

Plea Bargaining and Its Practical Application

Lirime Çukaj¹, Blerina Recı Xhakolli², Dorina Hoxha³

Abstract

The plea bargain judgment and sentencing agreement is an innovation introduced in the Criminal Procedure Code through the reform undertaken in 2017. The purpose of adopting this type of special judgment was to establish agreement between the prosecution authority and the defendant regarding the admission of guilt, the type of punishment, the severity of the penalty, and the manner of its enforcement. This agreement is executed in the necessary presence of the defendant's counsel.

The inclusion of this type of special judgment in the code aimed at judicial efficiency as well as benefiting from the admission of guilt. In this kind of judgment, certain important rights are waived, such as the principle of adversarial proceedings, evaluation of evidence, their examination, and potentially the right of appeal. However, this type of judgment is considered to be in line with the spirit of the Criminal Procedure Code and its Article 6.

The agreement is prepared by the prosecutor and approved by the court, which verifies the fulfillment of legal conditions.

Although the legislator's intention was judicial economy and benefit for the defendant, statistical data reveal initially high demand for approval and a recent drastic decrease, with almost an inexistent number of agreements prepared by the prosecutor. This situation requires intervention in the provisions of the Criminal Procedure Code, making it more enticing and competitive with the expedited trial.

Keywords: *plea bargain, prosecution, defendant, counsel, court.*

INTRODUCTION

1. Trial by Agreement on the Conditions of Admission of Guilt and Sentencing.

Within the framework of reform in procedural criminal justice, it was deemed necessary to introduce, for the first time, the trial by agreement on the conditions of admitting guilt, as a special type of trial that does not follow the rules of ordinary trials. This special type of trial has a privileged role, as its application brings judicial economy and potentially "satisfies" the prosecutor's demands, such as the admission of guilt and the acceptance of the punishment measure, but also benefits the defendant who must benefit from confessing guilt.

Trial by Agreement for Admission of Guilt and Sentencing involves the drafting of an agreement by the prosecutor until the trial has not yet started. This agreement requires the consent of both parties, the prosecutor and the defendant, where the parties must agree

¹ Lecturer in the Criminal Department, Faculty of Law, University of Tirana

² Head of Department of Psychology, Faculty of Education "Aleksander Moisiu" University of Durres

³ Dean of the Faculty, University of Tirana

on all elements related to criminal liability. In this agreement, the prosecutor assumes the attributes of dispensing criminal justice, and from this perspective, the prosecutor must meticulously determine all elements related primarily to the existence of the criminal act, the provability of the criminal act beyond reasonable doubt based on evidence, proper qualification of the criminal act, mitigating and aggravating circumstances, specify the type of punishment, the extent of the punishment, and the mode of its enforcement. The agreement is permissible solely for criminal offenses for which the law stipulates a maximum punishment of not more than 7 years of imprisonment, excluding cases involving justice collaborators where this limitation does not apply.

As the agreement involves legal elements, the presence of the defense attorney is obligatory. The discussion that arises here concerns effective defense, particularly in cases of specifically appointed defenders. Effective defense will fully guarantee the rights of the accused, as the main condition in this agreement is the admission of guilt by the defendant, which would be given when the criminal act was proven beyond any reasonable doubt based on evidence. The agreement on the conditions of admitting guilt and determining the punishment requires, first of all, negotiations between the prosecutor, the defendant, and the defense attorney, to determine the terms of the agreement along with all its elements. When the parties agree, they draft it in writing, and this agreement is invalid if it does not contain the following elements:

- a) a clear description of the criminal act for which the accused is charged and its legal qualification;
- b) the statement of admission of guilt by the defendant;
- c) the type and extent of the main criminal sentence, supplementary punishment, as well as the mode of their execution, for which the parties have agreed;
- ç) provisions for material evidence and items belonging to the criminal act, as well as for the confiscation of the means and products of the criminal act, as per Article 36 of the Penal Code;
- d) in cases where civil claims are legitimate, his/her written approval for the measure of compensation for damages by the defendant.
- d) the amount of procedural expenses;
- e) the signatures of the parties and the defense attorney.

During the drafting of the agreement, the prosecutor must carefully exercise the competencies provided by the law in the preparation of this agreement, as mentioned earlier, he exercises the competencies of dispensing justice, assuming the attributes of a court, as we stated earlier.

When the prosecutor reaches the agreement, he informs the victim or their heirs that the agreement has been reached and that he has agreed regarding the criminal liability of the accused.

The Code has not specified whether the agreement is approved or not when the victim does not give consent.

So, as we mentioned earlier, the agreement on the conditions of admitting guilt and determining the punishment is drafted by the prosecutor, thus assuming the attributes of a court, as the sole constitutional body that administers justice. Certainly, this special type of trial, where the prosecutor dispenses justice, was not well-received by the judiciary, which in this type of trial remained without the function of dispensing justice. This led to the practice of judges being resistant, not approving the agreements.

The provisions for trial by agreement were subject to constitutional review. In the following, we will see the position of the constitutional court regarding these provisions.

2. Constitutionality of Plea Bargaining

The amendments to the Code of Criminal Procedure (hereinafter referred to as CCP) were accompanied by debates on the constitutionality of the provisions related to trial by agreement, seeking before the Constitutional Court the annulment of the second paragraph of Article 406/dh of the CCP of the Republic of Albania.

In this decision, the Court stated that:

"1. The contested provisions of the CCP are inconsistent with the content of Article 148 of the Constitution, according to which the prosecution is the sole body responsible for criminal prosecution and represents the accusation in court on behalf of the state. The competences of the prosecution's body in conducting criminal prosecution are limited, and the principles of legal hierarchy and the separation and balancing of powers are violated. According to the petitioner, the removal of the prosecution's exclusive authority in conducting criminal prosecution constitutes a deviation of this body from the exercise of its constitutional activity... In this case, it is not a matter of control anymore, but rather the assumption of competences. The legislator has acted against the provisions of the Constitution and the fundamental principles of criminal prosecution, as it envisages the prosecution as an independent and constitutional body. The Constitution-maker, by granting such a constitutional position to the prosecution, which is not part of the judicial system, has also conditioned the determination of the principles of exercising criminal prosecution.

In its reasoning, the Constitutional Court concluded that trial by agreement is inherently unconstitutional, as the prosecution is the subject responsible for criminal prosecution and represent the accusation on behalf of the state , but it is not an organ that dispenses justice; this is exclusively attributed to the judiciary. But the provisions were not declared unconstitutional because the necessary quorum could not be reached, and these provisions are being applied in practice.

In this specific type of trial, the defendant waives certain rights that are part of the right to a fair legal process, such as the principle of adversarial proceedings, cross-examination, compensation, evidence presentation, and the right to appeal, under circumstances when the defendant has given consent and admitted to committing the criminal act. As mentioned earlier, the Constitutional Court failed to reach a decision due to a lack of quorum. Meanwhile, elements of the right to a fair legal process that are either avoided or compromised in this type of trial were not part of the constitutional debate. Next, we will examine the standpoint of the ECHR court regarding these types of specialized trials."

3. The Jurisdiction of the ECHR regarding plea bargain judgments.

The jurisdiction of the ECHR is comprehensive regarding plea bargain judgments, encompassing not only their nature but also the elements of the right to a fair legal process, such as the principle of protection, adversarial nature, evidence presentation, the right of appeal, etc.

In the case of *Natsvlshvili and Togonidze v. Georgia*, it provided a legal interpretation of "plea bargaining judgments."

In this case, the ECHR has expressed its views for the first time regarding the compatibility of plea bargain judgments with the principles of a fair legal process and the right of appeal. The European Court of Human Rights has highlighted that the determination of the sentence in a plea bargain between the prosecution and the defendant is already a characteristic of the criminal justice systems of European states, and this trial procedure cannot be criticized. The Court has recognized the legitimacy of the plea bargain trial procedure as a procedural tool aimed at simplifying the judicial process. Additionally, in this decision, the ECHR has stated that limiting the right to appeal in the plea bargain trial procedure does not violate the right of appeal and the fair legal process.

Specifically, the defendant, Natsvlshvili, had voluntarily reached the plea bargain agreement and had declared understanding of the content and consequences of the abbreviated trial.

The ECHR states that: "In plea bargain trials, there is a possibility for the defendant to make a more favorable change to the charges or to benefit from a reduction in their sentence in exchange for admitting guilt."

Waiving specific procedural rights wasn't inherently problematic according to Article 6.

However, it's crucial to fulfill certain conditions:

- a) that waiving these rights be clearly stipulated.
- b) that waiving these rights be accompanied by even minimal safeguards to prevent abuses.
- c) that waiving these rights is not in conflict with the public interest.

In the specific case, the Court noted that it was the accused, Natsvlshvili, who had initiated the request for a plea bargaining with the prosecutor. He was familiar with the evidence against him and was represented by two chosen defense lawyers who had assisted him during the negotiations for the agreement. Before the court, he had declared that he had signed it, fully understood its contents and the legal consequences that arose from it, and that the agreement's conclusion was not a result of pressure or false promises. Moreover, a signed copy of the agreement by Natsvlshvili himself had been submitted to the court. For these reasons, the court had rightfully approved the agreement.

Regarding the alleged violation of Article 2 of Protocol 7 to the Convention (right of appeal in criminal proceedings), the Supreme Court of Justice (GJEDNJ) has expressed that there was no violation of the right to appeal. According to the court, Natsvlshvili, with full awareness, had accepted the agreement's judgment and the consequences it entailed, one of which was waiving the right to appeal. The acceptance made by the accused was not a result of pressure or false promises from the prosecutorial authority. On the contrary, the agreement was accompanied by sufficient procedural guarantees. The court also noted that the agreement did not run counter to the public interest.

What is evident in the jurisdiction of the ECHR court is its comprehensive stance regarding the compatibility of the nature of plea agreements in general with Article 6 of the ECHR. The approval of the plea agreement is accompanied by procedural guarantees such as the right to defense, free will, and benefits such as the reduction of the sentence, and the accused has voluntarily waived certain other rights. We will further examine the position of our courts regarding plea agreement procedures.

4. Assessment of the agreement by the court.

The agreement reached by the parties, prosecutor, defendant, and defense counsel, is subject to control by the court. This verification is not merely formal but also substantive.

The formal elements that the court examines are the conditions specified in Article 406/d of the Criminal Procedure Code. After verifying the fulfillment of the formal legal conditions and criteria for the judgment by agreement, the court proceeds to the next phase, the substantive one. The court assesses whether the admission of guilt and the determination of the penalty are in harmony, in line with the very purpose of this institution, as well as with the legal provisions of the Penal Code regarding criminal liability, the determination and individualization of the penalty, and the mitigating and aggravating circumstances.

The elements that are reviewed by the court include:

a. The free will of the accused, this is the first element verified by the court, occurring in situations where we have an agreement between the prosecutor and the accused, and if this will is absent, the agreement would be invalid.

b. Another element that the court checks is the presence of the defense attorney in the negotiations for reaching and signing the agreement. The achievement of the agreement requires specific knowledge about all elements of criminal liability, such as the proper legal qualification of the criminal act, the standard of proof, mitigating and aggravating circumstances, the type and extent of the punishment, its execution method; all these elements are not factual but legal matters that necessitate the presence of the defender in a mandatory manner, whose presence would be a guarantee for the accused.

c. The distinctive and defining element of this judgment, is the acknowledgment of guilt by the accused. If the accused understands the agreement for admitting guilt and determining the punishment, and comprehends its content, it requires effective recognition of this agreement and all its elements. This is another element that the court verifies. However, it's not only about effective recognition of the agreement, but also the consequences brought about by signing the agreement. From this perspective, the court checks whether the accused has understood that they have waived certain rights, such as the right to appeal, the right to contest evidence, to argue about them and present new evidence, as in this type of judgment there is no debate concerning the evidence.

d. Finally, the court examines the proportionality between the committed criminal act and the specified punishment in the agreement. In this case, the court verifies all elements related to criminal liability, individualizing the accused's sentence. If this agreement achieves the purpose of justice and if the judge himself would have rendered justice objectively, then this would be the decision.

5. Approval or refusing the Agreement.

In the judgment through plea bargaining on the conditions of admission of guilt and the determination of punishment, drafted by the prosecutor, the court has a controlling and verifying role of the aforementioned elements, but it cannot alter the terms of the agreement.

However, the court, in the exercise of its exclusive constitutional function of dispensing justice, before approving the agreement, mainly assesses whether we are dealing with cases of dismissing the charges or case or returning the case back to the prosecutor. Otherwise, it approves the agreement.

The court shall refuse the approval of the agreement when:

- a) the defendant withdraws his consent.
- b) it is proven that the will of the defendant is flawed
- c) the defendant who has been duly summoned, does not attend the hearing, without legitimate reasons

In these cases, the decisive element for the agreement is clearly missing, the will of the accused. When this will is missing, there is no valid agreement for the court to approve.

- ç) one of the grounds for non-initiation of the proceedings or dismissal of the charge or the case exist

These are circumstances for which the accused cannot have penal liability, and the non-approval of the agreement is a proper decision of the court in the exercise of its function of dispensing justice.

- d) evidence in the investigation file contradict the admission of the defendant to have committed the criminal offence

Even in this case, it is not proven that the criminal act has been committed by the accused. The accused's confession regarding the commission of the criminal act contradicts the evidence and the standard required by Article 4 of the Code of Criminal Procedure, which states that the court declares the accused guilty based on the standard that the person committed the criminal act beyond reasonable doubt, based on evidence.

dh) the legal qualification of the criminal offence and the circumstances of its commission are wrong or

In this case, the court verifies whether the criminal offense committed by the accused and confessed by them has been properly qualified by the prosecutor, so that the accused can be held criminally liable for the act they have committed.

e) the punishment set in the agreement is inappropriate in relation to the committed offence and the character of the defendant.

In this case, the court rightly verifies the most important and essential element of the agreement, whether justice has been served through this agreement, or if there has been a subjective stance by the prosecutor. We believe this is the crucial element that the court should verify.

Following we can see some practical cases when the court has refused the agreement.

5.1. Practical cases from the courts regarding the approval or disapproval of the agreement.

In this perspective, we would like to draw your attention to the fact that in many cases of practice, the applicability of judgment by agreement has not been approved by the court precisely for these reasons.

Missing defendant attorney

The Tirana District Court, in several of its decisions with numbers 68 dated 17.01.2018 and 2106 dated 12.07.2018, rightfully refused the approval of the agreement due to the mandatory absence of the defense lawyer. In these decisions, it is stated: "The agreement was reached without the presence of a defense lawyer, as there is no signature of the mentioned defense lawyer in the agreement."

Non-signing, lack of effective knowledge about the agreement, and absence of defense counsel.

The Tirana District Court, in its decisions No. 68 dated January 17, 2018, and No. 2106, has stated that: "...to reach the final decision regarding the prosecutor's request for the approval of the agreement dated December 7, 2017, for admitting guilt and determining the criminal penalty against the defendant B.H., will take into consideration the fact that the agreement dated December 7, 2017, for admitting guilt and determining the penalty, was made in writing between the prosecutor and the defendant B.H., who is not only illiterate and unable to read and understand the content of this agreement but also was not assisted by a defense counsel. As a result, the Court concludes that this agreement is not valid."

Lack of the defendant's will.

The Elbasan District Court, with Decision No. 437, dated June 6, 2018, has decided not to approve the agreement, which was reached without the presence of the defendant himself, as there is no evidence that the defendant has signed the agreement. The Court reasoned that: "The prosecutor should not have accepted the defense counsel's proposal to reach a plea agreement, as the defendant must be present in reaching the agreement and consequently all the criteria provided by the procedural provisions are unfulfilled."

Defendant's absence in the session for the approval of the agreement.

In several decisions of the Tirana District Court, with numbers 3103, dated November 22, 2017; 70, dated January 17, 2018; 408, dated February 12, 2018; 625, dated March 5, 2018; 2046, dated July 9, 2018; 251, dated February 1, 2019; 404, dated February 15, 2019; 473, dated February 21, 2019, the defendant did not appear in several sessions without justified reasons.

In the mentioned cases, the court has rightly decided to reject the agreement due to the defendant's absence in the court session. The court has not had the opportunity to verify whether the defendant has made the agreement with his free will, understood its content, and comprehended the consequences arising from the approval of the agreement. This legal provision has been established with the purpose that the court, as a procedural subject established by the law over the parties, verifies whether during the preliminary investigations, the prosecution and the defendant have exercised their rights and obligations in accordance with the principle of equality of parties in the process, without being influenced by the superiority that the prosecution has in the preliminary investigation phase. The consequences of not fulfilling the above-mentioned conditions regarding the mandatory presence of the defendant are provided in Article 406/d, point c, of the Criminal Procedure Code, where in the event that the duly notified defendant does not appear in the session without justified reasons, the court must decide to reject the agreement.

Appropriate sentence determined in the agreement.

The appropriateness in sentencing is another essential condition that the court verifies in the exercise of its constitutional function of dispensing justice. The District Court of Tirana, in its decisions with numbers 298, dated 09.01.2018, 180, dated 13.02.2020, and 277, dated 29.06.2020, found that the penalty imposed in the agreement was not appropriate in relation to the gravity of the committed offense, as per Article 197 of the Criminal Code. The prosecution imposed a penalty below the minimum allowed by the relevant provision.

In this case, the prosecution has entered into an "Agreement on the Conditions of Admission of Guilt and Determination of Sentence" with the accused S.C. on December 20, 2017, regarding the admission of guilt for the criminal offense of "Illegal Construction" as stipulated by Article 199/a/2 of the Penal Code, and the imposition of a 3-month prison sentence based on the Penal Code. The prosecution has also requested the suspension of the prison sentence under Article 59 of the Penal Code and has placed the accused on a probationary period of 6 months. In its submission, the prosecution has argued that the accused, through his actions, has fulfilled the elements of the offense, has considered his admission of the charge, and has taken into account the fact that he has no prior convictions when determining the type and extent of the sentence.

On its part, the Court has assessed that the prosecution's request did not fulfill all the criteria and specifications required by this specific type of trial outlined in Articles 406/d-406/e of the Penal Code. The Court has reasoned that: "The prosecution has agreed with the accused on the agreement of December 20, 2017, by accepting the accused's admission of guilt for the criminal offense attributed as stipulated in Article 199/a/2 of the Penal Code and imposing a sentence below the minimum allowed by this provision (the sentencing range for imprisonment from 1 to 5 years). Therefore, the sentence determined in this agreement is inappropriate and in contradiction with the restrictive sanctioning provisions of the said penal provision."

In another decision, the court has reasoned that: "The application of Article 63 of the Penal Code does not achieve the purpose of the imposed sentence and does not achieve effective justice." (The criminal offense for which the accused was charged was "Forgery of school documents" as stipulated in Article 187 of the Penal Code).

6. Analysis of the Progress of Adjudication through Plea Agreements via Statistics.

The approval of this specific type of adjudication, in August 2017, aimed at judicial efficiency and the agreement between the admission of guilt and the determination of the sentence by the defendant and the defense counsel.

Following, we will analyze the progression of this type of adjudication over the years.

According to the statistics obtained from the Tirana District Court, the overall jurisdiction indicates that:

In 2018, there were a total of 280 requests for plea agreement approval, 141 were approved (of these, 62 were from the year 2017 and 78 were from the year 2018).

In 2019, there were a total of 150 requests for plea agreement approval, 103 were approved (of these, 49 were from the year 2018 and 52 were from the year 2019).

In 2020, there were a total of 107 requests for plea agreement approval, 26 were approved (of these, 22 were from the year 2019 and 4 were from the year 2020).

In 2021, there were a total of 39 requests for plea agreement approval, 17 were approved (of these, 16 were from the year 2020 and 1 were from the year 2021).

In 2022, there were a total of 8 requests for plea agreement approval, 29 were approved (of these, 25 were from the year 2021 and 4 were from the year 2022).

What is noticeable is a drastic decrease in the requests for plea agreement approval.

CONCLUSIONS AND RECOMANDATIONS

The plea agreement trial regarding admission of guilt and determination of punishment was an innovation aimed at judicial economy, as it avoided the trial phase and eased the position of the defendant. Our Constitutional Court expressed that the drafting of the plea agreement by the prosecutor is unconstitutional, as it is a way of dispensing justice, and this constitutional competence is vested in the court. The decision was not made due to a lack of quorum, and in these circumstances, the plea agreement trial is constitutional. A significantly different standpoint is held by the GJEDNJ, which finds the plea agreement fully aligned with the spirit of Article 6, but emphasizes that the waiver of certain rights must be accompanied by specific procedural safeguards.

According to the statistics from the Prosecutor's Office of the District Court of Tirana, the General Jurisdiction, it appears that the prosecution has initiated requests for plea agreement trials in the early years. However, it is observed that the approved requests by the court are quite low, around 1/3 of those requested. The reasons for refusal often lack legal support, as the court sometimes abuses the legal criterion of its approval, that of appropriateness regarding the type, extent, and manner of serving the sentence, rejecting the plea agreement even when it has been appropriate.

Meanwhile, Criminal Procedure Code underwent some changes in relation to the preliminary hearing in 2021. When the defendant requests an expedited trial, the case is judged by this judge and closed in a single hearing. This is a more cost-effective solution compared to a plea agreement, which, when not approved, needs to be sent back to the prosecutor, who then has to initiate new procedural requests. These elements have resulted in a drastic reduction in plea agreement trials, which are currently nonexistent.

The Criminal Procedure Code allows the prosecutor to negotiate a plea agreement until the judicial proceedings have commenced, even during the preliminary hearing. According to Article 406/dh of the Criminal Procedure Code, if the plea agreement is presented during the preliminary hearing, the court decides according to the provisions of paragraph 4 of Article 332/c of the same Code, which states: "After the defendant

presents their claims, the victim, and other private parties present theirs, when they are present."

The role of the victim in the approval of the plea agreement is mainly formal; their consent is not of significant importance. The victim cannot exercise the rights recognized by the law, such as the right to compensation.

To encourage more frequent application of this special type of trial by the prosecution and its approval by the court, amendments to the Criminal Procedure Code should be made to incentivize the defendant to seek this type of trial, such as: the possibility of suspending the prison sentence, reducing the sentence by up to one-third, exemption from the obligation to pay procedural costs, non-application of supplementary penalties or security measures, non-recording of the conviction in the criminal record, etc.

Raising the awareness of judges that in the specific case, the attribute of dispensing justice is not being taken away from them, as the control still passes through them.

Encouraging defendants to seek this type of trial as much as possible, by undergoing some changes to the trial by agreement process.

Raising the awareness of prosecutors to apply this type of trial by agreement as much as possible.

References

- Constitution of the Republic of Albania, 2018;
- European Convention on Human Rights;
- Code of Criminal Procedure of the Republic of Albania, as amended;
- Penal Code of the Republic of Albania, 2018;
- Decision No. 7, dated March 2, 2018, of the Constitutional Court of the Republic of Albania;
- Directive 2012/29/EU;
- Recommendation No. P(87)18 of the Committee of Ministers of the Council of Europe from 1987, on simplification of criminal justice;
- Recommendation No. P(95)12 of the Committee of Ministers of the Council of Europe from 1995, on the administration of criminal case-law;
- Decision of June 25, 2013, GJ.E.D.NJ vs Georgia Application No. 9043/05;
- HYSI, V, Relation to the Code of Criminal Procedure, page 11;
- Annual Reports on the work of the Prosecutor's Office of the District Court of Tirana, 2018-2022;
- Decisions from the District Court of Tirana, General Jurisdiction.