Some Issues for Sentencing

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'...To do true justice makes even a dry tree green'....
Shota Rustaveli
/translation by Lyn Coffin/

In this quote by Shota Rustaveli it is evident that there are two types of justice: just and unjust. We do not aim here to make a fundamental discussion of the essence and significance of just or unjust justice or justice in general. This is not the topic of our analysis/ research at this moment.

However, it is also noteworthy that the meaning of these words by Shota Rustveli is actual even today. To do justice ('…To do true justice...') is the most important issue in the establishment and development process of the legal state. To do true justice must be, is and will be an eternal and important issue of law, including criminal law.

On each stage of state and society development, doing true justice has always risen great interest.

Necessity of legal development is not arguable and does not need proving. The higher is the tradition of legal culture of the state, the better it protects the rights of citizens. Just justice, doing true justice raises the citizen's trust in state authority and especially in the court authority. Just justice is the prerequisite of the respectful attitude towards the state bodies and state in general.

On the contrary, unjust justice makes citizens lose the trust in governmental bodies and causes disrespect and seek for alternative ways of achieving justice.

Unjust justice can be caused by useless, bad laws, as well as with their application.

For just justice it is necessary to introduce 'good' laws as well as to apply and execute them in a just manner. Only correct and just application of the law is not enough, if the law itself is extraordinary strict and unjust.

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The most repressive branch of the law is criminal law. Therefore, the mistake made in this branch or purposeful action can have the heaviest and unjust outcomes.

The significant condition for just justice is imposing corresponding, adequate, proportionate legal responsibility for law violation.

In criminal law, 'doing true justice' means appointing justpunishment to the offender. It is impossible without the application of proportionality. For 'doing true justice', it is compulsory to punish the offender proportionately, corresponding the crime committed. Consequently, it is necessary to adjust the proportionate, adequate punishment to the crime. Legal authority should observe correspondence - proportionality, considering all given circumstances.

Therefore, proportionality issue (principles) is an important factor for legislative, as well as sentencing stage. Ascertaining crime structure and imposing adequate and proportionate penalty is the function of the legislative body. Appointing the proportionate, adequate sentence to the offender is the main task of the justice. It can be claimed that observance of proportionality principles at the stage of sentencing is more vital for 'doing true justice' than on the legislative stage. However, as we have already mentioned above, its significance is also undisputable.

A defendant and generally citizens, observance of the proportionality principle by the court, imposing just penalty on the offender with its application, feel and appreciate much more directly, than defining the proportionate punishment by the legislation. The reason for this can also be the fact that the courtappoints the punishment to them and not the legislative body. They have 'nothing to do with' the parliament, their fate is directly linked to court resolution (verdict).

Therefore, the feeling of justice or injustice is more directly associated with court activities. It has its grounds. Legal state means the existence of 'judicial Law' and its further development. In such circumstances, the court, within its competence can improve even useless, strict laws and make a just verdict. However, in case of incompetency of judge, court, or lack of independence, even good laws can't help execution of true justice, with observance of proportionality principle.

As far as justice is carried out through the court, this body is most responsible for proportionality principle while appointing the punishment. It will support just sentencing, 'doing true justice', defining adequate, proportionate sentence for the committed crime, appearance of the feeling of justice in the citizens, and even in the defendant, as well as the rise of the judicial authority and strengthening of its trust. Finally, it will also promote

the deserved rise of judicial authority in building and development of the legal state.

I consider that the observance of the proportionality principle and its application in jurisdiction indeed have such a great practical significance.

While sentencing, in order to better understand the significance of the proportionality principles, it is compulsory to discuss the issue of appointing the adequate penalty to the crime committed. From this point of view, the theory of free action space, stepwise theory and the theory of appointment criminal conduct proportionate penalty[1].

Proportionate punishment issue/topic is well processed in German juridical literature. We cannot say the same on Georgian criminal law. In short, we can claim that the theory of free action space is the combination of blame based prevention oriented theories of appointing the punishment. This theory gives to the judge big enough free action space.[2] Stepwise theory marks off the blame and prevention.[3] According to this theory, while imposing the punishment, on the first stage wrongness is considered, and the blame comes on the following stage.

According to the theory of crime, proportionate punishment, the proportionality of crime exists under the umbrella of blame principle. The punishment is defined in proportion to the crime based on the significant circumstances important to the blame[4]. It is also noteworthy that the above-mentioned theory is oriented towards the wrongness of the action.[5] We should support the opinion, according to which the punishment should be proportionate to the criminal action and disproportionality is impermissible.[6]

While appointing the punishment following the principle of proportionality, we should consider the frugality of the punishment and the prevention of the possible crime.

The main essence of the proportionality is that the size of the punishment depends on the

1) This issue is quite well analysed by T. Tskitishvili based on German literature. See T. Tskitishvili, 'the proportionality of punishment.' In the book: 'The Criminal Law legislation liberalization tendencies in Georgia, Tbilisi, 2016, p.499–662;

2) This issue is well analysed by Hörnle, see Hörnle, T., Tatproportionale Strafzumessung, Berlin, 1999;

3) This issue is interestingly discussed in the manual of 'General part of Criminal law' by co-authorship of H-H. Jescheck and T. Weigend as well as the papers by B.D. Mier and etc. see: Jescheck/Weigend., Lehrbuch des Strafrechts, AT, 5.Aufl., 1996, as well as Meier B-D., Strafrechtliche Sanktionen, 4. Aufl., Berlin, Heidelberg, 2015;

4) Streng F, Strafrechtliche Sanktionen, Die Strafzumessung und ihre Grundlagen, 3. Aufl., Stuttgart, 2012, s.314;

5) ibid, p.317;

6) T. Tskvitishvili, the above mentioned work, p.604;

crime, more precisely, on all signs of the crime. Exactly the system of the crime, signs together with the goals of the punishment is some kind of landmark for the judge in defining the punishment.

While appointing the punishment, not only the peculiarity of the criminal offense should be taken into the consideration (mainly its commitment, aggravation or lightening), but the blame and punishment goal as well.

After discussing the works by German authors[7], T.Tskitishvili says that 'the crucial point for the legislation is wrongness and its heaviness and as far as the blame is personal wrongness, the legislator can't assess the personal wrongness or blame of each defendant in advance. Therefore, this function is transferred to the judge.[8]

Indeed, the punishment foreseen by the criminal code proportionate to the crime defines the equal, same sanction for any possible misconduct and the legislator defines it for any potential criminal considering general prevention principles (However, sometimes it is questionable whether it is like that or not). However, the punishment defined for any potential criminal will no longer be proportionate without considering the personality and the guilt of the concrete offender. While defining even proportionate punishment foreseen by the law, it is crucially important to take into the consideration the defendant's guilt. Different wrongdoers for one the same crime can be judged in different way. These circumstances must be necessarily taken into the consideration on the stage of recognition of the wrongdoing as a blame. This is the essential condition from the side of the court to appoint the proportionate punishment to the crime committed by the defendant. As it is mentioned in the 1st part of the paragraph 53 of the Criminal Code, 'the court will appoint just punishment for the offender according to the corresponding paragraph of the private part of this code as well as according to the statements of the general part of the same code. More severe punishment can be defined when less severe one can't support the realization of the punishment goal.'

Thus, in each case for the same misconducts, the punishment considered proportionate according to the same paragraph of the criminal law, needs further ascertaining of the proportionality to the crime even within the limits set by the certain paragraph of the criminal law. This is impossible without the following the individualism principle. Every criminal according to the level of crime committed, should be sentenced adequate, proportionate punishment.

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7) Here we mainly mean Hörnle, T., Hassemer W., Puppe I. etc.

8) T. Tskitishvili, Punishment proportionality in the book: The Criminal Law legislation liberalization tendencies in Georgia, Tbilisi, 2016, p.611;

As the 3rd part of the 53rd paragraph of the Criminal Code stipulates, 'While appointing the punishment, the court takes in the account the aggravating and lightening circumstances of the crime committed by the criminal. In particular, motivation and the goal of the crime, the will of wrongdoing expressed in misconduct. The character and level of responsibility violation, the form of realization of the misconduct, its way and outcomes, defendant's past life, personal and financial circumstances, behaviour after the misconduct and especially his/her striving to compensate the damage and to make up with the aggrieved party'.

If we properly analyse the requirements of this paragraph of the Criminal Code, we will see that court, while defining the punishment should consider such circumstances that promote injustice, however, some of them have personal character. After proper analysis of double prohibition principle, T. Tskitishvili makes correct notice that 'following the principle of prohibition of the double evaluation is very important for defining the punishment. The judge, in order to define proportionate punishment to the defendant, should take into the account the requirements of the above-mentioned principle. Otherwise, disproportionality of the appointed punishment to the crime is inevitable.[9)]

Therefore, the content signs of the misconduct, even personal ones, which promote guiltiness and influenced the content ascertaining, should not be considered for the second time while condemning and appointing the punishment. These are the signs that the legislator can take into the account and according to which he/she can define the proportionate punishment.

As for the signs that are impossible to be taken into the account at legislative level, they should be considered in the process of defining the punishment and should built up the basis for proportionate punishment on the stage of due process.

Therefore, for example, from the signs of the contents (of wrongness), such signs as legal kindness, conduct, weapon, goal etc. – mainly objective signs, as well as some subjective signs must be unambiguously treated with double prohibition principles., when it supports misconduct.

For example, mercenariness, when it ascertains/changes contents, must not be considered at the stage of imposing the punishment for defining the proportionate punishment to the crime (paragraph 109, Criminal Code of Georgia).

9) T. Tskitishvili, Punishment proportionality in the book: The Criminal Law legislation liberalization tendencies in Georgia, Tbilisi, 2016, p.631;

However, there are such circumstances, which can't be defines by the legislator in advance. These circumstances necessarily are to be ascertained and taken into the account for appointing the proportionate punishment. For instance, the legislator can't define beforehand who will commit the crime, stealth. The legislation foresees certain punishment for such crime that is considered proportionate. However, for appointment of proportionate punishment, the criminal's personality should be taken into the account. In order to define a proportionate punishment, we should necessarily consider, as Criminal Code of Georgia stipulates - 'Past life of the defendant, personal and financial circumstances, behaviour after the misconduct and especially his/her striving to compensate the damage, make up with the aggrieved party' (paragraph 53, part III).

It is true that the legislator sets the equal, proportionate punishment for any potential offender; however, the court can't do the same. **Proportionality at the stage of imposing the punishment is personal.** This implies the consideration of offender's personality and guilt. For example, the robbery was committed by **A** and **B**.**A** committed the misconduct for the first time. He/she has difficult financial condition, needed money to buy the medicine. He regrets his action and tries to compensate for damage. **B** has good financial position; his is well off, but wanted/needed more money to play in the casino. The legislator cannot foresee beforehand who will commit the crime, but the court should consider all circumstances in order to impose proportionate punishment. It is true that the motivation is the personal sign of the action, but when it changes/ascertains contents, we should ascertain what made the offender make a decision to commit the crime, if we want to appoint the crime proportionate to punishment. However, the legislation should admit such possibility as well.

There are certain signs of contents that are foreseen by the legislative construction. They should be ascertained in order to give an action right legal qualification. They make it possible to ascertain or/and change contents (aggravating or lightening). According to the signs described by the legislation, the Law foresees the proportionate punishment.

However, there are such signs of contents that do not influence the contents stipulated in the law, but their consideration is reasonable and compulsory for appointing just and proportionate punishment.

To the signs of contents described below belongs time - the facultative sign for objective contents of the action. Sometimes it has essential significance for ascertaining action contents. Paragraph 388, part I of the Criminal Code imposes criminal responsibility on military servant for wilful leaving of military unit or other location. According to the first part of the paragraph 388, 'The act of wilful leaving of the military unit or work location by the military servant as well as being late for work or military unit without excusable

reasons for more than 48 hours, but not more than 10 days and night is punishable by the law.' Part three of the same paragraph foresees the duration of more than 10 days and nights, but a month at most and the part 4 – more than 1month time limit.

Therefore, here the time limit ascertains or changes the contents. However, the contents foreseen in the 4th part does not change if the action has been committed with the duration of more than 1 month, even during several years. Here time is not important from this point of view. For this misconduct, the law foresees imprisonment up to 5 years as a proportionate punishment. This is the limits of the punishment to be appointed to those, who left the military unit for more than one month or the other work location and the same punishment is reserved to those who did the same but with the duration of more than five years. Appointing proportionate and just punishment means the first offender should be more slightly punished than the second one, though they have committed the misconduct of equal heaviness. The same is with continuing conduct. For example, the 1st part of the paragraph on the desertion foresees the imprisonment from 3to 7 years. The legislator can't predict who and how long will be the deserter – for three months or for 3 years. The court, while appointing the punishment should necessarily consider the situation in order to assign a criminal the proportionate and just punishment.

The same can be said about the crime scene. Sometimes crime scene ascertains/changes the contents, though sometimes it does not have any importance for ascertaining and, correspondingly, defining the punishment. However, it would be just and proportionate to consider it while assigning the punishment.

Thus, for example, the crime scene does not have any significance for ascertaining the marking off the main and special contents of the robbery. Similarly, it does not have any significance for the crime of robbery. However, probably it would be just to appoint different (proportionate) punishment to the criminal who committed the murder in the street and who committed the homicide in his/her own flat or work place. Certainly, if other circumstances do not exist and they do not change the contents.

It is also possible to discuss other signs of crime as well but time and place analysis are enough to make a conclusion that if some sign of the contents is foreseen by the legislative construction, it ascertains or changes the contents, then its significance for the proportionality of the punishment is defined by the legislation. Therefore, their consideration while appointing the punishment would be the violation of the principle of double evaluation prohibition. Therefore, they should be considered while ascertaining the contents and not while defining the punishment. ***(Proportionality on the level of legislation).***

If some sign of the misconduct contents do not change contents, than it should be considered together with the guilt by the court in order to assign just and proportionate punishment. ***(Proportionality on the court level).***

As T.Tskitihsvili justly mentions: 'the punishment should not only be proportionate to the misconduct, but it also must be rational and proportionate in the broad sense of the word.[10)]

Her discussions on the punishment proportionality in the broad sense of the word is also noteworthy. 'Punishment proportionality in the broad sense of the word includes not only the proportionality of the punishment to the heaviness of the crime committed and the guilt level, but it also includes other factors. We should distinguish between the crime proportionate punishment and the proportionate punishment in the broad sense of the word that includes the rationality of the punishment. And the rationality of the punishment indicates on social function of the punishment.'[11)]

Thus, the proportionate punishment in the broad sense of the word covers a lot more factors than proportionality on legislative and court levels. Here we should also consider the proportionality on the stage of punishment execution. The issue of economic punishment as well as pragmatic and criminal law approach should also be considered. How appropriate is to finally execute even proportionately appointed punishment? Criminal Law acknowledges the institute of release from the punishment. In proper conditions, it is possible to release the criminal from the assigned punishment, which is considered proportionate by the legislation, and, at the same time, is appointed as the proportionate punishment by the court.

Now we are not going to discuss different grounds for release from punishment. However, we think that proportionality should be kept here as well.
If on the legislative level, proportionality is meant for unknown, indefinite person, on the level of appointing the punishment, it is individual. As for the issue of proportionality of release from punishment, in certain cases, it is individual; however, sometimes it implies indefinite circle of the people.

I would like to touch upon the issue of proportionality in relation with pardoning.
It is interesting to see how the paragraph on pardoning is applied in relation with proportionality. According to the paragraph 78, part 2 of Criminal Code of Georgia: 'The

10) ibid, p.648;
11) T. Tskitishvili, Punishment proportionality in the book: The Criminal Law legislation liberalization tendencies in Georgia, Tbilisi, 2016, p.647;

condemned person can be released with the pardon act from serving the rest of the punishment and the punishment appointed to him/her can be commuted – decreased or replaced with lighter one'.

Is not this statement against proportionality principle?

Due to the political reasons or other circumstances, the person can be thoroughly released from the punishment with pardon act. This is when another person condemned for other light crime, who was not pardoned, has to serve the punishment to the end.

If the court appointed to the offender adequate, proportionate, just punishment, should it be possible to release him/her from it with pardon act? How fair is it?

The grounds for pardoning can be various (many of them proved and just, but sometimes groundless), but not proportionality. In such cases, the offender is not punished adequately, in proportion to the crime committed as far as he was pardoned.

We suggest that this issue needs contemplation and further study. Can it be the form of interfering in justice (more exactly, in execution of justice) for some political reasons?

Proportionality should be observed on legislative as well as on judicial procedure and penal level. **How true The Romans say: 'Let justice be done though the heavens fall *(Fiat justitia ruat cælum (Latin)"* and if it so, today, in the 21st century nobody should stand above the law. Nobody should have the opportunity (even foreseen by the law) to individually cancel or change the verdict or sentence appointed by the court.**

From proportionality point of view, the situation is different with amnesty, because amnesty is usually announced towards indefinite persons and pardon is granted to the individuals, to definite persons, who have already been condemned by the court.

If the court appointed to the condemned person inadequate, disproportionate punishment, then the problem is in justice system itself but if the court appointed the punishment adequate and proportionate to the misconduct and offender itself, then why it should not be executed even if it has been pardoned? Moreover, there are cases that the persons, who have committed more crimes that are serious, are pardoned. We do not discuss here the motives, grounds circumstances how indeed people get in the pardon list.

The plea bargain contradicts proportionality principles, as well as pardon and, partially, conditional sentence too!

It is impossible to observe proportionality principles in case of conditional sentence without considering the personality of the condemned person. In case of conditional sentence, keeping proportionality principle is only partially possible.

This situation is again proves that proportionality principle in punishment appointment stands on the guilt of the offender, the level of condemning and not only on the misconduct, because for the same misconducts, considering personal factor and guilt level, the conditional sentence has been appointed to some persons and has not been appointed to others.

It is also noteworthy that for appointing conditional sentence, it is not enough to consider only condemned person's personality.

According to the acting legislation, the essential condition for appointment of conditional punishment is plea bargain between the parties. According to the paragraph 63, part I of the Criminal Law: **'if the plea bargain has been signed between the parties, the court is authorized to deduce that the appointed sentence should be considered conditional.'**

In case of plea bargain, it is complicated, if not impossible to keep proportionality principle. Relative proportionality with its nature, in case of plea bargain is becoming relative. It prevents the appointment of adequate and proportionate punishment.

The more adequate, exact and proportionate the punishment foreseen on the level of the legislation is, the easier it becomes to observe proportionality in appointment of the punishment.

Proportionality on the level of punishment appointment (execution of justice) is directly linked to observing proportionality on legislation level. If the legislation based on proportionality principle decreases the distinction between upper and lower limit of some type of punishment, its amplitude, then it takes more responsibility and function on itself and leaves little to justice. *When this amplitude is big, or free action space is broad for the court, then, correspondingly, court responsibility is bigger from the point of view of maintaining the proportionality, than that of legislator.*

Between these two circumstances, the intermediary is the application of so-called 'guidelines', 'Recommendation offer'.[12] This meant working out certain standard and

12) On this issue, please, see Tumanishvili G. „On the application of the 'guidelines' in justice system,' 'Justice and Law', 2010, №3;

unified court practice *(and not only this!)*. We think that this circumstance prevented court from the appointment of just, proportionate punishment and diminished the role of court in defining the sentence. The legislation itself should support the increase of the court role.

We think that free action space of the court should not be too much limited or too much increased. ***The proportion of the proportionality should be observed.***

This means that legislation should foresee the proportionate punishment to the crime and besides, the court should set the norms for defining the proportionate punishment. **In order to define the proportionate punishment, it is necessary to observe the principle of proportionality between legislative and court authority.**

If we look at the proportionality in a broad sense and take into the consideration not only the aim of the punishment, but also rationality and punishment serving appropriateness**, then together with the court and legislative proportionality of the punishment, punishment execution proportionality is equally important**. **Here also we need more individualism, than on the legislative level.**

Thus, observing proportionality means defining just, proportionate punishment by the legislation (1), appointment of proportionate sentence by the court (2) and correspondingly, its proportionate execution by the penal institutions *(3). Maintaining proportionality is of vital importance on all three stages for Criminal law to perform its function.*

Admitting disproportionality on any of the stages mentioned above will result in undesirable and sometimes deplorable consequences.

On the legislative level, the crime adequate, proportionate punishment is foreseen.
In any case, the legislation should consider the proportionate punishment.

With the application of acting legislation and taking into the consideration all circumstances, on the court stage, while executing justice, the proportionate punishment should be appointed. It is essentially important for true justice. Proportionality should be observed while assigning the punishment.

However, disproportionate execution of the proportionally considered and defined punishment prevents the criminal law task realization from the special as well as from general prevention point of view.

Thus, it is very important execute/serve proportionally foreseen and appointed

punishment.

As it is known, in order to prevent the crime, inevitability of the punishment is more important than its severity. Therefore, even in case of existence of good, remarkable and best laws, if the punishment is not appointed to the offender and is not properly executed, than its stipulation only in the law won't be effective.

The crime proportionate (or sometimes disproportionate) sentence foreseen in the Criminal Code, taking into the account all the circumstances should be 'brought to life' and must be proportionately applied/defined by the court, and penal institutions should support its execution.

As we have already mentioned above, the condemned person has not intermediate link/ touchpoint with legislation. This is because that the legislator ascertains the same, proportionate punishment for everybody.

In difference from the legislator, the court individually appoints the punishment to the offender and therefore, feelings of justice or injustice are mostly linked to the legal proceeding, than to the legislative procedure.
Proportionality on the stage of legal proceeding is based more on the individual factors and, correspondingly, requires more grounding.

With appointment of the proportionate punishment, the court links the functions of defining and executing the punishment with each other on the legislative and executive levels. The execution of the punishment defined and foreseen by the law will become impossible 'though the heavens fall', if the court does not appoint it.

The condemned person may have less complaints towards justice (or may not have them at all), legislative and penal bodies, but he/she used to have, has and will always have demands for justice in front of court.

The court itself can't take fair decision without the proportionality principles among other circumstances. The condemned person's feelings of fairness or unfairness depend on court work. He/she has to serve the punishment because the court appointed it to him/her, though, in his/her opinion he/she could release him/her or appoint less punishment.

Moreover, leaving everything aside, the person expects to find justice in the court, even if it concerns strictness of the law or its execution. The court is obliged to appoint the punishment, adequate and proportionate to his crime and personality. Therefore, proportionality on the level of justice is more important than observance of proportionality

principles on other bodies.

In a legally developed state, the court can appoint and prove just, proportionate punishment even in terms of incomplete legislation (failures in legislation).

However, it is not enough to apply proportionality only on the court level while appointing the punishment. Only with complex, three stage application of proportionality principle it becomes possible to realize criminal law tasks that should serve the protection of human, citizen, society and state interests.

The basis for changing the sentence by the upper instance court was the absence of aggravating circumstances, plea of guilty and sincere repentance, and collaboration with investigation bodies, poor financial position, as well as the aggravation of health condition.

For the crime committed by N.B. the legislation foresaw the imprisonment as well as the fine as the proportionate, adequate punishment.

The first and appeal instance courts appointed the imprisonment to him. However, appeal chamber considering the circumstances mentioned above, considered the change/lighten the imprisonment sentence with the fine.

Thus, considering person's condition (health condition among them) the fine was considered the proportionate punishment.

Even this fact confirms that proportionality should be preserved at the stage of considering the punishment on the legislative level as well as on the stage of its appointment and execution.

The condemned person's behaviour and change of the circumstances can result in change of the punishment, considered proportionate earlier with the new one, with reconsidered proportionality, its preservation and application.

While changing the punishment for the cases discussed to the upper instance court, mainly three circumstances are established:

1. The qualification has been changed, and, logically it required the appointment of a new, proportionate punishment that would correspond to the qualification;
2. The qualification has not been changed but the punishment has been changed, because the punishment appointed earlier was considered either more severe, or lighter (disproportionate);

3. The personal traits of the condemned person influenced the change of the punishment or the circumstances connected to it;

Proportionality is relative, especially at the stage of appointment of the punishment and what is considered proportionate by one court (instance), that can be considered disproportionate by another, upper instance court and be used as the reason for change of punishment (making it more severe or, more frequently-lighter). Such cases in the court practice are quite frequent that proves the correctness of our approach.

On the legislative level, proportionality is equal (universal) for everybody (it deals with all potential offender), and on the court level, it is individual (it refers only to the certain criminal). Individual approach towards every offender and factual background imposes much responsibility on the court from the point of view of appointing proportionate punishment.

In 2016, 920 complaints have been made to Cassation Instance. 763 of them were on the criminal case.[13] Except condemnatory sentence cancelation (5) and case dismissal (2) (These are the cases when sometimes the punishments appointed earlier by the lower court is considered disproportionate), the sentence has been changed for 33 persons and in 28 criminal cases and towards 13 persons in 12 cases, the grounds for change of the sentence was the change of qualification. Thus, even for 33 persons all three instance courts appointed different punishments and considered (proved) the sentence proportionality differently.

The fact that for one the same criminal case, towards the same offender, the proportionality of the sentence was considered differently by different instance courts and was appointed the different punishment is a clear indicator that the proportionality is relative and at the same time, it needs substantiation while appointing a just punishment.

No matter how theoretically and scholarly at a high level the punishment appointment issue will be treated (among them the issue of proportionality application while appointing the punishment), the courts will always have different approach. Moreover, this will be the basis for appointing the different punishment even in different instances. However, the proportionality observance is important because the disproportionality made by different courts should not be very, evidently disproportionate and should not cause the distrust towards to certain or all instances.

The courts of all instances should try to observe the proportionality of the sentence and

13) ibid;

appoint just punishment. Not all the criminal cases go to the upper instance. The majority of the criminal cases ends on the first instance. However, with the sentence made by the first instance court, the crime proportionality issue does not end. As we have already seen above, it can be continued and become actual for appointing the punishment in appeal and cassation instances.

As we have already mentioned above, it is equally important to maintain proportionality while execution of the punishment.

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