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PERSONAL CHARACTERISTICS OF THE PERPETRATOR AND SENTENCING[1]

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Abstract: The subject of this paper is personal characteristics of the perpetrator, its significance for sentencing in Criminal Legislation, Criminal Law Literature and jurisprudence. In the first part of the paper, the author will consider the term and types of sentencing as well as circumstances which are relevant for sentencing in our Criminal Legislation. Special attention will be paid to the influence of personal characteristics of perpetrator for sentencing. There is a great number of dilemmas in theory and jurisprudence related to this topic to the resolution of which the author will try to contribute. In principle there is no unique opinion on what is meant by personal characteristics of perpetrator. If the perpetrator has a profession which is of high social importance (policeman, doctor, etc.), it is unclear whether this circumstance should be taken into account as mitigating or aggravating. Also, there is a question whether the unemployment of perpetrator should be taken into account in sentencing as aggravating or mitigating circumstance. It is disputable whether the courts should take into account only personal characteristics that existed in time of execution of offense or the ones occurred after commission of offense are relevant as well.

Finally, the results of jurisprudence research will be presented in this paper which almost always takes personal characteristics of perpetrator as mitigating circumstance. The author will explain his critical opinion on court's proceeding in sentencing.

Keywords: personal characteristics, sentencing, mitigating and aggravating circumstances.

INTRODUCTION

The sentencing is important institute of Criminal Law because the purpose of perpetrator punishment can be realized only under condition that this criminal sanction is adequately sentenced. Consequently, sentencing in our Criminal Legislation is very important (Art. 54-63 of CCS). However, CCS does not define the term of sentencing. On the other hand, in the Criminal Law theory is generally accepted the opinion that sentencing the penalty to the perpetrator of offense means determine the type and amount of penalty.[2] This refers to regular sentencing which is regulated by Article 54 of CCS. In broader sense the sentencing refers not only to sentencing in law determined limits for specific offense but to sentencing below and above special minimum of penalty as well.[3]

From CCS provision which prescribes regular sentencing follows that the legislator in our country accepts so called system of relatively defined penalties, according to which the court sentence the penalty within the type and range of penalty defined by legislator.[4] The system of absolutely indeterminate penalties which application would result the unlimited arbitrariness of judges while sentencing the strictest criminal sanction is overcame, and as such is not accepted in most modern criminal codes. Also, its application would lead to legal uncertainty because of the possibility that the courts for the same or similar offenses sentence largely different penalties, which is unacceptable.

However, the system of indeterminate penalties was accepted till 80's of the 20th century in the United States for offenses prescribed by federal laws. It was not a system of absolute indeterminate penalties in the true sense of the word, because the laws have always prescribed only minimum penalty for certain offenses. After that, came into effect a system of determinate penalties,[5] which means the sentence of fixed pen-

1 This paper is a result of scientific-research projects financed by Ministry of Education, Science and Technological Development of Republic of Serbia: The Development of Institutional Capacity, Standards and Procedures for Opposing Organized Crime and Terrorism in Terms of International Integrations (No. 179045), realized by Academy of Criminalistic and Police Studies in Belgrade 2011–2015 (the project coordinator Professor PhD Sasa Mijalkovic).
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2 N. Srzentić, et. al., Krivično pravo Jugoslavije - opšti deo, Beograd, 1995, str. 307.
3 Z. Stojanović, Krivično pravo – opšti deo, Beograd, 2011, str. 271.
4 G. Božilović-Petrović, Odmeravanje kazne, Zbornik radova: Strategija državnog reagovanja protiv kriminala, Beograd, 2003, str. 276.
5 1984 godine je donet Sentencing reform Act.

alties. This system which may be called a system of absolutely determinate penalties showed serious faults, which are primarily reflected in the fact that judges have discretion in terms of conditional release, depending on the behavior of the convicted during the penalty execution. Thus, the legal system of determinate penalties due to jurisprudence became a system of indeterminate penalties.[6] In addition, fixed penalties do not allow the possibility of taking into account various aggravating and mitigating circumstances which are relevant for sentencing in a particular criminal matter. Therefore, the purpose of Sentencing Reform Act from 1984 has not been achieved, because it contributed to legal uncertainty and led to the situation that different persons for the same or similar offenses are being punished with significantly different penalties.

When considering sentencing in the United States one should bear in mind that according to the Constitution of this country's jurisdiction for sentencing is divided between the legislative, judicial and executive authority. The legislative authority prescribes federal offenses, the type and range of penalties, as well as manner of execution; judicial authority determines the type and amount of punishment in a specific case within the limits set by the legislator; executive authority determines the place where convicts serve their sentence in prison and supervise after serving the sentence.[7]

In this regard, it is disputable whether we can speak about the judicial and legislative sentencing. Some authors believe that with the judicial should accept the existence of the legislative sentencing, because the courts must comply with the type and amount of the sentence prescribed by the legislator. This is true, but it is also true that within different types and ranges of penalties determined by the legislator courts have sufficient freedom,[8] which is why there is opinion that the concept of sentencing refers exclusively to the court activity.[9] It is our opinion that this view should be accepted, because the penalties in modern criminal codes are often prescribed in large ranges, because the view that the legislator sentences the penalty to perpetrator prescribing the type and range cannot be accepted. According to the opposite view, not only that legislative sentencing is not challenged, but disputes the existence of the penal policy of the courts. It is emphasized that there is no penal policy of the courts, but the courts through their decisions in specific criminal matters only realize penal policy of the legislature.[10] This cannot be accepted, not only because of the large range of penalties for certain offenses. As we shall see, it often happens that when interpreting the provisions which regulate sentencing, on court assessment depends whether a circumstance should be taken into account as a mitigating or aggravating. Some authors believe that the legislature should "avoid overbroad criminal frames when prescribes penalty for a particular offense, because it allows arbitrariness in sentencing."[11] The author of this opinion suggests that in order to achieve this goal, the legislature determines relatively small penalty ranges for basic forms of some offenses, predicting easier or harder form of offense for which special penalties are prescribed. This may be accepted in general, but it is difficult to realize in practice because for certain severe offenses ranges of penalties must be great. Accordingly, the courts have a decisive role in sentencing and in the creation of penal policy.

The legislature in our country prescribes the types of penalties, ranges and circumstances that must be taken into account when sentencing in particular cases. Within the prescribed types and ranges of penalty courts impose specific penalties, "considering the purpose of punishment and taking into account all the circumstances that affect that sentence be smaller or larger (mitigating and aggravating circumstances), and in particular: the degree of guilt, the motives for the committed offense, the intensity of endanger or injury of the protected good, the circumstances under which the offense was committed, the past life of the perpetrator, his personal characteristics, his conduct after the commission of the offense and particularly his relation towards the victim of the offense, as well as other circumstances related to the personality of the perpetrator (Article 54 of the Criminal Code)."

Therefore, in our criminal legislature circumstances which court takes into account when sentencing are exhaustively listed, while each of these circumstances, depending on the specifics of a particular event can be aggravating or mitigating. The mitigating circumstance refers to the one that affects that smaller penalty is sentenced to the perpetrator within prescribed range of penalty; while the aggravating circumstances are the ones that affect larger penalty to be sentenced within prescribed limits.

The alternative is particularly exhaustive listing of aggravating and mitigating circumstances, which is not a solution, because it is not disputed that each circumstance relevant to sentencing may be aggravating or mitigating. For example, the degree of guilt of the perpetrator may be an aggravating circumstance (direct or indirect premeditation) or mitigating circumstance (conscious or unconscious negligence). According to one view, the assessment of mitigating and aggravating circumstances "penalty is agreed with

6 F. Doherty, Indeterminate sentencing returns: the invention of supervised release, N.Y.U. Law Review, 2013/3, New York, str. 958.
7 R. Howell, Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment, Journal of Criminal Law and Criminology, 2004/5, Chicago, str. 1071.
8 D. Janković, Odmeravanje i individualizacija kazne u krivičnom zakonodavstvu i sudskoj praksi Republike Srbije, Anali, 2010/2, Beograd, str. 373.
9 Z. Stojanović, op. cit., str. 270.
10 Z. Perović, Kaznena politika sudova, Zbornik radova: Strategija državnog reagovanja protiv kriminala, Beograd, 2003, str. 247.
11 F. Bačić, Krivično pravo – opći dio, Zagreb, 1995, str. 367.

degree of free will expressed by perpetrator in the commission of the offense, as well as with all objective circumstances characterizing the perpetrator and concrete offense."[12] According to the author of this opinion, sentencing and penalty individualization are two different concepts, which are justified criticized in the theory of criminal law, because there are no clear criteria for distinguishing them.[13] In addition, followers of the penalty individualization consider that the circumstances relevant to the individualization are the ones that courts take into account when sentencing (the degree of guilt, the motives for the committed offense, the intensity of endanger or injury of the protected good, etc.),[14] which is also in favor of our thesis that the concept of individualization is redundant.

However, the starting point of authors who support the penalty individualization can be accepted. They argue that the court in any criminal matter should adjust the penalty to the personality of the perpetrator. Only if the penalty is adjusted to the personality of perpetrator, regardless of the committed offense, the objectives of special prevention may be achieved.[15] This means that when sentencing, the personal characteristics of perpetrator which are not associated with the offense should be taken into account, which will be explained with more details in the following chapters.

PERSONAL CHARACTERISTICS OF PERPETRATOR IN THE THEORY OF CRIMINAL LAW

As in this paper noted above, Article 54 of the CC prescribes that the court when sentencing should take into account besides the purpose of punishment among others the personal characteristics of the perpetrator. It could be said that this provision of our CC is in accordance with the provisions of comparative legislation which regulates the sentencing. According to Article 46 CC of Germany: "1) the basis for sentencing is the perpetrator's guilt. In sentencing is taken into account the expected impact from penalty on the future life of the perpetrator; 2) in sentencing, the court assesses the relationship between aggravating and mitigating circumstances. Court also specifically assesses: motives and aims of the perpetrator; moral perceptions arising from committed offense and the perpetrator's will manifested while committing the offense; extent of violations of duties; manner of execution and consequences of the offense, the past life of perpetrator; the personal and material characteristics of the perpetrator; his conduct after the commission of the offense, particularly his efforts to indemnify and attempt to reach a settlement with the injured party. 3) Circumstances which are already special elements of offense must not be taken into account."[16]

If we compare Article 54 of the CCS and Article 46 of the CCG, we come to the conclusion that the legislature regulates sentencing in both countries in a similar manner. In both Codes the personal characteristics of the perpetrator are mentioned as circumstances relevant for sentencing. We note that the legislator in Germany does not provide recidivism as a special circumstance of importance for sentencing, as opposed to solution which has been accepted in our country (Article 55 CCS). The perpetrator's recidivism is according the German jurisprudence and theory circumstance related to the personal characteristics of the perpetrator. However, it is our opinion that the recidivism is too important circumstance for sentencing, that it should be considered when assessing the personal characteristics of the perpetrator.

It is disputable primarily what is meant by personal characteristics of the perpetrator. According to the German theory and jurisprudence, these are the circumstances that are not directly related to the commission of a criminal offense, but are relevant for sentencing:[17] the conditions of socialization, education, profession, social status, health status and previous guiltiness and impunity of the perpetrator.[18] However, in one verdict while sentencing for the offense under Article 125 of CCG (disturbance of the general peace), the court did not take into account as a mitigating circumstance the fact that the defendant was the illegitimate child who grew up in foster homes, which according to psychology often causes psychological damage of personality which are accompanied by a greater degree of aggressiveness.[19] We believe that this attitude of the court may be criticized, because the conditions within which the personality of the perpetrator has been developing were in the causal relation to the committed offense.

According to Atanackovic, personal characteristics of perpetrator are circumstances that are of importance to the moral gravity of the offense, while on the other hand, the personal characteristics may be rele-

12 D. Janković, op. cit., str. 374-375.
13 B. Schünemann, Tatsächliche Strafzumessung, gesetzliche Strafdohungen und Gerechtigkeits – und Präventionserwartungen der Öffentlichkeit aus der deutscher Sicht. In: Krise des Strafrechts und der Kriminaliwissenschaften?, Berlin, 2001, str. 345; (Prema: Z. Stojanović, str. 271).
14 D. Janković, op. cit., str. 374-387.
15 F. Bačić, op. cit., str. 372.
16 A. Schönke, H. Schröder, Strafgesetzbuch – kommentar, München, 2001, str. 270.
17 F. Streng, Münchener Kommentar zum Strafgesetzbuch, München, 2003, str. 1440.
18 Ibid. str. 1443.
19 OLG Hamburg, Urt. v. 8. 9. 1971. – 1 Ss 67/71; (Prema: NJW, 1972/6, München-Frankfurt/Main, str. 265).

vant for assessing the tendency of the perpetrator to commit offenses in the future.[20] According to this author, personal characteristics may affect the assessment of whether the perpetrator has tendency to commit offenses only under certain conditions. It is necessary to determine that there is a causal relation between 1. the circumstances that make personal characteristics of perpetrator; 2. the offense; 3. the tendency of the perpetrator to commit offenses. Accordingly, the circumstances that make personal characteristics of perpetrator must through the commission of the offense indicate that there is a tendency to commit offense in the future. In favor of that the following example is stated, if one person is left orphan early, living in an environment that has negative impact on his mental development, it is necessary to determine whether the cause of violation of criminal law provisions is the negative impact of the social environment, as well as whether mentioned personal characteristics may be the cause of committing offenses in the future. It follows that not every circumstance of the perpetrator's life may be classified as personal characteristics in terms of sentencing, but only those circumstances that are causally related to the committing of the offense and with the perpetrator's tendency to commit new offenses.

Part of the theory considers that personal characteristics are "the circumstances under which the perpetrator lived before and after the commission of the offense", which can be divided into subjective and objective circumstances.[21] The circumstances of the subjective nature are the age of the perpetrator, family circumstances, material status, etc., while circumstances of objective nature are rarely mentioned (e.g. housing circumstances of the perpetrator). Our opinion is that housing circumstances in general cannot be relevant for sentencing, except in the case if the commission of the property related offense is motivated by perpetrator's desire to buy or rent an apartment.

In the German theory is represented the concept according to which the personal characteristics of the perpetrator refers to for example age, intelligence and family characteristics, while economic characteristics of the perpetrator have a special significance in sentencing the amercement.[22] It is disputable whether the specific lifestyle of the perpetrator can be considered in terms of personal characteristics as an aggravating or mitigating circumstance. It is believed that lifestyle of the perpetrator may be relevant for sentencing only under condition that in specific case a close relationship between lifestyle and commission of the offense is established.[23] It is pointed out that as a mitigating circumstance should be taken into account the perpetrator's work in the public interest (for example, participation in the rescue during floods, work in non-government organizations which care for the general interest and vulnerable populations etc.).[24]

Given that in the theory and practice is generally accepted opinion that the profession of the perpetrator should be taken into account when sentencing, one might ask what is the relationship between the responsibilities of a person in the community or company and sentencing for the committed offense. In other words, whether the persons who have a greater responsibility therefore be more severe punished. We believe that it should accept the opinion according to which the degree of responsibility is not always proportional to the measure of the penalty to be imposed upon the perpetrator of offense.[25] It is assumed that there is no general rule according to which certain categories of persons who have a greater level of duty in society deserve greater penalty. For example, a civil servant should not be punished stricter comparing with any citizen, if he commits rape or any other offense against sexual freedom. In this regard, in our theory identical position is taken: if the perpetrator of rape is married and has children, this circumstance should not be taken into account as a mitigating, because it is not in the direct causal relation with the committed offense.[26] According to one view, the fact that the perpetrator of rape is married can be taken into account as an aggravating circumstance, "because it cannot be expected from the family man such violent and illegal behavior in sexual life, and if he did such a thing he should be subject to heavier sentence in relation to the perpetrator with different personal characteristics."[27] The starting point of this concept can be accepted, because it is unexpected that a married man who has children commits rape, but if it happens, it is our opinion that this circumstance should not be taken into account as an aggravating circumstance. Simply put, the fact that the commission of offense by certain categories of perpetrators is a surprise or an exception to the statistical data indicating that the perpetrators are other persons, should not be relevant for sentencing. If we accept the opposite solution, it would give the courts too broad powers without clear limits and the result would be sentencing of different penalties in the same or similar cases, i.e. would lead to legal uncertainty and inequality of citizens before the law.

20 D. Atanacković, Kriterijumi odmeravanja kazne, Beograd, 1975, str. 104.
21 M. Milović, Lične prilike učinioca kao okolnost pri odmravanju kazne, Zbornik radova: Strategija državnog reagovanja protiv kriminala, Beograd, 2003, str. 287.
22 U. Kindhäuser, Strafgesetzbuch, Berlin, 2003, str. 299.
23 F. Streng, op. cit., str. 1443.
24 A. Schönke, H. Schröder, op. cit., str. 730.
25 Ibid., str. 732.
26 D. Atanacković, op. cit., str. 105.
27 D. Miladinović-Stefanović, Redovno odmeravanje kazne u krivičnom pravu, neobjavljena doktorska disertacija, Beograd, 2012. str. 444.

Similar to the above example, if a police officer commits the offense by non-payment of taxes, his profession should not be taken into account as an aggravating circumstance. Accordingly, in general it can be said that for sentencing is not important whether the perpetrator is a lawyer, a doctor, a manual worker or a professional soldier. However, according to this view, the profession of the perpetrator may be relevant for sentencing if directly related to the offense, i.e. if it is misused for committing an offense (for example, a lawyer is abusing the trust of the client and makes a criminal offense).[28] One might ask whether the greater extent of penalty deserve the traffic police officers or instructors in driving schools if they commit an offense against traffic safety. According to German jurisprudence, these categories of persons are imposed stricter penalties for traffic offenses.[29] At first glance, this reasoning cannot be disputed because the perpetrators were people who best knew the traffic regulations; they are at least expected to violate them. Also, these are the persons who should contribute that traffic participants comply with traffic regulations and not themselves not to comply with the same. However, our opinion is that profession can be taken into account as an aggravating circumstance to these categories of persons only if it is misused with the commission of the offense. In other words, if a traffic policeman while performing official duty violates traffic regulations, it is aggravating circumstance in sentencing. In contrast, if the traffic offense has been committed when traffic policeman was not on duty, profession of perpetrator is not relevant to sentencing. This does not mean that in this and similar cases profession of perpetrator cannot be taken into account when determining the degree of guilt of the perpetrator.

In this paper has already been said that each of the circumstances which are according to our criminal legislation relevant to sentencing may be taken into account as an aggravating or mitigating circumstance. On the other hand, when the court evaluates the personal characteristics of the perpetrator some circumstances are always taken into account as mitigating.[30] For example, a youth of perpetrator is always a mitigating circumstance, which is not questioned in the theory of criminal law. A particular problem is to determine whether the perpetrator is young or mature man, which will be said with more details in the following chapters. Generally speaking, we believe that the youth of the perpetrator should to be taken into account as a mitigating circumstance. The reason is inexperience, immaturity and frivolity of young people, who in most cases make a decision about commission of offense in the moment, without thinking about the consequences of such act. Also, serving prison sentence will have more serious consequences on the young man i.e. his re-socialization will be more difficult. However, when assessing the importance of youth it should be taken into account that it is about the age of person, on which anyone can not influence on their own will. In theory, there is opinion that the circumstances that are relevant for sentencing could qualify considering the fact whether some of those circumstances depend on the perpetrator will or not. According to this view, greater importance should have circumstances that depend on perpetrator will, "because they represent the attitude of the perpetrator on generally accepted social values."[31] We believe that this opinion should be accepted, i.e. perpetrator's youth should be taken into account when sentencing as a mitigating circumstance, but that the importance of this circumstance should be relativized. Simply told, the fact that the perpetrator is young by itself says nothing about his attitude towards the system of values in a society. Conversely, if he employed, and supports his family, this circumstance indicates the positive traits of his personality that should be given special importance in sentencing. Everything that is said about perpetrator's youth as a mitigating circumstance refers to the old age as well. Of course, if there is a perpetrator who is sick this circumstance should be taken into account as a mitigating. From the severity of the disease the importance that this circumstance will have to sentencing will depend on.

Against this view, there is an opinion that personal characteristics "are such circumstances to which the perpetrator cannot influence by his owe will."[32] We believe that this reasoning cannot be accepted. For example, if a perpetrator because of gambling lost his property or refused a job that was offered by the Department of Employment and thus brought into question the existence of family, poor financial situation cannot be taken into account as a mitigating circumstance.[33] Thus, the poor financial situation is not always a mitigating circumstance in sentencing. However, our courts as per rule take bad financial situation of the perpetrator as a mitigating circumstance without the necessary checks.

Referred to Article 54, Paragraph 2 of the CCS shows that the courts in sentencing the amercement will particularly take into account the financial status of the perpetrator. However, this does not mean that the financial status is not relevant to sentencing in prison. We believe that it should accept the opinion that personal characteristics of the perpetrator also include his property status, if it is related with the commission of an offense.[34] For example, if the perpetrator committed the offense because of the difficult economic

28 F. Streng, op. cit., str. 1443.
29 A. Schönke, H. Schröder, op. cit., str. 733.
30 M. Milović, op. cit., str. 288.
31 D. Miladinović-Stefanović, op. cit., str. 443.
32 M. Milović, op. cit., str. 287.
33 A. Schönke, H. Schröder, op. cit., str. 731
34 F. Streng, op. cit., str. 1443.

situation of his family, this fact should be taken into account as a mitigating. As already stated, this does not mean that the poor financial situation of the perpetrator will always be a mitigating circumstance. Accordingly, if the perpetrator was able to meet the modest basic existential necessities of life, but had no means of appropriate cultural life (theater, concerts, and exhibitions), better clothes, etc., property status does not have significance of mitigating circumstance. In other words, if the minimum existence is provided without the execution of offense, bad financial situation has no importance of mitigating circumstance.[35] Also, if perpetrator is situated, this circumstance cannot always have importance of aggravating circumstance, because it is a factual issue. In a judgment of German highest court instances the court took into account as an aggravating circumstance to the perpetrator of offense accepting a bribe, "ruthless ambition to become rich."[36]

If the perpetrator is existentially threatened, in exceptional cases can be discussed on the application of necessity. In some cases, in Spanish jurisprudence drug dealers referred to the necessity. Their defense was based on the claim that they were forced to sell drugs in order to provide their families livelihoods. However, the courts did not accept their defense, because the property situation of perpetrators was not the state of necessity, i.e. they could ensure livelihoods on other way which was in accordance with the law.[37] According to the English jurisprudence (case Williams from 1971) stems that the hungry, the homeless and other persons who have existential problems are not entitled to refer to the necessity if they commit an offense.[38] The exception may be only the situation in which the perpetrator by stealing food prevents death from starvation.[39] In contrast, there is opinion that the intent of the perpetrator to steal food to sustain life can only consider as a mitigating circumstance in sentencing.[40] We find this view too strict i.e. that because of the significance of life as the most important legal interest hunger that threatens life should be understood as a danger in terms of necessity. Of course, only under the condition other terms for the application of necessity prescribed by criminal legislation are fulfilled.

So far in this paper we mainly discussed the particular circumstances which are in theory and jurisprudence considered as personal characteristics of the perpetrator in terms of sentencing. We may ask whether it is possible to determine an abstract definition of personal characteristics. The starting point is that any circumstance which belongs to the personal characteristics of the perpetrator cannot be considered relevant for sentencing. According to one view, under the personal characteristics are considered only those circumstances related with the commission of the offense or the guilt of the perpetrator.[41] It is our opinion that this definition is too narrow because it does not take into account the circumstances that could be classified as personal characteristics, and occurred after the commission of the offense (for example, the perpetrator is seriously ill after commission of the offense) and circumstances which are not directly related with offense or guilt (the perpetrator takes care of the multi-member family). Therefore, we believe that we should refrain from abstract definition of personal characteristics and let the courts determine whether a circumstance which belongs to the personal characteristics of the perpetrator is relevant to sentencing in particular case. Instead of dealing with a definition which will certainly be unspecific, energy should be focused on individual circumstances which belong to the personal characteristics of the perpetrator and their significance for sentencing.

PERSONAL CHARACTERISTICS OF PERPETRATOR IN JURISPRUDENCE[42]

The personal characteristics of the perpetrator in our jurisprudence almost always have the significance of mitigating circumstance. This is supported by the results of our study that analyzed 50 final judgments of the High Court in Belgrade, referring to drug related offenses: illicit production and trafficking of narcotic drugs (Article 246 CCS), unauthorized possession of narcotic drugs (Article 246a CCS) and enabling the use of narcotic drugs (Article 247 CCS). The analyzed judgments became final in the period of 2010-2012:

35 A. Schönke, H. Schröder, op. cit., str. 734.
36 BGH, Urt. v. 19. 8. 1986 – 1 StR 359/86 (LG Stuttgart); (Prema: NJW, 1987/9, München-Frankfurt/Main, str. 510).
37 Olivares, G. Q., Prats, F. M., Parte General del Derecho Penal, Barcelona, 2006, str. 505; (Presuda Vrhovnog suda Španije od 16. septembra 1982. godine).
38 J. Herring, Criminal Law, London, 2004, str. 619.
39 M. Jefferson, Criminal Law, London, 2007, str. 274.
40 R. Heaton, Criminal Law – cases and materials, London, 1988, str. 182.
41 A. S chönke, H. Schröder, op. cit., str. 732.
42 This paper is a result of scientific-research projects financed by Ministry of interior affairs of Republic of Serbia: "Criminality in Serbia and instruments of State reaction", realized by Academy of Criminalistic and Police Studies in Belgrade 2015–2019 (the project coordinator Professor PhD Dragana Kolarić).

8 judgments from 2010,[43] 4 judgments from 2011, [44]and 38 judgments from 2012.[45] From a total of 50 analyzed judgments, 12 are modified.[46]

The Court in observed sample in each of the judgments the personal characteristics of the perpetrator took into account as a mitigating circumstance, arises from the next table. On the other hand, in any of the analyzed criminal matters personal characteristics of the perpetrator according to court opinion did not have the character of aggravating circumstances in the sense of Article 54 CCS.

Personal characteristics of perpetrator (50 judgments)	Mitigating circumstance	50
	Aggravating circumstance	-

According to view of the High Court in Belgrade, mitigating circumstance is the youth of perpetrator; this is widely accepted opinion in the theory of criminal law, which in this paper has already been discussed. However, in certain judgments the Court takes the view that the youth of perpetrator is mitigating circumstance despite the fact that it is a person who is 33 years old,[47] or 38 years old.[48] In certain judgments it is stated that the defendant at the time of the commission of offense was a relatively young man.[49] There is no need to set a quantitative limit on the age of perpetrators and to consider young people only those who have not reached, for example, 25 years. It is a factual question to which the answer gives the court in each particular case, taking into account all relevant circumstances (type and severity of offense, the manner of execution, etc.). However, it is not justified to take into account the youth as a mitigating circumstance if the perpetrator as in the examples above is 33 or 38 years old. A particular problem is that in terms of youth as a mitigating circumstance there is no uniform jurisprudence. For example, in the judgment K. 263/12 the court justified did not take into account the youth of perpetrator who was at the time of commission of the offense 34 years old.

In addition, the court as a mitigating circumstance takes into account the fact that the defendant is parent.[50] However, in almost all analyzed judgments in the explanation of the sentenced criminal sanction courts lump sum state that the defendant is parent, without providing data whether he actually supports his family, or whether he is the only one supporting his family. There is no doubt that the family members of the convicted person become a victim of his punishment, if they are economically dependent on him. Example to be followed is the judgment K. 263/12 according to which the defendant "is the only one who supports a wife and three small children." Therefore, it is necessary in the explanation of sentenced criminal sanction to indicate whether the perpetrator has children, whether they are a minor or the adult children, if children have the other parent, and whether the other parent has the possibility to take care of the children while the defendant serves a prison sentence. A similar comment can be given to taking into account as mitigating circumstance that the defendant takes care of younger sister who is at school, [51]or has a sick family member.[52]

In some judgments the court highlights as a mitigating circumstance the fact that the defendant is student.[53] However, this circumstance as well as many others related to the personal characteristics of the perpetrator is determined by the data taken from the perpetrator without checking. The judgment does not specify what college defendant studies, which is the number of his index, is he passed some of the exams or just enrolled in college.

In some judgments from our sample the fact that the defendant is employed is taken into account as a mitigating circumstance.[54] However, according to the jurisprudence of the Court of Appeal in

43 K. 150/10, K. 257/10, K. 301/10, K. 485/10, K. 529/10, K. 701/10, K. 1923/10, K. 3943/10.
44 K. 677/11, K. 882/11, K. 944/11, K. 1276/11.
45 K. 14/12, K. 18/12, K. 34/12, K. 112/12, K. 143/12, K. 181/12, K. 240/12, K. 263/12, K. 334/12, K. 398/12, K. 444/12, K. 456/12, K. 467/12, K. 551/12, K. 552/12, K. 570/12, K. 614/12, K. 637/12, K. 686/12, K. 709/12, K. 716/12, K. 721/12, K. 722/12, K. 741/12, K. 128/12, K. 749/12, K. 761/12, K. 764/12, K. 787/12, K. 832/12, K. 834/12, K. 863/12, K. 886/12, K. 970/12, K. 1009/12, K. 276/12, K. 121/12, K. 1078/12.
46 The following judgment are modified: K. 150/10 (modified by judgment of Appeal Court K. 1313/13); K. 301/10 (modified by judgment of Appeal Court K. 184/13); K. 18/12 (modified by judgment of Appeal Court K. 425/13); K. 34/12 (modified by judgment of Appeal Court K. 5933/12); K. 112/12 (modified by judgment of Appeal Court K. 600/13); K. 467/12 (modified by judgment of Appeal Court K. 463/13); K. 570/12 (modified by judgment of Appeal Court K. 803/13); K. 614/12 (modified by judgment of Appeal Court K. 427/13); K. 721/12 (modified by judgment of Appeal Court K. 2311/13); K. 761/12 (modified by judgment of Appeal Court K. 1038/13); K. 764/12 (modified by judgment of Appeal Court K. 1235/13); K. 1009/12 (modified by judgment of Appeal Court K. 1511/13).
47 K. 551/12.
48 K. 722/12.
49 K. 529/10.
50 K. 276/12.
51 K. 721/12.
52 K. 570/12.
53 K. 34/12.
54 K. 834/12.

Kragujevac, the fact that the defendant is unemployed is also a mitigating circumstance in terms of sentencing.[55] The question is whether it is justified to qualify one and other circumstance as a mitigating, especially if it is known that the data are taken from the defendant without checking. It is disputable why the fact that the defendant is employed or unemployed is relevant to sentencing. If the defendant is unemployed for a longer period it may indicate a lack of employment opportunities in the labor market or the lack of ambition of the defendant. In the second case, it is a life attitude of defendant which consequences only he will have to bear, because we do not see the connection with sentencing. However, for short-term penalties of deprivation of freedom it is important to determine whether the defendant is employed, because the length of the prison sentence may affect the eventual termination of employment.

Here it should be noted that in the analyzed judgments difficult financial situation has no importance of mitigating circumstance. For example, in the above mentioned judgment K. 263/12 the court in the explanation of sentenced criminal sanction states that the defendant as a car mechanic who earns 30.000 dinars per month "is the only one who supports a wife and three minor children," but this circumstance (amount of earnings) is not relevant to sentencing. This can be accepted for two reasons: first, the Court in the judgment stated without checking that the defendant earns 30.000 dinars per month (car mechanics generally earn much more); second, the defendant can increase his income in other ways that does not include the commission of offenses.

In this paper it has been already stated that according to the opinion of the theory level of education is one of the personal characteristics in terms of sentencing.[56] However, in the observed sample court did not take into account the education of the perpetrator as a relevant circumstance. The Court in the introduction of judgment, as per rule specifies the level of education of the perpetrator, but this circumstance is not taken into account in sentencing. In the sample the perpetrators of the primary and secondary levels of education are dominant (from a total of 69 defendants 14 completed primary school, 53 secondary, while only 2 defendants graduated from university).

In certain criminal matters, the court did not take into account as a mitigating circumstance the defendant's disease (epilepsy); although the expert psychiatrist in his report stated that the defendant was suffering from this disease.[57] The circumstance that the defendant healed from addiction to narcotic drugs has significance of mitigating circumstance.[58] It is disputable whether the fact that the defendant is addicted to narcotic drugs has significance in sentencing for drug related offenses. It is our opinion that this circumstance should be taken into account as a mitigating, especially with the criminal offense of unauthorized possession of narcotic drugs (Article 246a CCS). However, in the judgment K. 1276/2011 court did not take into account the perpetrator's addiction as a mitigating circumstance, although the expert psychiatrist found that the offense was committed in a state of addiction, due to which the perpetrator's insanity has been reduced. In the observed sample of 50 judgments, from a total of 69 perpetrators 15 are addicted to narcotic drugs (21.74%), which make it necessary to consider the effect of addiction on the sentencing.

Finally, in certain judgments generally is stated that the court took into account the personal characteristics of perpetrator as a mitigating circumstance, whereby the court gives no explanation what exactly is considered as mitigating circumstance and why it was taken into account.[59] This kind of sentencing is not acceptable, because it will cause legal uncertainty and enable manifestation of judge's arbitrariness.

The data we obtained in our study do not mean that the personal characteristics of the perpetrator can only be a mitigating circumstance. As in this paper has already been said, if the perpetrator abuses his profession for commission of offense, his personal characteristics may have significance of aggravating circumstance. The Serbian Supreme Court took the view that the aggravating circumstance is the fact that the defendant "killed his wife who was the mother of two children and the only foster parent of the family", while on the other hand, "the fact that the defendant was the father of two children in a particular case can not represent a mitigating circumstance."[60] The Court took into account that the commission of offense has serious impact on children of the perpetrator and that for growing up a minor daughter who attended the commission of the offense "is more favorable to grow up in the absence of the defendant."

55 K. 5552/13.
56 F. Streng, op. cit., str. 1443.
57 K. 764/12.
58 K. 716/12.
59 K. 121/12, K. 257/10, K. 128/12.
60 K. 118/07.

REFERENCES

1. A. Schönke, H. Schröder, Strafgesetzbuch – kommentar, München, 2001.
2. B. Schünemann, Tatsächliche Strafzumessung, gesetzliche Strafdohungen und Gerechtigkeits – und Präventionserwartungen der Öffentlichkeit aus der deutscher Sicht. In: Krise des Strafrechts und der Kriminaliwissenschaften?, Berlin, 2001.
3. D. Atanacković, Kriterijumi odmeravanja kazne, Beograd, 1975.
4. D. Janković, Odmeravanje i individualizacija kazne u krivičnom zakonodavstvu i sudskoj praksi Republike Srbije, Anali, 2010/2, Beograd.
5. D. Miladinović-Stefanović, Redovno odmeravanje kazne u krivičnom pravu, neobjavljena doktorska disertacija, Beograd, 2012.
6. F. Bačić, Krivično pravo – opći dio, Zagreb, 1995.
7. F. Streng, Münchener Kommentar zum Strafgesetzbuch, München, 2003.
8. F. Doherty, Indeterminate sentencing returns: the invention of supervised release, N.Y.U. Law Review, 2013/3, New York.
9. G. Božilović-Petrović, Odmeravanje kazne, Zbornik radova: Strategija državnog reagovanja protiv kriminala, Beograd, 2003.
10. J. Herring, Criminal Law, London, 2004.
11. M. Jefferson, Criminal Law, London, 2007.
12. M. Milović, Lične prilike učinioca kao okolnost pri odmravanju kazne, Zbornik radova: Strategija državnog reagovanja protiv kriminala, Beograd, 2003.
13. N. Srzentić, et. al., Krivično pravo Jugoslavije - opšti deo, Beograd, 1995.
14. Olivares, G. Q., Prats, F. M., Parte General del Derecho Penal, Barcelona, 2006.
15. R. Heaton, Criminal Law – cases and materials, London, 1988.
16. R. Howell, Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment, Journal of Criminal Law and Criminology, 2004/5, Chicago.
17. Z. Perović, Kaznena politika sudova, Zbornik radova: Strategija državnog reagovanja protiv kriminala, Beograd, 2003.
18. Z. Stojanović, Krivično pravo – opšti deo, Beograd, 2011.
19. U. Kindhäuser, Strafgesetzbuch, Berlin, 2003.
20. NJW, 1987/9, München-Frankfurt/Main.
21. NJW, 1972/6, München-Frankfurt/Main.