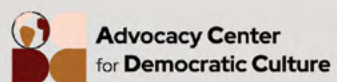




COMMUNITY SERVICE SENTENCING



Report author:

Predrag Miljković

Publisher:

NVO AKTIV

Editor:

Miodrag Milićević

June 2023.

This publication was produced with the financial support of the UNMIK in the scope of the “Further Support to Access to Justice and Human Rights in the Mitrovica Region” project.

Its content is the sole responsibility of NGO Aktiv and do not necessarily reflect the views of UNMIK.

CONTENT

▶ Introduction	5
▶ The normative character of the alternative sentence to community service from the perspective of the Criminal Code and the Law on the Execution of Criminal Sanctions	7
▶ Criminal Code of Kosovo	7
▶ Law on Execution of Criminal Sanctions	8
▶ Representation of alternative sentence to community service work	11
▶ Probation Service of Kosovo	12
▶ Conducted research and detected problems regarding the choice of criminal sanctions, as well as the successful execution of the sentence of community service	13
▶ Cooperation between basic courts and the probation service	13
▶ Problems of the probation service in terms of organization, resources, staff, and transparency of work	14
▶ Experiences of countries in the region - the example of Montenegro	15
▶ Conclusion and recommendations	17

INTRODUCTION

Community service is one of the alternative criminal sanctions that offers an opportunity to have the society take part in its execution, and thus to have the perpetrators of criminal acts to whom this non-institutional sanction is applied treated as equal members of the community, and it is therefore more humane than classic criminal sanctions.

This type of alternative sanctions can influence the convict not to repeat the crime (special prevention), to influence his or her attitude towards breaking the law, to improve his or her relation towards the community and increase the responsibility of observing the law, i.e. to fulfill the prescribed purpose of sanctions, however with a visibly more pronounced special prevention in relation to general prevention.

Taking into account the aforementioned, it can be said that this sanction contains minimal retribution with a strongly pronounced resocialization. The introduction of community service work as a criminal sanction appears as a reaction to the negative consequences of other criminal sanctions, primarily imprisonment, which has proven to be ineffective for certain perpetrators of criminal acts. Non-institutional sanctions represent sanctions by which the purpose of punishment can be achieved in conditions that are less restrictive than prison sentences and which delay the pronouncement or execution of prison sentences. In the criminal legislation of Kosovo, this sanction can be imposed only with the consent of the defendant, which refers to the performance of community service. The probation service implements this sanction after the Ministry of Justice concludes a contract with certain legal entities (institutions) in which the community service work is being performed, and in accordance with the provisions of the Law on the execution of criminal sanctions, determines the rights and obligations of the defendant during the execution of the sentence.

THE NORMATIVE CHARACTER OF THE ALTERNATIVE SENTENCE TO COMMUNITY SERVICE FROM THE PERSPECTIVE OF THE CRIMINAL CODE AND THE LAW ON THE EXECUTION OF CRIMINAL SANCTIONS

CRIMINAL CODE OF KOSOVO

Criminal Code of Kosovo (Law No. 06/L-074) Article 57. Prescribes that “an order for community service work may be imposed on a convicted person, if the court imposed a punishment of a fine of up to two thousand five hundred (2,500) EUR or a punishment of imprisonment of up to one (1) year. Community service work may only be ordered upon the consent of the convicted person.” Paragraph 2 of the same article prescribes that “When imposing an order for community service work, the court shall order the convicted person to perform unpaid community service work for a specified term of thirty (30) to two hundred forty (240) working hours. The probation service will determine the type of community service to be performed by the convicted person, designate the specific organization for which the convicted person will perform the community service, decide on the days of the week when the community service work will be performed and supervise the performance of the community service work”. Para 3 says that “the community service work shall be performed within a period of time determined by the court which shall not exceed one (1) year”. Paragraph 4 prescribes that “when imposing an order for community service work, the court shall also order the convicted person to maintain contact with the probation service and may order the convicted person to perform one or more of the obligations provided for in paragraph 3. of Article 48 or Article 56 of this Code.”¹ The duration of an obligation provided for in of Article 56 shall not be less than six (6) months or more than three (3) years.

The provisions of Article 57, paragraph 3 of this Code, are applied according to the obligation prescribed in this paragraph. Paragraph 5 states that “if the convicted person fails to perform the community service work the court may extend the duration of the supervision within the verification period or revoke the sentence”, while the paragraph 6 prescribes that “if, upon the expiry of the specified period, the convicted person has not performed the community service work or has only partially performed such community service work, the court shall order a term of imprisonment. One (1) day of imprisonment shall be ordered for every eight (8) working hours of community service that was not performed.”

¹ See: Article 48 para 3. and Article 56 of the Criminal code of Kosovo (Law No. 06/L-074)

Therefore, as we can see, community service appears as a substitute for prison sentence or a fine and is reserved for lesser offences.

The specificity of this sanction is reflected in the voluntariness of the convicted individual, i.e. the necessity of his or her consent. In this way, and in accordance with international legislation, the legislator wanted to avoid “forced labor”. In any case, as the law prescribes, if the sanction of community service work is not carried out or it is carried out partially, and the guilt and failure to execute this sanction stems from the actions of the convicted person, then for every eight hours of work, one day of imprisonment will be ordered.

It is worth noting that in accordance with Article 57 paragraph 4 and in connection with Article 55 paragraph 3 of the Criminal Code, when imposing this sanction, the court takes into account the age of the convicted person, his general health and mental state, lifestyle and needs, especially the needs related to family, school or work, motives related to the commitment of the crime, behavior after the crime was committed, defendants previous behavior, personal and family circumstances and other circumstances that are relevant for the selection of the type of work and duration of the work.

LAW ON EXECUTION OF CRIMINAL SANCTIONS

Law on Execution of Criminal Sanctions (Law No. 08L-132), in Chapter V more closely determines, who, how and when in terms of the implementation of alternative sanction of community service. In accordance with provisions of Article 146 of this Law, when the court pronounces the sentence with an order for community service work, in accordance with the provisions of the Criminal Code, the judgment and all of the information which the court possesses are sent to the competent probation service for the execution of this alternative sanction, and if a convicted person is held in detention on remand, the court shall also send the decision to the detention facility where he or she is held. The director of the appropriate correctional facility shall release the convicted person to execute this alternative sanction.

Article 147 of the Law on Execution of Criminal Sanctions prescribes “a program for community service work for a convicted person, in accordance with the provisions of the Criminal Code of Kosovo and with his or her abilities, skills and background”.

Probation service will supervise the execution of a sentence with an order for community service work, while in coordination with the organization where the community service work is to be performed, it develops the rules for insurance for workplace injury or illness, general behavior in the workplace and other relevant matters prior to the commencement of community service work. The by-laws related to working hours, breaks, weekly rests and workplace safety will apply to the performance of community service work.

Community Service performance supervision is prescribed in the Article 148 of the Law on Execution of Criminal Sanctions , which stipulates that when the court imposes a sentence with an order for community service work and orders the convicted person to contact the probation service or to fulfil one or several obligations according to the provisions of the Criminal Code, the probation service supervises the maintenance of contact or the fulfilment of the obligation. If a convicted person fails to maintain contact with the probation service or fails to perform an obligation ordered by the court, the probation service will inform the court after verifying facts and the reasons for the failure to maintain contact or to perform the obligation. The administration bodies at central and local level, institutions and other legal entities as well as natural persons are obliged to cooperate with the probation service and the regional probation offices in the execution of punishment with an order for the community service work. Paragraph 4 of this Article stipulates that the Minister² concludes cooperation agreements with regard to the execution of sentences ordering community service work from paragraph 3. of this Article. The cooperation agreements set out the mutual rights and obligations.”

Article 149 of the Law on Execution of Criminal Sanctions prescribes that “the organization where the community service work is to be performed shall immediately inform the probation service if the convicted person fails to perform the community service work to a satisfactory level. Failure to perform the community service work to a satisfactory level is assessed by the probation service and reported to the court. Failure to perform the community service work satisfactorily includes late arrival to work; unauthorized absence from work; failure to comply with work rules.”

Article 150 of the Law on Execution of Criminal Sanctions foresees a possibility of correction (revision) of community service work program by the probation service, which was previously determined, but under the following conditions:

1. The execution of an order for community service work ordered with a sentence may be postponed or suspended due to:

- ✓ the sudden illness of the convicted person, which requires him or her to obtain medical treatment and prevents him or her from performing community service work;
- ✓ the death of a family member, which requires him or her to act as the primary caregiver to other family members and prevents him or her from performing community service work; or
- ✓ any other extraordinary circumstances which require the constant presence of the convicted person for humanitarian reasons and prevent him or her from performing community service work.

² Justice Minister of Kosovo

A request to postpone or suspend the execution of an order for community service work ordered with a suspended sentence may be submitted to the court by the convicted person, defense counsel or a representative from the probation service. The submission of the request suspends the obligation to perform community service work until the court decides on the request. The court shall decide on the postponement or suspension of the execution of an order for community service work ordered with a sentence within three (3) days of receiving the request. If the court approves a postponement or suspension of the execution of the order for community service work, the act will specify the period of the postponement or suspension. The postponement or suspension of the execution of an order for community service work ordered with a suspended sentence may last:

- ☑ until the end of the illness, in cases under subparagraph 2.1. paragraph 2. of the this Article; and;
- ☑ for up to twenty (20) days the most, in cases under subparagraphs 2.2. and 2.3. of paragraph 2. of this Article. The probation service reports to the court about the successful completion of the community service work. Upon the receipt of such report, the court will issue a decision stating that the alternative sentence has been served.

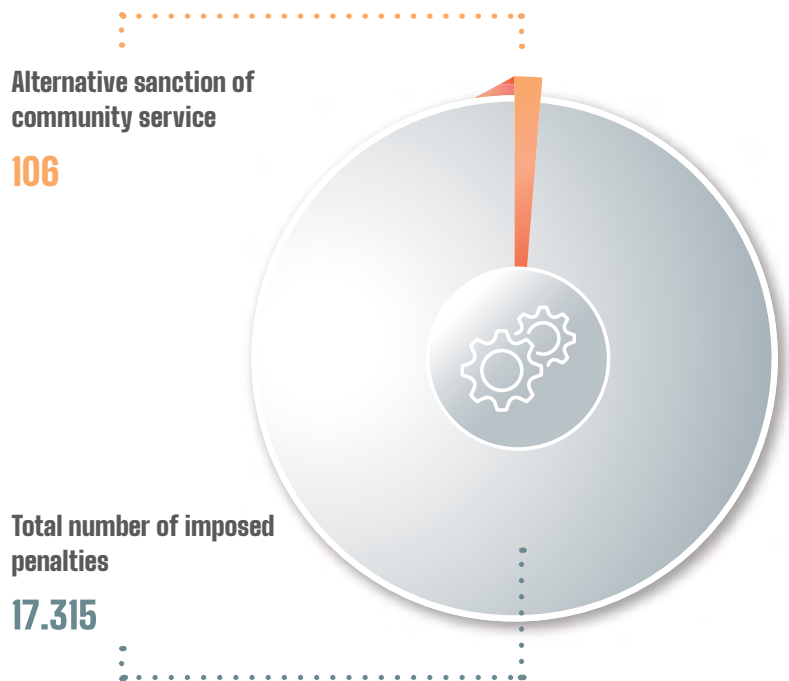
From a psychological point of view, this sanction creates convicted persons' sense of belonging to the wider community, rather than a feeling of being rejected by society. A community that often believes that criminals should be isolated, begins to change its opinion about them. As the person who is sentenced to community service performs his or her daily tasks, looks after his or her family and performs community or humanitarian work in his or her free time, in the exes of the community, an image is being created, that of a person who should be given the opportunity to become useful and equal member of the community, without any form of isolation.^{3.}

³ D. Radulović, Alternative criminal sanctions in the criminal legislations of Montenegro, *Facta Universitatis: Series, Law and Politics*, br. 1, Vol. 15, str. 18.

REPRESENTATION OF ALTERNATIVE SENTENCE TO COMMUNITY SERVICE WORK

According to currently available statistical data in the Kosovo Agency of Statistics⁴ (which has not been updated since 2019 for the domain of justice), in 2019, the courts in Kosovo have pronounced 17,315 convictions. Out of the total number of imposed sentences, the basic courts opted for the sentence of community service work in only 106 cases. In terms of percentage, only 0.61% of this alternative sanction was imposed in 2019.

SHARE OF COMMUNITY SERVICE PUNISHMENT IN THE TOTAL NUMBER OF IMPOSED CRIMINAL SANCTIONS IN 2019 IN KOSOVO



The data tells us that in almost 99% of cases, the courts have opted for some other type of sanction, most likely considering that it would fulfill the purpose of punishment, but as it also turned out during the research, that due to the work and coordination between courts and the probation service which are not so good, it resulted in a certain mistrust of judges that the alternative sanction of community service would be successfully implemented or at least implemented by the probation service.

⁴ <https://ask.rks-gov.net/sr/agencija-za-statistiku-kosova/socijalne/pravosude>, as accessed on 05.06.2023

Such a negligible number of community service sentences seems discouraging, if one takes into account the purpose of alternative sanctions, and especially sentences to community service.

PROBATION SERVICE OF KOSOVO

Probation Service of Kosovo functions within the Ministry of Justice of Kosovo and it is considered that its establishment was the first of its kind in the Balkans. The service was founded on December 2, 2002, as a pilot project in Pristina, under the authority of Penal Management Division / Department of Justice. With the UNMIK Regulation No. 2006/26 dated April 27, 2006, the competencies over the Kosovo Probation Service were handed over from the Department of Justice to the Ministry of Justice.

The competences and responsibilities of the Probation Service of Kosovo are:

- ✓ organization, implementation and supervision of the execution of the alternative sanctions and the social reintegration of the convicted persons (probation duties);
- ✓ preparation of social inquiries and pre-sanctions reports for the perpetrators of criminal acts;
- ✓ evaluation of criminal risk and assessment of the treatment needs of the perpetrators of criminal acts;
- ✓ execution of alternative measures and educational measures for juveniles;
- ✓ supervision and assistance for the convicted persons serving alternative punishments;
- ✓ supervision and assistance for perpetrators who are addicted to drugs or alcohol and who are undergoing mandatory rehabilitation treatment while they are released pending further proceedings;
- ✓ supervision and support for the convicted persons on parole;
- ✓ development of individual programs of supervision;
- ✓ drafting of reports on execution the alternative sanctions for persons on parole and persons released from the prison for the prosecutors, courts and parole panels;
- ✓ guidance and support of convicted persons for the completion of their sentence;
- ✓ maintenance and preservation of evidence and registries on the execution of alternative measures and sanctions in the electronic system for data management;⁵

Organizational structure of the Probation Service consists of the following: Central office of the Probation Service whose seat is in Pristina and regional probation offices.

⁵ <https://md.rks-gov.net/page.aspx?id=3,19>

CONDUCTED RESEARCH AND DETECTED PROBLEMS REGARDING THE CHOICE OF CRIMINAL SANCTIONS, AS WELL AS THE SUCCESSFUL EXECUTION OF THE SENTENCE OF COMMUNITY SERVICE

At the beginning, it is necessary to emphasize that each choice of a criminal sanction represents the discretion of the trial judge in accordance with the Criminal Code and the Criminal Procedure Code. Since the discretionary rights of judges cannot and should not be interfered with, this research was aimed to learn what do judges in Kosovo think about alternative sanctions, what problems do they encounter during their work, and what most often makes them decide not to impose this sanction, given that it is evident that the number of imposed sanctions in the form of community service was too low. On the other hand, for the purposes of the research, Head of the Regional directorate of the probation service in Mitrovica was interviewed regarding the problems and obstacles that this service faces in its work, as well as recommendations for improving the work of the courts and probation services, as well as the probation service with other institutions.

COOPERATION BETWEEN BASIC COURTS AND THE PROBATION SERVICE

According to the collected information, one of the biggest problems that arises in this concrete case is the low level of cooperation between the probation service of Kosovo with the basic courts in Kosovo and vice versa, which is very unsatisfactory, if we consider the fact that the probation service must be the “extended arm” of the courts or rather that their liaison and coordination is crucial for the successful implementation of the law. Both parties deny a sufficient level of cooperation, and so we were able to hear from the probation service that the courts often do not inform the probation service about the imposed sanction, and then they are not able to carry out supervision or execution. Meanwhile, the other side, the courts, claim that they properly deliver the judgments to the probation service, but that the probation service does not deliver reports on supervision and actions that were taken. Furthermore, what was observed is a certain amount of uncertainty among judges that the sentence of community service will be successfully implemented, but also uncertainty whether the purpose of punishment will be successfully fulfilled with the sentence of community service. Also, during the research, it was noticed that judges participate in annual seminars organized by the JCK, however, very few of those seminars deal with alternative types of sanctions and their application. Taking into account the aforementioned, the insufficient cooperation of the court with the probation service is considered to be the main reason why this type of sanction is not imposed, and so judges more often opt for other criminal sanctions.

LEMS OF THE PROBATION SERVICE IN TERMS OF ORGANIZATION, RESOURCES, STAFF, AND TRANSPARENCY OF WORK

The data we obtained during the research indicate that the probation service is faced with problems in the form of insufficient resources, which is the reason why they strive to conclude cooperation agreements (contracts) with as many institutions as possible. However, it was observed during the research that it is not possible to identify more precisely the level of cooperation between different institutions and the probation service (the problem of PSK transparency), because although the fact that they cooperate with a large number of institutions is important, perhaps it would be more important to recognize which are those institutions and to what extent are they suitable for the execution of the sanction of community service in them. As examples, the probation service cited: libraries, driving schools, fire stations, etc.

In order to overcome this problem, it is necessary to establish what kind of work would be the most "beneficial" for the public interest (community interest), and consequently to find an adequate institution. As an example, it is considered that performing community service in a driving school does not constitute work in the interest of public. Driving schools most often operate in the private sphere, on the other hand, it remains unclear what kind of work in a driving school would contribute to a community. When enforcing the sentence of community service, it is necessary to take into consideration all of the personal and professional circumstances of the perpetrator (his special knowledge, skills, health condition, etc.), and then also the needs of the community in which the community service work is to be carried out, and here is an example: if this is, let us say, a place with frequent snowfall, perhaps the public interest would be best served by cleaning and maintaining the public roads. If the place is rich in forests, lakes or rivers (or is a tourist place), perhaps community service work in that case would be most adequately satisfied with some kind of maintenance of such public areas. Of course, this would be executed with all precautionary measures prescribed by Law on Execution of Criminal Sanctions and the prohibition of performing difficult physical jobs or those that involve a high level of danger, special knowledge, etc.

Another problem worth noting is the insufficiently transparent work of the probation service of Kosovo. During the research, it was observed that at the regional level PSK does not have its own website with contact information, there are no officially published statistics (data is obtained on request) of the number of persons who have been sentenced to some of the sanctions carried out by the probation service of Kosovo, although this data should be available to the public and are otherwise published as part of annual statistical bulletins. Also, there are no data on work performance i.e. success rate (resocialization of convicted persons) or the number of returnees, publicly announced contracts with institutions with which a cooperation agreement is concluded, etc. sa kojima se zaključuje sporazum o saradnji i sl.

EXPERIENCES OF COUNTRIES IN THE REGION – THE EXAMPLE OF MONTENEGRO

Unlike the Criminal Code of Kosovo, according to the Criminal Code of Montenegro⁶ sanction of community service is prescribed as a principal punishment, in addition to long-term (forty-year) imprisonment, imprisonment sentence and a fine.⁷ Therefore, by incorporating the penalty of community service work, Montenegro decided to prescribe this sanction as the principle penalty, that is, a penalty that can be imposed independently. The statistical data that were collected during the research, illustrate a good example of the transparency of the work of the Montenegrin institutions. The table below clearly documents the number of sentences imposed for community service through a longitudinal analysis from 2012 to 2021, with the number of sentences imposed by courts and the total balance of sentences imposed for community service.

⁶ <https://www.paragraf.me/propisi-crnegore/krivicni-zakonik-crne-gore.html>

⁷ Article 33 of the Criminal Code of Montenegro („Official Gazette of Montenegro No. 70/2003, 13/2004 – corr. and 47/2006 i „ Official Gazette of Montenegro No. 40/2008, 25/2010, 32/2011, 64/2011 – other law, 40/2013, 56/2013 – corr. 14/2015, 42/2015, 58/2015 – other law 44/2017, 49/2018 i 3/2020)

It is clear from the collected data, that there is a trend towards an increase in the share of community service punishment out of the total number of imposed sanctions, so in 2012 only eight of these punishments were imposed in Montenegro, in 2013 - 32, in 2014 - 96. 2015 - 172, 2016 - 225, 2017 - 287, 2018 - 226, 2019 - 262, 2020 - 218, 2021 - 173, i.e. a total of 1699 for the period that is here shown. The penalty of community service in relation to a fine, a suspended sentence, a prison sentence and other penalties participates with an average of 4.8%. For example, in 2019, the punishment of community service in Montenegro accounted for 7.75% of the other sanctions that were imposed, while in the same year before the courts of Kosovo, that percentage was 0.6%.

Table of the number of imposed community service penalties from 2012-2021 in Montenegro⁸

OSNOVNI SUD	YEAR										TOTAL
	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	
Bar	0	0	1	10	20+1	21	7	13	21+2	17+1	110
Berane	0	0	0	9	21	41	16	30	26	10	153
Bijelo polje	0	0	17	18	29	21	7+1	17+1	12	10+2	131
Cetinje	2+1	19	24	22	29	19	5	3+1	4	2	129
Danilovgrad	4	5+1	0	1	1+1	3	8+1	11+1	3	5+1	41
Herceg Novi	0	1	9	15	10	9	2+1	8	7	15	76
Kolašin	0	0	0	1+1	0	0	1+1	2+2	4+4	2+2	10
Kotor	2+1	2+2	10+1	22	21	25	23	34	30+6	24	193
Nikšić	0	0	11	35	38	47	37	36	9+1	6	219
Plav	0	0	0	0	2	23	35	8	18	8	94
Pljevlja	0	0	0	1+1	0	1	0	4	0	0	6
Podgorica	0	3	20	33	48	68	73	80	52+2	67	444
Rožaje	0	0	0	0	1	3	1	1	6	0	12
Ulcinj	0	2+1	4	5+1	5	5	1	5	15	2	44
Žabljak	0	0	0	0	0	1	10	10	11	5+2	37
TOTAL	8	32	96	172	225	287	226	262	218	173	1.699

⁸ V. Simonovic, Center for monitoring and research - CeMI, Penal policy and application of alternative sanctions in Montenegro (original title: Kaznena politika i primjena alternativnih sakncija u Crnoj Gori), Podgorica, 2002, page 11.

CONCLUSION AND RECOMMENDATIONS

Recommendations concerning courts:

1. It is necessary to establish a mechanism that would initiate the “beginning” of cooperation between the courts and the probation service at all levels, along with the exchange of information and experiences, as well as the organization of various seminars with the aim of joint improvement. During the research, it was found that this mechanism between the court and the probation service might be entrusted to the NGO sector, for several reasons. The first reason is their concrete neutrality, bearing in mind that the court and the probation service belong to different “pillars” of power (judicial and executive), while the second reason, which is no less important, is the willingness and demonstrated interest in resolution of institutional problems. In connection with the aforementioned, it should be emphasized that at the moment, this type of cooperation needs to be established between the Basic Court in Mitrovica and the regional probation service in Mitrovica, because the most porous relations between the court and PSK have been observed in the Mitrovica region.
2. For the purpose of adequate professional training of judges, including state prosecutors, as well as the acquisition of special knowledge in the domain of implementation and enforcement of alternative sanctions, it is necessary to create a special manual that would help judges in their daily work (modeled on the manual for civil procedure issued by the Kosovo Judicial Institute⁹);

As a recommendation to the Probation Service of Kosovo, it is necessary to improve the following:

3. Better organization of work at the regional level, or rather the recognition of community needs in the relevant region (work should not be of just any kind, it ought to be useful for the community);
4. Bigger number of qualified officers for supervision¹⁰;
5. Orientation in terms of cooperation with other institutions, in lieu of the existing aspiration towards cooperation with “a large number of institutions”, to cooperation with “adequate institutions”;
6. It is necessary for an independent body to establish a mechanism that would supervise the entire process of execution of sentences carried out by the Probation Service of Kosovo, and in particular the sentence of community service, as well as the monitoring of the work of the institutions where this sentence is to be carried out, about which quarterly and annual reports would be published, which, in addition to the established state (success in resocialization, recidivism of convicts, remarks and recommendations for improvement, etc.) would also contain all the necessary statistical data.

⁹ https://ad.rks-gov.net/Uploads/Documents/doracakKontestimSQ_.pdf

¹⁰ It refers to officials who would be subjected to special programs, seminars and training in appropriate fields (pedagogy, psychology, sociology, criminology, penology, etc.) for the sake of their professional development.

7. Higher transparency of the work of PSK, in the form of creating special websites with all the information about the regional probation service, monthly, quarterly or annual reports, examples of “success stories”, statistical data, a certain bibliography or publishing of the laws and by-laws which they apply in their work;
8. Significantly higher level of cooperation with courts, and especially to increase the cooperation in Mitrovica region.
9. It is also necessary to work to raise the awareness of citizens about the existence and application of alternative types of sanctions, especially due to the fact that the imposition of a community service sentence is conditioned by the consent of the defendant.

Finally, we must emphasize that in addition to the constant improvement of legislative solutions, the implementation of such solutions in practice is equally important. After all, they remain “dead letter” without their adequate implementation. Although the Kosovo judicial system is in a way the first in the Balkans in terms of the inclusion of the alternative sanction of community service work, it is certainly the last in terms of its application.

