

Đuričić Nada*

<https://orcid.org/0000-0002-7398-4915>

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SUSPENDED SENTENCE WITH CUSTODIAL SUPERVISION IN SERBIA – WHAT DOES CUSTODIAL SUPERVISION INVOLVE?

ABSTRACT: Suspended sentence with custodial supervision represents an alternative sanction that the legislation of the Republic of Serbia has known for half a century, but its application is rare because it is ordered in a negligible number of cases. Ordering custodial supervision has its advantages and it can be effective in cases when it is not enough to just sentence a person conditionally nor would it be justified and effective to punish the individual more severely, but it is necessary to ensure some sort of help and support in order to correct the offender’s behavior and deter them from committing criminal acts in the future. In order to better understand this sanction and see how it works in practice, we have analyzed measures of custodial supervision which are most often prescribed in accordance with the committed crimes. The paper uses a statistical and comparative method and analyzes the available literature, as well as the judgments of those courts that in a certain observed period had the largest number of suspended sentences with custodial supervision.

Keywords: *custodial supervision, suspended sentence, alternative sanction.*

* Master of Laws (LLM), Teaching Assistant at the Faculty of Law for Commerce and Judiciary in Novi Sad, University Business Academy, Serbia, mail: nadasdjuricic@gmail.com

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1. Introduction

Probation is a sanction recognized by legislatures around the world, and our legislation accepts a mixed system of probation. It was created by taking on the characteristics of the continental system of conditional sentence with elements of probation, trying to overcome the shortcomings of the existing systems that have been seen, Anglo-Saxon and continental (Jovašević, 2018). However, it should be noted that although the determination of custodial supervision with a conditional sentence includes elements of probation, probation is a broader concept than this form of sentence, because it does not only include the supervision of the conditional sentence, but also a number of other tasks that can be assigned to the defendant in different stages of criminal proceedings (Korać & Vuković, 2016, p. 65). The second half of the nineteenth century and the beginning of the twentieth century is the period in which suspended sentence appeared (Jovašević, 2017, p. 43), while the its prescribing and peculiarities in a certain legal system depends on which system given country has adopted and the characteristics of that system. It first appeared in England and America in the first half of the nineteenth century, while the continental system of suspended sentence was created in 1888 in Belgium, and then in 1891 in France (Radovanović, 1972, p. 277; Ilić & Maljković, 2015, p. 125). There are certain differences between these two systems which are reflected in the fact that in the Anglo-Saxon system, the criminal proceedings are not ended but postponed and the punishment is not pronounced, the custodial supervision is determined and it is carried out by professionals, while in the second type of suspended sentence, the court sentences the perpetrator of the criminal act and at the same time, under certain conditions he postpones its execution for a certain time. If the suspended sentence is revoked, in the first case the procedure will be carried out and the sentence will be imposed, while in the second case the determined sentence will be carried out (Jovašević, 2018, p. 33). These two systems have their advantages, but there are also certain disadvantages, which is why the mixed system of suspended sentence was created. In this system the court pronounces a suspended sentence on the perpetrator of the criminal act and at the same time determines his punishment but postpones its execution for a certain period of time under certain conditions, determining at the same time the exercise of custodial supervision over the perpetrator of the criminal offense, in order to provide him the necessary help and support and in order to deterred him from committing criminal acts in the future. Serbian legislation has accepted the mixed model of suspended sentence and since 1976 it has

been prescribing the possibility of determining a suspended sentence with custodial supervision, although there were proposals for its introduction earlier (Stojanović, 2006, p. 299).

2. Measures of custodial supervision with suspended sentence in the current legislation of Serbia

According to the current law, if the conditions are met, the court can impose a suspended sentence¹ and order custodial supervision when it considers that the purpose of the suspended sentence can be achieved more successfully, taking into account the personality of the perpetrator of the criminal act, his earlier life, behavior after the crime, his relationship to the victim and as circumstances of the commission of the criminal offense (Criminal Code, 2019, Art. 72). Custodial supervision includes a number of measures aimed at providing help, care, protection and supervision to the perpetrator, which the court determines when imposing a suspended sentence and they form the content of custodial supervision. When deciding, the court chooses those measures that it considers adequate in the specific case and effective in achieving the purpose of custodial supervision. When deciding on the content of custodial supervision, the court will take into account the circumstances related to the perpetrator's personality, such as his age, state of health, inclinations and habits, motives from which he committed the crime, demeanor after the crime, previous life, personal and family opportunities and the existence of conditions for fulfilling the instructions that are determined to him (Criminal Code, 2019, Art. 74). The duration of these measures is determined by the court and it must be within the probationary period. In case of failure to fulfill the instructions determined by the suspended sentence, the court has the possibility to caution the person, to replace the instructions,

¹ The law prescribes that the court, when imposing a suspended sentence, determines the punishment for the perpetrator of the criminal act and at the same time determines that it will not be carried out if this person does not commit a new criminal act within a certain period of time. This time is called the probationary period and is determined by the court and can last from one to five years. The court can impose a suspended sentence on the perpetrator who has been sentenced to imprisonment for less than two years, taking into account the purpose of the suspended sentence, the personality of the perpetrator, his previous life, behavior after the crime, degree of guilt and other circumstances under which the crime was committed, while prescribes that this warning measure cannot be imposed for criminal offenses for which it is possible to impose a prison sentence of eight years or a heavier sentence, as well as in cases where a person has already been sentenced to prison or a suspended sentence for an intentional criminal offense and has not passed more than five years from the finality of the conviction (Criminal Code, Art. 65-66).

to extend the duration of the custodial supervision within the probationary period or to revoke the suspended sentence.

The imposition of this type of suspended sentence is a possibility prescribed by law and it's not an instruction for the court. It decides to impose custodial supervision when it can be expected that in this way the purpose of the suspended sentence will be more fully realized. There is no difference between the purpose of this and the basic form of suspended sentence, because they are imposed for the same purpose, in order to influence the behavior of the convicted so that he does not commit criminal acts again in the future. What distinguishes the two forms of this admonitional sanction is the way in which it can be achieved. In the case of the basic form, only the threat of punishment is sufficient in case of non-fulfillment of conditions determined by the court decision, while in the case of suspended sentence with custodial supervision, this is not the case, because it is necessary to determine and apply certain supervision measures aimed at providing the necessary help and support to the perpetrator, because there is a risk that without applying these measures, this person will commit a criminal offense again in the future (Delibašić & Kostić, 2020, p. 319). The application of measures of custodial supervision works adequately in cases where it is not certain that a person a person without this help, support and supervision will not repeat this behavior, which is why it is not justified to impose a classic suspended sentence, and it is not justified, nor is it effective to impose a more severe sanction, such as a prison sentence. Therefore, the imposition of this form of suspended sentence appears as an appropriate solution for all those borderline cases in which it is not possible to sentence the perpetrator only conditionally (Stojanović, 2012, p. 12), but he needs some help in order to refrain from future illegal activity.

The Criminal Code prescribes the content of custodial supervision, and the court's freedom in choosing the instructions in a specific case is not absolute, because it is limited by the content prescribed by law. Therefore, in a specific case, the court chooses those measures it considers effective, but it does not have the possibility to determine those instructions that the law does not prescribe. Also, the probationer who is in charge of executing the sanction in question is limited by the court decision and he carries out the execution of only those measures that the court determined when imposing a suspended sentence, not other measures of custodial supervision (Tešović, 2020, p. 63). However, neither the law regulating the procedure for the execution of this sanction (Law on the execution of sanctions and measures that are carried out in the community, 2018, Art. 34-37), nor other sanctions and measures

that are carried out in the community, did not specify the content of these instructions,² nor other laws.

The legislator provided that the court can determine in a specific case one or more instructions, prescribing that the following instructions constitute the content of custodial supervision: reporting to the authority responsible for the execution of custodial supervision within certain period of time set by certain authority; training of a person who is assigned custodial supervision for a particular profession; the instruction of this person to accept employment that corresponds to his abilities; fulfillment of family instructions, which consist in supporting the family, looking after and raising children, etc.; the instruction to refrain from visiting certain places, establishment or events that could be an opportunity or an incentive for the perpetrator to re-commit criminal offenses; the instruction to provide timely notification of a change of place of residence, address or workplace; abstinence from the use of drugs or alcohol; treatment in an competent medical institution; visiting certain professional and other counseling centers or institutions and acting according to their instructions; elimination or mitigation of damage caused by a criminal offense, especially reconciliation with the victim of the committed criminal offense (Criminal Code, 2019, Article 73).

The legislator prescribed a greater number of instructions that make up custodial supervision, however, this is not enough for their implementation. Some instructions are difficult to implement, due to their vagueness and the absence of conditions for their execution, their existence of circumstances that make it difficult to fulfill them and for certain instructions is the question of the possibility of supervision (Dragojlović & Pašić, 2017, p. 381). Conditions of high unemployment make difficult to fulfill the instruction to accept employment and the person's living conditions can make difficult or impossible to implement other instructions, because their fulfillment in the first moment might have a negative impact on the existence of the person to whom the fulfillment of the instructions is determined or for his family (Spasojević, 2021, p. 18), which is the opposite of the intended aim. This problem is noticeable when it comes to the measure of fulfilling the instruction

² The Law on the execution of sanctions and measures that are carried out in community regulates the procedure for the execution of this sanctions and measures, which were pronounced by the court in criminal, misdemeanor or other court proceedings, and it prescribes the purpose, content, method of execution, and the position of persons in the proceedings, and supervision, for the purpose of protecting society from criminality, with the aim of achieving resocialization and reintegration of convicted persons through their execution. This law prescribes that the tasks of execution of the mentioned sanctions and measures are under the jurisdiction of the trustee service.

to train for a particular profession, which as a measure is well thought out, but the question is whether its application is appropriate in certain cases when a person is in difficult living conditions, in which he must provide means for his life and the life of his family. When implementing this measure, it remains questionable who would pay the costs of fulfilling the instruction, as well as whether the person would be able to find suitable employment after fulfilling this measure. Measures such as treatment in an appropriate health institution and visiting certain professional and other counseling centers or institutions and acting according to their instructions are good measures, but the question is whether there are a sufficient number of these institutions in Serbia and whether they are accessible to all citizens. The instruction to refrain from visiting certain places, establishment or events that could be an opportunity or an incentive for the perpetrator to commit criminal acts again, the issue of supervision over the execution of this instruction arises. It should also be kept in mind the importance of the trustee's work in achieving the purpose of custodial supervision, because probation officers are professionals with certain competencies, knowledge and skills who helps and supervises the perpetrator in fulfillment of the instructions. In addition to the above, we should take into account the fact of the number of trustees employed in Serbia, who have a number of responsibilities and tasks, because in addition to tasks related to the execution of suspended sentences with custodial supervision, they are also responsible for the execution of other alternative sanctions and measures. The fact is that the court determines the measure of supervision in a specific case taking into account the aforementioned circumstances and that if there are no conditions for the application of a certain measure, it will not even determine it. However, in order to impose the sanction in question, it is necessary to fulfill the conditions for its application and for all the measures which are prescribed by law, leaving the court the possibility to choose the one it considers adequate in the specific case. One of the reasons for the rare application of this sanction is the vagueness of certain measures and the impossibility or difficult possibility of their implementation in practice. This deficiency should be eliminated and it should create necessary conditions for its better application in practice.

Although this form of suspended sentence has been prescribed for many years, in practice its application is unnoticed. This is because there were no adequate conditions for its application for a long time, wherefore its pronouncement was also absent and the lack of a normative nature also could be considered the reason why the application of this sanction in practice has not taken off. In the meantime, some of the deficiencies have been eliminated.

Establishment of a trustee service, as a special state authority that is competent for execution of this sanction, is an important prerequisite for its application. However, this alternative sanction is still imposed in a small number of cases. Recognizing its advantages, we must strive to remove the obstacles due to which it has been forgotten and strive for its more frequent application so that it can justify its existence and demonstrate its effectiveness in practice.

3. Measures of custodial supervision in the practice of Basic Courts in the Republic of Serbia

In order to find out what measures are most often imposed on adult offenders, whether they are imposed independently or with other measures of custodial supervision, as well as what are the reasons why the court decided to impose this form of suspended sentence, the author of the paper analyzed the judgments of the courts that in a certain period had the largest number of suspended sentences with custodial supervision in the Republic of Serbia. The observed period is 2019-2021. By looking at the frequency of the imposition of the sanction in question, it can be seen that it is imposed in a negligible number. In the period from 2019 to the end of 2021 it was pronounced only 43 times, 14 times in 2019, 19 times in 2020 and only 10 times in 2021. It is interesting that the classic suspended sentence is the most frequently pronounced sanction and counts thousands of judgments (Republički zavod za statistiku, 2021).³ In the observed period, in relation to all courts in Serbia, the Basic Court in Pančevo ordered custodial supervision with a suspended sentence the most times (10 times), followed by the Basic Court in Novi Sad (8 times), the Basic Court in Požega (6 times), The Basic Court in Subotica and the Basic Court in Vranje each had three such verdicts, the First Basic Court in Belgrade, the Basic Court in Kragujevac and the Basic Court in Niš each handed down two suspended sentences with custodial supervision and the Basic Court in Sombor, Niš, Šid, Aleksinac, Vrbas and Leskovac each had one verdict, which imposed a suspended sentence with custodial supervision. As the majority of suspended sentences with custodial supervision in the period from 2019 to the end of 2021 were pronounced by the Basic Court in Pančevo, the Basic Court in Novi Sad and the Basic Court in Požega, the paper analyzes the verdicts of these courts (a total of 22 verdicts out of 24).

The supervision measure that is imposed is the instruction to abstain from the use of drugs or alcohol, because it was determined in fifteen judgments,

³ In 2019, there were even 16,079 suspended sentences, 14,160 in 2020, and 14,488 in 2021.

that is, it was determined in 35% of cases, of which abstinence from the use of alcohol was determined eight times and abstinence from the use of drugs five times, while abstinence from both substances was determined twice. This measure is generally determined with another instruction and it was most often with the instruction to visit certain professional and other counseling centers or institutions and act according to their instructions or with reporting to the authority responsible for the enforcement of this sanction. According to the frequency of determination, these two measures follow the instruction to abstain from the use of drugs or alcohol, because the instruction to report to the competent authority was determined ten times, of which this measure was determined independently only once and the remaining nine times it was determined with another instruction. It is an interesting fact that although the exercise of custodial supervision requires the existence of a certain relationship of trust, cooperation and communication between the probation officer and the person who has been sentenced to a suspended sentence with custodial supervision, the instruction to report to the authority responsible for the execution of custodial supervision within certain period is not foreseen as a mandatory measure of custodial supervision, but the court may or may not determine it in each specific case. Therefore, this measure was not determined every time the relevant sanction was imposed, but it was done in 23% of cases. The instruction to visit certain professional and other counseling centers or institutions and to act according to their instructions constitutes 21% of certain measures with a suspended sentence, because it was determined nine times with the instruction to fulfill other measures, the most common of which was abstinence from alcohol use. Other instructions were determined by the court only a few times: treatment in an appropriate medical institution four times, refraining from visiting certain places, establishment or events if this could be an opportunity or incentive for committing criminal acts again was determined twice and other instructions were determined once or none at all (fulfillment of family support instructions, child care and education and other family instructions and timely notification of change of residence, address or workplace are not specified in any of them).

By looking at the judgments that were the subject of the analysis, it can be seen that the majority of suspended sentences with custodial supervision were imposed for the crime of domestic violence (Criminal Code, 2019, Art. 194 paragraphs 1 and 2) and unauthorized possession of narcotic drugs (Criminal Code Code, 2019, Article 246a). Out of the analyzed twenty two judgments that imposed this sanction, nine times it was due to the committed criminal act of domestic violence of which the Basic Court in Pančevo

pronounced six, the Basic Court in Požega two, and the Basic Court in Novi Sad one. In connection with the mentioned criminal act, the aforementioned judgments set the instruction to abstain from the use of drugs or alcohol in all cases: in seven judgments the instruction to refrain from the use of alcoholic beverages was determined and in two judgments was ordered the instruction to refrain from the use of narcotic drugs or alcohol. The instruction that consists in visiting certain professional and other counseling centers or institutions and acting according to their instructions is the next measure in terms of the frequency of determining the perpetrators of the criminal act of domestic violence. It was ordered to abstain from the use of drugs or alcohol seven times, of which in one case it was ordered to report and refrain from visiting certain places, establishment or events that could be an opportunity or incentive for the perpetrator to commit criminal acts again. The instruction to abstain from drug use is determined in the majority of cases for perpetrators who have been convicted of the crime of unauthorized possession of narcotic drugs (Criminal Code, 2019, Article 246a). Out of a total of seven judgments by which a person was convicted for this criminal offense,⁴ in six cases a measure of supervision of abstinence from drug use was determined, and in four cases, along with this instruction, the instruction to report to the authority responsible for enforcement this measure was determined, while in one case it was also determined the instruction to report to the authority responsible for the execution of custodial supervision and the instruction to receive treatment in the appropriate medical institution. In the remaining cases, the persons who were ordered to be supervised with a suspended sentence were convicted for committing the following criminal acts: endangerment of safety (Criminal Code, Art. 138), violation of family duty (Criminal Code, Art. 196), robbery (Criminal Code, Art. 206), facilitating the taking of narcotics (Criminal Code, Article 247), causing general danger (Criminal Code, Article 278), attack on an official in performance of duty (Criminal Code, Article 323) and the remaining measures of custodial supervision were determined by them.

When it comes to the reasons why the courts decided to impose this sanction, it should be noted that, in accordance with the legal possibilities a large number of judgments do not contain an explanation and because of that it is not possible to determine them in every case. One of the reasons why the court determined this form of suspended sentence in this particular case is the

⁴ In the period from 2019 to the end of 2021, the Basic Court in Požega imposed four suspended sentences with protective supervision for the committed criminal offense under Article 246a of the Criminal Code, the Basic Court in Pančevo two, and the Basic Court in Novi Sad one.

court's opinion that this is a specific and complex case and that it would not be necessary, justified, or even expedient to impose a prison sentence, because it would represent retaliation against the defendant and to his family, because that would put them in an even more difficult and unfavorable position than the one they are in, considering at the same time that the imposition of a suspended sentence in a specific case is proportional to the gravity of the committed criminal offense, the degree of guilt of the defendant and that its imposition in a given case necessary and sufficient to achieve the purpose of this criminal sanction, considering that the mere threat of punishment will not influence enough on the defendant to refrain from committing criminal acts in the future, and the supervision measure consisting of refraining from visiting gambling houses, casinos, betting shops and other places where he determined the possibility of gambling and the instruction to visit the department for addiction diseases, because he indisputably established that the defendant has problems with gambling and often goes to places where gambling is allowed, which he did on the day he committed the crime for which he was convicted.⁵ Accepting the prosecutor's proposal to hold a hearing for the imposition of a criminal sanction, the Basic Court in Pancevo sentenced the defendant to a suspended sentence with custodial supervision for the crime of domestic violence, because it was established that the defendant committed the crime in question in a state of ordinary drunkenness, and that in the person in question has an emotionally unstable personality disorder with a problem of controlling impulses from the emotionally volitional drive sphere, negative affects and emotions. The court ordered the defendant to undergo custodial supervision measures to refrain from consuming alcohol and narcotics and visit certain professional counseling centers or institutions and act according to their instructions for a period of two years from the finality of the verdict. The court considered as mitigating circumstances for the defendant the fact that he is the father of two minor children and that he is unemployed, while it did not find any aggravating circumstances and considered that the imposed criminal sanction will sufficiently influence the defendant to refrain from doing the same or similar criminal offense in the future and that it achieves fairness and proportionality between the severity of the committed criminal offense and the imposed sanction.⁶ The Basic Court in Novi Sad handed down a suspended sentence to the defendant for the criminal offense of assaulting an official in the performance of official duties, determining the measure of

⁵ Judgment of the Basic Court in Novi Sad, K. 1400/20 from 02.12.2020.

⁶ Judgment of the Basic Court in Pančevo, 1K. 583/21 from 30.07.2021.

custodial supervision of treatment in an appropriate medical facility, accepting the expert's opinion that it is necessary to order psychiatric treatment for the defendant in outpatient conditions at liberty, because he has certain illnesses and lower tolerance and poorer functioning control, due to which there is a possibility that he will commit this or a similar act again in the future if he does not undergo treatment and even if he does, but then the risk is significantly lower. Determining that the defendant acted in the specific case with direct intent, the court imposed a suspended sentence with custodial supervision, considering that it is appropriate for the degree of guilt of the defendant and the severity of the consequences of the criminal act, as well as the personality of the defendant, and that it will produce the consequences provided for by law, which will achieve the purpose of punishment in relation to the defendant, but also in relation to achieving the goals of general prevention.⁷

4. Conclusion

Domestic criminal legislation prescribes the possibility of imposing conditional sentence with custodial supervision. However, although it is not intended for broader use, the courts in Serbia rarely and insufficiently use this possibility and in a negligible number of cases they impose the mentioned form of this sanction. Of all the courts in the Republic of Serbia, the Basic Court in Pančevo, the Basic Court in Novi Sad and the Basic Court in Požega imposed the sanction in question the most. In 86% of cases, the content of custodial supervision consisted of several measures and the measure of abstinence from the use of drugs or alcohol is the most frequently determined instruction of the custodial supervision. Although it would be logical for the instruction to report to the authority responsible for the enforcement of the sanction in question to be mandatory, it was determined in half of the cases, making it the second measure of custodial supervision in terms of frequency of determination. The instruction to visit certain professional and other counseling centers or institutions and to act according to their instructions was also determined several times, while other measures were determined sporadically or not at all. One of the reasons why this is the case is that the realization of certain measures is difficult or impossible and therefore we need to work on solving this problem. The mentioned three measures of custodial supervision are most often imposed on perpetrators who have been convicted of domestic violence or unauthorized possession of narcotic drugs. This points

⁷ Judgment of the Basic Court in Novi Sad, K. 304/2018 dated 13.06.2019.

to a problem that needs to be solved in the field of prevention, by pointing out the need to preserve family values, creating and nurturing healthy habits and values, and by pointing out the harmful consequences of alcohol and narcotic drug consumption, but also by taking measures to suppress violence, domestically and in general.

The application of this alternative sanction favors those cases that need some help in order to correct their behavior in order to deter them from committing criminal acts again in the future, which is why it is not enough to only conditionally sentence such persons and on the other hand, their deprivation of liberty would not be justified in order to punishment, and therefore it is not even intended for wide use (Stojanović, 2012), but its application should certainly be greater compared to the past. It would be good if the professional, as well as the civil public, realized the advantages of its application and that it applied more, because it has the potential to eliminate the causes and conditions that led to the commission of a criminal offense and it can be effective in cases when punishment is neither justified nor effective and a suspended sentence without additional measures is not sufficient to achieve its purpose.

Đuričić Nada

Pravni fakultetu za privredu i pravosuđe u Novom Sadu, Univerzitet Privredna akademija u Novom Sadu, Srbija

USLOVNA OSUDA SA ZAŠTITNIM NADZOROM U SRBIJI – SADRŽINA ZAŠTITNOG NADZORA

REZIME: Uslovna osuda sa zaštitnim nadzorom predstavlja alternativnu sankciju koju zakonodavstvo Republike Srbije poznaje već pola veka, ali je njena primena u praksi retka, jer se izriče u zanemarljivo malom broju slučajeva. Određivanje zaštitnog nadzora ima svoje prednosti i ono može da se pokaže efikasnim onda kada nije dovoljno lice samo uslovno osuditi, niti je opravdano i delotvorno strožije ga kazniti, već je potrebno pružiti mu određenu pomoć i podršku kako bi ono korigovalo svoje ponašanje i kako bi se odvratilo od vršenja krivičnih dela u budućnosti. Radi boljeg

razumevanja predmetne sankcije, uvida kakvo je stanje u praksi, koje su mere zaštitnog nadzora bile najčešće određene i za koja krivična dela, u radu je primenjen statistički i komparativni metod i analizirana je dostupna litaratura, kao i presude onih sudova koji su u određenom periodu imali najveći broj uslovnih osuda uz koje je određen zaštitni nadzor.

Ključne reči: zaštitni nadzor, uslovna osuda, alternativna sankcija.

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