

Imposition of Punitive Order in Criminal Procedure-in Context of Kosovo

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Abstract

Punitive order represents one of the possibilities of criminal case resolution without having the need to conduct the main trial. In Kosovo this instrument for the first time has been provided by the Criminal Procedure Code of 2103. As such shall be applicable in cases of commission of light criminal offences punishable by fine or imprisonment up to three years when evidences attached to criminal report prove undoubtedly the fact of commission of criminal offence and its relation to the accused person and when the request of state prosecutor for imposition of punitive order has been addressed through the filed indictment to the competent court. Advantages of application of this instrument are numerous and diverse, but mostly lie in terms of increasing criminal procedural effectiveness. This instrument of criminal case resolution in Kosovo Basic Courts practice results to have been applicable in very rare cases. Causes of this condition should be sought in the lack of experiences of judges working in Kosovo courts concerning its application, but also in the lack of their proper professionalism.

Keywords: Court, prosecution, case, order, punishment.

Introduction

Punitive order as an instrument of criminal case resolution outside of the main trial has a great criminal-legal, criminal-procedural and criminal policy importance. Through this instrument Kosovo legislator aimed to increase the effectiveness of the courts work in resolution of court cases. This instrument shall be used by courts only in cases of commission of light criminal offences punishable by fine or imprisonment up to three years when exist relevant evidences proving undoubtedly the existence of commission of criminal offence and its relation to the accused person and when the request of state prosecutor for imposition of punitive order has been addressed through the filed indictment to the competent court.

Competent to impose the punitive order is the single trial judge which adjudicates within General Department of the Basic Court. The importance of this instrument of criminal case resolution consists in the fact through this instrument is affected in reducing criminal pending cases in court, there shall be a cut of public money expenses dedicates to the courts work, the society is protected from commission of criminal offences and is influenced in education of perpetrators by sense of repenting and apology, and victims in order to raise the level of cooperation with criminal procedure bodies. As it shall be seen below Kosovo courts despite the advantages they have during the period of time 2013-2015 have applied relatively rare this instrument of criminal case resolution. Observing in this context, is required a concrete engagement of institutional respective spectrum to find motivation ways for judges in order to apply this legal instrument in the future more often in their judicial practice.

1. The meaning of punitive order and its characteristics

Punitive order is a criminal-procedural instrument through which is made possible the resolution of a criminal case without having the need to conduct the main trial.^{*} In these cases the resolution of criminal case is made by judicial verdict and by respecting entirely the rights of defendants guaranteed by law. "In Kosovo this instrument of criminal case resolution for the first time has been provided by the Criminal Procedure Code of the Republic of Kosovo, which entered into force on January 1, 2013."[†] The goal of this instrument is to accelerate the resolution of a criminal case which is object of trial, by imposition of certain criminal sanctions to the perpetrator of light criminal offences without having the need to conduct the main trial.[‡]

As any other criminal-procedural instrument also punitive order has its characteristics. Consequently, as characteristics of punitive order shall be considered:

1. The resolution of criminal offence by judgment without having the need to conduct the main trial. As it results, this criminal-procedural instrument represents an exemption from principal rules which obliges the court to resolve a criminal offence through conducting the main trial. In fact, this is the only instrument, excluding decision-making process during first review of indictment,[§] which makes it possible criminal case resolution outside of the main trial through judgment. As it results, Criminal Procedure Code of the Republic of Kosovo recognizes also other possibilities of criminal case resolution outside of the main trial, such is the case by procedure of mediation, suspension of procedure etc., but through this the resolution of a criminal case is made by a special verdict.

2. The imposition of judgment supported by relevant and reliable evidences on basis of which is filed a criminal report. Consequently, the punitive order shall be imposed by supporting in evidences proceeded to state prosecution and court through a criminal report, but which undoubtedly prove the existence of a criminal offence and its relation to the accused person.

3. Non-processing of evidences according to several basic criminal procedural principles. In fact, in procedure for imposition of punitive order, the review and evaluation of evidences on basis of which shall be imposed a respective criminal sanction is not made based on concepts of criminal procedural conceptual principles upon which is applicable the main trial, such is the direct, oral and contradictory principle. But this does not mean that such evidences become subject to a superficial evaluation.

^{*} Hajdari Azem, Criminal Procedure Law, Special Part, Prishtina, 2013, pg. 147.

[†] See: Code No. 04/L – 123 (articles 493 - 497).

[‡] Hajdari Azem, Commentary, Criminal Procedure Code, Prishtina, 2016, pg. 1129.

[§] See more: Hajdari Azem, Judicial practice skills, Prishtina, 2013, pg. 111- 119.

4. The possibility of attacking the punitive order by a special legal remedy (objection) which does not produce the effects of the institute *reformation in peius*. This means that to court is recognized the right to impose another measure from the one proposed by state prosecutor, despite the fact in this way it may come to the deterioration of position of the accused in criminal proceedings.

2. Procedure on imposition of punitive order

Procedure on imposition of punitive order shall be initiated by competent state prosecutor. He shall initiate a such procedure only when ascertains a fulfillment of legal requirements (for a criminal offence which is punishable by fine or imprisonment up to three years) and when it considers that evidences attached to the criminal report prove undoubtedly the fact of commission of criminal offence^{**} and its relation to the accused person. In the concrete case, a state prosecutor by proceeding the indictment to the competent court requires from court to impose a punitive order to the accused person, respectively the punishment or respective measure without having the need to conduct the main trial.

In his request for imposition of punitive order the state prosecutor may request the imposition of one or more punishments or following measures: punishment by fine, prohibition of driving, publication of judgment, confiscation of assets, judicial admonition, or confiscation of material benefit acquired by a criminal offence.^{††}

After arrival of indictment with included request on imposition of punitive order to the accused person is a single trial judge of the competent court to which is given the possibility to impose punitive order. A single trial judge in a procedure for imposition of punitive order is not obliged to the request of state prosecutor concerning the punishment or proposed measure by state prosecutor. He has a complete autonomy in its decision. Thus, a single trial judge may impose a proposed measure by state prosecutor, another measure of what the prosecutor has proposed, only a punishment or a possible measure or more of them regardless of the proposal made by state prosecutor. What kind of measure shall impose a single trial judge in a procedure for imposition of punitive order depends on circumstances characterizing the case and evaluation of those circumstances made by the competent judge.^{‡‡}

The single trial judge shall dismiss the request on imposition of punitive order when:

1. Concluded that for such criminal offence cannot be filed such a request and
2. A state prosecutor requires the imposition of punishment which under the law is not allowed.

When a single trial judge considers that data in indictment does not offer a sufficient base for imposition of punitive order, or from such data it may be expected the imposition of another punishment from what proposed a state prosecutor after acceptance of indictment sets the main trial and invites persons that should participate in the main trial.

When a single trial judge resolves the criminal case through punitive order, he shall include in judgment for imposition of such order instruction for legal remedy addressing the possibility to propose new evidences,^{§§} as well as the notification after expiration of deadline for objection, when it is not exercised,

^{**} See more: Hajdari Azem, Criminal procedure law, General Part, Prishtina, 2014, pg. 205 – 214.

^{††} Sahiti Ejup and Murati Rexhep, Criminal procedure law, Prishtina, 2013, pg. 443.

^{‡‡} Hajdari Azem, Commentary, Code, . . . , pg. 1133.

^{§§} A legal remedy (objection) shall be filed by the defendant and its defense counsel within eight days of receipt of the judgment on imposition of punitive order. The legislator in the interest of procedural efficiency and other pragmatic reasons rightly has denied the possibility of filing an objection against this judgment to other parties.

the punitive order becomes final. When a judgment becomes final than shall be opened the paths for execution of imposed punishment, respectively imposed measure.^{***}

3. Conditions on imposition of punitive order

For imposition of punitive order must be fulfilled certain conditions. Consequently, as such conditions shall be considered:

1. A small importance of the committed criminal offence. In order for a state prosecutor to be able to impose propose the imposition of punitive order, according to paragraph 1 of the article 493 of the Code of Criminal Procedure goals of Republic of Kosovo is required to have been committed a criminal offence for which a legislator has provided a punishment by fine or imprisonment up to three years.
2. The existence of relevant evidences proving existence of concrete criminal offence and its relation to the accused person. Such evidences is required to have been proceeded to state prosecutor through criminal report and then they should be attached to the indictment proceeded to competent court. In this case is about reliable evidences through which can be seen the commission of criminal offence circumstances and the authorship of the accused person related to that.
3. Evaluation of evidences. It is a strict rule that a single judge trial prior to decide on request for imposition of punitive order shall make a detailed assessment of the evidence on the basis of which the state prosecutor made the request to impose such order.
4. Inclusion of request for punitive order in indictment. In order to impose punitive order is necessary for indictment to include such a request. This means to a single trial judge is not granted the right *ex officio* (without proposal of state prosecutor) to impose a punitive order, and regardless of the fact of fulfillment of legal requirements for the possibility of criminal case resolution through punitive order.

4. Authority for imposition of punitive order

The competent authority for imposition of punitive order in the Republic of Kosovo belongs to the competent court, respectively to a single trial judge.^{†††} This is a competent judge to which is a case concerning which the competent state prosecutor through indictment proceeded in court has proposed the imposition of punitive order.^{†††}

When it comes to decision-making regarding the request on imposition of punitive order a single trial judge shall consider these circumstances: the gravity and circumstances of commission of criminal offence, the criminal history of the accused person, the motives of commission of criminal offence, the attitude of convicted person towards victim of crime, physical, psychological and psychiatric condition of the defendant, its social and family condition as well as legal requirements on basis of which has been addressed the issue of imposition of punitive order.

^{***} Hajdari Azem, Commentary, Code,...., pg. 1133.

^{†††} According to the Law on Courts (Law no. 03 / L-199 article 11) a single trial judge has the authority to judge criminal cases for which is competent the General Department of the Basic Court.

^{†††} Sahiti Ejup, Murati Rexhep, Elshani Xhevdet, Criminal Procedure Code of the Republic of Kosovo, Commentary, Prishtina, 2013, pg. 1165.

During the review of request on imposition of punitive order, as abovementioned, a single trial judge shall take these decisions: to approve the request and to impose the punitive order^{§§§} or to dismiss the request on imposition of punitive order.^{****}

When a single trial judge dismisses the request on imposition of punitive order, he sets the date of main trial concerning the indictment of state prosecutor and invites the defendant and its defense counsel, state prosecutor, injured party, legal and authorized representatives, witnesses, experts and interpreter. In the main trial, a single trial judge gives to the defendant necessary instructions and warnings as well as continues by reading the indictment and undertakes other procedural actions, until making a judicial decision.^{††††}

5. Importance of criminal case resolution through punitive order

Criminal case resolution through punitive order has a multiple importance. Consequently, this instrument manifests stretch of interest in criminal law procedure^{††††} as well as in criminal law^{§§§§} and criminal policy.^{*****} As a matter of fact the importance of criminal case resolution through punitive order has to deal with the fact through this instrument:

1. Is affected in reducing the number of criminal cases proceeded in courts. Addresses of criminal case resolution through punitive order are simple in comparison to cases when they become subject of regular treatment in criminal procedure, respectively by proceeding them in the main trial. In these cases there shall be a cut of their timelines of their resolution. This approach in conditions when in Kosovo courts wait for resolution 440832 cases, of which nearly the half of them are criminal cases has a great criminal policy importance.^{†††††}
2. There shall be cut public money expenses which in terms of conducting regular criminal procedures (standards) would be spent for witnesses, experts, other lump sum expenses, which is estimated of a particular importance due to the fact Kosovo continues to have a very limited budget.^{†††††}
3. Society is protected from re-commission of criminal offences, based on the fact the accused persons for commission of criminal offences in relation to which has been applied the procedure for

^{§§§} Such decision is made by a single trial judge when considers that concerning a concrete case has been fulfilled all conditions on imposition of punitive order. It is meant the fulfillment of legal requirements and other circumstances concerning criminal offence and its perpetrators.

^{****} Such decision is made by a single trial judge when a) concludes that for such a criminal offence it cannot be submitted such request, b) when state prosecutor requires the imposition of punishment which under the law is not permitted, and c) when a judge finds that data included in indictment does not offer a sufficient basis for imposition of punitive order. In these cases a single trial judge sets the main trial and proceeds with the case upon rules applicable to this stage of the criminal proceedings.

^{††††} Hajdari Azem, Criminal procedure law, Special Part, ..., pg. 149.

^{††††} Criminal Procedure Code except punitive order has provided also three other possibilities of criminal case resolution outside of the main trial. They are: temporary suspension of proceedings, mediation and decision-making during the first review of the indictment.

^{§§§§} See more: Latifi Vesel, Elezi Ismet, Hysi Vasilika, Combating Crime Policy, Prishtina, 2012 pg. 257 - 259.

^{*****} See more: Milan Milutinovic, Criminal Policy, Prishtina, 1984, pg. 321-323.

^{†††††} Court Statistics report, Yearbook 2015, Kosovo Judicial Council, Prishtina, 2016. See link: <http://www.gjyqesori-rks.org/sq/kjc/report/list/1>.

^{†††††} This budget in recent years, although it has increased, did not exceed more than half a billion dollars per year.

imposition of punitive order in practice in very rare cases decide to commit criminal offences, in comparison to persons against whom were applied regular criminal procedure, despite imposed judgments by courts. §§§§§

4. Perpetrators of criminal offences shall be motivated to educate with the feeling of repent for the committed criminal offence, apology and of compensation of damage for victims of crime. This is dictated by the fact that procedure for imposition of punitive order can be implemented in practice only if the accused person is repented for the committed criminal offence, apologizes to the victim of crime and shows willingness to compensate the inflicted damage. Such an acting approach has been very effective in elimination of vengeance feeling, which concerning several criminal offences, such is the case with criminal offences against life and body, those against sexual integrity., continues to be present to a considerable category of victims of these crimes.

5. Victims of crimes are motivated in coordination with criminal procedure bodies to increase the level of communication with perpetrators of criminal offences in order to realize easier the compensation of damage inflicted by criminal offence. In case of application of procedure for imposition of punitive order it comes faster, easier and in a manner that is satisfying for criminal-procedural parties to realization of legal-property claims of victims of crime. *****

6. Several data on imposition of punitive order

In order to be able to come to conclusions and to address concrete as well as useful recommendation for respective state institutions and society in general by using modest results of this scientific paper has been necessary to examine and study the work of state prosecution and courts concerning the application of instruments of criminal case resolution outside of the main trial in Kosovo for the period of time including the last three years (2013-2105). We have been focused in this short period of three years based on the fact this instrument of criminal case resolution has been included in domestic legislation only by Criminal Procedure Code of the Republic of Kosovo which entered into force on January 1, 2013. Presentation of courts work concerning this instrument was not easy at all. This due to the fact regarding the work of these institutions during the researching period there are no published data. Such data are not published within reports which regarding court work has been published by Kosovo Judicial Council. Despite this fact, in the following treatments, presentation of cases of criminal case resolution through imposition of punitive order shall be based on data obtained from criminal registers of four of the seven basic courts which currently act in the territory of Kosovo, and the Basic Court of Prishtina, Gjilan, Mitrovica, Peja. †††††

Below, in a special table shall be presented the data concerning number of criminal offences reviewed and resolved in the procedure for imposition of punitive order by Basic Court of Prishtina, Gjilan, Mitrovica and Peja for the period of time 2013-2015.

Years	Requests of state prosecutor for imposition of punitive order	Approved requests-imposition of punitive orders	Dismissed requests
2013 – 2015	611	499	112

§§§§§ Hjadari Azem, Criminal Procedure, Commentary, Prishtina, 2010, pg. 591.

***** Compare: Hjadari Azem, Conditional Release of Convicted Persons in Kosovo, International Journal of Research in Humanities and Social Studies, Volume 3, Issue 7, July 2016, PP 32-39, fq.34.

††††† See: Criminal Records of Basic Court of Prishtina, Gjilan, Mitrovica and Peja for the period of time 2013-2015.

According to these data during the period of time 2013-2015 in Basic Court of Prishtina, Gjilan, Mitrovica and Peja has been received 611 indictments with proposal of imposition of punitive order. From these submitted proposals in 499 cases above-mentioned courts have accepted requests of Basic Prosecutions for accused persons and have imposed a punitive order, whereas in 112 cases courts rejected requests for imposition of punitive order. This type of decision-making courts have applied in all cases when they have considered that there is no fulfillment of legal requirements for imposition of punitive order, and in some cases fewer (13) when they concluded that proposed measure by state prosecutor was not allowed under applicable law. Data used prove that Basic Court of Prishtina has imposed the biggest number of judgments, by means of which has imposed the punitive order (291), whereas Basic Court of Mitrovica has applied this instrument of criminal case resolution only in 389 cases. This fact indicates that Kosovo courts prefer more the resolution of criminal case through application of the main trial, as a traditional way of their resolution. This occurs due to the fact that criminal procedure bodies during resolution of criminal cases prefer confrontation of criminal-procedural parties with evidences and arguments before making a decision concerning criminal case, a circumstance that comes to expression in the main trial. Bearing in mind the advantages of this instrument of criminal case resolution, I consider state courts should apply it in the future more often. As it results, a number of criminal cases, although could have been resolved easily through punitive order.

For this, probably influenced the fact of lack of experience, but also the lack of proper level of judges professionalism. Therefore, I consider that courts in the future should organize relevant trainings which increase the level of professionalism in the work of judges towards common application of these instruments, so in this way state and criminal procedural parties easier manifest their interests in criminal proceedings.

Conclusion

Modest results of this scientific paper led me to these conclusions:

1. Punitive order is an instrument of addressing criminal case outside of the main trial which makes it possible the resolution of criminal case without having the need to become subject of treatment within main trial. In these cases is made possible evident protection of defendants from their stigmatization, which otherwise is evident when the criminal case is resolved through the main trial.
2. Code of Criminal Procedure of the Republic of Kosovo has provided addressing and resolving a criminal case through punitive order for cases of criminal offences punishable by fine or imprisonment up to three years for which there are reliable evidences through which is proven the existence of criminal offence and guilt of defendant, as well as for this there is an explicit request of state prosecutor included in his indictment submitted to the competent court.
3. For imposition of punitive order is competent a single trial judge which operates in General Department of Basic Court. Punitive order is imposed by judgment and only when it is ascertained the fulfillment of respective legal and factual criteria. This means a single trial judge has the possibility to reject the request of state prosecutor for imposition of punitive order. In these cases a single trial judge proceeds with resolution of such case by setting the main trial. Against judgment by means of which has been imposed the punitive order shall be filed an objection by defendant and its defense counsel. Objection is submitted to reviewing panel of judges operating at the same court.
4. Resolution of criminal case through punitive order manifests important effects of state character (public), group effects and for criminal-procedural parties itself, especially to the defendant and the victim of crime. Through this instrument is affected in reducing the number of pending court cases, there shall be a cut of public money expenses, increase the level of social responsibility and elimination of cases of vigilantism.

5. During the research of Basic Court of Prishtina, Gjilan, Mitrovica and Peja has been noticed that during the period of time 2013-2015 they applied this instrument of criminal case resolution in very rare cases. According to used data these courts during this period of time have resolved 499 criminal cases through application of this instrument.

6. Kosovo courts, by bearing in mind the great importance has procedure for imposition of punitive order, is required in the future to apply more often this instrument of criminal case resolution. In these terms, is required for Kosovo judges to be developed respective trainings programs that would motivate them towards common application of this instrument.

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