# COMPENDIUM OF EUROPEAN STANDARDS AND GOOD PRACTICES OF JUDICIAL REASONING

# COMPENDIUM OF EUROPEAN STANDARDS AND GOOD PRACTICES OF JUDICIAL REASONING

**Prepared by:**
Idlir Peçi on the basis of submissions and data collected by
Igor Dolea
Tudor Osoianu
Vincent Delbos
Kanstantsin Dzehtsiarou
Hugo Rascão
Cristi Danilet
Natalia Rosca
Ion Graur
Vasile Cantarji

Council of Europe

*This work was developed and published within the framework of the Project "Strengthening the Human Rights Compliant Criminal Justice System in the Republic of Moldova", funded by the Council of Europe Action Plan for the Republic of Moldova 2021–2024.*

*The opinions expressed in this work are the responsibility of the author(s) and do not necessarily reflect the official policy of the Council of Europe.*

The reproduction of extracts (up to 500 words) is authorised, except for commercial purposes as long as the integrity of the text is preserved, the excerpt is not used out of context, does not provide incomplete information or does not otherwise mislead the reader as to the nature, scope or content of the text. The source text must always be acknowledged as follows "© Council of Europe, year of the publication". All other requests concerning the reproduction/translation of all or part of the document, should be addressed to the Directorate of Communications, Council of Europe (F-67075 Strasbourg Cedex or publishing@coe.int).

All other correspondence concerning this document should be addressed to the Co-operation Programmes Division, Implementation of Human Rights, Justice and Legal Co-operation Standards Department, Directorate of Human Rights, Directorate General Human Rights and Rule of Law.

Cover design and layout:
IS Tipografia Centrala
1 Florilor St., Chisinau
Republic of Moldova
www.tipografiacentrala.md

Cover photos: © Shutterstock.com
Council of Europe Publishing
F-67075 Strasbourg Cedex
http://book.coe.int

© Council of Europe, September 2024
Printed by: IS Tipografia Centrala

# Contents


**LIST OF ABBREVIATIONS** **5**

**INTRODUCTION** **7**

**METHODOLOGY** **11**

**General Considerations** **11**

**Methodological Principles** **11**

**Project Team** **12**

**CHAPTER I: JUDICIAL REASONING, THE EUROPEAN COURT OF HUMAN RIGHTS STANDARDS** **13**

**1.1. Introduction** **15**

**1.2. General Rules of Judicial Reasoning** **16**

**1.3. Judicial Reasoning in Certain European Court Cases** **20**

*1.3.1. Article 5 Cases* 21

*1.3.2. Article 5 Cases in which the Republic of Moldova Acted as a Respondent State* 22

*1.3.3. Article 6 Cases* 27

*1.3.4. Article 6 Cases in which the Republic of Moldova Acted as a Respondent State* 28

*1.3.5. Examples of Reasoning in Relation to Other Articles of the Convention* 33

**CHAPTER II: STANDARDS OF LEGAL WRITING AND REASONING** **35**

**2.1. Introduction** **37**

**2.2. Consultative Council of European Judges (CCJE) Opinion No. 11 of the quality of judicial decisions** **38**

**2.3. Main principles of Legal Reasoning and Writing** **39**

*2.3.1. Using the IRAC (Issue, Rule, Analysis and Conclusion) Method* 39

*2.3.2. Key Facts* 40

*2.3.3. Application of the Rule to the Key Facts* 41

*2.3.4. Evaluation of Evidence* 42

*2.3.5. Use of Language* 43

**2.4. Interpretation Methods** **44**

**CHAPTER III: COMPLIANCE WITH STANDARDS OF NATIONAL LEGAL FRAMEWORK ON REASONING OF JUDGMENTS** **45**

**3.1. Introduction** **47**

**3.2. Methodology** **47**

*3.2.1. Selection criteria for the types of offences* 47

*3.2.2. Selected offences* 48

*3.2.3. Sampling procedure* 50

**3.3. Checklist** **51**

**3.4. General Overview of the Examination of Court Decisions** **51**

*3.4.1. Mapping of court decisions examined* 51

*3.4.2. Data on the Offence and the Imposed Sentence* 52

*3.4.3. Data on the Defence* 54

**3.5. Criteria for the Descriptive Part of Sentences of Conviction** **55**
*3.5.1. Description of the Criminal Act* **55**
*3.5.2. Evidence* 58
*3.5.3. Mitigating and Aggravating Circumstances* 61
*3.5.4. Recidivism* 66
*3.5.5. Legal Qualification* 66
*3.5.6. Punishment with imprisonment* 70
*3.5.7. Reference to the Case Law of the Constitutional Court and the European Court* 72
**3.6. Recommendations** **76**
**CHAPTER IV: EXTRACTS OF GOOD PRACTICES REGARDING MOTIVATION OF JUDGMENTS IMPOSING CRIMINAL SANCTIONS** **77**
4.1. Introduction 79
4.2. The Judgments Should Be Reasoned in Such a Way as to Enable Anyone Who Reads Them to Establish Whether the Defence Filed a Response to the Indictment and Whether This Contained Arguments Which Will Call for a Response by the Court 80
4.3. The Judgments Should Be Reasoned in Such a Way as to Enable Anyone Who Reads Them to Establish Whether the Defence Filed Written Conclusions on the Proposed Settlement and Whether They Contained Arguments Which Will Call for a Response by the Court 83
4.4. The Judgments Should Be Reasoned in Such a Way as to Include the Description of Evidence Substantiating the Conclusions of the Court and the Reasons for Which the Court Rejected Other Evidence 87
4.5. It is of Utmost Importance to Have a Clear Picture on Who Put Forward a Motion for Mitigating Circumstances. Only in This Way It Can Be Checked Whether a Judgment Has Responded to Significant Arguments of the Parties 99
4.6. It is of Utmost Importance to Have a Clear Picture on How the Court Reacted on a Mitigating Circumstance Regardless of Who Put it Forward 105
4.7. The Court Rejects the Mitigating Circumstance Based on the Analysis of Evidence and Particular Circumstances of the Given Case 109
4.8. Aggravating Circumstances are Taken into Consideration Only if the Court, Based on the Analysis of Evidence and the Circumstances of the Case, is Satisfied That the Relevant Aggravating Circumstance is Proven Beyond Reasonable Doubt 111
4.9. The Legal Qualification of the Acts of the Defence and the Reasons for Changing the Accusation in Favour of the Defendant Are Very Important Parts of the Decision Which Enable the Convict to Realize How Did the Court Come to the Imposition of a Penalty for a Particular Offence 113
4.10. Courts Should Justify the Imposition of Imprisonment Where the Criminal Code Provides for an Alternative Sanction 120
4.11. The Reference to the Case Law of the European Court and Constitutional Court Should Not Be Formalistic 127
4.12. Courts should react by default to references to the case law of the European Court, even when they think that the case law referred to is not relevant 132
**ANNEX** 134

# LIST OF ABBREVIATIONS

**CC** – Constitutional Court of the Republic of Moldova
**CCJE** – Consultative Council of European Judges
**CCP** – Code of Criminal Procedure of the Republic of Moldova
**ECHR** – European Convention on Human Rights
**ECtHR** – European Court of Human Rights
**NGO** – Non-governmental Organization
**NIFM** – National Institute of Forensic Medicine
**RM** – Republic of Moldova
**SCJ** – Supreme Court of Justice
**SCM** – Supreme Council of Magistracy
**TUCN** – Technical University of Cluj-Napoca

# INTRODUCTION

The Council of Europe Report on the Application of Criminal Sanctions in the Republic of Moldova[1] (the Report) identified several shortcomings related to the quality of the reasoning of court judgments in the Republic of Moldova. The deficiencies were of a general as well as specific nature. Overall, the Report found most of the national court judgments studied as having an average level of reasoning. Additionally, a noteworthy portion of judgments analysed was inadequately reasoned, while others displayed commendable levels of reasoning. In more specific terms, problems were identified with respect to the motivation of the acceptance or rejection of mitigating and/or aggravating circumstances, the individualisation of the sentence, and the proportionality of the sentence. Furthermore, a recurring problem highlighted in the analysed judgments was the frequent absence of a response to specific, pertinent, and essential arguments presented by the defence. Given these findings, the Report recommended the development of templates of court decisions with elements of adequate reasoning.[2] These templates could serve as a guide for judges in order to enhance the overall quality of judicial reasoning in the Republic of Moldova.

The Council of Europe continuously supports the Republic of Moldova in fulfilling its human rights obligations in the field of criminal justice. To this end, the Council of Europe is implementing the Project *"Strengthening the Human Rights Compliant Criminal Justice System in the Republic of Moldova"*[3] in the framework of the Council of Europe Action Plan for the Republic of Moldova 2021-2024. The main goal of the project is to further ensure higher respect for human rights in the functioning of the criminal justice system in the Republic of Moldova by assisting the national authorities to build an effectively functioning criminal justice system which is in line with European human rights standards, based on the principles of humanisation, resocialisation and restorative justice.[4] The present Compendium is a follow up of the recommendations stemming from the Report as described above. The Compendium should be seen as a guiding tool towards better reasoned judgments in conformity with the essential principles and methods of legal reasoning and requirements of the Code of Criminal Procedure of the Republic of Moldova (CCP) and the case law of the European Court of Human Rights (European Court).

The Compendium starts with the description of the methodology. It then continues with Chapter I which provides an analysis of the standards of the case law of the European Court on reasoning of criminal judgments with a special focus on judgments against the Republic of Moldova. In this context, the European Court has ruled especially in relation to alleged violations of Article 5 of the European Convention on Human Rights (European Convention or Convention). In general, the problems identified by the European Court concerned: stereotyping the court's reasoning and neglecting the defence's arguments against the evidence presented by prosecutors *(Becciev, Şarban, Popovici, Malai, Străisteanu, Stici, Boicenco)*; non-probation of reasonable suspicion *(Stepuleac, Muşuc)*; identical reasons invoked both in the application of the arrest and in the extension of the measure *(Modârcă, Castraveţ, Stici)*; no proper consideration given by the courts to the justification for

1 Council of Europe (2021), *Report on the Application of Criminal Sanctions in the Republic of Moldova*, available at: https://rm.coe.int/report-criminal-sanctions-eng-final/1680a1c6ef

2 Council of Europe (2021), *Report on the Application of Criminal Sanctions in the Republic of Moldova*, Section 3.6.

3 https://www.coe.int/en/web/chisinau/strengthening-the-human-rights-compliant-criminal-justice-system-in-the-republic-of-moldova

4 See description of the Project at: https://www.coe.int/en/web/national-implementation/moldova-strengthening-the-human-rights-compliant-criminal-justice-system-in-the-republic-of-moldova

the applicants' continued detention *(Istratii)*; unjustified refusal to examine witness for establishing reasons for detention in remand *(Muşuc)*; the detention on remand on the grounds of the defendant's refusal to present witnesses to prove his innocence and not motivated refusal to apply alternative measures asked by the applicant *(Ţurcan and Ţurcan)*; lack of clearness and foreseeability regarding the time-limits on the duration of the detention on remand *(Savca)*. Another group of judgements refers to reasoning of the judgement in the examination of the merits of the criminal case such as the negligence of defence arguments regarding alibi *(Grădinar)*; contestation of several evidence which were the basis of the accusation *(Vetrenco)*; the credibility of the statements of witness/victim *(Fomin)*; the interpretation of the law that would have led to the acquittal of the defendant (*Mitrofan)*. Other decisions concern failure to state reasons for the refusal to hear the defence witnesses *(Plotnicova)*; failure to state reasons for a conviction as a result of the cassation of a sentence of acquittal *(Popovici)* etc.

Chapter II provides an overview of standards on legal reasoning and writing. Beyond the prescribed legal requirements, it is equally important to look at the structure of the legal argument. This concept is fundamental; without a standardised structure, it would be impossible to compare the argument and evaluate its effectiveness. The main idea is that a legal argument should follow a predictable path. This path begins with the issue that the legal argument is addressing and ends with the conclusion or conclusions that directly answer the posed question. Thus, the essence of legal writing lies in the fact that the analysis revolves around answering the given question. Given this fundamental principle, an exploration of the standards of legal reasoning and writing become indispensable in this endeavour.

In Chapter III an analysis of national court decisions in the light of the relevant provisions of the CCP is conducted. The CCP contains detailed provisions which serve as a basis for a reasoned court judgment.[5] For example, the criminal procedural norms explicitly address the standard of legality, thoroughness and motivation of the sentence[6]. Also, a list of issues is established to which the court must respond in the sentence.[7] The CCP also imposes the exclusion of assumptions on which a conviction may be based,[8] but also the obligation to describe the evidence on which the court's findings are based and the reasons why the court rejected certain evidence.[9] According to the Constitutional Court these provisions contain legal guaranties regarding the observance of the right to a fair trial and defence.[10] At the same time, the Constitutional Court case law ensures the independence of judges[11] who must have unrestricted freedom to settle cases impartially, in accordance with the law and their own assessment of the facts.[12] Moreover, it has tackled issues of the reasoning of court judgments regarding the rejection of witness evidence or the reasoning in the appellate courts.[13] The Supreme Court of Justice has also contributed to the development of standards of reasoning of criminal court decisions in general[14] and of criminal decisions related to sentences in particular.[15] These judgements are explanatory judgments in the form of recommendations and according to the Constitutional Court, these recommendations given in an individual case cannot be the basis for a court judgement, which is to be based exclusively on legal provisions. However, they contribute to issuing reasoned judgements.[16]

---

5 Articles 384(3), 385, 389, 392-399 and 417-418 CCP.

6 Article 384 CCP.

7 Article 385 CCP.

8 Article 389 CCP.

9 Article 394 CCP.

10 Decisions of Constitutional Court No. 152 of 29.11.2018; No. 9 of 27.01.2020; No.18 of 22.05.2017.

11 Decision of Constitutional Court No. 2 of 09.02.2016.

12 Decision of Constitutional Court No. 21 of 22.06.2016.

13 Decisions of Constitutional Court No. 123 of 30.10.2018; No. 33 of 23.11.97; No. 23 of 05.08.2021; No. 123 of 25.11.2019; No. 74 of 02.07.2020.

14 *Judgment of the Supreme Court of Justice (SCJ) Plenum on the practice of examining criminal cases on appeal (No. 22 of December 12, 2005); Judgment of the SCJ Plenum on judicial practice in criminal cases regarding minors (No. 39 of November 29, 2004); Judgement of the SCJ Plenum on judicial practice in cases of the category of sexual offenses (No. 17 of November 7, 2005); Judgement of the SCJ Plenum on some issues regarding the individualization of the criminal punishment (No. 8 of November 11, 2013); Judgement of the SCJ Plenum regarding the judicial practice on the release from the execution of the sentence of severe ill persons (No. 9 of May 15, 2017).*

15 Judgement of the SCJ Plenum No. 5 of June 19, 2006.

16 Decisions of Constitutional Court No. 21 of 22.06.2016.

Chapter IV takes as a starting point the findings and recommendations of Chapter III. For each recommendation given in Chapter III, good practices from the Republic of Moldova and several European countries are provided in Chapter IV. This is done by means of extracts from judgments which address the issues identified in Chapter III according to the standards set out by the European Court case law and the general standards of legal reasoning and writing. The idea is to let the extracts of the selected good practices 'speak for themselves'. There are thus no comments or suggestions added to each extract presented in Chapter IV. It is hoped that these extracts of good practices together with the standards on reasoning of judgments as set out by the European Court and the general standards of legal reasoning and writing will serve as an inspiration source for Moldovan judges in their daily work of motivating judicial decisions.

# METHODOLOGY

## General Considerations

The present Compendium is developed based on a methodology which involves both empirical and desk research. Both methods were deployed simultaneously and as complementary to each other. Desk research was conducted for the purposes of drafting the analysis of the European Court case law on standards of judicial reasoning. To this end the relevant case law was analysed. Desk research was also conducted for the purposes of drafting the analysis on standards of legal reasoning and writing. The research consisted of the review of several opinions of the Council of Europe Consultative Council of European Judges (CCJE) and literature on the topic of legal reasoning and writing.

The empirical research was conducted in parallel with the desk research described above. National experts looked into a selection of judgments to check the compatibility of judgments of Moldovan courts with the legal framework of the CCP. The judgments studied were final judgments. Th focus was on the response of the courts on the motions raised by the parties, especially the defence in the course of the imposition of penal sentences. To this end, a checklist was prepared which indicated the criteria upon which the national experts conducted the analysis of the selected judgments. The selection of the judgments was done based on a sampling universe developed by a statistician/expert in social sciences. A detailed account of the methodology of the empirical research is provided further in Chapter III of this Compendium.

The analysis of the data gathered through the empirical research and the results of the desk research provided the basis for the compilation of extracts of good practices in Chapter IV of this Compendium. Desk research was used again to make a selection of extracts from several jurisdiction, including the Republic of Moldova. The methodology used for the selection of extracts is further explained in the introduction of Chapter IV of this Compendium.

It was important to ensure the ownership of the judiciary from the very outset of this project. To this end an advisory board of judges from all instances in the Republic of Moldova was established by the Superior Council of Magistracy (SCM). The role of the advisory board was to give feedback to the expert team in various phases of the project.

## Methodological Principles

The research carried out for the purpose of this Compendium was based on the following principles:

– objectivity and impartiality;
– confidentiality;
– non-involvement in individual cases;
– accuracy.[17]

The experts involved in the research have committed to provide truthful information, preserve the confidentiality of the data and to have no conflict of interest in carrying out the tasks assigned to them.[18]

---

[17] See generally *UN Manual on Human Rights Monitoring*, available at: https://www.ohchr.org/Documents/Publications/Chapter02-MHRM.pdf; see also W.D. Crano, M.B. Brewer, A. Lac, *Principles and methods of social research*, Routledge: New York and London, 2015.

[18] Ibid.

## Project Team

The Compendium was developed based on the contributions of a team composed of a lead international consultant,[19] four international consultants,[20] two senior national consultants,[21] two national legal consultants,[22] and one national consultant in the field of sociology.[23]

The lead international consultant was responsible for:

- drafting the initial concept note and workplan for the Compendium;
- taking a lead in developing the Methodology for the empirical research;
- performing desk research and drafting the analysis on the standards of legal reasoning and writing (Chapter II);
- taking a lead in analysing the data on judgments gathered by national supporting legal consultants and drafting Chapter III;
- taking the lead and participating in expert meetings with the project team;
- guiding and consolidating the contributions of other consultants engaged in the research (especially Chapter IV); and
- compiling, consolidating and drafting the overall Compendium.

The four international consultants performed the following tasks:

- draft Chapter I of the Compendium;
- conduct research and provided extracts of good practices from Portugal, Romania and France respectively for the purposes of Chapter IV.

The two senior national consultants were responsible for:

- substantial contribution and providing feedback to the concept note and workplan of the Compendium;
- substantial contribution and providing feedback to the Methodology of the empirical research;
- providing feedback to the analysis of the data on judgments gathered by national supporting legal consultants;
- selecting and preparing extracts of good practices from the Republic of Moldova for the purposes of Chapter IV;
- co-leading and participating in expert meetings with the project team;
- providing feedback to the overall Compendium.

The two national legal consultants were responsible for:

- examining the relevant sample;
- filling in the checklist forms in cooperation with the national consultant in the field of sociology;
- participating in expert meetings with the research team.

The national consultant in the field of sociology was responsible for:

- developing the sampling methodology;
- developing the gadgets to process the data in line with the checklist; processing the data into illustrative tables and charts to be used throughout the research report.

[19] Dr Idlir Peçi, Council of Europe international consultant.
[20] Prof. Kanstantsin Dzehtsiarou, Hugo Rascão, Cristi Danilet and Vincent Delbos, Council of Europe international consultants.
[21] Igor Dolea and Tudor Osoianu, Council of Europe national consultants.
[22] Natalia Rosca and Ion Graur, Council of Europe national consultants.
[23] Vasile Cantarji, Council of Europe national consultant in the field of sociology.

# CHAPTER I:

# JUDICIAL REASONING, THE EUROPEAN COURT OF HUMAN RIGHTS STANDARDS

# CHAPTER I: JUDICIAL REASONING, THE EUROPEAN COURT OF HUMAN RIGHTS STANDARDS

## 1.1. Introduction

The obligation to provide reasons is **not explicitly mentioned** in Article 6 of the European Convention, the European Court has long affirmed that this is an **implied right**.

It is important to note that the obligation to give reasons alone cannot turn an unfair trial into a fair one. The evidence needs to be properly examined, the equality of arms ensured, and national courts should be independent. However, the failure to give reasons can **exacerbate** other alleged violations of Article 6. Therefore, fair trial is a holistic system which has multiple elements. While this report looks at judicial reasoning, it can hardly be clearly separated from other fair trial requirements. For this reason, in some parts of this report the obligation to give reasons is discussed in the context of other Article 6 standards.

In practical terms it is important that the highest courts in the country deliver well-reasoned judgments. The judges from lower courts often consult the judgments of the Supreme or Constitutional courts and they are required to imitate the reasoning that these courts produce. Therefore, it is imperative, that the **highest courts come up with clear, consistent and well-reasoned judgments**.

Judicial reasoning becomes more and more important. Properly reasoned national judgment increases the likelihood that it will not be deemed by the European Court as a violation of human rights. Nowadays, the European Court increasingly uses **procedural review**. When the European Court engages in procedural review it comments on the decision-making process rather than on a specific substantive matter. In other words, the European Court considers the quality of reasoning rather than the outcome of the case unless the outcome is manifestly in breach of the Convention. In recent years, procedural review became one of the most widely discussed techniques of the Convention interpretation used by the European Court.[24] **Judge Spano** argued that the European Court is entering the stage of 'procedural embedding' of the Convention.[25] In other words, the European Court often supervises not **what** has been decided on the national level (obviously, within certain limits) **but how** it was decided. This approach extends in relation to various national decision-makers including courts.[26] To conclude, if the national courts **reason** their judgments **properly**, it is then more likely that the European Court will **not find a violation** in this case. This is especially relevant in cases of imposition of criminal sentences. The European Court does not act as a fourth instance court and usually leaves the issue of sentencing to the national court. Properly reasoned

---

24 See, for example, J. Gerards and E. Brems (eds.), *'Procedural Review in European Fundamental Rights Cases',* Cambridge University Press (2017); P. Popelier, *'The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights'*, in P. Popelier et. al. (eds.), O M Arnardóttir, `*The Procedural Turn under the European Convention on Human Rights and Presumptions of Convention Compliance'* (2017) 15(1) International Journal of Constitutional Law, page 9. For a discussion beyond the European Court, see, for example, Leonie M Huijbers (2019), *Process-based Fundamental Rights Review: Practice, Concept and Theory*. Cambridge: Intersentia.

25 Spano R (2018), *The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law*, Human Rights Law Review, page 473.

26 See, for example Saul M (2021), *Shaping Legislative Processes from Strasbourg*, European Journal of International Law.

decision will satisfy the European Court that the national courts exercised their discretion in compliance with the Convention and not in an arbitrary way.

Although the general principles applicable to reason given are cross-cutting, there are many aspects that are relevant to reasoning in particular circumstances. These general principles are clarity, consistency, and coherency of reasons. However, much more specific assessment of reasons should be conducted in relation to various situations in criminal and civil procedures. For instance, the national courts must consider specific reasons for deciding on **pre-trial detention, house arrest or bail**. Specific reasons should be developed in relation to **admissibility of evidence, authorisation of wiretapping**, and many others. This report will consider some of these circumstances, but the proper reason-giving goes far beyond Articles 5 and 6 and are relevant to effectively all articles of the Convention. For instances, **Article 2** places a positive obligation on the states to investigate suspicious deaths. If the authorities decide to end the inquiry, they need to provide relevant and sufficient reasons.

This chapter will first outline the **general requirements** for judicial reasoning. Then it will provide some **specific examples** from the *body* of case law of the European Court, followed by a sweeping analysis of the European Court judgments in which the Republic of Moldova was a respondent state. As it has been outlined, the European Court has limited jurisdiction in assessment of the specific sentences in criminal cases unless this sentence is so severe that it violates the right not to be subjected to inhuman or degrading treatment[27] or disproportionately affected some other rights of the Convention such as freedom of expression[28]. That said, the general requirements of reasoning that are established in the case law of the European Court in relation to various aspects of Articles 5 and 6 of the Convention can be applied *mutatis mutandis* to the justification of imprisonment sentencing in criminal procedure.

## 1.2. General Rules of Judicial Reasoning

Neither Article 6 nor Article 5 of the Convention enshrines a **specific right to judicial reasoning**. However, the European Court established the right to understand the rationale for various judicial acts and the corresponding obligation of courts to provide reasons for judicial decisions.

The Court established this obligation on a number of occasions, for example:

> …judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. Without requiring a detailed answer to every argument advanced by the complainant, this obligation presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings.[29]

National courts are given **significant discretion in relation of judicial reasoning**. The extent of the obligation to give reasons depends on the particularities of the case at hand. It is not always possible to clearly indicate what should be included in the reasoning or what precisely is the correct way of substantiation of a particular point. It very often depends on the type of decision made by courts, but the European Court made the following general observation in this respect:

[27] See, *Vinter and Others v. the United Kingdom* [GC], Nos. 66069/09 and 2 others, ECHR 2013.
[28] See, *Stoll v. Switzerland* [GC], No. 69698/01, ECHR 2007-V.
[29] *Moreira Ferreira v. Portugal (No. 2):* https://hudoc.echr.coe.int/eng?i=001-175646, § 84.

> The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing between the Contracting States with regard to statutory provisions, customary rules, judicial opinion and the presentation and drafting of judgments. That is why the question as to whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case.[30]

Often, the European Court identifies the **drawbacks** of the reasoning rather than highlights the best practices. According to the European Court, national courts are not expected to follow a particular format in their judgments or a certain structure. However, they must provide **enough reasons that the losing party would be able to appeal** against this decision.

> The Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6. The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him. The Court's task is to consider whether the method adopted in this respect has led in a given case to results which are compatible with the Convention.[31]

Also, national courts are **not expected to provide responses to every argument** made by the parties, but they must not miss **specific, pertinent and important points** raised by them:

> … while Article 6 § 1 obliges the courts to give reasons for their judgments, it cannot be understood as requiring a detailed answer to every argument adduced by a litigant. The extent to which the duty to give reasons applies may vary according to the nature of the decision at issue. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case.[32]
>
> Without requiring a detailed answer to every argument advanced by the complainant, this obligation [to give reasons] presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings. It must be clear from the decision that the essential issues of the case have been addressed. [33]

In *Zhang v. Ukraine* the European Court further elaborated on this point:

> the Court observes that the domestic courts at all three levels of jurisdiction failed to give any assessment to the applicant's specific pertinent and important points about the serious flaws in the prosecution witness evidence and about the alleged unlawfulness and arbitrariness of the exclusion of all the defence witness evidence from the file.[34]

---

30 *Čivinskaitė v. Lithuania,* https://hudoc.echr.coe.int/eng?i=001-204601

31 *Hadjianastassiou v. Greece,* https://hudoc.echr.coe.int/eng?i=001-57779, § 33.

32 *Helle v. Finland,* https://hudoc.echr.coe.int/eng?i=001-58126, § 55.

33 *Rostomashvili v. Georgia,* https://hudoc.echr.coe.int/eng?i=001-187363, § 55.

34 *Zhang v. Ukraine,* https://hudoc.echr.coe.int/eng?i=001-187602, § 73.

The European Court emphasised that:

> in determining whether the applicants' arguments required an explicit reply, the Court must have regard to whether they were sufficiently well-substantiated as to have cast doubt on the findings of the domestic courts and the evidence already available in the case file.[35]

In its judgments the European Court can assess the reasoning of national courts and analyse whether it reflects all key areas of the parties' submission. The European Court also sometimes emphasises which arguments were and were not properly examined. For example:

> the Court observes at the outset that the applicant's argument concerning his alibi was addressed, even if briefly, by the court of first instance. It reasoned that the statements given by the defence witnesses were contradictory and considered the account untrustworthy.
>
> 57. By contrast, the applicant's two principal arguments before the domestic courts were not given an explicit reply. Firstly, he had argued that unlike his co-accused, no piece of forensic evidence concerned him or his alleged actions and therefore did not implicate him, in any manner whatsoever, in the crimes he had been charged with. Secondly, the applicant had underlined that immediately following the murder the victim's father was found at home, apparently unaware of his son's death, and that it was unclear why he had allegedly pretended being unaware of his son's murder. This, the applicant had argued, made it open to doubt whether the eyewitness had been at the crime scene at all. Based on those submissions, the applicant maintained that the prosecution's case against him was devoid of any factual and evidentiary grounds and was based on a mere suspicion, in violation of the pertinent legislation.[36]

National courts are expected to reply to the allegations of the parties when the violations of the Convention are made at the national level.

> The Court must bear in mind that, even though the courts cannot be required to state the reasons for rejecting each argument of a party, they are nonetheless not relieved of the obligation to undertake a proper examination of and respond to the main pleas put forward by that party. Where, in addition, those pleas deal with the "rights and freedoms" guaranteed by the Convention and the Protocols thereto, the national courts are required to examine them with particular rigour and care.[37]

**National courts are best placed to interpret their national law**. That is why the European Court allows quite wide national discretion in this area. The European Court would intervene only when there is a significant and manifest arbitrariness in interpretation of national law or when the trial cannot be seen as 'just'[38]:

> a domestic judicial decision cannot be qualified as arbitrary to the point of prejudicing the fairness of proceedings unless no reasons are provided for it or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a "denial of justice".[39]

In *Bochan v. Ukraine* (*No. 2)*, the European Court ruled that the decision of the national court that actually **reinterpreted the judgment previously delivered by the European Court** and changed its meaning to the opposite was not properly reasoned. Moreover, the Court listed examples of the situation when such reasoning would amount to a "manifest error":

---

35 *Lobzhanidze and Peradze v. Georgia,* https://hudoc.echr.coe.int/eng?i=001-201336, § 69.
36 See, *Rostomashvili v. Georgia,* https://hudoc.echr.coe.int/eng?i=001-187363, §§ 56-57.
37 *Wagner and J.M.W.L. v. Luxembourg,* https://hudoc.echr.coe.int/eng?i=001-81328, § 96.
38 See, *Navalnyy and Ofitserov v. Russia*, § 119.
39 *Moreira Ferreira v. Portugal (No. 2),* https://hudoc.echr.coe.int/eng?i=001-175646, § 85.

> …if the error of law or fact by the national court is so evident as to be characterised as a "manifest error" – that is to say, is an error that no reasonable court could ever have made – it may be such as to disturb the fairness of the proceedings. In *Khamidov*, the unreasonableness of the domestic courts' conclusion as to the facts was "so striking and palpable on the face of it" that the Court held that the proceedings complained of had to be regarded as "grossly arbitrary". In *Anđelković*, the Court found that the arbitrariness of the domestic court's decision, which principally had had no legal basis in domestic law and had not contained any connection between the established facts, the applicable law and the outcome of the proceedings, amounted to a "denial of justice".
>
> 63. In the present case, the Court notes that in its decision of 14 March 2008 the Supreme Court grossly misrepresented the Court's findings in its judgment of 3 May 2007. In particular, the Supreme Court recounted that this Court had found that the domestic courts' decisions in the applicant's case had been lawful and well founded and that she had been awarded just satisfaction for the violation of the "reasonable time" guarantee, these being affirmations that are palpably incorrect.[40]

Often the lack of proper reasons will lead to a violation of Articles 5 (right to liberty and security) and 6 (right to a fair trial). However, one needs to note that judicial reasoning is a very wide phenomenon that is relevant to almost any judicial decision and judgment. **Incorrect reasoning and application of legal provisions** can also lead to the violations of the substantive rights enshrined in the Convention and Protocols, such as Article 1 of Protocol No. 1.

> …having regard to the Šibenik County Court's failure to indicate a legal provision that could be construed as the basis for its finding that the debt could have been acknowledged only by the head of the Central Finance Department of the Ministry of Defence, the Court finds the impugned interference was incompatible with the principle of lawfulness and therefore contravened Article 1 of Protocol No. 1 to the Convention, because the manner in which that court interpreted and applied the relevant domestic law, in particular section 387 of the Obligations Act, was not foreseeable for the applicant.[41]

As this quote shows, **inconsistent and unpredictable reasoning** might lead to finding a violation of the Convention. Moreover, in some situations overly **laconic, insufficient and brief reasoning** might also result in finding a violation. For example, national courts are expected to provide detailed reasoning when they decide to depart from the well-established national case law and change precedents.

> … the Court observes that the Supreme Court changed the jurisprudence in the applicant's case by deciding it contrary to already established case-law on the matter. In this connection, the Court notes that case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement. However, it recalls that the existence of an established judicial practice should be taken into account in assessing the extent of the reasoning to be given in a case. In the present case, the Supreme Court deviated from both the lower courts' and its own jurisprudence on the matter. In this connection, the Court recalls that the requirement of judicial certainty and the protection of legitimate expectations do not involve the right to an established jurisprudence. However, given the specific circumstances of the case, the Court considers that the well-established jurisprudence imposed a duty on the Supreme Court to make a more substantial statement of reasons justifying the departure.

[40] *Bochan v. Ukraine (No. 2)*, https://hudoc.echr.coe.int/eng?i=001-152331, §§ 62-63.
[41] *Lelas v. Croatia*, https://hudoc.echr.coe.int/eng?i=001-98827, § 78.

That court was called upon to provide the applicant with a more detailed explanation as to why his case had been decided contrary to the already existing case-law. A mere statement that the employers were no longer required to provide concrete reasons for reassignment, but only to refer to one of the terms specified in the Collective Agreement was insufficient. While such a technique of scarce reasoning by the highest court is, in principle, acceptable, in the circumstances of the present case it failed to satisfy the requirements of a fair trial.[42]

If national law allows courts to be **proactive in seeking explanations and justifications** for their judgments, they must use these opportunities.

the Court is compelled to note at the outset that the Court of Appeal failed to avail itself of the possibility – provided by Article 62 of the new Code of Civil Procedure – to invite the applicants to provide further particulars of their ground of appeal.[43]

On the basis of the analysed materials, one can suggest the following summary of the key standards that the European Court associates with judicial reasoning.

1. It is an obligation of courts to provide reasons for their decisions.
2. Courts have discretion as to what reasons should be included in their decisions and judgments and there is no 'one form fit all' approach.
3. Courts should not reply to every single argument submitted to them but should be able to identify the core issue(s) in the case and reason the position taken.
4. National courts should reply to specific, pertinent and important points raised by the parties and those pleas that can cast doubt on the finding of that court.
5. The reasons should be clear.
6. The reasoning should not be formalistic, stereotypical or automatic. The national courts should take individual circumstances into account.
7. The reasons should be consistent and coherent in terms of application of law and assessment of facts. The applicable law should not be interpreted arbitrarily.
8. In certain circumstances the national courts are under the increased obligation to provide sufficient and clear reasons. For example, courts must provide reasons if they decide to change the case law or if the European Convention rights are at stake in the case.
9. If national law allows courts to be proactive and seek specific evidence or explanations that can form part of their reasoning, they should take this opportunity.

These standards are further elaborated in the subsequent chapter of this report.

## 1.3. Judicial Reasoning in Certain European Court Cases

This section makes a general overview of the standards that the European Court applies to judicial reasoning in cases related to Articles 5 and 6 of the ECHR followed by the analysis of the judgments delivered in cases against the Republic of Moldova. Finally, this section will offer some selected examples of how judicial reasoning features the European Court's analysis of other articles of the Convention.

The section is not comprehensive as these standards depend on the particularities of the legal system, the factual circumstances of the cases. They can be seen as illustrative examples rather than as a comprehensive overview. That said, the report aims to highlight the abstract rules of reasoning that can be used beyond the specific context of Article 5 and Article 6 cases and by doing that can inform the approach to the imposition of criminal sanctions.

---

[42] *Atanasovski v. the former Yugoslav Republic of Macedonia,* https://hudoc.echr.coe.int/eng?i=001-96673, § 38.
[43] Ibid, § 92.

### *1.3.1. Article 5 Cases*

The European Court established that a decision of national courts that do not contain proper reasoning is a violation of Article 5 of the European Convention. The violations are most likely to be found under **Articles 5(1)c[44] or 5(3)** and in the majority of cases they concern the pre-trial detention. This does not mean that the case law of the European Court in the context of Article 5(1)c and 5(3) is not relevant to the considerations of the present report. The abstract standards of reasoning are applied by the Court to specific situations. This means that the discussion in this section can be used to inform the **general standards** of the imposition of sanctions and demonstrate how these general standards can be **applied to specific cases**. For instance, it has been established that the absence of any ground would be considered as incompatible with prohibition of arbitrariness:

> the reasoning of the decision ordering a person's detention is a relevant factor in determining whether the detention must be deemed arbitrary. In respect of the first limb of sub-paragraph (c) the Court has found that the absence of any grounds in the judicial authorities' decisions authorising detention for a prolonged period of time was incompatible with the principle of protection from arbitrariness enshrined in Article 5 § 1.[45]

The similar conclusion can be made by the European Court if the national decision is **very brief** and do not contain any references to the relevant legal provisions:

> the Regional Court's [national court] decision of 13 March 2002 was extremely laconic with regard to the issue of detention and made no reference to any legal provision which would have permitted the applicant's further detention. It follows that the decision did not offer sufficient protection from arbitrariness and failed to satisfy the standard of "lawfulness" required under Article 5 § 1 of the Convention.[46]

The European Court has also established that the **lack of reasoned judgment** will lead to a violation of Article 5(3) of the European Convention.

> 87. According to the Court's established case-law under Article 5 § 3, the persistence of a reasonable suspicion is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish (1) whether other grounds cited by the judicial authorities continue to justify the deprivation of liberty and (2), where such grounds were "relevant" and "sufficient", whether the national authorities displayed "special diligence" in the conduct of the proceedings. The Court has also held that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. When deciding whether a person should be released or detained, the authorities are obliged to consider alternative means of ensuring his or her appearance at trial.[47]

The reasons that are considered appropriate need to be **justified and explained**. Among the reasons that would be considered appropriate for initiation and extension of the per-trial detention are the **danger of absconding**, **obstruction of the proceedings**, **repetition of offences**, **preservation of public order**. In relation to each of these reasons national courts should provide relevant and sufficient justification with references to available evidence and facts. For instance, in *Sulaoja v. Estonia* the European Court pointed out:

---

44 The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonable considered necessary to prevent his committee an offence or fleeing after having done so.

45 *S., V. and A. v. Denmark*, https://hudoc.echr.coe.int/eng?i=001-187391, § 92.

46 *Khudoyorov v. Russia*, https://hudoc.echr.coe.int/eng?i=001-70865, § 157.

47 *Buzadji v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-164928, § 87.

> The Court observes that the judicial orders authorising the applicant's detention on remand were based on a brief standard formula that the detention was justified, namely that the applicant had been previously convicted, did not have a place of residence, a job nor a family and that he could commit new offences, and abscond. No more elaborate reasons were put forward to justify the need for the protracted detention of the applicant.
>
> The Court finds that the mere absence of a fixed residence does not give rise to a danger of flight. Nor can it be concluded from the lack of a job or a family that a person is inclined to commit new offences. The Court has doubts as to whether the grounds for the applicant's detention, as reflected in the perfunctorily reasoned court orders, retained their sufficiency for the whole period of the pre-trial detention.[48]

The rule that the reason for pre-trial detention should be justified by the facts is relevant to all other reasons in other contexts: they need to be properly explained and national court's arguments should rely on **facts** rather than on **stereotypes or assumptions**.

### *1.3.2. Article 5 Cases in which the Republic of Moldova Acted as a Respondent State*

In the Report prepared by the Council of Europe in 2020 it was established that the lack of proper reasoning is one of the **systemic problems** in Moldovan criminal procedure. The Report stated that

> failure to give relevant and sufficient reasons for ordering and extending detention on part of investigating judges and/or appellate judges. This problem seems to be repetitive and still raises concerns. It emerges as a systemic deficiency…[49]

In the Grand Chamber case of *Buzadji v. the Republic of Moldova*[50] the European Court considered the **reasons given to justify the house arrest** of the applicant and then extension of this arrest in the context of Article 5(3). The European Court assessed the reasons given by the national court and stated:

> 115. Turning to the justifications provided for the applicant's provisional detention in the present case, the Court observes that the domestic court, which on 5 May 2007 issued the initial order to detain the applicant on remand, relied only on the risk of his collusion with his sons and on the seriousness of the offence imputed to him. While the latter reason is normally invoked in the context of the risk of absconding, the national court considered that the danger of absconding along with the risk of influencing witnesses and the risk of the applicant's tampering with evidence had not been substantiated by the prosecutor and were implausible.
>
> 116. The applicant appealed and argued, inter alia, that the risk of collusion had not been invoked by the prosecutor and that, in any event, he had had plenty of time to collude with his sons, had he had such an intention. However, his appeal was dismissed by the Court of Appeal, without any answer to his objections.

[48] *Sulaoja v. Estonia*, https://hudoc.echr.coe.int/eng?i=001-68229, § 64.

[49] Report on the Research on the Application of Pre-Trial Detention in the Republic of Moldova, https://rm.coe.int/report-research-pre-trial-detention-eng-final/16809cbe15, page 159.

[50] *Buzadji v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-164928

117. In this connection the Court notes, as the applicant pointed out, that the prosecutor had not relied on such a reason as the danger of collusion with his sons. Moreover, it follows clearly from the facts of the case that the investigation against the applicant and his sons was initiated in July 2006, i.e. some ten months before the applicant's arrest and that he would indeed have had enough time to collude with them had he had such an intention (see §§ 9-12 above). In such circumstances, the Court sees no merit whatsoever in this argument. Furthermore, it notes that the Court of Appeal failed to give an answer to this objection raised by the applicant. There is no indication in the judgments that the courts took into account such an important factor as the applicant's behaviour, between the beginning of the investigation in July 2006 and the moment when first ordering his remand in custody.

118. When prolonging the applicant's detention for the first and second times, on 16 May and 5 June 2007 respectively, the courts no longer relied on the risk of collusion, which was, in essence, the only supplementary reason relied upon by the courts to order his remand in the first place. This time the courts invoked other reasons, namely the danger of absconding and the risk of influencing witnesses and tampering with evidence (see §§ 20 and 25 above). In this regard, the Court notes that these were the same reasons as had been invoked by the prosecutor in the initial application for placing the applicant in detention on remand but which both the first-instance court and the Court of Appeal had dismissed as being unsubstantiated and improbable (see §§ 15 and 17 above). There is no explanation in the court decisions prolonging the applicant's detention as to why those reasons became relevant and sufficient only later (see, for instance, *Koutalidis v. Greece*, No. 18785/13, § 51, 27 November 2014), for instance whether anything in the applicant's behaviour had prompted the change. As in the case of the initial detention order, no assessment was made by the courts of the applicant's character, his morals, his assets and links with the country and his behaviour during the first ten months of the criminal investigation.

119. When examining the prosecutor's application for the third prolongation, on 26 June 2007, the first-instance court dismissed the prosecutor's arguments in favour of detention and found in essence that there were no grounds militating for his continued detention. Nevertheless, the court ordered the applicant's continued detention under house arrest (see § 30 above).

120. After three days of house arrest, the Court of Appeal quashed that detention order on 29 June 2007, while finding again that the applicant could abscond, influence witnesses, tamper with evidence and collude with his sons if kept under house arrest. It therefore ordered that his continued detention take place in a remand facility. The court did not explain the reasons why it disagreed with the first-instance court as to the absence of reasons to detain him, nor did it explain the basis for its fear that he might abscond, influence witnesses and tamper with evidence (see § 32 above).

121. When examining the prosecutor's fourth application for prolongation, the Court of Appeal dismissed all the reasons invoked by the prosecutor and stated that there were no reasons to believe that the applicant would abscond or interfere with the investigation. Nevertheless, in spite of the absence of such reasons, the court ordered his house arrest, which was later prolonged until March 2008 (see § 36 above). The decisions ordering and prolonging house arrest did not rely on any reasons in support of such a measure other than the seriousness of the offence imputed to him (see §§ 37 and 38 above).

122. In addition to the above-mentioned problems, the Court considers that the reasons invoked by the domestic courts for ordering and prolonging the applicant's detention were stereotyped and abstract. Their decisions cited the grounds for detention without any attempt to show how they applied concretely to the specific circumstances of the applicant's case. Moreover, the domestic courts cannot be said to have acted consistently. In particular, on some occasions they dismissed as unsubstantiated and implausible the prosecutor's allegations about the danger of the applicant's absconding, interfering with witnesses and tampering with evidence. On other occasions they accepted the same reasons without there being any apparent change in the circumstances and without explanation. The Court considers that where such an important issue as the right to liberty is at stake, it is incumbent on the domestic authorities to convincingly demonstrate that the detention is necessary. That was certainly not the case here.

> 123. In the light of all of the above factors, the Court considers that there were no relevant and sufficient reasons to order and prolong the applicant's detention pending trial. It follows that in the present case there has been a violation of Article 5 § 3 of the Convention.[51]

In other words, the European Court identified that the national courts used controversial reasons to justify extension of house arrest. Those reasons that were dismissed initially were used again in the subsequent decisions. This demonstrates that the national courts were inconsistent in their reasoning, and this led the European Court to finding a violation of Article 5 of the Convention. This **inconsistency** is one of the key issues with judicial reasoning in the context of Article 5.

The formality of the reasons that have no real connection to the case at hand was also discussed in *Sarban v. the Republic of Moldova*:

> 95. The Court recalls that under the second limb of Article 5 § 3, a person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify his continuing detention.
>
> 96. Moreover, the domestic courts "must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release.
>
> 97. Article 5 § 3 of the Convention cannot be seen as authorising pre-trial detention unconditionally provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities.
>
> 98. A further function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.
>
> 99. While Article 5 of the Convention "does not impose an obligation on a judge examining an appeal against detention to address every argument contained in the appellant's submissions, its guarantees would be deprived of their substance if the judge, relying on domestic law and practice, could treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting in doubt the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty." In this context, "[a]rguments for and against release must not be 'general and abstract'".
>
> 100. The Court notes that the applicant advanced before the national courts substantial arguments questioning each of the grounds for his detention. He referred to the fact, for example, that since the first arrest warrant was issued, he had never obstructed in any way the investigation and had appeared before the relevant authorities whenever summonsed. His conduct regarding the investigation had always been irreproachable. He had a family, had property in Moldova and none abroad, and several newspapers were prepared to offer guarantees for his release in accordance with the provisions of the Code of Criminal Procedure. The applicant was also ready to give up his passport as an assurance that he would not leave the country.

51 Ibid.

> 101. The Court further notes that the domestic courts devoted no consideration to any of these arguments in their relevant decisions, apparently treating them as irrelevant to the question of the lawfulness of the applicant's detention on remand, even though they were obliged to consider such factors under Article 176 § 3 of the Code of Criminal Procedure. This is striking, given the fact that on 18 November 2004 the Court of Appeal had found that a number of those factors militated against the applicant's detention. The other courts either did not make any record of the arguments submitted by the applicant or made a short note of them and did not deal with them. They limited themselves to repeating in their decisions in an **abstract and stereotyped way the formal grounds for detention provided by law**. These grounds were cited without any attempt to show how they applied to the applicant's case.
>
> …
>
> 103. In the light of the above, the Court considers that the reasons relied upon by the Buiucani District Court and by the Chişinău Court of Appeal, in their decisions concerning the applicant's detention on remand and its prolongation, were not "relevant and sufficient".[52]

These **formal and stereotypical reasoning** has been highlighted by the European Court in the context of Article 5(3) in relation to many other Moldovan cases:

> 34. The existence of a reasonable suspicion is not disputed in the present case. However, the Court notes that as in *Sarban v. the Republic of Moldova* (cited above, at §§ 11 and 14) the reasons relied upon by the domestic courts in their decisions to remand the applicant in custody and to prolong his detention (see §§ 8 and 11 above) were limited to paraphrasing the reasons for detention provided for by the Code of Criminal Procedure, without explaining how they applied in the applicant's case. Accordingly, the Court does not consider that the instant case can be distinguished from *Sarban case* in what concerns the relevance and sufficiency of reasons for detention.[53]

Similarly, in *Boicenco v. the Republic of Moldova* the national court **simply cited relevant laws without explaining how these laws are applicable to the situation at hand**.

> [T]he Court notes that both the first-instance court and the Court of Appeal, when ordering the applicant's detention and the prolongation thereof, have cited the relevant law, without showing the reasons why they considered to be well-founded the allegations that the applicant could obstruct the proceedings, abscond or re-offend. Nor have they attempted to refute the arguments made by the applicant's defence.[54]

In some cases, the national courts **instead of direct quoting just paraphrased the reasons** for detention provided by the national legislation. This also was not deemed sufficient.

---

52 *Sarban v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-70371.

53 *Castravet v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-79767. See, also, *Modarca v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-80535, *Popovici v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-83460, *Ursu v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-83486, *Malai v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-89577, *Ignatenco v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-103319, *Oprea v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-102427 and others.

54 *Boicenco v. Moldova*, https://hudoc.echr.coe.int/eng?i=001-76295, § 143.

> … the domestic courts limited themselves to paraphrasing the reasons for detention provided for by the Code of Criminal Procedure, without explaining how they applied in the applicant's case. The only exception was that they referred to the applicant's Romanian passport, which could have enabled him to abscond abroad, and his lack of a permanent job. However, the courts did not react in any way to the applicant's argument that both his Romanian and Moldovan passports could have been seized by the authorities if they had decided that this was necessary to prevent his absconding and that alternative preventive measures existed, some of which (for example, house arrest) provided virtually the same guarantees against absconding as pre-trial detention. Neither were any other factors in favour of the applicant's release examined, such as his appearance before the investigator at the latter's first request, despite an express requirement to do so under Article 176 (3) of the Code of Criminal Procedure and the applicant's reference to several *prima facie* relevant reasons against detention. The Court also takes into account that the applicant was held for over two years in detention pending trial, even though no new reasons were advanced for the continued need for such detention.[55]

In some cases, the European Court assessed **the quality of the reasons** advanced in the decisions of the national courts:

> 51. The Court is particularly struck by the reasons for D.T.'s detention starting on 8 November 2005 (see §§ 23 et seq. above), namely that he refused to disclose to the prosecution the names of witnesses who could prove his innocence at trial. It considers that this not only cannot constitute a ground for detaining a person, but it is in breach of the accused's right to remain silent as guaranteed by Article 6 the Convention.[56]

It seems that some of the reasons enshrined in the decisions might not improve the quality of such decisions. Reasons should not be irrelevant and **by advancing these reasons the national court should not violate rights** of the Convention.

This brief analysis shows that the courts from the Republic of Moldova sometimes do not reason the pre-trial detention properly. The key challenges are the following:

1. In some cases, no reasons are provided.
2. In some cases, the reasons provided are formalistic and are limited to citing or paraphrasing the law.
3. In some cases, the reasons are not relevant to the case at hand.
4. In some cases, the key reasons advanced by the applicant are ignored and not discussed at all.
5. In some cases, the reasoning is controversial, and the subsequent courts rely on the reasons that were rejected by the previous decisions.
6. In some cases, new reasons for extending the detention are not articulated and explained.
7. The national courts do not consider alternative restraining measures and do not explain why these alternative measures are not adequate in the case at hand.

This non-exhaustive list shows a challenging pattern of failure in legal reasoning in the context of Article 5 in the Republic of Moldova.

[55] *Stici v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-82897, § 44.
[56] *Țurcan and Țurcan v. the Republic of Moldova,* https://hudoc.echr.coe.int/eng?i=001-82919.

### *1.3.3. Article 6 Cases*

Judicial reasoning is relevant to many of the aspects of Article 6. In this sub-section, the report will highlight some of them.

**Assessment of evidence and submissions**

The requirement of assessment of evidence has two sides: **procedural and substantive**. From a procedural point of view, the European Court requires national courts to consider certain evidence and prevents national court from ignoring key evidence or submissions.

> 80. The Court notes that the right to a fair trial as guaranteed by Article 6 § 1 of the Convention includes the right of the parties to the trial to submit any observations that they consider relevant to their case. The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective, this right can only be seen to be effective if the observations are actually "heard", that is duly considered by the trial court. In other words, the effect of Article 6 is, among others, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant.[57]

From a substantive side, the European Court can examine the quality of assessment of the available evidence although this assessment is limited to some specific situations. The European Court is not a **fourth instance court** and therefore it would only re-consider the assessment of facts and submissions within the scope of Article 6 if such assessment can be characterised as a '**manifest error**':

> whilst acknowledging the domestic judicial authorities' prerogative to assess the evidence and decide what is relevant and admissible, the Court reiterates that Article 6 § 1 places the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties without prejudice to its assessment of whether they are relevant to its decision. An error of law or fact by the national court which is so evident as to be characterised as a "manifest error" – that is to say, an error that no reasonable court could ever have made – may be such as to disturb the fairness of the proceedings.[58]

**Examination of witnesses.** The Court established that national courts need to provide reasoning for its decision to refuse to call a particular witness. The Court developed the relevant test in the case of *Murtazaliyeva v. Russia*:

> 158. Where a request for the examination of a witness on behalf of the accused has been made in accordance with domestic law, the Court, having regard to the above considerations, formulates the following three-pronged tests:
>
> 1. Whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation?
>
> 2. Whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial?
>
> 3. Whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings?
>
> 164. Any such assessment would necessarily entail consideration of the circumstances of a given case and the reasoning of the courts must be commensurate, i.e. adequate in terms of scope and level of detail, with the reasons advanced by the defence.[59]

---

57 *Perez v. France*, https://hudoc.echr.coe.int/eng?i=001-61629.
58 *Carmel Saliba v. Malta*, https://hudoc.echr.coe.int/eng?i=001-169057, § 64.
59 *Murtazaliyeva v. Russia*, https://hudoc.echr.coe.int/eng?i=001-187932.

**Reasoning depending on the stage of the trial**. The European Court has emphasised on a number of occasions that the depth of the detail of reasoning will depend on the stage of the trial. So, the European Court would not expect the same level of reasoning at the appeal as compared to the first instance decisions:

> …according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. Although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument. Thus, in dismissing an appeal an appellate court may, in principle, simply endorse the reasons for the lower court's decision. A lower court or authority in turn must give such reasons as to enable the parties to make effective use of any existing right of appeal.[60]

**Comprehensive reasoning.** In *Gard and others v. UK*, the European Court established why it was of the opinion that the reasoning was sufficient and comprehensive:

> The Court recalls that they [national courts] were meticulous and thorough; ensured that all those concerned were represented throughout; heard extensive and high-quality expert evidence; accorded weight to all the arguments raised; and were reviewed at three levels of jurisdiction with clear and extensive reasoning giving **relevant** and **sufficient** support for their conclusions at all three levels.[61]

### *1.3.4. Article 6 Cases in which the Republic of Moldova Acted as a Respondent State*

The issue of judicial reasoning has also been discussed by the European Court in the Article 6 cases against the Republic of Moldova.

The European Court has emphasised that national courts have to **assess and respond to the relevant arguments of the parties**. In *Fomin v. the Republic of Moldova* the Court stated the following:

> 26. In the present case, the Court observes that the applicant was convicted of insulting R. in her apartment on 9 June 2005. It also notes that the judgment of the first-instance court started by stating, from the very beginning, that the applicant had committed the offence. No other reason was given either for finding the applicant guilty or for dismissing her arguments aimed at challenging R.'s version of events.
>
> 27. Similarly, while the Court of Appeal's judgment was longer, it too started from the established fact of the applicant's guilt and moved on to whether the lower court had observed procedure before dealing with the issue of the penalty imposed on the applicant
>
> 28. Moreover, the Court finds it strange that the domestic courts did not comment in any manner on the fact that the complaint made by R. and her husband referred to one address (Viilor str.), while the applicant was convicted of insulting R. at another address (Mateevici str). This could not be seen as a simple typographical mistake, because the applicant had made an express argument in this regard to the Court of Appeal, which did not comment.

---

60 *Sanchez Cardenas v. Norway*, https://hudoc.echr.coe.int/eng?i=001-82560.
61 *Gard and others v. UK*, https://hudoc.echr.coe.int/eng?i=001-175359#, § 124.

> 31. […] The right to be heard therefore includes not only the possibility to make submissions to the court, but also a corresponding duty of the court to show, in its reasoning, the reasons for which the relevant submissions were accepted or rejected. This duty is always subject to the provision that a court may consider it unnecessary to respond to arguments which are clearly irrelevant, unsubstantiated, abusive or otherwise inadmissible owing to clear legal provisions or well-established judicial practice in respect of similar types of arguments.
>
> 32. The Court finds that the applicant's arguments in the present case, such as those undermining R.'s credibility or those concerning the discrepancy between the address of the alleged wrongdoing as described in R.'s complaint and that mentioned in the courts' decisions, were not clearly inadmissible and were supported by evidence. Moreover, the first-instance court's failure to give any reasons for finding the applicant guilty of the offence hindered her from appealing in an effective way against her conviction.[62]

The European Court found a violation of Article 6 in this case because the reasoning of the national courts was not **comprehensive and did not respond to significant and relevant arguments** by the parties. It seems that one of the most crucial competences that the judges should possess is the ability to distinguish between relevant and irrelevant arguments and respond to the former properly.

Similar findings were made by the European Court in *Mitrofan v. the Republic of Moldova.*

> 50. The Court reiterates that it is not its primary task to interpret domestic law and even less so to decide on the guilt or innocence of a person convicted by the domestic courts. However, it will examine whether the proceedings as a whole complied with the requirements of Article 6 of the Convention, including the obligation to give reasons for the judgments given. In this latter connection it reiterates that "a court may consider it unnecessary to respond to arguments which are clearly irrelevant, unsubstantiated, abusive or otherwise inadmissible owing to clear legal provisions or well-established judicial practice in respect of similar types of arguments".
>
> 51. In the present case, the applicant raised two specific arguments before the domestic courts: that by admitting students to his private school he could not have been performing duties as a public official and that, in any event, the damage allegedly caused was on a much smaller scale than the minimum required for Article 329 of the Criminal Code to become applicable. The Court points out that it is not its task to examine whether these two arguments were well-founded. It confines itself to observing that in the applicant's case these submissions were relevant: had the domestic courts decided that either of the two arguments were well-founded, they would have been obliged to dismiss the case against the applicant since the elements set out in Article 329 would not have been met.
>
> 52. The Government referred to the existence of well-established case-law concerning both arguments raised by the applicant, which in their submission had made it unnecessary for the courts to give a specific response in this particular case. However, the Government did not cite any examples of such case-law, even though the applicant pointed this out in his observations. In the absence of any evidence of such case-law or of any other customary rule or legal text contradicting the applicant's position, including the commentary on the Criminal Code produced by the applicant, it could not be said that the courts were able to remain silent in response to his two arguments because they had already been answered before.

[62] *Fomin v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-106789.

53. In the Government's opinion, the applicant's aim was to obtain the Court's own interpretation of the relevant domestic legal provisions. The Court has no intention of interpreting the domestic law or of verifying whether the domestic courts' interpretation was correct. Yet it cannot but conclude that no interpretation has been given by the domestic courts in the present case, except for a statement that "...these [arguments] are unsubstantiated and are contradicted by the material in the case file". This statement is so general that it could be inserted into any judgment, without providing any additional details or reasons specific to that judgment. In the present case, the courts made no analysis of how the applicant, being accused of enrolling pupils at his private school, had acted in any official capacity or why the damage caused had been sufficient to trigger the application of Article 329 of the Criminal Code, which only applies to large-scale damage (that is, at least MDL 10,000).[63]

54. The domestic courts' failure to give a response to the two serious arguments raised by the applicant also appears to conflict with their obligation to examine each argument raised in an appeal, as expressly set out in the Code of Criminal Procedure. Moreover, the Court of Appeal's failure to give any specific reasons as to the applicability of Article 329 prevented the applicant from appealing in an effective way against his conviction.

The first instance courts and the appeal court failed to provide any **specific** reason that would dismiss **relevant arguments** of the accused party. For that reason, the Court found a violation of Article 6 in this case.

Although, the requirement to judicial reasoning of **the appeal court** is less strict than in relation to the first instance court's ruling, they still exist and especially if the appeal court **changes the decision of the first-instance court**. In *Lazu v. the Republic of Moldova*, the Court stated:

37. The first-instance court acquitted the applicant because it did not trust the witnesses after hearing them in person. In re-examining the case, the Chișinău Court of Appeal disagreed with the first-instance court as to the trustworthiness of the witness statements without ever hearing those witnesses. As a result, it found the applicant guilty as charged.

38. Firstly, the Court notes that the Chișinău Court of Appeal breached the provisions of Article 436 of the Code of Criminal Procedure and failed to observe the instructions of the Supreme Court of Justice to rule on the merits of the case after a fresh examination of the evidence and did not provide any reasons for doing so.

39. Secondly, in doing so the Chișinău Court of Appeal did not provide any reasons whatsoever as to why it had come to a conclusion different from that of the first-instance court. It simply referred to a summary of the witness testimony without addressing the discrepancies within and between individual witness statements.[64]

In some cases, the fact that no reasons were given in the appeal court might demonstrate that the **appeal was not effective** in the case at hand. In *Deli v. the Republic of Moldova*, the Court stated:

43. The Court has examined the question of compliance with the principle of impartiality in a number of cases of contempt in the face of the court, where the same judge then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction. The Court has emphasized that in such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench.

---

[63] *Mitrofan v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-115874.
[64] *Lazu v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-164459.

> 44. In the present case, the applicant submitted that Judge B. could not have been impartial because he had simultaneously pressed charges against him and decided on the outcome of those charges. The Government argued that this had been in accordance with Article 209 of the Code of Administrative Offences.
>
> 45. The Court notes that in the proceedings against the applicant, no one had the procedural role of an accuser. In such circumstances the Court considers that Judge B. had no alternative but to undertake the task of presenting – and, what is more pertinent, to carry the burden of supporting – the accusation during the hearing. The fact that the case was subsequently reviewed by the Chișinău Court of Appeal did not remedy the lack of impartiality of the court which convicted the applicant. That court did not quash the applicant's conviction on the grounds that the Ciocana District Court had not been impartial, but upheld the decision without giving any reasons.[65]

Indeed, the lack of reasons can be an indicator that national courts violated **some other standards of Article 6** such as the principle of legal certainty. For instance, the European Court stated the following in the case of *Dacia SRL v. the Republic of Moldova*:

> 76. The Court does not call into question the power of the legislator to establish different limitation periods for different types of lawsuits. However, no reasons were given in the present case for exempting State organisations, when claiming restitution of State property, from the obligation to observe established limitation periods which would bar the examination of such claims brought by any private person or company.[66]

It is an obligation of national courts to explain significant **discrepancies in witness statements** and explain why the courts rely on some of them and reject some other. In *Dan v. the Republic of Moldova* (No. 2), the Court stated:

> 58. The Court notes further that the three witnesses heard by the Chişinău Court of Appeal in the reopened appeal proceedings made statements which, at a first glance, did not appear to be inconsistent with the version of events as presented by the alleged bribe-giver, C. Nevertheless, upon closer examination, the Court finds these statements to present serious problems.
>
> 59. Thus, the three witnesses who, it should be recalled, were all police officers involved in the police operation conducted against the applicant, appeared to have remembered in 2013 new facts which they did not appear to have witnessed back in 2006. For instance, witnesses C.M. and C.C. recollected seeing the moment when the money was passed from C. to the applicant, while in 2006 they had not stated that they had seen the transfer.
>
> 60. The three witnesses did not declare that they intended to change their initial statements but stated that they maintained them, the result being that their consolidated statements contradicted each other in parts. For instance, witness C.C. stated both that he had been in charge of filming the operation and that he had not known who had filmed it.
>
> 61. Faced with the above situation, the Chişinău Court of Appeal did not consider it necessary to seek explanations and reconcile the problematic issues and inconsistencies in those statements in its judgment but merely considered the applicant's guilt proven and convicted him on the strength of them, without explaining whether it relied on the statements given back in 2006 or on the new statements and for which reasons it found one set of statements more credible than the others. In such circumstances, the Court cannot but find that the Court of Appeal did not give sufficient reasons in its judgment finding the applicant guilty.[67]

---

65 *Deli v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-196887.

66 *Dacia SRL. v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-85480.

67 *Dan v. the Republic of Moldova (No. 2)*, https://hudoc.echr.coe.int/eng?i=001-205818.

In *Sandu v. the Republic Moldova* the European Court emphasised the importance of judicial reasoning in the context of **prohibition of entrapment**. The European Court in particular stated:

> 33. In order to verify whether the applicant was incited to commit the crime, the Court must determine whether he could be reasonably considered as having been engaged in the relevant criminal activity prior to the police involvement. In other words, it must be verified whether the applicant would have committed the crime in the absence of the alleged incitement.
>
> 34. The Court reiterates that where the police involvement is limited to assisting a private party in recording the commission of an illegal act by another private party, the determinative factor remains the conduct of those two individuals. Accordingly, since the applicant accused C. of having incited the commission of the offence, it is necessary to examine the manner in which the **domestic courts analysed C.'s conduct in the present case**. In this respect the Court notes that the applicant argued before the domestic courts that C. had never had a dog. Accordingly, he had had no reason to visit the applicant's office and to ask for vaccination documents. The pet passport which was included in the file concerned a dog of a different breed than that initially indicated by C. in his report to the police. Moreover, according to the applicant, and not disputed by the Government, that document mentioned the dog as belonging to another person, rather than to C.
>
> 35. In the Court's view, the above inconsistencies between C.'s version of events and the objective evidence (the dog papers) available at the time of deciding whether to record the applicant's bribe-taking should have caused the police to have legitimate doubts or at least led to a more detailed check of the veracity of his complaint and of his motives. Indeed, if C. provided false information to the police about having a dog and needing to obtain papers for it, his credibility in respect of the alleged soliciting of a bribe by the applicant would also be shaken. In their turn, the domestic courts should have **made a proper analysis of these inconsistencies and of the manner in which the police reacted to them**.
>
> 36. The Court notes that the applicant clearly raised these arguments in front of the domestic courts, accusing C. of incitement with the assistance of the police. In such a situation, "it falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement". However, rather than analysing these arguments, which as noted above were not completely groundless, all three levels of the courts relied on C.'s confirmation of his version of events and the fact that the applicant had knowingly accepted the bribe, based on him having taken the money out of his pocket. In other words, **while the applicant directly challenged C.'s credibility, the courts simply relied on C.'s statements, without any examination of his credibility** and of the possibility that C. had incited the applicant to commit the crime for any ulterior motives.
>
> …
>
> 38. In conclusion, the Court considers, having regard to the foregoing, that the domestic courts failed to properly assess whether C.'s actions, acting on behalf of the police, had the effect of inciting the applicant to commit the offence of which he was subsequently convicted or whether there had been any indication that the offence would have been committed without such intervention. Although in the present case the domestic courts had reason to suspect that there was an entrapment, they did not analyse the relevant **factual and legal elements which would have helped them to distinguish entrapment from a legitimate form of investigative activity**. In view of the above, and of the use of evidence obtained through C.'s active involvement under police supervision to convict the applicant, his trial was deprived of the fairness required by Article 6 of the Convention.[68]

[68] *Sandu v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-140773.

To summarise, the European Court has observed the following standards in the cases in which the Republic of Moldova acted as a respondent state:

1. National courts are **obliged** to provide proper reasons.
2. This obligation is more pertinent in relation to **first-instance courts,** but it is also relevant in relation to appeal courts especially if the latter courts change the decision of the former.
3. The lack of reasons **exacerbates** the **failure** to observe other standards of Article 6. For instance, the principle of legal certainty in connection to the status of limitation or the rules concerning prohibition of entrapment.
4. National courts are not obliged to respond to all arguments of the parties, but they need to explain their decision in relation to **legally significant claims and facts**. The reasoning should be comprehensive and clear.

### *1.3.5. Examples of Reasoning in Relation to Other Articles of the Convention*

Although this report primarily looks at the judicial reasoning in the context of Articles 5 and 6 of the Convention it is important to provide a few examples of the European Court's judgments in other areas showing that judicial reasoning is an issue that is relevant to almost all articles of the Convention. This is especially important as the **proportionality of punishment** is often considered in connection to the articles of the Convention others than Articles 5 and 6. For instance, the European Court often examines if the **punishment** imposed in the **context of freedom of expression** is **proportionate**[69] and in this case the proper reasoning of the national courts can persuade the European Court that the punishment was proportionate.

The Court also considered reasoning in the context of **Article 8**. In *Strand Lobben and Others v. Norway,* the Grand Chamber of the European Court examined the compliance with the Convention of the removal a mother's parental authority and found that the process that led to this removal was faulty and incomprehensive.

> Against this background, taking particular account of the limited evidence that could be drawn from the contact sessions that had been implemented, in conjunction with the failure – notwithstanding the first applicant's new family situation – to order a fresh expert examination into her capacity to provide proper care and the central importance of this factor in the City Court's assessment and also of the lack of reasoning with regard to X's continued vulnerability, the Court does not consider that the decision-making process leading to the impugned decision of 22 February 2012 was conducted so as to ensure that all views and interests of the applicants were duly taken into account. It is thus not satisfied that the said procedure was accompanied by safeguards that were commensurate with the gravity of the interference and the seriousness of the interests at stake.
>
> In the light of the above factors, the Court concludes that there has been a violation of Article 8 of the Convention in respect of both applicants.[70]

The lack of judicial reasoning was one of the reasons why **Article 10** was violated in *Cumhuriyet Vakfı and Others v. Turkey*. In this case the European Court was asked to review the injunction issues against the applicant newspaper. Here, the Court established a clear link between the requirements to provide judicial reasoning in the context of Article 6 and the obligations under Article 10 of the Convention.

---

69 See, for example *Mariya Alekhina and Others v. Russia*, No. 38004/12, 17 July 2018.

70 *Strand Lobben and Others v. Norway,* https://hudoc.echr.coe.int/eng?i=001-195909, §§ 225-226.

> Another procedural problem tainting the interim injunction decision in question was the failure of the domestic court to provide any reasoning for its decision, either when granting the injunction or when refusing the ensuing request for it to be lifted. The Court reiterates that the obligation to provide reasons for a decision is an essential procedural safeguard under Article 6 § 1 of the Convention, as it demonstrates to the parties that their arguments have been heard, affords them the possibility of objecting to or appealing against the decision, and also serves to justify the reasons for a judicial decision to the public.
>
> This general rule, moreover, translates into specific obligations under Article 10 of the Convention, by requiring domestic courts to provide "relevant" and "sufficient" reasons for an interference. This obligation enables individuals, amongst other things, to learn about and contest the reasons behind a court decision that limits their freedom of expression, and thus offers an important procedural safeguard against arbitrary interferences with the rights protected under Article 10 of the Convention. The Court is, therefore, of the opinion that the failure of the Ankara Civil Court of First Instance to provide relevant and sufficient reasons to justify its interim injunction decision stripped the applicants of the procedural protection that they were entitled to enjoy by virtue of their rights under Article 10.[71]

**Article 1 of Protocol 1** enshrines the right to property. In the case of *Megadat.com SRL v. the Republic of Moldova*, the European Court has ironically commented on the process in the Court of Appeal and found a violation of the said article.

> The Court has also given due consideration to the procedural safeguards available to the applicant company to defend its interests. … Procedural safeguards also appear to have failed at the stage of the court proceedings. While the case was not one which required special expediency under the domestic law, the Court of Appeal appears to have acted with particular diligence in that respect. After setting the date of the first hearing, the Court of Appeal acceded to ANRTI's [national regulator] request to speed up the proceedings and advanced the hearing by two weeks. Not only did the Court of Appeal decide the case in the applicant company's absence, but it failed to provide reasons for dismissing the latter's request for adjournment. The Court notes in this connection that the matter to be examined by the Court of Appeal affected the applicant company's economic survival.[72]

[71] *Cumhuriyet Vakfı and Others v. Turkey*, https://hudoc.echr.coe.int/eng?i=001-126797, §§ 67-68.
[72] *Megadat.com SRL v. the Republic of Moldova*, https://hudoc.echr.coe.int/eng?i=001-85732, § 73.

# CHAPTER II:

# STANDARDS OF LEGAL WRITING AND REASONING

# CHAPTER II:
# STANDARDS OF LEGAL WRITING AND REASONING

## 2.1. Introduction

Legal reasoning and writing represent one of the main factors for the quality of the justice process. Based on its significant importance, it deserves special attention from all legal professionals, especially from judges, prosecutors and lawyers.

A judicial decision is basically an official legal act built upon the relevant facts of a concrete case, followed by the application of the relevant legal rule and the decision/conclusion on the legal issue(s) at stake. In other words, a judicial decision explains the concrete factual case that leads to the identification of the main legal issue(s), analyses the relevant legal principles, and then applies the law on the relevant facts of the case to reach a decision in favour of one of the parties. Judicial decisions should be very well reasoned, since they are an authoritative answer to the legal issues raised by the parties.

Several general standards on legal writing and reasoning have been developed either in law schools and professional training institutions through texts dedicated to training law students and/or judges and prosecutors or in the form of manuals for legal professionals. These standards apply to any written legal text in general as well as to judicial decisions. They all tackle the main issues encountered in the process of legal writing, such as the identification of the key relevant facts, the identification of the legal issue(s) at stake or the formulation of the legal question(s), the identification of applicable legal norm(s), the application of the norm to the relevant facts and the answering of the main legal question(s). Moreover, special attention is paid to the use of clear, understandable, concise and correct language.

The remainder of this chapter will give an account of the above-mentioned standards. To this end, the chapter starts with a brief discussion of the standards set out in CCJE Opinion No. 11 on the quality of judicial decisions.[73] The chapter will continue with a more detailed account on the main principles of legal writing and reasoning, including instructions for use of clear, consistent, and simple language. Interpretation methods are key to the drafting of judicial decisions, hence the last section dedicated to this topic.

[73] See also Chapter II of this Compendium for more details on the case law of the European Court of Human Rights on the reasoning of judgments.

## 2.2. Consultative Council of European Judges (CCJE) Opinion No. 11 of the quality of judicial decisions

CCJE Opinion No. 11 (the Opinion) deals with the quality of judgments.[74] The Opinion distinguishes between external factors and internal factors that impact the quality of the judgments. The **external factors** relate to the quality of the legal framework within which a judge operates, the resources available and the training judges undergo.

The **internal factors** identified by the Opinion include the professionalism of the judge, the procedure and the management of the case, the hearing, and elements inherent to the decision. According to the latter elements, a high-quality decision is one which is '*perceived by the parties and by society in general as being the result of a correct application of legal rules, of a fair proceeding and a proper factual evaluation, as well as being effectively enforceable*'.

The clarity of the language used in drafting a judicial decision and the quality of the reasoning are identified as core elements determining the quality of a judicial decision. The Opinion stresses out that a decision should be '*intelligible, drafted in clear and simple language – a prerequisite to their being understood by the parties and the general public. This requires them to be coherently organised with reasoning in a clear style accessible to everyone*'.

The proper reasoning as a core element of the quality of judgments, is '*a safeguard against arbitrariness.*' To this end, the Opinion stresses out the importance of '*consistent, clear, unambiguous and not contradictory*' reasoned decisions. This enables the audience to '*follow the chain of reasoning which led the judge to the decision*'.[75] In this context, it is important that the decision should address the arguments put forward by the parties. This contributes directly to the confidence that the parties and the public place on the courts. However, the Opinion follows the case law of the European Court of Human Rights and stipulates that the decision does not have to address every single motion put forward by the parties. The response that the judge will give to the submissions of the partiers depends on the context of the case and especially whether the arguments are relevant and capable of influencing the resolution of the dispute. It is thus important that the reasoning demonstrates that '*the judge has really examined all the main issues which have been submitted to him or her*'.

The Opinion stresses out that '*the judicial decision includes an examination of the factual and legal issues lying at the heart of the dispute.*' Regarding the factual issues, the Opinion recognises the importance of responding to arguments casting doubt to the evidence, especially in terms of admissibility of evidence. The judge also needs to '*consider the weight of the factual evidence likely to be relevant for the resolution of the dispute.*'

The Opinion stipulates that the examination of the legal issues entails the application of national, European and international law. The judicial decision should apply only the relevant law and where possible and appropriate also the relevant case-law.

Finally, the Opinion underlines the importance of the reasonable length of the reasoning of a judicial decisions. This should not be necessarily long, '*as a proper balance must be found between the conciseness and the proper understanding of the decision.*'

---

74 Opinion No.11 (2008) of the Consultative Council of European Judges (CCJE) on the quality of judicial decisions, 18 December 2008, available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2008)OP11&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864

75 The standard of consistent, clear, unambiguous, and not contradictory reasoned decisions contributes also to measuring the satisfaction of court users as an essential tool for policies aiming at introducing a quality culture in the judiciary. The European Commission for The Efficiency of Justice (CEPEJ) strongly recommends this tool and to this end it has also published a *Handbook for Conducting Satisfaction Surveys Aimed at Court Users in Council of Europe Member States*, available at: https://rm.coe.int/168074816f#_Toc462130559

## 2.3. Main principles of Legal Reasoning and Writing

The Opinion tackles the main issues encountered in the process of drafting of judicial decisions. The consideration of the factual evidence for the resolution of the dispute, the use of relevant legal norms, the response given to the submission of the parties and the use of simple consistent and not contradictory language are all issues which are common not only to the drafting of judicial decisions but also to the drafting of any legal text. This section of the report will present the main principles applicable to these issues.

It should be noted from the outset that the discussion below should not be seen as a mandatory formula. It rather gives some guidance to legal practitioners and to judges in the process of drafting of legal texts and/or judicial decisions. This section will start with a brief discussion of the IRAC method, which is widely accepted as a logical way of presenting and solving a legal issue. The elements of the IRAC method entail the identification of the key facts of the case, the application of the elements of the law into the key facts, and the analysis of the evidence, including the response to the submissions made by the parties. These elements will be further elaborated, while adapting them to the drafting of legal decisions and using factual examples as an illustration. The section will continue with a discussion on the use of language used in judicial decisions and it will close with a short account on interpretation methods.

### *2.3.1. Using the IRAC (Issue, Rule, Analysis and Conclusion) Method*

A well-reasoned judicial decision should explain the issues at stake, identify the key facts of the case, apply the relevant rule to the key facts and make a ruling based on the application of the law. The IRAC method practically contains all these elements in a logical way. Nevertheless, the IRAC method should be considered as a starting point in legal writing, and it should thus be applied with a certain degree of flexibility when drafting judicial decisions, having in mind the possible limitations of the method when dealing with complex cases with multiple parties and/or multiple legal issues. **IRAC** is an acronym for: **Issue, Rule, Analysis and Conclusion**. This method originates from the common law systems but in the recent years is widely applied also in the civil law systems. There is a vast amount of literature[76] on the IRAC method and the remainder of this paragraph will give a short overview of each element of the method.

*Identification of the Issue*

The first element of the IRAC method is the presentation of the legal issue at stake based on the key facts of the case. The key facts of the case are those facts upon which the legal analysis of the applicable legal rule will be based. A legal issue could be presented as follows:

> *Is there self-defence (legal question) as foreseen by Article X of Criminal Code (applicable law) when a person A stabs another person B with a knife in his (B's) chest in response to B's punch on the jaw of A (key facts).*

*Identification of the Applicable Rule*

The next element of the IRAC method is the identification of the applicable rule. This means that the applicable rule should be identified precisely. Reference to an abundance of rules, which do not relate to the issue at stake is one of the mistakes encountered mostly in identifying the applicable rule. It can be that the facts of the case call for the application of more than one rule. If this is the case, each of the rules must be identified precisely and explained why the rule is applicable to the facts of the case. Once the applicable rule is identified, the next step is to identify and present the elements of the rule.

[76] See among many authors, S. I. Strong, *Writing reasoned Decisions and Opinions: A guide for Novice, Experienced and Foreign Judges, 2015,* J. Disp. Resol. (2015); J. L. Trautman, L.C. Taylor and J. Ford, *Irac! Irac! Irac!: How to Brief Supreme Court Opinion (2016),* available at SSRN: https://ssrn.com/sbstract=2827285 ; Orin S. Kerr, *How to Read a Legal Opinion, 2007,* 11 Green Bag 2d 51; M. Bitner, *The IRAC Method of Legal Analysis: A Legal Model for the Social Studies, 1990,* available at: https://www.tandfonline.com/doi/abs/10.1080/00377996.1990.9957530; T Bench-Capon, *Explaining Legal Decisions Using IRAC, 2020,* CEUR Workshop Proceedings 2020.

*Analysis*

The analysis entails the application of each element of the applicable rule to the key facts of the case. In this way the reader will be able to follow the chain of reasoning which led to the conclusion. It is thus not enough to just rephrase all the facts or even the key facts of the concrete case. The analysis would be incomplete without considering the counterarguments that may be raised during the application of the rule to the key facts.

*Conclusion*

The conclusion is practically the answer to the legal issue identified in the beginning of the process of writing and reasoning. The conclusion is thus a logical result of the application of the rule to the key facts of the case.

### *2.3.2. Key Facts*

Every legal dispute has two main ingredients which are intertwined, namely the facts of the dispute and the applicable law. The very purpose of every legal dispute resolution is to solve the dispute through the application of legal principles and rules on the facts of the dispute. The key facts of the dispute are essential for the identification and formulation of the main issue(s) of the case. Some facts are more important than others and the most important are the key facts - those facts on which the outcome of the case depends. Key facts are the facts needed to prove or reject a claim. A key fact is so fundamental that, if it were to be changed, the outcome of the case would also be different. Apart from the key facts, a case has also irrelevant or unimportant facts and circumstantial facts. Consider the following factual situation:

*On 2 July 2019, a Monday morning, A. went to the bank to apply for a loan. It was a warm sunny day and A. was wearing a white linen shirt, green shorts and sandals. The security guard saluted A. and directed him to the information desk of the bank. B., the clerk at the information desk showed A. the desk where he needed to be for the application. Once in front of the relevant desk, A. noticed that the clerk in charge with the applications for loans was his neighbour D., with whom A. had an ongoing legal conflict regarding the adjoining fence of their respective gardens. They had taken the case to the District Court and the case was still pending. D. was wearing his regular bank uniform and once A. approached the desk, he greeted him professionally and offered him his assistance in any matter that A. had with the bank. A. stated that he wanted to apply for a loan and that he had all the necessary documentation for the application. D. checked the documents and told A. that he needed some additional documents. A. got suspicious and angry at that point and started swearing at D. The latter kept his calm professionally and warned A. that if he does not stop, he will be forced to call security. This irritated A. even more, who continued to insult D. At this point, the security intervened and forced A. out of the bank.*

*Two days later, A. and D. met by chance in the neighbourhood bar, where neighbourhood boys usually gather to socialize over a drink. The bar is a well-known establishment in the city, and it offers drinks and finger food, which is the speciality of the house. A. is a regular customer while D. goes rarely to the bar, mainly when he needs to buy cigarettes which are sold at the machine hanging on the wall next to the entrance of the toilette. When A. saw D., he got mad and started swearing at D. again, who completely ignored A. This irritated A. even more, who attacked D. with the glass of beer in front of him. D. avoided the blow and immediately took out a knife from the back pocket of his pants and stabbed A. in the chest. A fall dead to the ground as a result of the stabbing. During all this time, D. was standing at the door of the bar, which was open.*

In this factual situation, as in every case, there are two equally important factors which determine the main legal issue(s) at stake and the outcome of the case. As already stated above these factors are the law and the facts of the case. The main legal issue(s) here is whether the death of A. can be qualified as murder and whether D. committed the murder in self-defence. The applicable rules are the relevant articles of the Criminal Code on murder and self-defence.

Let us concentrate in the remainder of the discussion on the question whether D. acted in self-defence. In this context, the *irrelevant/unimportant factors* for this case are:

- the date and day of the event,
- the weather conditions,

– the clothes that each of the personages of the situation had on,
– the interaction of A. with the security guard and the clerk at the information desk upon his entry into the bank,
– the facts around the bar where the fatal incident happened,
– the fact that A. is a regular customer of the bar while D. goes there if he wants to buy cigarettes,
– the location of the cigarette machine in the bar.

There are some facts in this case which, although they are not important for solving the case, put the key facts in the right context. In the specific case, these *circumstantial facts* are, for example, the legal conflict for the fence, the incident at the bank between A. and D., the fact that A. started swearing at D. at the bar again and that A. got irritated when D. ignored him. These facts are not essential to determine whether D. acted in self-defence, but they serve to give information about the motives of the quarrel between A. and D.

As already mentioned above, the *key facts* are those facts that if it were to be changed, the outcome of the case would also be different. Considering the above example, the key facts which determine the legal issue, and the outcome of the case are:

– A. attacked D. with a beer glass,
– D. avoided the blow and took a knife out of his pocket and stabbed A. in the chest,
– A. fall dead because of stabbing,
– D. standing in front of the open door during all the events.

Each of these facts is a key fact. Each of them, if changed, affects the outcome of the case. The rest of the facts are not key. Even the fact that A. started swearing at D. and that he got even more irritated when D. ignored him are not key. If these facts change the outcome of the case would not change.

### *2.3.3. Application of the Rule to the Key Facts*

As mentioned above, the identification of the applicable rule is not enough. The next step should be the identification of each element of the applicable rule. This is very important because, for giving an answer to the legal issue at stake, the judge must present the facts which prove each element of the applicable rule. These are the key facts of the case. Following the example above, suppose that Article X of Criminal Code (the applicable rule) which regulates self-defence reads as follows:

*There is no criminal responsibility for the person who committed the offense while being obliged to defend his life, health, rights and interests of himself or another, from an unjust, real and immediate attack provided that the character of the defence is in proportion to the dangerousness of the attack.*

In such a case, to determine whether there was self-defence one must look whether:

– there was an unjust, real and immediate attack,
– the defendant reacted to defend the life, wealth, rights and interests of himself or another from the attack,
– the defendant was obliged to react in the way he reacted,
– the response (defence) was proportionate to the dangerousness of the attack.

The next step is to present the facts of the case which prove each element of the applicable rule. Here a distinction should be made between key facts and circumstantial facts. Following the example above, this exercise could look like follows:

- *There was an unjust, real and immediate attack:* the *key fact* here is that A. attacked D. with a beer glass. *Circumstantial facts* which put the key facts in the right context are the legal conflict for the fence, the incident at the bank between A. and D., the fact that A. started swearing at D. at the bar again and that A. got irritated when D. ignored him.

- *The defendant reacted to defend the life, wealth, rights and interests of himself or another from the attack:* the *key fact* here is that A. attacked D. with a beer glass. All other facts are irrelevant for this element.
- *The defendant was obliged to react in the way he reacted:* the *key facts* here are that A. attacked D. with a beer glass. D. avoided the blow and took a knife out of his pocket and stabbed A. in the chest. D. was standing in front of the open door during all the events. *Circumstantial facts* which put the key facts in the right context are the incident at the bank between A. and D. and especially the reaction of D., the fact that A. started swearing at D. at the bar again and that A. got irritated when D. ignored him.
- *The response (defence) was proportionate to the dangerousness of the attack:* the *key facts* here are that A. attacked D. with a beer glass, D. avoided the blow and took a knife out of his pocket and stabbed A. in the chest and that A. fall dead because of stabbing. All other facts are irrelevant for this element.

### *2.3.4. Evaluation of Evidence*

All the key and circumstantial facts need to be proved with evidence legally obtained, which is evaluated by the judge. However, judicial decisions very often tend to have a descriptive and voluminous character with exaggerated descriptions of witness statements and evidence. This is unnecessary and damages the analytical part of a decision. Therefore, the selection of relevant evidence is essential for their accurate and objective evaluation.

When it comes to the selection of the relevant evidence, the question that the judge must ask is which piece of evidence is necessary to prove the key facts relevant to each element of the applicable rule of the case. In the above example, the key fact which proves that there was *an unjust, real and immediate attack* is the fact the A. attacked D. with a beer glass. Witnesses who were present in the bar know of the attack and saw the events and who made a statement that A. indeed attacked D. with a beer glass are very essential to prove one of the key facts of the case. Their statements are very relevant pieces of evidence. Moreover, any eventual security camera footage of the bar is also very relevant piece of evidence. However, witness statements confirming that the bar indeed is a well-known establishment in the city and it offers drinks and finger food, which is the speciality of the house, or that A. is a regular customer while D. goes rarely to the bar, mainly when he needs to buy cigarettes, have nothing to do with the key facts of the case and are thus irrelevant and should not be included into the analysis or reasoning. The same goes for the *circumstantial facts* such as for example, the incident at the bank. Witness statements which confirm that A. indeed insulted D., or security camera footage showing any threatening gestures of A. towards D. will be relevant pieces of evidence. Other evidence not related to this event, such as for example, witness statement regarding the clothes that A. had on the day he visited the bank are irrelevant and should not be included into the analysis.

The examination of the credibility of the evidence is of particular importance. It is necessary to analyse in detail and comprehensively why the testimony of a witness or the production of material evidence, such as a document or technical or scientific evidence, such as DNA is reliable. This would also entail an analysis of the credibility and reliability of the witness's personality. To this end, the judge should look at many factors such as the objectivity or subjectivity of the witness, the consistency of his/her statements, the accuracy of the statement, its spontaneity etc. Such factors must be addressed and taken into consideration before drawing a conclusion to determine the truth, accuracy, and reliability of the witness's testimony.

The reasoning of a judicial decision should contain the answers to the submissions made by the parties during the procedure. This is especially important for the submissions made by the defence. This is a necessary protective mechanism, because it enables the parties to be sure that their claims and arguments have been examined and the judge has taken them into account. The obligation of the court to present the reasons for the decision does not mean that the court must answer to every argument raised by the defence. Regardless of the judge's ability or obligation to act on his/her own initiative in certain cases, the judge must respond to the relevant arguments raised by the defence that may have an impact on the outcome of the case. In the above example, one of the key factors to prove that *the defendant was obliged to react in the way he reacted* was that D. was standing in front of the open door during all the events. Suppose that D. claims that it is true that the door was open, but he could not run because he had strangled

his leg that morning during his jogging routine and as a result he was limping. He also presents medical documents to support his argument and asks the court to check the footage of the security cameras at the entrance of the bar to confirm this. This argument, which is supported by evidence, is clearly contesting one of the key facts of the case. Therefore, it cannot be ignored by the judge, who needs to give an answer as to why this argument does not change his or her conclusion that D. could have acted differently and thus could have avoided the stabbing of A.

### 2.3.5. Use of Language

Regarding the language used in judicial decisions, it can be said that there is no magic formula applicable to all the basic principles that make a legal document a good document. However, there are certain basic principles with respect to legal writing.

*Make it easy for the reader.* It is important for the judge to think for whom he/she is writing the decision. In this context, the judge must put himself/herself in the place of the reader and reflect if the decision can be easily understood, if the decision fully justifies the result and if the decision adheres to the procedural rules.

*Write like a lay person and not like a lawyer.* It is not unusual that lawyers are often overwhelmed by the feeling of impressing others with their writing style, which may be full of abstract and difficult-to-understand concepts. Therefore, the judge should bear in mind that his/her decisions are written for the parties, who in most cases are not lawyers. Justice in a case before the court is not fulfilled only by the fact that the court has decided in a fair manner and according to the law. It will be considered that justice has been fulfilled, respectively the goal of justice has been achieved, when the court has managed to convince the parties that it has decided in a fair and just way. It is thus very doubtful whether this can be achieved if the parties are not able to understand the decision.

*Make a sketch of the case.* A sketch helps to define the issues and the issues form the basis of the outline. Sketches can be anything that works, for example, a scheme of facts which does not need to be put on paper. It could also exist in the judge's mind.

*Use headings and bullet points.* In writing a judicial decision the judge may use these titles:

- the background of the case
- the facts of the case
- the evidence
- legal basis
- legal analysis
- the conclusion

Bullet points can in principle be used in the text written within a title. For example, the following bullet points can be used in the title *background of the case*:

- the claims of the plaintiff,
- the defendant's claims.

*Write short paragraphs.* Paragraphs are important because they organise the writing according to the ideas presented. As such they make the understanding of the written text easier for the reader because the text is divided into simple units. The basic rule for a short paragraph is thus: one idea, one paragraph.

*Write short sentences.* The sentence is the smallest meaningful unit of the organization of thought and therefore the central linguistic structure through which thoughts are organized and expressed. Short and clear sentences enable the writing of short and coherent paragraphs, and therefore make the text easy to understand without the need for the reader to use interpretation to find out the meaning of the text. If the sentences and paragraphs are very clear and if the connection between them is good, then we can talk about the clarity of the text.

## 2.4. Interpretation Methods

One of the core tools to reach a decision in a judicial decision is to interpret the law. The rules of interpretation most employed in judicial decisions in brief are:

*Literal interpretation*: The literal interpretation is primarily based on the ordinary meaning of the legal text, where no consideration is given to non-textual sources, such as intention of the legal act when passed, the problem it was intended to remedy, or significant questions regarding the justice or rectitude of the legal act.

*Systematic interpretation*: Systematic interpretation takes into account the system of the legal act where the provision which is under interpretation is incorporated. For example, if the interpretation of the rape is at stake, the judge may inquire what the relation of the relevant provision with other provisions in the respective chapter/part/section of sexual offences is.

*Interpretation by analogy*: Interpretation by analogy is carried out in those cases when, during the scrutiny of a concrete case, the judge finds that the legal act does not foresee a specific provision for its resolution. When interpretating by analogy, a solution offered in another legal act, covering analogous cases, is used to close the gap. Analogy is prohibited when the case under scrutiny is expressly foreseen by the legal act or it is clear that the legal drafter intended not to provide such rule. Interpretation by analogy should be used as an exception and not as a rule and it is strictly forbidden in criminal cases.

*Interpretation a contrario*: Academic commentaries and rare judicial decisions that address this principle demonstrate that there is disagreement over the most basic characteristics of this method of interpretation. *A contrario* interpretation is often understood as a means of arriving at the intention of the drafters in an imperfectly expressed legal provision. In the interpretation *a contrario* the contrary meaning of the obvious wording is given to the legal provision. The interpreter gives to the legal norm that meaning that in reality comes out from the overall meaning and scope of the legal act and the fundamental legal principles upon which the norms are based. By way of interpreting the legal norm in the contrary meaning, one is able to bring out the proper meaning of the concrete provision, on which the solution of the case relies.

*Teleological interpretation*: By way of a teleological interpretation a legal provision is interpreted in the light of the intention the provision aims to achieve expressed through the values, legal, social and economic goals emanating from the provision or the respective legal act. The objective of this method is to determine the meaning of a legal provision when the wording of legal provisions does not adequately reflect the intent of the drafter, thus in case of a conflict between a legal text and the drafter's intention.

*Historical interpretation*: By way of historical interpretation the legal provision is interpreted on the basis of the history of its creation. This method is divided in just legal drafting history and in a broader concept of history, like general history, relevant historical events.

# CHAPTER III:

# COMPLIANCE WITH STANDARDS OF NATIONAL LEGAL FRAMEWORK ON REASONING OF JUDGMENTS

# CHAPTER III: COMPLIANCE WITH STANDARDS OF NATIONAL LEGAL FRAMEWORK ON REASONING OF JUDGMENTS

## 3.1. Introduction

As it was mentioned in the Introduction the CCP contains detailed provisions on the structure and content of court judgments, both in first instance and appeal.[77] At the same time both the Supreme Court of Justice (SCJ) and the Constitutional Court (CC) have contributed through their case law to the development of standards of reasoning of court judgments in criminal law.

Having in mind the above, a preliminary analysis regarding the way judges apply the formal requirements of the CCP, the case law of the CC and the recommendations of the SCJ into their judgments will help to identify the shortcomings with respect to national law. To this end, empirical research was conducted by Moldovan experts who looked into a selection of judgments in order to see what the shortcomings are with regard to the issues described above.

The remainder of this chapter provides an analysis of the data collected during the empirical research mentioned above. A Methodology for the sampling of judgments and a Checklist for the analysis of court judgments was developed as a preliminary step. The Checklist served as the basis instrument for collecting data from the analysis of judgments regarding the observance of the requirements of the CCP and case law of the Constitutional Court and the European Court. Therefore, this chapter starts with a description of the Methodology for the sampling and of the Checklist. The chapter goes on with an analysis of the data collected. The analysis follows the structure of the checklist. The chapter closes with some concluding observations.

## 3.2. Methodology

### *3.2.1. Selection criteria for the types of offences*

As to the criteria regarding the types of offences, it should be kept in mind that in line with Article 16 of the Criminal Code of the Republic of Moldova, depending on the prejudicial nature and degree, offences are classified into minor, less serious, serious, particularly serious and exceptionally serious and are punishable up to 2, 5, 12 years inclusively, above 12 years and life imprisonment respectively.

A complete and detailed analysis of the entire system of sanctioning in the Republic of Moldova will not be possible under the current exercise, whereas it should be possible to do this for a selection of offences. To this end, a preliminary analysis should be conducted to justify the selection of offences. Various studies and reports suggest that despite the numerous efforts and the frequent changes in the legislation, there is still

[77] Articles 384(3), 385, 389, 392-399 and 417-418 CCP.

work to be done with regard to the decriminalisation and humanisation of criminal law.[78] A pertinent issue seems to be the length of the duration of deprivation of liberty in Moldovan prisons.[79] Therefore, **the length of the imprisonment sentence** will be used as one of the selection criteria of decisions regarding the types of offences to be studied under the analysis.

Another set of criteria needs to be defined to select a number of decisions as representative per each type of offences. To this end, it is proposed to follow the Research and use **the frequency of the application of an imprisonment sentence for a particular offence** as the criterion for selecting the decisions regarding the specific offences among the types of offences already preselected.

It should be noted directly here that the criteria of *length of imprisonment* and *frequency of the application of the imprisonment for a particular offence* would require the use of extensive and coherent statistical data. However, having regard to the limited time at the disposal for drafting this analysis and the lack of public coherent statistical data, the analysis is based on sporadic data from 2018, 2019, 2020, 2021 until 1 April 2022 which was the last date when statistical data were retrieved prior to the commencement of the analysis. Despite this impediment, the available data already give a good indication and basis for the analysis as done in the following section.

### *3.2.2. Selected offences*

In line with the situation of 1 January 2022,[80] it can be noted that **1850** convicts, serve their imprisonment sentences for **a period of 5 to 10 years, which is of 35.23% of the total inmates** (**in 2020** this figure was **2054**). There are **1020 convicts** who serve their imprisonment sentence for a term **from 10 to 15 years**, **which constitutes 19.42% of the total inmates** (**in 2020** this figure was **982**). This category is followed by **883** convicts, who serve their imprisonment sentence for a period of **3 to 5 years, which is 16.82% of the total inmates** (**in 2020** this figure was **852**). When it comes to the types of offences, the data show that as of **1 January 2022**, there were:

- **180** convicts serving an imprisonment sentence for minor offences (in 2020 – **118**), or **3.4% of the total inmates**;
- **992** convicts serving an imprisonment sentence for less serious offences (in 2020 – **1030**), or **18,9% of the total inmates**;
- **1748** convicts serving an imprisonment sentence for serious offences (in 2020 – **1860**), or **33,29% of the total inmates**;
- **1534** convicts serving an imprisonment sentence for particularly serious offences (in 2020 – **1572**), or **29.21% of the total inmates**; and
- **797** convicts serving an imprisonment sentence for exceptionally serious offences (in 2020 – **864**), or **15,17% of the total inmates**.

The figures as per 1 April 2022 are not calculated in the same terms as calculated above, because that would not give a consistent annual picture. However, the figures as per 1 April 2022 are inserted in the table below, which shows the top-ranking offences.

**The above data show that persons serving their prison sentence from 3 to 10 years (from 5 to 10 years – 35.23%; from 3 to 5 years – 16.82%), constitute around 52% of the total inmates and are serving their sentence for less serious and serious offences. However, statistics also show that the share of almost 30% of convicts with particularly serious offences is quite important and cannot be neglected. As to the detainees sentenced for minor offences, their share in the total number of detainees is insignificant, a situation that can justify their exclusion from the analysis.**

[78] Many reports have been produced on this subject. See, for example *the Council of Europe "Report on assessment of needs with respect to the criminal justice system of the Republic of Moldova in the light of the principles of humanization and restorative justice"*, of 16 August 2018, available at: https://rm.coe.int/2018-08-16-needs-assessment-report-component-1-final-eng/16808e2c00 M. Vidaicu and G. Ohrband on "Action 2.5.1 of the JSRS 2011-2016. Liberalization of criminal proceedings by using sanctions and non-custodial preventive measures for certain categories of persons and certain offenses", of February 2016.

[79] Information Note to the draft Law No. 163/2017.

[80] Report on the activity of the Penitentiary Administration System for 2021, available at: https://drive.google.com/file/d/1Itu2_qZ8BYQznVTuSEvj-VPPfO0j67MOr/view

Having determined that the analysis will focus on **less serious, serious, and particularly serious offences**, the criterion of the frequency of the application of imprisonment sentences for a specific offence will be deployed for selecting the specific offences among the types of offences already preselected. Statistics show that the top-ranking offences are as follows:[81]

| Offence | Number of detainees, 01.01.2019[82] | Number of detainees, 01.01.2020[83] | Number of detainees, 01.01.2021[84] | Number of detainees, 01.01.2022[85] | Number of detainees, 01.04.2022[86] |
|---|---|---|---|---|---|
| **Article 145.** Intentional murder and **Article 147.** Infanticide | 1686 | 1288 | 1301 | 1279 | 1189 |
| **Article 151.** Serious intentional injury to a person's bodily integrity or health | 560 | 494 | 430 | 429 | 342 |
| **Article 164.** Kidnapping a person | 111 | 108 | 86 | 97 | 55 |
| **Article 165.** Human trafficking | 80 | 105 | 103 | 103 | 72 |
| **Article 171.** Rape | 535 | 521 | 596 | 499 | 361 |
| **Article 172.** Violent sexual actions and **Article 173.** Sexual harassment | 403 (393+10) | 381 (371+10) | 406 (402+4) | 379 (373+6) | 283 (281 +2) |
| **Article 186.** Theft | 1773 | 1574 | 1420 | 1694 | 489 |
| **Article 187.** Robbery | 973 | 800 | 875 | 822 | 433 |
| **Article 188.** Plunder | 883 | 793 | 753 | 728 | 384 |
| **Article 190.** Fraud | 488 | 388 | 404 | 365 | 173 |
| **Article 201¹.** Family violence | 423 | 334 | 313 | 314 | 223 |
| **Article 217-219.** Illegal activities/ trafficking of drugs. *From the group of these offences it is suggested to focus only on the offence of Article 217¹* | 613 | 781 | 708 | 874 | 458 |
| **Article 264.** Violation of the rules on the security of traffic or operation of means of transportation by the person driving the means of transportation | 101 | 99 | 135 | 146 | 116 |
| **Article 264¹.** Driving the means of transport in a state of alcohol intoxication with advanced degree or in a state of intoxication produced by other substances | 156 | 110 | 126 | 140 | 116 |
| **Article 287.** Hooliganism | 381 | 350 | 347 | 358 | 195 |

[81] Statistical data regarding convicted persons executing prison punishment in the penitentiary facilities as of 1 April 2022, Rapoarte de bilanț semestriale/anuale | ANP - Administrația Națională a Penitenciarelor (gov.md)

[82] https://drive.google.com/file/d/1bTgQ4V3XojUaGHj7cZViuYj1p1Miw2ts/view (Statistical data regarding convicted persons executing prison punishment in the penitentiary facilities as of 1 January 2019);

[83] https://drive.google.com/file/d/1QdkIKbmw4U_3leekq1GhaUOHJkxTQObc/view (Statistical data regarding convicted persons executing prison punishment in the penitentiary facilities as of 1 January 2020);

[84] https://drive.google.com/file/d/1Jl7TWwKx23fp-NBrOQCraidu9qldJh3m/view (Statistical data regarding convicted persons executing prison punishment in the penitentiary facilities as of 1 January 2021);

[85] https://drive.google.com/file/d/1LzDvDOO3NTa8ZF1C3ROahFsFTpE3DriD/view (Statistical data regarding convicted persons executing prison punishment in the penitentiary facilities as of 1 January 2022);

[86] https://drive.google.com/file/d/1OA1uLmHJ_4yz14Qn2ruj_sLA0ak_Ju_q/view (Statistical data regarding convicted persons executing prison punishment in the penitentiary facilities as of 1 April 2022)

Based on the frequency criterion the above offences will constitute the focus of the research. However, most of these articles have more than one paragraph, each of them constituting an aggravation of the respective offence. Therefore, it is necessary to further itemise these offences into the types of offences. The offences that are finally selected for the purpose of the research are grouped as follows:

| Qualification of the Offence | Less Serious Offences | Serious Offences | Particularly Serious Offences |
|---|---|---|---|
| Intentional murder | | | Article 145 (1) |
| Serious intentional injury to a person's bodily integrity or health | | Article 151 (1) and (2) | Article 151 (4) |
| Kidnapping a person | | Article 164 (1) and (2) | Article 164 (3) |
| Human trafficking | | Article 165 (1) and (2) | Article 165 (3) and (4) |
| Rape | Article 171 (1) | Article 171 (2) | Article 171 (3) |
| Infanticide | Article 147 | | |
| Violent sexual actions | Article 172 (1) | Article 172 (2) | |
| Theft | Article 186 (2) | Article 186 (3), (4), (5) | |
| Robbery | Article 187 (1) | Article 187 (2), (2$^{1}$), (3), (4) | Article 187 (5) |
| Plunder | | Article 188 (1), (2), (2$^{1}$), (3) | Article 188 (4), (5) |
| Fraud | Article 190 (1) | Article 190 (2), (2$^{1}$), (3), (4) | Article 190 (5) |
| Family violence | Article 201$^{1}$ (1) | Article 201$^{1}$ (2), (3) | Article 201$^{1}$ (4) |
| Illegal trafficking of drugs, ethnobotanics or their analogues to sale purpose | Article 217$^{1}$ (2) | Article 217$^{1}$ (3) | Article 217$^{1}$ (4) |
| Violation of the rules on the security of traffic or operation of means of transportation by the person driving the means of transportation | Article 264 (2) | Article 264 (3), (4), (5), (6) | |
| Hooliganism | Article 287 (1), (2) | Article 287 (3) | |

### *3.2.3. Sampling procedure*

**Sampling universe includes a** number of decisions of the Criminal College of the SCJ in the period 2018-2022. The sample represents over 8000 judgments from 2018-2022 and includes appeals against the decision of the Appellate Court (recourse was made to the selection of decisions which file number contains the combination 1ra).

**Statistics source** is the Database of the SCJ rulings. The statistics for surveyed period and per court are presented in the Excel file.

**Each case** will be identified at all court levels from top to bottom, being selected the decision of the Supreme Court of Justice, after that the decision on the case of Appellate Court and the decision of the First Instance Court. The proper analysis should start in reverse (bottom-to-top) for a better understanding of the evolution of the file.

**Sample size:** The proposed sample size is 609 decisions at all levels (200 decisions*3 levels).

The sample size for decisions offers a precision level ±4% at 95% confidence level and 6,9% per criminal cases.

**Sample type:** probabilistic, random.

**Selection source** represents the List of decisions of the Criminal College of the SCJ published in the section named "Criminal College"[87]. Only the decisions of the Criminal College of the SCJ will be analysed that passed the admissibility by which the appeal was allowed or dismissed, except for those decisions by which the retrial was ordered by the Appellate Court.

**Selection procedure:** The decisions to be analysed are selected randomly, using random generation of numbers, selection being provided from the office. The random selection of decisions is applied for a probabilistic sample for all the decisions in the selected period (2018-2022) using EXCEL function RANDBETWEEN.

**Data entry** is performed by experts during data collection, using Google forms.

## 3.3. Checklist

A Checklist that serves as the basis instrument for collecting data from the relevant sample was prepared following the criteria for the selection of the offences. The Checklist is attached as an Annex to the present Compendium. It is divided into two parts, and it contains detailed questions regarding several aspects of data to be collected. The first part aims at retrieving general data on the courts that delivered the judgments, the defendant, the qualification of offences and the sentence. The second part follows the logic and structure of the Moldovan CCP, Criminal Code and the case law of the SCJ and CC. It enables the collection of data on issues such as the description by the court of the criminal act and the evidence, the way the courts respond to motions on mitigating and aggravating circumstances, the way they motivate decisions based on recidivism, the description of the qualification of the offence, the motivation of the imposition of an imprisonment sentence especially in cases where the law provides for alternative sentences, and the way courts refer to the case law of the Constitutional Court and European Court. The Checklist is foreseen with detailed explanations and various scenarios and possibilities to answer the questions therein. This was done with a view to minimize to the extent possible the subjectivism of the consultants who analysed the court judgments.

## 3.4. General Overview of the Examination of Court Decisions

This section follows the structure of the first part of the Checklist, which aims at retrieving general data on the courts, which was delivered by the judgments, the defendant, the qualification of offences and the sentence. This Section provides thus an analysis of the data collected on these issues. Thereby, a general first impression of the findings of the decisions analysed is provided.

### *3.4.1. Mapping of court decisions examined*

As mentioned in the Methodology, 609 decisions at all court levels were examined as a sample. The data collected was disaggregated and analysed in line with the distribution of the decisions corresponding to the types of courts (first instance, appellate and Supreme Court of Justice), the region (Chisinau courts and courts outside Chisinau) and chronological distribution (to look at the tendencies during the chosen period). Regarding the latter aspect of the disaggregation and analysis, it should be mentioned that the period chosen was 1 January 2018 till 1 April 2022 of decisions at the SCJ. The mapping of the decisions examined is provided in Table A and Table AA below (distribution per year of decision examined at the instance at all three levels).

[87] See at: http://jurisprudenta.csj.md/db_col_penal.php

**TABLE A**

**Mapping of court decisions examined**

| | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| First instance | 3 | 3 | 2 | 24 | 63 | 44 | 35 | 23 | 6 | | 203 |
| Appellate Court Balti | | | 2 | 4 | 10 | 11 | 10 | 6 | 4 | | 47 |
| Appellate Court Cahul | | | | 2 | 4 | 3 | 3 | 2 | | | 14 |
| Appellate Court Chisinau | | 2 | | 9 | 46 | 31 | 18 | 16 | 10 | | 132 |
| Appellate Court Comrat | | | | | 4 | 2 | 1 | 3 | 1 | | 11 |
| Supreme Court of Justice | | | | | | 104 | 44 | 30 | 20 | 4 | 202 |
| **Total** | **3** | **5** | **4** | **39** | **127** | **195** | **111** | **80** | **41** | **4** | **609** |

**TABLE AA**

**Date (year) of the First Instance Court Decision**

| | Count |
|---|---|
| 2013 | 3 |
| 2014 | 5 |
| 2015 | 4 |
| 2016 | 39 |
| 2017 | 127 |
| 2018 | 195 |
| 2019 | 111 |
| 2020 | 80 |
| 2021 | 41 |
| 2022 | 4 |
| **Total** | **609** |

### *3.4.2. Data on the Offence and the Imposed Sentence*

This section corresponds to questions 3 and 4 of the Checklist. Question 3 of the Checklist aimed at gathering general information on the gravity of the offence for which the accused was convicted as in the decision analysed by looking at their legal qualification. The gravity of these offences varies from less serious to serious and particularly serious offences, depending on the applicable paragraph of the respective provisions. The exact figures of the distribution of selected offences according to the criteria described in the Methodology above are presented in Chart No. 1 and Table B below.

**CHART No. 1**

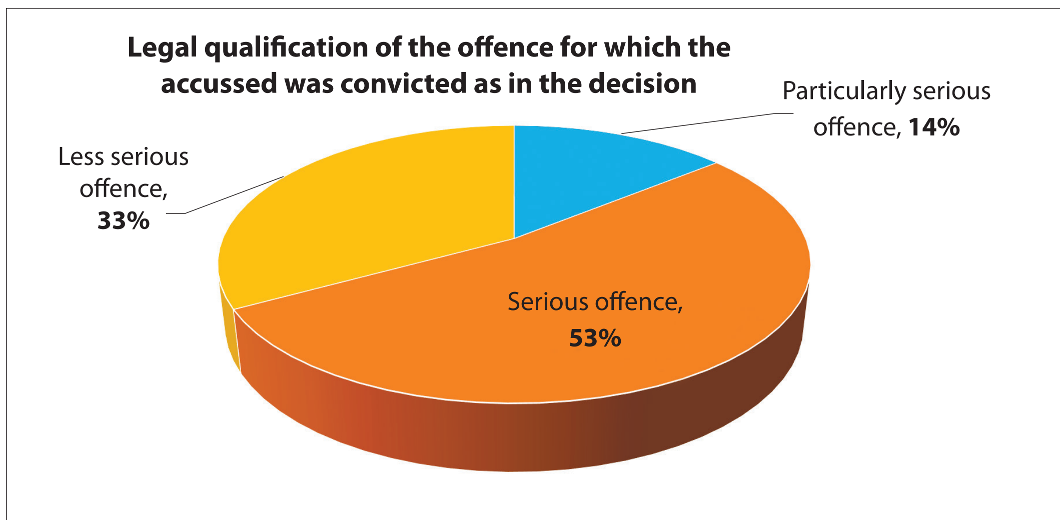


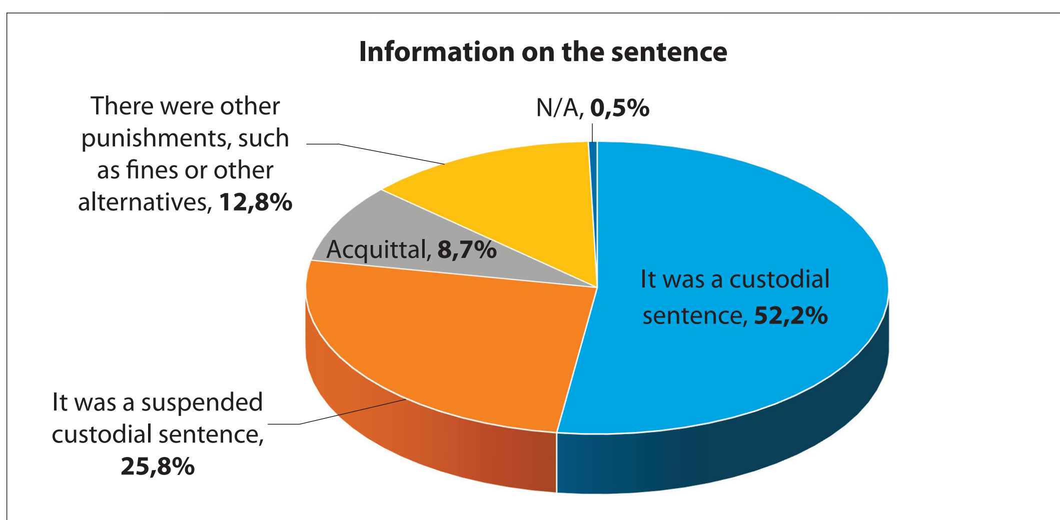

**TABLE B**

**Legal qualification of the offence for which the accused was convicted as in the decision**

| | No. | % |
|---|---|---|
| Particularly serious offence | 86 | 14% |
| Serious offence | 322 | 53% |
| Less serious offence | 201 | 33% |
| **Total** | **609** | **100%** |

Question 4 of the Checklist aimed at retrieving general data on the type of sentence imposed. To this end, it looked at whether there was a custodial sentence, an acquittal or whether there was another alternative to imprisonment. The data gathered in this respect are presented in Chart No. 2 and Table C below. **The data gathered show that the imposition of a custodial sentence is the one applied mostly by Moldovan courts.[88] In this context, the proper motivation of judgments and especially of the choice to impose a custodial sentence over other alternatives, becomes even more important.**

**CHART No. 2**




[88] The Council of Europe (2021), *"Report on the Application of Criminal Sanctions in the Republic of Moldova"*, came to the same conclusion in section 2.2.

**TABLE C**

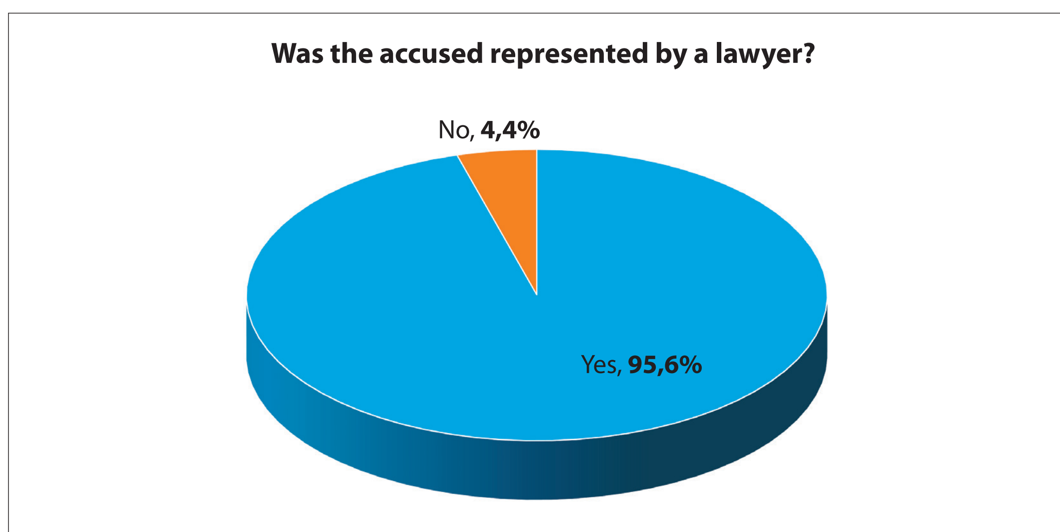
**Information on the sentence**

| | No. | % |
|---|---|---|
| custodial sentence | 318 | 52.2% |
| suspended custodial sentence | 157 | 25.8% |
| acquittal | 53 | 8.7% |
| other punishments, such as fines or other alternatives | 78 | 12.8% |
| N/A[89] | 3 | 0.5% |
| **Total** | **609** | **100%** |

## *3.4.3. Data on the Defence*

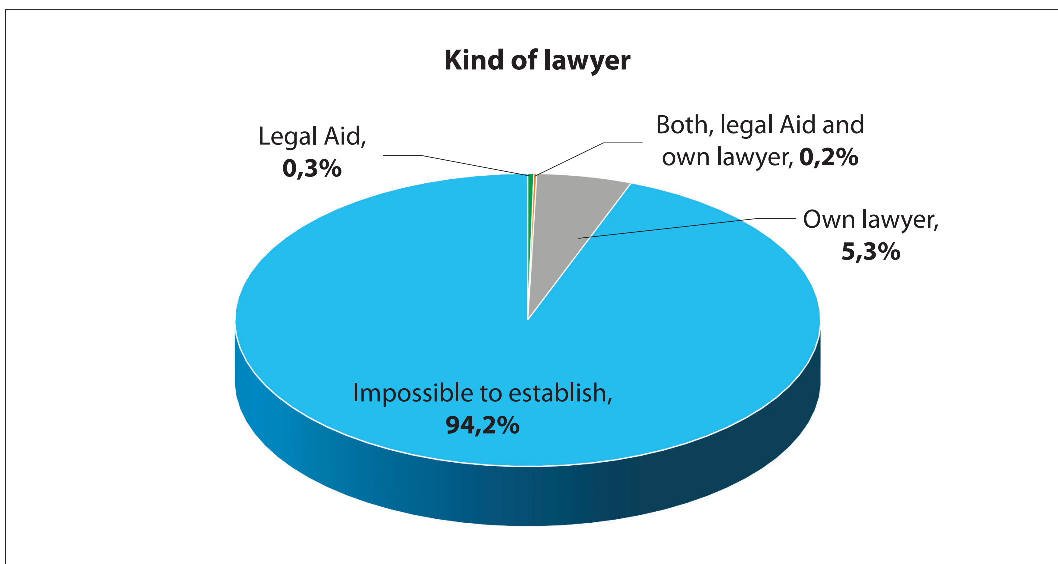
Data on the representation of the accused by a lawyer were collected based on Question 5 of the Checklist. The data collected help to get a complete picture of the decisions analysed and to understand the level of presentation of accused persons in the Republic of Moldova in order to better adjust any interventions needed towards defence lawyers as well. The figures presented in Chart No. 3 show that the level of representation of accused persons by defence lawyers is close to 100%. The project team had the expectation that, usually, the decisions of the national courts, do not specify whether the lawyer was of own choosing or came out of the legal aid scheme. The Checklist foresaw thus the possibility to tick the box respectively. The figures in Chart No. 4 show that in most of the decisions analysed (that is 94.2%) it was impossible to retrieve information on this aspect. Although this is not important in itself to the motivation of judgments as such**, detailed information on the type of defence lawyer included in the judgment could help the transparency of the decision making as well as could be a better tool to understand the efficiency of the legal aid lawyers and plan any interventions accordingly.**

**CHART No. 3**




[89] This figure is due to the Amnesty Law No. 210/2016.

**CHART No. 4**



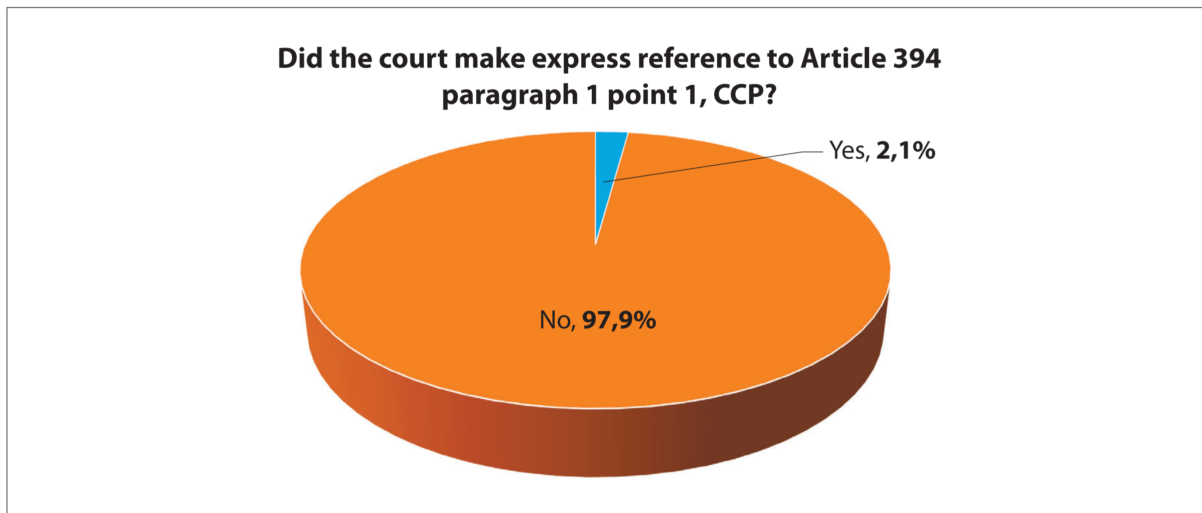

## 3.5. Criteria for the Descriptive Part of Sentences of Conviction

This section follows the second part of the Checklist. It aims at retrieving information on how judges apply the formal requirements of the CCP in issues such as the description of the criminal act and the evidence, the response to motions on mitigating and aggravating circumstances, the motivation of decisions based on recidivism, the description of the qualification of the offence, the motivation of the imposition of an imprisonment sentence especially in cases where the law provides for alternative sentences. This Section also aims at collecting data on the way courts refer to the case law of the Constitutional Court and the European Court. A conscious choice was made to focus the analysis mainly on the decisions of first instance and to a lesser degree to decisions of the courts of appeal, since the results of the Research demonstrated a strong indication that judgments from the first instance courts are the most problematic in terms of reasoning.

### *3.5.1. Description of the Criminal Act*

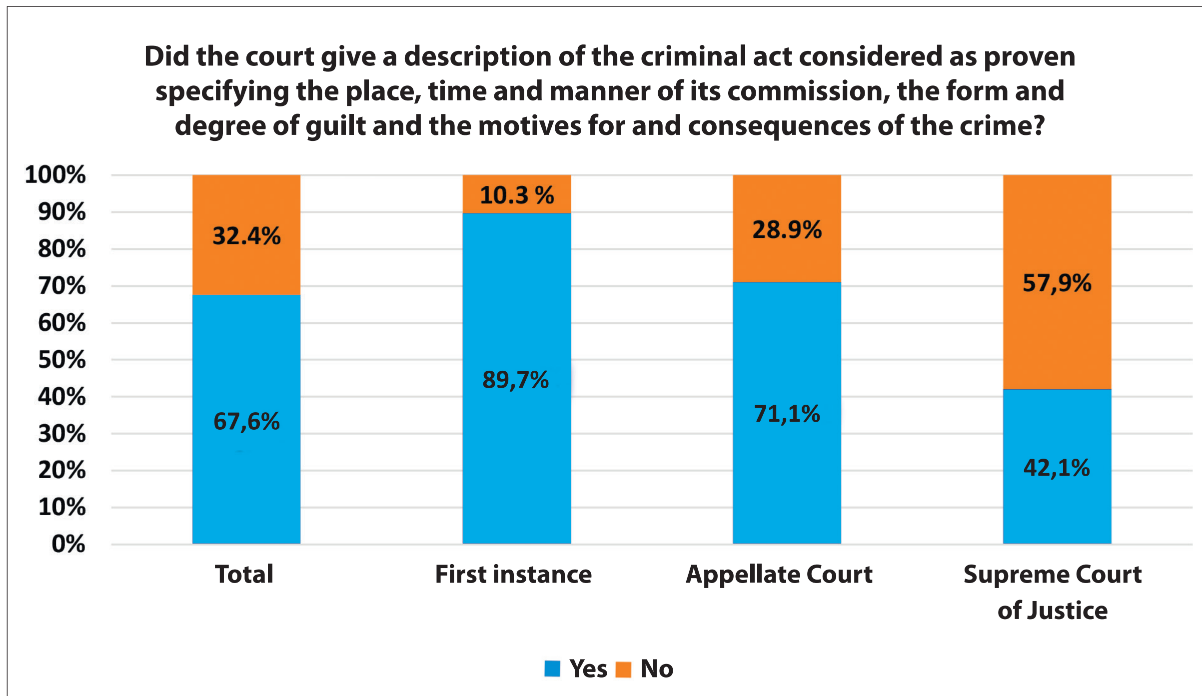
Article 394 CCP deals with the content of the descriptive part of a sentence/decision. According to point 1 of paragraph 1 of this article, the descriptive part of a sentence should first of all include a description of the criminal act considered as proven specifying the place, time and manner of its commission, the form and degree of guilt and the motives for and consequences of the crime. As it is shown in Chart No. 5 below, in almost all the decisions analysed, the courts did not make an express reference to Article 394, paragraph 1, point 1 CCP. It should be noted here that the appellate courts and the SCJ are in principle not obliged to refer to Article 394 CCP. **However, for the sake of transparency, it would be better if the courts would make express reference to the articles they apply in their decisions.**

**CHART No. 5**




The picture changes when it comes to the application of the contents of Article 394, paragraph 1, point 1 CCP. The Checklist contains instructions as to how to look into the question whether indeed the courts give a description of the criminal act considered as proven specifying the place, time and manner of its commission, the form and degree of guilt and the motives for and consequences of the crime. The box was ticked as 'yes' only if the reasoning of the court goes further than simple citation of the criteria of Article 394, paragraph 1, point 1 CCP. The data demonstrated in Chart No. 6 below show that in **most of the decisions analysed (67.6%) the courts did include in their decisions a description of the criminal act as required by the CCP.**

**CHART No. 6**



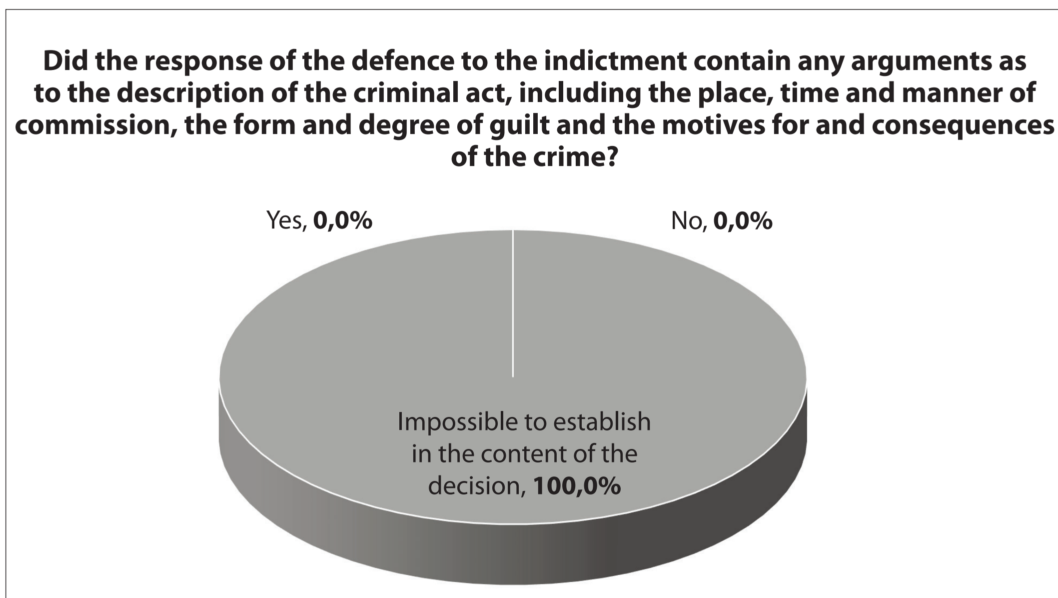

**It should be noted here that the fact that in 57,9% of the decisions of the SCJ there was not a description of the criminal act does not mean that there is a problem with the motivation of the SCJ decisions concerning this aspect. The SCJ is delivering a judgment on the points of law, and it normally is not obliged to go into the facts of the case, except for the case when the SCJ considers that a lower court admitted a serious factual error (Article 427 (1) (6) CCP).**

The appellate courts have given a description of the criminal act in 71,1% of the cases. This is a very positive finding. The 28,9% of the decisions where the appellate courts did not give such a decision includes mainly cases where the appellant did not challenge the criminal act but the points of law. Since the courts of appeal are bound by Article 409 CCP to judge within the boundaries of the appeal request, there is no obligation on their part to give a description of the criminal act if this is not challenged by the appellant.

The figures concerning the first instance courts are also very positive. The description of the act as required by Article 394 CCP is given in almost 90% of the decisions analysed. The above figures show the importance of this issue which contributes to the clarity of the decision, to a better understanding of the reasoning of the courts which in turn increases the chances of a well-prepared appeal in higher courts.

One important issue related to the description of the criminal act is the response of the defendant to the indictment. Article 366(2) CCP requires that if a response to the indictment was filed, the chairperson of the hearing shall bring it to the knowledge of those present. The standards established by the case law of the European Court[90] as well as the standards of legal reasoning and writing,[91] require that the court takes into account the arguments brought forward by the defendant, including thus the response of the defendant to the indictment, provided that they are legally significant claims. The figures in Chart No, 7 below, reveal that the situation in this respect is worrying. The expectation was that response of the defence to the indictment is not always possible to be retrieved from the contents of the judgment. That is why a note was made to this respect in the Checklist and the possibility was given to tick the box respectively. Indeed, the expectations were met, since in all of the decisions analysed it was impossible to establish whether the response of the defence to the indictment contain any arguments as to the description of the criminal act, including the place, time and manner of commission, the form and degree of guilt and the motives for and consequences of the crime. This was so because it was impossible to establish in the first place whether the defence made a response to the indictment at all. The reason for this can be that the courts interpret article 366(2) CCP as requiring only that mention of the response of the defence to the indictment is made only during the hearing and that there is no express obligation to include it in the reasoning of the judgment. Another cause could be that there was simply no response to the indictment made by the parties. **Whatever the reason might be, the judgments should be reasoned in such a way as to be enable anyone who reads them to establish whether the defence filed a response to the indictment and whether this contained argument which will call for a response by the court. This in turn would enable anyone to see whether the courts have motivated the judgment adequately. It should be noted here that these figures apply only to first instance courts.**

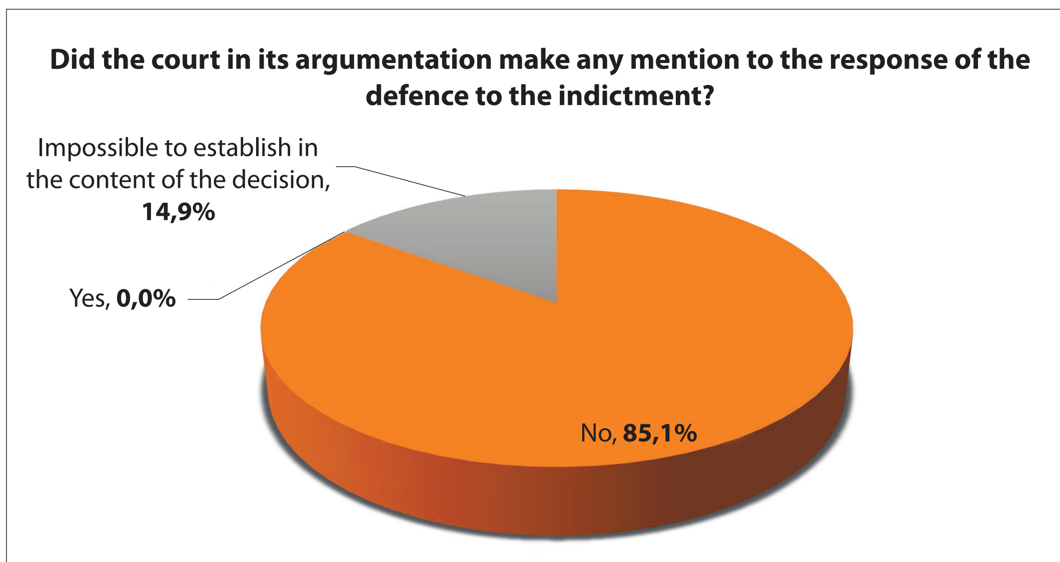
**CHART No. 7**




[90] See Chapter I of this Compendium.
[91] See Chapter II of this Compendium.

The same was observed also regarding the question of whether the court in its argumentation made any mention to the response of the defence. The figures are presented in Chart No. 8 below and they show that only the courts either did not make any mention to the response of the defence (that is 85.1%) or this was impossible to establish (that is 14.9 %)). The arguments and conclusions in the description of Chart No. 7 above apply here *mutatis mutandis*.

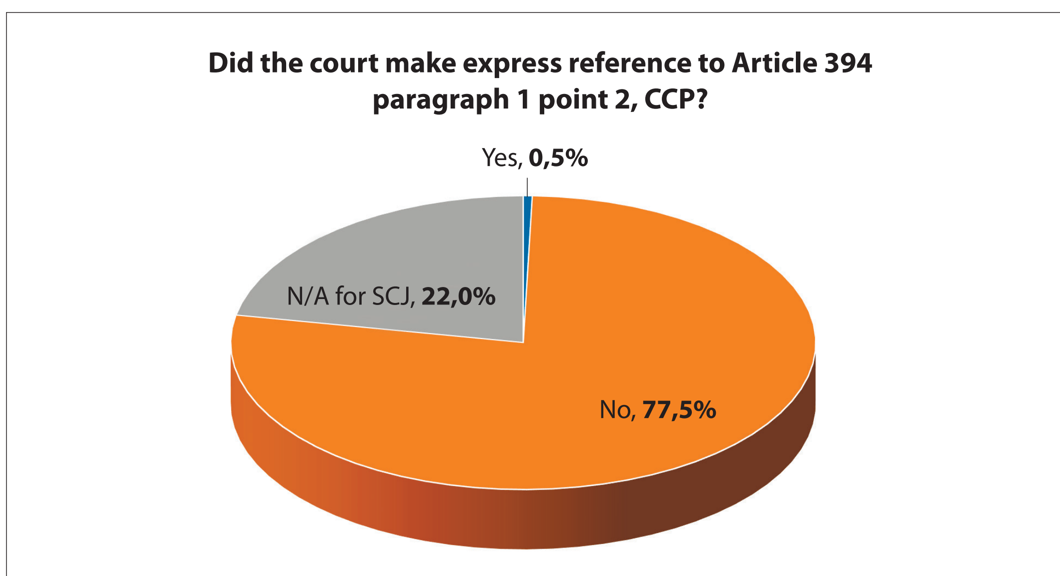
**CHART No. 8**




### *3.5.2. Evidence*

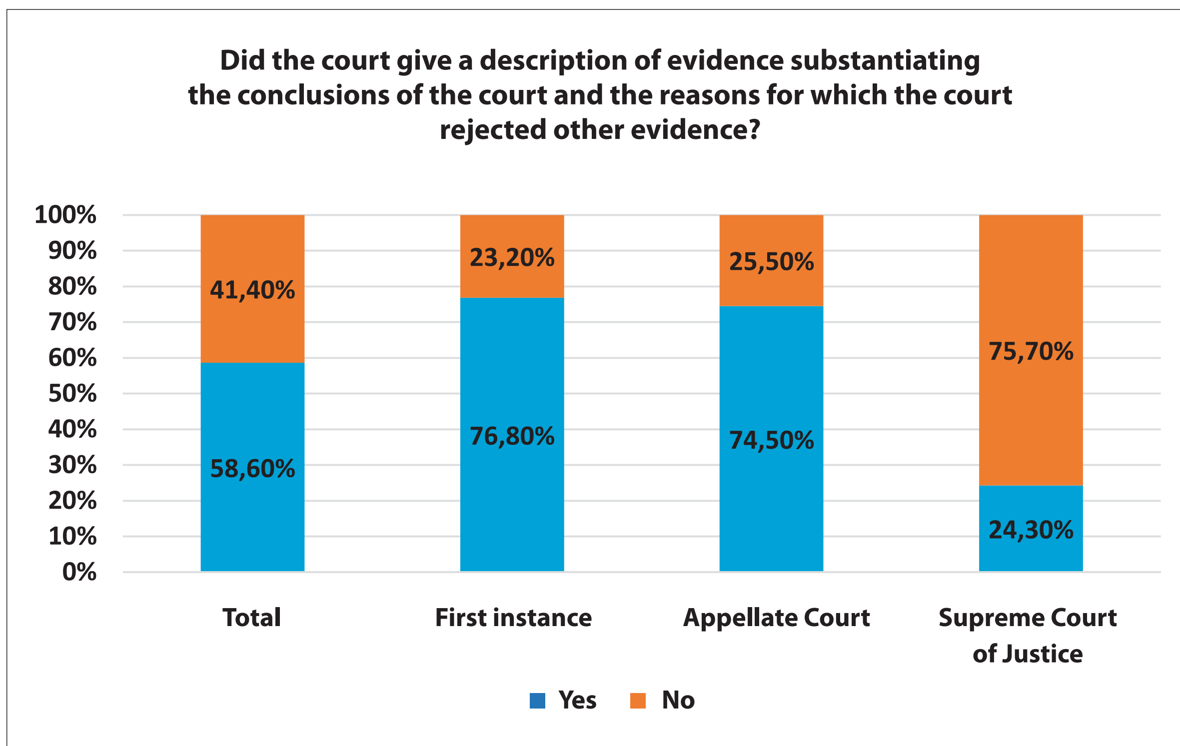
Article 394, paragraph 1, point 2 CCP requires the first instance courts to include in the judgment a description of evidence substantiating the conclusions of the court and the reasons for which the court rejected other evidence. As it is shown below in Chart No. 9 the courts do not mention this article expressly in their judgments. Only in 3 or 0.5% of the judgments analysed was there an express mentioning of Article 394(1)(2) CCP. It should be noted here that the appellate courts and the SCJ are in principle not obliged to the refer to Article 394 CCP. **However, for the sake of transparency, it would be better if the courts would make express reference to the articles they apply in their decisions.** It should be noted here that the question was not applicable to the judgments of the SCJ because of their nature.

**CHART No. 9**



The courts did provide in the majority of the cases analysed (58.6%) a description of evidence substantiating their conclusions and the reasons for which certain evidence was rejected. Although this is a very positive development, it should be mentioned that the European Court has found a violation of Article 6 ECHR on the part of Moldova because of the failure of national courts to give reasons as to why they accepted or rejected evidence.[92] Therefore, **the amount of the judgments where the courts did not describe the evidence is too high to be ignored and this is a problem that needs to be addressed in this compendium.** A note should be made here regarding the figures related to the SCJ. The high figure of the decisions where the SCJ did not give a description of the evidence does not mean that there is a problem with the reasoning of the SCJ, since this court deals only with recourses on the point of law and as a rule does not evaluate the evidence. Also, with regard to the Appellate Courts it should be said that the decisions of the appellate courts are bound by the subject matter of the appeal, which does not necessarily always involve the evaluation of evidence. The figures are found in Chart No. 10 below.

**CHART No. 10**



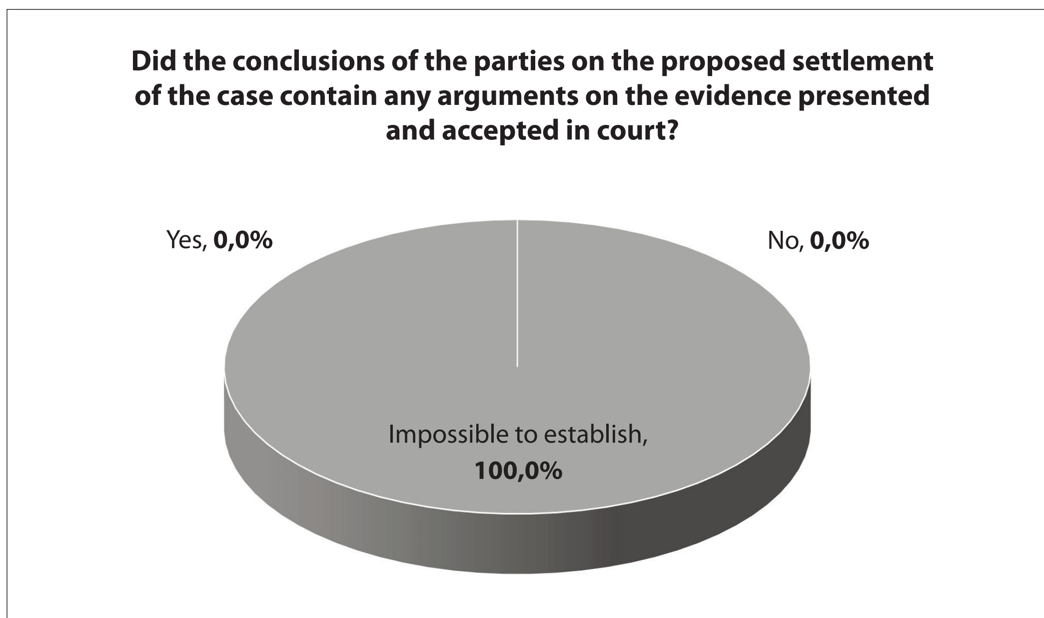

The conclusion of the parties on the proposed settlement of the case are important in the above context. The conclusions of the parties may contain arguments on the evidence accepted or rejected, which may constitute a legally significant claim that warns a response of the court.[93] However, **if the court does not include in its reasoning the written conclusions of the parties or if it could not be established whether such conclusions were put forward, it will be impossible to check whether the court indeed gave a well-reasoned judgment**. Article 381 CCP provides that upon the completion of the arguments and the final plea, the parties may submit to the court written conclusions on the proposed settlement of the case. The conclusions proposed by the parties shall not be mandatory for the court. The written conclusions shall be attached to the transcript. Based on these provisions and the above argument, the Checklist provided questions to see whether the conclusions of the parties on the proposed settlement of the case contain any arguments on the evidence presented and accepted in court. Moreover, the Checklist contained a question to see whether the courts mentioned the conclusions of the parties in their reasoning. A prerequisite for these issues is obviously to see whether any conclusion was put forward by the parties.

---

92 See Chapter I of this Compendium.
93 Ibid.

However, in all of the decisions analysed it was impossible to establish whether the parties put forward conclusions on the proposed settlement of the case. The reason for this can be either because the court interpret the provisions of Article 381 as not establishing an obligation for them to include the conclusions of the parties in their decisions or there were merely no conclusions filed, which is more unlikely to be the case. **Whatever the reason might be, the judgments should be reasoned in such a way as to enable anyone who reads them to establish whether the defence filed written conclusions on the proposed settlement and whether they contained arguments which will call for a response by the court. This in turn would enable anyone to see whether the courts have motivated the judgments adequately. It should be noted here that these figures apply only to first instance courts.** Chart No. 11 below contains the exact figures on these issues.

**CHART No. 11**




The same was observed also regarding the question of whether the court in its argumentation made any mention to the conclusions of the parties. The figures are presented in Chart No. 12 below and they show that in the vast majority of the judgments, that is 84.4% of the decisions analysed, the courts did not mention the conclusions of the parties in the argumentation of the judgment, while in the rest of the decisions analysed it was impossible to establish whether the conclusions of the parties were mentioned. As already mentioned above under Chart No. 11, the figures here should concern the courts of first instance and not the appellate courts and SCJ, since Article 381 CCP applies to first instance courts. However, even after the disaggregation of the figures as shown in Chart No. 13 below, the figures regarding the first instance courts remain worrying. Their decisions either did not mention the conclusions of the parties (that is 69%) or it was impossible to establish whether any mention was made to the conclusions of the parties (that is 31%). The arguments and conclusions in the description of Chart No. 11 above apply here *mutatis mutandis*.

**CHART No. 12**

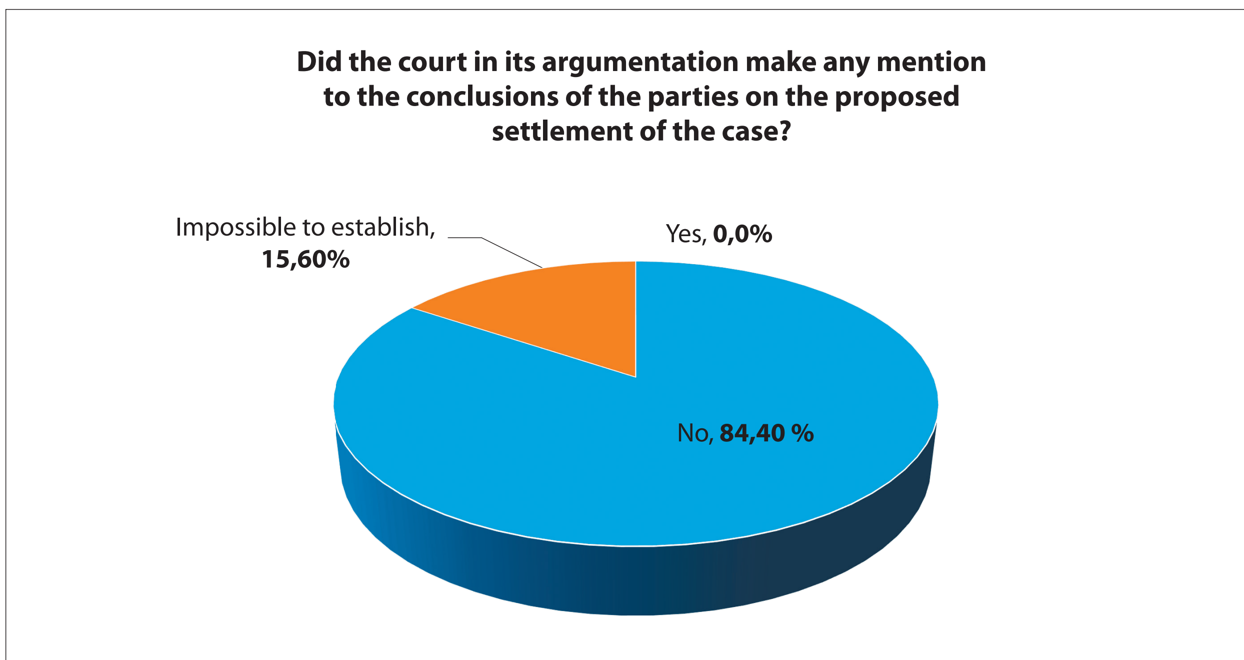
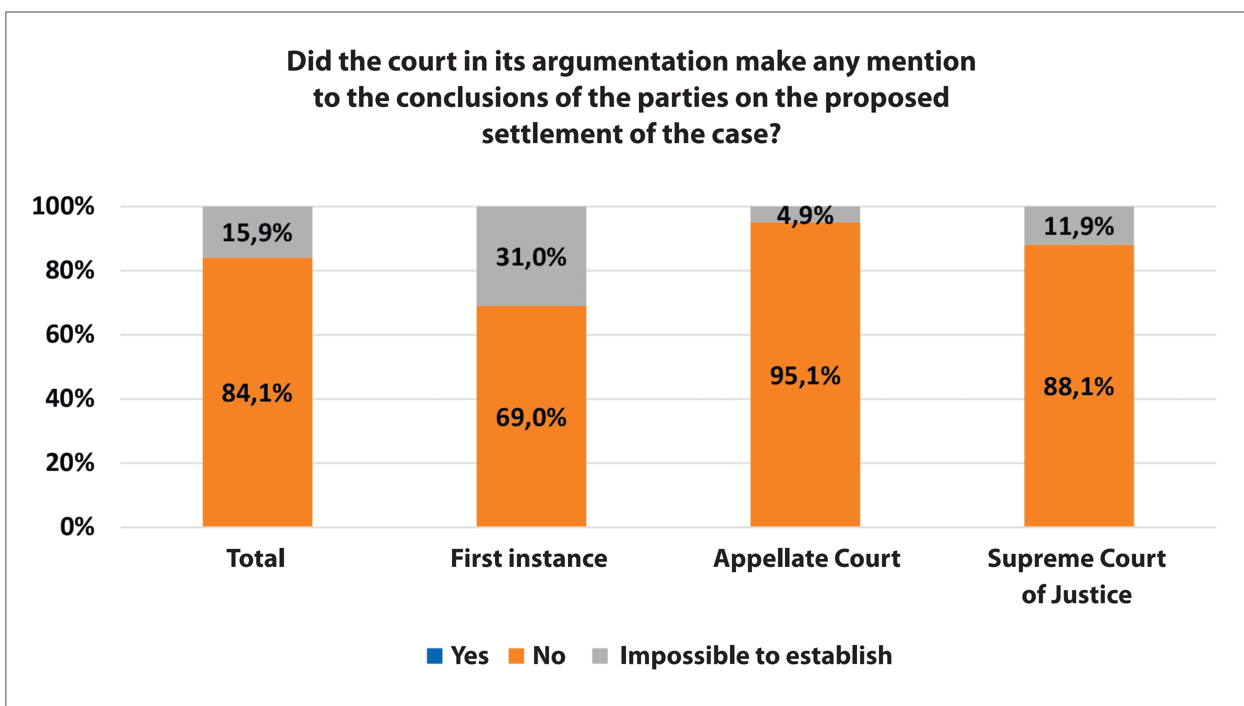



**CHART No. 13**




## *3.5.3. Mitigating and Aggravating Circumstances*

Article 394, paragraph 1, point 3 CCP provides that the descriptive part of a sentence of conviction shall include any circumstances mitigating or aggravating criminal liability. In 18.9% of the judgments analysed there was a mitigating circumstance put forward either by the prosecution or the defence (see Chart No. 14 below). However, in 84,4% of the judgments where a mitigating circumstance was put forward, it was impossible to establish who put forward the motion (see Chart No. 15 below). Moreover, in 21,8% of the judgments where a mitigating circumstance was put forward, it was impossible to establish whether the court accepted or rejected the motion (see Chart No. 16 below).

**CHART No. 14**

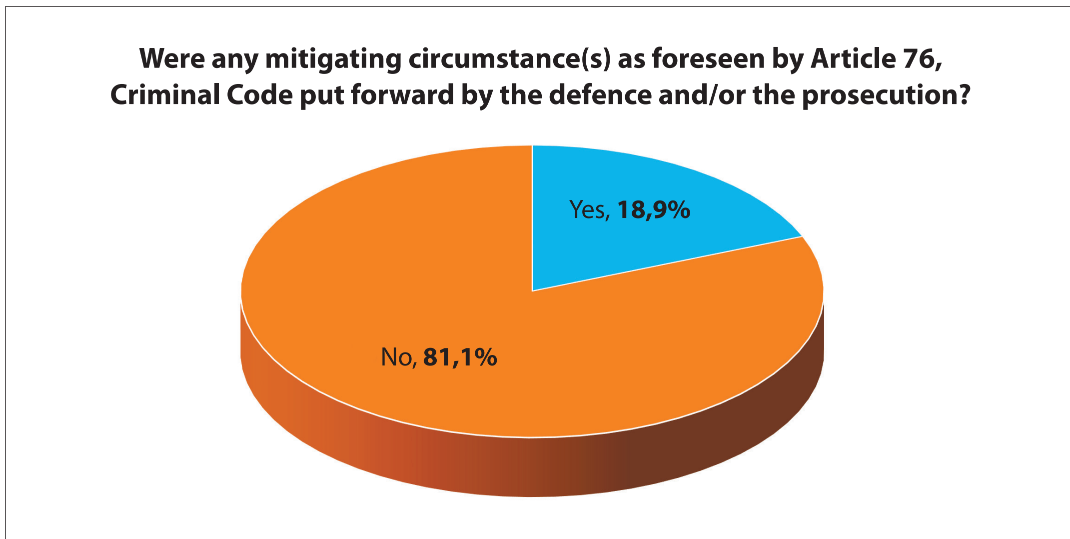



**CHART No. 15**

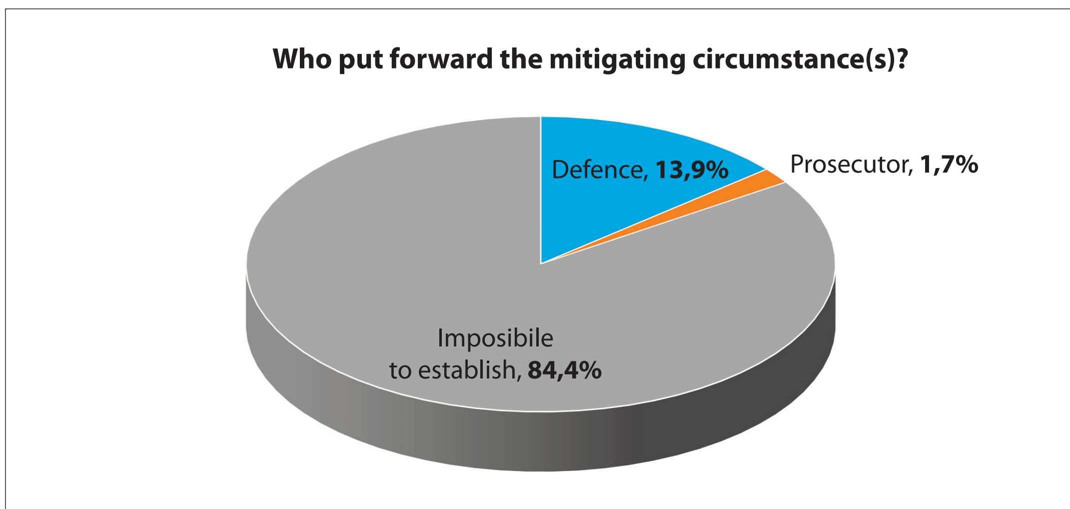
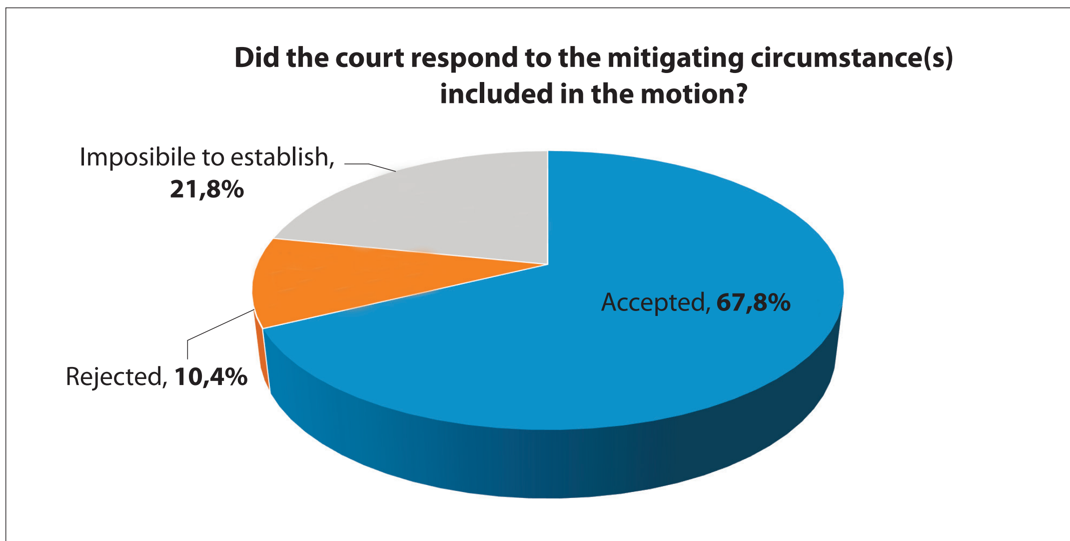



**CHART No. 16**



The above figures reveal two issues which deserve attention, and which are related to each other. The first one is the fact that in the vast majority of the cases where a motion on mitigating circumstances was put forward (84,4%) it was impossible to establish who put the motion forward. At the same time, in 21,8% of the cases where a mitigating circumstance was claimed, it was not possible to establish whether the court accepted or rejected the motion. These figures cannot be ignored because **it is of utmost importance to have a clear picture on who put forward a motion for mitigating circumstances. Only in this way it can be checked whether a judgment has responded to significant arguments of the parties. It is even more important to have a clear picture on how the court reacted on a mitigating circumstance regardless of who put it forward.** The figures on the question of whether in case of rejection, the court, based on the analysis of evidence and particular circumstances of the given case, concretely articulated that it was satisfied that the relevant mitigating factor does not exist, are not sufficient to draw a sound conclusion. Only in 8 decisions the answer to the question was affirmative while a negative answer was received in 4 judgments. Nevertheless, this does not mean that no attention should be paid to this issue in the compendium.

The figures on aggravating circumstances put forward by the prosecutor should be looked at with caution because, as it is shown in Chart No. 17 below, only in 5,6% of the decisions (that is 34 decisions in total) there was an aggravating circumstance put forward by the prosecutor. However, this figure is sufficient to have a cautious indication of the situation in this regard. The first indications that can be drawn out of the figures is that in the majority of the cases (76,5% or 26 decisions) where the prosecutor put forward a motion for aggravating circumstance, his/her motivation was formalistic and simply quoted the legal criteria of Article 77 Criminal Code (see Chart No. 18 below).

**CHART No. 17**

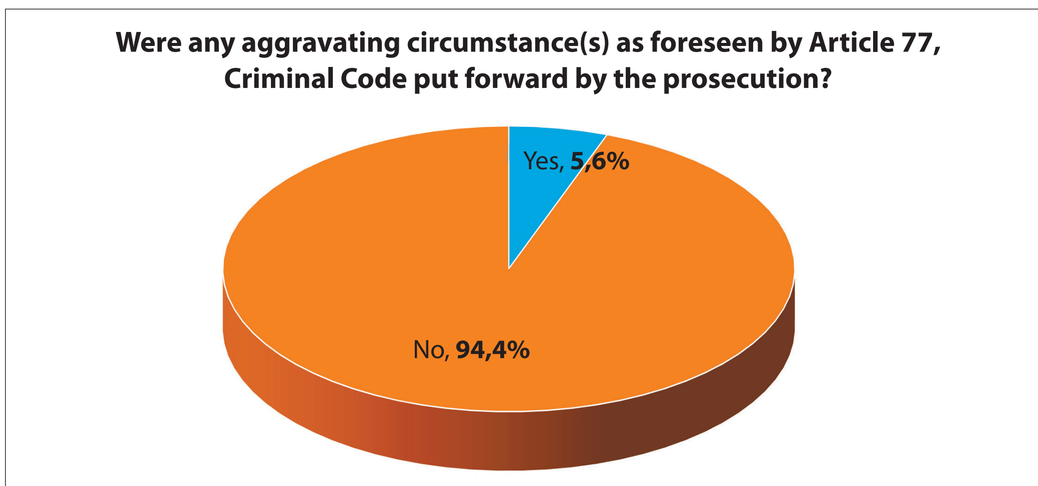
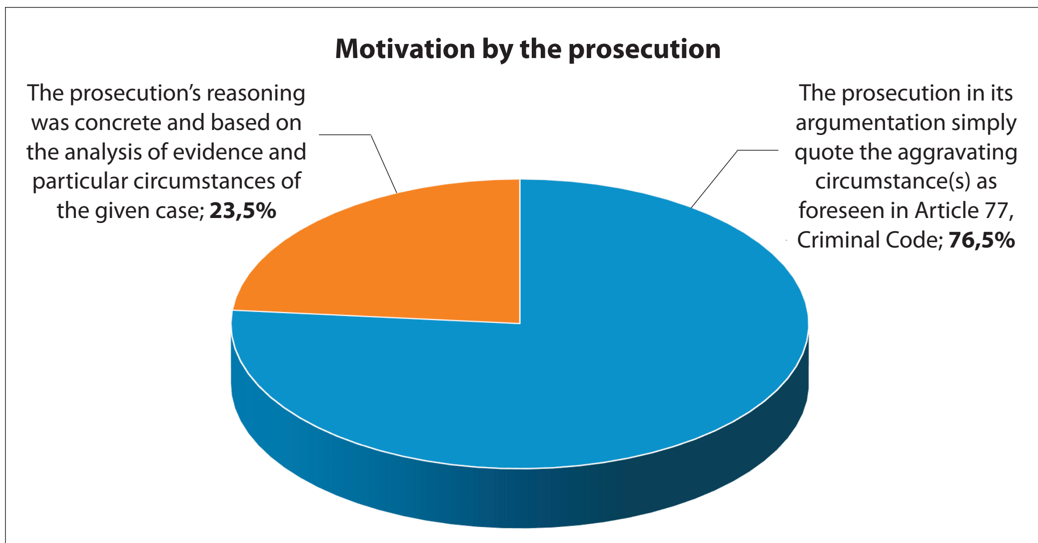



**CHART No. 18**



The above figures need to be put in the context by looking at the response of the court on the motions put forward by the prosecutor. Chart No. 19 and Chart No. 20 below contain the relevant figures.

**CHART No. 19**

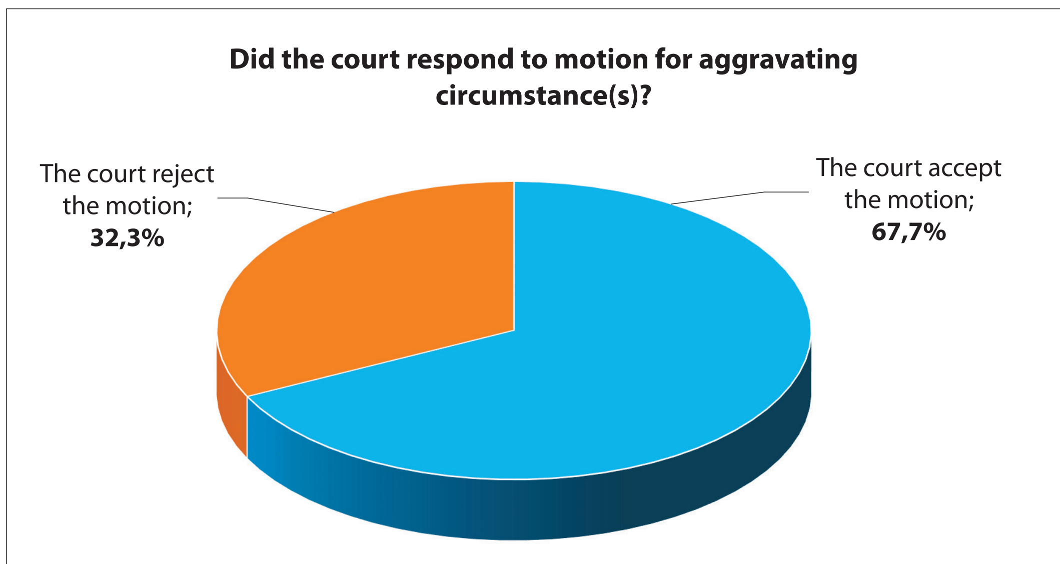
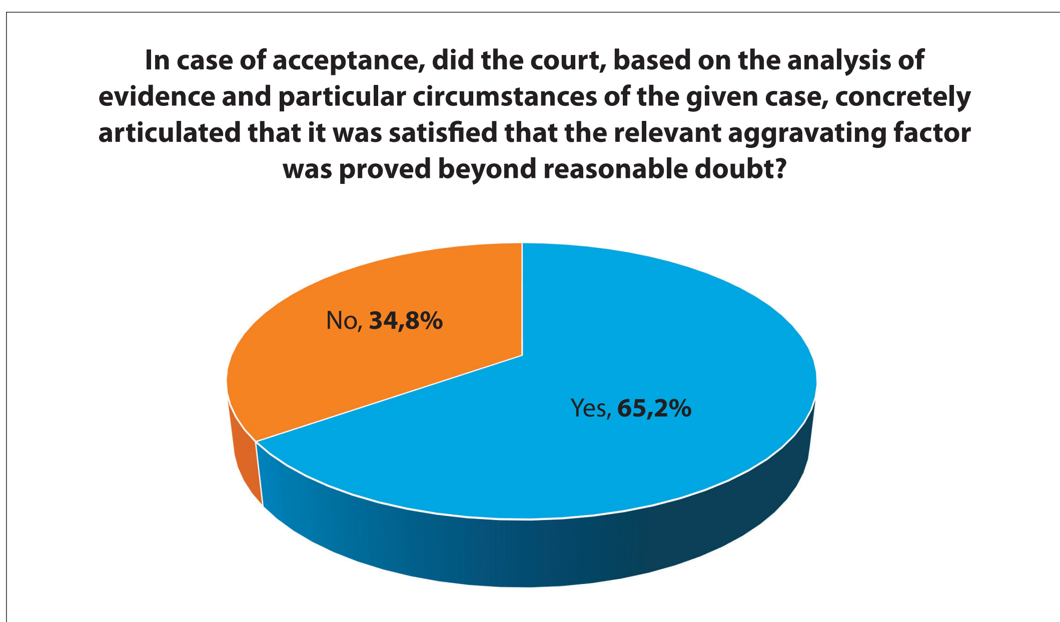



**CHART No. 20**




The situation would have been problematic if the courts would accept the not well motivated motions of aggravated circumstances put forward by the prosecution without an analysis of the evidence and particular circumstances of the case. The figures above suggest that in the majority of the cases the courts accepted the motions put forward by the prosecution (67,7% or 23 decisions) and that the acceptance occurred in the majority of the cases (65,2% or 15 decisions) based on the analysis of the evidence and circumstances of the case which proved the existence of the aggravated circumstance beyond reasonable doubt. In 34,8% of the cases or 8 decisions, that is more than one third of the decisions, the courts accepted the motivations without an analysis of the evidence and thus based only on the motion of the prosecution. **As already mentioned, the figures are not sufficient to draw sound conclusions, however, they are enough to warrant caution on this issue and to pay closer attention to the motivation of the aggravating circumstances put forward by the prosecution. This becomes even more necessary when taking into account that in the majority of cases the motivation of the prosecution was formalistic.**

Normally speaking, aggravating circumstances are considered only if they are included in the indictment. However, the analysis of the judgments showed that it is not always clear whether the aggravating circumstances are considered because they were included in the indictment. This is a deficiency in the way judgments are reasoned and the consequence thereof will be that the interpretation of the receiver/reader of the judgement would be that the court took the aggravating circumstance into consideration *suo moto*. Hence, the reference to the *suo moto* consideration of the aggravating circumstance by the court in Charts No. 21 and No. 22 below. In 17,9,% of the decisions analysed, the courts took into consideration an aggravating circumstance *suo moto* (see Chart No. 21 below). In 58,2% of these decisions (or 32 decisions) the court, based on the analysis of evidence and particular circumstances of the given case, concretely and clearly articulated that it was satisfied that the relevant aggravating factor was proved beyond reasonable doubt. In 41,8% out of the 17,9% of decisions above (or 23 decisions) the aggravating circumstance taken into consideration *suo moto* was not proved beyond reasonable doubt based on the evidence and circumstances of the case (see Chart No. 22 below).

**CHART No. 21**

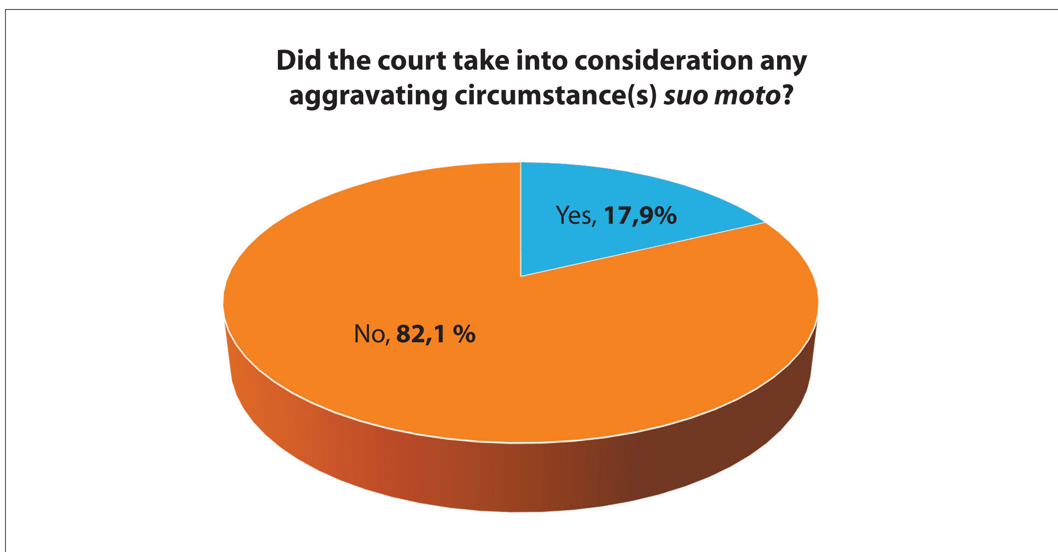
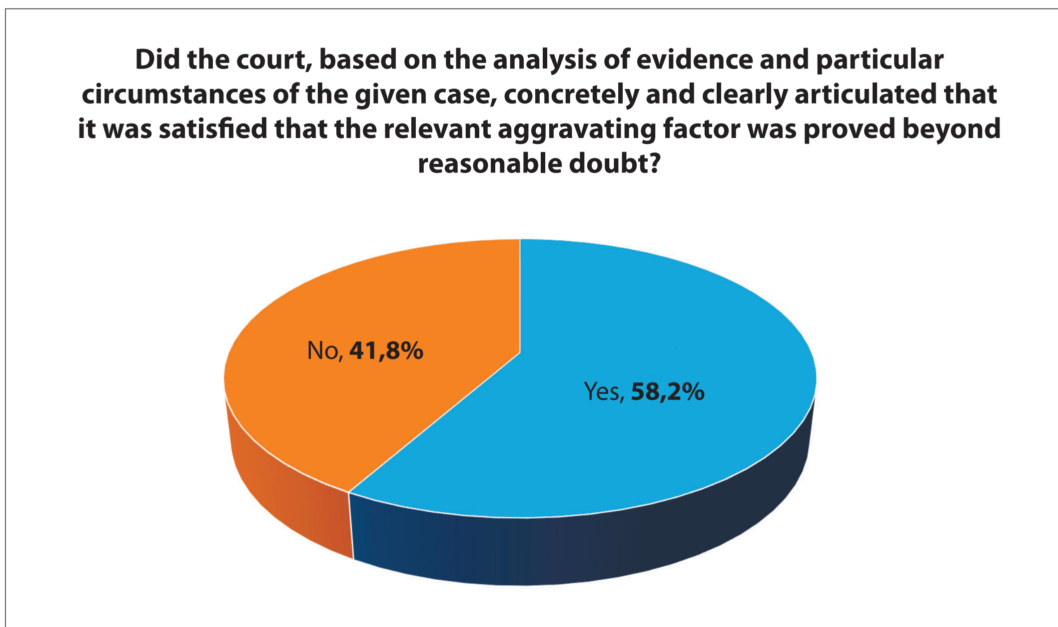



**CHART No. 22**

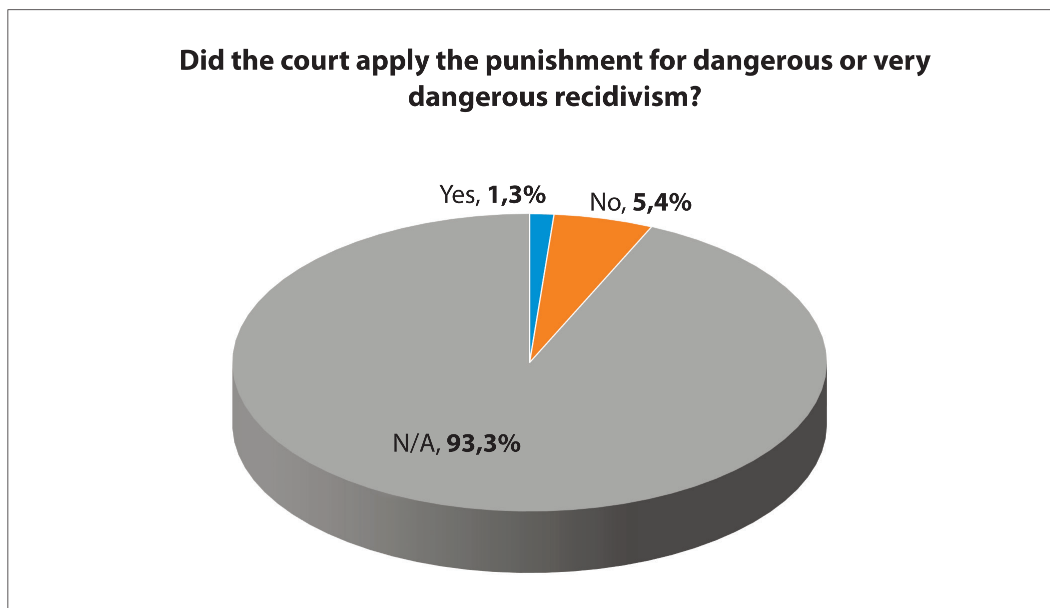


The figures here are higher than in Chart Nos. 17-20. However, they are still not high enough to justify sound conclusions. Nevertheless, the figures are sufficient to have a clear indication that **there is a problem with the motivation of the aggravating circumstances taken into consideration *suo moto* by the courts. In nearly half of the decisions analysed the aggravating circumstance was not proved beyond reasonable doubt based on the evidence and circumstances of the case. Special attention needs therefore to be paid also in the reasoning of the judgments in these cases.**

### 3.5.4. Recidivism

Article 394, paragraph 1, point 6 CCP requires that the first instance courts make a remark on recidivism in the descriptive part of the convicting sentence. That is why the Checklist included a set of questions dealing with the way the courts motivate cases of recidivism. Following the findings of the Research[94] the focus was on dangerous or very dangerous recidivism. However, the data gathered from the analysis of the 609 judgments for the purposes of the current exercise showed that only 1.3% of the cases, or 8 out of 609 decisions, the courts applied punishment for dangerous and very dangerous recidivism. This figure is too insignificant to warn any sound conclusions. Therefore, this aspect will not be further analysed here.

**CHART No. 23**

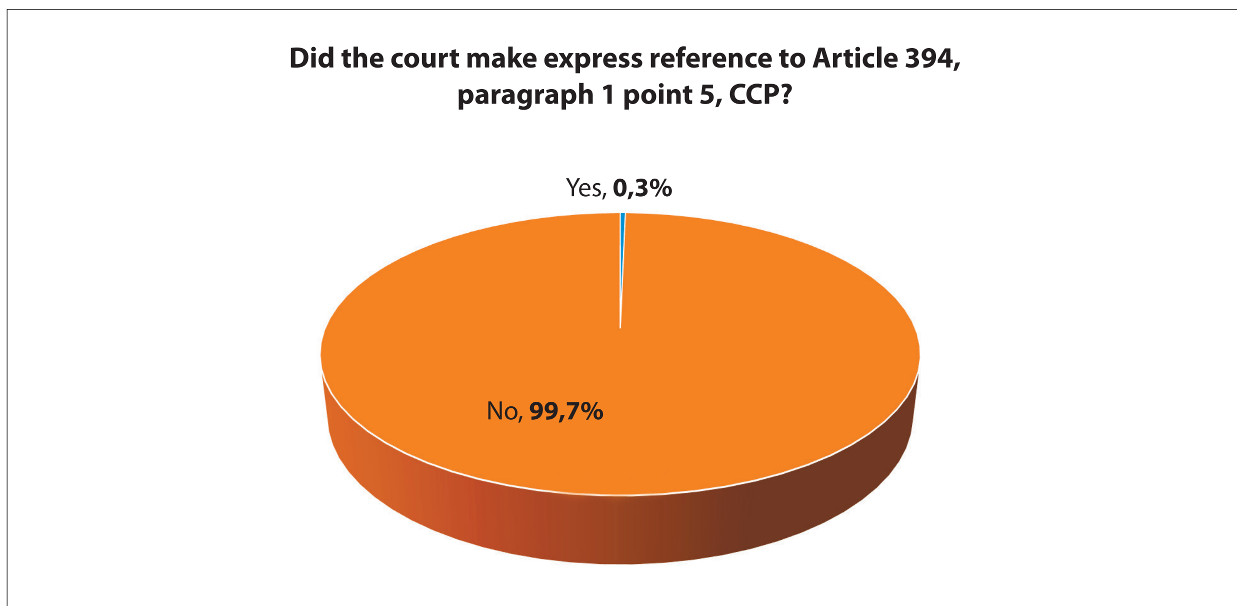



### 3.5.5. Legal Qualification

Article 394, paragraph 1, point 5 CCP requires that the first instance courts give the legal qualification of the actions of the defendant and the reasons for changing the accusation, if any. As it was the case with other paragraphs of Article 394 CCP analysed above, the courts in almost all the cases did not make an express reference to this provision. It should be noted here that the appellate courts and the SCJ are in principle not obliged to refer to Article 394 CCP. **However, for the sake of transparency, it would be better if the courts would make express reference to the articles they apply in their decisions.**

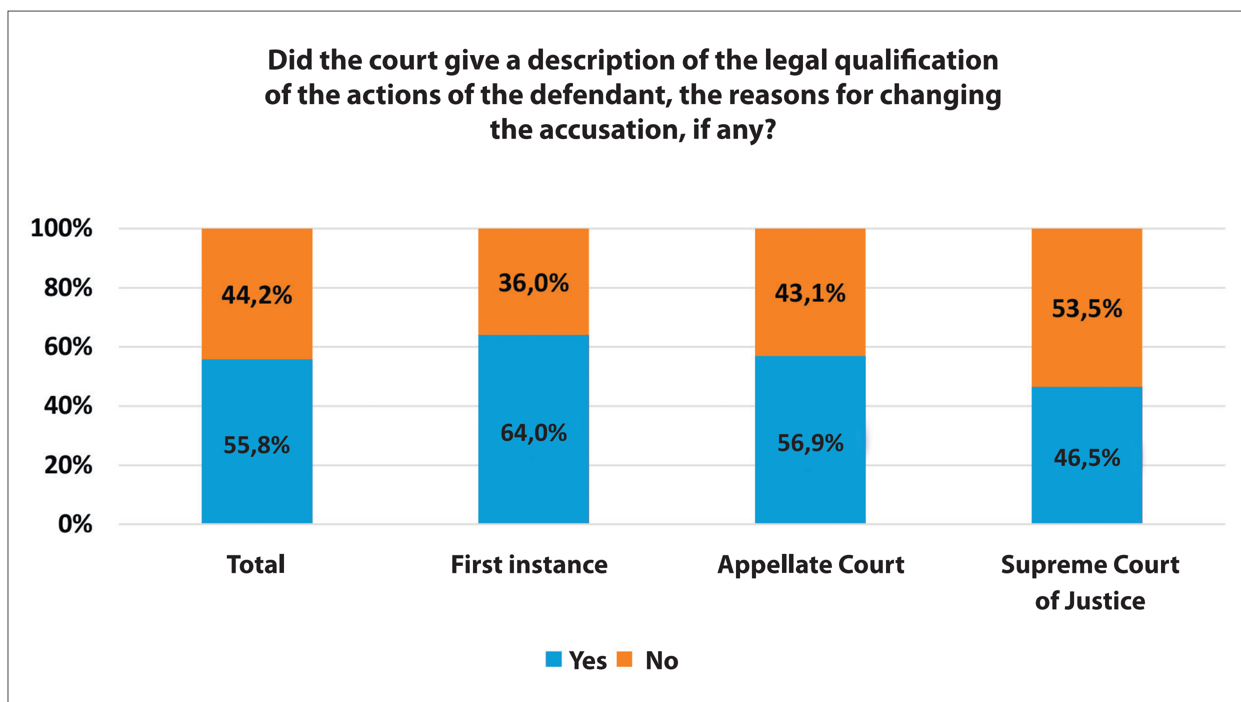
[94] The Council of Europe (2021), "*Report on the Application of Criminal Sanctions in the Republic of Moldova*".

**CHART No. 24**




**The courts do give the legal qualification of the actions of the defendant and the reasons for changing the accusation, if any, in the majority of the cases, that is 55.8% or 340 decisions out of 609 judgments analysed.**

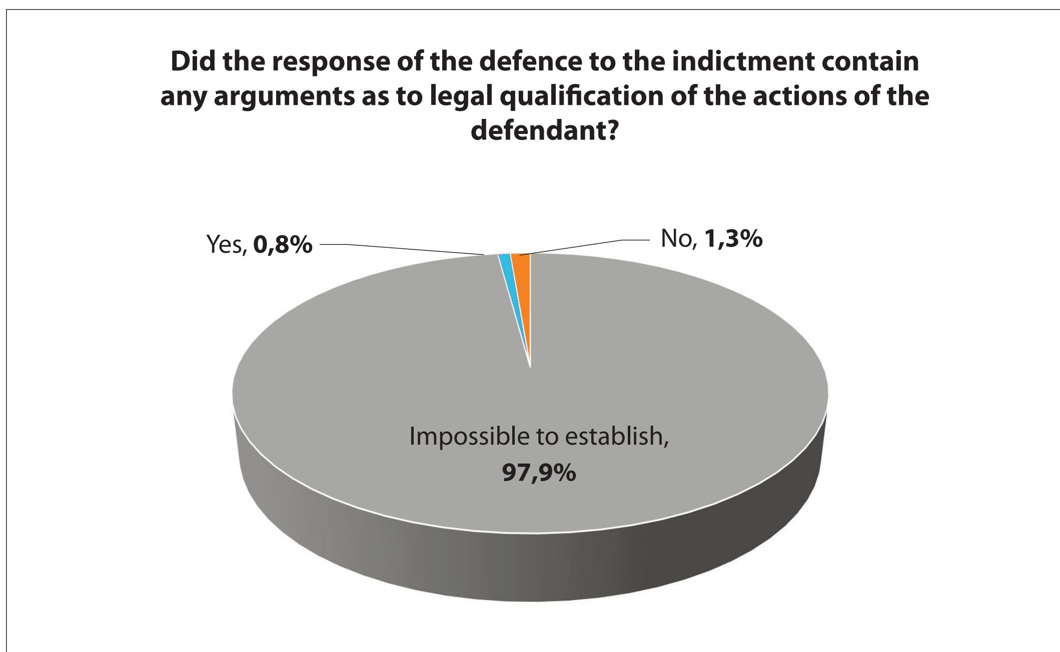
**CHART No. 25**



An explanation is due regarding the figure 44,2% of the court decisions which did not include a description of the criminal act as required by the CCP. These decisions also include decisions of the courts of appeal and SCJ. The contents of the decisions of the court of appeal and of the SCJ are determined by Article 417 CCP, which does not expressly mention an obligation for the court of appeal/SCJ to include a description of the legal qualification of the acts of the defendant. This could be the main reason why in the decisions of the courts of appeal/SCJ no qualification of the acts of the defendant was given. Another reason may be that the appeal/cassation simply did not challenge the qualification of the legal acts of the defendant. Moreover, the figures show that first instance courts, which do have an obligation to give a description of the legal qualification, do not fulfil this obligation in more than one third of the decisions analysed (that is 36% of the decisions). **The reason may be, the legal qualification of the acts of the defence and the reasons for changing the accusation, if any, are very important parts of the decision which enable the convict to realize how did the court come to the imposition of a penalty for a particular offence. This is equally important also for courts of appeal. Such information would enable the parties to better prepare the appeal or cassation, as the case may be.**

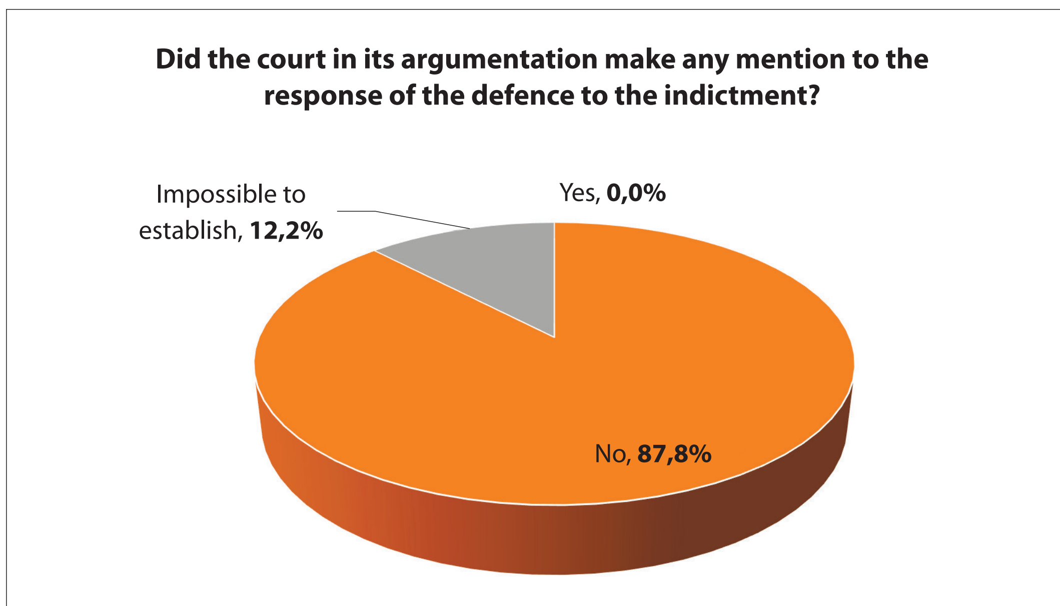
One important issue related to the description of the legal qualification of the acts of the defendant is the response of the defendant to the indictment. Article 366(2) CCP requires that if a response to the indictment was filed, the chairperson of the hearing shall bring it to the knowledge of those present. The standards established by the case law of the European Court[95] as well as the standards of legal reasoning and writing,[96] require that the court takes into account the arguments brought forward by the defendant, including thus the response of the defendant to the indictment, provided that they are legally significant claims. The figures in Chart No. 26 below, reveal that the situation in this respect is worrying. Also, the figures with regard to the question whether the courts made any mention to the response of the defence to the indictment are not positive. The same arguments and conclusions/recommendations that were given in Section 5.1 above under the analysis of Chart No. 7 and Chart No. 8 apply under Chart Nos. 26 and 27 equally. It should be noted here that these figures apply primarily to decisions of first instance courts.

**CHART No. 26**



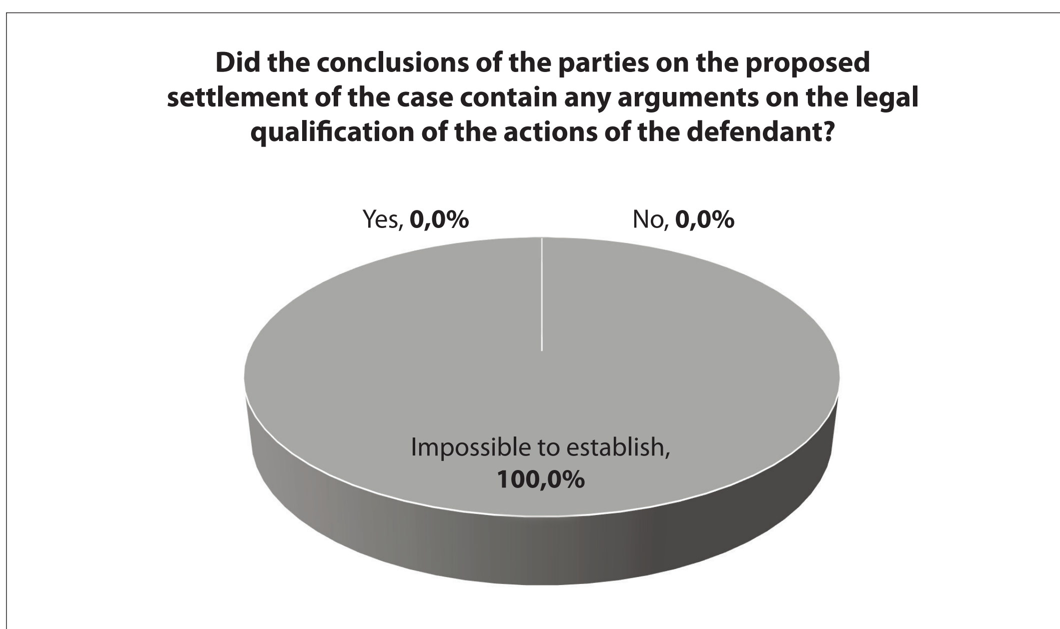

[95] See Chapter I of this Compendium.
[96] See Chapter II of this Compendium.

**CHART No. 27**



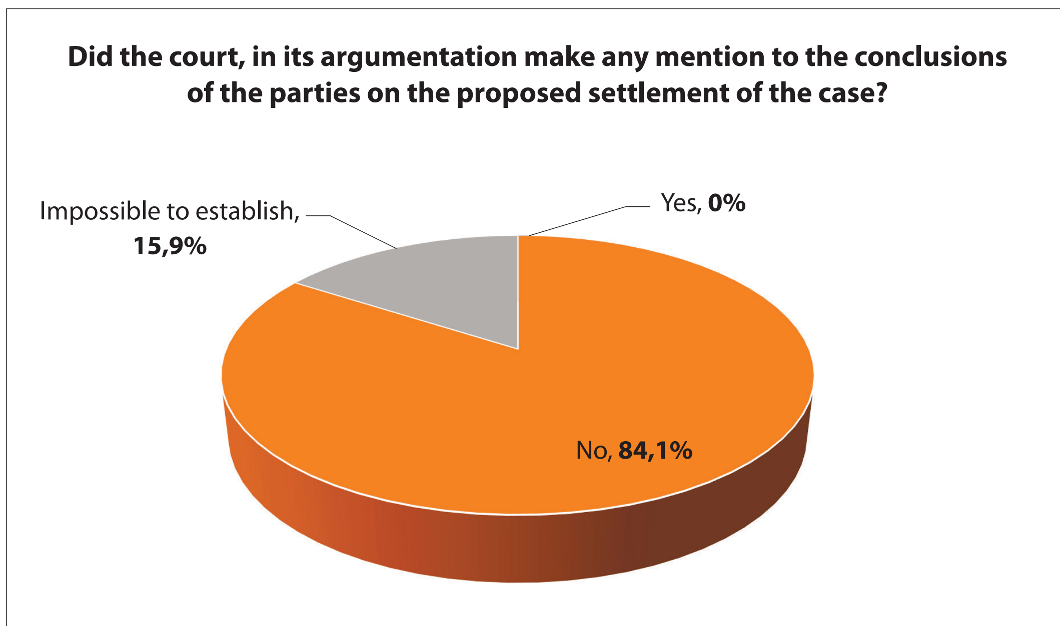

The conclusion of the parties on the proposed settlement of the case are important in the above context. The conclusions of the parties may contain arguments on the legal qualification of the acts of the accused, which may constitute a legally significant claim that warns a response of the court.[97] However, **if the court does not include in its reasoning the conclusions of the parties or if it could not be established whether such conclusions were put forward, it will be impossible to check whether the court indeed gave a well-reasoned judgment**. As it is shown below in Chart No. 28 in all of the decisions analysed it was impossible to establish whether the parties put forward conclusions on the proposed settlement of the case. Moreover, the courts, either did not make mention of the conclusions of the parties or it was impossible to establish this (see Chart No. 29 below). It should be noted here that these figures apply primarily to decisions of first instance courts. The situation is the same as it was above in the analysis of the data in Section 5.2 under Charts Nos. 11 and 12. The arguments and conclusions/recommendations provided respectively above apply equally to the data in Charts Nos. 28 and 29 below.

**CHART No. 28**




97 Ibid.

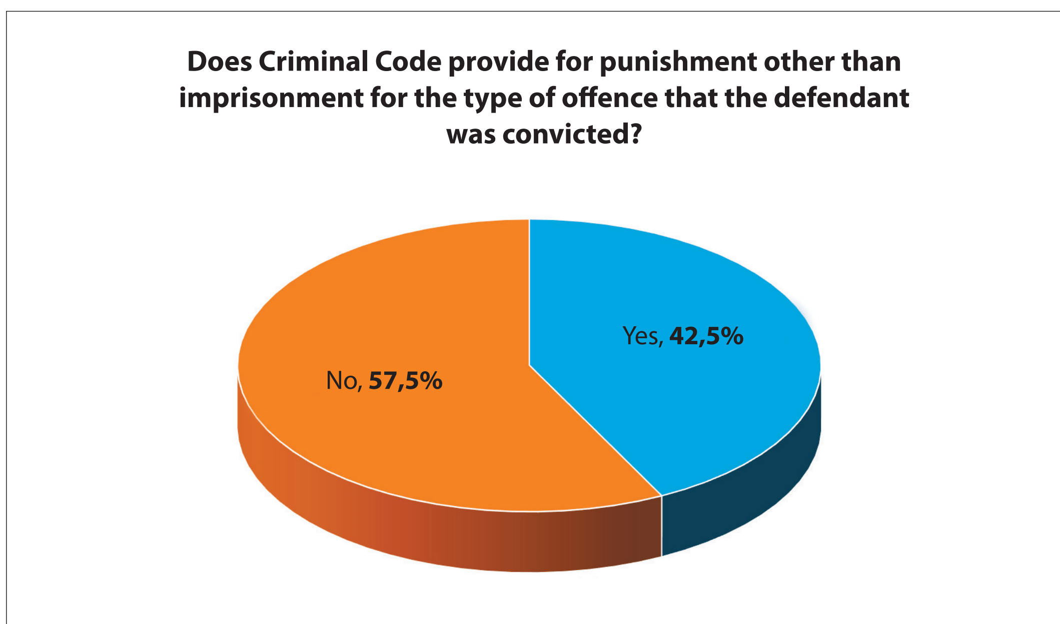
**CHART No. 29**




### *3.5.6. Punishment with imprisonment*

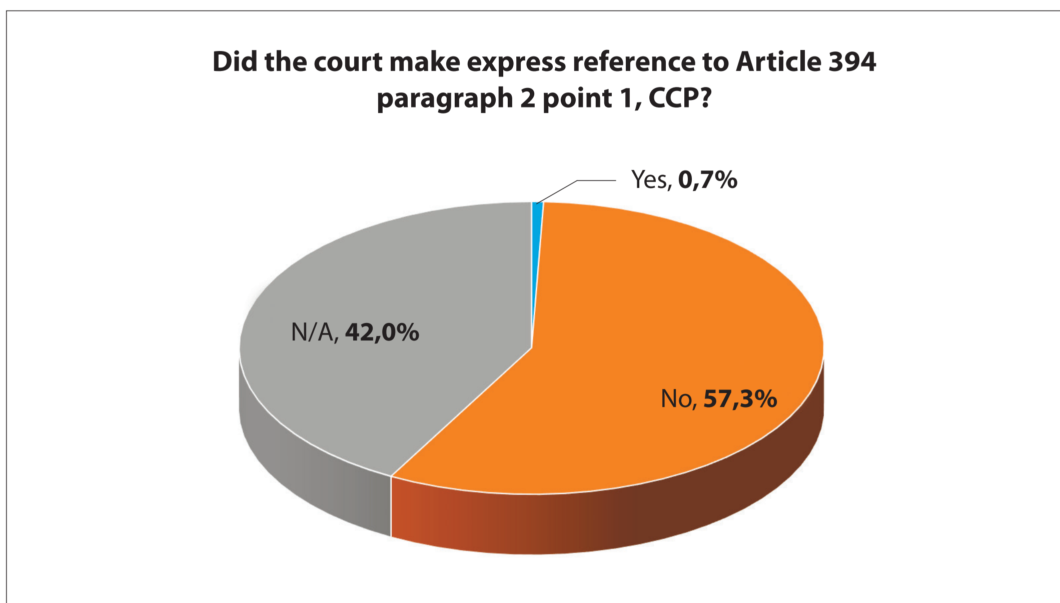
According to Article 394, paragraph 2, point 1, CCP, the court shall justify the punishment by imprisonment if criminal law provides for other categories of punishment. The first step to collect data on this aspect was to see whether the Criminal Code provided for punishment other than imprisonment for the type of offence that the defendant was convicted. The data collected and demonstrated in Chart No. 30 below show that in 259 judgments or 42,5 % the Criminal Code did provide for other punishments than imprisonment.

**CHART No. 30**



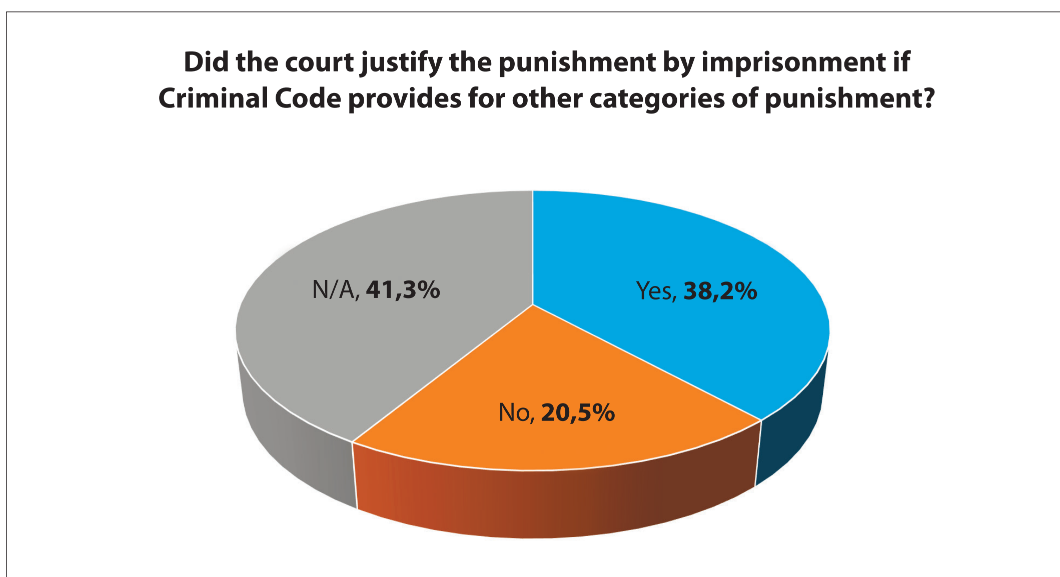
The figures in Chart No. 30 above do not reveal in how many cases the court imposed imprisonment as the punishing sentence. The disaggregation regarding the number of convictions is given in Chart No. 32 and Table D below. Before analysing these data, it is worth noting that courts again did not make express reference to Article 394, paragraph 2, point 1 CCP in their decisions (see Chart No. 31 below). It should be noted here that the appellate courts and the SCJ are in principle not obliged to refer to Article 394 CCP. **However, for the sake of transparency, it would be better if the courts would make express reference to the articles they apply in their decisions.**

**CHART No. 31**




In 259 decisions, that is 58,7% of all the decisions analysed, imprisonment was applied as a sanction. As shown in Chart No. 32 below, the courts justified the imposition of imprisonment in 38,2% of the decisions (that is 99 decisions). In 41,3% of the decisions where imprisonment was imposed as a sanction, the Criminal Code did not provide for an alternative sanction. Hence the figure of 41,3% is N/A.

**CHART No. 32**




The figures of 38,2% where the answer was 'Yes' and 20,5% where the answer was 'No' include all three instances, thus appellate courts and the SCJ as well. The disaggregation of these figures is provided in Table D below.

**TABLE D**

**Did the court justify the punishment by imprisonment if criminal law provides for other categories of punishment?**

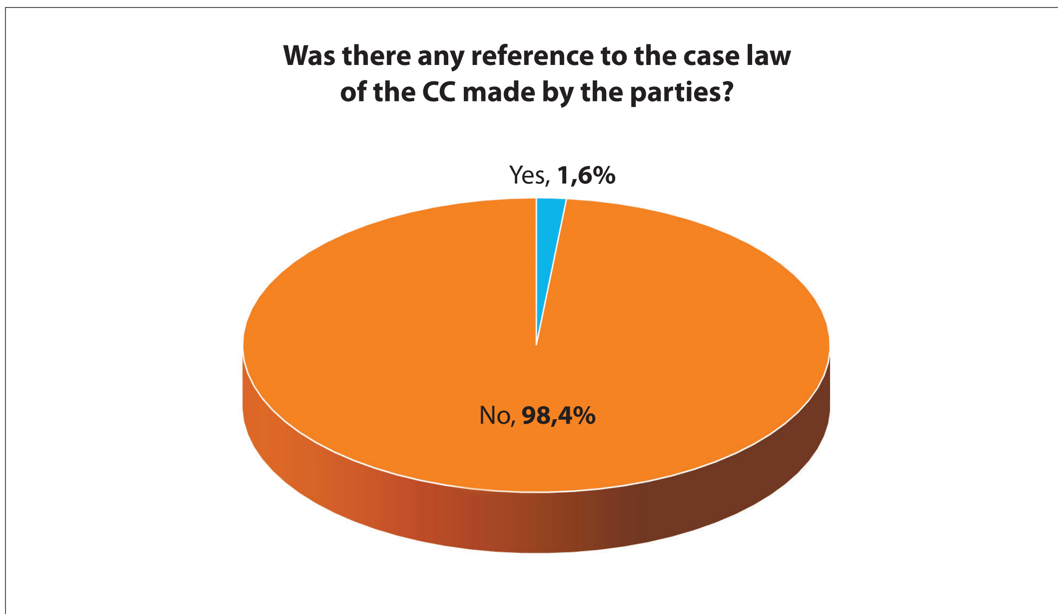
| Count | | Decisions | First Instance Courts | Appellate Courts | SCJ |
|---|---|---|---|---|---|
| Yes | 38,2% | 99 | 38,2% | 43,5% | 32,9% |
| No | 20,5% | 53 | 24,7% | 23,6% | 12,9% |
| N/A | 41,3% | 107 | 37,1% | 32,9% | 54,2% |
| **Total** | **100%** | **259** | **100%** | **100%** | **100%** |

The obligation to justify the punishment by imprisonment as required by Article 394, paragraph 2, point 1 CCP lays with the court of first instance. However, according to Article 417, paragraph 1, point 8 CCP, the appellate courts need to provide the factual and legal grounds for rejecting or accepting the appeal and the reasons for adopting the respective decision. In case of acceptance of the appeal, the appellate courts may also change the sentence imposed by the first instance courts in accordance with Article 415 CCP. This decision should be indicated in the final decision as requested by Article 417, paragraph 1, point 9 CCP. This would mean that in cases where the appeal challenged the imposition of an imprisonment while the Criminal Code provided for other punishment, or in cases where the appellate courts changed the sentence, a justification of the punishment by imprisonment when the Criminal Code provides for other categories of punishment is due. The same applies to the SCJ if the cassation concerned the imposition of imprisonment while the Criminal Code provides for other alternatives. The above discussion relativizes the figures where the appellate courts and the SCJ did not justify the imposition of imprisonment. In other words, the fact that these courts did not provide for the justification does not automatically mean that there is a problem with the reasoning. This simply could mean that the appeal or the cassation did not challenge the imposition of imprisonment. **Nevertheless, there is still room for improvement since the first instance courts in 24,7% of the decisions (that is almost a quarter of the total) did not justify the imposition of imprisonment while the Criminal Code provided for an alternative sanction.**

### *3.5.7. Reference to the Case Law of the Constitutional Court and the European Court*

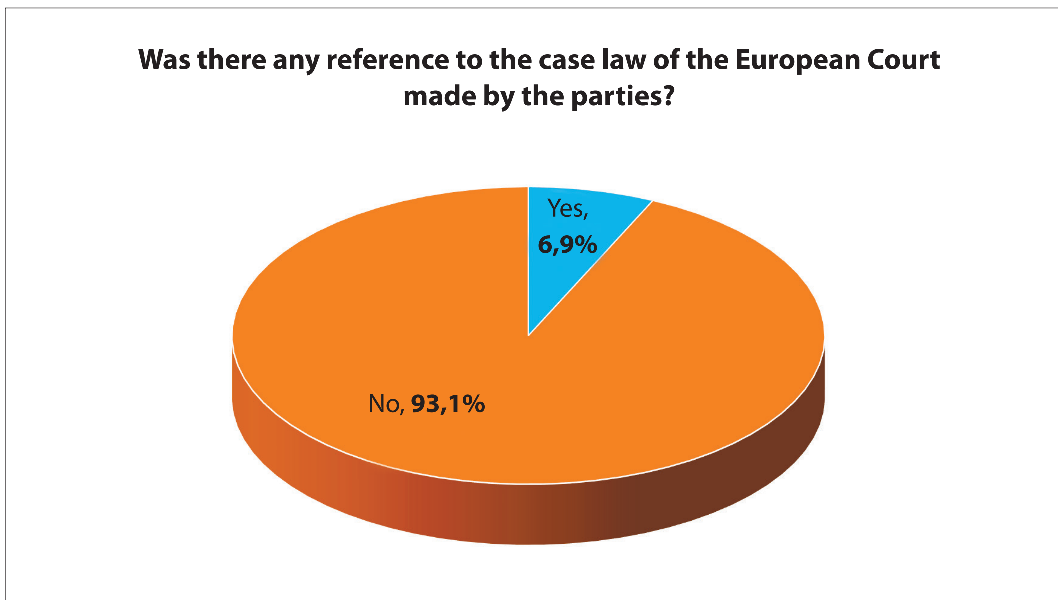
As mentioned in the introduction of this report, the case law of the Moldovan Constitutional Court and the European Court contribute to issuing reasoned judgements. Hence, the last sections of the Checklist are dedicated to the reference to the case law of these courts. For the sake of reading efficiency, the data on both courts will be analysed together since the structure of the Checklist on both courts was identical. The first data collected concerned the referral of the parties to the proceedings to the case law of the respective courts. The figures collected for the reference of the parties to the case law of the CC are very low. Only in 10 cases (or 1,6%) out of 609 analysed did the parties refer to the case law of the CC (see Chart No. 33 below). The reasons for this can be many, ranging from non-awareness of the parties regarding the case law of the CC to the non-existence of relevant case law in the decisions analysed. Therefore, it would be highly speculative to draw any conclusion based on these figures. For this reason, the data collected on questions on whether and how did the court react on the reference to the case law of the CC will not be analysed. However, it is worth mentioning, of course with all the caution described above, that in 24,7% in all cases where the courts did react on the reference to the case law of the CC, the reaction was not formalistic (this is in only 8 decisions). The Checklist contained a note where it was explained that a formalistic reference of the case law of the CC or the European Court is deemed to be a reference by simply recognising the case law of the respective court without going into the analysis of the case law and application of that case law into the concrete case.

**CHART No. 33**




The figures with respect to the reference of the parties to the case law of the European Court are slightly different. The parties made reference to the case law of the European Court in 46 decisions or 6,9% of the decisions analysed. Again, the reasons for this low score can vary. However, the figures here are a little bit higher than the reference to the case law of the CC. Despite this, any conclusion which is drawn here should be read with the necessary caution.

**CHART No. 34**




The reaction of the courts does not seem to be entirely adequate. There is a discrepancy in the figures concerning the question whether the courts reacted to the reference to the case law of the European Court and the question whether the reaction was formalistic.

**CHART No. 35**

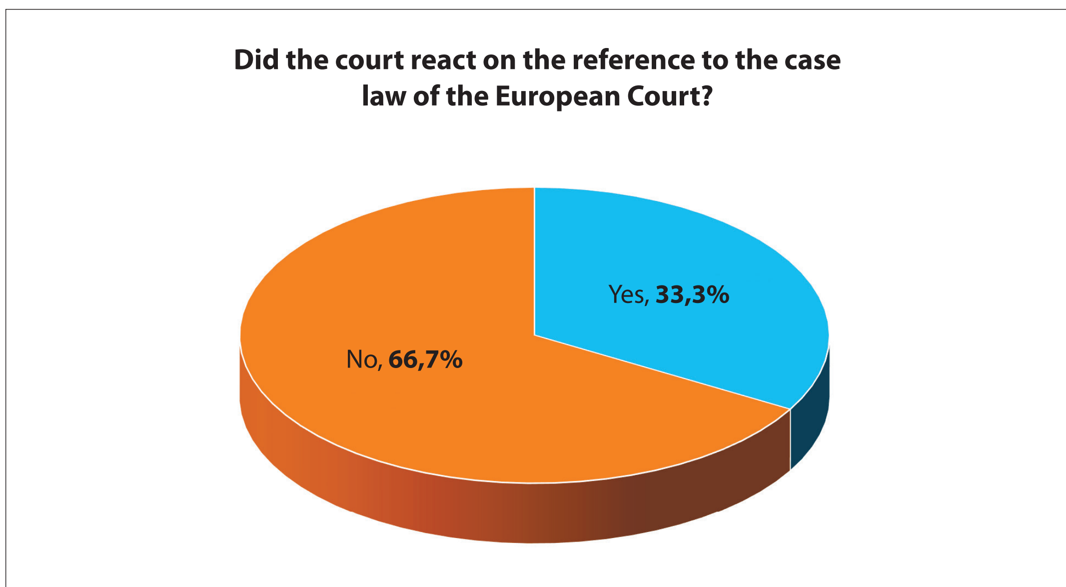
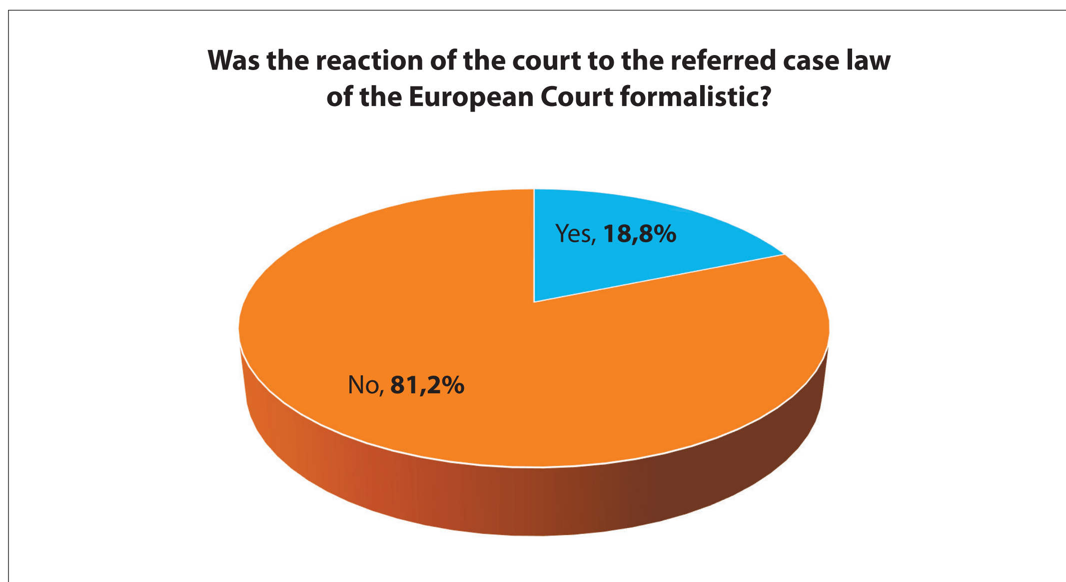



**CHART No. 36**

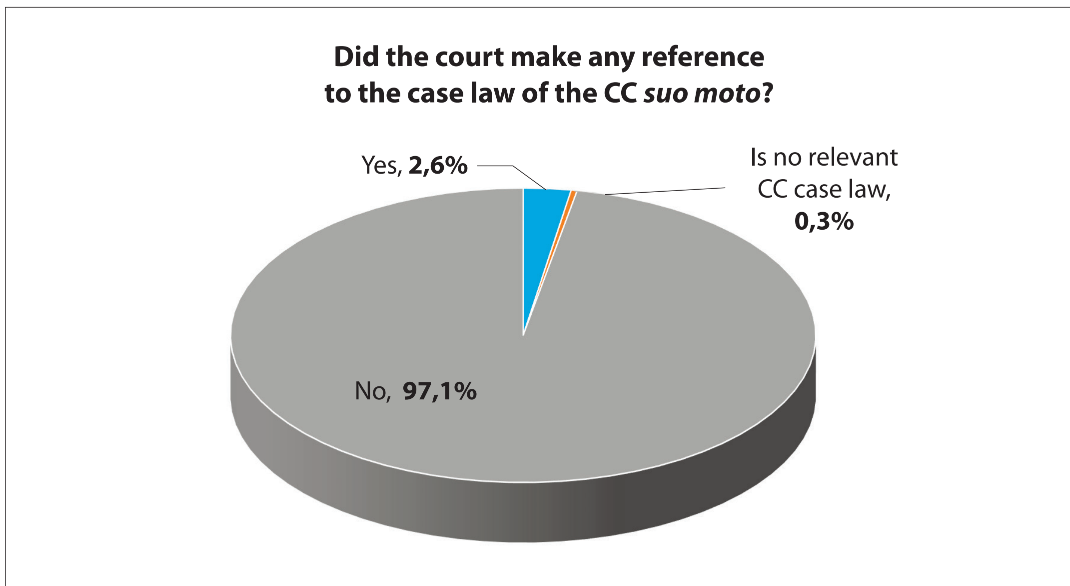



Although the figures in both charts are low to draw sound conclusions, they are sufficient to cautiously indicate that the courts in the majority of the cases do not respond to references to the case law of the European Court. This was the case in 66,7% of the decisions, that is 32 out of 48 decisions where a reference was made. **Therefore, more attention should be paid to the reaction of the courts to the reference of the parties to the case law of the European Court. It recommended that the courts react by default to references to the case law of the European Court, even when they think that the case law referred to is not relevant. In such cases an explanation as to why the case law referred to by the parties is irrelevant.**

When it comes to the question whether the reaction of the courts was formalistic, the figures are far too low to draw any sound conclusion or to see any cautious indication. It could be worth mentioning that in 13 out of 16 decisions (that is 81,2%) where the courts reacted to the reference to the European Court, the reaction was not formalistic. **It is recommended to use these examples as good practices to be followed by all the courts.**

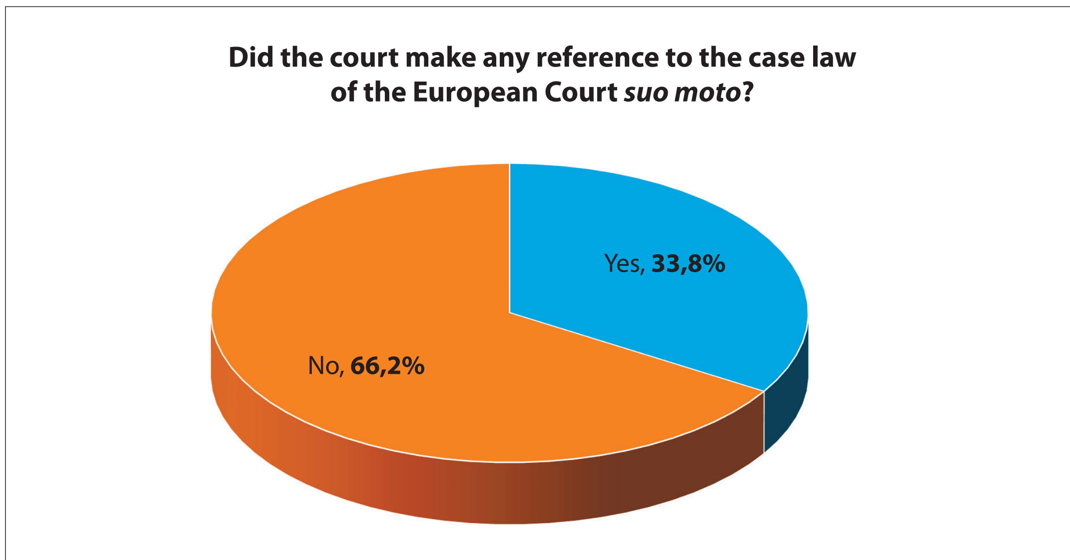
The Checklist also foresaw a question regarding the reference to the case law of the CC and the European Court *suo moto* by the courts. The figures for the *suo moto* reference to the case law of the CC are again low. Only in 2,6% or 16 decisions there was a reference made *suo moto* to the case law of the CC. As it was the case above, the reasons for this can vary and it would be highly speculative to draw any sound conclusions. It is worth mentioning here as well that in those decisions where there was a reference to the case law of the CC, the reference was in most of the cases not formalistic (88,9%). **It is recommended to use those cases as an example of good practice to be followed by the parties.**

**CHART No. 37**




The figures regarding the *suo moto* reference to the case law of the European Court are considerably different. The courts made in 33,8% of the decisions analysed, that is 206 decisions, a reference *suo moto* to the case law of the European Court (see Chart No. 38 below). In most cases, namely 70,4% or 145 decisions, the reaction was not formalistic. However, there was still quite a high number of cases where the reaction was formalistic (29,6% or 61 decisions). **Therefore, more attention should be paid that the references to the European Court are not formalistic, but used as an authoritative source to substantiate and support the own arguments of the courts in the concrete circumstances of the case they are dealing with.**

**CHART No. 38**



## 3.6. Recommendations

- It is not a reason for appealing or cassation if the courts do not make an express mention of Article 394. However, it is important for the quality of the reasoning, and for the sake of clarity if the courts make express reference to the articles they apply in their decisions, including Article 394. This is valid for all the chapters.
- The judgments should be reasoned in such a way as to enable anyone who reads them to establish whether the defence filed a response to the indictment and whether this contained arguments which will call for a response by the court.
- The judgments should be reasoned in such a way as to enable anyone who reads them to establish whether the defence filed written conclusions on the proposed settlement and whether they contained arguments which will call for a response by the court.
- The judgments should be reasoned in such a way as to include the description of evidence substantiating the conclusions of the court and the reasons for which the court rejected other evidence.
- It is of utmost importance to have a clear picture on who put forward a motion for mitigating circumstances. Only in this way it can be checked whether a judgment has responded to significant arguments of the parties.
- It is of outmost importance to have a clear picture on how the court reacted on a mitigating circumstance regardless of who put it forward.
- The court rejects the mitigating circumstance based on the analysis of evidence and particular circumstances of the given case.
- Aggravating circumstances are taken into consideration only if the court, based on the analysis of evidence and the circumstances of the case, is satisfied that the relevant aggravating circumstance is proven beyond reasonable doubt.
- The legal qualification of the acts of the defence and the reasons for changing the accusation in favour of the defendant, are very important parts of the decision which enable the convict to realize how did the court come to the imposition of a penalty for a particular offence.
- Courts should justify the imposition of imprisonment where the Criminal Code provides for an alternative sanction.
- Reference to the case law of the European Court and Constitutional Court should not be formalistic.
- Courts should react by default to references to the case law of the European Court, even when they think that the case law referred to is not relevant. In such cases an explanation as to why the case law referred to by the parties is irrelevant should be given.

# CAPITOLUL IV:

# EXTRACTS OF GOOD PRACTICES REGARDING MOTIVATION OF JUDGMENTS IMPOSING CRIMINAL SANCTIONS

# CHAPTER IV:
# EXTRACTS OF GOOD PRACTICES REGARDING MOTIVATION OF JUDGMENTS IMPOSING CRIMINAL SANCTIONS

## 4.1. Introduction

The analysis conducted in Chapter III above (the Analysis) provided a basis for identifying the most frequent problems with respect to motivation of judgments imposing criminal sanctions in the Republic of Moldova. The Analysis revealed that there are several issues which need to be looked into with special attention when it comes to the motivation of judgments imposing a criminal sanction. The present chapter of the compendium is the final piece of the puzzle, which is intended to contribute to better motivated judgments, adhering not only to the national legal framework in place for this purpose but also to international standards. Each of the recommendations stemming from the Analysis will constitute a separate section of the present chapter. Good practices are selected under each section in the form of extracts from judgments relevant to the issue under discussion in the respective section. The idea is to let the judgments 'speak for themselves'. There are thus no comments added to the extracts. However, a short summary of the facts is included for each extract. This is intended to place the user of the compendium in the right context and enable him/her to better understand the extract.

Several sources were used to collect the extracts of good practices which could serve as inspiration and a reference to best national and international standards. The first and foremost source was the sample of 609 judgments selected for the purposes of the Analysis. The sample could not cover the whole spectrum of the issues identified and which are under discussion in the present chapter. To this end several Moldovan judges provided extracts of good practices from their daily experience. Moreover, three international experts were engaged to provide extracts of good practices from their own jurisdictions. The extracts from these three sources could cover all the issues identified in the Analysis. The foreign jurisdictions chosen were France, Portugal and Romania. The choice of the jurisdictions was random and dictated by the availability of experts, resources and time. The extracts of good practices from these jurisdictions vary in style, approach and length. However, their common denominator is the attention paid by the courts in the motivation of the sensitive issues identified in Moldova. Some of the issues under discussion in the present chapter were not covered by extracts from the chosen jurisdictions. This was mainly so because of the legal framework of these jurisdictions. Where necessary, footnotes with explanations are added in order to enable the users of the compendium to better understand the legal context of the chosen extract from the chosen jurisdictions.

## 4.2. The Judgments Should Be Reasoned in Such a Way as to Enable Anyone Who Reads Them to Establish Whether the Defence Filed a Response to the Indictment and Whether This Contained Arguments Which Will Call for a Response by the Court.

### Extracts of good practice from France[98]

***Crim. 18 July 1991, No. 90-82.208, Bull. crim. No. 301.***[99]

***Summary of the Facts:*** *An employer, Lucienne X...., the wife of Y...., manager of a furniture store, forces her employees to work during the weekly free time provided for by the Labour Code. She is investigated, found guilty and sentenced to pay several fines, in the total amount of EUR 5,000. She appeals and the Court of Appeal confirms the conviction from the first instance, on the one hand, it limits itself to invoking a previous decision, on the other hand, it refrains from ruling on the legality of a decree for which the appellant requested a preliminary ruling to the Court of Justice of the European Union. The Court of Cassation quashes the decision of the Court of Appeal for the following reasons.*

***Extract of the Judgment of the Court of Cassation***

Whereas it appears from the contested judgement that Lucienne X...., the wife of Y...., was prosecuted for having violated, in 1988, an order of the prefect of the Haute-Savoie department, of 5 January 1982, which provided for the closure on Sundays, for the public, of all units in the department specializing in the sale of furniture, furnishings and bed linen;

Whereas the appellant regularly challenged the legality of this decree, alleging that it did not ratify an inter-union agreement regularly concluded between furniture professionals; since she also claimed that the decree in question was not opposable to her, since her unit conducted carpentry work, which was not included in the list of professional activities mentioned in the normative act in question;

Whereas, in order to remove this argument and to declare the prevention established, the Court of Appeal limited itself to stating that the legality of the prefect's decree of January 5, 1982, cannot be challenged and referred, in this regard, to "its previous decisions of October 9, 1986" and to "the judgements of the Criminal Section of November 22, 1988;

But since they decided on these grounds, the judges of the second court, who refrained from answering the peremptory heads of claim of the conclusions presented to them, did not respect the principles stated above.

### Extracts of good practice from Romania

***Criminal sentence No. 1857/25.06.2014, Bucharest Court – Criminal Division I, Romania***
***www.rejust.ro/juris/736426e9***

***Summary of the Facts:*** *The defendant, under arrest, is being brought to justice for committing the criminal offences of first-degree murder committed through cruelty and aggravated robbery committed during the night and by having a weapon on him. It was noted that on 19.09.2013, while he was in his concubine's home where she was sleeping, overcome by jealousy and on due to alcohol consumption, the defendant repeatedly hit her with a knife in vital bodily areas causing her serious injuries as a result of which the victim died. Immediately after committing the deed, the defendant left the victim's house taking two mobile phones that belonged to her, goods that were found on him at the time of detection and arrest by the criminal investigation bodies.*

***Extract from the Judgment of the Bucharest Court***

The defendant admits the act of murder but claims that it does not fall under the criminal offence of first-degree murder, but under the criminal offence of murder. Thus, he shows that the prosecutor requested the first

[98] Not all issues are covered with extracts of good practices from France. This is due to a lack of practice appropriate to the recommendation. It should be noted that while the provisions of French criminal law no longer allow the judge to impose sentences of imprisonment of less than six months without modification (parole), they are too recent to have given rise to established case law. On the contrary, it seems that a collateral effect has been a lengthening of the pronounced sentences.

[99] Article 485 of the Code of Criminal Procedure provides that: "Every judgment must contain reasons and a disposition. The grounds constitute the basis of the decision". Article 593 of the same Code punishes the absence or inadequacy of reasons for decisions of a penal nature or the omission to rule "either on one or more requests of the parties, or on one or more submissions of the public prosecutor".

classification only in relation to the number of blows but did not take into account the forensic expertise. This shows that the injuries were produced dynamically, many representing attempts that did not reach their target, being blows that stopped in non-lethal areas, in the shoulders and arms, due to the victim-aggressor dynamic, and thus they cannot reflect the cruelty because the blows were applied quickly, over a short period of time. With regard to the aspect recorded in the forensic expert report in the sense that the death was violent, the defendant shows that he did not cause the victim any pain other than those inherent to the blows applied that led to the quick death of the victim. He appreciates that the number of blows represents nothing more than the excess of adrenaline triggered at the time of committing the act, the defendant hitting the victim until she stopped moving, in order not to cause her pain, but instant death. Apart from the number of blows, the Prosecutor's Office did not bring any argument or any additional evidence to support the aggravating circumstance of cruelty, and the number of blows applied in non-vital areas does not maintain the suspicion of such classification.

As for the request of the defence not to retain the aggravation of first-degree murder, namely the version of committing the act through cruelty, the Court rejected this request based on the factual elements arising from the evidence and which corroborate with the conclusions of the necropsy report which also makes reference to the number of blows applied with a cutting object – a kitchen knife – 13 blows in vital areas, on a sleeping person as well as to the areas where the blows were applied. The application of this aggravating circumstantial element is also substantiated by the concrete way of committing the criminal offence, consisting in the fact that the defendant applied her the first blows while she was sleeping (being unable to defend herself), and when the victim reacted and put her hand on the aggressor's chest, asking him to stop, the defendant continued committing the act despite her pleas, hitting his victim with a knife until she died.

During the entire judicial investigation, the defendant tried to minimize or exclude his guilt, claiming that he suffers from a series of ailments that, against the background of alcohol consumption (a situation that he constantly presented), degenerated into a violent action that he cannot explain. The court constantly rejected the conducting of new investigations or forensic checks regarding this aspect, in relation to the conclusions of the psychiatric forensic expert report which does not contain contradictory elements, and which took into account the existence of the diseases to which the defendant makes reference to and which are recorded in point 315 of the expert report.

***Criminal sentence No. 289/12.10.2017, Cluj Court – Criminal Division, Romania,***
***www.rejust.ro/juris/49693776***

***Summary of the Facts:*** *The defendant is brought to justice for committing the criminal offence of perjury, as he refused to give statements at the request of the police regarding the relationship between X (brought to justice for trafficking in human beings) and Y (the victim of trafficking). The defendant is acquitted by the court not because of his answers to the indictment but because the court found that his act, as it was actually committed, is not provided for by the criminal law.*

***Extract from the Judgment of the Cluj Court***

The court analysed the witness statement, dated 27.09.2016, taken by the investigative body that asked him to declare "what he knows about the said Y and the relationship she had with X". The witness replied that he knows the two, that he does not wish to give statements regarding the relationship between them, that he does not declare anything regarding the questions asked, that he does not want to be cited as a witness because it is their problem, and he is not interested.

In his defence, the defendant invoked two aspects:

1. *He did not know that he was not allowed to refuse to testify as a witness*. The court cannot accept this excuse. Thus, it is assumed that any person knows the law, that persons over 14 years of age are criminally responsible, and the only persons who can refuse to testify are those indicated by Article 117 of the Code of Criminal Procedure. However, the witness has no family relationship with the two. The witness could have also invoked the right to remain silent under Article 118 of the Code of Criminal Procedure. But, in that case, he was not the one prosecuted, nor was he subsequently prosecuted to invoke such right.

2. *He later retracted his statement, so he should benefit from the non-punishment case provided by Article 273 (3) of the Code of Criminal Procedure*. The court finds that, indeed, on 13.03.2017, he was heard for perjury as a defendant, on which occasion the defendant stated, this time, in detail, aspects regarding X and Y. But,

according to the indicated legal text, this retraction should have taken place until the moment of apprehension, arrest or initiation of the criminal action in the criminal process in which the allegedly false statement was given. However, since February 4, 2017, X was arrested for 30 days as a defendant, after the initiation of the criminal action against him (page 117 of vol. XI up).

The defence claims that the defendant would have had the opportunity to withdraw his allegedly false statement until one of the three measures or procedural acts provided for by the law would have been taken against him. The court cannot accept this contention that the retraction concerns the trial in which the perjurer himself is being investigated and not the trial in which the testimony was given. This follows from the purpose of criminalizing the criminal offence of perjury, which is the proper functioning of judicial bodies, preventing them from being misled and the fair resolution of cases. Therefore, the Court finds that, under these conditions, the case of non-punishment is an encouragement for the one who gave the testimony regarding another person, to reconsider it, if it is not in accordance with reality, precisely so that the person prosecuted is not erroneously held liable. It is clear, therefore, that this case of non-punishment can only apply if the person committing the perjury withdraws it at the trial in which he committed it. As a matter of fact, this is also the opinion of the authors of the former Criminal Code, who also published its interpretation: "The retraction of the false testimony should be conducted within the same case in which the false statement was made, thus until this case has not been definitively judged or settled. The statement of the witness given in the criminal trial initiated against him for perjury, that he indeed made false statements, does not have the nature of a "retraction of testimony", but of recognition of committing the criminal offence of perjury" (see V. Dongoroz et. al., Theoretical Explanations of the Romanian Criminal Code, Special Part, vol IV, RSR Academy Publishing House, Bucharest, 1972, page 188).

## Extracts of good practice from Portugal

***Process No. 267/18.8JDLSB First instance judgment – Judicial Court of Lisbon***

***Summary of the Facts:*** *The case relates to four crimes of sexual abuse of children. The defendant contested the indictment in relation to three crimes (while for the other one he relegated to the trial phase), in particular on the alleged undue pressure he faced during the detention and examination by the Police. The extract of the judgment below includes the response of the defendant to the indictment as summarized by the Court in the Judgment.*

***Extract from the Judgment of the Judicial Court of Lisbon***

**REPORT**[100]

(…)

The defendant is accused of committing four crimes of sexual abuse of children (provided for and punished under the terms of the combined provisions of Articles 171, paragraph 1 and 2, and 177, paragraph 1, subparagraph b) of the Criminal Code).

The Public Prosecutor's Office has requested that, in the event of the defendant's conviction, an amount be awarded as compensation for the damage suffered by the victims, who are minors, pursuant to the provisions of article 82-A of the Code of Criminal Procedure.

It also requested the application to the defendant of accessory punishments prohibiting adoption, guardianship, custody or trust of minors, for a period to be set between five and twenty years (in accordance with the provisions of article 69.o-C, No 2, of the Criminal Code), and prohibiting the exercise of a profession, job, functions or public or private attributions, the exercise of which involves regular contact with minors, for a period to be set between five and twenty years (in accordance with the provisions of Article 69-B, paragraph 2 of the Criminal Code).

The defendant contested (claiming, in summary, that: with regard to the facts related to the minor A., he relegated his defence to the trial stage; as for the remaining three crimes for which he was accused, his acquittal is imperative; in the first judicial interrogation he admitted to feeling a sexual impulse for children, impulses that became difficult to control, and admitted to having committed the acts for which he was indicted; on XX (date) the defendant was detained and interrogated in the premises of the Judiciary Police

[100] In the structure of a judgment in Portugal, ´Report ´is often the first section of the judgment where the Court summarizes the charges, the response of the defendant, requests for compensation and relevant procedural background. Regularly the structure of the judgment includes the following sections: report, reasoning – description of facts proven and not proven and respective factual findings, applicable law, legal reasoning and determination of punishment.

for several hours, without being accompanied by a lawyer; he had never previously faced problems of judicial order, much less with facts of the seriousness of those that sustained his detention; due to the exhaustion of long hours of interrogation and the nervous pressure he was under, he signed the report on page 45 without properly reading its content, consequently it was recorded that, in addition to the acts committed against the minor A., he had committed others that would support the accusation for the commission of three more crimes; he never confessed before the Judiciary Police that he had committed the facts described in the indictment and that they would have occurred in the hotel A., having previously mentioned that he felt sexual impulses towards minors and that these same impulses began to become difficult to control, culminating in the facts practiced on the minor A.

He mentioned that in that same hotel where he provided babysitting services he had felt the will to insert his finger in the anus of some minors who were in his custody and care, which he never managed to do; these impulses were nothing more than a will that he managed to repress until the night of the XX (date), the night when he had the youngest A. in his care; the record of page 45 does not faithfully reproduce the statements made by the defendant; the Defendant only became aware of the content of the statements contained in the record on page 45 when confronted with the same in the first judicial interrogation, maintaining such statements because he is convinced that changing their meaning could lead to the commission of other crimes; he is completely ignorant of judicial matters, he was not accompanied by a lawyer and was subject to strong and understandable emotional pressure, under the threat of preventive detention; during the investigation and instruction[101] phase of the process, no evidence was collected to support the indictment regarding three crimes allegedly committed at the Hotel A.; he has always guided his behaviour by legality and has always shown himself to be a respected person with a wide circle of friends; he is aware that he may suffer from a psychological disorder and that he needs specialized medical care, which he requested and which was not given to him; is a socially integrated person with a solid family structure; in professional terms, he has a guarantee, from his employer, that he will be integrated again, even if this implies that he has to be transferred to other functions that imply the absence of contact with minors; he requested to be acquitted in relation to the three crimes allegedly committed at the Hotel A. and submitted a probative request (which was granted).

A social report was prepared on the defendant.

The hearing for discussion and judgment was held in compliance with the legal formalism.

Subsequent to the order that designated the day for the hearing, there were no other exceptions, prior or incidental issues that need to be decided, nothing preventing the assessment of the merits of the cause.

## 4.3. The Judgments Should Be Reasoned in Such a Way as to Enable Anyone Who Reads Them to Establish Whether the Defence Filed Written Conclusions on the Proposed Settlement and Whether They Contained Arguments Which Will Call for a Response by the Court.

### Extracts of good practice from France

***Cour de Cassation, Chambre criminelle, du 20 juin 2000, 99-81.235***
***https://www.legifrance.gouv.fr/juri/id/JURITEXT000007069178***

***Summary of the Facts:*** *Mr. X is a trader who, placed on the French market and sold a phytopharmaceutical product for agricultural use that had not been authorised. The court and then the Court of Appeal in Versailles sentenced him to pay a fine of 20,000 francs, suspended. Mr. X argued that the unapproved agricultural insecticide came from Belgium, where it had a marketing authorization, and that, by virtue of the free movement of goods and equivalent measures, it no longer needed an approval in France. The Court of Appeal considers that Mr. X did not request authorization for the product and states the provisions of the decree of May 5, 1994, which transposes the European directive, that phytopharmaceutical products cannot be placed on the French national market unless they have been previously authorized.*

[101] The Criminal Procedure Code in Portugal foresees the so called ´*fase de instrução*", between the investigation and the trial phases, which aims to have a judicial confirmation of the decision to prosecute or to archive the investigation in order to submit the case to trial or not. It is an optional, not mandatory, procedural phase that may be requested to the Court by the Defendant or the injured party where applicable.

***Extract from the Judgment of the Court of Cassation***

By virtue of the fact that any judgement or detention should contain the specific reasons justifying the decision and responding to the peremptory observations of the parties; that insufficient or contradictory reasoning is equivalent to its absence (…) Taking into account the way it was delivered, without responding to the conclusions of the petitioner who argued that the incriminated product, similar to an already authorized product in France, was exempted from approval through the application of Article 10 of Directive 91-414-CEE of July 15, 1991 regarding the placing on the market of phytopharmaceutical products, the Court of Appeal did not give its decision a legal basis (…) Hence, it follows that the quashing is decided.

## Extracts of good practice from Romania

***Criminal sentence No. 132/10.02.2023, Bucharest Court – Criminal Division I, Romania,*** ***www.rejust.ro/juris/98d7433d3***

***Summary of the Facts:*** *The defendant was brought to justice for committing the criminal offences of "murder" and "driving a vehicle under the influence of alcohol or other substances". It was noted that on 08.09.2019, amid a fit of jealousy, being in a state of anger, with an alcohol blood level of over 1.96 g/l and being under the influence of cocaine, he went to the club where his former girlfriend was and who refused to go home at his request. He drove the car at a speed that far exceeded the legal speed limit of 50 km/h in locality: he crossed the red light at a speed of 145 km/h in the intersection, then accelerated to 162 km/h when he passed by another vehicle travelling at low speed in lane I, eventually mounted the vehicle with its left side on a square to the front left of his traffic lane, where there was no obstacle, and pressed down on the accelerator pedal to the maximum, in a context where he was driving a vehicle equipped with an engine that develops approximately 700 horsepower, subsequently entering the incoming traffic lane, where he collided head-on, at 03:02:39 hours, at a speed of 143 km/h, with another car driven by a person who died on the spot. The defendant was found guilty and sentenced at first instance to 15 years in prison.*

***Extract from the Judgment of Bucharest Court***

On 06.02.2023, the defendant, through his chosen lawyer, submitted written conclusions to the case file (pages 193-203 vol. V court file). The written conclusions claimed the violation of the right to a fair trial, criticizing, among other things, the decisions taken by the court during the judicial investigation. These aspects cannot be analysed by the court of first instance, being true reasons for appeal, prematurely submitted, prior to the delivery of the judgement. The court cannot revert and order other measures than those it has already ordered during the judicial investigation, for the reasons shown exhaustively in the conclusions of the meetings from each term, briefly reproduced in this decision, as well; all decisions taken by the court were ordered to guarantee the rights of all parties to the trial, in order to observe the equality of arms as a component of the right to a fair trial.

Further alleging the violation of the right to a fair trial, it was indicated through the written conclusions that the court would have been "truly impartial, had it admitted without discussion the evidence with the requested expertise considering the fact that, in the case of any traffic accident resulting in casualties, it is mandatory to establish with certainty who or what generated the state of danger". In this matter, it is necessary to make the following clarifications: the competence to establish who or what generated the state of danger in the case of a road accident belongs only to the court of law, as it expressly results from the provisions of Article 103 (2) of the Code of Criminal Procedure, following the evaluation of all the evidence in the file. Under the conditions of para. (1) of the same text of law, the evidence does not have a value established in advance under the law (emphasis of the court – not even the expertise conducted in a case can have absolute value) and are subject to the free assessment of the judicial bodies following the evaluation of all the evidence administered in the case. As previously shown, the evidence was evaluated by the court, including the Forensic Expertise Report in which the experts concluded on the causes of this road accident and noted technical aspects (travel speeds, distances to impact from the time of entry of the defendant on the incoming traffic lane, reaction times from the same moment, etc., matters not disputed by the parties). The court, therefore, did not make the decision without such a report in the case file, as claimed (the defendant even had the opportunity to recommend a party expert who even submitted his point of view, analysed at length, in this decision). In reality, the defendant disputes this report, whose conclusions are unfavourable to him, based on the merits, unjustified as shown in previous considerations.

It should also be added that the defence thesis cannot be accepted in the sense that "jurists, not having the specific medical knowledge in criminal matters, not only in relation to moral norms, but also in relation to legal norms, we must call on the expertise of specialists and mandatorily endorse their conclusions", as supported by the written conclusions submitted to the file.

As previously shown, the competence to rule on any aspect of fact or law in a case belongs only to the court of law, as it expressly results from the provisions of Article 103 para. (2) of the Code of Criminal Procedure, following the evaluation of all the evidence in the file. Under the conditions of para. (1) of the same text of law, the evidence does not have a value established in advance under the law (emphasis of the court – not even the expertise conducted in a case can have absolute value) and are subject to the free assessment of the judicial bodies following the evaluation of all the evidence administered in the case.

However, as already shown, for all the previously stated considerations, the court cannot endorse the conclusions of the psychiatric expert from Italy. The documents emanating from the psychiatric expert could, at most, be taken into account upon ordering, in the present case, a psychiatric forensic expertise under the conditions of the Romanian criminal law, conducted by a National Institute of Forensic Medicine (NIFM) commission consisting of two psychiatrists and a forensic physician. By the conclusion of 16.11.2022, the court expressly showed that it has nothing against the performance of this expertise, under the legal conditions, according to the Romanian Code of Criminal Procedure, with the participation of any experts recommended by the accused Italian Ministry, the civil parties, the civilly responsible party, and only in the presence of the defendant and with his examination by a commission from NIFM, at the headquarters of this institution. However, at that procedural moment, the court found that such expertise is not possible due to the conduct of the defendant and his family (his provisional legal representative). Even through the requests submitted, the defendant automatically excluded such possibility. However, the defendant cannot choose the place of the expert examination this way, given that he is a transportable person (this aspect expressly results from the audio-video recording transmitted by the Italian judicial authorities on the occasion of the attempt of the defendant's hearing, on which occasion he kept quiet) and, moreover, the expertise would be useful precisely for the settlement of a request submitted by the defendant, through lawyers, in his exclusive interest.

It cannot be claimed that the defendant is not transportable given that he was transported on the territory of Italy among several medical clinics, and neither can it be claimed that he cannot be transported to Romania due to medical recommendations from Italy (submitted by the defendant to the file) which would be in the sense of not moving him. Just as the provisional legal representative of the defendant made the decision to discharge him from the University Emergency Hospital contrary to medical recommendations, the provisional legal representative can proceed the same way in this case, as well, and the defendant will be able to be transported from Italy under qualified medical supervision and will be able to benefit of all the medical care he would need, in Romania.

It is also necessary to specify that from 06.12.2022 (the date when the conclusion of 16.11.2022 was available to the defendant's lawyers in the electronic file and it was indicated that the court can approve, in relation to the conduct of the defendant and of the provisional legal representative, the psychiatric forensic expertise by the NIFM at the headquarters of this institution), at none of the subsequent court dates of 07.12.2022, 08.12.2022, 11.01.2023 and 13.01.2023, the defendant did not request, through lawyers, such an expertise with regards to which it was appreciated, according to what was mentioned in the conclusion of 16.11.2022, that it guarantees the equality of arms, as a component of the right to a fair trial.

Therefore, even at the term of 13.01.2023, when the court declared the debates closed, such expertise could not be ordered, as it was not requested by the defendant's defence. However, its ordering would have required the prior agreement of the defendant and/or the provisional legal representative to ensure the presence of the defendant before the National Institute of Forensic Medicine "Mina Minovici" (NIFM), an agreement that was never presented to the court. According to the *impossibilium nulla est obligatio* ("no one can be forced to do the impossible") legal principle, the court could never order a forensic expertise whose execution would be impossible to conduct because the defendant would not appear before the NIFM commission in Bucharest, having jurisdiction according to Romanian law to conduct a forensic psychiatric expertise, mandatorily consisting of two psychiatrists and a forensic physician.

The court cannot postpone the case indefinitely, waiting for the defendant to appear at NIFM in order to conduct an expertise that the defendant himself requests (but wants to choose the place where it will be conducted),

since, according to Article 8 of the Code of Criminal Procedure and Article 6 of the European Convention, the court is obliged to settle the case within a reasonable time. However, the court has been notified of this case since 2020, and 3 years and 5 months have passed since the criminal offence was committed; moreover, in the case, related to the last decision of the Constitutional Court of Romania regarding the prescription - Decision No 358/26.05.2022, at least with regard to one of the two offences brought to trial (the one provided for in Article 336 of the Criminal Code), there is a risk of the general limitation period of 5 years being fulfilled.

Consequently, the court cannot accept those defences of the defendant that aim the violation of the right to a fair trial.

***Criminal sentence No. 349/15.11.2021 delivered by the Cluj Court – Criminal Division, Romania, https://www.rejust.ro/juris/d5d8e78e3***

***Summary of the Facts**: A group of people was brought to justice for committing the criminal offences of fraud, forgery and use of forged documents. In their charge, it was noted that during the period 2007-2010 they obtained, through the complicity of some medical staff and psychologists, documents certifying that they suffer from mental illnesses, which were submitted to the file required to obtain the "person with disability" certificate, on the basis of which they obtained monthly allowances from the state. During the trial in the first instance, it was found that the prescription of criminal liability had run its course, but with regard to civil liability, the beneficiary defendants, jointly with the medical and psychologist defendants, were obliged to return the wrongfully collected money. To resolve this issue, the parties were requested to present written submissions. The defendants and the prosecutor presented written submissions*.

***Extract of the Judgment of the Cluj Court***

The court held that in the written submissions presented by the defendants, the issue of the procedural quality of the institutions that filed civil claims - city halls, respectively county councils - was raised. The court finds that these issues concern the legality of requests for bringing a civil action in the criminal proceedings phase and should have been debated in the preliminary chamber, under the conditions of Article 282 of the Code of Criminal Procedure. As this deadline has passed, the relative nullity is covered and the bringing civil actions in the criminal proceedings remain valid as filed.

Also, in the written conclusions, another objection was raised regarding the legality of the civil action as regards the passive subject, generated by the fact that the prejudiced public institutions did not expressly indicate against whom the civil action was brought in the criminal proceedings. The court notes that this issue is also one that should have been raised during the preliminary hearing. Anyway, in the criminal proceedings, the bringing of a civil action is made against the defendant, because the civil action is secondary to the criminal action, and the passive subject of the two actions is the defendant. In the situation where during the proceedings it is discovered that the criminal offence was committed by several people, it is evident that the civil action concerns all participants in the commission of the criminal offence.

It was also argued, in the written submissions, that the right of the County Directorate of Social Assistance to bring a civil action has expired, since it was proven, following the hearing of some employees of this institution, that they had suspicions that some certificates had been incorrectly issued since 2008. This aspect should have also been invoked during the preliminary chamber. Anyway, it is found that the last acts were committed at the end of 2010.

However, the court notes two issues. On the one hand, what is imputed to the defendants is the criminal offence of fraud, which is exhausted upon the collection of the allowances due to disabled people on the basis of fraudulently obtained certificates (offence exhausted upon the collection of the last allowance is collected prior to the suspension of payments by the County Directorate of Social Assistance, when they realized it was a fraud and notified the Prosecutor's Office). On the other hand, it is true that according to Article 2528 of the Civil Code the prescription of the right of action to repair a damage that was caused by an illegal act begins to run from the date when the injured party knew or should have known both the damage and the person responsible for it, but when it comes to the exercise of a civil action in the criminal proceedings, Article 2537 point 3 of the Civil Code should be taken into account, according to which the general three-year limitation period is interrupted by the bringing of a civil action in the criminal proceedings or before a court of law until the judicial investigation begins.

The fact was also invoked that, since these certificates were issued too easily, in violation of the procedures even by the members of the specialized Commission within the County Council, the amount of compensation should have been reduced according to the fault of these employees. The court cannot accept such a defence, because no person with responsibility in issuing these certificates has been brought to court. Even so, in civil matters, one is liable for the slightest fault, and in the case of co-participants all are liable jointly, without the criminal court being called to establish the proportion of the damage that is incumbent on each.

It was also shown that the holders of the certificates obtained the classification as severe disability, with care assistant. These certificates were cancelled, and payments stopped. Subsequently, some holders obtained the classification in degrees of slighter disability, this time, in the correct manner. It was requested that, in such circumstance, they should not be obliged to refund in full the amounts received on the basis of the cancelled certificates, but only the differences, since they were anyway entitled to be included in a degree of slighter disability.

The Court categorically rejects such a defence. For a period of time, the holders obtained certificates on the basis of false medical documents, therefore the respective certificates of inclusion in the degree of severe disability were fraudulently obtained. They cannot be converted by the court into certificates valid for another degree of disability: such classification is conducted only by an administrative body, not by a judicial one. The restitution of the amounts of money is imposed in full, according to the principle "*what is null produces null effects*" and the damage has to be repaired in full.

The physicians complicit in the fraud showed that there is allegedly no causal link between the certificates issued to the "patients" and the undeserved payment of the allowance to the holders of the certificates. The Court cannot accept this defence. The disability allowance is collected on the basis of the disability classification certificate. According to the *Joint Order No. 762/1992 of 2007 of the Ministry of Labour and the Ministry of Health for the approval of the medical and psychosocial criteria on the basis of which the classification in the degree of disability is established*, in the form in force on the date of the commission of the acts, at the Commission for the Evaluation of Adults with Disabilities, documents issued following the psychiatric examination are used. However, all psychiatrists brought to trial in this case issued such documents, on which they expressly wrote that these were intended for this commission. So, they had the representation of the purpose for which the "patients" turn to them.

## 4.4. The Judgments Should Be Reasoned in Such a Way as to Include the Description of Evidence Substantiating the Conclusions of the Court and the Reasons for Which the Court Rejected Other Evidence.

### Extracts of good practice from the Republic of Moldova

***File No. 1-258/2020 (electronic No: 1-20133831-28-1-27102020) Edineț Court (Briceni headquarters)***
***https://jed.instante.justice.md/pigd_integration/pdf/4486ad77-3495-4ec3-8d22-34e2af1ab002***

***Summary of the Facts:*** *The defendant is accused of having committed the criminal offence provided by Article 186, para. (2), let. c), d) Criminal Code - secretly stealing the property of another person, committed by breaking into a home, by causing considerable damage. Also *****, on August 15, 2020, at approximately 9:20 a.m., with the intention of stealing another person's property, broke into the home of citizen *****, located in the ***** district, where, for the purpose of profit, openly, applying non-dangerous violence on the latter, stole money in the amount of 1,000 MDL from the bed, thus causing the injured party considerable damage in the amount of 1,000 MDL.*

***Extract of the Judgment of the Edineț Court (Briceni headquarters)***

„21. The guilt of the defendant ***** in committing the offence of theft, i.e. the theft of another person's property by concealment, committed by breaking and entering the dwelling, causing considerable damage, an offence provided by Article 186, para. (2), let. c) and d) of the Criminal Code, is also confirmed by the materials of the criminal case studied in the court hearing, as follows:...

23. The record of the on-site investigation from 07.08.2020 (f.d. 10, vol. I) and the enclosed photographic plate (f.d. 12-17, vol. I), which reflected the absence of the object declared stolen - money in the amount of 5,000 EUR and 1,000 MDL - from the household of the citizen *****, located in Briceni district, village *****.

24. The record of the hearing of the victim ***** from 07.08.2020 (f.d. 19-20, vol. I), who communicated that he lives in Briceni district, village *****, together with his wife *** **. Following the sale of his "Mercedes Vito" model car, an amount of 5,000 EUR and several thousands of Lei was obtained, which the victim kept at his home. He and his wife were at home on the day the money disappeared. His wife was in the kitchen and he was working outside the house. At approximately 11:00 a.m., ***** took 30 MDL from his wallet, leaving 5,000 EUR and 1,000 MDL in the wallet. Leaving the house, he left the doors open. The gate next to the house was also left open. During the day, there were several people in the yard of the house. From the yard, you could see who was entering the house, but you couldn't hear it, because the cement machine was working. At approximately 5:00 p.m., ***** was called by his wife, who asked if he had taken money from his wallet. When checking the house, it was found that the wallet with the indicated amounts of money was missing. The persons who were with them during the day stated that they did not take the wallet with the money. The banknotes in the wallet were of the denomination of 200 EUR (19 banknotes), one hundred EUR (2 banknotes), and the rest with a denomination of 50 EUR. By the time it disappeared, the wallet was in the top drawer. The wife informed him that another woman's bag was also checked by the thief, where 2 other wallets were.

26. The record of verification of the statements at the scene of the crime from 08.08.2020 (f.d. 33, vol. I) and the related photographic plate (f.d. 34-40, vol. I). As a result of checking the statements cet. ***** at the scene it was found that the latter, coming from his brother in the village of *****, saw a house where two people were working in a garage. Going further downhill, he decided to enter the house in order to steal goods. He jumped over the fence, walked through the garden and entered a wooden door. Arriving in a room, he opened a chest of drawers, from which he took out a wallet and took the money from it. Then ***** went out the way he came into the house. Leaving the house, he hid a part of the stolen money under a tree in a street. He spent a part of the stolen money in a village shop.

38. The record of the examination of the object of August 12, 2020 (f.d. 80, vol. I) and the photographic plate enclosed to it (f.d. 79, vol. I). During the examination, money in the amount of 150 euros was checked, namely - 3 banknotes of 50 EUR each.

39. The record of the hearing of the accused ***** from August 10, 2020 (f.d. 117, vol. I). The latter stated that he recognizes his imputed guilt, he repents of what he has committed. He fully supports the statements given as a suspect.

40. The record of the hearing of the accused ***** from din October 23, 2020 (f.d. 230, vol. I). The latter stated that he recognizes his imputed guilt, he repents of what he has committed. He fully supports the prior statements given as a suspect.

41. Forensic report No. 202037A0252 of 07.10.2020 (f.d. 183-185, vol. I). In its conclusions it was stated: "***** does not suffer from any chronic mental illness of psychiatric-legal significance, presents the diagnosis "Moderate mental retardation. Psychopathic syndrome aggravated by alcohol intoxication". At the time relevant to the criminal case, ***** did not suffer from any chronic mental illness or exceptional conditions of psychiatric-legal significance, he presented the diagnosis: "Moderate mental retardation. Psychopathic syndrome aggravated by alcoholism", which, however, did not deprive him of the ability to be aware and direct his actions. If proven guilty of the offending actions, he may be held liable. Based on his current mental state, *****'s behaviour is not dangerous to society. At the moment there is no evidence of a need for medical coercive measures. It is recommended to register with the district psychiatrist. ***** has the capacity to participate in criminal prosecutions and trials. The current examination does not reveal any data that would show that the examinee was suffering from a state of pathological impairment at the times described in the ordinance".

*Sentence in the name of the Law of November 26, 2020.*

II. Statements of trial participants given during the court hearing

**The injured party** *****, having been directly heard before the court, communicated that he is not in any kind of relationship with *****. On August 7, 2020, ***** was working in his household. At approximately 11:00 a.m., his wife ***** served him a coffee, after which he decided to buy watermelons. ***** told her husband that she was going to the house to get some money from her wallet. In the house, the wife discovered that the sum of 5,000 EUR, which had resulted from the sale of the car a few days ago, was missing from her purse. Money in the amount of 1,200 MDL also disappeared from the same wallet. Asking the boy who worked with R.N. in

the household – G. - about the missing money, he replied that he did not know anything. G. was taken to the Police Inspectorate, after being released. ***** searched all night for the money hoping to find it. The next day, in the morning, ***** saw the police officers coming with ***** to his house. The police officers informed him that *****u was the person who stole his money. When being questioned, ***** replied that he was refunded the sum of 3,650 EUR during the criminal investigation, while the sum of 1,350 EUR and 1,200 MDL remained to be refunded. He believes that *****u must be punished with a custodial sentence.

7. **The injured party** *****, during the court hearing, declared that she is not in any kind of relationship with the defendant *****. On August 15, 2020, she went shopping and, when she returned home, she put the money on the bed. She went to see the goat, and when she returned to the house, she found that the money was already missing. Then she entered another room of the house and noticed ***** there. ***** blamed him for taking her money. ***** hit her and ran away. ***** called an employee of the City Hall who also called the police. After this, after a very short time *****u was brought to her home by police officers. He told about what happened. He said that he gave the money to pay off a debt. Then, *****, on a Monday she was called to the Police Inspectorate, where the money was returned to her. When questioned, ***** answered that ***** stole all the money that was in her wallet. The person whom she found in her house was exactly *****. At that time, he had nothing in his hand, as he probably put the money into his pocket. ***** did not see the moment of the theft, but she spotted the defendant when he was leaving the house. The money was already missing at that time.

8. **The witness *****,** during the court hearing, informed that the injured party ***** is her husband. With the other parties on the file, they are not related and are not in any relationship. Around the beginning of August 2020, ***** and her husband were at home and they had a person working on their household in the garage. At one point, husband N. told her to serve their worker a cup of coffee.

At that moment, ***** saw a person passing by on the road who smiled sarcastically. They have cars in the village selling fruits and vegetables. A car offering watermelons drove by their house. She told her husband that she wanted to buy a watermelon. Her husband N. told her to go into the house to get the money to buy the watermelon. When ***** entered the house and looked into the wallet, it was empty. Then G. asked her husband if he had changed the location of the money. He replied that he had not. The R. couple asked the boy who worked for them in the household about this, to which he told them that he did not take the money. The police was called. The day after that, the police brought in a person, whom ***** recognized. It was that person who passed by their house and who smiled sarcastically. The person told the whole story, how he broke into the house and how he took the money. He said that he gave part of the money to his child, his wife and his mistress, and he buried another part of the money next to a light transformer on the road. The R. couple collected this money after selling their car. When questioned, the witness ***** communicated that 5,000 EUR were stolen from his house, of which 3,350 EUR were returned; 2,360 MDL were also stolen. Afterwards, 150 EUR and 645 MDL were returned. The witness had not previously seen the defendant, but he knows that a brother of his works as a shepherd's helper in their village.

9. **The witness *****,** directly before the court, stated that, about a month and a half ago, a person who is known to her by the nickname "Gypsy" came to her at the store. He gave her euros. ***** informed her that she had no change to give him, so she exchanged the amount of 50 EUR given to her with her own money. She offered him the sum of 900 MDL or so. When questioned, she answered that the given person had also exchanged money with her husband, also in the amount of 50 EUR. The money in the amount of 50 EUR was taken directly from her, *****. The person who gave her the amount of 50 EUR is the person on the TV (i.e., the person whose presence is ensured via the teleconference).

10. **The witness** *****, in the court hearing, communicated that, approximately 2 months ago, ***** came to his house with some euros. *****'s wife sold to ***** a bottle of brandy and gave him the change - 700 MDL. ***** said he works in the sheepfold. Later, the police came to *****'s house and informed him that ***** had stolen some money from the village. *****when questioned, the witness replied that he sold to *****. 0.5 litres of brandy and he paid with euros, but did not give him the change. Two weeks later *****came to ***** to buy more brandy and had 427 MDL with him. After this ***** was called to the police, where he was told that ***** had stolen the money from *****, and had beaten her, but *****knew nothing about this.

11. **The witness** *****, being questioned in the court room, explained that ***** is her son. However, she wishes to testify. When questioned, ***** communicated that, in August, she heard that her son *****u was at

*****, but she knew nothing about the money he had brought home. There was 2,000 MDL on the stove, under the carpet, but she did not see any euros. *****u put 2,000 EUR under the mattress and her granddaughter showed her this money.

***** lifted the mattress and saw this money. The money given was later picked up by police officers.

12. **The witness** *****, in the court hearing, communicated that, approximately in July-August 2020, ***** came to her and had euros with him. ***** wanted to buy some food products and she, *****, after buying the products she returned to ***** the money difference in MDL. Being surprised where ***** had money in euros, he told her that he was at the sheepfold. She knows that the people who work at the sheepfold, if they need money, the owner gives them money. When questioned, the witness answered that she recognized the person on the TV screen (the court hearing being held via teleconference) as the person who came to her with the amount of euros. He came that day with another person, named M., with whom he was in concubinage, and they purchased beer and provisions.

**13. The witness** *****, in the court, declared that he knows ***** as he is her compatriot. In August 2020, the person on the TV screen entered her store (she pointed to *****, whose presence was ensured via teleconference) and asked her to exchange 50 EUR and told her that he comes from his brother from the sheepfold. *****u's brother, ***** knows him well, as he often came to the store to buy groceries. When questioned, she answered that *****had the sum of 50 EUR, and she did not see any other sums of money. The given person (she pointed to the TV screen) was alone on the day he exchanged 50 EUR with me.

14. **The witness** *****, in front of the court, communicated that she only knows the person on the TV screen in the court room (he pointed to *****u, whose presence was ensured via teleconference). Thus, around August, ***** came to her house. To whom ***** sold a bottle of brandy. He paid them in euros. ***** did not have any change at that time and gave him the brandy on loan. A few days later *****l came. And he brought *****the debt in the amount of 427 MDL. When questioned, she answered that ***** when he gave her euros, he was alone and he was holding in his hands 50 EUR that he offered to her.

15. During the court hearings, the defendant ***** refused to give statements, refused to answer questions and/or sign any documents. For the last word, he stated that if the court finds him guilty of committing the offences charged, he is ready to serve the sentence of unpaid community service. He also added that he will work and will not commit such acts again.

***File No. 1ra-400/2014 Criminal College of Supreme Court of Justice (SCJ)***
***http://jurisprudenta.csj.md/search_col_penal.php?id=2146***

***Summary of the Facts:*** *G.V.V. was brought to justice for the fact that on March 19, 2011, around 02.00 a.m., acting together and in agreement with a person not identified by the criminal investigation body, being inside the premises of the "Pizza Star" café located on 44 Dacia Bld., Chişinău Mun., with hooligan intentions, grossly violating public order and expressing an obvious lack of respect for society, without reason, initiated a conflict with H.L.P., during which they inflicted multiple punches and kicks on the latter, on different areas of the body. By showing a bodacious insolence, G.V.V. applied several blows to his face and head area, with the "Baikal 442" type firearm, which he legally owned, causing H.L.P., according to the forensic expertise report in commission No. 369 of 19.12.2011, serious bodily injury.*

***Extract of the Judgment of Criminal College of SCJ***

The College notes that, when examining the declared appeals, the appellate court complied with the requirements of Article 414 of the CCP verified and assessed the content of the evidence and its probative value, with the presentation of the carried out and thorough analysis of them in the text of the decision of the court of appeal, concluding that the factual and legal situation was correctly established by the trial court, it agrees and is based on the analysis of the evidentiary material, and the reasons invoked by the appellants in support of the appeal were the object of study at the judicial investigation, which took place in all aspects, completely and objectively through the principle of adversariality and immediacy, establishing the defendant's guilt in committing the acts of hooliganism with the use of a weapon and serious intentional injury to bodily integrity, which caused the stable loss of 1/3 of the work capacity based on the following evidence administered and investigated: the statements of the injured party, of the witnesses C.T., C.V., H.R., H.G., C.N., B.A., the referral report of March 22, 2011, information 903 of February 19, 2011, the confrontation minutes, expert report No.

369 of December 19, 2011, the minutes of the lifting of June 30, 2011 and July 11, 2011, the minutes of the examination of the decryption of the telephone conversations of February 20, 2012.

Checking the evidence provided in the case through the defendant's defences, the College considers that the appeal court concluded well-grounded that the first instance court gave a correct legal assessment of the statements of witnesses C. N. and B. A. made in the first instance court, basing the sentence on those made during criminal prosecution, but these witnesses changed their statements in the first instance, without being able to explain the reason for the inconsistency in their statements. The appellate court correctly assessed this circumstance as the pursuit of the goal of easing the situation in which their leader found himself, they being in work relations with the defendant. Also, a fair legal assessment was given to what was reported by B.V., L.I. and K.E., heard as witnesses at the defence's request, because, as it follows from their statements, they were not witnesses to the conflict, leaving the bar before it started. At the same time, the decryption of the telephone conversations shows that what was shown by the witness L.I. does not correspond to reality, because at the time indicated by her "March 18, 2011 at 21:00-24:00", she was not in the Botanica sector in the municipality of Chisinau, but in the Rascani sector in the municipality of Chisinau. Those declared by the witness L.I. contradict the statements of the witnesses B.V. and K.E. in the part regarding the position of the injured party in the bar where the offences were committed and as it was established, from the decryption of the telephone conversations, B.V. and K.E. had multiple telephone conversations with the defendant both before the incident and after, respectively the court correctly considered that these witnesses were not at the scene on the day and time of the incident and what they reported did not correspond to the actual circumstances, they submitted statements to ease the situation of their friend and acquaintance.

In this context, the court of appeal held that there was no basis to critically evaluate the statements made by the injured party and the witnesses of the prosecution, as they were not known until the incident to the defendant and there were no relationships between them, and their consecutive statements corroborate and complement each other and with the rest of the probatory material provided.

Thus, in the opinion of the College, the criticism of the defendant, which tends to the erroneous assessment of the evidence, is not founded, because the court of appeal, taking full account of the provisions of Articles 99-101 of the CCP, examined the evidence presented by the parties in all aspects, heard the defendant, the injured party, the witnesses, examined the evidence provided in the file, admitted the request of the defendant's defence attorney and ordered the additional forensic expertise to be carried out in the commission with the experts' questions, reading the minutes, expert reports and other documents, verifying and appreciating them justly from the perspective of their relevance, conclusiveness, usefulness and veracity, and as a whole - from the point of view of their corroboration and therefore correctly maintained the state of facts, the legal status and the guilt of the defendant G.V.V. established by the court of first instance.

(...) The College notes that in the case there is no discrepancy between what was retained by the court of appeal and the actual content of the evidence, by ignoring some obvious aspects that resulted in the provision of a different solution than the one supported by the evidence.

## Extracts of good practice from Romania

***Decision No. 677/07.05.2021, Cluj Court of Appeal – Criminal and Juvenile Division, Romania,***
***www.rejust.ro/juris/4dg585g9***

***Summary of the Facts:*** *The Cluj Court sentenced the defendant, a university professor, to 3 years of suspended term of imprisonment under supervision for the criminal offence of repeatedly taking bribes from students (43 material acts) in order to pass the exams organised in July and August 2017. The Cluj Court of Appeal rejected the appeal of the defendant.*

***Extracts of the Judgments of Cluj Court of Appeal***

Thus, the defendant contested the decision of the Court, showing that there is no correlation between the accusation lodged and those resulting from the evidence: the existence of an agreement between the defendant and the students regarding the claiming/receiving of a sum of money related to passing the exam was not proved. The defence of the defendant showed that the way of formulating the accusation is contradictory, namely that he would have received sums of money to pass the students in the exam or to provide them with the subjects prior to the exam or to give them passing grades even in case of their

absence at the exam, and as a matter of fact, by reference to the technical tests, it is not even confirmed. He requested to be established that there was no proof that he conditioned the passing of the exam on the payment of a sum of money and, moreover, that he did not pass any student without the student having minimal knowledge of the subject.

The Court rejected this defence on the ground that from the evidence that was provided during the criminal prosecution and partially retaken before the Court, a complete confirmation of the accusation emerges. These are the statements given by the students who remitted the sums of money, heard before the Court as witnesses, as well as the content of the technical evidence with reference to the authorized audio and video recordings conducted in the ambient environment, which reveal the fact that, in the student environment at TUCN, it was known, by notoriety, that the defendant passed exams for the amount of 50 EUR per exam.

The records show that, in the days prior to the exams, the students basically "queue" at the door of the defendant's professor's office, that each one in turn enters the professor's office and has the same pattern of discussion about how they can be helped to pass the exam, that each student has the envelope with the amount of 50 EUR prepared (or the equivalent in RON), and the defendant is not at all surprised neither by the help he is being asked to pass the exam, nor by the remittance of the envelopes with money, on the contrary, he exactly establishes with the students the subjects which they will be asked at the exam or, more than that, he even allows them not to show up at the exam, being considered as having passed the exam, only for the payment of the amount of 50 EUR.

From the statements of the students, it follows that some simply passed the exam, without showing up for the exam, others were provided by the defendant with a paper that substituted the oral exam, and, in other cases, the student was supposed to show up for the oral exam, but would previously receive from the defendant the subject which he/she was to be examined for, in the form of the exam note that the student had to present at the oral exam as if it had been drawn that day of the examination (obviously, in order to create the appearance of a fair exam in relation to other students who were in the exam room that day).

As for the claims of the defence that there is no agreement between the defendant and the students for the receipt of the said money and the fact that it was not clarified how the students would have known that the defendant passed students in exams for a sum of money, the Court finds the audio and video recordings extremely probative, therefore the Court will continue to refer to the ways in which the meetings between the defendant and the students took place, as follows:

On July 4, 2017, student A. appeared in the defendant's office, and upon seeing him, the defendant stated "you will be the ones to crucify me!" and asked him which group he is from, and immediately after, the defendant starts searching inside the folder with the notes containing the exam subjects and hands the student one of them, asking him to learn that subject for the exam. In turn, the student hands the defendant an envelope and tells him he cannot come to the exam, because he has to leave the locality, upon which the defendant no longer gives him the exam subject and confirms to him that everything is all right, but asks him not to tell anyone else that he was there (optical support No. 36 audio video file No. 1 minute 1.43).

On the same day, students B. and C. appeared together in the defendant's office, who, upon entering the office stated that they were from group 1121 and both, without any other introduction, left an envelope on the table in front of the defendant. The defendant told them that he would give them each a topic to write a paper each, drawing their attention not to tell anyone about this agreement, and that the topics should be resolved in great detail (optical support 36 file No. 1 minute 1.07).

Immediately after the two young men left the defendant's office, other two entered, D. and E., respectively, both took out an envelope from their pockets and put them on the table, to which the defendant replied: "I think I would trust you not to talk!". The two students assured him that they would not talk, because that would not solve anything, and the defendant handed them each an exam subject and asked them to learn, establishing with them that they have to show up for the oral exam on Saturday that week (optical support 36 file No. 1 minute 1.23).

Immediately after that, a group of 3 students entered the defendant's office, who showed they were from group 2721, each left an envelope on the defendant's table, and the defendant, upon seeing those envelopes, asked them to write their names on each of them. At the same time, the defendant asked them if there are other students waiting outside, receiving confirmation that three more students wanted to enter the office.

After they left, witness F. entered the defendant's office, who placed the envelope directly on the table, the defendant handed him a subject and asked him to prepare it for the exam on Saturday, after which the student left (optical support 36 file No. 1 minute 1.28).

After another two minutes, two other students from group 1126 entered the defendant's office, and without saying anything, each left an envelope on the table, one of them saying that he could not show up for the exam, as he was going to another country. The defendant asked them to write their names on the envelopes and not to talk about what happened in the office, "so that colleagues and people do not know" (optical support 36 file No. 1 minute 1.31).

At minute 1.33 of the same recording, two other second-year students entered the defendant's office - as they introduced themselves - who placed an envelope on the defendant's table, and the defendant handed each of them a subject, asking them, at the same time, to write their names on the envelopes. He asked them too if there are any other students waiting outside, and the boys answered that there was one more (optical support 36 file No. 1 minute 1.33).

At minute 1.34 of the same recording, a student entered the defendant's office, stating that he was in his second year, and while the student was putting an envelope on the table, the defendant handed him a subject and told him not to brag about with regards to being there. We note that this was the shortest meeting, in less than a minute, the passing of the exam being settled against the amount of 50 EUR (from viewing the audio video file, it appears that the student entered at minute 1.34.44 and left at 1.35.21).

At minute 1:36, another student entered the defendant's office holding an envelope, which he placed on the defendant's table from the very first moment he entered the office and told him that he could not appear for the exam because that day he would be leaving to Leipzig. The defendant handed him a topic and asked him to prepare a written paper by the afternoon and bring it to the faculty.

After this student leaves, the recordings during the 1.39-1.40 interval capture how the defendant examines the envelope left by the student who had just left, takes out the money, which he places in the left pocket of his pants. Next, the defendant takes, one by one, each of the envelopes left by the students who had previously been to his office and at 8 different times, the defendant takes the money out of the envelopes and puts them in the same pocket of his pants, throwing the empty envelopes on the floor.

On July 8, 2017, witness G., a university student, entered the defendant's office, who, as soon as he entered the room, was asked by the defendant if he had a paper to submit and what it was called. The student said his name, which the defendant wrote down, and further explained to his professor that he came that day for him and for another colleague who had an accident on his way to the university and went to the hospital, so he no longer made it to the meeting with the professor. The defendant asked him the name of that student and wrote it down: H., while the defendant makes these notes, G. places an envelope on the defendant's table. The defendant notices the student's gesture and said to him: "Say that you have been here!", his interlocutor assuring him that he will do so.

After G. leaves, the defendant takes the envelope left by him, looks at it, examines the content, after which he leaves it on the desk (optical support No. 55 audio video file 1, minute 1.51 and subsequent recordings).

On July 9, 2017, a student from group 1126 entered the defendant's office, who told the defendant that he could not appear for the exam and left an envelope on the table. He explained that he was leaving for work abroad, that he was a barber, and the defendant, while making notes in a notebook, told him that he would give him a passing grade, but he had to tell everyone that he was at the exam, not to brag about that he was not. As the student was leaving, the defendant calls after him: "So the agreement is that you were!" (optical support 56 minute 0.27).

On the same day, not even a minute away, student J. entered the defendant's office with an envelope in his hand, which he placed on the defendant's table, and explained that he could not come to the exam because he was away in Maramureş. It can be observed from the records that the defendant is not bothered by the student's absence from the exam and makes notes in a notebook that he also used for the previous student (optical support 56 minute 0.30).

After he leaves, being alone in the office, the defendant takes both envelopes, takes out the money, counts it, puts the money inside a clutch (optical support 56 minute 0.31).

Regarding the defendant's claims, according to which the existence of an agreement between the defendant and the students specific to the criminal offence of bribery (which has as a correlative offence the giving of a bribe to obtain a certain behaviour from the corrupt official) was not proven, the Court finds that the playing of images preserved as technical evidence provide the answers to such criticisms and the dimension of the act of corruption, the defendant's conduct being one of obvious notoriety. The circumstance that the students enter the defendant's office having the envelopes of money already prepared, that most of them leave these envelopes on the defendant's table without any explanation of the gesture, and the defendant, in his turn, has no reaction of surprise, bewilderment upon the leaving of these envelopes, but on the contrary, very naturally responds to them by offering exam subjects or solutions for passing the exam, even by the absence of the student from the exam, prove this notoriety of the way in which the defendant acted, in the obvious sense that, for the amount of 50 EUR, the exam in the subjects taught by him, could be passed, regardless of whether the student has the necessary knowledge or, equally, regardless whether or not the student showed up for the exam.

And precisely in this notoriety regarding the way in which the defendant helped students pass the exams lies the reason why no preliminary, introductory discussion was necessary between the defendant and the students related to receiving/offering the money and the purpose for which these amounts are given. As each of them knew exactly the needs and claims of the other (the defendant demanded 50 EUR for passing of an exam, the students intended to pass the exams), the understanding between them acquired a much simplified form, without, however, thereby affecting the objective typicality of the offence of corruption, which is the subject of the case.

The defendant's lack of reaction upon the students leaving the envelopes proves without a doubt that he knew what the envelopes contained, namely money, he also knew how much money should be in each envelope, and the fact that, after being alone in the office, he visually checked the contents of the envelopes, and, at the end of the day, he collected the money, counted it and put it in his pockets (in his shirt, pants or clutch) supports the same conclusion.

The defendant also asked to be noted that on September 2, 2017, the date of the flagrant arrest and searches, it appears from the video recordings that the students entered his office, left envelopes on the table, but he sent them to the exam room, there being no fraudulent agreement regarding the receipt/acceptance of money or the passing of the exam.

According to the records from that date, it appears that the students who entered the defendant's office and left envelopes, immediately received from him a note containing exam subjects and were sent to the classroom to be "examined". It notes, for example, the audio video recording of the meeting between the defendant and student K. from 02.09.2017 (AV file No. 1, min. 2.25 optical support 58) from which it follows that the student asked the defendant for help with the exam, the defendant asked him his name, the student introduced himself, the defendant wrote down the name and, while K. left the envelope with money on the table, the defendant handed him the note with the subject of exam and told him to go to the classroom.

The materiality of what happened between the defendant and the student that day, taking into account the evidentiary set of the case file, from which the defendant's course of action in the exam sessions results, supports the existence of the act of bribery, committed by the defendant by the fact, in exchange for the amount of 50 EUR, he gave the students passing grades in the exams, as he had examination duties.

The Court also observes that the deep degree of corruption of the defendant also determined a certain behaviour on the part of the students who did not even consider the fact that, in order to pass the exam, studying or appearing for the exam was necessary, the only condition was to make the payment of the amount of 50 EUR. On the other hand, the way in which the video evidence captures the discussions held by the defendant with the students, attests, from the Court's perspective, a long exercise of a corrupt practice, the absence of moral benchmarks, the defendant having no inhibitions or precautionary measure in relation to the fact that he was in an illicit position. Also, this aspect, of the lack of any inhibition, the natural manner in which the defendant accepts the money and addresses the problem of the fraudulent passing of the exams by the students paying the bribes, supports the same conclusion of a long-practised illegal activity and which, undetected by the judicial bodies, ended up giving the defendant the illusion of invincibility.

The Court shows that it is not necessary to prove the origin, the source of the rumour circulating among students that the defendant helped them pass the exams in exchange for money, and that for the existence of

the criminal offence it is sufficient to prove the fact that he received money to help students pass the exams, which, in the present case, happened.

Regarding the accusation, the defendant showed that: "I did not give any importance when students entered my office and left envelopes on the table and I cannot say why I did not give any importance, there were situations when I received religious objects or small icons and I did not want to open the envelope to take out the icon right in front of the student if that's what it is about. I did not expect money to be in those envelopes". His claims are evidently unreal since, after the students left the office, the defendant used to examine the contents of the envelopes, so he would immediately find out that it was money (in reality, he knew it was money even without examining the envelopes).

"In summer, in 2017, during the exam session, after the students had left the office, and, as a matter of fact, more precisely, after the students' exams were already completed, I opened the envelopes that some of the students had left with me in the room at the university, on the desk, and I noticed that, in these envelopes, there was money with various amounts of RON 100, RON 200, #### 50. I placed the said money in an office cupboard, in a pencil case, and they were found there during the search in the fall of 2017.... I did not return that money, because those were the last days of the session, and the students went home and I did not have the opportunity to do it". These statements of the defendant are not real, from the video recordings it appears that he, after being alone in the office, used to collect the money from the envelopes and put them in his pockets. And, as the collection of the money was conducted the same day that he received it, and in some situations, the students had to take the exam during the following days (in the case of those who were still coming to the exam), it is obvious that if he had wanted/intended to return the money, he would have had the opportunity to do it.

## Extracts of good practice from Portugal

***<u>Process 38/18.1T9VFC Judicial Court of Açores – Vila Franca do Campo</u>***

***Summary of the Facts:*** *The case relates to the criminal offences of abuse of trust and theft. The defendant, which was convicted of both offenses, is the sister of a person who was unable to act with autonomy due to health reasons, hence gave authorization to the Defendant to use his bank account for current life expenses. The Defendant misused that authorization withdrawing high amounts of money for her personal benefit. The extract of the judgment below describes the proven and unproven facts and the evidence (for example, witness statements, documentary evidence, bank statement, medical reports) for which the Court based its reasoning in relation to the specific facts.*

***Extracts of the Judgment of the Judicial Court of Açores – Vila Franca do Campo***

*Reasoning*

*A. Proven facts*

From the trial and with interest for the good decision of the case, the following facts were proven:

1. The defendant M. was the sister of J.

2. On December 28, 2016, J. had a haemorrhagic stroke and subsequently underwent four cycles of chemotherapy, between 02.12.2017 and 05.08.2017, and during the treatments he remained partially dependent on others, with periods of mental confusion.

3. Between 20.11.2017 to 28.11.2017 J. was hospitalized in the Palliative Care Unit and since that moment, there has been a progressive decline in his general condition, mainly neurologically, with limitation of his motor capacity, becoming totally dependent on others, having died on December 26, 2017.

4. Due to J. state of health, in December 2016 the defendant began living at his house, located in XX, in order to help him with domestic tasks and daily life.

5. Due to the relationship of trust that he maintained with the defendant and with the intention that she would help him with everyday tasks, since he was unable to carry them out, J. authorized the defendant to operate the bank accounts he held and of which he was the only holder domiciled in the banking institutions C. and M.

6. Thus, the defendant began to have transaction powers on 30.03.2017 in the bank account number XXX domiciled at bank C., and transaction powers on 03.15.2017 in the bank accounts with number XX and XXX domiciled at Bank M.

7. Verifying that the state of health of J. worsened significantly, and that he was prevented from safeguarding his assets, the defendant immediately formulated the intention of appropriating monetary amounts existing in the aforementioned bank accounts.

8. In pursuit of her purpose, on the following days, the defendant withdrew the following amounts from bank account XX domiciled at Bank C: (note: detailed info – date and each amount - on 30 money withdrawals in the total value of 5690 EUR).

9. The Defendant proceed with payments and withdraw the following amounts in the bank account XXX of Bank M. (note: detailed info – date and each amount - on 113 money withdrawals, including few payments, in the total value of 26.774,04 EUR).

10. In addition, the defendant, after the death of J., proceeded to withdraw the amount of €400.00 and gave three transfer orders from the term deposit account with number XXX to the mentioned bank account at 9., and then made three bank transfers to her account bank account in the total amount of €25,000.00.

11. From 03.15.2017 to 12.26.2017, the defendant made the payment in cash of the following amounts:
– 450 € x 10 months = 4500 € (+ 450 € in December) = 4,950 € with the maid S.;

– 300 € x10 months = 3,000 € alimony for the deceased's children;

– 800 € for the purchased articulated bed, all for a total of 8,750.00 €;

12. After having withdrawn at the ATM and having received the aforementioned monetary amounts in the bank account in her name, the defendant appropriated them, making them her own, allocating them to her expenses and integrating them into her assets.

13. The defendant knew that the sums of money she had at her disposal, pursuant to the authorization granted, did not belong to her and that when making payments and withdrawing them without prior authorization from the account holder, or without any legitimate reason for effect acted unaware and against the will of its legitimate owner, J.

14. By acting as described in 10, the defendant knew that the transaction authorization had expired with the death of J. and that she only had access to the monetary amounts due to the lack of knowledge of the M. bank, acting with the concrete purpose of appropriating those amounts, well knowing that they were part of J.'s inheritance and acted in ignorance and against the will of the heirs.

15. With her cunning conduct, the defendant took advantage of the fact that J. was weakened and managed to squander all of his savings, thus managing to appropriate the global amount of €48,714.04 (forty-eight thousand, seven hundred and fourteen euros and four cents).

16. The defendant acted freely, deliberately and consciously, well aware that her conduct was prohibited and punished by criminal law.

Yet it has been proved,

17. The defendant is a cook at secondary school and earns the regional minimum wage, and is currently on sick leave;

18. She lives with her daughter R. and her brother E. in the latter's own house;

19. Has the 1st year of schooling;

20. The defendant's daughter and brother work and contribute to expenses;

21. The defendant has no criminal record;

22. The defendant returned the sum of €40,000.00 of her brother to the heirs who died on 03.14.2022, of which €20,000.00 was deposited in this case file on account of the amounts referred to in point 10 on 01.19.2022, and already ordered its return to the heirs and the amount of €20,000.00 for the amounts referred to in 8 and 9, which was made by bank transfer;

*B. Facts not proven*

a) That the defendant spent around €565.00 on home appliance repairs;

b) That the defendant, on 03/20/2017, paid the sum of €83.25 for her own benefit;

*C. Reasoning of factual findings*

The Court's conviction regarding the proven facts was formed taking into account the evidence contained in the present case file and produced at the trial hearing under the terms of Article 355, paragraph 1 of the Civil Code, valued in accordance with the principle of free assessment, enshrined in Article 127 of the Criminal Procedure Code. The court made use of the rules of common experience.

The defendant was present at the trial hearing and began by making statements, confirming that she was the sister of the late J., and that he had a stroke and became ill and so was only authorized by the Hospital to go home if there was someone to support him there.

The defendant states that, together with her brothers, she decided to go to her brother's house, but as she lived with her brother E. in his house and her partner C. and her daughter R. also lived there, they all went to the home of brother J.

In this part, the defendant's statements were credible, as someone really should take care of her brother and she seemed to be the most available.

However, in the course of her statements, the defendant was always showing an attitude of indifference, referring that she did everything to help her brother and that he wanted to help her, and that in relation to the money she used to pay all the household expenses and feed J. and his family who lived there, because in her version he wanted it that way.

However, her statements were subject to several inconsistencies throughout the trial, from the outset, the defendant lied with regard to physiotherapy, stating that each session was 18 euros but later it turned out that J. had 18 sessions and each one was only 1 euro and not 18 euros per session as she said, here at this point the documents attached to the file on pages 1032, 1033 and 1058, and confirmed by witness S. who worked at Fitness Absoluto.

The defendant also mentioned that she had taken animals she had at her house to her brother's house and that she had expenses with them, which appeared to be false, since the witness E. and R. and also C., brother, daughter and partner of the defendant stated that such animals never existed at the defendant's house, but at J. house, which is surprising as to why the defendant lied.

The defendant had access to the M. bank account on 03.15.2017, according to the bank document on page 361, however, the reason why is not understood and looking at the account statement on page 354, a request for a pin is found that very day. If the defendant's brother really wanted to leave her move the account as it says, why did not he give her the pin and she had to ask for a new one?

On that day, the defendant withdrew €600, and 6 days later she shopped at Alberto Oculista for €234 and at the Stradivarius store for €90.65. When the defendant was questioned, she said that she bought pyjamas and that at some point she had to buy new glasses for J. and that was the expense. It turns out that this does not deserve credibility since neither C., nor R. nor E. who lived with J. noticed that he had changed his glasses, only the witness A., J's caregiver, reportedly said that he had an appointment and changed his glasses but that was all in the village. It is not believed that at the Stradivarius store selling women's and youth items, the defendant bought pyjamas for her brother and there is no optician Alberto in the village, and furthermore, a list of J's E-invoice was requested and attached to the case file, where on the date of the expenditure on 02.21.2017 there is no corresponding invoice, see page 1018.

Although the defendant mentions that she was granted authorization to spend everything that was necessary for the house, what is certain is that when confronted with an expense at IKEA in Loulé on 02.09.2017, see the bank statement on page. 356, she already mentioned that she took the card and that J. said she could spend it on whatever she wanted.

Throughout the numerous testimonies, the Court realized that the version presented by the defendant had many inconsistencies, even knowing whether the maid she had at her house started to provide services at her brother's house. If brother E. said that he paid the maid Z., and that she went from time to time to brother J's house, this was denied by her in the trial that before she was paid to clean the house but then it stopped receiving it, which it did not seem credible.

For conviction regarding the facts described in 1 to 10, the court considered the extensive documentary evidence attached to the file, from the outset, the death certificate on page 45, qualification of heirs on pages 6 to 9, information on the state of health of the defendant on pages 277 to 278, bank statements from the Montepio bank account on pages 73 to 75, 293 to 305, 350 to 362 and 580 to 582, bank statements from XX domiciled account on pages 253 to 266, bank statements on pages 268 to 272, the deceased's e-invoice on pages 1015 to 1019 and the documentation of the Fitness Absolute gym on pages 1031 to 1033 and 1037 to 1039.

From the outset, it should also be mentioned the testimonies of the defendant's relatives, the brothers E., J. and C., who were not specifically aware that the defendant made almost daily withdrawals of € 400.00 and none of them realized that spending at home or standard of living had improved. The defendant's daughter also stated that she had the same standard of living despite living in a larger house with a swimming pool. All of them thought that the defendant only spent what was necessary to support her brother, who, incidentally, the Court must clarify that it has no doubts that he was well taken care of.

However, looking at the medical reports attached to the file and the testimony of witness N, J's doctor, led the Court to believe that he had many periods of confusion and that he was not well enough to make decisions. The decisions to hire A. to take care of J. are not understandable, since there are four people living in J's house, with one more joining before the summer, C. the defendant's daughter, who was a nurse, and even then, it would not be enough to take care of J., given that the defendant was on sick leave a few months after moving to her brother's house.

On the other hand, it is not believed that a person undergoing chemotherapy treatments would have the discernment to say to withdraw about €1000 per week to have at home in case something happened.

Witnesses from the pharmacy and supermarket where the defendant was going were heard, but such witnesses did not help with the facts that are in question here since they only attested that the defendant was going there to buy things, but even the values from the pharmacy had the taxpayer number of J. and are insignificant values compared to the amounts raised by the defendant. It should be noted that in April, the defendant withdrew €400.00 almost daily from the bank X. account and from the bank XX. account, and it is not believed if that money was all spent on supermarkets, we are talking about expenses of more than € 1500.00 per week for a family of 6 or 7 people, 4 of whom earn a salary.

Looking at the bank statements, the reason why the defendant raised €400 on the same day and paid for purchases on the Mainland and Solmar on the same day is even more strange, if the version of this was that she raised it to pay for purchases and current expenses.

After listening to injured party F., her sister J. and mother E., it was possible to infer that at the time of J's illness, the defendant forbade them to be with their father, as they no longer had their rooms free in their father's house , and they were no longer able to go there or visit the hospital, as stated by the doctor N., who said that she authorized the son's visits outside of normal visiting hours, because she knew there was a conflict with the defendant.

The statements made by witness J. demonstrated the negative affectation that the defendant had on the lives of her brother's children, were credible and it is noted that, despite the fact that almost 5 years have passed since the death of the witness's father, she still feels very disturbed when she talks about the times before her father passed away.

All the witnesses heard who were listed by the Prosecution and by the injured party, including the defendant herself, mentioned that J. was a very frugal person and that he did not spend money in vain, he did not stop doing anything, but he saved everything he could save, and hence the document that prepared inserted in pages 735 of the case file, confirmed by witness L., a bank worker. This document states that it authorizes the defendant to operate only the current account in order to help him with current expenses, and “only the current account” is underlined. This is J's only declaration of will, which is compatible with the description given by the witnesses that he was a thrifty person and did everything not to spend money that was not necessary, and for that reason he only wanted help with current expenses.

The defendant not only spent the money for current expenses but also withdrew all the money that J. had in the account to the point that the value of the instalment of the new car that she bought was deducted and there was no money in the account.

With regard to point 11, the court considered, in the case of payments to the employee A., the statements made by her and by the witnesses E. and C., who confirmed such amounts.

With regard to the value of the alimony, it was mentioned by the witness E. and F., that the amount of € 300.00 was deposited in the account and therefore it would have to be in cash.

With regard to the articulated bed, the Court considered the testimony of J. who confirmed that she had received €800.00 in cash from the defendant.

Combining the evidence produced with the rules of common experience, facts relating to the intellectual or volitional elements in points 12 to 16 were considered proven, since the defendant knew that the bank accounts she was authorized to use would only be to guarantee the current expenses and she knew that by withdrawing amounts of € 400 almost daily that she would be going beyond the authorization, filling herself with values that did not belong to her, she was well aware that when his brother died, who no longer had authorization to operate the account and still thus, she took €25,000.00, well knowing that it did not belong to her, and that in both cases she would be committing a crime. There is no other explanation for her conduct.

The economic and personal conditions of the defendant, described in points 17 to 20, the court considered the statements made by her that deserved the credibility of the court.

With regard to the criminal record described in point 21, the content of the updated Criminal Record Certificate, together with the file on page 935.

Regarding point 22, the Court based its conviction on the document submitted to the case file on 03.17.2022, which contains the transaction between the heirs and the defendant.

Facts not proven:

In relation to subparagraph a) it will always be said that there were only doubts as to the repairs that were made to the property, since witness C. refers that the television was what broke down and the brand went there to repair it, while witness R., mentioned a washing machine, and the defendant a microwave. Afterwards, the supposed service provider was heard, who ended up mentioning that the amount he put in the declaration attached to the file with the response to the indictment, which is an estimated amount, because that year he had gone there a few times and ended up billing that amount, but he didn´t know if he received such value, if it was in cash, if it was being paid. Witness A. stated that he had an invoice without a consumer for the services provided, but that was not what was requested, or if he did in fact have that documentation, why did the defendant not ask for such a document and a written and signed statement that he did not even describes what was provided. Thus, there are doubts and therefore this fact was given as unproven.

In relation to sub-paragraph b), this was considered unproven, insofar as it is a current supermarket expense and therefore the Court understood that this could undoubtedly be part of the current expenses to be borne by the defendant for managing the house, no longer the other values contained in point 9 of the facts, namely the values relating to the purchase of glasses and at Stradivarius and also purchases at IKEA Loulé, and for that reason it was excluded.

## 4.5. It is of Utmost Importance to Have a Clear Picture on Who Put Forward a Motion for Mitigating Circumstances. Only in This Way It Can Be Checked Whether a Judgment Has Responded to Significant Arguments of the Parties.

### Extracts of good practice from Romania

***Decision No. 677/07.05.2021, Cluj Court of Appeal – Criminal and Juvenile Division, Romania,*** ***www.rejust.ro/juris/4dg585g9***

***Summary of the Facts:*** *The Cluj Court sentenced the defendant, a university professor, to 3 years of suspended term of imprisonment under supervision for the criminal offence of repeatedly taking bribes from students (43 material acts) in order to pass the exams organised in July and August 2017. The Cluj Court of Appeal rejected*

*the appeal of the defendant, but admitted the appeal of the Prosecutor's Office and ordered the sentence to be executed in the penitentiary.*

***Extracts of the Judgment of Cluj Court***

The defendant requested that the extenuating circumstance provided for by Article 75 para. (2) letter b) of the Criminal Code, in the sense that the duration of the sentence be reduced and the suspension under supervision maintained, on the grounds that there is no evidence that he conditioned the passing of the exam by the remittance of an amount of money, that no student passed without them having minimal knowledge of the subject, that he has had an impeccable career and that, in the previous year, he had retired from the department.

The Court of Appeal reasoned that the invoked legal provision refers to "circumstances related to the committed deed that diminish the seriousness of the criminal offence or the dangerousness of the offender". The aspects invoked by the defendant, even if real, would not justify retaining the incidence of Article 75 para. (2) letter b) of the Criminal Code since the way of committing the continued offence, the negotiations between the member of the teaching staff and the students and the image reflected by this kind of behaviour on the university education, on the level of training of the students are just as many arguments that found the opposite solution. In the evaluation of the legal criteria, of the provisions that regulate the mitigating circumstances invoked, it is necessary to take into account all the circumstances related to the deed, which influence the person who committed it, the Court shows that one cannot give precedence to some circumstances to the detriment of others, against the rule of their plural examination.

Additionally, we note that some of the arguments brought by the defendant in support of his request for favourable circumstances are not real. We will note that the defendant gave passing grades to some students who did not even appear for the exam, at most, based on papers brought (served) to the examining member of the teaching staff (not being clear who exactly solved the subjects or prepared the respective papers) which was not equivalent to an examination of the knowledge acquired throughout the semester or the academic year. We further note that, as a rule, the defendant would offer the paying students the subject that had to be prepared for the oral exam, asking them to learn "at least a little", which cannot mean, in the opinion of the Court, that the defendant proceeded to examine the student's knowledge, so that he had a minimum of exigency towards them and towards the subject taught.

## Extracts of good practice from Portugal[102]

***<u>Process 92/20.6GAPNI.C1, Court of Appeals – Coimbra</u>***

**Summary of the Facts:** *The appellant (M.) was convicted in first instance for the criminal offence of aggravated homicide in co perpetration with appellant S. S. was the father of the victim (V.) and M. the stepmother. M. appealed alleging several mitigating circumstances, including among others, that the punishment was excessive and should be reduced by application of Article 10* **§** *3 of the Criminal Code. According to Article 10* **§§** *2 and 3 of the Criminal Code[103] the commission of a result by omission is only punishable when the omitting party has a legal duty that personally obliges him to avoid that result. In this case the penalty may be specially mitigated. The*

102 Pursuant to Article 71 of the Portuguese Criminal Code, the court shall *ex officio*, regardless of motion of the Defendant, consider all the mitigating and aggravating circumstances in the determination of the punishment.
***Article 71 (Concrete determination of the punishment)***
*1 - The determination of the measure of the penalty, within the limits defined by law, is made according to the guilty of the agent and the requirements of prevention.*
2 - When determining the specific penalty, the court <u>takes into account all the circumstances that, not being part of the type of crime, are in favor of or against the agent</u>, considering, namely:
a) The degree of unlawfulness of the act, the way in which it is carried out and the seriousness of its consequences, as well as the degree of violation of the duties imposed on the agent;
b) The intensity of the intent or negligence;
c) The feelings manifested in the commission of the crime and the purposes or reasons that determined it;
d) The personal conditions of the agent and his economic situation;
e) The conduct before the fact and after it, especially when it is intended to repair the consequences of the crime;
f) The lack of preparation to maintain a lawful conduct, manifested in the fact, when this lack must be censured through the application of the penalty.
3 - The grounds for the measure of the sentence are expressly mentioned in the judgment.

103 Article 10 (Commission for action and omission)
1 - When a legal type of crime entails a certain result, the fact includes not only the appropriate action to produce it but also the omission of adequate action to avoid it, unless otherwise stipulated by the law.
2 - The commission of a result by omission is only punishable when the omitting party has a legal duty that personally obliges him to avoid that result.
3 - In the case provided for in the previous number, <u>the penalty may be specially mitigated.</u>

*appeals judgment partially transcribed below summarizes the appeal of M. including the allegation of the overall mitigating circumstances.*

***Extracts of the Judgment of the Court of Appeals, Coimbra***

1.3. Defendant M. appealed (Appeal B), presenting the following conclusions:

1. The sentence condemned the now appellant in co-authorship and in the consummated form, of a crime of qualified homicide foreseen by Articles 131, 132.2 a), c), d), e) and j) and 69 A of the Criminal Code in the sentence 18 (eighteen) years in prison; a crime of desecration of a corpse or a funeral place, p.p. Article 254.1 a) of the Criminal Code, with a penalty of 18 (eighteen) months in prison; a crime of abuse and simulation of danger signs, p.p by Article 306 of the Criminal Code in the sentence of 9 (nine) months of imprisonment. In legal combination of partial prison sentences, the appellant was sentenced to a single sentence of 18 years and 9 months in prison.
2. For this purpose, the court considered that the crime of homicide by commission had been verified, as regards the appellant, considering that there was a practical close relationship with victim V., as this had been entrusted to her by her mother, with her (and the father, the Defendant S.) living for some time. A legal duty was imposed on her, which personally obliged her to avoid the result resulting from her omission.
3. The provisions of paragraph 2 of Article 10 of the Criminal Code only apply when there is a legal duty that personally obliges the agent to avoid the result.
4. This duty must flow directly from the law and not from any moral principles or natural law.
5. In the present case, this legal duty does not apply between the appellant and the victim V., so this rule - Article 10 No. 2 of the Criminal Code - is not applicable to this case.
6. The first instance court interpreted paragraph 2, Article 10 of the Criminal Code to be a restriction on the provisions of paragraph 1 of the same article "… *by assuming that the omission is only punishable when the omission falls under a legal duty that personally compels him to avoid the result arising from his omission. This is a restriction of recognized sensitivity since the legislator does not provide us with safe criteria that clarify the source of this legal duty (law, contract, concrete situation created) nor when it can be said that, in the existence of this duty, the omitting is personally obligated to avoid the prohibited result*".
7. As the court *a quo* recognizes the legislator's lack of criteria to clarify the source of this legal duty, the court under appeal should always have decided to acquit the appellant in relation to the crime of aggravated homicide of which she was accused.
8. Deciding as it did, he did so contrary to his own reasoning.
9. At the very least, in clear violation of the principle in *dubio pro reo*.
10. The Court a quo equated *facecere with omitter* (under the terms of Article 10.1 Criminal Code) in a clear expansion of the margins of punishment, subtracting the principle of criminal typicality and legality.
11. Even if there was any legal duty on the part of the appellant that caused the omission of the conduct to fall, pursuant to paragraph 2 of Article 10 of the Criminal Code, the causal link between the fact and the omission of the appellant has not been verified.
12. Article 10 (1) of the Criminal Code enshrines the doctrine of adequate causality to resolve the objective attribution of the result to the agent and the equation of the omission with the action and so that a causal link can be established between a result and an action, or omission, it is necessary that, in abstract, action or omission be suitable to cause the result.
13. Now, the court *a quo* considers that V.'s death resulted from a cerebral contusion with subarachnoid haemorrhage, this cause of violent death, by forceful action.
14. The Court also found that "the defendant S. struck multiple blows, with great force, on the legs and buttocks of the youngest V., and that, in the bathroom, the defendant S. struck with great force, with his hands, on her head, on the top of her skull, which caused her internal bleeding and, consequently, made her fall into the bathtub, which then began to faint and have convulsions.

15. It is also proven, from S.'s (defendant's) statements, statements by the appellant and R.'s testimony that the appellant had intervened between the accused S. and the victim in order to deter him from the practice of the acts that led to victim's death.
16. What is proven in the first statements of the defendant S., at the instance of the Public Prosecutor's Office (follows the transcription of these statements):

"0h49m10s – S.: "It was my wife who told me to calm down and then I dropped everything and went to the bedroom again."

0h50m26 s - Prosecutor: "And hit like hitting the face hitting the body... several times?

S.: Oh ma'am, I do not know...

Prosecutor: And was it once, several times?

S.: it was even my wife who pulled me to stop

0h50m47s Prosecutor: that is, your wife pulled you and you left?

S.: No, of course not. I told her to stop that she has nothing to go around pulling that the daughter is mine. But then I went to the bedroom again.

0h55m34s – Prosecutor: "and your wife in the face of this (the attacks)?

S.: My wife always...was against everything I did 55.40

0h55m40s Prosecutor – "No, but I didn't ask you that. I asked her how did she do in terms of gestures or words?

S.: "for me not to do, to stop, for me not to do these things 55.50

0h52m51s Prosecutor – "She just told you verbally, is that it?"

S.: "yes... and... she grabbed me and I "pulled her away (?)" so she wouldn't get involved in this matter... things like that"

0h56m51s Prosecutor- "and your wife over there, came to you, didn't she?

S.: Of course, she was always trying to calm me down

0h56m56s Prosecutor - "What did she do there, in the bathroom?

S. "she was trying... she grabbed me in the shower so I wouldn't do it... she tried to turn off the water... she was here on this side and I told her to move away.

0h57m07s Prosecutor – "and you didn't take the lead, for example?"

S.: "it became clear".

57.19 Prosecutor - "So you didn't take the lead?"

S.: "she did but I always pushed her away".

0h57m23s - Prosecutor – "so you diverted the water, was that it?"

S.: "I don't know, I don't remember... whenever she came, whenever she came, whenever my wife came to put herself between me and my daughter, I always pushed her away".

17.And, based on statements by defendant S., at the first trial hearing (3/26/2021), at the instance of the Prosecution:

0h4m16 ss - Prosecutor: Mr. S., from your point of view, when did the girl die?

S.: When she was already... when she was sitting on my lap... then I stopped feeling the pulse.

0h4m30ss Prosecutor: And her breathing?

S.: I didn't feel anything anymore.

0h4m35ss Proc. How were her eyes?

S.: They were half-closed.

0h4m54ss Proc. and at that time you told M. that the girl was dead?

S.: Yes, I think so.

0h5m01ss - Proc. So, when you put her on the couch, for you, was she already dead?

S.: Right, yes.

18. And as well as the declarations for future memory, of the only eyewitness of the facts, R.:

0h04m00 ss- R. - I woke up around eight thirty in the morning and heard you say “Stop”. He was hitting her hard.

0h4m15ss - My mother telling him to stop that she was still little.

0h4m50ss - ...He wet her with boiling water, my mother crying, telling him to stop, that she was still small. That it was hurting her too much for him to stop still 5.03.

0h5m03ss – “… my mother told him to call INEM, the police, the fire department, call for help and he said "no, the daughter is mine, I won't call, I'll do what I want" ... and my mother said "no, don't do that, call for help. And he said "no, don't get between me and her, this is a matter between me and her, so you don't have to get involved, it has nothing to do with you. And my mother continued to insist that he call for help and he wouldn't let her. And then he said like this "if you say something to someone you will be without the girls and the R."

0h28m21s R.: "I heard someone hit the wall and then I saw V. walk a little forward and fall out of the bathtub. And my mother tried to get her up, help her, but S. pushed her away, my mother, and that's when he threatened my mother to be without us.

0:29:58 MM Judge: so, what happened immediately after?

R.: My mother went to try to help V.

0h30m02ss - Q. how did your mother do it?

R.: my mother... she saw that S. was going to hit her more, she pushed S. away and was going to grab her.

30.19 P. Did S. also try to get her up, is that it?

R. yes, but I saw my mother pushing S. to try to lift V.. S. then put my mother by the wall “you... this is between me and her... I am her father, I know what I do”. And then S. told my mother that if... that it was between her and him, and if she dared to call for help or tell anyone anything that she was going to lose me and my sisters.

R.: She started to lose strength. My mother saw that it was not all right with her (V.). I told S. to be there looking after her. She asked him "do you want me to call INEM, do you want me to call INEM? Do you want me to call the fire department?" and he said “No, don’t call anything or you’ll be without the kids!”

19. According to the statement provided by the legal medical expert, it is proved that V. died a few minutes after the aggressions:

“0h 2m50ss – Judge. Mr. Doctor says some time after these attacks, is that it?”.

Expert: Exactly.

0h3m02ss – Judge This time, can we fix it in this time frame?

Expert: this is impaired, I cannot determine the time interval here.

0h3m15ss – Judge: Mr. doctor can't determine the time interval, is that it?

Expert: No, what I can say is that that time gap wasn't that big, so we're talking about minutes per hour. So, I can't be more precise than that.

0h4m00ss – Judge: then the second question was the smallest V......... had she been rescued, could the result of death have been avoided?

Expert: Hardly. Hardly because the injuries, the severity of the injuries, although they do not allow for an immediate death, but the severity of the injuries, namely the magnitude of the cerebral edema, the cerebral haemorrhage, would hardly have a different outcome from that of death, (...).

0h4m55ss - Judge: But Mr. Doctor, when you say it's difficult, you don't exclude that possibility, or do you?

Expert: Very unlikely indeed. (...)

20. With all due respect, when deciding as it did, the Court a quo did so contrary to the evidence produced

21. Having been demonstrated and proven the appellant's constant help to the victim;

22. Having also been proven in the statements of the defendant S. that the victim V. was dead when she was taken to the sofa:

"1h4m06s – Prosecutor - "so you think that when you took her to the couch, she was already dead?

S.: "yes".

1h4m14s – Prosecutor - "I thought that, in your view, she had only died later?

S: "When she was sitting on my lap, I could no longer feel her pulse".

23. Also in terms of clarification provided by the legal medical expert regarding V.'s death, he claims that it occurred a few minutes after the aggressions.

24. Except for a better understanding, there is no clear and irrefutable causal link between the omission (appellant) and the result.

25. From the evidence produced, resulted in the death of the victim of the action of the Defendant S. – blow delivered by the Defendant on the head of V. – who consequently died, a few minutes after the blow was delivered, proving to be innocuous any and all help/assistance that the appellant could have sought, in addition to what was provided.

26. As shown by the evidence produced (testimonial), the appellant (by action) tried to protect V., which is why the Court *a quo* erred when, contrary to the evidence produced, it considered that the appellant committed a crime of qualified homicide, by omission, for having done nothing to prevent the resultant death.

27. It has not been demonstrated that the omission for which the appellant was convicted had necessarily led to death, so that, except for a better understanding, the provisions of paragraph 1 of Article 10 of the Criminal Code, since the appellant's conduct was not punishable, by omission, the court *a quo* was wrong in condemning the defendant for the crime of homicide by commission. Having committed a crime, the appellant may have committed a crime of omission to provide assistance foreseen in Article 200 of the Criminal Code, but never the crime of homicide qualified by commission, for which she was convicted therefore she must be acquitted.

28. (no indication in the judgment).

29. Even if it is understood that the appellant committed a homicide crime, the special censure or perversity referred to in paragraph 2 of Article 132 of the Criminal Code is not proven, therefore, the court a quo could never have condemned the appellant for the crime of aggravated homicide, let alone making use of the principle in *dubio pro reo*.

30. As provided in Article 29 of the Criminal Code "*each participant is punished according to his guilt, regardless of the punishment or the degree of guilt of the other participants*".

31. It has been proved that the applicant did what she could to protect the victim in good time.

32. It was also proved that the time between the beginning of the events that led to V.'s death and the moment when she was taken to the sofa was about 45 minutes (8.30/8.45 to 9.30).

33. As shown by the statements of defendant S., the testimony of R., and clarifications by the medical expert, and in accordance with the rules of the experiment, V. was already dead when she was taken to the sofa just like that.

34. The court *a quo* considers the declarations of the defendants for the purposes of proof, disregarding them, without any grounds, regarding the moment of death, namely the declarations of the defendant S. when he claims that she was dead at the moment she was taken to the sofa.

35. The court *a quo*, in our view, incurring an interpretation contrary to the evidence produced, incorrectly condemning the appellant for the crime of qualified homicide p.p Article 132.2 Criminal Code.

36. If the crime of homicide is verified, the appellant should always have been convicted by legal rule 131 of the Criminal Code under the heading "homicide", foreseen with a sentence of 8 to 16 years in prison, and never a sentence exceeding 12 years prison.

37. The penalty imposed is manifestly excessive.

38. No. 3 of Article 10 of the Criminal Code admits the special mitigation of the penalty in the case of crimes committed by omission.

39. In the present case, it has not been proven that the appellant acted with direct intent.

40. The appellant's cooperative and assertive personality has been proven, for example, social report, always available to provide details and clarify doubts that were being put to her, the regret shown in court, the sincere apology made in court, and a strong awareness of the social penalty of his actions; A journey of life, so far, undeserving of any repair; All factors that, we believe, clearly diminish the guilt of the appellant and, as such, the penalty should have been specially mitigated, within the limits of Article 73 of the Criminal Code, as allowed by the aforementioned provision (Article 10.3 Criminal Code).

41. Therefore, the defendant should never have been sentenced to more than 16 years and four months for the crime of aggravated homicide for which she was convicted.

## 4.6. It is of Utmost Importance to Have a Clear Picture on How the Court Reacted on a Mitigating Circumstance Regardless of Who Put it Forward.

### Extracts of good practice from the Republic of Moldova

***File No. 1ra-742/2018 Criminal College of the SCJ***
***http://jurisprudenta.csj.md/search_col_penal.php?id=11295***

***Summary of the Facts:*** *C. V., was brought to justice for the fact that on February 7, 10, 12, 2017 and twice on March 17, 2017, being in the room of the 2nd therapeutic ward of the Medical Sanitary Institution of Vulcăneşti Hospital, located on 37 Lenin St., for a temporary stay during the cold period of the year, being in the public institution where, at that time, the activity of providing medical services was conducted, where together with the PMSI DH Vulcăneşti staff who were fulfilling their service obligations, there were also the patients of the medical institution, acting intentionally, obviously violating the social norms and the rules of behaviour in society, seriously violating public order and acting with particular cynicism, began to publicly address himself to the medical personnel on duty and to other people, with uncensored and non-normative words, which are offensive in meaning and indecent in content, demeaning the honour and dignity of those around, as a result of the illegal behaviour, the work regime of PMSI DH Vulcăneşti, as a public institution, being violated. (Article 287 para. (1) and 287 para. (2) letter a) of the Criminal Code).*

***Extract of the Judgment of Criminal College of SCJ***

The enlarged Criminal Panel established that the appellate court, when adopting this solution, unjustifiably did not take into account the fact that the defendant is of advanced age and suffers from chronic alcoholism, for which he must be treated, but not isolated from society.

"Furthermore, it is mentioned that the court of appeal did not take into consideration the fact that the defendant fully admitted his guilt in what he committed, sincerely repented and, as a result, requested the examination of the case in a simplified procedure. Under the mentioned circumstances, the Enlarged Criminal Panel reaches the conclusion to intervene in the length of the sentence set for defendant C. V., without aggravating his situation.

***File No. 1-818/2020, 1-20038018-12-1-18032020 Chişinău District Court (Buiucani headquarters)***

***Summary of the Facts:*** *The person is accused of committing the criminal offence of (1) Intentional severe bodily injury or damage to health which is life-threatening provided for by Article 151 para. (1) of the Criminal Code of the Republic of Moldova. The court reasoned the mitigating circumstances taken into consideration.*

***Extracts of the Judgment of Chişinău District Court (Buiucani headquarters)***

According to Article 76 para. (2) of the Criminal Code, as a mitigating circumstance regarding the defendant, the court held: the sincere remorse shown by her at the trial stage of the case.

Likewise, the court held as a mitigating circumstance, according to the provisions of Article 76 para. (2) CC, the positive characteristic, signed by the senior officer of the IP Ciocana sector, Chișinău Mun., chief inspector G.S. (f.d.92). According to the characteristic, cit. M. L. was not listened to at the administrative commission. She was not previously held criminally liable. She is positively characterized by her neighbours, no complaints have been registered against her, in this regard. In the circle of friends, she enjoys esteem and respect. IP Ciocana has no compromising material against cit. M.L. According to her domestic living, she is positively characterized.

With reference to the provisions of Article 76 para. (1) letter g) Criminal Code, the court considered as a mitigating circumstance the fact that the reason for the criminal offence was determined by the immoral conduct of the victim. Or, when the latter arrived at the defendant's apartment, she hit the door hard, she called her "mamasha" in very familiar terms, stayed in her apartment against her will and of requests to leave the apartment, had fun all night with the defendant's daughter in one of the apartment's rooms (see the analysis of evidence No. 7 as well as the explanations in the paragraph describing the reason for the criminal offence). The court considers that it was the conduct of the victim of the offence that determined the defendant to resort to her criminal act.

## Extracts of good practice from Portugal

***Process 92/20.6GAPNI.C1, Court of Appeals – Coimbra***

***Summary of the Facts:*** *This is the same judgment as the one under point 4 above and therefore the factual context is the same. In addition to what was said under point 4 above, the Court of Appeals addressed the appeal of defendant M. including in relation to the mitigating circumstances. The crime of homicide was disqualified and the Court of Appeals convicted the person to simple homicide by omission and applied also the special mitigation on sentencing considering also other circumstances and applicable law. The extract below from the judgment is the reasoning of the Court of Appeals.*

***Extracts of the Judgment of the Court of Appeals, Coimbra***

*Reasoning of the Court of Appeals in relation to Appeal B - appellant M.*

(…)

**m)** Turning to the consideration of appeal B presented by defendant M., the following are the issues to be considered:

**i)** Find out whether the court a quo erred in considering that the defendant was under a legal duty that personally obliged her to avoid the result resulting from her omission, the appellant defending that this was not the case;

**ii)** Assess whether the challenge of the matter of fact should be considered, resulting from the transcripts of the statements that the appellant interposed between the defendant S. and the victim in order to deter him from the practice of the acts that led to the death of the victim, and also that the death resulted from the blow inflicted by the defendant S., proving to be innocuous any and all help/assistance that the appellant might have sought, and thus the commission of a crime of qualified homicide, by omission, cannot be imputed to the defendant for nothing have done to avoid the resulting death;

**iii)** Determine whether the qualifiers of the homicide detected imputed to the defendant S. must be imputed to the defendant M. pursuant to Article 28 of the Criminal Code, thus being imputed to her also the commission of a crime of aggravated homicide, or if Article 29 of the Criminal Code should be applied, according to which each participant is punished according to his own guilty;

**iv)** Assess whether the penalty applied is manifestly excessive, and should be reduced, especially by applying paragraph 3 of Article 10 of the Criminal Code, which provides for a special mitigation of the penalty in the case of crimes committed by omission.

(…)

**ii)** The third question to be considered in relation to appeal B, consists of conclusions 29th and 30th, 35th and 36th, where the appellant argues that the court *a quo* could not have condemned the defendant for the crime of aggravated homicide, not resulting in proof of the special censorship or perversity, since in view of Article 29 of the Criminal Code, each co-participant is punished according to his fault, regardless of the punishment or the degree of guilt of the other co-participants.

The question thus lies in knowing whether the qualifications that were considered verified in relation to the defendant, are transmitted to the defendant pursuant to the provisions of Article 28 of the Criminal Code.

It should be recalled that the contested decision, in this part, begins by citing doctrine and jurisprudence characterizing qualified homicide and the standard examples, which allow concluding that the agent's attitude manifested in the fact may be particularly objectionable, or reveal and expose externally special perversity.

Afterwards, it writes that "*the standard example of al. a) easily indicted, as the defendant S. was the father of the victim. The defendant M., however, does not have any kinship relationship with the unfortunate V.*" Even so, it proceeds to the transcription of Article 28 of the Criminal Code and cites doctrine in the sense of explaining this norm, concludes that "*It is manifestly the case, so also in relation to the defendant this paragraph is filled in*". Then, the decision under appeal also describes other standard examples that it considers fulfilled, and condemns the defendant S. - and also the defendant M. - for the commission of a crime of aggravated homicide, provided for and punishable by Articles 131, 132, No. 2, al. a), c), d), e) and j) of the Criminal Code.

**jj)** Now, as the contested decision itself defends when writing that the qualification of homicide involves a "*generic assertion of a special type of guilt*" and also results from citations to which it comes from doctrine and jurisprudence, the standard examples relate essentially to the guilt issue.

Article 132 of the Criminal Code contemplates a type of guilt aggravated by virtue of the general clause of censorship or perversity, implemented according to a non-automatic and non-exclusive list of circumstances, a position assumed from the outset by Eduardo Correia and Figueiredo Dias in the revision commission of the Criminal Code - cf. Pinto Albuquerque, Commentary on Code. Criminal, Ed. Unv. Catholic, page 509, note 2.

As Teresa Serra notes (in a work cited by the contested decision), the legislator adopted a type of fault as a generalizing criterion because "*only within the scope of a material concept of fault susceptible of graduation, having as its own reference object the greater or lesser disvalue from the agent's attitude updated in the fact, the function of types of guilt that aggravate the criminal frame can be fully understood*" – Qualified Homicide – Type of Guilt and Measure of Punishment, Almedina, 2000, page 125.

Or, as Fernando Silva writes (...) "*the classification of homicide is based on the aggravated guilt that the agent reveals with his action, being a type of guilt. (...) the type of Article 132 of the Criminal Code includes elements of guilt, translated into greater censure or perversity revealed by the agent, corresponding to an aggravated degree of censorship conformed through these concepts*" – in Special Criminal Law, Crimes against People, 3rd Edition, Quid Iuris, page 54 ff.; cfr. also, in the same sense, the Conimbricense Commentary on the Criminal Code – Special Part. 2nd Edition. Coimbra Editora, 2012, Volume I, page 51.

Just as the privilege of homicide is based on a diminished guilt of the agent (cfr. the expression "*sensibly reduce the guilt*" mentioned in Article 133 of the Criminal Code), qualified homicide foresees an aggravated type of guilt, a position which, in our opinion, if not unanimously, is largely dominant in our jurisprudence - for example, B.C. from the S.T.J. of 27-05-2010, process No. 517/08.9JA CBR.C1.S1, in www.dgsi, and Dec. from the S.T.J. 19-2-2014, data juris.

**ll)** Therefore, and precisely contrary to what the contested decision defends, article 28 of the Criminal Code is inapplicable in this case, which, as the epigraph itself stipulates, refers exclusively to the illegality of the type. On the contrary, pursuant to Article 29 of the Criminal Code, each participant in a given homicide is punished according to the qualifying circumstances that are verified in relation to him - cfr. Pinto Albuquerque, ibidem, page 518, note 31.

The situations of the standard examples referred to in paragraph 2 of Article 132 of the Criminal Code, are relevant due to guilt, not illegality and, therefore, are not communicable, but susceptible to autonomous assessment in relation to each participant, applying the provisions of Article 29 of the Criminal Code - Ac. from the S.T.J. of 17-3-1999, case No. 98PI1434.

It follows that the standard examples that the court a quo considered verified exclusively by the defendant's actions (constant in items a), c), d) and e), are not transmitted to the defendant, who will thus be acquitted of committing the crime of qualified homicide.

**mm)** As the homicide is disqualified, we must also consider that the defendant M. was convicted of homicide in its omissive form, as the appellant has a legal duty to avoid the result - in this case the death of the stepdaughter - by application of paragraph 2 of Article 10 of the Criminal Code.

In these circumstances, paragraph 3 of the same Article 10, establishes the possibility of the penalty being specially mitigated, constituting this normative provision one of the situations referred to in paragraph 1 of Article 72 of the Criminal Code as one of the cases expressly provided for in the law that point to this possibility.

In this case, in addition to the omissive form, another element points to the application of the institute of special mitigation of the penalty. Effectively, when it is proven that the defendant was satisfied with the result, but not that she wanted it, it is concluded that she acted with eventual intent (*dolus eventualis*), a circumstance omitted by the contested decision, which does not mention it in the setting of the sentence to the defendant, but which must be considered. As is well known, direct intent and eventual intent are equivalent to different degrees of intensity of representation and will to carry out a typical fact - given that eventual intent constitutes, in any case, a less intense degree of will (conformation) of the one that is present in the direct intent (intention), which necessarily has to assume significant relevance.

Therefore, the commission of the crime by omission, and with eventual intent, points to a circumscribed form of guilt, doubly calling for the special mitigation of the penalty provided for in Article 73 of the Criminal Code (especially mitigating the penalty also in a case of homicide by omission, with eventual intent, but in circumstances that, comparatively, deserve greater censure, since it was the convict herself who materially provoked the causal process - aggressions - not interrupted by due assistance to the victim, which is not the case in this case, see STJ decision of 11-27-2013, 37/12.7JACBR.C1.S1, in dgsi.pt).

**nn)** The special mitigation of the penalty implies the reduction of one third of the maximum limit of the penalty, and the reduction to one fifth of the minimum limit of the penalty - 73º No 1 al. a) and al. b), 1st part. Applying these factors to the penal framework for the crime of simple homicide (8 to 16 years – Article 131 Criminal Code), it results in the penal range especially mitigated from 3 years and 4 months to 11 years and 8 months, range where we will have to find the concrete penalty.

**oo)** The determination of the concrete measure of the prison sentence, within the aforementioned abstract range, is made according to the guilt of the defendant and the prevention requirements (general integration and special socialization), in accordance with the provisions of paragraph 1 of Article 71 of the Criminal Code, taking into account, namely, the circumstances listed in paragraph 2 of the aforementioned provision; The penalty must be found in a criminal framework of general positive prevention - which satisfies the community felt need to reaffirm general confidence in the validity of the violated norm - defined and concretely established also in terms of the requirements of special prevention or socialization, but cannot, under any circumstances, exceed the concrete measure of guilt, which establishes an insurmountable limit to the prevention requirements - Article 40 of the Criminal Code.

In this case, the need for general prevention is very high, first of all because we are facing a homicide crime, which causes alarm and disquiet in the community, by irremediably calling into question the value recognized by all as the most important: life.

In terms of special prevention, the defendant has no criminal record, maintaining a normative lifestyle until the commission of the crime, being socially inserted, so the requirements in this field are not particularly high.

The behaviour after the crime of the defendant does not deserve repairs, presenting a stable behaviour, showing adequacy in the face of the imposed rules and establishing good relationships, trying to help colleagues in need, being cordial with the prison guard and with the technicians, without showing any incidences disciplinary.

Her stance in court should also be positively valued, as it was based on her testimony – in conjunction with that of her son R. examined in statements for future memory – that the court sought a good part of his conviction regarding the facts considered proven, and that the decision under appeal, in setting the concrete measure of the penalty, considered that the defendant showed some regret.

We must also take into account – even if in a moderate way – the circumstance that results from the file, that if the defendant did not decisively oppose the causal process (the defendant's attacks on the victim), she demonstrated (essentially verbal) opposition to them.

All considered, we decided to set the penalty for the crime of voluntary homicide by omission at 8 years in prison, considering it appropriate and in accordance with the standards of our jurisprudence (for example, Ac STJ 27-11-2013).

**pp)** Regarding on sentencing the single penalty based on the assumption of a new partial penalty, and the other two penalties that were not the subject of an appeal, again using the above-mentioned criteria determined by Article 77 of the Criminal Code.

In this case, the range to be considered will have a minimum sentence of 8 years (the highest sentence in the contest), and as for the maximum limit, the sum of partial sentences is equivalent to 10 years and 3 months.

Here too, it is necessary to consider the spatio-temporal concentration and connection of the concurrent facts, since the facts related to the crimes of desecration of a corpse and of abuse and simulation of danger signs, occurred in the sequence of the crime of homicide, and in turn cause. Once again taking into account the proven facts and the personality of the agent, we consider the sentence of 9 years in prison to be adequate.

## 4.7. The Court Rejects the Mitigating Circumstance Based on the Analysis of Evidence and Particular Circumstances of the Given Case.

### Extracts of good practice from the Republic Moldova

***File No 1-818/2020, 1-20038018-12-1-18032020 Chişinău District Court (Buiucani headquarters)***

***Summary of the Facts:*** *This is the same judgment as the one under point 5 above and therefore the factual context is the same.*

***Extracts of the Judgment of Chişinău District Court (Buiucani headquarters)***

The court notes that the offence provided for by Article 151 para. (1) Criminal Code, according to Article 16 para. (4) Criminal Code, is a serious criminal offence.

The argument of the defence according to which the mitigating circumstance would be retained in the case, the commission for the first time by M. L. of the offence provided for in Article 151 para. (1) Criminal Code, cannot be accepted. Or, Article 76 para. (1) let. a) Criminal Code provides for the commission of a minor or less serious criminal offence for the first time. Thus, in the situation where the offence established by Article 151 para. (1) is a serious one, the respective mitigating circumstance cannot be considered.

The court would like to mention that the other circumstances indicated by the defence, namely that: the defendant is employed, has a permanent place of residence, has not evaded criminal prosecution, according to Article 76 Criminal Code, do not represent mitigating circumstances, but the defendant's conduct during the criminal prosecution and the trial of the case will be taken into account in the individualization of the punishment.

### Extracts of good practice from Romania

***Judgement No. 234/22.12.2022, Botoșani Court – Criminal Division***
***www.rejust.ro/juris/39gg9d285***

***Summary of the Facts:*** *The defendant is brought to court by the prosecutor for domestic violence through murder and desecration of corpses. It was noted that on the morning of 05.04.2019 the defendant, aged 36, gave birth at her home in her village, to a child which she strangled, causing his death, and on the night of 05/06.04.2019 she set fire to the inanimate body.*

***Extracts of the Judgment of Botoșani Court – Criminal Division***

The defendant agreed with the trial of the case based on the evidence administered during the criminal investigation, but requested the application of a punishment below the special minimum considering the personal situation of the defendant and the lack of any criminal record.

The court rejected this defence on the grounds that the mitigating circumstance provided for by Article 75 para. (2) let. b) of the Criminal Code considering the manner of committing the acts, which reveal both the high level of seriousness of the criminal offences and the dangerousness of the defendant. Thus, in the summer of 2018, the defendant had a short-term relationship with an unknown man, with whom she had sexual relations and became pregnant. Out of shame, she did not tell anyone in the family and hid the pregnancy, but she travelled to the city, where she had medical check at the family physician's office, the pregnancy progressing accordingly. While she was at home, on the night of 04/05.04.2019, the defendant started to feel sick, and around 02:00-03:00, she started to give birth to the baby. Without telling anyone she went out to the yard and walked behind the animal stable, into a shed in which several goods were stored, namely corn cobs, raffia bags with clothing items, a pillow and boards. Around 05:00, the defendant gave birth by herself, without any help and without anyone in the house knowing. When the new-born began to scream and move, the defendant strangled him until he had no more vital signs, then put the body in a satchel and a raffia sack, hiding it under some corn stalks in the shed, after which she washed herself, returned to the house and went to bed, and after she woke up, during the day, she carried out household activities. After the defendant's parents went to bed, she took the corpse and put it in an oven (part of a summer kitchen) in the yard where she set it on fire, fuelling the fire throughout the night, and the next day she took out the ashes and threw it in the garden without telling anyone.

In the end, the court imposed on her the resulting sentence of 7 years and 2 months in prison for committing the two criminal offences.

## Extracts of good practice from Portugal

***<u>Process 2427/19.5PSLSB Judicial Court of Lisbon</u>***

***Summary of the Facts:*** *The case relates to several crimes of theft (for example, money and mobile phones) and one homicide from a group of perpetrators against different victims during a certain period of time. In the case of the homicide the Defendant alleged as mitigating circumstance the lack of intent to kill and the alleged resistance of the victim towards the perpetrator. The crime was committed in a park in the centre of the city in the evening and the victim died as a result of stabbing with a kitchen knife. The extract of the judgment below includes the assessment and findings of the first instance Court regarding aggravating and mitigating circumstances in relation to the different criminal acts of the Defendants, including the alleged lack of intent in the homicide which was rejected by the Court.*

***Extracts of the Judgment of Judicial Court of Lisbon***

With regard to the guilt of the defendant, attention must be paid to all circumstances that, not being part of the type of crime, otherwise there would be a double assessment of guilt, testify in favour or against the defendant, considering, namely, the degree of the unlawfulness of the act, its mode of execution, the intensity of the intent, the purposes or reasons that determined it and the personal conditions.

Indeed, all the circumstances for the individualization of the sentence imposed on the defendant must be considered in a balanced way,

Thus, in the circumstances that preceded, contemporaneous or subsequent to the commission of the crime and that influence the determination of the penalty, in order to materialize the type and severity of the same, the circumstances, unfavourable and favourable, must be considered:

The first (unfavourable):

- The high degree of unlawfulness of the facts, given the circumstances in which they occurred, the extent of the injuries and the treatments that some of the offended need, the succession of crimes, increasing violence and in a very short period of time (19.10.2019 to 28.12 .2019), the fact that they act as a group, in numerical superiority, approaching the offended individuals and/or young people, in isolated places and/or at night, the criminal motivation is linked to the frivolous will of stealing mobile phones, of more expressive economic value (easily suitable for being quickly and profitably instantly), to sell them for cash availability to buy more "showy" garments or go to parties/discos, not shying away from using and employing violence against third parties with a view to pure (and gratuity) satisfying selfish, vain and superficial interests;
- the existence of direct intent (in its most intense form);
- the self-complacent, self-centred and excusing speech revealed by all these defendants;

- the fact that the criminal record certificate of the defendant S. contained a previous conviction, for facts of a related nature, committed on XXX, final and unappealable on XXX, revealing indifference to a condemnatory confrontation with the penal system and Justice, denoting a personality averse to the Law, of total indifference to the conviction suffered and alien to respect for values with criminal protection and dignity, which aggravates, in a marked way, the needs for special prevention, whether negative or positive;
- the fact that the defendant S. left the place where the offended P. is located without providing any assistance, not even caring about it, and having the discernment to calmly leave the place, throw away, in a rubbish bin, the knife sheath, go home, clean the knife, leave the house again, that same night/early morning, to go sell the cell phone which had been taken from the offended F., denotes a total lack of critical sense, which was, moreover, reinforced by the content of his statements, in seeking to excuse his behaviour with the resistance of the offended P., by failing to recognize the force and retaliation (three) of the blows he struck while it was clearly demonstrated in the autopsy report;

The following circumstances are in favour of the defendants:

- the fact that they all denote social integration and family support, which also, and concomitantly, militates to their detriment, since such circumstances did not prevent the defendants from committing this succession of serious crimes, as well as having the economic, family and social conditions for them to adopt behaviours such as those described above, given that the three defendants have cohesive and professionally integrated family contexts;
- the youth of the defendants, however, also denote an immaturity, which is not ignored as a characteristic of age, but which is revealed in the lack of ability to decentralize their speech, with flaws in sequential thinking, devaluing the repercussions that their decisions affect the lives of third parties, as well as their patrimonial sphere;
- the acknowledgment of the facts, albeit in a partial way and with reservations, with a self-centred, self-complacent and excusing speech, because, despite verbalizing regret, the truth is that, the way in which they describe the facts is not yet accompanied by a revealing process of interiorization of the lack of value of the conduct, since, it can be seen that the defendants, even after hearing, for example, the witnesses D. and P. (facts that, in essence, they confessed), deny having thrown a punch or kicked;
- the fact that the defendants T. and B. are primary (without previous convictions).

## 4.8. Aggravating Circumstances are Taken into Consideration Only if the Court, Based on the Analysis of Evidence and the Circumstances of the Case, is Satisfied That the Relevant Aggravating Circumstance is Proven Beyond Reasonable Doubt.

### Extracts of good practice from the Republic of Moldova

***File No 1-18/2021,1-21001080-12-1-05012021 Chişinău District Court (Buiucani headquarters)***

***Summary of the Facts:*** *The person is accused of committing the criminal offence of Illegal circulation of drugs, ethnobotanicals or their analogues for alienation purposes, by two or more people, using the service situation; on the territory of educational institutions, social rehabilitation institutions, penitentiaries, military units, in places of leisure, in places where educational actions, training of minors or youth, other cultural or sports actions are conducted, or in the immediate vicinity thereof, in large proportions, Article 217/1 para. (3) let. b), d), e) and f) Criminal Code.*

***Extracts of the Judgment of Chişinău District Court (Buiucani headquarters)***

According to the provisions of Article 82 para. (1) – (2) Criminal Code, when applying the punishment for dangerous recidivism and particularly dangerous recidivism for criminal offences, the number, nature, seriousness and consequences of criminal offences previously committed, the circumstances under which the previous sentence was insufficient to correct the culprit, are taken into account, as well as the nature, seriousness and consequences of the new criminal offence. (2) The length of the sentence for dangerous and particularly dangerous recidivism cannot be less than one third of the maximum sentence provided for

in the corresponding article of the Special Part of this code. If only mitigating circumstances are established, the court may establish the sentence within the limits provided for an offence in the Special Part of this code.

The sanction provided for in Article 217[1] para. (3) let. b), e) f) CC, for natural persons, is a prison sentence of 3 to 7 years with the deprivation of the right to hold certain positions or to exercise a certain activity for a period of 3 to 5 years.

Considering the circumstances of the commission of the criminal offence, the role of organiser played by C. A. in the commission of the incriminated offence, the number of qualifying aggravating circumstances (3) distinct qualifying aggravating circumstances)), considering the fact that the defendant committed the criminal offence noted by this sentence in a state of dangerous recidivism, taking into consideration the general principles for the application of the punishment established in the content of the provisions of Article 61 para. (2) Criminal Code, arising from the nature of the criminal offence committed by the defendant which, according to the provisions of Article 16 para. (4) of the Criminal Code, is part of the category of serious offences, starting from the limits of the sentence established according to the provisions of Article 82 para. (2) Criminal Code, taking into account the increased social danger of the illegal circulation of drugs for the purpose of alienation, the court concludes that defendant C. A., for committing the criminal offence established by Article 42 para. (3) Article 217/1 para. (3) let. b), e) f) Criminal Code, shall be applied a main sentence in the form of imprisonment, for a term of 6 (six) years in prison, in a semi-closed penitentiary, as well as a mandatory complementary sentence - deprivation of the right to hold certain positions or to conduct activities related to the management and handling of narcotic, psychotropic or analogue substances for a period of 5 (five) years.

As mentioned, the case materials and the information taken from the National Courts' Web Portal reveal that by sentence No. 1-508/16 issued by the Chișinău District Court, Centre headquarters on 27.12.2018, C. A. was found guilty of committing the criminal offence established by Article 187 para. (2) let. b) e) f) Criminal Code. He received a prison sentence for a period of 5 years in a semi-closed penitentiary. The calculation of the respective term was ordered from 27.12.2018 with the application of the arrest to him from 27.12.2018.

According to the provisions of Article 85 para. (1) CC, if, after the delivery of the sentence, but prior to the full execution of the sentence, the convict has committed a new criminal offence, the court shall add, in full or in part, the unexecuted part of the sentence established by the previous sentence, to the punishment applied by the new sentence. In this case, the final sentence cannot exceed the term of 30 years of imprisonment, and in the case of persons who have not reached the age of 18 and of persons who have reached the age of 18 years, but have not reached the age of 21 years, who have not been previously convicted - the term of 15 years.

Under the respective conditions, by partially adding to the punishment established by this sentence (6 (six) years imprisonment, in a semi-closed penitentiary with the deprivation of the right to hold positions or exercise activities related to the management and handling of narcotic, psychotropic or analogue substances for a term of 5 (five) years) of the sentence established by sentence No 1-508/16 issued by the Chișinău District Court on 27.12.2018 (imprisonment for a term of 5 years in a semi-closed penitentiary with the calculation of the respective term from 27.12.2018, with the application of the arrest to him from 27.12.2018), the court imposes on defendant C. A. a definitive sentence in the form of imprisonment for a term of 7 years in a semi-closed penitentiary, with the calculation of this term from the date of delivery of this sentence, as well as with the inclusion in this term of the executed part of the established sentence by sentence No. 1-508/16, namely of the period from 27.12.2018 – 04.10.2021.

The court reiterates that, this sentence does not debate on the punishment established by sentence No. 1-851/17 issued by the Chișinău district court, Buiucani headquarters on 21.07.2021, as there is no information regarding its definitive nature in the case file. As regards the cumulation of the respective punishment to this sentence, another court is to subsequently reason, in the order of Article 469 para. (1) point 11 CCP.

## Extracts of good practice from Romania

***Criminal sentence No. 645/23.09.2021, District Court 3 Bucharest,***
***https://www.rejust.ro/juris/d5984528d***

***Summary of the Facts:*** *While he was in a store, the defendant stole a mobile phone worth 4000 lei from the victim's pocket. Given that he was wearing a mask on his face that covered his mouth and nose, the court retained the aggravated form of theft. The defendant defended himself by claiming that it was the period of the pandemic, and all citizens were required to wear a mask.*

***Extracts of the Judgment of District Court 3 Bucharest***

In rem, the defendant's deed which consists in the fact that, he stole the victim's mobile phone, of the brand iPhone X with IMEI series ###############4, from her pocket, taking advantage of the inattentiveness of the injured person, while he was wearing a mask on his face that covered his nose and mouth, while being at the Supeco store located in Bucharest Municipality, on 30.05.2021, around 08:57, meets the typical conditions of a crime of aggravated theft, provided by Article 228 para. 1 – 229 para. 1 let. c) Criminal Code. The material element of the objective side is achieved by the act of stealing an asset - the mobile phone, from the possession of another person, without their consent. The immediate consequence consists in the impact brought to the social relations regarding the possession of movable goods and the production of damage, by reducing the patrimony of the injured person with the value of the stolen asset. This would not have occurred in the absence of the defendant's criminal activities, thus proving the existence of the causal relationship. On the subjective side, the defendant acted with direct intent, according to Article 16 para. (3) lit. a) Criminal Code ("I noticed a mobile phone in the pocket of a woman's tracksuit top, which is why I decided to steal it" - defendant's statement on pages 54-56 of the record file), as he anticipated the damaging outcome for the property of the injured person and pursued its production by stealing the asset, without the consent of the person who owned it. The aggravating circumstance provided for by: Article 229 para. 1 lit. c) Criminal Code (by a masked person) as the defendant's face was covered with a surgical mask (record of video images captured by the surveillance cameras installed inside and outside the Supeco store, according to pages 25-37 of the criminal investigation file). In this regard, the court notes that, although, during the act of committing the crime, it was mandatory to wear a mask in closed spaces, it cannot be denied that the defendant took advantage of the legal provision precisely to commit the crime and not to be easily recognized. Based on provisions of Article 229 para. 1 let. c) of the Criminal Code it is noted that the legislator does not make a distinction regarding the aggravating circumstantial element retained in the case and does not condition it in any way, so that a contrary interpretation would be in disagreement with the legal provision. Moreover, the court appreciates that for the retention of the aggravating provided by Article 229 paragraph 1 let. c) Criminal Code it is not necessary to prove that the author wanted or sought to protect himself by disguising himself, considering also the circumstance that this aggravating circumstance is a real circumstance, and if it were deemed necessary to prove that the author disguised himself with the explicit intention of committing the theft, a special purpose would be added, which the legislator did not provide. Beyond these aspects, the court considers that the person who wears a mask, even if he is obliged by law to do so, foresees, and accepts that the theft will be facilitated, and the concealment of the crime will be easier taking advantage of the specific social context.

## 4.9. The Legal Qualification of the Acts of the Defence and the Reasons for Changing the Accusation in Favour of the Defendant Are Very Important Parts of the Decision Which Enable the Convict to Realize How Did the Court Come to the Imposition of a Penalty for a Particular Offence.

### Extracts of good practice from the Republic of Moldova

***File No. 1 ra-986/2018 Criminal College of the SCJ***

***Summary of the Facts:*** *P.R., was brought to justice for the fact that, with the purpose of appropriating another person's property, on 13.06.2016, he travelled to Pituşca village, Călăraşi district, where, through deception and abuse of trust, under the pretext of needing a laptop to engage in betting on the Internet, he acquired from P.E., a resident of xxxx village, xxxxx district, an ASUS 15.6 E502MABlue model laptop, having a value of 8,690 MDL, thus causing the injured party considerable damage (Article 190 para. (2) let. c) of the Criminal Code).*

***Extract of the Judgment of the Criminal College of the SCJ***

By analysing the legal classification of the defendant's actions based on the evidence investigated in detail by the court of first instance and the court of appeal, the court of ordinary review considers it necessary to reclassify them, based on the provisions of Article 10 Criminal Code, of Law No 179 of 26.07.2018 for the

amendment of some legislative acts in force from 17.08.2018, adopted after the delivery of the decision of the court of appeal, by which amendments to the provisions of Article 190 of the Criminal Code were introduced, which are in favour of the defendant. Thus, according to the new provisions of Article 190 para. (1) of the Criminal Code, it is considered a criminal offence of fraud - "the unlawful appropriation of another person's goods by deceiving one or more persons by presenting a false fact as true or a true fact as false, as to the nature, substantial qualities of the object, parties (if their identity is the determining reason for the conclusion of the legal act) of the null or voidable legal act, or if its conclusion is determined by the malicious or cunning behaviour causing considerable damage", at the same time the qualifying indices provided by Article 190 para. (2) let. c) of the Criminal Code being repealed - "causing considerable damage". Under the above, the enlarged Criminal Panel considers it necessary to quash the sentence of the Strășeni Court (Călărași headquarters) of December 13, 2017 and the decision of the Criminal Panel of the Chișinău Court of Appeal of January 18, 2018, in the part of the legal classification of the defendant's actions and the establishment of the sentence, taking into account the provisions of Article 10 para. (1) of the Criminal Code, which provides that "The criminal law that removes the criminal nature of the act, that eases the sentence or, otherwise, improves the situation of the person who committed the criminal offence, has a retroactive effect, i.e. 10 it extends to the people who committed those acts until the entry into force of this law, including on the persons who are serving the sentence or who have served the sentence, but have a criminal record". By way of consequence, the enlarged Criminal Panel invokes that, from the content of the new amendments to Article 190 of the Criminal Code, it follows that the legislator objectified the prejudicial actions and consequences by which the criminal offence of fraud is committed "the unlawful appropriation of another person's goods by deceiving one or more persons that caused considerable damage", moreover, the legislator adopted a more concrete concept as regards the methods by which the unlawful appropriation of another person's assets is committed, in the case of fraud, namely: a) by deceiving one or more persons by presenting a false fact as true; b) by misleading one or more persons by presenting a true fact as false. Thus, the court of ordinary review emphasizes the fact that through the legislative changes operated in the content of Article 190 of the Criminal Code, the actions of defendant P.R. were not decriminalized, the legislator did not change the concept of fraud or its content, but taking into account the case law of the European Court, the national and international recommendations, as well as the Decisions of the Constitutional Court of the Republic of Moldova regarding the clarity and predictability of the criminal rule, it replaced the pre-general phrases, previously used - "deception or abuse of trust", with more concrete, clearer injurious facts, methods and means of committing fraud. Therefore, the court of ordinary review concludes that the actions of defendant P.R. are to be reclassified based on Article 190 para. (1) of the Criminal Code (edited on 26.07.2018), according to qualifying indices "fraud, namely the unlawful appropriation of another person's goods by deceiving a person, with the conclusion of the voidable legal act determined by the cunning behaviour causing considerable damage", being found that defendant P.R., by his cunning behaviour, deceived the injured party P.E., as he borrowed the ASUS 15.6 E502MABlue model laptop from her, having a value of 8,690 MDL, for a short period, but, in reality, he appropriated it, because he did not return it to the injured party P.E., causing her considerable damage.

***File No. 1-818/2020 1-20038018-12-1-18032020 Chişinău District Court (Buiucani headquarters)***[104]

***Summary of the Facts:*** *The person is accused of committing the criminal offence (1) Intentional severe bodily injury or damage to health which is life-threatening provided for by Article 151 para. (1) of the Criminal Code of the Republic of Moldova. The court justified the legal classification of the deed. Under such conditions, the court assesses that, in this case, the defendant's deed meets all the mandatory distinguishing signs of the composition of the crime established by Article 151 para. (1) Criminal Code – intentional severe bodily injury or damage to health, which is life-threatening.*

***Extracts of the Judgment of Chişinău District Court (Buiucani headquarters)***

Regarding the classification of the offence based on Article 151 para. (1) Criminal Code, the following clarifications are made:

The ***special legal object*** of the detected offence is constituted by the social relations regarding the person's health. These social relations were affected by the criminal act conducted by the defendant, who, by stabbing the injured party in the abdomen, caused the latter bodily injury in the form of a penetrating stab wound at

104 The extracts from this judgment could be also used for point 3 above.

the level of the abdomen, hemoperitoneum in a volume of around 1000 ml of blood and which, according to this criterion, qualifies as serious bodily injury. It is noted that no circumstances have been established in the case that would exclude the social danger of the act committed by the defendant.

The ***material object*** of the criminal offence found is the body of the injured party C.C.

The ***objective side*** of the criminal offence found is expressed by 1) the prejudicial act expressed by the action of stabbing the victim with the blade of a kitchen knife, in the region of the abdomen, and 2) the prejudicial result expressed by the appearance of bodily injuries to the victim, in the form of a stabbing cut wound, penetrating at the level of the abdomen, hemoperitoneum in a volume of around 1000 ml of blood, which according to the forensic expert report No 202002D0426 of 19.02.2020, presents a danger to life and based on this criterion, qualifies as serious bodily injury and 3) the connection of direct causality between the prejudicial act (1) and the prejudicial consequences (2).

It is noted that element No. 1 is demonstrated by the statements of the injured party C. C. (f.d. 22), the statements of the witness M. S. (f.d. 29), the content of the minutes of the confrontation between the witness M. S. and the suspect M. L. (f.d. 94-95) and the content of the minutes of the confrontation between the injured party C. C. and the suspect M. L. (f.d.96-97).

Element No. 2 is demonstrated by the judicial expert report No 202002D0426 of 19.02.2020 (f.d.38-39).

Item No. 3 is proved by the statements of the injured party C. C. (f.d.22), the statements of the witness M. S. (f.d.29), the content of the minutes of the confrontation between the witness M. S. and the suspect M. L. (f.d.94-95) and the content of the minutes of the confrontation between the injured party C. C. and the suspect M. L. (f.d.96-97).

The ***subjective side*** of the criminal offence found is characterized by the direct intention of the defendant M.L., as she was aware of the prejudicial nature of her action, foresaw the prejudicial consequences thereof, wanted such consequences to occur and acted for the realisation thereof.

The defendant's direct intent is demonstrated by all the evidence in the record, including the statements of the injured party and witnesses. In the same way, this intention is also demonstrated by the conduct adopted by the defendant immediately after committing the prejudicial act, namely wiping the papillary marks from the *corpus delicti* - the kitchen knife. According to the forensic expert report No 34/12/1-R-742 of 27.02.2020 (f.d. 48-52) regarding the kitchen knife collected during the on-site investigation of 27.01.2020, conducted at the address in Chișinău mun., *****St., ap. **, presented for examination, no papillary marks were found. This fact leads the court to believe that actions were taken to hide the traces of the criminal offence and to destroy the incriminating evidence in order to prevent the establishment of the truth.

The ***reason*** of the criminal offence was the defendant's tendency to "punish" C. C. for his behaviour on the evening of January 26, 2020, especially for the fact that he approached her with too much familiarity, hit the apartment door hard on the evening of January 26, 2020 when he arrived together with the defendant's daughter and called the defendant with particularly familiar terms as "mamasha" or "mother", as well as for his inaction to leave the defendant's residence, at the latter's request, including the fact that he, at the request of the defendant's daughter, stayed in her room, where they consumed alcohol, smoked, had fun all night and also watched a movie. These conclusions are based on the defendant's statements, as well as the minutes of the confrontation between her and the witness M.S., as well as the victim C. C.

The ***subject*** of the criminal offence is the responsible natural person (f.d.91) – M.L., born on *****, who at the time of committing the prejudicial act - 27.01.2020 was over the age of 14 years, more precisely she was 53 years 5 months 15 days. Thus, it is found that the perpetrator of the criminal offence meets the mandatory conditions of the subject of the criminal offence (see Article 21 para. (1) and 22 Criminal Code of the Republic of Moldova).

As a result, the court notes that the facts committed by the defendant contain all the qualifying elements and signs of the criminal offence established by Article 151 para. (1) of the Criminal Code of the Republic of Moldova – intentional severe bodily injury or damage to health, which is life-threatening.

Judging on the issue related to the necessity of holding the defendant M. L. criminally liable for her commission of the criminal offence established by Article 151 para. (1) Criminal Code, the court considers that

no circumstances that would determine the release from criminal liability of the defendant in the given case have been established.

For these reasons, the defendant shall be found guilty and held criminally liable for committing the criminal offence established by Article 151 para. (1) Criminal Code.

## Extracts of good practice from Romania

***Judgment of the hearing from 12.02.2021, Galati Court,***
***www.rejust.ro/juris/34e22d323***

***Summary of the Facts:*** *The defendant is sent to court for aggravated theft committed during the night, allegedly stealing two perfumes from a store located in a mall-type building. The court changes the legal classification to simple theft. The solution is challenged by the prosecutor, but the Court of Appeal upholds it www.rejust.ro/juris/847g84d.*

***Extracts of the Judgment of Galati Court***

The defendant requested the change of the legal classification of the crime charged against him from the crime of qualified theft, provided for by Article 228 - Article 229 par. 1 let. b) Criminal Code to the crime of theft, provided by Article 228 para. 1 Criminal Code, through the defence attorney. He claimed that the circumstance of qualified theft at night starts from the criterion of reality and differs depending on the season but must also consider a certain realistic interpretation. In the case, this circumstance should not apply since the alleged act was committed in a commercial space. He also claimed that it was a busy period during the winter holidays and the employees' senses were not diminished by the darkness as there was light in the commercial space.

Having analysed the request to change the legal classification through the perspective of the claims, the evidence material and the relevant legal provisions in the case, the court notes the following: the indictment ordered the prosecution of the defendant for committing the crime of qualified theft, provided for by Article 228 para. 1 Criminal Code - Article 229 par. 1 let. b) Criminal Code. In essence, it was noted that the defendant stole two perfumes worth 685 lei from the premises of the store located inside the Shopping City mall by taking advantage of the inattention of the employees, on 10.12.2018, at around 6 p.m. To be able to retain this aggravating circumstance, it is necessary for the deed to be committed by the author after the darkness has replaced the light, the concrete determination to be made by the court according to the astronomical criterion. Nevertheless, the court notes that the application of this circumstance is conditional on the perpetrator taking advantage of the darkness when committing the act. In such conditions, the court emphasizes that this circumstance may not be retained when the alleged act is committed in a closed place with artificial lighting, where intense activity, of a public nature, in is carried out after dark, as well. In the present case, the alleged act would have been committed by the defendant in a public space, with artificial lighting. The alleged act would have taken place during business hours, with several people present, both employees of the injured person and customers. Given these considerations, the court finds that the defendant did not take advantage of the darkness, thus not being able to retain the aggravating circumstance. Consequently, the court will admit the request of the defendant and pursuant to Article 386 of the Criminal Procedure Code will order the change of the legal classification retained in his charge in the indictment, from the crime of qualified theft, provided for by Article 228 para. (1)- 229 para. (1) Criminal Code.

## Extracts of good practice from Portugal

***Case PCS989/22.9PBPDL Judicial Court of Acores – Ponta Delgada***

***Summary of the Facts:*** *The Defendant was charged with the criminal offence of domestic violence pursuant to Article 152 para 1, al. d) and No. 2 al. a) of the Criminal Code[105]. In particular, the Defendant is accused of verbally*

[105] **Article 152 (Domestic violence)**

1 - Anyone who, repeatedly or not, inflicts physical or psychological abuse, including corporal punishment, deprivation of liberty, sexual offenses or prevents access to or enjoyment of their own or common economic and property resources:

a) To the spouse or ex-spouse;

b) To a person of another sex or of the same sex with whom the agent maintains or has maintained a dating relationship or a similar relationship to that of spouses, even if without cohabitation;

c) To the parent of a common descendant in the 1st degree; or

d) To a particularly helpless person, namely on account of age, disability, illness, pregnancy or economic dependence, who cohabits with him;

*injuring the mother and threating to kill her. The mother was 71 years old, has cancer, being especially vulnerable due to the age and disease. The Defendant was previously convicted to 15 years imprisonment for the criminal offence of homicide, and 5 years suspended imprisonment sentence for the criminal offence of domestic violence against his ex-wife and daughters. He was also convicted before for the criminal offenses of driving without license and aggravated theft. The first instance Court considering the facts proven and not proven changed the legal qualification of the facts to lesser criminal offences - crimes of injury, threat, offense to physical integrity. The extract of the judgment below is the reasoning of the Court.*

***Extracts of the Judgment of Judicial Court of Acores – Ponta Delgata***

In this case, the factuality considered proven allows imputing to the defendant, in abstract, the practice of crimes of injury, threat, offense to physical integrity. But does it allow to fall in the type of criminal offense that he is accused of: the crime of domestic violence?

We consider that the answer to that question will have to be negative, since most of the facts imputed to the accused in the indictment have not been proven. Just the incident that occurred on 23.06.2022 was proven as well as the frequently existence of discussions between the accused and the offended party (victim) and in circumstances not specifically determined in which both argued, calling against each other “excommunicated” and “damned”, given that the accused called the mother a “whore”.

Considering the proven facts, we consider that they do not objectively have the seriousness necessary to violate the legal interest protected by the criminal offense of domestic violence. Although inexcusable, the defendant's behaviour appears in the context of a deeply dysfunctional family relationship, with exaltation not only on his part, but also on the mother's part, with the defendant under the influence of drugs.

It cannot be concluded from the proven facts that the conduct of the defendant has jeopardized the human dignity of the victim. It is true that the defendant, with his conduct, affected the victim's honour, frightened her and affected the victim's peace of mind. However, it does not appear from the file that a state of compression in her life has been consolidated in her personal freedom or a diminishing of the dignity that any human being is entitled to have. Indeed, the posture assumed by the defendant's mother, refusing to let go of her suitcase, which was pulled by the defendant who wanted to verify that his Integration Social Income check was there, and who in the discussions calls the defendant terms that replicate — partly those that the defendant addressed to her, denotes someone who, despite her age and health problems, has resilience and the ability to fight back, and not someone who is so fragile or feels so mocked and annulled that accepts everything.

We do not support the understanding that any physical or psychological aggression between any of the persons indicated in the aforementioned Article 152 of the Criminal Code, just because they assume such a quality, has to be part of the crime of domestic violence. The base type of each of the offenses into which that crime of domestic violence is broken down is sufficient whenever the circumstances in which the facts occur and their low gravity rule out the decrease in self-esteem and the will of those who are targeted of such behaviour.

---

e) To a minor who is his descendant or one of the persons referred to in subparagraphs a), b) and c), even if he does not cohabit with him;
shall be punished with a prison sentence of one to five years, if a more serious sentence does not apply under another legal provision.

2 - In the case provided for in the previous number, if the agent:
   a) Commits the act against a minor, in the presence of a minor, at their common domicile or at the victim's domicile; or
   b) Disseminates, via the Internet or other means of widespread public dissemination, personal data, namely image or sound, relating to the intimacy of the private life of one of the victims without their consent;
   is punished with imprisonment from two to five years.

3 - If the facts provided for in paragraph 1 result:
   a) Offense to serious physical integrity, the agent is punished with imprisonment from two to eight years;
   b) Death, the agent is punished with imprisonment from three to ten years.

4 - In the cases provided for in the previous numbers, including those in which a more serious penalty is applicable under another legal provision, the accessory penalties of prohibition of contact with the victim and prohibition of the use and carrying of weapons may be applied to the defendant, at least period of six months to five years, and the obligation to attend specific programs for the prevention of domestic violence.

5 - The accessory penalty of prohibition of contact with the victim must include removal from the victim's residence or place of work and its compliance must be monitored by technical means of remote control.

6 - Whoever is convicted of a crime provided for in this article may, in view of the specific gravity of the fact and its connection with the function performed by the agent, be inhibited from exercising parental responsibilities, guardianship or exercising measures relating to an adult accompanied by a period of 1 to 10 years.

In this context, the decision of the Court of Appeals of Coimbra, on the 29th of January 2003, is relevant, in which it considered that it is not simple, multiple or repeated acts that characterize the crime of ill-treatment of a spouse, what matters is that the facts, isolated or repeated, assessed in the light of the intimacy of the home and the repercussions that they may have on the possibility of living together, place the offended person in a situation that must be considered as a victim, more or less permanent, of a treatment incompatible with their dignity and freedom, within the marital environment.

In short, as the concrete circumstantiality in which the discussions took place did not result - namely who initiated them, what was said or their frequency, namely how many times the defendant called the offended party a "whore", "disgusting", it remains to be seen whether this has happened enough times for us to be faced with repeated behaviour as defined by the criminal offense of domestic violence.

In other words, we believe that the facts found are scarce for the Court to be able to conclude by reiterating the behaviour. But it also seems to us that objectively looking at the situation that occurred on 23.06.2022, the same despite truly reprehensible, it does not assume a special gravity that allows it to fill in, by itself, the criminal offense of domestic violence.

The Defendant insulted his mother on the street, it's true, and he wouldn't let her into the house, but the words he used (the usual ones in this type of situations) and his action when he pulled the suitcase from his mother's arm (which wasn't particularly violent or persistent, as the victim kept the suitcase with her and the intervention of the neighbours to hold it was momentary), are not particularly serious. All the behaviour of the defendant is reprehensible, but taking into account what we have explained above, we understand that the defendant, with his conduct, did not fulfil the objective elements of the criminal offense of domestic violence provided for in Article 152. Para. 1, item d), and 2, of the Criminal Code.

However, since the type of offense imputed to the defendant was not filled in, this did not mean that his behaviour was not part of the practice of crimes of injury and threat, and the commission of the crime of offense to simple physical integrity may still be equated, pursuant to Articles 143, 153, paragraph I and 155, paragraph 1, paragraph a), and 181 of the Criminal Code.

Article 143 (Offense to physical integrity) of the Criminal Code punishes anyone who offends the body or health of another person. With such incrimination it is intended to protect the physical integrity of the human person, a legal right endowed with constitutional dignity (cf. Article 25 of the Constitution of the Portuguese Republic).

Analysing the objective type of offense, it appears that the law distinguishes two modalities: offenses to the body and offenses to health.

The objective type is completed by verifying any offense to the body or health, regardless of the pain or suffering caused; it can exist without any external injury — ethical-social concept of aggression (cf. AC. S.T.J., plenary of the criminal sections, 12/18/1991, D.R., 1-A, 02/08/1992; Maia Gonçalves, "Código Penal Português Anotado", 1997, 1st Edition, page 482; Rui Pereira, "Journeys on the revision of the Criminal Code", AAFDL, 1998, page 185, Leal Henriques/ Simas Santos, "Código Penal Anotado ", King of Books, 2nd Edition, page 134).

Article 181 (Injury) of the Criminal Code, in turn, punishes anyone who offends another person, imputing facts to him, even in the form of suspicion, or saying words that are offensive to his honour or consideration. This incrimination is intended to protect honour seen as a complex legal interest that includes either the personal or inner value of each individual, rooted in their dignity, or their own reputation or external consideration - José de Faria Costa, "Commentário Conimbricense" tomo I, Coimbra Editora, 1999, 607.

Honour constitutes the range of ethical values that each person possesses, such as character, loyalty, probity, rectitude, that is, subjective dignity, the personal and internal heritage of each one; and the consideration, the merit that the individual has in the environment social life, that is, good name, credit, trust, esteem, reputation, which constitute objective dignity, the heritage that each one acquires throughout his life (AC. R. L. , 10/26/2000, c.J., IV, 154).

The base type/conduct of the crime of threat, in turn, is provided for in article 153 para. 1 of the Criminal Code. Such an offense punishes anyone who threatens another person with the commission of a crime against life, physical integrity, personal freedom, sexual freedom and self-determination or property of considerable

value, in an adequate way to provoke fear or uneasiness or to impair his or her freedom of determination. The conduct is aggravated, in what matters now, whenever the threat is made by means of a threat with the commission of a crime punishable with a prison sentence of more than 3 years, in compliance with the provisions of article 155, paragraph 1, subparagraph a), of the Criminal Code.

For its consummation, it is necessary that the perpetrator intends to inflict on another an evil that constitutes a crime, produces in him: I) fear or restlessness; 2) loss of freedom of determination.

On the other hand, the threatened evil must be future and not imminent. After the amendment of this provision, introduced by Decree-Law No. 48/95, of March 15, in order for the crime of threat to be considered committed, it is no longer required that the same cause an effective disturbance in the freedom of the person threatened or that it causes fear or uneasiness, provided that, according to common experience, it is adequate to provoke such situations or to impair their freedom of determination. Therefore, such a crime is no longer a crime of result and damage, becoming a crime of mere action and danger.

As highlighted in the judgment of the Court of Appeal of Coimbra, of 16/03/2000 CJ, 2000, currently, the crime of threats is a crime of concrete danger, requiring that the threat be, in the concrete situation, adequate to provoke the offended fear or restlessness.

Concretizing what has just been exposed, we will say that to fill in the respective type/conduct it is not necessary that, in concrete terms, the threats have provoked fear or uneasiness in the threatened person; it is enough that they are adequate to provoke those moods in him. The criterion for judging the adequacy of the threat to provoke fear or concern, or to undermine freedom of determination, must be objective and take into account the concrete objective situation, in the sense that the threat must be considered adequate, taking into account the circumstances in that is uttered, as well as the personality of the agent and the susceptibility to intimidate or unsettle any person in that situation, and should also highlight the psychic-mental characteristics of the threatened person.

The threat being aggravated, as it is with the commission of a crime of homicide, and, therefore, a crime punishable with a prison sentence of more than 3 years. When practiced against a particularly defenceless person, due to age, disability or illness, the behaviour is equally aggravated, but by paragraph b) of the same legal provision.

In subjective terms, any of the offenses requires intentional behaviour, in any of its forms.

In view of the proven facts and better described in points 6, 7, 9, II, and 12 of the proven facts, we find that the requirements just stated are verified, since the attitude and expressions uttered by the defendant, addressing in a serious tone and intimidating the offended party, in the context in which the accused acted while being visibly excited, under the influence of drugs, and not having refrained from acting even in the presence of third parties in a climate of dysfunctionality, of latent tension in the family, make the possibility of verifying the threatened harm more credible, which lead us in a linear fashion to the suitability of the threat to provoke fear or uneasiness in the offended party, added in this case because the defendant has already been convicted of committing two crimes of homicide, even in the attempted form. Also calling the mother a “disgusting whore” and other expressions given as proven, and having pulled the suitcase, allow subsuming the conduct of the defendant to the other offenses indicated above: offense to physical integrity and injury.

Indeed, the words and expressions addressed by the accused to the victim have a meaning that is understood by the entire community as an attack on the honour of any person, they have an objectively offensive value, something that the accused was well aware of. But also, by having pulled the victim's suitcase, exerting force and having resistance on her part, he knew that it could cause pain and eventually an injury to the victim, which he also knew to be prohibited behaviour and punished by law, and with which he conformed.

Despite the fulfilment of the provisions of paragraph a) of paragraph 1 of Article 132 of the Criminal Code, it does not appear to us that the defendant's behaviour falls within the provisions of Article 145 (Offense to physical integrity qualified), paragraph 1, paragraph a) and paragraph 2, of the Criminal Code, as it is not particularly censorable and/or perversity.

Indeed, the "*special censure" refers to "(...) conduct in which the special judgment of guilt is based on the refraction, at the level of the perpetrator's attitude, of especially invaluable ways of realizing the fact, and the "special perversity"*

*those in which the special judgment of guilt is based directly on the documentation of the fact that the perpetrator's personality qualities are especially disadvantageous* " Commentário" 29).

In the present case, and not intending to hide the defendant's action, he pulled with moderate violence the suitcase that the victim was carrying, causing it to be pulled, it is true, but the form of action was not especially virulent if it had been. If the victim had been offended, she would have had some type of injury or would have dropped the suitcase — the defendant's objective was to access that same suitcase because he was convinced that the victim had her (the defendant's) Integration Social Income[106] check, which happened when she was under the influence of narcotics. As we have already stated above and we reaffirm, the defendant's behaviour is harmful, worthless and unjustified, but his actions do not show any special censure, which deserves a qualified punishment.

Thus, and not verifying any causes that justify the illegality or that exclude the guilt, the accused committed facts subsumable to the criminal offenses of simple physical integrity, aggravated threat, and of injury, foreseen by Articles 143, No. 1, 153, 155 No. 1, paragraph a) and No. 2, and 181 of the Criminal Code, since its objective and subjective elements are fulfilled.

Taking this in consideration, it is necessary to analyse the necessary consequences of the different legal framework given to the conduct of the defendant.

And we state that the defendant can only be convicted of committing the crime of aggravated threat, foreseen and punished by Articles 153, 155, paragraph 1, paragraphs a) and b) of the Criminal Code, but not for the commission of crimes of offense to physical integrity and injury perpetrated against his mother.

Indeed, the crime of injury is of a particular nature[107], depending, to that extent, on a particular accusation under the terms of Article 188, paragraph 1, of the Criminal Code, so that, since the offended party has not constituted herself as assistant nor submitted the competent accusation/indictment, the defendant cannot be punished for committing such an offense, as the Public Prosecutor's Office lacks the legitimacy to prosecute the defendant for such facts.

Moreover, neither can the defendant be punished for committing the crime of offense to physical integrity.

In fact, such an offense is of a semi-public nature, in accordance with the provisions of Article 143, paragraph 2, of the Criminal Code, and, as such, admits the withdrawal of a complaint, in the combined terms of those legal provisions with Articles 116, para. 2, 117, all of the Criminal Code, for which reason, as we had already anticipated, it is necessary to approve the withdrawal of the complaint previously required by the injured party, which was not opposed by the defendant.

## 4.10. Courts Should Justify the Imposition of Imprisonment Where the Criminal Code Provides for an Alternative Sanction.

### Extracts of good practice from the Republic of Moldova

***File No. 1 ra-986/2018, Criminal College of the SCJ***
***http://jurisprudenta.csj.md/search_col_penal.php?id=12222***

***Summary of the Facts:*** *The facts are the same as the judgment of the SCJ in point 8 above.*

***Extracts of the Judgment of the Criminal College of the SCJ***

The enlarged Criminal Panel notes that when determining the defendant's sentence, it will fully take into account the provisions of Article 75 of the Criminal Code, which stipulates that the person found guilty of committing a criminal offence shall be given a fair sentence within the limits set in the Special Part of this Code and in strict accordance with the provisions of the General Part of this Code. The general criteria for the individualization of the sentence can be defined as those rules, principles, provided in the Criminal Code,

[106] RSI – Rendimento Social de Integração

[107] In Portugal there are crimes of particular nature which requires the accusation/indictment by the victim/injured party who has to request to be constituted as an assistant in the proceedings. There are semi-public crimes which requires the complaint by the victim/injured party to initiate the criminal proceedings who also have the right to withdraw the complaint and public crimes which are initiated ex officio by the Prosecution.

which the court should take into account when determining the type, duration or amount of the sentence within the operation of its individualization. The term of sentence, apart from the seriousness of the criminal offence committed, is established taking into account the person of the guilty person, which includes data on the degree of mental development, the material, family or social situation, the presence or absence of criminal antecedents, the defendant's behaviour prior or after the commission of the criminal offence. Thus, the enlarged Criminal Panel considers that the person declared guilty should be given a fair sentence, within the limits of the sanction of the article on the basis of which the person pleads guilty. The enlarged Criminal Panel concludes that when individualizing the defendant's sentence, it will take into account the general principles of individualizing the sentence, the gravity of the less serious offence, the personality of the culprit, who was held criminally liable twice under Article 186 para. (2) of the Criminal Code (f.d. 47), has several contraventional violations (f.d. 51), is positively characterized (f.d. 55), did not return the damage caused to the injured party, is not in the records of the narcologist and psychiatrist, lack of mitigating or aggravating circumstances, as well as the influence of the sentence applied for his correction and re-education, achieving the purpose of the criminal sentence provided by Article 61 para. (2) of the Criminal Code, restoring of social equity, the correction and resocialization of the convict, as well as the prevention of the commission of new criminal offences, both by him and by other persons. Therefore, in view of the above, the court of review reaches the conclusion to impose on the defendant the sentence in the form of imprisonment, within the limits of the sanction provided by Article 190 para. (1) of the Criminal Code (drawn up 26.07.2018), with the execution of the sentence in accordance with the provisions of Article 72 para. (3) Criminal Code in a semi-closed type penitentiary, which will ensure the achievement of the purpose of the sanction, contributing to the re-education of the defendant, to the forging of his new attitude towards the legal order, the rules of social coexistence and moral principles.

## Extracts of good practice from Romania

***Decision No. 677/07.05.2021, Cluj Court of Appeal – Criminal and Juvenile Division, Romania,*** ***www.rejust.ro/juris/4dg585g9***

***Summary of the facts:*** *The Cluj Court sentenced the defendant, a university professor, to a sentence of 3 years of imprisonment with suspension under supervision, for the criminal offence of taking bribes from students, in a repeated manner (43 material documents) so that they would pass the exams by knowing the subjects in advance or without even showing up for them. The Prosecutor's Office appealed regarding the manner of enforcing the sentence. The court agreed and ordered the execution of the sentence in prison.*

***Extracts of the Judgment of Cluj Court of Appeal – Criminal and Juvenile Division***

Thus, upon the judicial individualization of the sentence, the Court took into account the general criteria contained in Article 74 of the Criminal Code namely the nature and seriousness of the criminal offence committed, in relation to the concrete circumstances of its commission, the criminal period found, the special limits of the sentence, as well as the dangerousness of the offender in the light of the fact that he is a graduate of higher education, having the title of PhD Professor of Engineering and is at his first confrontation with the criminal law, committing this offence at the age of 66, after a life dedicated to the teaching profession. On the other hand, the assumption of responsibility for the criminal activity conducted was not complete, there being, however, a partial acknowledgement of some of the material acts imputed to him, even if during the phase of the judicial investigation he chose to be tried in the usual procedure and the amounts of money received added up are not significant, even if the criminal conduct, as a whole, is serious, from the perspective of reprehensible conduct by a university staff, who, in order to obtain undue benefits, encouraged the lack of study on the part of students and the passing of exams based on unprofessional criteria. For these reasons, the court sentenced the defendant to 3 (three) years in prison.

On the other hand, the Court found that the requirements for suspending the execution of the sentence under supervision provided for by Article 91 of the Criminal Code are fulfilled, considering the amount of sentence imposed on the defendant, which does not exceed 3 years in prison, the fact that he has not previously been convicted and has expressed his agreement to perform unpaid work for the benefit of the community, in the opinion of the court the application of the sentence being sufficient, even without its execution, for the defendant not to commit other criminal offences in the future, being however necessary to supervise his

conduct for a certain period of time. This is in the conditions where, despite the fact that the criminal activity of this defendant is serious and reprehensible, we appreciate that the defendant's age and higher professional training will contribute to keeping him out of the criminal illicit and will determine a reconsideration of his values and a commensurate social reintegration.

The Court of Appeal found that the purpose of the sentence is to prevent the commission of further offences, for the person involved and for the general public. This is achieved through the coercive function of the sentence (which involves a deprivation of rights of the defendant), the re-education function (which involves removing the anti-social habits of the defendant), but also through the exemplary and dissuasive function of the sentence, which aims to determine other possible subjects of criminal law to avoid committing new criminal offences, due to the consequences to which they expose themselves.

However, in order for the sentence to fulfil its functions and the purpose defined by the legislator, it should correspond, in terms of its duration and nature, to the seriousness of the act committed, the potential for social danger that the defendant actually poses, but also to his ability to better himself under the influence of the sanction. Therefore, it is established as a matter of principle that the achievement of the double purpose - educational and preventive - of the sentence is essentially conditioned by its appropriateness, the duty of the court of law being to ensure a real balance between the seriousness of the deed and the dangerousness of the offender, as well as the duration and manner of executing the sanction on the other hand.

In the process of individualization, the Court notes that the court of first instance referred to all the criteria provided by Article 74 of the Criminal Code, respectively the circumstances and manner of committing the offence, the state of danger created for the protected value, the nature and seriousness of the result produced or other consequences of the offence, the reason for committing the offence, the conduct after the commission of the offence and during the criminal process, the level of education, age, state of health, family and social situation, referring to the special limits of the sentence provided by the incriminating text. Regarding the degree of social danger of the criminal offence charged to the defendant, the court correctly assessed that it is high, however, in relation to the relatively small sums received by the defendant and the fact that he partially assumed the facts, the individualization of the execution of the sentence was ordered under supervision.

The reasoning presented by the first instance in relation to those revealed by the judge is a correct one, but the Court observes that, in this analysis, not all the circumstances, criteria and elements that need to be evaluated in order to decide on the method of executing the sentence, were taken into account.

First, we will note that, as regards the duration of the sentence imposed on the defendant, namely 3 years imprisonment, located at the minimum limit, it was justly individualized by the court, the defendant not being known to have a criminal record, and with regard to the method of execution chosen by the Court, by means of detention, this duration of 3 years is considered sufficient, corresponding to the seriousness of the deed and able to respond to the purpose of the sentence.

The Court found the appeal of the Prosecutor's Office as well-founded in terms of the effective execution of the sentence, in which sense it took into account the elements related to the person of the defendant (who did not accept his actions even when faced with the irrefutable evidence of guilt, an aspect that reveals his resistance to reformation). The Court also took into account the seriousness of the act itself, beyond the theoretical, abstract aspects (criminal offence of corruption), the effects of a conduct like that of the defendant, in the education system, and the need to adopt an appropriate, dissuasive sanction, so that this kind of behaviour is not to be repeated.

The law does not show those elements that the court should take into account in order to assess whether or not the suspension under supervision of the execution of the sentence is required, thus leaving the courts the widest possibilities in terms of detecting and assessing their significance. In these conditions, in addition to the seriousness of the act in its concrete materiality, the court ought to conduct a complete analysis of the offender's personality, monitoring, in this respect, his behaviour in social life, at the workplace, prior and after the commission of the criminal offence and only as long as it is proven that the commission of the deed is due to an accidental combination of circumstances and that, for its correction, the effective execution of the sentence is not necessary, its suspension can be ordered.

Of course, this attempt is granted, if from the circumstances of the facts and from his previous conduct, it follows that he deserves and justifies the expectations according to which his conduct will be good in the future even without the execution of the sentence.

An essential condition for the application of suspension of the execution of the sentence under supervised, is, without a doubt, the subjective ability of the defendant to correct himself, to free himself from the mentality and antisocial habits that led him to the path of crime, through efforts made under the threat of the sentence, to which he was convicted and from whose execution he can escape only through a correct conduct and, therefore, through self-re-education. This condition cannot be considered fulfilled in advance based on the presumption that any criminal is capable of such an effort. On the contrary, the real possibility of correction that the defendant would be capable of should be found, a finding that has to result from certain objective data, reflecting this possibility. It is understood that the main source of this data is the previous conduct of the defendant and his behaviour in the actual commission of the criminal offence for which the manner of executing the sentence is to be analysed. If regarding the previous conduct, the documents in the file reveal that the defendant has not crossed the criminal line, as regards the conduct in the present case and during the commission of the offences under analysis, the Court finds a serious lack of moral benchmarks and, consequently, a serious negligence in assuming responsibility, which means that the defendant did not realize the seriousness of his actions nor the effects of such conduct on the part of a teacher, a person who should be a benchmark for his students, in a true model of life. The ease with which the defendant accepted both his bribery and the students' lack of preparation or even their absence from the exam, denotes that, for the defendant, his teaching job meant nothing more than a source of undue benefit that had to be exploited during the exam session.

Therefore, the conduct proven in the case in the charge of the defendant does not appear as an accidental deviation, conjuncture or passing episode, but appears to be a real way of life for him. When a person has committed an offence, the presumption that he will commit another one in the future is well-founded, sociological studies showing that once the inhibitions and psychic resistances are overcome, a much smaller effort is required to repeat an act, every time inside the individual there is an indubitable tendency to perform those behaviours.

In relation to the concrete way of committing the acts and the person who committed them, the term of the sentence ensures the concrete achievement of the goals of the sentence, and its execution, through deprivation of liberty, will give the opportunity for the defendant, through the educational programs conducted in a closed environment, with the valorisation of his abilities, even by restricting the freedom assumed by such a method of execution, to become aware of the consequences of his actions, with a view to his real social reinsertion.

## Extracts of good practice from Portugal

***PCS989/22.9PBPDL, Judicial Court of Açores – Ponta Delgada***

***Summary of the Facts:*** *The Court determined imprisonment in relation to the case referred in point 7 where the applicable law foresees the possibility for alternative sanction. The extract of the judgment below is the reasoning of the Court to sentence on effective imprisonment (9 months) and not apply fine, suspended sentence, work in favour of community or regime of permanence in the house.*

***Extract of the Judgment of Judicial Court of Açores – Ponta Delgata***

*Determination of the punishment*

The crime of threat is punishable by imprisonment of 1 month to 2 years or with a fine of 10 to 240 days (Articles 41, No. 1, 47, No. 155, No. 1, and 155, paragraph 1, a), all of the Criminal Code). As a result, alternatively, deprivation and non-deprivation of liberty are applicable. Article 70 of the Criminal Code provides that, if a custodial sentence and a non-custodial sentence are alternatively applicable to the crime, the court must give preference to the second whenever it adequately and sufficiently fulfils the purposes of the punishment, provided for in Article 40 of the same diploma.

In the case, the demands for general prevention are high, given the frequency and tendency with which people decide to resolve their conflicts by threatening their fellow citizens. The demands of raising the defendant's awareness of the need to conform his conduct to legal-criminal values (special positive prevention) are very high.

Indeed, we are dealing with an eclectic and recurrent offender, who has four previous convictions for crimes as diverse as driving without a legal license (1), aggravated theft (1), attempted murder (2) and domestic violence (3). Penalties of fines, suspended imprisonment and effective imprisonment have already been sentenced to him, but not even these previous convictions have definitively removed him from committing other crimes, not having constituted sufficient warning for the need to start to guide his behaviour in accordance with the values protected by the legal system.

In the confrontation of the alternative between imprisonment and a fine, the application of a fine is not considered sufficient and adequate to achieve the purposes of punishment — protection of legal interests and reintegration of the convicted person.

It is important that the punishment proves to be suitable for making the defendant feel that his conduct is not in line with what was required of him, and the need to guide his future actions accordingly. Thus, and in short, we understand that the conviction of the defendant in a punishment other than imprisonment would result in a feeling of impunity and discredit of the Law.

(…)

*The non-replacement of the prison sentence by a fine:*

Pursuant to Article 45, of the Criminal Code, the prison sentence applied for a period not exceeding one year is replaced by a fine or other non-custodial sentence, except if the execution of the prison is required by the need to prevent the committing future crimes.

Now, in the present case, despite the concrete determination of the penalty being less than one year, it is understood that it should not be replaced by a fine, under the terms provided for in Article 45 of the Criminal Code. In effect, the defendant committed the acts that are the subject of the present case file during the full period of probation, and less than 1 year after being sentenced to a single sentence of 5 years in prison, even if its execution was suspended, for the commission of 3 crimes of domestic violence. In view of this circumstantiality and taking into account the circumstances of the defendant's life that have been proven, we understand that there is a real danger of committing crimes of the same nature again, with the need to prevent recidivism that prevents the option of replacing the prison sentence for the fine.

*Non-replacement or suspension of the prison sentence:*

Pursuant to Article 50, paragraph 1, of the Criminal Code, the court suspends the execution of the prison sentence applied for a period not exceeding 5 years.

The existence of a favourable prognosis regarding the defendant's behaviour constitutes a material precondition for suspending the execution of the prison sentence. And, as Professor Figueiredo Dias mentions (in Portuguese Criminal Law — the legal consequences of the crime, page 343), "*in formulating the aforementioned prognosis, the court refers to the moment of the decision, not to the moment of the practice of the fact.*"

The purposes of special prevention of socialization that are at the basis of the suspension of the execution of the prison sentence are: the political-criminal purpose that the law aims with the institute consists of "*removal of the delinquent, in the future of the practice of new crimes and not any correction*", "*decisive here is the minimum content of the idea of socialization, consubstantiated in the prevention of recidivism*" (Figueiredo Dias, op.cit.).

The perpetrator's guilt plays no role here. The existence of previous convictions does not prevent the granting of suspension, although, in this situation, the favourable prognosis regarding the defendant's behaviour becomes more demanding.

In any case, what is at stake here is not just any certainty, but the well-founded hope that socialization in freedom can be achieved, the Court must be willing to take a certain risk — founded and calculated - on the maintenance of the perpetrator at liberty (Figueiredo Dias, in "Portuguese Criminal Law - The Juridical Consequences of Crime I', Notícias Editorial, 1993, page 344).

However, we believe it is clear that in the present case this judgment of favourable prognosis cannot be made. Considering the defendant's criminal record, revealing a personality marked by difficulties in adapting to the limits and standards defined by legal norms, and the insensitivity of the need to change his behaviour, it does not seem to us that the simple censorship of the fact and the threat of imprisonment adequately and sufficiently accomplish the purposes of punishment.

As the case file demonstrates, the defendant has already received fines, suspended imprisonment and actual prison sentences, and none of them had the potential to make him change his behaviour, so it is not possible to have any founded hope that socialization in freedom can be achieved (F. Dias, op. cit., 344).

The ineffectiveness of the non-custodial penalty for the purposes of punishment is duly demonstrated in the case file. The solemn warning which those condemnations should have constituted, did not have the desired effect. The defendant has already been warned that criminal behaviour was inadmissible.

And, having to and being able to choose the path of rehabilitation right away, he opted to relapse into the practice of new typical illicit acts, demonstrating, through acts that he assumed and that only he can be blamed for, that he had a personality with a tendency to commit crimes, which are relevant for the requirements of prevention, whether general or special (which are the only ones to consider when choosing the concrete penalty) and above all the latter.

None of the circumstances analysed above point in favour of the defendant, as the creditor of a trust that he did not know how to take advantage of and that he himself frustrated by committing a new typical illicit act.

Incidentally, paradigmatic of the inadequacy of the suspension of the prison sentence is the circumstance of the facts object of the present case that occurred in the middle of the period of parole. Indeed, the defendant was serving a (single) sentence of more than 15 years and 6 months in prison, was released on parole on 30.11.2019, remaining on probationary period until 30.1.2014, and despite knowing the consequences that would arise for him from committing illicit acts during that period, he still committed a crime again. That is, not even the prospect of having to serve 5 years in prison, if the parole was revoked, made him change his behaviour.

But even more preponderant than this circumstance, and which leads the Court to definitively rule out the possibility of making any judgment of favourable prognosis, is the existence of a recent conviction, of 09/09/2021, final on 02.11.2021, in which the defendant was convicted of committing 3 crimes of domestic violence in a single sentence of 5 years in prison. In these records, the sentence was suspended, subjecting the defendant to a probationary regime. And despite this conviction, the accused returned, once again, to delinquency. And he did it not only in the full period of parole, but also in the middle of the suspension of a prison sentence.

He went back to committing new typical illicit acts, even knowing that the practice of new illicit acts could represent for him, at the limit, not only a new conviction, but also having to serve another 10 years in prison. Even admitting that he was not given support by the competent authorities at the time of his probation, even admitting that the test regime imposed on him was not yet fully implemented, even so, the ultimate responsibility lies with the defendant himself, who instead of staying away from drug use, fell back on those same consumptions.

In short, it is clear that the aforementioned prison sentence should not be suspended in its execution, as there is a real danger of recidivism, that is, of committing new crimes, and the Court cannot make any judgment of favourable prognosis like the mere threat of the fulfilment of the prison sentence will make the defendant rethink his behaviour and will avoid, in the future, the commission of other crimes. However, we also understand that **replacing the prison sentence with work in favour of the community is not appropriate in this case.**

As mentioned in the judgment of the Court of Appeal of Coimbra, dated 03/10/2004, when referring to the penalty of performing work in favour of the community: "*This penalty is justified (imposed) when, on the one hand, the special prevention of socialization requires it and, on the other hand, the minimum required for the protection of the legal interests in question. (...) Unlike all the others, it does not have the specific purpose of negative personal punishment. It presupposes, on the one hand, that the acts committed do not require a real punishment of a personal nature* ".

It also refers in that same judgment that when the defendant: (...) *by his previous recurrent behaviour and by the antisocial manifestations of his current conduct, reveals a clear lack of preparation of his personality to behave lawfully, such penalty shall not be applied*." (in DGSI database, in www.dgsi.pt/jtrc).

In the present case, and considering the proven fact, we understand that the defendant's behaviour lacks a true personal punishment, to which is added the fact that the defendant reveals a tendency to commit an offense, implying such a lack of preparation of his personality to behave lawfully.

In short, we understand that the ineffectiveness of the non-custodial sentence — or a non-detention way of executing the prison sentence - for the fulfilment of the purposes of the punishment is duly demonstrated in the case file, so we conclude that it is not necessary to replace the prison sentence applied for performing work in favour of the community, nor proceed with its suspension, otherwise the purposes of the punishment would not be carried out in an adequate and sufficient manner.

Lastly, the **regime of permanence in the house**, provided for in Article 43 of the Criminal Code, is not adequate and sufficient for the purposes of punishment. As decided in the judgment of 11.12.2018, of the Court of Appeal of Lisbon, issued within the scope of file 48/15.0PEPDL, "*The material prerequisite for applying this replacement penalty is that it is suitable for the purposes of executing the penalty of prison. The choice of this replacement sentence, like any other, is exclusively determined by considerations of a preventive nature, whether general prevention or special prevention. (...) In effect (...) with the criminal conduct of the file, the appellant shows an indifferent personality to the previously suffered convictions, including effective imprisonment, two were suspended in their execution, and another in effective imprisonment*".

*Indeed, the reasons for special prevention already mentioned above are pressing and are clearly obstacles to concluding that the execution of the single prison sentence set forth in the present case file under a regime of permanence in the dwelling adequately and sufficiently fulfils the resocialization purposes that this case imposes, as it compromises any prognosis of adherence to the obligation to remain in the dwelling that characterizes the analysed regime, making the necessary favourable judgment unfeasible in the sense that this form of execution of the prison satisfies the needs of special prevention identified in the concrete case*.

*The purposes of special prevention are, therefore, decisive here in order to consider that the regime of permanence in the dwelling proves to be insufficient and totally inadequate, which prevents the fulfilment of the material assumption on which its application depends*.

And the considerations woven there, we believe are fully applicable here. The Defendant proves to be an impulsive person, who has not yet internalized the need to conform his behaviour to the rules of life in a community with consequences, of which the present case files are paradigmatic. Taking into account the defendant's life path, his personality averse to complying with rules and external intervention, the nature of the offense in question, the way in which it was committed, its motive, the defendant's background, his drug addiction, the lack of a normative figure of reference capable of containing the impulses of the defendant, suggest that, giving in to an impulse, the defendant could once again commit new illicit acts.

In view of all these circumstantial circumstances, the Court concludes that it is impossible to apply such a substitution penalty to the accused due to the exposed needs for reprobation and crime prevention (Articles 40, No. 1, and 70, both of the Criminal Code). In short, the only way left is the effective fulfilment of the fixed prison sentence, otherwise the purposes of the punishment will not be adequately and sufficiently fulfilled.

## 4.11. The Reference to the Case Law of the European Court and Constitutional Court Should Not Be Formalistic.

### Extracts of good practice from the Republic of Moldova

***Reference to the European Court case law***

***File No. 1ra-1057/2020 Criminal College of the SCJ***
***http://jurisprudenta.csj.md/search_col_penal.php?id=16899***

***Summary of the Facts:*** *F. G. was accused of the fact that during the period 30.06.2014-01.07.2014, the exact time was not established by the criminal prosecution body, in xxxxx village, xxxxx district, at his home, acting systematically, deliberately and with the aim of causing bodily harm, knowing with certainty the minor age of xxxxx xxxxx, b.d. xxxxx, applied multiple blows to the latter with his fists and feet over different parts of the body, causing the minor, according to the forensic report No. 130 of 13.08.2014, bodily injuries in the form of cerebral oedema involving the brainstem, following the subdural haematoma, closed traumatic brain injury, which qualifies as serious, life-threatening bodily injuries, as a result of which the victim died. (Article 151 para. (4) of the Criminal Code)*

***Extracts of the Criminal College of the SCJ***

The court of appeal, rejudging the given case, motivated its decision without hearing defendant F.G. and the additional research of the evidence on which the court of appeal relies in the decision, which indicates that the court of appeal delivered a solution containing an error of law, because a reasoning of the solution should also result from a legal administration of the evidence, according to the rules for judging in the first instance.... The European Court emphasizes that, when a review court is called upon to settle a case in fact and in law and to examine, as a whole, the question of guilt or innocence, it cannot, for reasons of fairness of the procedure, decide on these matters without the direct hearing of the statements given in person either by the accused, who states that he did not commit the act of which he is accused of (see *Ekbatani v. Sweden*, May 26, 1988, § 32, Series A, No 134; *Constantinescu v. Romania*, No. 28.871/95, § 55, ECHR 2000-VIII; *Dondarini v. San Marino*, No. 50.545/99, § 27, July 6, 2004; and *Igual Coli v. Spain*, No. 37.496/04, § 27 , March 10, 2009), or by the witnesses who gave statements during the procedure (*Găitănaru*, point 35 and *Hogea v. Romania*, No 31.912/04, point 54, October 29, 2013; *Moinescu v. Romania* of 15.09.2015).

***File No. 1-1181/17 12-1-41037-13062017, Chișinău District Court (Buiucani headquarters)***

***Summary of the Facts:*** *The person is accused of committing a crime of Violation of transport traffic or operational safety rules by the person operating the means of transport, that caused by imprudence an average bodily injury or damage to health. The court motivated an aspect of the sentence by analysing the jurisprudence of the European Court.*

***Extracts of the Chișinău District Court (Buiucani headquarters)***

Thus, it is noted that in the court session, the defender of the defendant, attorney P. V., pleaded for the nullity and exclusion of the documents that were drawn up at the stage of the criminal prosecution without an interpreter, a request also supported by the defendant Z. V. and, in this respect, an application (f.d.133) was also submitted by the latter requesting the nullity of the documents drawn up in the absence of the translator, namely, the minutes of the investigation of the scene of the road accident (f.d.9), the minutes regarding the notification of the parties about the appointment of the expertise (f.d.47), the minutes of communication of the expert report (f.d. 52), the minutes of the bringing in from April 8, 2017 (f.d. 17), the minutes for submitting to the accused and his defence attorney of the criminal prosecution materials (f.d.89).

In this chapter, the court notes that, in accordance with the provisions of Article 16 para. 1) CCP of the RM, the state language shall be used in conducting the criminal trial. According to paragraph 2) and 3) of the cited article, the person who does not possess or does not speak the state language shall have the right to know all the documents and materials of the case file, to speak in front of the criminal prosecution body and in the court through an interpreter, and the procedural acts of the criminal prosecution body and those of the court shall be handed to the suspect, the accused, the defendant, being translated into his mother tongue or into the language he knows, in the manner established by this code.

According to Article 6 para. 1) CCP of the RM, the procedural act is the document by which any procedural action provided for by this code is recorded, namely: ordinance, minutes, indictment, conclusion, sentence, decision, judgement, etc.

In accordance with Article 251 para. 2) and 3) CCP of the RM, violation of the legal provisions related to the jurisdiction by matter or by the quality of the person, to the notification of the court, to its composition and to the publicity of the court session, to the participation of the parties in mandatory cases, to the presence of the interpreter, the translator, if mandatory according to the law, shall lead to the nullity of the procedural act, the nullity provided for in para. (2) shall be removed in any way, it can be invoked at any stage of the trial by the parties, and shall be taken into account by the court, including *ex officio*, if the annulment of the procedural act is necessary for finding out the truth and the just settlement of the case.

It is noted that in the case of *Brozicek v. Italy* (application No. 10964/84 para. 40-41) as well as in the case of *Vizgirda v. Slovenia* (application No. 59868/08 para. 80 -101) the court developed certain criteria for verifying the observance by the national authorities of the right to an interpreter and the impact of the lack of an interpreter on the subjective right guaranteed by Article 6.3 of the Convention.

In the cited jurisprudence, it was mentioned, among other things, that the right to an interpreter is a common body with the right to be notified of the nature of the accusation in criminal matters (para. 6.3. of the Convention). In this regard, the Court mentions that in the sense of paragraph 3 a of Article 6 of the Convention, each accused shall have the right to be informed as soon as possible, in a language he understands (...) of the nature and cause of the accusation brought against him. It is noted that this article does not indicate the need to translate in writing and provide to **a foreign defendant** with the relevant explanations, this provision indicates the need to show extreme care to notify the person concerned of the charge. The Court mentions that an accused who is foreign to the language used by the court may, in practice, be disadvantaged if he is not provided with a translation of the indictment in a language he understands.

At point 78 of *Vizgirda v Slovenia*, it is indicated that paragraph 3a of Article 6 of the Convention does not go so far as to give the applicant the right to obtain the translation of each documentary evidence or official piece in the case file. In this respect, it is indicated that the text of the convention refers to the term interpreter and not to the term translator. This allows the interpretation that an oral linguistic assistance can satisfy the requirements of the convention.

Finally, the court notes that the European Court, when evaluating the violation or non-violation of the right to notification of the accusation in criminal matters, subjects the following aspects to analysis:

a) the reasons given for the appointment of an interpreter, b) the assessment of the need to provide an interpreter for the applicant, c) other indications of the applicant's knowledge of the language, d) the lack of complaint or application for the appointment of another interpreter during the trial.

In this respect, the Court mentioned (*Vizgirda v. Slovenia* para. 81) that the obligation to provide an interpreter rests with the national authorities.

The Court also indicated that this obligation arises when they receive the defendant's application regarding the fact that he needs an interpreter (*Brozicek v. Italy* para. 41). However, the Court mentioned that the obligation to ensure the presence of an interpreter is not limited only to the situation where a foreign defendant expressly requests the presence of an interpreter, but starting from the importance of the right to a fair trial in a democratic society, such obligation (to ensure an interpreter) arises from the moment there are grounds to believe that the accused does not sufficiently know the language of the proceedings, for example in the circumstance where the defendant is neither a native nor a resident of the country where the procedure is being conducted.

***Reference to Constitutional Court case law***

***File No. 1ra-329/20 Criminal College of the SCJ***
***http://jurisprudenta.csj.md/search_col_penal.php?id=16384***

***Summary of the facts:*** *B. N. was brought to justice for the fact that on April 30, 1999, while working as a cadastral engineer at OCT Chișinău, contrary to his work duties, he intentionally conducted actions that clearly exceeded the limits of the rights and duties granted by law, not complying with the assignment of chronological numbering, doubling the numbering of constructions, adding let. "A", (inventoried in 1964) at the already demolished*

*house and finding the non-existence of the demolished house, issued certificate 12020 of April 30, 1999, for final reception, in the name of citizen G.M. with a share of 1.0. Pursuant to the mentioned legal act, by the decision of Chișinău municipality No. 14/44-2 of June 27, 2000, the right of ownership over the building constructed without authorization on the territory of Botanica v., Chișinău Mun. was acknowledged, namely house let. "A" from xxxxx, with a total area of 30.6 m2 and a living area of 18.2 m2, built by Mrs. G.M., the decision in question being registered with the cadastral body on July 20, 2000, with number xxxxx. ...... Thus, the cadastral number xxxxx was to be kept only during the existence of the immovable asset and deleted with the destruction of the immovable asset. Through his intentional actions, B.N. caused severe consequences in the amount of 163,169 Lei, expressed by the loss of the right of ownership over the mentioned immovable property that he built, by the fact of assigning citizen B. A. a 2/3 share. (Article 328 para. (3) let. d) Criminal Code)*

***Extracts of the Criminal College of the SCJ***

(...) on October 1, 2018, the Constitutional Court delivered judgement No. 22 regarding the exception of unconstitutionality of Article 328 para. (3) let. d) of the Criminal Code (excess of power and excess of official authority causing severe consequences), by which the respective rule was declared unconstitutional.... Considering the aspects highlighted above, in the context of declaring the unconstitutionality of the provisions of Article 328 para. (3) let. d) of the Criminal Code, the Enlarged Criminal Panel considers it necessary to intervene in the judgement of the first instance, by excluding the sign "severe consequences" from the facts imputed to the defendant, as a result, the defendant's actions being circumscribed by the provisions of Article 328 para. (1) of the Criminal Code.

## Extracts of good practice from Romania

***Reference to the European Court case law***

***Sentence No 401/25.03.2020, The District Court Oradea – Criminal Division,***
***www.rejust.ro/juris/edd25d447***

***Summary of the Facts:*** *The defendant was part of a Bar established by an NGO. He claimed to be acting on behalf of a foreign investment bank and assured a Romanian investor that he would obtain from this institution the amount of EUR 20 million in exchange for a success fee of EUR 135,000. The two concluded a consultancy agreement and an advance of EUR 25,000 was transferred to the lawyer. During the same year, the lawyer presented a loan agreement that aroused suspicions of the investor, who learned from the foreign bank that the document presented was not a valid contract, that the signatures of the two vice presidents in the contract were forged, and the bank's official data had been copied from the official electronic and public page. In the first instance, the lawyer was convicted by the Oradea Court for fraud and forgery, but was acquitted for exercising a profession or activity without the right. The court reasoned that the defendant was part of a "parallel" bar to the official one, but was convinced that his activity was legal. In the appeal declared by the Prosecutor's Office, the Oradea Court of Appeal also convicted him for this latter criminal offence, establishing a final sentence of 4 years and 2 months of imprisonment with execution.*

***Extracts of the District Court Oradea – Criminal Division***

In the reasoning, the court claimed that the defendant actually exercised activities specific to the profession of lawyer having, prior to the date of 03.11.2015, when the decision No 15/21.09.2015 of the High Court of Cassation and Justice was published in the Official Gazette - The competent panel to judge the appeal in the interest of the law, the belief that the acquisition of the capacity of lawyer was legitimized by the judicial proceedings initiated in order to establish the structure whose member he is, and, in these factual circumstances, it cannot be found, beyond any reasonable doubt, that the defendant was not convinced of the legitimacy of his capacity, which excludes his intention to harm the social relations that concern the proper conduct of the legal profession.

The constant jurisprudence of the European Court of Human Rights has shown that the term "law" is an autonomous notion within the meaning of the Convention, which includes not only statutory law, but also the jurisprudence of national courts and which is subject to certain requirements of accessibility and predictability (ECHR, *E.K. v. Turkey, Application No. 28496/95, para. 51, February 7, 2002)*, and the lack of an accessible and predictable judicial interpretation can lead to the violation of Article 7 of the Convention (ECHR, *Grand Chamber, Del Rio Prada v. Spain, Application No. 42750/09, Judgement of 21.10.2013, para. 91 - 93*).

Thus, in the present case, compliance with the requirements imposed by Article 7 of the Convention, through the priority application of these provisions, under Article 20 para. (2) of the Constitution is required, in which respect it is emphasized that Decision No 15/21.09.2015 of the High Court of Cassation and Justice was determined precisely by the non-unitary judicial practice regarding the fact consisting in the exercise of activities specific to the lawyer profession within entities that are not part of the forms of professional organization recognized by Law No 51/1991, reason for which the court considers that, until the publication of the said decision of the supreme court, in the absence of a sufficiently accessible and predictable law, the defendant did not have the tools necessary to comply his activity with the precept of the criminal law, which received various interpretations in the practice of judicial bodies.

From the considerations presented, finding with regards to this criminal offence pursued, the incidence of the case of preventing the exercise of the criminal action, provided for by Article 16 para. (1) let. b) sentence II of the Code of Criminal Procedure, the court will order the acquittal of the defendant with regard to the criminal offence of exercising a profession or activity without the right, provided by Article 348 of the Criminal Code.

## Extracts of good practice from Portugal

***Reference to the European Court case law***

***Process 1516/08.6PBGMR.P1, Court of Appeals of Porto***

***Summary of the Facts:*** *The Defendant appealed the first instance judgment which convicted him for the crime of threat. The threat was conducted through a phone conversation. The victim put the phone in loudspeaker for witness E. to also hear. This witness provided testimony in Court and confirmed the content of the threat. Among other matters of appeal, the appellant requested the testimony of witness E. to be considered inadmissible evidence as the access to phone conversation through loudspeaker by a third party should be inadmissible as the voice emitter (Defendant) did not know someone else was listening to it neither provided his consent for it. The extract of the judgment below is the reasoning of the Court of Appeals in relation to the admissibility of this evidence grounded also in ECHR case, regardless of its allegation by the appellant.*

***Extracts of the Judgment of the Court of Appeals of Porto***

(…)

Naturally, such disclosure of a telephone conversation over the loudspeaker system on the initiative of the victim, like any other testimonial evidence given at the hearing, is also subject to the adversarial principle (355.º), not only as a result of the defence guarantees (32.º, No. 5 Constitution), but also as one of the dimensions required by the right to a fair trial (20.º, No. 4 Constitution; 10.º, UDHR; No. 14.º, No. 1 ICCPR; 6.º, No. 1 ECHR; 47.º § 2 CDFEU).

This reading is also supported by the jurisprudence of the European Court, which has positioned itself in the sense that, even if the necessary margin of appreciation of the national legislator is safeguarded, only interferences in private life are considered legitimate (8.º, No. 1 ECHR), provided that they are taken in accordance with the law, respect the requirements of a fair process, proving to be understandable and necessary in a Democratic State of Law, namely for "the prevention of criminal offenses, … or the protection of rights and freedoms of others" (8.º, No. 2 of the ECHR). Naturally, they must be proportional to the objective pursued, weighing the seriousness of the crime with the intensity of the interference in private life (*Jalloh v. Germany*, 2006/Jul./11, *Juhnke v.Turkey*, 2008/ May./13; *Bogumil v. Portugal* 2008/Oct./07), as with the interference or dissemination of telephone conversations (ECHR *Bikov v. Russia*), always having as an unsurpassable limit the physical and moral integrity of the person in cause, absolutely prohibiting practices involving torture or inhuman and degrading treatment (3$^{rd}$ ECHR).

From the constitutional and legal criminal procedure regime, we can conclude that the realization of criminal justice, in a Democratic State of Law, is based on the respect and guarantee of the fundamental rights of the citizens, both of the presumed agents of the crime, as well as of the correspondents and potential victims, especially the preservation of human dignity. Thus, the regime of legality of evidence, as an "imperative of judicial integrity", both deals with the means of proof (i) and focuses on the means of obtaining evidence (ii). Its first dimension concerns the elements that serve to form the conviction regarding the facts subject

to trial (i), while the second dimension corresponds to the instruments used by the judicial authorities to investigate and gather evidence (ii). Both one and the other compress the principle of free assessment of evidence resulting from Article 127, establishing the corresponding prohibitions on the production or assessment of evidence.

In the case of prohibited evidence, it must be officially known and declared at any stage of the process, appearing as authentic incurable nullities, along with those that expressly integrate the catalogue of Article 119.

Taking this in consideration, we can outline the following guidelines regarding the interception and recording of telephone communications or through other technical means of transmission, in accordance with the primacy of human dignity, the constitutional guarantees of defence and the reserve of privacy, duly supported by the principle of minimal intervention, which is subject to proportionality criteria, as well as the principle of legality of evidence:

i) Such means of obtaining evidence are part of the constitutional pillar of relatively prohibited evidence, which will happen when they prove to be abusive;

ii) They will be abusive means of obtaining evidence when their realization is not proportional to the constitutional parameters established by the principle of minimum intervention (i) and the requirements of a fair criminal procedure (ii), namely in its aspect of legal interdiction;

iii) Such a means of obtaining evidence will therefore be legally admissible when it is decreed by court order and the respective legal requirements are observed, that is, it concerns crimes entered in the catalogue described in Article 187, paragraph 1 CCP (i) – as happens with the crime of threats when committed by telephone and naturally by any other technical means of transmitting conversations or communications (187.º, No. 1, subparagraph e); 189.º, No. 1); such interception or recording affects, regardless of the ownership of the means of communication used, the communications made, among others, by the suspect or defendant (a) or else the victim of the crime, but with their actual or presumed consent (b) (187 para. 4, item a) and c) CCP) (ii);

iv) Outside of these circumstances, the disclosure of a telephone communication will be a legally admissible means of obtaining evidence provided that, according to a double effect criterion, the substantive legal requirements of telephone tapping are fulfilled (i), proving to be this necessary, adequate and fair disclosure to repel a current and unlawful aggression of which one is a victim (ii), especially when this is the interlocutor and recipient of said telephone communication or other equivalent technical communication, always safeguarding the dignity of the person of the intervenient in the respective communication;

v) In the latter case, the disclosure of a telephone conversation over the loudspeaker system is justified when that precise telephone communication is the means used to commit a crime of threats and the victim consents, expressly or implicitly, to its disclosure to third parties as a way to protect against such threats.

Accordingly, we did not find that the first instance Court admitted any evidence prohibited by law when considering the testimony of witness E., when this revealed the content of the words considered threatening that the defendant addressed to D., due to the fact that the latter had placed the sound system of the phone on "loud speaker", as this means of obtaining evidence had a legitimate cause, proving to be proportional to the disclosure, at that precise moment and in real time, of that telephone conversation, likely to be part of a crime of threat, with the protection who deserves such a victim.

## Extracts of good practice from France

***Reference to the European Court case law***

***Cour d'appel de Paris 29 Novembre 2011 RG No. 10/21490 Pôle 5 - Chambre 7***
***https://www.courdecassation.fr/decision/616348f4543823d76b031787***

***Summary of the Facts:*** *In a criminal procedure for tax fraud, the residence of Mr. X is subject to a search authorized by a judge. Mr. X challenges this authorization, accusing the judge of issuing a warrant that repeated the reasons of a model prepared by the administration that submitted the complaint.*

***Extracts of the Judgment of Cour d'appel de Paris***

As regards the complaint regarding the previous drafting of the ordinance by the tax administration and the alleged lack of effective control by the judge of liberties, the jurisprudence of the Court of Cassation is consistent in this regard and has recently confirmed that the ordinance issued and signed by the judge of liberties is presumed to have been established by the latter and that the fact that the ordinance is drafted in the same terms as those issued by other presidents is not such as to make it inconsistent. The European Court decided that the complaint based on the ineffectiveness of the control conducted by the judge of liberties cannot be considered to the extent that the Court of Appeal will have to conduct a second control of the documents submitted by the tax administration in support of the authorization request of conducting a home visit (the European Court, section 5, August 31, 2010, No. 33088/08, SAS Arcalia î. France)

## 4.12. Courts should react by default to references to the case law of the European Court, even when they think that the case law referred to is not relevant. In such cases an explanation as to why the case law referred to by the parties is irrelevant should be given.

### Extracts of good practice from the Republic of Moldova

***File No. 1ra-168/2020, Criminal College of the SCJ,***
***http://jurisprudenta.csj.md/search_col_penal.php?id=15958***

**Summary of the Facts:** *C.I. and P.V. were brought to justice for the fact that starting from February 2015, having the information that their acquaintance from Romania, P.S. knows the 2 persons not established by the criminal prosecution body who deal with the manufacture of counterfeit currency on the territory of Italy, pursuing the goal of obtaining a monetary profit, purchased from him the amount of 5000 counterfeit EUR against the amount of 1000 real EUR. On 11.03.2015, immediately after returning from Romania, C.I. P.V. returned to Ungheni city, where F.O. purchased from C.I. in exchange for the sum of 1,500 real EUR, the amount of 5,000 counterfeit EUR, the equivalent of which, according to the data of the National Bank of Moldova, represented the amount of 101,324.50 Lei, and B.A. purchased from P.V. in exchange for the sun of 1,500 real EUR, the amount of 5,000 counterfeit EUR, the equivalent of which, according to the data of the National Bank of Moldova, represented the amount of 101,324.50 Lei. (Article 236 para. (1) Criminal Code)*

***Extracts of the Judgment of the Criminal College of the SCJ***

With regard to the error of law provided for in Article 427 (1), point 15) of the Code of Criminal Procedure, invoked in the appeal lodged by lawyer C.A., on behalf of the defendant C.I., according to which the judgements of the appeal court may be appealed in order to remedy errors of law committed by the trial and appellate courts if the international court, by judgement in another case, has found a national violation of human rights and freedoms which may also be remedied in this case, pointing in this context to the ECHR judgement of 09.04.2013 in the case of *Flueras vs. Romania*, the enlarged Criminal Panel establishes that the Court's statements in the aforementioned judgement are not applicable to the case as they are not similar to the circumstances present in the case before the court, not being relevant to the present case, or the court of appeal justly found the guilt of the defendants P.V. and C. I. following the examination of all the evidence in the case, and not only on the basis of the statements of witnesses, and in this regard the enlarged Criminal Panel, in relation to the grounds invoked in the appeal, which are declaratory, finds that such an error has not been confirmed in the examination of the appeal lodged, lacking grounds for the involvement of the Court of Appeal in order to set aside the contested judgement.

***File No. 1ra 655/2020, Criminal College of the SCJ,***
***http://jurisprudenta.csj.md/search_col_penal.php id=16664***

**Summary of the Facts:** *T.O.V. was accused of the fact that, during the year 2011, the exact date and time was not established by the criminal prosecution body, together and by mutual agreement with other persons not established, to date, by the criminal prosecution body, acting with direct intention, pursuing the goal of producing,*

*possessing and using counterfeit official documents in 2 unknown circumstances, made on his behalf, power of attorney No. 9870 of October 29, 2010 which was allegedly authenticated by private notary N.I., in which, according to the technical-scientific report No. 2180 of June 23, 2011, the signature of the notary was forged, and according to the expert report No 717 of February 23, 2012 the round stamp impression was not applied by the round stamp "XXXXXX XXXXXC". The mentioned power of attorney granted O.T. the right to drive with the right to travel abroad, deregistration from the records and the sale, exchange, donation, pledge, lease, replacement of the owner of the "xxxx" model vehicle, VIN CODE: xxxxxx, engine number - xxx, xxxx and which belonged to R.R. Subsequently, continuing his criminal actions, pursuing the goal of the full realization of his criminal intentions, O.T. held the forged power of attorney until May 27, 2011 when he presented it together with the "Xxxx" model vehicle with xxxxxxx, the technical passport of the indicated vehicle, at BEET Ialoveni, where he concluded the sales-purchase agreement No 63 of May 27, 2011, according to which he sold the "Xxxx" model vehicle to himself, becoming its owner, deregistering it from the records, subsequently registering it in his own name, obtaining the xxxx registration numbers. (Article 361 para. (2) let. b) of the Criminal Code).*

***Extracts of the Judgment of the Criminal College of the SCJ***

Regarding the error of law provided for by Article 427 para. (1) point 15) Code of Criminal Procedure, invoked in the appeal declared by the attorney, on behalf of the defendant, according to which the judgements of the court of appeal can be subject to review in order to correct the errors of law committed by the first instance and appeal courts, if the international court, by ruling on another case, found a violation at the national level of human rights and freedoms that can be remedied in this case as well, indicating, in this context, the ECHR Judgement of 16.09.2014, in the case of *Mishie v. Romania*, the enlarged Criminal Panel establishes that the Court's statements in the said judgement are not applicable to the case at hand, as they are not similar to the circumstances present in the case brought to court, not being relevant for the present case, or the court of appeal found the defendant's guilt following the investigation of all the evidence administered in the case at hand, and not only based on the statements of the witnesses and, in this respect, the enlarged Criminal Panel, in relation to the reasons cited in the review, finds that neither this ground of review was confirmed during the examination of the declared review, the involvement of the review court for quashing the contested judgement not being justified.

## ANNEX

# *Checklist*

***Instructions:***

- ***Use this Checklist for each court decision.***
- ***Use ONLY ONE Checklist per court decision.***
- ***Use a separate Checklist for appellate court's decisions.***
- ***Use a separate Checklist for Supreme Court's decisions.***
- ***Complete and generate a separate file for each Checklist.***
- ***Fill in only verified data according to the requirements in the relevant cell.***
- ***Do not copy and paste text from court decisions/files. Do not engage the court staff, prosecutors, judges or defence lawyers in reviewing the documents necessary for filling in the Checklist.***
- ***Contact the Project Team for any further questions or doubts in reviewing the court decisions/files and/or filling in the Checklist.***

| **GENERAL LOGISTICAL/STATISTICAL DATA** | | | |
|---|---|---|---|
| **1** | **Checklist No.** | *Insert an ordinal number for the current Checklist. DO NOT confuse with the number of the file.* | |
| **2** | **Information on the courts** | | |
| 2a | First Instance Court | *Indicate the first instance court, which took the decision.* | |
| 2b | Date of the First Instance Court Decision and No. of the case file | *Fill in the date of the first instance court decision examined and No. of the case file.* | |
| 2c | Appellate Court | *Indicate the Appellate Court. Please fill in the required information ONLY if the decision of the Appellate Court was reviewed under this Checklist.* | |
| 2d | Date of the Appellate Court Decision and No. of the case file | *Fill in the date of the Appellate court decision examined and No. of the case file.* | |
| 2e | Supreme Court of Justice | *Fill in the date of the Supreme Court decision examined and No. of the case file.* | |
| **3** | **Legal Qualification of the offence for which the accused was convicted as in the decision.** | *Indicate the Article, including the paragraph, of the Criminal Code.* | |
| 3a | Was it a less serious offence? | *If yes, tick the box.* | |
| 3b | Was it a serious offence? | *If yes, tick the box.* | |
| 3c | Was it a particularly serious offence? | *If yes, tick the box.* | |
| **4** | **Information on the sentence.** | *Indicate whether there was a custodial sentence.* | |
| | | *Indicate imprisonment sentence with suspension if any.* | |
| | | *Indicate other sorts of sanctions, such as fines or alternative sanctions, if any.* | |
| **5** | **Defence** | *Was the accused represented by a lawyer? If yes, tick the box.* | |
| 5a | Legal Aid.<br>NOTE: Usually, this aspect is not specified in the decisions of the national courts, therefore, to be established to the extent possible. Hence, the option to tick the respective box if this is the case. | *Was the accused represented by a lawyer appointed from the legal aid scheme?* | *If yes, tick the box.* |
| | | | *If not possible to establish from contents of the decision, tick the box.* |

<table>
<tr><td rowspan="2">5b</td><td rowspan="2">Own lawyer.<br><br>NOTE: Usually, this aspect is not specified in the decisions of the national courts, therefore, to be established to the extent possible. Hence, the option to tick the respective box if this is the case.</td><td rowspan="2">Was the accused represented by a lawyer of his own choosing?</td><td>If yes, tick the box.</td></tr>
<tr><td>If not possible to establish from contents of the decision, tick the box.</td></tr>
<tr><td rowspan="2">5c</td><td rowspan="2">Both legal aid and own lawyer.<br><br>NOTE: Usually, this aspect is not specified in the decisions of the national courts, therefore, to be established to the extent possible. Hence, the option to tick the respective box if this is the case.</td><td rowspan="2">Was the accused represented by both a legal aid lawyer (usually in the beginning of the process) and a lawyer of his own choosing?</td><td>If yes, tick the box.</td></tr>
<tr><td>If not possible to establish from contents of the decision, tick the box.</td></tr>
<tr><td colspan="4">CRITERIA FOR THE DESCRIPTIVE PART OF SENTENCES OF CONVICTION</td></tr>
<tr><td colspan="4">The CCP of the Republic of Moldova contains several provisions, which serve as a basis for a reasoned court judgment. For example, the criminal procedural norms indicate directly on the standard of legality, thoroughness and motivation of the sentence (Article 384). Also, a list of subjects is established to which the court must respond in the sentence (Article 385). The CCP also imposes the exclusion of assumptions on which a conviction may be based (Article 389), but also the obligation to describe the evidence on which the court's findings are based and the reasons why the court rejected certain evidence (Article 394). The analysis concerns final judgments, and the focus is on the response of the courts on the motions raised by the parties, especially the defence in the course of the imposition of penal sentences. To this end this section of the checklist follows relevant provisions the CCP, especially Articles 366, 381, 385 and 394. Moreover, for the sake of completeness attention will be paid also to reference to the case law of the Constitutional Court (CC) and European Court of Human Rights (the European Court).</td></tr>
<tr><td>6</td><td colspan="3">Description of the Criminal Act</td></tr>
<tr><td>6a</td><td>Application of Article 394 paragraph 1 point 1, CCP.</td><td>Did the court make express reference to Article 394 paragraph 1 point 1, CCP?<br>If yes, tick the box.</td><td></td></tr>
<tr><td>6b</td><td>Completeness of description of the criminal act.</td><td>Did the court give a description of the criminal act considered as proven specifying the place, time and manner of its commission, the form and degree of guilt and the motives for and consequences of the crime? If yes, tick the box.<br>NOTE: The box should be ticked if the reasoning of the court goes further than simple citation of the criteria of Article 394 paragraph 1 point 1, CCP.</td><td></td></tr>
<tr><td rowspan="4">6c</td><td rowspan="4">Response to the<br>indictment (Article 366 CCP).<br><br>NOTE 1: This is in particular valid for decisions of first instance courts (sentences).<br>NOTE 2: The response of the defence to the indictment is not always possible to be retrieved from the contents of the judgment. Hence, the option to tick the respective box if this is the case.</td><td rowspan="2">Did the response of the defence to the indictment contain any arguments as to the description of the criminal act, including the place, time and manner of commission, the form and degree of guilt and the motives for and consequences of the crime?</td><td>If yes, tick the box.</td></tr>
<tr><td>If not possible to establish from contents of the decision, tick the box.</td></tr>
<tr><td rowspan="2">Did the court in its argumentation make any mention to the response of the defence to the indictment?</td><td>If yes, tick the box.</td></tr>
<tr><td>If not possible to establish from contents of the decision, tick the box.</td></tr>
</table>

| | | | |
|---|---|---|---|
| **7** | **Evidence** | | |
| 7a | Application of Article 394 paragraph 1 point 2, CCP. | *Did the court make express reference to Article 394 paragraph 1 point 2, CCP? If yes, tick the box.* | |
| 7b | Completeness of description of evidence.<br><br>NOTE: This is valid for the sentences of the first instance courts and the decisions of the Appellate Court. | *Did the court give a description of evidence substantiating the conclusions of the court and the reasons for which the court rejected other evidence? If yes, tick the box*. | |
| 7c | Written conclusions (Article 381 CCP).<br><br>NOTE 1: This is valid for first instance courts (sentences).<br>NOTE 2: The conclusions of the parties on the proposed settlement are not always possible to be retrieved from the contents of the judgment. Hence, the option to tick the respective box if this is the case. | *Did the conclusions of the parties on the proposed settlement of the case contain any arguments on the evidence presented and accepted in court?* | *If yes, tick the box.* |
| | | | *If not possible to establish from contents of the decision, tick the box.* |
| | | *Did the court in its argumentation make any mention to the conclusions of the parties on the proposed settlement of the case?* | *If yes, tick the box* |
| | | | *If not possible to establish from contents of the decision, tick the box.* |
| **8** | **Mitigating Circumstances** | *Were any mitigating circumstance(s) as foreseen by Article 76, Criminal Code put forward by the defence and/or the prosecution? If yes, tick the box.* | |
| 8a | Who put forward the mitigating circumstance(s)?<br><br>NOTE: It is difficult to establish or not always can be established from the content of the court decisions who put forward the mitigating circumstances. Hence, the option to tick the respective box if this is the case. | *Defence* | *If yes, tick the box.* |
| | | | *If not possible to establish from contents of the decision, tick the box.* |
| | | *Prosecutor* | *If yes, tick the box.* |
| | | | *If not possible to establish from contents of the decision, tick the box.* |
| 8b | Did the court respond to the mitigating circumstance(s) included in the motion? | *Did the court reject the motion? If yes, tick the box.* | |
| | | *Did the court accept the motion? If yes, tick the box.* | |
| | | *In case of rejection, did the court, based on the analysis of evidence and particular circumstances of the given case, concretely articulated that it was satisfied that the relevant mitigating factor does not exist? If yes, tick the box.<br>NOTE: The box should be ticked if the reasoning of the court goes further than simple citation of legislative criteria or a standard formulation that the court based on the evidence presented to it is satisfied that the relevant mitigating factor does not exist.* | |

| | | | |
|---|---|---|---|
| **9** | **Aggravating circumstances** | *Were any aggravating circumstance(s) as foreseen by Article 77, Criminal Code put forward by the prosecution? If yes, tick the box.* | |
| 9a | Motivation by the prosecution. | *Did the prosecution in its argumentation simply quote the aggravating circumstance(s) as foreseen in Article 77, Criminal Code? If yes, tick the box.* | |
| | | *Was the prosecution's reasoning concrete, and based on the analysis of evidence and particular circumstances of the given case? If yes, tick the box.*<br>*NOTE: The box should be ticked if the reasoning of the prosecution goes further than simple citation of legislative criteria or a standard formulation that the prosecution based on the evidence presented to the court is satisfied that the aggravating factor is proved beyond reasonable doubt.* | |
| 9b | Did the court respond to motion for aggravating circumstance(s)? | *Did the court reject the motion? If yes, tick the box.* | |
| | | *Did the court accept the motion? If yes, tick the box.* | |
| | | *In case of acceptance, did the court, based on the analysis of evidence and particular circumstances of the given case, concretely articulated that it was satisfied that the relevant aggravating factor was proved beyond reasonable doubt? If yes, tick the box.*<br><br>*NOTE: The box should be ticked if the reasoning of the court goes further than simple citation of legislative criteria or a standard formulation that the court based on the evidence presented to it is satisfied that the aggravating factor was proved beyond reasonable doubt.* | |
| 9c | Did the court take into consideration any aggravating circumstance(s) *suo moto*? | *If yes tick the box.* | |
| | | *Did the court, based on the analysis of evidence and particular circumstances of the given case, concretely and clearly articulated that it was satisfied that the relevant aggravating factor was proved beyond reasonable doubt? If yes, tick the box.*<br>*NOTE: the box should be ticked if the reasoning of the court goes further than simple citation of legislative criteria or a standard formulation that the court based on the evidence presented to it is satisfied that the aggravating factor was proved beyond reasonable doubt.* | |

| | | | |
|---|---|---|---|
| **10** | **Recidivism** | *Did the court apply the punishment for dangerous or very dangerous recidivism?*<br>*If yes, tick the box.*<br>*NOTE: The box should be ticked only if the court decision shows that dangerous or very dangerous recidivism has been established.* | |
| 10a | Criteria for applying punishment for recidivism. | *Did the court take into account the criteria provided in Article 82(1), Criminal Code? If yes, tick the box.* | |
| | | *Did the court simply quote the above criteria? If yes, tick the box.*<br>*NOTE: If the court simply quoted the criteria, then it can be argued that the punishment for recidivism is automatic.* | |
| | | *Did the court also pay attention to the period free of criminality prior to the present offence and the age of the culprit? If yes, tick the box.*<br>*NOTE: These are Council of Europe standards included in Recommendation No. R(92)17, but not foreseen in Article 82(1), Criminal Code.* | |
| **11** | **Legal qualification** | | |
| 11a | Application of Article 394 paragraph 1 point 5, CCP. | *Did the court make express reference to Article 394 paragraph 1 point 5, CCP?*<br>*If yes, tick the box.* | |
| 11b | Completeness of description of legal qualification. | *Did the court give a description of the legal qualification of the actions of the defendant, the reasons for changing the accusation, if any? If yes, tick the box.*<br>*NOTE: the box should be ticked if the reasoning of the court goes further than simple citation of the criteria of Article 394 paragraph 1 point 5, CCP.* | |
| 11c | Response to the indictment (Article 366 CCP).<br><br>NOTE 1: This is in particular valid for decisions of first instance courts (sentences).<br>NOTE 2: The response of the defence to the indictment is not always possible to be retrieved from the contents of the judgment. Hence, the option to tick the relevant box, if this is the case. | *Did the response of the defence to the indictment contain any arguments as to legal qualification of the actions of the defendant?* | *If yes, tick the box.* |
| | | | *If not possible to establish from contents of the decision, tick the box.* |
| | | *Did the court in its argumentation make any mention to the response of the defence to the indictment?* | *If yes, tick the box.* |
| | | | *If not possible to establish from contents of the decision, tick the box.* |

<table>
<tr><td rowspan="4">11d</td><td rowspan="4">Written conclusions (Article 381 CCP).<br><br>NOTE 1: This is in particular valid for decisions of first instance courts (sentences).<br>NOTE 2: The response of the defence to the written conclusions is not always possible to be retrieved from the contents of the judgment. Hence, the option to tick the respective box if this is the case.</td><td rowspan="2">Did the conclusions of the parties on the proposed settlement of the case contain any arguments on the legal qualification of the actions of the defendant?</td><td>If yes, tick the box.</td></tr>
<tr><td>If not possible to establish from contents of the decision, tick the box.</td></tr>
<tr><td rowspan="2">Did the court in its argumentation make any mention to the conclusions of the parties on the proposed settlement of the case?</td><td>If yes, tick the box.</td></tr>
<tr><td>If not possible to establish from contents of the decision, tick the box.</td></tr>
<tr><td>12</td><td colspan="3">Punishment with imprisonment</td></tr>
<tr><td>12a</td><td>Type of punishment</td><td>Does Criminal Code provide an alternative to imprisonment for the type of offence that the defendant was convicted? If yes, tick the box.</td><td></td></tr>
<tr><td>12b</td><td>Application of Article 394 paragraph 2, point 1, CCP.</td><td>Did the court make express reference to Article 394 paragraph 2 point 1, CCP?<br>If yes, tick the box.</td><td></td></tr>
<tr><td>12c</td><td>Justification of punishment by imprisonment.</td><td>Did the court justify the punishment by imprisonment if criminal law provides for other categories of punishment? If yes, tick the box.</td><td></td></tr>
<tr><td>13</td><td colspan="3">Reference to the case law of the Constitutional Court (CC)</td></tr>
<tr><td rowspan="3">13a</td><td rowspan="3">Reference to the CC by the parties.</td><td>Was there any reference to the case law of the CC made by the parties? If yes, tick the box.</td><td></td></tr>
<tr><td>Did the court react on the reference to the case law of the CC? If yes, tick the box.</td><td></td></tr>
<tr><td>Was the reaction of the court to the referred case law of the CC formalistic? If yes, tick the box.<br>NOTE: A formalistic reaction of the court is deemed to be a reaction by simply recognising the case law of the CC without going into the analysis of the CC and application of that case law into the concrete case.</td><td></td></tr>
<tr><td rowspan="3">13b</td><td rowspan="3">Reference to the case law of the CC by the court suo moto.<br>NOTE: This is valid if there is CC case law on the issue examined by the court. If there is no CC case law on the respective issue, the consultants should tick the respective box.</td><td rowspan="2">Did the court make any reference to the case law of the CC suo moto?</td><td>If yes, tick the box.</td></tr>
<tr><td>Tick this box, if there is no relevant CC case law.</td></tr>
<tr><td>Was the reference of the court to the case law of the CC formalistic? If yes, tick the box.<br>NOTE: A formalistic reference of the court is deemed to be a reference by simply recognising the case law of the CC without going into the analysis of the CC and application of that case law into the concrete case.</td><td></td></tr>
</table>

| 14 | **Reference to the case law of the European Court** | | |
|---|---|---|---|
| 14a | Reference to the European Court case law by the parties. | *Was there any reference to the case law of the European Court made by the parties? If yes, tick the box.* | |
| | | *Did the court react on the reference to the case law of the European Court? If yes, tick the box.* | |
| | | *Was the reaction of the court to the referred case law of the European Court formalistic? If yes, tick the box.*<br><br>*NOTE: A formalistic reaction of the court is deemed to be a reaction by simply recognising the case law of the European Court without going into the analysis of the European Court and application of that case law into the concrete case.* | |
| 14b | Reference to the case law of the European Court by the court *suo moto*.<br><br>NOTE: This is valid if there is the European Court case law on the issue examined by the court. If there is no European Court case law on the respective issue, the consultants should tick the respective box. | *Did the court make any reference to the case law of the European Court suo moto?* | *If yes, tick the box* |
| | | | *Tick this box, if there is no relevant European Court case law.* |
| | | *Was the reference of the court to the case law of the European Court formalistic? If yes, tick the box.*<br>*NOTE: A formalistic reference of the court is deemed to be a reference by simply recognising the case law of the European Court without going into the analysis of the European Court and application of that case law into the concrete case.* | |

ENG

www.coe.int

The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.