have a direct impact on the social dangerousness of the offense, of its author and the degree of guilt are assessed as mitigating circumstances; the courts have evaluated the same circumstances differently and have taken different positions.

The main purpose of the paper is not only the identification of real problems related to the implementation of mitigating and aggravating circumstances in Albania, but also to propose for a practical and unified solution for the applicability of these circumstances, based on the model of a foreign jurisdiction.

This proposed methodology for application aims at the unification of the practice by applying the same standards for the evaluation and application of mitigating and aggravating circumstances by courts and prosecution bodies. The best practice of foreign jurisdictions, such as that of the United States of America or the United Kingdom, help us to apply this model.

In these jurisdictions, the so-called “Sentencing Guidelines” are applied to sentencing, clearly defining the manner of application of mitigating and aggravating circumstances, without violating the principle of individualization of criminal punishment for each condemned.^[15] Although

¹⁵ United States Sentencing Commission, Guidelines Manual, §3E1.1, 2011. <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf>.

these guidelines are no longer mandatory in the United States today, after the Supreme Court decision in “Booker”, they are extremely important in unifying the practice for the application of mitigating and aggravating circumstances in each trial.^[16]

The Federal Sentencing Guidelines are non-binding rules that set out a uniform sentencing policy for defendants convicted in the United States federal court system and became effective in 1987. The Guidelines provide for a “very precise calibration of sentences, depending upon on a number of factors.” These factors relate both to the subjective guilt of the defendant and to the harm caused by the facts of the case, as required by the United States Supreme Court decision” *Payne v. Tennessee*.^[17]

The Guidelines are not mandatory, because they may result in a sentence based on facts not proven beyond a reasonable doubt to a jury, in violation of the Sixth Amendment as mandated by the United States Supreme Court decision *United States v. Booker*, which held that the sentencing guidelines are only advisory and not mandatory. This means that they can still be referred to them when imposing a sentence but now other factors should also be taken into account. However, judges must consider them when determining a criminal defendant’s sentence. If a judge determines within his or her discretion to depart from the Guidelines, the judge must explain what factors warranted the increased or decreased sentence. If a Court of Appeals reviews a sentence imposed through a proper application the Guidelines, it may presume that the sentence is reasonable as stated in the United States Supreme Court decision *Rita v. United States*.^[18]

As a result, now the 18 U.S.C. §3553(a), is comprised of 7 factors that the court must consider when imposing a sentence.^[19] The factors to be considered are:

- the nature and circumstances of the offense and the history and characteristics of the defendant;
- the need for the sentence imposed to reflect the seriousness of the offense;

¹⁶ United States Supreme Court, *United States v. Booker*, 543 U.S. 220, 2005. <https://supreme.justia.com/cases/federal/us/543/220/>.

¹⁷ United States Supreme Court, *Payne v. Tennessee*, 501 U.S. 808, 820, 1991,

¹⁸ United States Supreme Court, *Rita v. United States*, 127 S.Ct. 2456, 2007.

¹⁹ Federal Sentencing: The Basics, September, 2020. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf.

- to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- the kinds of sentences available;
- the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines in the case of a violation of probation or supervised release;
- the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28 any pertinent policy statement the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct;
- the need to provide restitution to any victims of the offense.

Booker helps defense attorney provide mitigating factors to show that this person is more than just a number. Mitigating factors can include letters from the community showing that the person is of good character, family history, cooperation with the investigation, or anything to show that the person should not be sentenced harshly.

In Booker the court rejected the provisions of any federal sentencing statute that require federal or district judges to impose a sentence within the range of the United States Federal Sentencing Guidelines. The court instructed judges that they could impose sentences with a wider range of sentencing factors than those prescribed by the federal sentencing statutes.

The Federal Sentencing Guidelines in the United States work by defining for each criminal offense a series of levels (e.g. from 1 to 43) and for each aggravating or mitigating circumstance going up or down the scale, given that each level, depending on each figure offense, provides for a certain type and measure of punishment. In this way, not only the prosecution body and the courts would be much more accurate in the application of aggravating and mitigating circumstances, but at the same time the possibility of arbitrary assessment of these circumstances by these bodies would be avoided, thus guaranteeing the implementation of the same and sustainable principle of justice in determining punishment and the existence of proportional criminal punishment in the sense of Article 17 of the Albanian Constitution.

A judge must impose a sentence that is sufficient, but no greater than necessary to reflect the seriousness of the offense; to promote respect for the law; to provide just punishment for the offense; to adequately deter criminal conduct; to protect the public from further crimes by the defendant; and to provide the defendant with any necessary educational or vocational training, or medical care.

In the United States of America, the U.S. Probation and Pretrial Services Office prepare a “pre-sentence report,” or “PSR,” that makes an initial calculation of the Guidelines-recommended sentencing range. Both the defendant and the prosecutors have the opportunity to make objections to the PSR and to advocate for the sentence that they believe is appropriate. Ultimately, the judge performs the definitive Guidelines calculation.

The Guidelines take account of the nature and specific characteristics of the offense, providing a higher range for more serious offenses. For example, if the offense resulted in a large monetary loss or involved a large number of victims, the Guidelines will recommend a more severe sentence. The same is true if the defendant abused a position of trust or was a leader of the criminal activity. But the Guidelines will recommend a lower sentence if the defendant has accepted responsibility for his actions, or otherwise played a minor role in the offense conduct. The Guidelines also factor in the defendant’s prior criminal history and recommend a more severe sentence for repeat offenders.^[20]

One factor that may weigh heavily in a judge’s decision to order a sentence more lenient than that recommend by the Guidelines is a defendant’s assistance in the criminal investigation of another. This can factor into a sentence in a number of ways.

First, even before a defendant appears before a judge, prosecutors may agree, as part of a plea agreement, to recommend a lower sentence or to charge a less serious crime in exchange for the defendant’s cooperation. Second, the Guidelines allow prosecutors to make a motion for a lower Guidelines range – known as a “downward departure” – if the defendant has provided “substantial assistance” in the investigation or prosecution of someone else. Finally, even if the government refuses to make a motion for a downward departure, a defendant may nonetheless argue to the judge

²⁰ Joshua Dressler, *Cases and Materials on Criminal Law* (American Casebook Series), 8th ed. (Eagan: West Publishing, 2003).

that he has cooperated with the government and, therefore, should receive a lower sentence.^[21]

A judge may also weigh certain intangible factors. For example, a defendant who pleads guilty on the eve of trial may technically receive credit for accepting responsibility for his actions, but a sentencing judge may give this consideration less weight than if the defendant had acknowledged from the outset that his actions were criminal.

Likewise, a judge may take account of a defendant's good deeds in other areas of his life, considering whether the crime is an aberration in the record of an otherwise well-intentioned individual or whether the crime is just one chapter in a life filled with deceit. A defendant will often submit letters from people he has known at various points in his life to paint a favorable picture.

3 | Conclusions and Recommendations

The mitigating and aggravating circumstances are additional facts to the constituent or qualifying elements of the criminal offense. Therefore, they do not affect the existence of the criminal offense, but have a direct impact on the type and extent of the criminal penalty against the perpetrator of the criminal offense. Because of this influence, they constitute evidence in the criminal process and must be expressly mentioned by the prosecutor in the indictment and in the request for sending the case to trial. They must be communicated to the defendant in any case in order to guarantee an effective defense, in accordance with the principle of due process of law.

The court cannot identify, verify and evaluate mainly the aggravating circumstances if they are not expressly mentioned in the indictment and if there is no request of the prosecutor for their evaluation. Their identification, verification and evaluation mainly by the court would contradict to the principle of not worsening the defendant's position. Therefore, these circumstances cannot be mentioned by the court in the reasoning of the decision as factors that influence the type and extent of the punishment.

²¹ Joshua Kaplan, Robert Weisberg, Guyora Binder, *Criminal Law: Cases and Materials (Aspen Casebook)*, 9th ed. (Boston: Aspen Publishing, 2021).

Regarding the assessment of mitigating and aggravating circumstances in relation to the type and measure of punishment, we recommend that for each figure of the criminal offense a method be created for the uniform assessment of the weight of each mitigating and aggravating circumstance. Specifically, we recommend issuing an orientation manual for courts and prosecutors' offices, where a unified scoring system is defined for each type of criminal offense, where each circumstance has a predetermined point value in relation to the type and extent of punishment. Creating a scoring system for each mitigating and aggravating circumstance would avoid arbitrariness in the assessment of these circumstances and their misuse in giving harsher or milder punishments.

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