



Incorporation of the Negotiated Pleas of Guilty in Kosovo Legislation and Its Application in Practice

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Abstract: The Negotiated Plea of Guilty is incorporated in the Kosovo legislation only in the last decade. Given the Kosovo context and the big number of the unsolved court cases, the pleas of guilty are considered to be a good tool to improve the efficiency of the court system. Thus, this paper is focused on describing how plea agreement is covered in the Code of the Criminal Procedure of Kosovo (2013) compared to the Temporary Code of the Criminal Procedure (2004) and how much negotiated plea of guilty is applied in the practice. The qualitative research design was employed and the data were collected through document analysis and published statistical data. The findings show that in addition to the the exclusive right attributed the defendant or his defense counsel to initiate the negotiated pleas of guilty, the Code of the Criminal Procedure (2013) entitles also the state prosecutor to initiate it. Still, the pleas of guilty are used in a limited number of cases and there is a need for further research to explore the reasons why the negotiated plea of guilty is used rarely.

Keywords: Plea of guilty; defendant; state prosecutor

Introduction

Since it has been established after the conflict, the judicial system in Kosovo is facing various challenges, among which, the large number of unsolved cases. According to the European Commission Report for Kosovo (2016), “Kosovo still needs to improve its efficiency in dealing with the backlog of cases. According to the Judicial Council’s Department of Statistics, at the beginning of 2016, the number of pending cases at court level was 440 627, the number of cases received was 400 982 and cases solved was 397 059. The clearance rate is increasing and Kosovo courts now have a clearance rate of 99.02 % of cases received and resolved within a year” (EC Report for Kosovo, 2016, p. 16).

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Application of the negotiated plea of guilty was considered to be a significant support in making faster the process of proceeding the unsolved cases. The Code of the Criminal Procedure (2013) has given important place to negotiated pleas of guilty, by adding it new sections which were not foreseen with the Law of 2008, for amendment of the Temporary Code of the Criminal Procedure.

Thus, the objective of this article is to describe how is the negotiated plea of guilty incorporated in the Kosovo legislation and understand how much it has been applied by the relevant institutions. Having into consideration that the negotiation of the plea of guilty is a new judicial practice even for the developing countries, the paper will also include a brief overview of this practice.

2. A Brief Overview and Definition of Negotiated Plea of Guilty

Plea of guilty agreement is any agreement between the prosecutor and defendant to solve a criminal case without going through the judicial process. Such a negotiation of plea agreement took place in informal way in the United States of America (USA) during XIX and XX century. While this way of solving criminal cases existed for more than one and a half century, only in 1970, the Supreme Court in the USA for the first time accepts and approves a criminal case solved with the negotiation of the plea agreement. While today, the courts in the USA recognize the negotiation of pleas of guilty as a component part of the judicial system and more than 95% of cases are solved by using this practice.

Following the success that the negotiated plea agreement had in the USA judicial system, this practice has begun to be applied in the European and other countries of the world. Italy is one of the countries that uses this practice to solve a considerable number of the criminal cases. The procedures based on pleading guilty by the defendant in return for some concession from the prosecutor have been established initially in 1981. However, the reform that supported further the negotiated pleas of guilty took place in 90's. According to Maffei (2004), the negotiated plea of guilty in Italian laws can be classified in two groups: negotiations on "proves" on which the court can base its decision, and negotiations on "taken decisions" which the court could apply for the sentenced person.

One of the main benefits of the negotiated pleas of guilty is the contribution that this practice has in the court efficiency. Toma (2014) asserts that the efficiency is the main factor that pushed forward the usage of this practice because it would fulfill the interest of the prosecutors and judges which wanted to increase the efficiency of

their work and reduce the number of the unsolved cases. She highlights that another important reason why prosecutors and judges prefer usage of pleas of guilty is winning of the cases. The pleas of guilty ensure the prosecutors they will win their case while the judges accept the plea agreement because it ensured them that nobody will file an appeal against their decision in the senior appeal courts.

With all the benefits that this practice of negotiation of pleas of guilty brings to the judicial system, still there are disagreements regarding its application. Maffei (2004) explains that one of the main questions is if this practice violates the right of the defendant to have a fair and independent trial. Another question is if the negotiation of pleas of guilty is against the prosecution obligation principles. How can an obligation to sue and accuse the crime be returned to an obligation to negotiate. And the last according to Maffei, the negotiation of pleas of guilty can be violation of the innocent principle of the defendant until the courts brings its decision.

The negotiation of the pleas of guilty is used recently in the International Court of Hague. While, recommended by the American legal experts, the negotiated pleas of guilty have become part of the Temporary Criminal Procedure Code of Kosovo (TCPC) in 2008, through a Law for Amending the TCPC. The negotiated pleas of guilty have been again amended in the Criminal Procedure Code, the latest version of which entered into force at 1 January 2013.

3. Method

The two main questions that guide this article are: (1) which are the main features of the negotiated plea of guilty incorporated in the Kosovo legislation and (2) how much did relevant institutions in Kosovo use the negotiated plea of guilty in the practice. The qualitative research method is employed and the data will be gathered through document analysis and other published statistical data.

4. Findings

The results will be presented in two parts. The first part includes the findings that address the question on the main features that are integrated in the Code of the Criminal Procedure (2013) as compared to the Temporary Code of the Criminal Procedure (2004) while the second part includes findings on the number of cases

that Prosecution and Courts in Kosovo solved using the the Negotiated Plea of Guilty for the year 2015 and 2016.

4.1. Negotiated Pleas of Guilty According to the Code of the Criminal Procedure in Kosovo (CCP)

The Code of the Criminal Procedure (2013) has included the negotiated pleas of guilty within the alternative proceedings chapter in the Code of the Criminal Procedure of the Republic of Kosovo. The Negotiated Plea Agreement is under the article 233 and it consists of twelve paragraphs. Sahiti and Murati (2013) explain that according to the Article 233, paragraph 1 and 2 the negotiated pleas is the negotiation of terms of a written plea agreement between the state prosecutor and the defendant under which they agree to the charges of an indictment and the defendant agrees to plead guilty in return for the state prosecutor to recommend a more lenient punishment to the court as it is foreseen the law or in return for other considerations in the interest of justice.

It is important to mention that the Code of the Criminal Procedure (2013) has also foreseen the possibility to negotiate the pleas of guilty before there is an indictment against the defendant. Article 233, paragraph 1 allows that “At any time prior to the filing of the indictment, the state prosecutor and the defence council may negotiate the terms of a written pleas of guilty.” This was not part of the Temporary Code of the Criminal Procedure (2008) according to which the negotiation of pleas of guilty could take place only after the indictment.

The possibility to negotiate the pleas of guilty at any time after the indictment is foreseen in the Article 233, Paragraph 2 of the Code of the Criminal Procedure (2013). The Paragraph 3 defines that “In cases when the defendant wishes to enter into a guilty plea agreement, the defendant’s counsel, or the defendant if not represented by council, shall request the state prosecutor for a preliminary meeting to commence negotiations for a plea agreement”. Further in Paragraph 4, it is explained that as soon as the state prosecutor receives the request for the preliminary meeting, he shall inform the chief of his office about the request that he received from the defendant. Only after the state prosecutor is given a written authorization, he can arrange the preliminary meeting with the defendant to commence a negotiation of guilty plea agreement.

4.1.1. The Role of the Prosecutor in the Negotiated Plea of Guilty

The previous Code of the Criminal Procedure (2008) gave the exclusive right to negotiate a plea of guilty agreement only to the defendant and defendant’s council.

The Code of the Criminal Procedure (2013) extends the right to negotiate the written plea of guilty agreement to the state prosecutor as well. In fact, the role of the state prosecutor in negotiating the plea of guilty agreements is substantial.

Through the Paragraph 5, which is a new paragraph included in the Code of the Criminal Procedure (2013), defines that the state prosecutor can initiate a negotiation of the plea of guilty agreement. Paragraphs 5.1 and 5.2 of the Code of the Criminal Procedure (2013) describe the steps the state prosecutor shall follow after he obtained the approval of the Chief Prosecutor to commence negotiations for the plea of guilty agreement. The steps that the state prosecutor shall follow include either sending a letter to the defence counsel describing the offered plea agreement or meet the defence counsel and defendant to negotiate the possibility of terms for a plea agreement.

The state prosecutor can also make an application to the court to issue an order declaring the defendant a “co-operative witness”. This role of the state prosecutor is specified in Article 233, Paragraph 6 of the Code of the Criminal Procedure (2013) which also states that if the defendant provides assistance as a co-operative witness, the state prosecutor can recommend to the court more lenient punishment for the defendant.

4.1.2. Benefits of the Defendant According to the Plea of Guilty Agreement

Compared to the Temporary Code of the Criminal Procedure (2008), the Code of the Criminal Procedure (2013) defines decisively the benefits of the defendant. The Article 233, Paragraph 7 (7.1 – 7.4) specifies the benefits that the defendant may have based on the time when the plea guilty agreement was reached. Pursuant to the Article 233, Paragraph 7 (7.1) if the plea agreement is achieved during the main trial, the defendant may be sentenced to a minimum of ninety per cent (90%) of the minimum possible imprisonment set by the provisions of the Code of the Criminal Procedure (2013). If the plea agreement is reached prior to main trial, the defendant may be sentenced to a minimum of eighty per cent (80%) of the minimum possible imprisonment (Paragraph 7.2). Paragraph 7.3 defines that a defendant may be sentenced to a minimum of 60% of the minimum possible imprisonment if the plea agreement is achieved prior to the main trial where the defendant participates as a cooperative witness and provides evidence in criminal proceedings.

While Paragraph 7.2 of the Article 233 defines that if the plea agreement is achieved prior to the main trial, a defendant may be sentenced to a minimum of

80%. The Paragraph 7.3 foresees that the defendant may be sentenced to a minimum of 60% of the minimum possible imprisonment set by the appropriate provisions of the Code of the Criminal Procedure (2013), if the plea agreement is achieved prior to the main trial where the defendant participated as a cooperative witness and provides evidence in a criminal proceeding.

According to the Paragraph 7.4 of the Article 233, of the Code of the Criminal Procedure (2013) the defendant may be sentenced to a minimum of 40% of the minimum possible imprisonment set by the appropriate provisions of the Code of the Criminal Procedure (2013), if the plea agreement is achieved prior to the main trial where the defendant participated as a cooperative witness in a covert investigation and provides evidence in a criminal proceeding.

4.1.3. Obligations of the Defendant and the State Prosecutor to Achieve the Negotiated Pleas of Guilty

Through the Article 233, Paragraph 8 of the Code of the Criminal Procedure (2013), the defendant and the defence council are obliged to be present during the plea negotiations before it may be presented to the court. According to the same paragraph, when the defendant is not participating as a cooperative witness, the state prosecutor shall inform the injured party of the negotiated plea agreement, once the agreement reaches its final form.

According to Sahiti and Murati (2013), the paragraph 9 defines that in the cases when the defendant participates as a cooperative witness, the state prosecutor ensures that the injured party/s claim for damages is treated by the plea agreement. Within this paragraph, it is also foreseen the right of the defendant to present a statement to the court regarding property claim prior to the court's sentencing of the defendant pursuant to the plea agreement.

4.1.4. Deadline for Negotiating the Plea of Guilty

The Code of the Criminal Procedure of Kosovo (2013) has foreseen the possibility that the court sets a reasonable deadline not longer than 3 months for the conclusion of the negotiations to prevent the possible delay of the procedure. The deadline gives the possibility to the prosecutor and the defendant or his defence council that they conclude the negotiated plea of guilty within three months. If the agreement is not concluded and presented in written to the court within this deadline, the court will proceed further the criminal case according to the provisions of the the Code of the Criminal Procedure (2013).

Paragraph 11 of the Article 233 defines the possibility that the state prosecutor or the defendant may reject a plea agreement before the court accepts this agreement. In this case the single trial judge or the presiding trial judge shall schedule the court trial as provided under Chapter XIX of the Code of the Criminal Procedure (2013).

4.2 Content of the Negotiated Pleas of Guilty

The article 233 of the Paragraph 12 of the Code of the Criminal Procedure (2013) provides the content of the negotiated pleas of guilty. According to this article the negotiated plea of guilty shall be signed by the chief prosecutor of the respective office, the defence council and the defendant. The agreement shall also contain:

- (12.1.) the charges to which the defendant will plead guilty;
- (12.2.) whether the defendant agrees to cooperate;
- (12.3.) the rights that are waived;
- (12.4.) defendant's liability for restitution to an injured party and confiscation of all assets subject to forfeiture under Chapter XVIII of the present code.

Article 233, Paragraph 13 provides the range of punishments that will be proposed by the state prosecutor if the defendant cooperates. If the court imposes a sentence outside of this range to the detriment of one party, that party shall be entitled to appeal for a decision on the sentence. While, the written plea agreement must be presented to the court in a hearing open to the public except as provided in paragraph 16 of this (Article 233. paragraph 14 of the CCP, 2013).

Through the paragraph 15 of Article 233, the law provides a new solution that was not included in the previous Temporary Code of the Criminal Procedure (2008). This provision provides that if the written plea agreement is negotiated prior to indictment, a separate indictment for the defendant subject to the plea agreement shall be filed concurrent with plea agreement.

The Court may officially accept or reject the plea agreement in accordance with the factors to be considered in paragraph 18 of the Article 233 (Article 233, Paragraph 16 of CPP, 2013). The guilty plea agreement will enter into effect only after it is officially accepted by the court on the record.

4.2.1 The Review of the Negotiated Plea of Guilty by the Courts

Before it decides if it will accept or not the negotiated plea agreement, according to the paragraph 18 of the article 233, the court must question the defendant, his or

her defence counsel and the state prosecutor. At the same time, the court shall conclude whether:

- (18.1.) the defendant understands the nature and consequences of the guilty plea;
- (18.2.) the guilty plea is voluntarily made by the defendant after sufficient consultation with defence counsel, if defendant has a defence counsel, and the defendant has not been forced to plead guilty or coerced in any way;
- (18.3.) the guilty plea is supported by the facts and material proofs of the case that are contained in the indictment, by the materials presented by the prosecutor to supplement the indictment and accepted by defendant, and any other evidence, such as testimony of witnesses, presented by the prosecutor or defendant; and
- (18.4.) none of the circumstances under Article 253, paragraph 1 and 2 of this Code exist.

After the court considers the negotiated plea agreement, the Code of the Criminal Procedure permits the injured party to make a statement at the end of defendant's cooperation prior to sentencing.

4.2.2. Decision of the Court Related to the Negotiated Plea of Guilty

If the court is not satisfied that all of the conditions set forth in paragraph 18 of the article 233, the court shall reject the guilty plea and the case shall proceed to trial as provided by the Code of the Criminal Procedure.

The court shall accept the guilty plea agreement if it is satisfied that all of the conditions in paragraph 18, article 233 are established. After the negotiated plea agreement is accepted, the court shall order the agreement to be filed with the court and sets the dates for the parties to make their statements regarding sentencing (Article 233, Paragraph 21 of the CCP, 2013). In this paragraph is also defined that the court shall impose the punishment after it accepts the statements of the parties.

In the article 233, paragraph 22 of the Code of the Criminal Procedure (2013) it is provided that the court may not permit defendant to withdraw the guilty plea or the state prosecutor to rescind the plea agreements. According to this paragraph, the plea agreement can be withdrawn only if the court finds that any of the conditions in paragraph 18 of the article 233 are no longer fulfilled. The party seeking to withdraw from the agreement bears the burden of proof in making such application to the court.

4.3. The Application of the Negotiated Plea of Guilty by the Justice System in Kosovo

Although there are still limited cases, the courts of the Republic of Kosovo begun to apply the negotiated plea agreement in solving the criminal cases. According to the data of BIRN (2016) for the year 2015/2016, there were about 903 cases in the Prosecution of the Republic of Kosovo were solved using plea agreement, while 34 cases in the courts of Kosovo.

Table 1. As taken from BIRN (2016): General Case Number resolved by guilty plea agreements in the Prosecutions of the Republic of Kosovo during the period 2015-2016

| Prosecutions | The number of guilty plea agreement |
|--------------|-------------------------------------|
| Prishtina | Did not reply |
| Prizren | 110 agreements |
| Peja | 149 agreements |
| Mitrovica | Did not reply |
| Gjilani | 508 agreements |
| Ferizaj | 60 agreements |
| Gjakova | 76 agreements |
| Total: | 903 agreements |

According to these data, during the period 2015-2016 in the Prosecution Office of the Republic of Kosovo used plea agreement to solve 903 cases. The largest number of cases resolved by this agreement occurred in the Basic Prosecution Office of Gjilani with a total of 508 cases, followed by the Prosecution Office of Peja with 149 cases, Prosecution Office of Prizren with 110 cases, Prosecution Office of Gjakova with 76 cases and that of Ferizaj with 60 cases. So, it the Basic Prosecution of Gjila that has marked a great deal of success in resolving cases of plea bargaining. While the Prosecutor's Office of the capital Prishtina and Mitrovica did not provide data regarding the application of this agreement.

In addition to the Prosecution Offices in Kosovo, the plea agreement has also been applied by the courts of the Republic of Kosovo but in a significantly lower number, only 35.

Table 2. As taken from BIRN (2016): General Case Number resolved by guilty plea agreements in the Courts of the Republic of Kosovo during the period 2015-2016

| Courts | The number of guilty plea agreement |
|-----------|-------------------------------------|
| Prishtinë | Did not reply |
| Prizren | 25 agreements |
| Ferizaj | 8 agreements |
| Gjilan | did not reply |
| Mitrovice | did not reply |
| Pejë | did not reply |
| Gjakovë | 2 agreements |
| Total: | 35 agreements |

The number of cases solved through the plea agreement were reported by three courts in Kosovo: Prizren 25 cases, Ferizaj 8 cases and Gjakova 2 applied cases. While the other four basic courts did not send any response regarding the application of the plea agreement.

5. Conclusions and Recommendation

Regarding the first research question, it is concluded that the Code of the Criminal Procedure (2013) has covered the implementation of the plea bargaining agreement by providing the possibility to reach this agreement at all stages of criminal proceedings. When compared to the previous Temporary Code of the Criminal Procedure (2008), where the exclusive right to initiate this agreement was attributed to the defendant or his defense counsel, the Code of the Criminal Procedure dated 2013 also entitles the state prosecutor to initiate the guilty plea agreement. Through this new incorporation, the Code of the Criminal Procedure (2013) has provided the possibility to increase the number of cases that could be solved using this following the more favorable plea agreements that state prosecutors can offer to defendants.

However, despite the advantages of this way of resolving cases of criminal offenses, the negotiation of the guilty plea agreement is used in limited cases by the justice system in Kosovo. Few of the courts did not even report it as another alternative way that might have support them in solving cases. It can be assumed that the negotiation of the plea of guilty agreement is being used rarely because it is a new practice for Kosovo judiciary system. However, there is a need for further research to find out the reasons why this practice is not being used by prosecutors and the defendants.

Considering this low level of application of this very important institute, the courts in Kosovo have missed the opportunity offered by the negotiated plea of guilty for the faster solving of criminal cases. Even starting from the large number of unsolved number of cases in the courts, I consider that the negotiated plea of guilty may be a very efficient tool to increase the number of solved cases. Therefore, I consider that in the future justice institutions should work more on the awareness and training of prosecutors, judges and lawyers about the positive effect of applying this institute in the speedy resolution of cases as well as the benefits the defendants will have if.

Finally, there should be done more to promote this judicial practice and raise awareness not only of the responsible person in the judicial system but also of those who commit offenses and the public. They shall know more about the benefits resulting from the negotiation of the plea agreement for both the defendant and the state.

6. References

BIRN, Court Monitoring Report 2016, Downloaded from: <http://kallxo.com/wp-content/uploads/2017/05/BIRN-RAPORTI-I-MONITORIMIT-T%C3%8B-GJYKATAVE-2016.pdf>.

Sahiti, E. & Murati, R. (2013). *The Criminal Procedure Law*. Prishtina.

Toma, M. (2014). *The Plea Agreements Process in the International Criminal Tribunal for the former Yugoslavia in the light of the Amnesty Process in the Truth and Reconciliation Commission in South Africa*.

Maffei, S. (2004). Negotiations on Evidence and Negotiations on Sentence. *Journal of International Criminal Justice*, 2, pp. 1050/1069.

*** (2004). *The Temporary Code of the Criminal Procedure of Kosovo*. Prishtina.

*** (2013). *The Code of the Criminal Procedure of the Republic of Kosovo*. Prishtina.

*** (2004). *The Temporary Criminal Code of Kosovo*. Prishina.

*** (2013). *The Criminal Code of the Republic of Kosovo*. Prishtina.

European Commission Report for Kosovo (2016). Downloaded from: https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/pdf/key_documents/2016/20161109_report_kosovo.pdf.