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PLEA BARGAINING

Introduction

Coronation of the Republic of Kosova, as a sovereign and independent state has been finalized by entry into force of the Constitution on June 15, 2008. By aiming to bring into line and harmonize our legislation with that of the European Union and international right, and by guaranteeing human rights and freedoms, the constitution, as the highest legal and political state act, in Articles 18,19,20,21 and 22[144] has incorporated international instruments and agreements as directly applicable by holding priority to law provisions and state acts.

After entry into force of the constitution, the justice system has subsequently suffered reforming changes, especially in the area of penal legislation, such as: amendment and supplementation of the Penal Code and of the Code on Penal Procedure, and the Law on Execution of Penal Sanctions which entered into force on January 1st, 2013. As such, a legal ground in the area of penal justice has been built. The new penal legislation has foreseen many new institutions, new incriminations, altering and harshening punishment policy, and other novelties.

Within the Code of Penal Procedure, for the first time in Kosova, an establishment of a Plea Bargaining Institution [145] has been foreseen. Since these legal institutions have been inaugurated for the first time, and with the purpose of promoting and applying them in practice, an independent scientific study of this institution is necessary and welcoming. In order to achieve the right scientific results, we have approached this study by inter-disciplinary methodology. For this purpose, we have used different scientific methods such as historical, sociological, normative-legal, comparative and analytical method. We hope this paper to be a modest contribution in advancing knowledge and application in practice of this institute's work.

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[144]Constitution of the Republic of Kosova, Article 18- 22.
[145]Penal Procedure Code, Article 233 par.1.

By aiming clear and comprehensive treatment, we will handle the subject of this study by starting with the notion, continuing with subject, background, legal procedure and a conclusion about the relevance of this institute.

1. Notion, Subject and Background of the Plea Bargaining

In order to ease the work in the system of penal justice, which is a sensitive and highly serious area, the Republic of Kosova has specified by law, and started to apply the institute of Plea Bargaining. An agreement written between the person indicted until the completion of the main hearing and the State Prosecutor which means guilt is inclined for the penal act, under certain conditions by which the state prosecutor withdraws from some counts in the indictment, determines limitations of easing the sentence or withdraws completely form the sentence if the accused accepts to become the cooperating witness.
In this case, such plea has influence over persons as a preventive measure in committing a criminal act or in proving they have committed criminal acts, and this presents the crucial subject of the Plea Bargaining. As such, the Plea Bargaining is a legal institution of penal procedure that includes issues of procedural, material and penal right. To put it differently, the Plea Bargaining provides possibility to the accused to benefit alleviations in the aspect of deciding on the type and duration of the legal sanction in exchange of pleading guilty.

In Anglo-Saxon and Euro continental countries, the institute of Plea Bargaining has begun its application in late 20th Century. Most of these countries have established a solid practice of application of this institute, while its effect has been welcomed. This institute, although in a different format, has been recognized by the Roman Right, while, in substance most of it was of a legal right civil character, but also customary right of many nations. As such, it has been recognized by our customary law summarized in the cannon of Lekë Dukagjini and other local cannons. Subsequently, when every perpetrator of a forbidden act pleads guilty, he/she would be treated and sentenced with less punishment.

In Kosova, with revisions and supplementations made in the Penal Code and Penal Procedure Code in 2008 (hereinafter: PC, respectively PPC) the Plea Bargaining has been inaugurated as a new institute. The PPC that entered into force on January 1st, 2013, talks about this institution in Article 233.

2. Motive and Interest of Parties in Reaching an Agreement

Reasons by which parties are driven to bond an agreement pleading guilty and eventually complete that agreement are numerous. The prosecutor, the accused and the defense may have interest in

reaching such agreement. The prosecutor has the "justice interest" while the accused his personal interest, but in compliance with the justice interest of the concrete penal case.
The prosecutor is interested to finish the case as soon as possible, which results to less expenses by avoiding conduction of a regular procedure, less human recourses that have to be engaged in a case (official persons, experts and barriers of jurisprudence functions; and material costs), and will also provide qualitative proof against other perpetrators of criminal acts that otherwise would be difficult for the prosecutor to access. Moreover, the result of this agreement would enable to indict and punish other perpetrators, which is very important in forms of organized crime.

The accused has also interest to reach a Plea Bargaining, so he can receive a lighter punishment compared to one from a regular trial, avoid costs that result from the trial, avoid being a subject of a long public hearing, and pleading guilty would express his actual remorse for the act committed. Last purpose of negotiating the Plea Bargaining is bonding the agreement and deciding on its terms and conditions of admitting guilt by a written contract compiled and signed by the state prosecutor, the accused and his defense.

3. Inclusion of the Plea Bargaining into the Penal Right

Entry of the institute of Plea Bargaining into the penal-legal system of Kosova according to above mentioned laws has also been reflected in PC, since a penal-legal ground had to be gained for lessening the penal sanction when bonding the agreement [146].

Provisions of PC in Articles 75, paragraph 1.3 on the punishment reduction state: "when the perpetrator has plead guilty by terms from Article 233, paragraph 20 of the PC, and the written agreement of pleading guilty contains a paragraph that predicts reduction of punishment, the court will decide on a lighter punishment. In such a case, the court shall take into consideration the opinion of the prosecutor, of the accused and the damaged party and shall be guided, but not obligated, to the limitations under Article 76 of the PC". Therefore, the limits of decreasing punishment will not be valid according to Article 76 of the PC.

4. Agreement of Pleading Guilty in the Aspect of Penal Procedure Right

According to Article 233, paragraph 1, of PPC, at any time, before filing the indictment, the state prosecutor and the defense can negotiate terms of agreement for pleading guilty based on which, the defendant and state prosecutor agree with the charges included in the indictment and the defendant agrees to plead guilty in exchange for:

[146]Penal Procedure, Book published in 2013, Prof.dr. EjupSahiti, p.329.

1. State prosecutor's consent to recommend to the court a lighter punishment, but not under the minimum predicted by law or the minimum foreseen in paragraph 7 of this Article, or;
2. Other considerations in the interest of justice, such as release from foreseen punishment by Article 234 of this Code (to release from punishment a cooperating witness who has committed a penal act, but cooperation with him has resulted in successful penal prosecution of other perpetrators of criminal acts, or when prevention of committing other penal acts has been achieved).

In order to reach a Plea Bargaining with the prosecutor, the defendant's defense lawyer, or the defendant, if not represented, requests for a preliminary meeting with the state prosecutor in order to begin negotiations for the Plea Bargaining, and during all these negotiations, the accused has to be represented by his defense in compliance with paragraph 1, of this Article. After receiving the request for preliminary meeting, the state prosecutor will inform the main prosecutor of his office, who will authorize such a meeting. Agreements of pleading guilty have to be written and approved from the relevant office's main prosecutor before being delivered formally to the accused. While, the court cannot participate in negotiations of pleading guilty, but according to need, can decide on reasonable deadlines of completion of agreement which cannot be longer that three months, so the resolution of the penal case will not be delayed.

5. Content and Effects of the Plea Bargaining

The whole procedure of pleading guilty is aimed at defendant's admittance of guilt and for the case to gain legal power by its recognition from the court. PPC, in the part that refers to the guilty plea, has foreseen a solution by which reaching of a Plea Bargaining is exclusively parties' issue, respectively of the public prosecutor's in one hand and of the accused and his defense on the other. This solution brings into life the principle of respecting the autonomy of parties. In this aspect, the court doesn't play an active role when it comes to reaching the agreement for pleading guilty, but it can set a reasonable deadline for reaching the agreement. This deadline can take up to three months at the most. We consider that this solution has been predicted in order to maintain court's authority and not delay penal procedure without reason. Consequently, the issue of the content of the agreement for pleading guilty and its effect has been regulated by Article 233 of the PPC. [147]

The Plea Bargaining has to be drafted in writing, being it is a formal document and mandatory for the parties. As such, the agreement should contain all terms of the agreement and has to be signed by the main prosecutor of the relevant prosecutor' office, the accused and his defense and is obligatory for all signing parties.

[147]Penal Procedure Code, Article 233 par.12. count 1-4*Penal Procedure, Book published in 2013, Prof.dr. EjupSahiti, fq.226.*Internet through google "agreement on admitting guilt" clicked on;20.06.2014

The Plea Bargaining should include at least:

1. Counts of indictment admitted by the accused;
2. Whether the accused accepts to cooperate;
3. Rights that are waved;
4. Responsibilities of the accused for damage compensation of the damaged party and confiscation of all material goods in compliance with Articles 489,499 of the Code.

The written agreement can also include a provision by which parties agree on the limitations of the damage that will be proposed by the public prosecutor, if the accused cooperates substantially, while, if the court announces a punishment that damages one party, the right to appeal will be granted to the party. According to this solution, the reached agreement on pleading guilty has to be drafted in writing and contain all terms to which parties have agreed upon. In addition, such agreement, in order to be valid, has to be signed by the main prosecutor of the relevant prosecutor's office and by the accused and his defense. As such, this reached agreement is obligatory to parties. Therefore, the parties cannot accept only certain parts of the reached agreement; it obliges parties to accept it as a whole. This is the principle aspect of the content of the agreement. This means that the agreement of pleading guilty can be focused on the content of only the data that are considered necessary.

In these cases the agreement can include, at least, counts of the indictment for which the accused admits guilt, the fact that the accused accepts to cooperate, rights that the accused waves (e.g. right to appeal) and the fact that specifies responsibility of the accused for compensating damage to the damaged party and confiscation of all material goods gained by the penal act. In compliance with this paragraph, the agreement can also include a point where parties agree to limitations of the punishment that will be proposed to the court. This applies to situations when the accused is willing to cooperate with the court. A part of this point can also be the recognition of right to the damaged party, that the damaged party can appeal the decision taken about the part related to deciding on punishment.

By the rules, the court doesn't take part in negotiating the guilty plea, but can set reasonable deadlines for reaching the agreement. The reached agreement is delivered to the court which then has two acting options.

The court can:

1. Approve the reached Plea Bargaining, or
2. Refuse it.

Consequently, the agreement has to be presented in the court in an open public hearing. This presentation enables parties and especially the court to know in public the agreement reached which will be in the function of bringing alive of the *basic principle, publicity and transparency* in the penal procedure. The court has to hear the accused before accepting the agreement in order to be persuaded:

1. That the accused has understood the nature and consequences of pleading guilty;
2. That pleading guilty by the accused was done in free will, and
3. That the guilt is based on facts, proofs and other documents.

The court will refuse the agreement if it evaluates that any of these circumstances have not been met. If the court accepts the agreement, it will put it in the case file and as such it produces legal consequences. If the court refuses to accept the Plea Bargaining, the trial continues in accordance with procedures predicted by PPC.

The agreement is invalid (null) if it violates public moral and order, if it is reached in conflict with legal rules or if influenced by threat, violence, compulsion or other similar circumstances. Situations that in general result in invalid legal works, apply also in cases of Plea Bargainings.

6. Parties in the Procedure and Their Position

The Accused

According to law provisions, the accused can make this agreement only by his free will. From this point of view, there is equality concerning initiative and discussion. The court is not entitled to interfere during the agreement of pleading guilty, which ensures the principle of presumption of innocence until proven guilty.

The accused under such procedure should have a defense representative (paragraph 3 of Article 233 of PPC) therefore it is supplemented by a new paragraph of Article 57, count 1.5 of the PPC when concerned with obligatory defense in the penal procedure.

The accused is entitled to take initiative related to preliminary meeting with the State Prosecutor to determine basis of the Plea Bargaining and earns limited immunity for his testimony. If the agreement results unsuccessful, or is not accepted by the court, testimonies will not be taken as evidence. The accused has also the right to appeal against the decision announced by the court if this criteria has not been met, which has to do with the fact that the court, when announcing the punishment for the act, has given a harsher or lighter punishment from that specified in the agreement.

The Damaged Party

When reaching the Plea Bargaining, the prosecutor is obliged to inform the damaged party, while it will take part in the session for reviewing the agreement in the court and will declare, if it is a closed hearing, prior to the session of announcing punishment. Meaning, he will be notified that the agreement and its terms have been accepted or refused.

Although the prosecutor is legally obliged to inform the damaged party about negotiations of the Plea Bargaining and court's obligation to inform about the session for agreement review, and the damaged party's declaration concerning the agreement, this doesn't represent a condition for agreement's approval by the court.

The public prosecutor is obliged to inform the damaged party about the agreement and its final form, and when a legal-property request exists that derives from the penal act of accusation; the agreement has to necessarily refer to the request of the damaged party. When reviewing the Plea Bargaining, the court has to listen to the opinions of the prosecutor, the defense and the damaged party. If the agreement for cooperation and for pleading guilty by the accused is closed, the court will allow the damaged party to give a statement after the completion of cooperation of the accused, prior to announcing the punishment.
The damaged party will be declaring concerning legal-property request in the court, before the court approves the Plea Bargaining and the responsibility of the accused for damage compensation to the damaged party, as well as confiscation of all material goods in compliance with Articles **489 – 499** of this Code."

When the court reviews the Plea Bargaining, it has to hear opinions of parties and of the accused, and if the hearing is closed for public (because it has to declare the accused as the cooperating witness) the damaged will be enabled a testimony at the end of the cooperation with the accused, but prior to announcement of the punishment to the accused.

7. Decisions of the Court from Reviewing the Agreement

The reached agreement is sent to the court, which has two acting options. Consequently it can:

a. Approve the reached Plea Bargaining, or
b. Refuse it.

The agreement should be presented in the court in an open public session. This presentation will enable parties and especially the court to get familiar with the agreement and if it is in accordance with enabling the *direct principle, publicity and transparency* in the penal procedure.

Prior to deciding about the acceptance of agreement, the court has to hear the accused, so it can be convinced:

1. That the accused has understood the nature and consequences of pleading guilty;
2. That pleading guilty by the accused was done in free will, and
3. That the guilt is based on facts, proofs and other documents.

The court will refuse the agreement if it evaluates that any of these circumstances have not been met. If the court accepts the agreement, it will put in the case file and as such it produces legal consequences. If the court refuses to accept the Plea Bargaining, the trial continues in accordance with procedures predicted by PPC.

The agreement is invalid (null) if it violates public moral and order, if it is reached in conflict with legal order, if influenced by threat, violence, compulsion or other similar circumstances. Situations that in general make legal work invalid, apply also in cases of Plea Bargainings.

8. Deciding on the Punishment and its Measurement in Cases of Negotiation

By the agreement, the length and type of punishment can be specified as predicted by provisions of the PC. Firstly, legal provisions related to the specific and general legal maximum and minimum. In certain cases, such as "substantial cooperation", can be negotiated under the legal specific and general minimum for deciding on the punishment. In cases of substantial cooperation, but also of cooperation in general, when deciding on the punishment in negotiations, these circumstances are considered:

4. Relevance of admitting the penal act;
5. Circumstances that the penal act could not be proved by other means or ways.
6. Pleading guilty will have an impact on preventing the crime, its detection and proving of other penal acts.
7. If in the concrete case, special mitigating circumstances exist.

According to the agreement, these options for setting up the punishment are possible:

a. The state prosecutor can propose the punishment and the other measure or just the punishment.
b. The main punishment together with the additional punishment.
c. Punishment on probation, court warning, etc.

The state prosecutor doesn't hold the right to decide on the punishment (iuspuniendi), therefore has to stick to the set rules on the penal material, when it comes to measuring the punishment, rules of reducing the punishment, when negotiating the agreement. Although the written act is

named a Plea Bargaining and has the guilt as its main element, the agreement on punishment is of the same importance. These agreements cannot stand alone, since both derive from the free will of the accused and the public prosecutor's and is based on legal provisions, otherwise the act of agreement without these two elements cannot stand.

9. Backing up of Negotiators from the Agreement

The parties, prosecutor or the accused can refuse the Plea Bargaining that they have bonded, before it appears in the court. (parag.11)[148]. In such a case, a regular proceeding continues same as in cases when negotiations have failed or the Plea Bargaining is not accepted by the court. The testimonies given by the accused, pleading guilty for certain points of the indictment or for the indictment in total, in cases when the agreement was not accepted by the court, or parties have backed up from the agreement before its appearance in the court, will present unacceptable proof in the penal procedure in which the negotiations were performed and in any other procedure.

10. Ensuring Execution of the Agreement

The guarantee that the Plea Bargaining will be applied by both parties, are evident from the point of view of procedural provisions that regulate this issue. Firstly, the Plea Bargaining is legally valid only after being approved by the court. Parties, at any time, can refuse/cancel the agreement, prior to court's approval. Although the court doesn't participate in negotiations of pleading guilty, it can postpone the session up to three months by a notice to parties involved in the procedure (Paragraph 10).

After the court approves the agreement, it can forbid the accused to back up from pleading guilty or the prosecutor to cancel the agreement, except in cases when they manage to convince the court that any of the terms of paragraph 18, was not met, which means the burden of proof falls upon the party that requests solution of the agreement (parag.22). After approval of the agreement, the court can set a date when parties will give their statements concerning the punishment. But, the court, in order to realize the obligation of the Plea Bargaining and the accused to serve as a cooperating witness, will postpone the session on punishment for a time which is not specified in the law. This provision will surely be taken as insurance for other obligations of the accused for the agreement to be realized.

But, the question arises, after execution of obligations of parties according to the agreement and its approval by the court, especially in cases when the quality of the cooperating witness has been used, "substantial cooperation" in another penal case, while the court announces a different

[148]Penal Procedure Code, Article 233 par.11

punishment from that approved by the court, will only the right of parties to appeal about the punishment should be called insurance of agreement execution.

11. Legal Means in Agreement Procedures

Against court's decision of discarding the Plea Bargaining, appeal is not allowed, since we are dealing with a procedural decision taken in the procedure court transcript where parties don't have the right to appeal. Provisions that regulate the Plea Bargaining, do not foresee filing of an appeal if the court discards the agreement. In the contrary, it will be continued with a court hearing in a regular procedure.

12. Appeal against the Decision Based on the Agreement

An inevitable question arises; if court accepted the agreement and a judgment was taken based on it, in what direction or ground can an appeal be filed as a regular legal instrument? Thus, if the court considers that terms for accepting the agreement are met, it will approve it and conclude it by a decision in the transcript while scheduling the hearing for announcing the punishment and other measures predicted by the agreement. After completion of the hearing, a judgment is reached with a factual description of the act and legal qualification of the indictment. Having in mind these circumstances, it can be concluded that the appeal in the aspect of punishment predicted by the agreement is not allowed and a legal restriction exists. For which the accused is instructed. If the accused appeals on this ground, the same will be discharged as prohibited.

If the Plea Bargaining has chosen as a solution receiving of pecuniary benefit, announcement of judgment by means of public information, decision on legal property request and procedural costs, and the court approves this request on these grounds, it cannot either file an appeal.

Likewise, in these situations, an appeal cannot be filed based on wrong and incomplete confirmation of the factual state, because the accused has pleaded guilty without doubts and has intentionally given up from a regular trial. While, without a trial and proof administration in a procedure as its crucial stage, there is no confirmation of a factual state, neither the judgment can be appealed on this ground.

Appeals on other grounds are not explicitly forbidden, although the right to appeal is guaranteed with Human Right Convention. It is possible to file an appeal based on essential violations of provisions of penal procedure and violation of the penal law, although this appeal ground can hardly influence in changing the decision of the court on the existence of penal act and penal responsibility. Without carrying out the penal procedure, in principle, there is no essential violation of penal procedure provisions, although it is not impossible, based on this, e.g. irregular panel of

judges, or announcement of punishment. (the judge who didn't participate in the main hearing was excluded from the trial, or the judges who was supposed to be excluded have participated, the hearing was held in the absence of the person whose presence was obligatory, the right to defense was violated, the court has failed in regards to existence of permission for prosecution from the competent body, etc). Same situation appears in the cases of penal law violations. A situation where the act committed by the accused is questioned for being a penal act, whether circumstances that exclude penal responsibility exist, whether the prescription has been achieved, whether the principle of 'bis in idem' was violated, material law was wrongfully applied, the authorization by the court was exceeded concerning the decision on punishment, security measure, taking of material benefit, whether the provisions of calculating detention have been applied?

From the point of view of the public prosecutor's right, independently the appeal is not explicitly forbidden based on decision of punishment, if the prosecutor has compiled the guilty pleas agreement which was approved by the court, the appeal would be dropped as unacceptable.

13. Conclusion

Viewed from the historical and developing aspect, this institution, in legal systems were applied so far, has resulted successful in regards to prosecution of perpetrators of penal acts, especially those related to organized crime. Criminal acts of co-execution are evident in penal acts of corruption, money laundry, etc. both in prosecution and in conviction, since the manner for case resolution has been made easier and strong and acceptable proof have been gathered in the penal procedure.

We consider that, after fair application of these provisions from justice bodies, the success in finding the perpetrators of penal acts will surely not be missing and in trying and preventing penal acts and their perpetrators. With the solutions provided by law, which can be supplemented further (can be applied this way also), the interest of justice would be realized, which is greater than any case, even when a person's punishment is reduced or removed completely, if his contribution results in finding out and putting under penal responsibility perpetrators, especially in organized crime, corruption, money laundry and human trafficking.

In relation with the defendant, *the Plea Bargaining* enables him to gain important procedural ease, favorable treatment and even lighter punishment in nature. Since the Plea Bargaining is applied in the penal procedure, in considerable measure spares the courts from e great deal of work. At the same time, the accused not only gains favors in this aspect, but the institution also improves in a great measure his position as a defendant in the penal procedure.

Whilst concerning the application of this important institution, according to data we possess the institute of Plea Bargaining in our country has been applied slightly, except for some individual cases. It remains for the future to promote this new institution more, and encourage justice bodies in our state to apply it at any case if the terms predicted by law are met.

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